## B. THE OLD PERSONAL ACTIONS[1]

GLANVILL,
Book 10

*Cap. 1*

A plea concerning the debts of the laity belongs to the crown and dignity of our lord the King. And so when anyone complains to the court of a debt which is due to him, if he can bring that plea to the court of our lord the King, he shall have the following writ for the first summons.

*Cap. 2*

Rex vicecomiti salutem. Praecipe N. quod iuste et sine dilatione reddat R. centum marcas quas ei debet ut dicit, et unde queritur quod ipse iniuste ei deforciat. Et nisi fecerit, summone eum per bonos summonitores quod sit coram me vel justitiis meis apud Westmonasterium a clauso Paschae in quindecim dies ostensurus, etc.

> The King to the sheriff greeting. Command N. that justly and without delay he render to R. one hundred marks which he owes, as he says, and whereof he complains that he unjustly deforces him. And unless he will do this, summon him by good summoners that he be before me or my justices at Westminster within fifteen days of the close of Easter to show [why he hath not done it].

*Cap. 3*

... The demandant can demand the debt for several causes. For some thing may be owed *ex causa mutui aut ex causa venditionis aut ex commodato aut ex locato aut ex deposito aut ex alia justa debendi causa. Ex causa mutui* something is owed when one lends to another such things as are counted, weighed or measured. ... When a thing is lent to anyone, the loan is generally accompanied by the giving of sureties, and sometimes by the deposit of a pledge, sometimes by the pledging of faith, sometimes by a deed, and sometimes by the concurrence of several of these modes of security. ...

*Cap. 12*

When the debtor appears in court on the appointed day, if the creditor has no pledge nor sureties nor any evidence save pledge of faith alone, this is no proof in the court of our lord the King. But for breach of faith or trespass (*de fidei laesione vel transgressione*) action can be brought in a Court Christian. But the ecclesiastical judge, though he may have cognisance of such an offence and may enjoin penitence or satisfaction upon the convicted party, yet, by an assise of the kingdom, he may not in a Court Christian deal with or decide pleas of lay debts or pleas concerning freeholds on the ground that there has been a pledge of faith. Wherefore, if the debtor denies the debt, the creditor must use other modes of proof ...; as by a sufficient witness or by the duel or by deed. ...

*Cap. 13*

There are also occasions on which something may be owed *ex causa commodati*; as where I lend my chattel to you gratuitously to be taken and used in your service. When the term of service is completed, you are bound to return my chattel to me without deterioration, provided that it still exists. But if the chattel itself has perished or has been lost, in whatever way, while in your custody, you are bound absolutely to render me a reasonable price for it. ...

*Cap. 14*

*Ex causa emptionis et venditionis* also something may be owed when one sells his own thing to another. For the price is owed to the seller and the thing bought to the buyer. But the purchase and sale is concluded

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[1] From C.H.S. Fifoot, *History and Sources of the Common Law* (London, 1949), 233–9, 39–40, 42–3, 261–2, 276–9. Other references given as they occur.

with effect (*perficitur cum effectu*)[1] from the time when the parties agree upon the price, provided, however, that it is followed by delivery of the thing bought and sold or that the price is paid in whole or in part or at least that something is given and received by way of earnest. But in the first two of these cases neither of the contracting parties can in any way withdraw of his own will from the contract, save for some lawful and reasonable cause; and so, if it is agreed between them that either may withdraw with impunity within a certain time, then either can thus withdraw within that time according to the agreement; for it is usually true that agreement overrides the general law (*quod conventio legem vincit*). Again, if the seller sells his thing to the buyer as being sound and without blemish, and if afterwards the buyer can show by reasonable proof that, at the time of the contract, it was not sound and without blemish, then the seller will be bound to take back his thing. But it is enough that the thing was in good condition at the time of the contract, whatever may afterwards happen to it. I am, however, doubtful within what time such proof or complaint may be made, especially where no pact supervenes. When only earnest has been given, then, if the buyer wishes to withdraw from the contract, he may do so with the loss of his earnest. If in such a case it is the seller who wishes to withdraw, I question if he may do so without penalty. I should think not, for then the seller would be in a better position than the buyer. But if he cannot do so with impunity, what shall be the amount of the penalty? But the risk of the thing bought and sold is generally with him who holds it, unless otherwise agreed.

*Cap. 15*

The seller and his heirs are bound to warrant the thing sold to the buyer and his heirs, provided it is an immovable. ... In the case of a movable, if a third party claims it from the buyer on the ground that it had previously been sold or given to him or had been acquired by some other lawful cause, then, provided there is no additional suggestion that he has lost it by felony, the law is the same as in the case of an immovable. But if the thing is claimed from the buyer as having been stolen, then the buyer is required to defend himself precisely from any charge of theft made against him or to vouch [the seller] to warranty. ...

*Cap. 17*

... The thing owed by sale or by loan should be proved by the general method of proof used in court, that is to say, by writing or by the duel. *Cap. 18*

*Ex locato et ex conducto* a thing may sometimes be owed, as when one lets his thing to another for a certain term, provided that a rent is fixed. Here the letter is bound to give to the hirer the use of the thing lent, and the hirer to pay the rent. It is to be observed that, on the expiration of the term, the letter can lawfully reinstate himself in the thing lent on his own authority. But what if the hirer does not pay the rent at the stated time? In this case also may the letter expel him on his own authority?

The above-mentioned contracts, made by the agreement of private persons, we pass over briefly, because, as said above,[2] private agreements are not usually protected in the court of our lord the King, and, as to those contracts which are analogous to private agreements (*quasi quaedam privatae conventiones*), the court of our lord the King does not concern itself.

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[1] Cf. Just. Inst. III. 23. pr.

