that now is, which the said merchants proffered and wherein it is willed that in every inquisition to be taken between Lombards and other men, whosoever they might be, the one half of that inquest is to consist of Lombards and the other half of men of England.

The jurors say by their oath that the aforesaid Richard made and executed the aforesaid writing by his good and free will and out of prison, and that the aforesaid merchants by reason of the unjust detention of the aforesaid debt had loss to the value of £20. Wherefore a day is given to the aforesaid merchants, at the aforesaid Quindene of St. Michael, at the Exchequer, to hear their judgment.

Afterwards, at that day, the aforesaid merchants ask leave to withdraw from their writ, and they have leave. And the said writing is delivered to them again.[5]

THE ECCLESIASTICAL COURTS

CHART c. FOSTER

Consistory Court of York (1511)
York, Borthwick Institute, CP.F. 321.

Extract from the libel (*complaint*).

... The aforesaid Oliver Foster, at a time before the feast of St. Lawrence recently past, bought and received from the aforesaid George Chart forty sheep, forty lambs and twenty hogs worth £6 6s 8d.

The same Oliver on the day of delivery and receipt of the said sheep, lambs and hogs, paid 26s 8d in part payment of the said sum of £6 6s 8d.

The same Oliver by his oath faithfully promised the same George to pay £5 the rest of the same £6 6s 8d on a certain day now past.

The aforesaid George by himself and his men long before the present suit duly requested the said Oliver to pay to the same George the said £5, the rest of the £6 6s 8d.

The aforesaid Oliver, thus requested as is aforesaid has delayed and refused to pay or deliver to the same George the said £5, just as he delays and refuses at the present time.

The aforesaid are true, public notorious, and manifest, etc.

NOTES AND QUESTIONS

1. There are many cases like this in surviving ecclesiastical court records. The number runs into the 100's in the surviving records in the 14th and 15th centuries, in the 1000's in reality, granted how much has been lost, and the same story can be told of other ecclesiastical jurisdictions.

2. This case is typical. What are the elements in the complaint?

3. The number of such cases declines noticeably in the late 15th century. In the early decades of the 16th century the number declines precipitously.

4. We will see in class that competition from the king's courts may not be the answer.

[5] Why did the Frescobaldi do this?

E. ASSUMPSIT: 16TH CENTURY AND BEYOND[1]

ORWELL v. MORTOFT

Y.B Mich. 20 Hen. VII, fo. 8, pl. 18 (CP 1505).[2]

[1] From J.H. Baker & S.F.C. Milsom, *Sources of English Legal History* (London, 1986), 406–15. Other references given as they occur.

[2] Also reported by Caryll in Keil. 69, 77 (correctly dated Mich. 21 Hen. VII).

Translation of the record[3]

Norfolk. William Mortoft, late of East Dereham in the aforesaid county, mercer, was attached to answer Thomas Orwell. ...[4] And thereupon the same Thomas, by William Knyghtley his attorney, complains that, whereas the aforesaid Thomas on 20 April [1503] in the eighteenth year of the reign of the present lord king had bought 60 quarters of barley from the said William [Mortoft] at Aylsham for a certain sum of money (namely £6) agreed upon between them, and the same William had undertaken, covenanted and bargained to deliver the aforesaid barley there within a certain time now elapsed (namely, before the feast of All Saints then next following): the aforesaid William, scheming fraudulently and craftily to defraud the said Thomas, wholly converted the aforesaid 60 quarters of barley to his own use and did not deliver it within the aforesaid time. And thereby he says he is the worse and has damage to the extent of £20. And thereof he produces suit etc.

And the aforesaid William, by John Brampton his attorney comes and denies the force and wrong when etc. And he says that the aforesaid Thomas did not buy from the selfsame William the aforesaid 60 quarters of barley or any part thereof in the way that the same Thomas above supposes by his aforesaid writ and count; and of this he puts himself upon the country; and the aforesaid Thomas likewise. Therefore the sheriff is commanded to cause to come here on the morrow of the Ascension 12 etc. by whom etc. who neither etc. to make recognition etc. because both etc.

Afterwards the process between the aforesaid parties in the plea aforesaid was continued, by the juries between them therein being put in respite here until this day, namely a fortnight from Michaelmas then next following, unless the lord king's justices assigned to take the assizes in the aforesaid county by the form of the statute etc. should first have come to Norwich in the aforesaid county on the Monday [21 July 1505] next after the feast of St James the Apostle last past. And now here at this day come both the aforesaid Thomas Orwell and the aforesaid William Mortoft, by their aforesaid attorneys. And the said justices of assize, before whom etc. have sent in their record in these words:[5]

> Afterwards, at the day and place contained within, before Sir John Fyneux and Sir [Robert] Rede, the lord king's justices assigned to take the assizes in the county of Norfolk by the form of the statute etc., come both the within named Thomas Orwell, by William Knyghtley his attorney, and the within named William Mortoft, by John Brampton his attorney; and the jurors of the jury mentioned within, having been called, likewise come and are chosen, tried and sworn to say the truth concerning the matters contained within. And thereupon the aforesaid Thomas shows in evidence to the same jurors here in court that he bought the within-mentioned 60 quarters of barley from the aforesaid William Mortoft for the within-mentioned £6, in the way that the aforesaid Thomas supposes within by his writ and count. And thereupon the aforesaid William Mortoft says that the aforesaid evidence given and alleged above by the said Thomas is insufficient in law to prove and maintain the within-mentioned action and issue, and that he need not and is not bound by the law of the land to answer that evidence given in form aforesaid. And so he prays judgment whether upon that evidence the aforesaid Thomas can maintain or ought to have his aforesaid action etc. [i.e., he demurs to the evidence; see note 3]. And the aforesaid Thomas, since he has given sufficient evidence to the aforesaid jurors to maintain his action and the within-mentioned issue, which evidence he is ready to verify, and which the aforesaid William Mortoft does not deny or in any way answer, prays judgment and that the aforesaid jurors should be charged to enquire of the damages etc. Where upon the aforesaid jurors (being charged to enquire of the damages etc. if the aforesaid matter in law should be adjudged in favour of the aforesaid Thomas) say upon their oath that the aforesaid 60 quarters of barley are worth £6 if the aforesaid Thomas cannot have that barley, and assess the damages of the selfsame Thomas by reason of the withholding of that barley (besides the value of the same, and the outlay and costs expended by him about his suit in that behalf) as £4, and assess the outlay and costs as £4. Thereupon a day is given to the aforesaid parties before the within-mentioned justices of the Bench at the within-mentioned day, for hearing their judgment therein, inasmuch as etc.

And because the justices here wish to be advised of and upon the foregoing before they give judgment, a day is given to the aforesaid parties here until the octaves of St Hilary for hearing their judgment therein, inasmuch as the justices here are not yet [advised] etc. ...

[There are similar continuances for advisement until Michaelmas term 1506, but no judgment is entered.]

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[3] CP 40/972, m. 123.

[4] The record here sets out the terms of the writ, which are repeated in the count.

[5] This *postea* records a demurrer to the evidence at Norwich assizes. Since the evidence added nothing to the facts alleged in pleading, it had much the same effect as a demurrer to the declaration, and this may explain why in Keil. 69 it is referred to as a 'demurrer in law'.

A man brought an action on his case, namely, that whereas he had bought from the defendant 20 quarters of malt, to be delivered to the plaintiff at a certain day, the defendant converted the said quarters to his own use, whereby an action accrued to him.

KINGSMILL. This action does not lie, but he must have an action of debt: for the property is not changed by the bargain, because it is unascertained (*en non certenté*) and he must have it by delivery from the defendant; and it is at the defendant's pleasure what grain he will pay him, for if he buys 20 quarters from someone else [afterwards] he may pay the plaintiff with them. ... It is not like the case where I bail goods to be looked after, and the bailee converts them to his own use: there an action on the case lies,[6] for the property is in me. But in this case at the bar, he shall recover damages in debt for the wrongful withholding of the grain.

FISHER and VAVASOUR were of the same opinion.