[2] See *Cap*. 8, '... Sometimes, creditor and debtor agree that a thing is to be pledged by way of security; then, if, after the receipt of the loan by the debtor, the pledge is not in fact delivered, what advice is to be given to the creditor, especially since the same thing may be pledged to other creditors before or afterwards? As to this, it must be noted that the court of our lord the King is not wont to protect or warrant private agreements of this kind for the delivery and receipt of things by way of pledge or of any other kind, if they are made outside the court or even in other courts than that of our lord the King; and so, if these agreements are not kept, the court of our lord the King does not concern itself with them, and thus it will not discuss the rights of the various creditors, prior or subsequent. ...'

BRACTON
fols. 99–100b
Thorne trans., for fols. 99–99b, pp. 2:283–4

*Whence an action arises.*

We must see whence an action arises. It is clear that actions are born of precedent obligations, as a daughter is born of a mother. The obligation, the mother of the action, takes its own origin and beginning from some precedent cause, either *ex contractu* or *quasi ex contractu* or *ex maleficio* or *quasi ex male*ficio. An obligation may arise ex contractu in many ways, as from an agreement, by questions and answers, from a form of words which brings the wills of the two parties into accord, as agreements by way of pact, which sometimes are nude, sometimes vested. If they are nude no action follows, for an action does not arise from a nude pact. A pact must therefore have vestments, of which something is said below. From a cause of this kind, *ex contractu* or *quasi*, [the action] will always be civil. An obligation also arises *ex maleficio* or *quasi*, [also *ex delicto* [or] *quasi ex delicto*, [for] *injuriae* are of several kinds,] *ex maleficio*, as where one commits the crime of lese-majesty, homicide or theft and the like; *quasi ex maleficio*, as where a judge wittingly renders a false judgment. That he is bound is clear, but because he is bound neither properly *ex maleficio* nor *ex contractu* and yet is understood to have done something wrong, though only through lack of skill, he therefore is taken to be bound *quasi ex maleficio*.

*What an obligation is and how it is contracted.*

Since actions are born of obligations, we must first see what an obligation (which takes its being ex contractu or *quasi*, not *ex maleficio* or *quasi*) is, how and by what words it may be contracted, by what persons it may be acquired and how it may be extinguished and destroyed; then, when it has been dissolved, how it may be renewed, how transferred to another person, and how one obligation may be converted into another. An obligation is a legal bond whereby we are constrained, whether we wish to or not, to give or do something, [if one is bound and obligated to another for something and the other is under a reciprocal obligation to him for something else, the *obligatio* is so to speak a *contraligatio*, and it has four ways by which it is contracted and several vestments. It is contracted by a thing, by words, by writing, by consent, by *traditio* by conjunction, all of which are termed the vestments of pacts.[1] An obligation is contracted by a thing, as by the giving of a *mutuum*, a loan for consumption, which consists of things reckoned by weight, number or measure. By weight, as in things which are weighed, copper, silver or gold; in number, as in coined money; in measure, as in wine, oil or grain. Such things, by weighing, counting or measuring, are given so that they at once become the property of those who take them, for that is properly termed a mutuum which, being *meum* becomes *tuum*,[2] and whenever not the very things but others of the same kind are returned to the creditor, or their value if they are consumed or lost by fire, earthquake or shipwreck, or stolen or carried away by thieves or enemies. He to whom a thing is given for use is also bound by the thing lent him. But there is a great difference between a loan for consumption[3] and a loan for use, for he who has taken a loan for use is bound to restore the very thing, and, [though] he is not excused if he shows as much care in its safekeeping as he ordinarily bestows on his own goods if another could have safeguarded the thing with greater care, is not held liable for force majeure or accidents unless there has been *culpa*, as where he takes on a journey a thing lent him for use at home and loses it in an attack of enemies or thieves or by shipwreck; he is then clearly liable. A thing lent for use is said to be given ad commodum, as an accommodation, and is properly understood to be lent when it is given without recompense. For a loan for use ought to be gratuitous and if payment is involved the transaction ought rather to be called a letting and

[1] Cf. Bracton, f. 16b:

Re, verbis, scripto, consensu, traditione,
Junctura, vestes sumere pacta solent.

[2] See Just. Inst. III. 14. pr.

[3] I [Fifoot followed by Thorne] follow here the emendation suggested by Kantorowicz, *Bractonian Problems* (1941), pp. 95–7. See also Holt, C.J. in *Coggs v. Bernard*, [Fifoot, *History and Sources*], p. 171.

hiring than a loan. He with whom a thing is deposited is [also] bound re and held to the restoration of the very object he accepted, [or its value if it is lost and] he has committed some wrongful act. For *culpa*, that is, carelessness or negligence, he is not liable, for he who entrusts a thing to the care of a negligent friend can only blame himself and his own lack of caution. A creditor who takes a pledge is bound *re* and is bound to restore the thing. [But] since a pledge is given for the benefit of both parties, that the money may more readily be entrusted to the debtor and be lent with more safety by the creditor, it is enough if the pledgee exercises the greatest care in safeguarding it. If he shows that but loses the pledge by accident he may be free of liability, nor will he be barred from suing for his loan.

An obligation is contracted verbis by stipulation. A stipulation is a set form of words, consisting in question and answer, as thus—*Promittis*? *Promitto*. *Dabis*? *Dabo*. *Facies*? *Facio*. *Fideiubes*? *Fideiubeo*. ... And a stipulation can be judicial or conventional. It is judicial if made by order of the judge or of the praetor. It is conventional if made by the agreement of both parties and not by order of the judge or of the praetor, and there are almost as many varieties of it as there are objects of contract. But with all these the King's court does not concern itself, save sometimes as a matter of grace. ...

A person may be bound *per scripturam*. For, if he writes that he owes money, he is bound by the writing whether the money has been advanced or not, and he will not be allowed the defence that the money has not been advanced in contradiction of his writing, because he has written that he owes it. ...

Again, an obligation is contracted not only by writing and words but also *consensu*, as in *bonae fidei* contracts such as purchase and sale, letting and hiring, partnership and mandate. And this kind of obligation is said to be contracted ex consensu because neither writing nor, in all cases, even the presence of the parties is necessary. ...