FROWYK [C.J.] thought the contrary. It has been argued that the plaintiff cannot take the 20 quarters, and has no property in them by the bargain; but this does not matter, for [the defendant] has done something to determine my[7] bargain, and has deceived me whereby I am caused loss: and so it is right that he should be punished for this wrongdoing (*misdemener*) by an action on the case. If I sell £10 worth of land, parcel of my manor, and covenant further to make an estate[8] by a certain day, and before the day I sell the whole manor to someone else: in this case an action on the case lies against me. Likewise, if I sell ten acres in my wood, and then I sell the whole wood to someone else. O[r] if I covenant, in return for money, to make a house by a certain day, and do not do it, an action on the case lies for the nonfeasance. Here, then, he has sold 20 quarters of malt to the plaintiff to be delivered at a certain day, and has not done this, but has converted them to his own use; and so it is right that he should be punished by an action on the case. And even though he could have debt, it does not follow that he cannot have this action. For if I bail money to be bailed over, and he converts it to his own use, I can have an action of account, or debt, or an action on the case. Likewise detinue: where a thing is bailed to be looked after, and he converts it to his own use, detinue lies, and so does an action on the case, as appears in the previous case of Cheseman.[9] But it would be a good thing to consider this present case further, and be advised.

Thereupon they were adjourned.

(On another day:) KINGSMILL. The action does not lie, but he shall be driven to his action of debt. Every bargain shall be interpreted equally as between the parties, and not more in favour of one than the other. (It is otherwise of a gift.) Therefore, since the vendor may not take his money for the thing sold, no more may the buyer take the thing (when it is unascertained, as here), especially when the bargain is that the seller should deliver it—but even if that term were left out he can not take the corn, for it must be measured out. Suppose the seller did not have corn at the time of the bargain, but bought some afterwards; or that he sold the corn which he had at the time of the bargain, but later bought other corn, which he could deliver on the day: this is good, which proves that the buyer had no interest in the grain at the time of the bargain, and is therefore to demand it by debt. (If, however, l sell the grain in my barn or house,[10] I may not deliver other grain; for it may be that there is no grain as good in the whole neighbourhood.) So it seems that debt lies. And where a general action lies, a special action on the case does not. Thus, where an assize of nuisance lies, a special action on the case does not.[11] An action on the case [sometimes] lies for not doing something: as where an attorney does not execute his office, or a labourer does not do his service in tilling and manuring my land, for I am damaged thereby and no general action lies.

FISHER and VAVASOUR to the same effect. ...

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[6] See [Baker and Milsom, *Sources*, pp. 524–8].

[7] Frowyk C.J. here begins to argue as if he were the plaintiff.

[8] I.e. execute a conveyance.

[9] *Bourghchier v. Cheseman* (1504) Mich. 20 Hen. VII, fo. 4, pl. 13; KB 27/972, m. 88. Two bags of jewels had been entrusted to a bailee, who died; they came into the defendant's hands; and the defendant *vi et armis* broke the bags open and converted the jewels to his own use. The defendant denied the conversion, and the jury found for the plaintiff with £220 damages. The question reported in the Y.B. is not whether detinue was more appropriate, but whether the defendant could traverse the conversion rather than the breaking of the chest. Fyneux C.J. thought he could.

[10] In Keil. 69, Kingsmill J. said his decision would have been different if the barley had been in sacks.

[11] See [Baker and Milsom, *Sources*, pp. 581–6].

FROWYK to the contrary. Everyone must be punished according to his fault. Therefore, although debt lies for the grain, nevertheless because the defendant has deceived him this is a greater wrong than the withholding of the grain or the non-payment, and he can not be punished for it in any other action than this action.[12] If I deliver money to someone to deliver over to my attorney, for my costs in some suit, and he delivers it to my adversary, in this case this delivery is a greater damage to me than the non-delivery [to my attorney], and yet debt lies against the bailee: but, even though debt lies, the action on the case lies for the wrongdoing. Thus these actions are taken upon separate causes. And where I am bound[13] upon condition to pay a lesser sum, and I deliver the lesser sum to my servant to pay it, and he does not pay it, in this case debt lies (or account) for the non-payment [i.e., against the servant]: but because I have forfeited my bond by the non-payment I have [suffered] a greater wrong, and for that I shall have an action on the case. Likewise in this case, because the plaintiff is deceived by the conversion of the grain to the defendant's own use, he thereby has a greater damage than the non-delivery thereof; and for that cause, as I understand it, the action lies here. As for Kingsmill's argument that an action on the case does not lie where [an assize of] nuisance lies, I quite agree; for one is real and the other is purely personal, and such actions may not stand together. But it is otherwise here. Suppose I covenant to enfeoff a man with an acre which is part of my manor, and I sell the whole manor to someone else: here an action on the case lies for this deceit. Likewise in this case at the bar, inasmuch as he sold the plaintiff 20 quarters of barley and then converted them to his own use, which is a deceit and wrongdoing for which an action lies.[14]

(*Reporter*. Coming from Westminster, I heard my lord Fyneux[15] say that in his view an action of debt would lie, in which he would recover damages for all this wrongdoing; but not this action.)