An obligation arises *de traditione* as we have already described in the title *de donationibus*.[4] *Junctura* is where several agreements (*pacta*) about the same thing are included in one stipulation. For several agreements may thus be included in a stipulation, just as several things may be, and, provided they are added to the principal stipulation at the time of the contract, they become part of the contract and add special terms to it; but, if added after an interval of time, it is otherwise. ...

BRACTON
fols. 61b–62

*De adquirendo rerum dominio ex causa emptionis*[5]

There is also a certain *causa* of acquiring the ownership of things, which is called *causa emptionis et venditionis*. When a man sells his thing to another, be it movable or immovable, the buyer is bound to the seller for the price and the seller conversely to the buyer for the delivery of the thing, according to what has been observed above in the case of gifts, for without delivery the ownership of things is not transferred. ... But the contract of purchase and sale is made when the price is agreed between the contracting parties, so long, at least, as something is received by the seller by way of earnest; since the receipt of earnest is evidence that the contract of purchase and sale has been made. And, if writing is to intervene, the purchase and sale will not be concluded (*perfecta*) until [the writing] is delivered and executed by the parties. And unless and until earnest is given or the writing executed or the thing delivered, there is a *locus poenitentiae* and the parties may withdraw from their contract with impunity. But if the price is paid or part of it, and [or][6] delivery is made, the purchase and sale is *perfecta*, and neither of the parties may afterwards withdraw from the contract on the pretext that the price has not been paid in part [or in whole]. But the seller may sue to obtain the balance of the price by the appropriate action, though not to recover the thing. ... Again, when

[4] Cf. Bracton, f. 11 *et seq*. Under this title Bracton treats of feoffments.

[5] Bracton's remarks on Sale and Hire occur, not in his treatment of consensual contracts, but in this title—"On acquiring the ownership of things (by reason of purchase)."

[6] The manuscripts are not clear. It would seem that, if there is either part payment or delivery, the contract is binding, and, in the case of part payment, the seller must deliver and sue for the balance.

something is paid before delivery by way of earnest, if the buyer repents his purchase and wishes to withdraw from the contract, he loses what he has thus paid. If it is the seller who repents, he must restore to the buyer double the amount of the earnest.

When a seller sells a thing as sound and without blemish, and afterwards it is found to be with blemish or unsound, and it can be proved by the buyer to have been in this state at the time of the contract, the seller will be bound to take it back. ...

When the contract of purchase and sale has been made as aforesaid, both before and after delivery the risk of the thing bought and sold is generally with him who holds it, unless otherwise agreed at the outset, because in truth a seller who has not yet delivered the thing to the buyer is still the owner of it, since it is by delivery and usucapion, etc., as can be seen above in the case of gifts.[7] ... But the seller and his heirs are bound to warrant the thing bought to the buyer and his heirs, whether it be movable or immovable; provided that, if it be immovable, the law is as will be stated below about warranties, and, if movable, as we shall state here after about theft.[8]

### BRITTON, 1.29.3

Nichols trans. 1:157

[An obligation] is clothed by a material thing, when anything is lend and borrowed, to be restored on a certain day; and by such loans the debtors are bound to restore to the creditors the things borrowed in as good or better condition than they received them, or else their value, unless by accident of fire, water, robbery or larceny, they have lost them; for against such accidents no one ought to answer for things lost, unless they happened by his own fault or negligence. But if a debtor carries money about him, and foolishly shows it among thieves, and is robbed of it, it does not follow that he is not bound to the creditor; because he did not use his diligence to keep the money, for he might have taken better care of it.

### THE STATUTE OF WALES

12 Edw. I (1284

The Forms of the King's Original Writs to be Pleaded in Wales

The Writ of Debt

Rex Vicecomiti salutem. Precipe A. quod iuste et sine dilatione reddat B. centum solidos quos ei debet et iniuste detinet, ut dicit. Et nisi fecerit et praedictus B. fecerit te securum de clamore suo prosequendo, tunc summoneas per bonos summonitores predictum A. quod sit coram Justiciario nostro ostensurus quare non fecerit. Et habeas ibi summonitores et hoc breve. ...[1]

> [The King to the Sheriff greeting. Command A. that he justly and without delay render to B. one hundred shillings which he owes him and unjustly detains, as he says. And if he does not do this and the aforesaid B. makes you sure of prosecuting his claim, then you are to summon by good summoners the aforesaid A. that he be before our Justiciar to show why he has not done it. And you are to have here the summoners and this writ. ...]

And if chattels, such as sacks of wool, be demanded, the writ shall be as follows:

Rex Vicecomiti salutem. Praecipe A. quod iuste et sine dilatione reddat B. unum saccum lanae precii decem marcarum quem ei iniuste detinet, ut dicit [vel catalla ad valenciam decem marcarum quae ei iniuste detinet, ut dicit]. Et nisi fecerit, etc.

> [The King to the Sheriff greeting. Command A. that he justly and without delay render to B. one sack of wool priced at ten marks which he unjustly detains from him, as he says [or chattels worth ten marks which he unjustly detains as he says]. And if he does not do this, etc.]

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[7] *Supra*, p. [4 n.4]; and cf. the familiar Roman text, *traditionibus et usucapionibus dominia rerum non nudis pactis transferuntur*, Cod. 2. 3. 20.

[8] Bracton has a detailed title *De Warantia* in ff. 380–399b, and deals specifically with warranty in connection with theft in ff. 151–151b.

[1] This form corresponds in substance with the specimen cited from the Register in H.E.L. III. 662.

And formulae shall be drafted in similar writs according to the allegation of the plaintiff and the diversity of the cases. ...

### THE STATUTE OF MERCHANTS

11 Edw. I (1283) trans. (with modifications) from S&M, pp. 172–3 (No. 52D)

Whereas merchants heretofore, on lending their goods to various people, have incurred poverty owing to the fact that no suitable law was provided whereby they could speedily recover their debt on the day set for payment; and whereas, on this account, many merchants have ceased coming into this land with their merchandise, to the damage of the merchants and of the whole kingdom:

[Therefore] the king, by himself and his council, has ordained and established[2]

That the merchant who wishes to make sure of his debt shall cause his debtor to come before the mayor of London or York or Bristol—[that is to say,] before the mayor and a clerk whom the king shall depute for that purpose—to acknowledge the debt and the day of payment, and the acknowledgment shall be enrolled by the hand of the aforesaid clerk so that it may be known. Moreover, the aforesaid clerk shall with his own hand write out a record of the obligation [escrit de obligacion], to which shall be attached the seal of the debtor, together with the king's seal provided for that purpose, which seal shall remain in the custody of the mayor and the clerk aforesaid. And if the debtor does not pay on the day set for him, let the creditor come to the mayor and the clerk with the record of the obligation [sa lettre de obligacion]; and if it is found by the roll and the record that the debt was acknowledged and that the set day has passed, the mayor shall at once, by view of worthy men, have movables of the debtor sold to the amount of the debt. ...[3] And the money without delay shall be paid to the creditor. ...

... And if the debtor have no movables whereupon the debt may be levied, then shall his body be taken where it may be found and kept in prison until that he have made agreement or his friends for him. ...

And to meet the cost of the aforesaid clerk, the king shall take a penny from every pound [of the debt]. This ordinance and establishment the king wishes henceforth to be observed throughout his entire kingdom of England by all persons who shall freely choose to make such acknowledgments, excepting Jews, to whom this establishment does not apply. ...

Given at Acton Burnell, October 12, in the eleventh year of our reign.

(French) *Statutes of the Realm*, I, 53 f.

### ISABELLA, WIDOW OF BALDWIN OF PULHAM v. SIMON CUTLER

Y.B. 6 & 7 Edw, II (Eyre of Kent, 1313–14)

ed. W. C. Bolland, et al., *The Eyre of Kent*, II, Selden Society, 27 (London, 1912), 16–17[1]

A. brought a writ of detinue of charters against one William and demanded two charters that were in the custody of B., A.'s mother, which William as B.'s executor detained after her death; and in his declaration he set out the contents of these charters.

*Cambridge*. We ourselves are tenants of the tenements comprised in the charters. Judgment whether you are entitled to recover the charters from us who are tenants of the tenements comprised in the charters.

STANTON, J. He tells you that the charters were in the seisin of his mother and in her custody, and that you took them, as executor, after his mother's death and wrongfully (de vostre tort demene) detain them. Consequently it is no answer to say that you are the tenant of the tenements unless you also justify your tort.

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[2] Despite the phrasing of the act, it was actually drawn up in the assembly of burgesses first summoned to Shrewsbury (above, p. [237]) and then transferred to Acton Burnell.

[3] The statute includes detailed provisions for the attachment of property in towns other than those mentioned, for imprisonment of debtors with insufficient chattels, and the like.

[1] The second report is omitted.

*Cambridge*. We tell you that we are seised of the tenements, and if we were impleaded we should vouch as feoffor an assignee under one of the charters; and if we cannot do this we shall lose our voucher, for our feoffor has naught to give us to the value.

GOLDINGTON, J. But just as great hardship would follow if you were to vouch A., for unless he had the charters he could not vouch over, and he would lose his voucher in circumstances where he would be able to vouch if he had the charters.

STANTON, J. (*ad idem*): If the demandant had the charters you would never be able to recover them from him by way of action. No more, then, can you withhold them from him by means of an exception.

SPIGURNEL, J. If the charters had been delivered to you by your feoffor together with the land, that would be some argument in your favour, but he tells you that after his mother's death you as executor tortiously took them; wherefore, etc.

*Cambridge*. We tell you that he who now brings this writ enfeoffed us of these tenements, and delivered seisin thereof and these charters to us at the same time. Judgment, etc.

SPIGURNEL, J. That is a good answer in bar, etc.

*Malberthorpe*. [Ready to aver] that you took them tortiously as executor, etc.

And thereon the other side joined issue, etc.

**Note from the Eyre Roll**

The plaintiff, according to the Roll, was Isabella, the widow of Baldwin, the goldsmith of Pulham. The defendant was Simon, the cutler of Canterbury, executor of the will of Margery, *la Cutillere*.

Isabella's count was: 'Whereas a certain charter, wherein is recited that one William Cokyn enfeoffed one John Carter, the father of the said Isabella, of one messuage with its appurtenances in the district of Canterbury, and also another charter, wherein is recited that the said John enfeoffed the said Isabella of the same messuage, were, while the said Isabella was under age, in the custody of the aforesaid Margery, while she lived, whose executor is the aforesaid Simon, and whereas these said charters, after the death of the said Margery, on the Wednesday after the feast of the translation of the blessed Thomas martyr in the thirty-fifth year of the reign of King Edward the father of the King that now is[2] came into the hands (*devenerunt ad manus*) of the aforesaid Simon as executor; yet, although the said Simon has been many times requested by the said Isabella to deliver to her the aforesaid charters, he has not delivered them and still refuses to deliver them; whence she says that she has suffered loss and has damage to the value of one hundred pounds, and thereof she produces suit, etc.'

Simon's plea was: 'That he ought not to deliver to her the aforesaid charters, because he says that the aforesaid Isabella of her seisin gave the aforesaid messuage contained in the aforesaid charters to one Roger Aunsel and the aforesaid Margery, then the wife of the said Roger, to have and to hold to the said Roger and Margery and their heirs for ever. And he says that the aforesaid Isabella delivered the seisin of the aforesaid messuage together with the charters to the aforesaid Roger and Margery. And he says that the aforesaid Margery survived the said Roger and afterwards of her seisin enfeoffed the said Simon the son of the said Margery of one half of the aforesaid messuage to have and to hold to the said Simon and his heirs for ever. And afterwards in her last will she left to him the rest of the aforesaid messuage and in her lifetime delivered to him the aforesaid charters. And this he is ready to verify by the country, etc.[3]; wherefore he prays judgment if he should render the aforesaid charters, etc.'