PYKERYNG v. THURGOODE

Spelman, *Reports*, p. 4, pl. 5 (KB 1532)

Note from the Record[1]

Richard Pykeryng, a London brewer, brought an action on the case against John Thurgoode, yeoman, of Hitchin, Hertfordshire, and declared that, whereas on 30 October 1531 the defendant had bargained and sold to the plaintiff 40 quarters of malt for £5. 13s. 4d. then paid in cash and another £5. 13s. 4d. to be paid on delivery, at the feast of the Purification (2 February 1532); and the defendant had then and there promised and undertaken to deliver the malt accordingly; and that, relying on this promise, the plaintiff had made lesser provision of malt for his brewing: the defendant, scheming to cause the plaintiff loss in his trade as a brewer, did not deliver the malt on time or at all, so that the plaintiff had no malt for his brewing but was forced to buy it from others at a much higher price. The defendant pleaded *Non assumpsit* and on 5 July 1532 at the Guildhall, London, before Fitzjames C.J., the jury found for the plaintiff with £9 damages and 40s. costs.

... The plaintiff prayed judgment; and the other party, by his counsel *Cholmeley* and *Hynde* Sjts., alleged in arrest of judgment that this action does not lie, since an action of debt lies: and where a general action lies, a special action on the case does not lie in the same case.

SPELMAN J. It seems that the action on the case does lie. For where a man has a wrong done to him, and has suffered damage, he must have an action. Now, because the defendant has broken his promise and undertaking, he has wronged the plaintiff; and the plaintiff has suffered damage through the non-delivery of the malt: ergo, the law gives him an action. And no action lies on this but an action on the case; and so

[12] Cf. Keil. 69: '... In my view the reason why this action is maintainable is that the plaintiff is damaged by the non-delivery at the time mentioned in the bargain; and even though the plaintiff could have an action of debt for the barley, he is nevertheless not thereby satisfied for being damaged'.

[13] I.e. in a conditional money-bond.

[14] Cf a further reason in Keil. 77: '... If I covenant with a carpenter to make me a house, and pay him £20 to make the house by a certain day, and he does not make the house by the day, I shall have an action on my case because of the payment of my money: and yet it sounds only in covenant, and without payment of the money in this case there is no remedy. If he makes the house, but badly, an action on my case lies; and for the nonfeasance also, if the money has been paid, an action on the case lies. Likewise, it seems to me, in the case at the bar: the payment of the money is the cause of the action on the case, without any alteration of property'. There is no explicit statement in the record, however, that Orwell had paid Mortoft.

[15] Sir John Fyneux (C.J.K.B. 1495–1525).

[1] KB 27/1073, m. 70; Selden Soc. vol. 94, p. 247.

the action lies. Although in some books[2] a distinction has been drawn between nonfeasance and malfeasance, so that an action of covenant lies on the one and an action on the case on the other, this is no distinction in reason. If a carpenter covenants for £100 to make me a house, and does not make it before the appointed day, so that I lack somewhere to live, I shall have an action on my case for this nonfeasance just as well as if he had made it badly. And although Pykeryng could have an action of debt, that is immaterial; for the action of debt is founded on the *debet et detinet*, whereas this action is founded on another wrong, namely, the breach of the promise. If a man sells me his land for £100 and promises to convey it to me before a certain day, and then enfeoffs someone else, I shall have an action on my case for his deceit; and yet covenant lies, because he has not performed any part of his promise. But the action of covenant is based on the covenant broken, while the action on the case is based on the deceit in enfeoffing someone else. If, in the same case, he had taken back an estate and enfeoffed me before the day, the action on the case would still lie if he had warranted [for] him and his assigns, for by taking the estate he is in of another estate, and so the warranty is void with respect to me.[3] If a man bails goods to look after, and the bailee converts them to his own use, in this case the bailor may have an action on the case upon this misdemeanour; and yet he could have had an action of detinue, but that would have been based on the bailment and the detaining. It was so [held] in the case between *Bourgchier* and *Cheseman*[4] ... he had judgment to recover, and yet he could have had an action of detinue; but that was immaterial, for the reason given.