Isabella's replication on which issue was joined was: 'That she never delivered the aforesaid charters together with the seisin of the aforesaid messuage to the aforesaid Roger and Margery. And that the aforesaid charters after the death of the aforesaid Margery, the aunt of the said Isabella, came into the hands (*devenerunt ad manus*) of the aforesaid Simon as executor of the said Margery, in whose custody they had been to the use (*ad opus*) of the said Isabella.'

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[2] Edward I died on 7 July 1307 in the thirty-fifth year of his reign. The Wednesday after the feast of the translation of St. Thomas (Becket) came that year on 13 July. There may be a confusion with St. Thomas the Apostle, the Wednesday after whose translation came that year on 5 July.

[3] *per patriam*—i.e., by a jury.

The verdict of the jury was: 'That the aforesaid Isabella had enfeoffed the aforesaid Roger and Margery of the aforesaid messuage and had delivered seisin thereof to them together with the aforesaid charters, just as the aforesaid Simon says.'

The judgment was: 'That the aforesaid Simon goes thence without a day and that the aforesaid Isabella takes nothing by that verdict, but be in mercy for her false claim.'

### WAGWORTH v. HALYDAY

Y.B. Trin. 29 Edw. III, fol. 38 (CP 1355)
in J. Baker and S.F.C. Milsom, *Sources of English Legal History* (London, 1986), 267–9

In detinue of chattels against Alice Halyday [brought] by Peter de Wagworth for a belt and purse etc., [Wagworth] said that he bailed the things to one G. Halyday to redeliver [on request], and he said that after G.'s death they came into the keeping of Alice.

WILLOUGHBY, J. How did they come into her keeping?

*Wynchyngham*. It does not matter how.

WILLOUGHBY, J. Nevertheless it would be better for you if you said how; and it is a mere formality and in no way against you, because the manner is not traversable.

*Wynchyngham*. Then we tell you that they came into her keeping as executor.

*Fynchenden*. And since you are to recover the principal from us and damages also as from an executor, and we are not named as executor, [we ask] judgment of the writ. And, sir, if this writ were upheld the following mischief would ensue: in case there were other executors who had released [the claim], that could not now be pleaded; for we could not allege that there were others if we are not named as executor.

*Wynchyngham*. You have not denied that the goods came into your keeping, and it does not matter whether as executor or otherwise since that is not traversable; and even if I had not said [it was as executor] my count would not have been less good. Once my chattels have come into your keeping, that [is what] charges you in itself and gives me this action against you, and not that you are executor. And so [we ask] judgment and pray our damages.

WILLOUGHBY, J. to *Fyncheden*. Say something else.

*Fyncheden.* Show what you have [in proof] of the bailment.

*Gour*. The bailment may be averred; and we tell you further that the goods came into her possession. And so everything that we say and allege can well be averred, and so etc.

WILLOUGHBY, J. Say something else, because he does not bring this action against you as executor. He has shown in his count how [the goods] came into your keeping as executor only to make a privity between you and the bailee; and so answer.

*Fyncheden*. The chattels that he demands did not come into our keeping, nor do we detain them in the manner he alleges, ready etc.

*Gour.* She has not denied the substance of our action, namely the bailment made to G. And if [the goods] came into her keeping at some time after G.'s death, but perhaps in a manner other than we have counted, perhaps for example not as executor, she has traversed the manner [but not] the substance directly. And so we do not think the law makes us answer this averment.

GREENE, J. The issue is wide enough, because she has traversed that the goods ever came into her keeping or that she detains them; and that is enough on this writ because she has traversed altogether. And although she says 'in the manner you allege', those words mean 'as you allege by [your] writ'; and such a mention makes any issue taken go to traverse of the writ.

*Gour*. The chattels came into her keeping, ready etc.

*Fyncheden*. You say that we detain, and we have traversed that, and you do not maintain it; [and so we ask] judgment. And although we have said further that the goods never came into our keeping, your replication always goes to your writ, namely that we are detaining the goods.

And then issue was joined on the one point and the other, namely that the goods came into her keeping and that she is detaining them, ready etc.

## CARLES[1] v. MALPAS

Y.B. Trin. 33 Hen. VI, fol. 26b, pl. 12 (CP 1455)
CD trans. from the "Maynard" ed.; see also Fifoot, pp. 42–3.

Detinue was brought of charters in London against Philip Malpas. The plaintiff counted of a sealed box and how three deceased persons were seised of certain land in fee, etc., [and containing] *a certain charter of theirs by which they gave those lands to a certain Jane*[2] in tail, etc., *and the names of the those lands and tenements which the same A., B., and C.*, to wit the donors, *held jointly with a certain John Appleton, and a certain charter by which a certain Thomas granted by gift the to the aforesaid A., B., and C., and to the aforesaid John Appleton the aforesaid tenements to have to them in fee, etc, and other charters, etc., concerning their right in the tenements with their appurtenances*. And he counted how the said Jane took a husband, and they both were possessors, etc., and had issue, the plaintiff. And after a sale[3] the said boxes came to the defendant *by trover* (*per inventionem*).

And the defendant demanded judgment of the count because he has declared about a sealed box and also about divers charters especially.

PRISOT, C.J. I could have notice which charters were in the box.

*Needham*. Again judgment of the count, because he has counted how three deceased persons were seised and gave the tenements as above, and by another deed how one T.D. was seised and enfeoffed the three persons and one Jane in fee, and he has not said that Jane is dead, so the charters belong to the said Jane as much as to the plaintiff.[4]

*Wangford*. Sir, we have counted that all the charters that were in the box concerned the tenements etc. And, sir, I understand that if I lose a box with charters, etc., concerning lands to which I have no title, still I shall have an action of detinue.

PRISOT, C.J. I understand that you will not. For in your case you should serve notice on him who found, etc, and should serve a request on him that he rebail. [And] if he refuses, you will have an action of trespass against him. For by the finding he does no wrong, but the wrong begins by the detention when he has knowledge. But if an A has the charters of my land, of which I am seised, and he loses them, and one B. finds them, I shall have an action of detinue against him without any notice, because I shall have a cause of action against A. who lost them.

*Littleton*. It seems that in the case *Wangford* [poses] he who lost the charters will have an action of detinue without any other title. Thus if I distrain for rent and afterwards the termor offers me the rent and arrears, and I deny him the distress, still he will not have an action of trespass against me, but a writ of detinue, because it was legal at the beginning when I took the distress, but if I kill them [the beasts taken in distraint] or work them on my own work, he will have an action of trespass.[5] So here, when he found the charters, that was legal, and because he did not deliver them on request, [the possessor] will have no trespass action, but an action of detinue against me, because no trespass is yet done. No more than if someone

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[1] We owe the identification of the plaintiff to Profs. Baker and Milsom, *Sources*, p. 537 n. 12. See also Milsom, *Historical Foundations*, pp. 272–3.

[2] Italics indicate Latin the original. The text is corrupt and the translation conjectural.

[3] This word is in English.

[4] The names are confused here. It is possible that "John Appleton," above, should be "Jane Appleton."

[5] Fifoot sees here an echo of trespass *ab initio*: see *The Six Carpenters' Case*, (1610) 8 Coke, 146a.

delivers goods to me to keep and rebail to him, and I detain them, he will never have a writ of trespass but a writ of detinue, *for the reason stated above*. But if by chance he burns them or breaks the seals, etc., or [does a] similar act, the action [of trespass] will be maintained.

*To this there was no response.*

PRISOT, C.J. If the plaintiff has a cause of action by one title and John Appleton by another title, and then the plaintiff brought his writ, and counted well, [the count would be good if it does not mention Appleton]. But if the count proves that the plaintiff has no cause of action except jointly with the said John Appleton not named in the writ, the writ will abate.

And then *Littleton* said secretly that this declaration *in trover* is a "new found Haliday", because the old declaration and intendment in such a case has always been that the charters *came into the hands and possession of the defendant* generally, and does not show how, but if it was on a bailment between the plaintiff and the defendant, it would be otherwise.

## THE STATUTE OF WALES
12 Edw. I (1284)

*Cap*. 6. *Breve de Conventione*

Rex vicecomiti salutem. Praecipe A. quod iuste et sine dilatione teneat B. conventionem inter eos factam de uno mesuagio et decem acris terrae et quinque acris bosci cum pertinentiis in N. Et nisi fecerit, etc., tunc summoneas praedictum A. quod sit, etc. ostensurus, etc.[1]

Ch. 6. Writ of covenant.

The King to the Sheriff greeting. Command A. that he justly and without delay observe the covenant made between them about one messuage and ten acres of land and five acres of wood with its appurtenances in N. And if he does not do it, etc., then you are to summon the aforesaid A. that he be, etc., to show. etc.

... And let there be writs of Covenant according to the complaints of the contracting parties and the diversity of the cases. ...

*Cap*. 10

Concerning the Third Article in which there is provided the Writ of Covenant, whereby sometimes movables are demanded and sometimes immovables by force of a covenant entered into between the parties which may derogate from the law ..., the proceeding upon the writ is thus. ...[2]

The plaintiff's complaint being heard and his Declaration, the defendant shall make answer; and upon the affirmation of the one party and the denial of the other they shall proceed to the Inquest, and the business shall be determined by the Inquest of the country. And it is to be known that sometimes a freehold is demanded by the writ of Covenant; as where any man letteth land to another to farm, rendering therefor a certain rent, under a condition added thereto in the writing of the Covenant that, if he be not satisfied for the rent, it shall be lawful for him to enter into the land that he hath demised and hold the same. If he to whom the land hath been demised do not pay the rent and he who demised it hath not the means of entering into the land demised according to the tenor of his writing, by reason of the power of his adversary, in this case he ought to recover the tenement by the writ of Covenant together with damages.

Where sometimes a covenant is made between parties that the one shall enfeoff the other of a certain tenement and shall deliver seisin unto him at a certain day, if afterwards he shall transfer that tenement by feoffment to a third person, since he cannot annul that feoffment by virtue of the prior contract that was not carried into effect, in that case the injured party cannot have other redress by writ of Covenant save satisfaction in money for his damages. And thus in one case there lieth an action to demand a tenement by writ of Covenant, and in another case money as damages or the tenement.

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[1] Cf. the specimen cited from the Register of Writs, by Holdsworth, H.E.L. III. App., p. 663.

[2] Here follows an account of the steps to be taken if the defendant makes default.

And because contracts in covenants are infinite, it would be difficult to make mention of each in particular. But, according to the nature of each covenant, by the affirmation of the one party and the denial of the other it will either come to be tried by the Inquest upon the facts or it will come to an acknowledgment of the writings brought into judgment and judgment will be awarded according to that acknowledgment; or the writings will be denied and then it will come to an inquiry into the making of the writings by the witnesses named in the writings, if there be such, together with the jury (cum patria); and if there should be no witnesses named or they should be dead, then by the jury only.

## THE WALTHAM HAY CARRIER'S CASE[1]

Y.B. 14 Edw. II (Eyre of London, 1321)
ed. H. Cam, *The Eyre of London A.D. 1321*, Selden Soc'y, 86 (London, 1969), 2:286–7

### I

Covenant concerning hay received at Waltham outside the Justices' jurisdiction and without specialty.

A man brought a writ of covenant against A. and said that on a certain day in London there was a covenant between them that (the defendant) should receive from (the plaintiff) a certain (load of) hay at Waltham to be carried thence to London for six shillings; and (the plaintiff) paid the three shillings down, and then (the defendant) received the hay at Waltham to be carried etc., and he did not bring it, but still detains it wrongfully.

*Gregory*. His count is that we received it at Waltham etc. and that is outside your jurisdiction. We ask judgment whether you will hear the case.

*Fastolf*. The covenant was made in this town.

*Gregory*. If we wished to deny the receipt (of the hay) at Waltham, you would not be able to take cognizance (of the plea).