PORT J. thought the contrary. This promise is part of the contract,[5] and it is all one. There is no act done by the defendant but merely the non-delivery, for which detinue[6] lies.

CONINGSBY J. and FITZJAMES C.J. It seems that the action lies and it is at the plaintiff's election to take either action, for they are based on different points—as Spelman has said. If a man bails money to be handed over to another, and he does not hand it over, it is at the bailor's pleasure whether to bring debt, account, or an action on his case; for the actions are based on different points. Or, if a man bails to me his robe to look after, and by my neglect (*sufferance*) the robe becomes moth-eaten, he shall have an action on his case for this negligence and ill-keeping, though he could also have had a writ of detinue at his pleasure: and although I lose by [his choice of an action on the case], since I could have waged my law in detinue but not in the action on the case, this is immaterial, because in *Cheseman's Case* (above), which is good law, he was ousted from his law which he could properly have had in an action of detinue. There are many precedents where a man has bailed goods to look after, and the bailee converted them to his own profit, or looked after them badly, and the bailor had an action on his case; and yet he could have had an action of detinue, in which the bailee could have waged his law. (So it seemed to them that the plaintiff ought to have his judgment to recover.

Later in the same term judgment was given for the plaintiff to recover his damages.

The record confirms that judgment was entered this term for £9 damages, and £4 costs (increased by the court).

HOLYGRAVE v. KNYGHTYSBRYGGE

Y.B. Mich. 27 Hen. VIII, fo. 24, pl. 3 (KB 1535)[1]

Note from the Record[2]

John Holygrave brought a bill against Henry Knyghtysbrygge complaining that, whereas he had recovered £6 15s. against one Oliver Tateham in the Sheriff's Court of London, and had Tateham imprisoned in the Bread Street Compter[3] in execution for this judgment-debt; the defendant had asked the plaintiff to let Tateham go free, and had undertaken and promised to pay the debt himself; and the plaintiff had thereupon released Tateham and discharged

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[2] See [Baker and Milsom, *Sources*, pp. 378–405].

[3] Cf. *Doige's Case* (1443), p. [32] above.

[4] (1504); see [46], fn [9] above.

[5] A variant text reads 'his covenant'.

[6] Perhaps a slip for debt.

[1] Collated with LC MS. Acc. LL 52960, 27 Hen. VIII, fo. 42. Also reported in Spelman, *Reports*, p. 7, pl. 8. Spelman makes no mention of the bill of exceptions or of 'Jordan'.

[2] KB 27/1094, m. 30d; Selden Soc. vol. 94, p 256.

[3] [A debtors' prison in the city of London.]

the debt: nevertheless the defendant, little regarding his promise and undertaking, had not paid the debt. The defendant pleaded *Non assumpsit*, and on 8 May 1535 at the Guildhall, London, before Luke J., the jury found for the plaintiff with £7 5s. damages.

The Y.B. adds some details which are not in the record: that the plaintiff (whom it calls 'Jordan') gave evidence at the trial that the undertaking was actually made to his wife, while he was away, and that she had later told him about it, and he had then released Tateham. The defendant objected that this evidence was insufficient, because the wife could not be party to the undertaking without the prior assent of her husband. The objection was overruled, and the defendant took the very unusual course[4] of praying a bill of exceptions. Such a bill was duly sealed, and it was argued in banc that it was invalid, because the procedure was not available in such a case. The better view seems to have been against allowing the bill, and that is doubtless why it was not entered of record. The argument on this point, and on the wife's agency, is here omitted.

...*Knightley*. It seems that this action does not lie, for he could have had an action of debt on this matter, and therefore should not have a writ on his case: for he should not have that unless there is no remedy by another writ.[5]

THE WHOLE COURT: That is not so, for in many cases a man may have an action on his case where he could have had another remedy. With respect to that reason, then, the action is good.