HERLE, J. He is not complaining that you did not receive it, and if you do wish to deny it we shall do what is for us to do. Therefore perhaps this would not be your answer.

*Gregory*. What (evidence) have you of the covenant?

*Fastolf*. Ready (to aver).

*Gregory*. Every covenant depends on specialty, and you show none. We ask judgment.

*Fastolf*. Specialty is not necessary for a cartload of hay.

HERLE, J. And we shall not undo the law for a cartload of hay. Covenant is none other than the assent of parties that lies in specialty.

And it was awarded that he take nothing by his writ.

### II

The defendant said that the plaintiff had counted that he ought to have received from him a barge load of hay at Waltham, which was outside etc. and it was not allowed because the covenant had been made in London.[2]

One A. brought a bill against C. who said that on a certain day and year in London a covenant was entered into that he would receive a barge load of hay at Waltham and carry it to London for six shillings, and he received four shillings down.

*Aldborough*. He has counted that we are supposed to have received the hay at Waltham, which is outside your jurisdiction, therefore we do not think that you will be willing to take cognizance of this plea.

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[1] [This is three different reports of the same case.]

[2] C's commentator has missed the second point in the case, which turns on the written covenant.

HERLE, J. He is not complaining that you did not receive it, and therefore etc. And if you wish to deny receipt, we shall do what is ours to do, and perhaps this will not be an answer. Therefore think again.

*Fastolf*.[3] What (evidence) have you of the covenant?

*Burton*.[4] Ready etc.

*Aldborough*. This matter involves specialty and he shows none. Judgment.

*Fastolf*. It is not necessary to have specialty for the carriage of a cartload of hay.

HERLE, J. The law will not be changed for a cartload of hay; for a covenant is neither more nor less than an agreement between parties which cannot be taken to law without specialty.

Therefore it was awarded that he take nothing by his bill.

III

Covenant where the plaintiff had no specialty to witness to the covenant.

One A. complains of B. by bill that whereas a covenant was made between them on a certain day etc. that the aforesaid B. should carry a certain quantity of hay, belonging to the aforesaid A., from one certain place to another for a certain sum of money, which he received from the aforesaid A., and that all the hay should be carried before a certain day, the aforesaid B. wrongfully did not carry the hay, to his damage, etc.

*Bacon*. What (evidence) have you of the covenant?

*Ashley*. We are ready to aver if you will deny it.

HERLE, J. A covenant is nothing but an agreement in words between parties, and it cannot be proved except by specialty, and therefore, etc.

*Ashley*. Sir, one cannot have a writing for every such little covenant.

*Bacon*. Sir, he complains of a broken covenant and shows no specialty for the covenant.

*Ashley* saw that he would get no answer without specialty.

And he was non-suited.

## HAUTUN v. PRESTON

Coram Rege Roll 39 (Mich., 16 Hen. III [1232])
ed. F.W. Maitland, *Bracton's Note-Book* (London, 1887), plea 859, 2:668.

Theobald Hautun claims against John Preston that he render to him a reasonable account for the time during which he was his bailiff of his manor of Mereflet (*quod reddat ei compotum racionabilem de tempore quo fuit ballivus suus de manerio suo*), and whereof he says that he is in arrears for three years and that he has suffered loss to the value of two hundred marks.

And John comes and says that he was never bailiff nor did he ever have that manor in his keeping from the said Theobald, but rather from a certain Adam of Mereflet, and that he has rendered his account to the said Adam and has received quittance; and that the said Adam was the bailiff of the said Theobald and was put in that position by Theobald, as the said John says: and of this he calls the said Adam to warranty.

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[3] Presumably Aldborough is the speaker.

[4] Presumably Fastolf is the speaker.

## STATUTE OF MARLBOROUGH
52 Hen. III (1267)

*Cap. 17*

It is provided that if land holden in socage be in the custody of the kinsfolk of the heir because the heir is within age, the Guardians shall make no waste nor sale nor any destruction of the same inheritance; but safely shall keep it to the use of the said heir, so that when he cometh to his lawful age they shall answer to him for the issues of the said inheritance by a lawful account (*per legitimam computacionem*), saving to the same Guardians their reasonable costs.

*Cap. 23*

It is provided also that if Bailiffs, which ought to make account to their lords (*qui dominis suis compotum reddere tenentur*) do withdraw themselves, and have no lands or tenements whereby they may be distrained; then shall they be attached by their bodies, so that the Sheriff in whose bailiwick they may be found shall cause them to come to make their account (*ad compotum suum reddendum*).

## STATUTE OF WESTMINSTER II
13 Edw. I (1285)

*Cap. 11*

Concerning Servants, Bailiffs, Chamberlains and all manner of Receivers, which are bound to yield account (*et quibuscumque receptoribus qui ad compotum reddendum tenentur*), it is agreed and ordained;

That when the Masters of such Servants do assign Auditors to take their account and they be found in arrearages upon the account (all things allowed which ought to be allowed), their bodies shall be arrested and by the testimony of the Auditors of the same account shall be sent or delivered unto the next gaol of the King's in those parts; and shall be received of the Sheriff or Gaoler and imprisoned in iron under safe custody, and shall remain in the same prison at their own cost until they have satisfied their master fully of the arrearages.

Nevertheless, if any person. being so committed to prison, do complain that the Auditors of his account have grieved him unjustly, charging him with receipts that he hath not received or not allowing him expenses or reasonable disbursements, and can find friends that will undertake to bring him before the Barons of the Exchequer, he shall be delivered unto them; and the Sheriff in whose prison he is kept shall give knowledge (*scire faciat*) unto his Master that he appear before the Barons of the Exchequer at a certain day with the rolls and tallies by which he made his account; and in the presence of the Barons or of the Auditors that they shall assign him the account shall be rehearsed and justice shall be done to the parties, so that if he be found in arrearages he shall be committed to the Fleet, as above is said. And if he flee and will not give account willingly, as is contained elsewhere in other statutes,[1] he shall be distrained to come before the justices to make his account, if he have whereof to be distrained;

And when he cometh to the Court, Auditors shall be assigned to take his account, before whom if he be found in arrearages and cannot pay the arrearages forthwith, he shall be committed to the gaol to be kept in manner aforesaid;

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[1] Statute of Marlborough. c. 23. *Supra* p. 15.

And if he flee, and it be returned by the Sheriff that he cannot be found, Exigents[2] shall go against him from county to county until he be outlawed, and such prisoner shall not be replevisable.[3] And let the Sheriff or keeper of such gaol take heed, if it be within a Franchise or without, that he do not suffer him to go out of prison by the common writ called Replegiare[4] or by other means, without assent of his Master; and if he do and thereof be convict, he shall be answerable to his Master for the damages done to him by such his servant according as it may be found by the country, and the Master shall have his recovery by Writ of Debt. And if the keeper of the gaol have not wherewith he may be justiced or wherewithall to pay, his superior, that committed the custody of the gaol unto him, shall be answer able by the same writ.

## BOX v. PALMER

Y.B. 3 Edw. II (CB 1310)

ed. F.W. Maitland, *Year Books 3 Edward II*, *1309–10*, Selden Society, 20 (London, 1905), 91[1]

### Note from the Record

Henry Palmer was attached by his body to answer John Box of a plea that he render to him a reasonable account of the time for which he was the receiver of John's money.

The plaintiff, by his attorney, says that, whereas the defendant was the receiver of his money at Kingston on Hull from the Sunday before Christmas in 35 Ed. I. to the Conversion of St. Paul in 3 Ed. II. and received by parcels a hundred and ten pounds to trade with (*ad mercandisandum*). he refused and still refuses to render an account: damages, a hundred pounds.

The defendant comes ... and says that he ought not to answer him to this writ; for he says that this writ of *monstravit*[2] aids those who exact an account in cases where such receivers or bailiffs have no lands or tenements whereby they may be distrained to render such account, and he says that he has lands and tenements in the vill of Pontefract and elsewhere in the said county by which he may be distrained to render such an account. and so had on the day of writ purchased. to wit, 2 Feb., 3 Ed. II.; and of this he puts himself upon the country.

Issue is joined. The defendant finding six mainpernors.[3] Subsequently a jury at York finds that the defendant has, and on the day of writ purchased had, a messuage in the vill of Pontefract in the right of one Alice his wife, which is worth six shillings a year; and that he has not, so far as the jurors know, any other tenement in the said county or elsewhere. ...

Afterwards, the defendant confesses that in the time aforesaid he received seventy-seven pounds of the plaintiff's money, and is ready to account. Three auditors are assigned, and he is committed to the Fleet. Afterwards, the account

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[2] See Blackstone, Comm. III. 283: 'Where a defendant absconds and the plaintiff would proceed to an outlawry against him ... a *capias* [must he sued out]. And if the sheriff cannot find the defendant upon the first writ of *capias* and returns a *non est inventus*, there issues out an *alias* writ, and after that a *pluries*. ... And if a *non est inventus* is returned upon all of them, then a writ of *exigent*, or *exigi facias* may he sued out, which requires the sheriff to cause the defendant to be proclaimed, required or exacted, in five county courts successively, to render himself, and, if he does, to take him, as in a *capias*; but if he does not appear and is returned *quinto exactus*, he shall then he outlawed.'

[3] For the writ *de homine replegiando*, see F.N.B. 66E–68C.

[4] See the previous note.

[1] The translation from the Year Book report is that given by Plucknett, *Statutes and their Interpretation in the Fourteenth Century*, pp. 182–3.

[2] The form of *monstravit de compoto* from F.N.B. 117H: 'The King to the sheriff, etc. The prior of N. hath shewed unto us that, whereas A. was his bailiff in K., having the care and administration of all his affairs and goods, the same A., his account not being paid, seeking subterfuges, lies hid in your bailiwick, nor can he be found and distrained to render to the said prior his account aforesaid; and because by the common council of our realm it is provided that, if bailiffs who are bound to render account to their lords do withdraw themselves and have not lands or tenements whereby they may be distrained, they shall be attached by their bodies, so that the sheriff in whose bailiwick they be found shall cause them to come to render their account, we command you that, if the aforesaid prior shall make you secure of prosecuting his claim, then attach the aforesaid A., so that you may have him before our Justices, etc. on such a day, to render to the aforesaid prior his account aforesaid, as he shall reasonably show that he ought to render to him, etc.'

[3] See P. & M. II, 584–90.

having been heard, the auditors record before the Justices here in the presence of the parties that the defendant is in arrear in thirty-three pounds, eighteen shillings and tenpence halfpenny. So he is re-committed to the Fleet until, etc.

John Box brought the *Monstravit de Compoto* against Palmer.

*Scrope*. The defendant has lands whereby he may be justiced. We ask judgment of this writ, which is given by Statute[4] against those who have no lands or tenements by which they can be justiced. ...

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

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

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

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

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

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

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

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

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

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[4] The statute of Marlborough, c. 23. *Supra* p. [15].

## C. TRESPASS IN THE CENTRAL ROYAL COURTS[1]

### WRITS OF TRESPASS

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

The King to the sheriff of Lincoln greeting. If A. shall give you security for pursuing his claim, then put by gage and safe pledges B. that he be before our justices at Westminster on the octave of St. Michael to show wherefore with force and arms he made an assault upon the same A. at N. and beat wounded and ill-treated him so that his life was despaired of, and other outrages there did to him, to the grave damage of the same A. and against our peace. And have there the names of the pledges and this writ.

The King to the sheriff of Lincoln greeting. If A. shall give you security for pursuing his claim, then put by gage and safe pledges B. that he be before our justices at Westminster on the octave of St. Michael to show wherefore with force and arms he broke the close of the same A. at T., and cut down his trees there lately growing and fished there in his several fishery and mowed his grass there lately growing, and took and carried away the hay thus made and the fish from the aforesaid fishery and also the aforesaid trees and other of his goods and chattels to the value of twenty marks and also forty pounds of his money in coined money

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

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