LUKE[6] ... And as to the argument that the plaintiff should have had a writ of debt, and not this action, it seems to me the contrary: for I think that a man shall have debt only where there is a contract. The defendant has no *quid pro quo*, but this action is founded on the undertaking, which sounds wholly in covenant. If it had been by specialty, the plaintiff would have an action of covenant; but since he has no specialty he has no remedy, it seems to me, than an action on his case. And a case was adjudged here since I have been a judge here, which was that a stranger went with a man to a London and said to the baker, 'Deliver to this man as much bread as he wants, and if he does not pay you I will', and the baker delivered a certain amount bread to the man, and the man did not pay the baker, and so the baker brought his action on the case on his special matter against the stranger; and the stranger demurred, and it was clearly adjudged that the action lay, and the baker recovered.[7] Likewise here, it seems.

SPELMAN to the same intent. ... Admitting the undertaking to be good, what action shall the plaintiff have? It seems to me that it is at the plaintiff's election to bring a writ of debt or this action, or some other action; for in several cases the law gives two ways for a man to attain his remedy. For instance, if I bail goods to you and you burn them, or else allow them to become moth-eaten, it is in my election to bring either action (that is, a writ of Detinue or an action on my case) at my pleasure; and because I shall have one, it is no proof that I shall not have the other.[8] And, if I am disseised, I can elect to bring a writ of entry *sur disseisin* or a writ of right. Thus, it seems to me that it is in the plaintiff's election to bring either action; and therefore it seems to me that the plaintiff should recover.

PORT, J., ... argued in the same way as SPELMAN.

FITZJAMES [C.J]. to the same effect. ... Shall he have an action of debt, or this action? It seems to me that he shall not have an action of debt, for there is no contract here, and the defendant did not have *quid pro quo*; and so he has no other remedy but an action on his case. Likewise, if a stranger buys a piece of cloth in London, and I say to the merchant, 'If he does not pay you by such a day, I will pay', here is no contract between the merchant and me, and he shall not have an action of Debt against me[9] ...

Afterwards the plaintiff had judgment to recover.

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[4] The usual procedure would have been to demur to the evidence: cf. Orwell v. Mortoft (1505), p. [45], above.

[5] Cf. Spelman's report: 'The defendant alleged in arrest of judgment that debt lay and not this action, for there is here a contract between the plaintiff and defendant whereby he promises to pay the plaintiff if he lets Tateham out of prison ... which is like the case where I promise a surgeon 100s. to cure the son of John at Style of an illness. ...'

[6] MS. Misprinted as 'Brooke'.

[7] *Squyer v. Barkeley* (1533) KB 27/1085, m. 32d (Selden Soc. vol. 94, p. 253); Spelman, *Reports*, p. 7, pl. 7.

[8] MS. The passage is very garbled in print.

[9] The same argument is reported in closely similar terms by Spelman, who evidently disagreed and thought debt was available here.

The record confirms that in Trinity term 1535 judgment was entered for the plaintiff for £7. 5s. damages and £2. 15s. costs.

SLADE'S CASE

4 Coke Rep. 91a, 92b (Ex. Ch. 1602)
ed. C.H.S. Fifoot, *History and Sources of the Common Law* (London, 1949), 371–9

The Record

Devon, *ss.*[1] *Memorandum*. At another time, that is to say, the term of St. Michael last past, before the lady the Queen at Westminster came *John Slade*, by *Nicholas Weare*, his attorney, and brought here into the Court of the said lady the Queen, then there, a certain Bill against Humphrey Morley, in the custody of the Marshal, etc., of a plea of Trespass upon the Case; and there are pledges of suit, to wit, John Doe and Richard Roe, which Bill followeth in these words:

ss. Devon, ss. John Slade complaineth of Humphrey Morley, in the custody of the Marshal of the Marshalsea of the lady the Queen, before the Queen herself,[2] for this,

That, whereas the said *John*, the 10th day of November in the 36th year of the reign of the said lady Elizabeth, now Queen of England, etc., was possessed for the term of divers years then and yet to come of and in one close of land with the appurtenances in Halberton in the county aforesaid called *Rack Park*, containing by estimation eight acres, and, so thereof being possessed, the said *John* afterwards, that is to say, the said 10th day of November in the 36th year aforesaid, had sowed the said close with wheat and rye, which wheat and rye in the close aforesaid ... afterwards, that is to say, the 8th day of May in the 37th year of the reign of the said lady the now Queen, were grown into ears;

The said *Humphrey*, the aforesaid 8th day of May in the said 37th year aforesaid ..., in consideration that the said *John* then and there, at the special instance and request of the said *Humphrey*, had bargained and sold unto the said *Humphrey* all the ears of wheat and corn which did then grow upon the said close ..., did assume, and then and there faithfully promised, that he the said *Humphrey* £16 of lawful money of England to the aforesaid *John* in the Feast of St. John the Baptist then next following would well and truly content and pay;

Yet the said *Humphrey*, his assumption and promise aforesaid little regarding, but endeavouring and intending the said *John* of the aforesaid £16 in that part subtilly and craftily to deceive and defraud, the said £16 to the said *John* according to his assuming and promise hath not yet paid nor any way for the same contented him, although the said *Humphrey* there unto afterwards, that is to say, the last day of September in the 37th year of the reign of the said lady the now Queen aforesaid at Halberton aforesaid by the said *John* was oftentimes thereunto required, but the same to pay him or any way to content him hath altogether refused and doth yet refuse; whereupon the said *John* saith he is the worse and hath damage to the value of £40, and thereof he bringeth Suit, etc. ...

John Slade brought an Action on the Case in the King's Bench[3] against Humfrey Morley ... and declared that ... the defendant, in consideration that the plaintiff, at the special instance and request of the said Humfrey, had bargained and sold to him the said blades of wheat and rye growing upon the said close ..., assumed and promised the plaintiff to pay him £16 at the Feast of St. John the Baptist then to come; and for non-payment thereof ... the plaintiff brought the said action. The defendant pleaded *Non assumpsit modo et forma*; and on the trial of this issue the Jurors gave a special verdict, *sc.*:—

> That the defendant bought of the plaintiff the wheat and rye in blades growing upon the said close as is aforesaid, *prout* in the said Declaration is alleged, and further found that between the plaintiff and the defendant there was no other promise or assumption, but only the said bargain.

And against the maintenance of this action divers objections were made by *John Doddridge*, of Counsel with the defendant. 1. That the plaintiff upon this bargain might have ordinary remedy by action of Debt, which is an action formed in the Register, and therefore he should not have an Action on the Case, which is an extraordinary action and not limited within any certain form in the Register. ... The second objection was, That the main tenance of this action takes away the defendant's benefit of Wager of Law and so bereaves him of the benefit which the Law gives him, which is his birthright. For peradventure the defendant has paid or satisfied the plaintiff in private betwixt them, of which payment or satisfaction he

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[1] [In the Middle Ages the clerks of the rolls placed a symbol not unlike a modern section mark (§) after the name of the county to divide it from the matter that followed. By the 16th century the function of this mark was forgotten and it was misinterpreted as a double long-stroke 's', or worse, as the abbreviation for *scilicet*, 'to wit.'].

[2] I.e., in the Queen's Bench.

[3] *Sic*.

has no witness, and therefore it would be mischievous if he should not wage his Law in such case. ... The defendant shall not be charged in an action in which he shall be ousted of his Law, when he may charge him in an action in which he may have the benefit of it.

And as to these objections the Courts of King's Bench and Common Pleas were divided; for the Justices of the King's Bench held that the action (notwithstanding such objections) was maintainable, and the Court of Common Pleas held the contrary. And for the honour of the Law and for the quiet of the subject in the appeasing of such diversity of opinions (*quia nil in lege intolerabilius est eandem rem diverso jure censeri*), the case was openly argued before all the Justices of England and Barons of the Exchequer, *sc*., Sir John POPHAM, Kt. C.J. of England, Sir Edm. ANDERSON, Kt. C.J. of the Common Pleas, Sir W. PERIAM, Chief Baron of the Exchequer, CLARK, GAWDY, WALMESLEY, FENNER, KINGSMILL, SAVIL, WARBURTON and YELVERTON, in the Exchequer Chamber, by the Queen's Attorney-General[4] for the Plaintiff and by John Dodderidge for the Defendant; and at another time the case was argued at Serjeant's Inn by the Attorney-General for the Plaintiff and by Francis Bacon for the Defendant. And after many conferences between the Justices and Barons it was resolved that the action was maintainable and that the plaintiff should have Judgment.

And in this case these points were resolved.

1. That altho' an action of Debt lies upon the contract, yet the bargainor may have an Action on the Case or an action of Debt at his election; and that ... in respect of infinite precedents (which *George Kemp*, Esq., Secondary of the Prothonotaries of the King's Bench shew'd me) as well in the Court of Common Pleas as in the Court of King's Bench ..., to which precedents and judgments, being of so great number in so many successions of ages and in the several times of so many reverend Judges, the Justices in this case gave great regard. ...[5] So that in the case at Bar it was resolved that the multitude of the said judicial precedents in so many successions of ages well prove that in the case at Bar the action was maintainable.

2. The second cause of their Resolution was divers judgments and cases resolved in our books where such Action on the Case on *Assumpsit* has been maintainable, when the party might have had an action of Debt. ...

3. It was resolved, That every contract executory imports in itself an *Assumpsit*, for when one agrees to pay money or to deliver any thing, thereby he assumes or promises to pay or deliver it; and therefore, when one sells any goods to another and agrees to deliver them at a day to come, and the other in consideration thereof agrees to pay so much money at such a day, in that case both parties may have an action of Debt or an Action on the Case on *Assumpsit*, for the mutual executory agreement of both parties imports in itself reciprocal Actions on the Case as well as Actions of Debt; and therewith agrees the judgment in *Read* and *Norwood's* Case.[6]

4. It was resolved, That the plaintiff in this Action on the Case in *Assumpsit* should not recover only damages for the special loss (if any be) which he had, but also for the whole debt, so that a recovery or bar in this action would be a good bar in an action of Debt brought upon the same contract. So, *vice versa*, a recovery or bar in an action of Debt is a good bar in an Action on the Case on *Assumpsit*. ...

5. In some cases it would be mischievous if an action of Debt should be only brought, and not an Action on the Case; as in the case *inter Redman* and *Peck*,[7] [where] they bargained together that for a certain consideration *Redman* should deliver to *Peck* 20 quarters of barley yearly during his life, and for non-delivery in one year it was adjudged that an action well lies, for otherwise it would be mischievous to *Peck*; for, if he should be driven to his action of Debt, then he himself could never have it, but his executors and administrators; for Debt does not lie in such case 'till all the days are incurred, and that would be contrary to the bargain and intent of the parties. ... Also it is good in these days in as many cases

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[4] Coke.

[5] Here follows a discussion of the place of Precedent in the contemporary law which, while of some general interest, is not germane to the particular purpose of this book.

[6] *Norwood* v. *Read* (1558) 1 Plowden, 180, [*in* Fifoot, *History and Sources*, p. 358].

[7] *Peck* v. *Redman* (1552) Dyer, 113a.

as may be done by the Law to oust the defendant of his Law and to try it by the Country, for otherwise it would be occasion of much perjury.

6. It was said, That an Action on the Case on *Assumpsit* is as well a formed action, and contained in the Register, as an action of Debt, for there is its Form. Also it appears in divers other cases in the Register that an Action on the Case will lie, altho' the plaintiff may have another formed action in the Register. ... And therefore it was concluded that in all cases when the Register has two writs for one and the same case it is in the party's election to take either. But the Register has two several actions, *sc*. Action upon the Case upon *Assumpsit* and also an Action of Debt, and therefore the party may elect either.

And as to the objection which has been made, that it would be mischievous to the defendant that he should not wage his Law, forasmuch as he might pay it in secret: to that it was answered that it should be accounted his folly that he did not take sufficient witnesses with him to prove the payment he made. But the mischief would be rather on the other party; for now experience proves that men's consciences grow so large that the respect of their private advantage rather induces men (and chiefly those who have declining estates) to Perjury ...; and therefore in Debt, or other action where Wager of Law is admitted by the Law, the Judges without good admonition and due examination of the party do not admit him to it. ... And I am surpriz'd that in these days so little consideration is made of an oath, as I daily observe. ...