Item, having examined the statements of the witnesses of the said Alice on the *de presenti* marriage contract that she proposed, the first two witnesses seem to depose that they contracted between themselves by words of the future tense. And these witnesses were sisters of each other, as the second witness seems to depose. Item, the third witness seems to depose that the man contracted by words of the present tense and the woman by words of the future tense, and she says that the second witness is the sister of Alice.

Item, having examined the witnesses of William produced on his exception of absence it seems that he proved by ten witnesses his absence at the same hour about which the witnesses of the said woman depose. Item, having inspected the statements of the witnesses produced on the replication of presence, they do not seem to obviate the statements of the witnesses on the exception of absence nor do they help the claim of the woman because they seem to speak of the previous year,[3] and even if they are speaking about the same year they seem to depose less fully, and they are only four in number and the witnesses of the man are ten.

[3]A neat point—Alice's witnesses on the principal claim speak of an event on St. Stephen's day, there were two years passed; William's witnesses on his absence speak of period on St. Stephen's day, there will be three years passed, i.e., on next St. Stephen's day; Alice's witnesses in replication speak of a period on St. Stephen's day, there were three years passed. We cannot exclude the possibility of scribal error ('erant' for 'erunt'), nor, it seems, could the examiners. The explanation may be, however, that Alice's replication witnesses were examined after 26 December, 1271.

C. THE DEVELOPMENT OF CHANCERY

Petitions in Chancery

S&M, pp. 285–88 (No. 71) [expanded by CD from the original ed.]

(A) PETITION FOR GENERAL RELIEF (1399)

To the most reverend father in God and most gracious lord, the bishop of Exeter, chancellor of England,[1] Simon Hilgay, Parson of the church of Hilgay, humbly makes petition [as follows]:—

Whereas he has charge and cure of souls in the same parish and is menaced by one Robert of Wesnam and by ...,[2] associates and confederates of the same Robert, who daily menace him to the extent that, through fear of unmerited death he does not dare to approach the said parsonage to hear the confessions of his parishioners in this most holy time of Lent, and [whereas] for purpose of their evil design, the said Robert de Wesnam, with the others above named, on the Tuesday in the first week of Lent last past, 22 Richard II [18 February, 1399], chased and pursued the said suppliant with force and arms, to wit, naked swords drawn, clubs and bucklers, from the town of Fincham in the county of Norfolk to the town of Crimplesham, which are two leagues distant, in order to have killed him, and there did beat one overe, who wwas in his company at that time, and [whereas], furthermore, the said Robert of Wesnam, with so many miscreants for associates and confederates, has such horrid maintenance that the said petitioner will never be able at common law to secure recovery against him and the rest without your most gracious aid: [therefore] may it please your most gracious lordship to consider the aforesaid matter and therein at your most wise discretion, to provide remedy for the said petitioner—for the sake of God and as a work of charity.

[Endorsed:] By virtue of this petition the herein named Simon Hilgay, parson of the church of Hilgay obtains four writs directed to the herein named persons, [summoning them] to appear before the said king and his council in his chancery on Tuesday next after the coming feast of St. Gregory, to make answer regarding the content [of the said petition].[3]

(Latin and French) Baildon, *Select Cases in Chancery*, pp. 44–5.

[1] Edmund Stafford, Chancellor, 1396–0, 1401–3; bishop of Exeter, 1395–1419.

[2] Six other persons named.

[3] Note that the defendants are to come before the council and not just the chancellor.

(B) PETITION FOR INJUNCTION (1396 X 1403)[4]

To the most reverend father in God and most gracious lord, the bishop of Exeter, chancellor of England, Edmund Francis, grocer and citizen of London,[5] humbly makes petition [as follows]:—

Whereas, on account of a certain debt owed to him ..., the said Edmund for the past two years has been executor over certain lands and tenements within the parish of Madesden in the county of Gloucester, once belonging to John Madesden, dyer of London, of which lands and tenements, according to the requirement of the common law, he had livery by the king's writ; and whereas it now happens that, through the maintenance and conspiracy of James Clifford and Hugh Bisley of the same county, no man or farmer of the said county ... dares to occupy or administer the said lands and tenements for the use and profit of the said Edmund: [therefore] may it please your most noble and gracious lordship to grant a writ of our lord the king directed to the sheriff of the said county and to the justices of the peace in the same locality, instructing them, on behalf of our said lord the king, to charge and command the same James and Hugh, on peril of the consequences, to permit the said Edmund and his servants and farmers to occupy and administer the said lands and tenements thus delivered to him by the law, without any interference or disturbance by the said James and Hugh; so that the said Edmund may have his profit from the said lands and tenements as awarded to him under the law—for the sake of God and as a work of charity.

(French) *Ibid.*, pp. 68 f.

(C) PETITION WITH REGARD TO A TRUST (n.d.)[6]

To the chancellor of England John Horsemonger humbly makes petition as follows:—

Whereas one John Peckham enfeoffed, among others, Reginald Pympe and Walter Judde with certain lands and tenements in the county of Kent on certain conditions, among which was contained the wish of the said John Peckham that, when the said lands were sold he who was next of blood to the said John Peckham, and to whom the inheritance of the lands and tenements would have descended, was to have £40 to relieve his estate; [and whereas] the said lands and tenements have now been sold by the said feoffees for 500*m.*, which sum the said Reginald has in his own possession, and, although the said petitioner, as kinsman and heir of the said John Peckham ..., has often requested the said Reginald to pay and deliver to him the said £40 according to the wish of the said John Peckham, [the said Reginald] is nevertheless unwilling to pay him a penny of it, to the great damage of the said petitioner: [therefore] may it please your most gracious lordship, for the honour of God and the cause of righteousness, to grant writs summoning the said Walter and Reginald to appear before you in the king's chancery, which is a court of conscience, there to make answer in this matter, as is demanded by reason and conscience; otherwise the said petitioner is and shall be without remedy—which God forbid!

(French) *Ibid.*, pp. 120 f.

(D) PETITION AND JUDGMENT REGARDING A MORTGAGE (1456)

To the right reverend and worshipful father in God, the archbishop of Canterbury, chancellor of England,[7] Robert Bodenham humbly makes petition [as follows]:—

Whereas he lately borrowed £80 from John Hall of Salisbury, for which [sum] the said John, through subtle promises, caused the said Robert, on May 1 in the thirty-third year of the reign of our sovereign lord

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[4] Petitions to the Chancellor are not normally dated. Hence, unless (as in the previous petition) the petition has an internal date, they can only be dated by the term of office of the chancellor in question. Here, the short terms of offi of Edmund Stafford (above note 1) provides relatively narrow bracketing dates.

[5] For another complicated land transaction involving Francis, see Frances v. Westby, Y.B. Mich. 6 Ric. II, pl. 18 (CB 1382), Ames Foundation, pp. *107–11*, 100–4.

[6] Here the absence of any indication of who the chancellor is makes dating even more problematical. This is unfortunate, because the petition contains what seems to be a very early reference to the Chancery as a "court of conscience."

[7] Thomas Bourchier, Chancellor, 7 March 1455 to 11 Oct. 1456.

the present king,[8] trustingly to enfeoff the said John with the manor of Shipton-Bellinger in the shire of Suffolk, to have and to hold for the said John and his heirs and assigns, on condition that, if the said Robert or his heirs or executors would pay to the said John or his assigns £100 at the feast of St. John the Baptist in the year of our lord 1461, the said feoffment should then be void,[9] as plainly appears from an indented deed made in that connection, so that the said John thereby intends to receive and have the issues of the said manor until the said day of payment, which will amount to the sum of 85*m*, and also £100 by way of usury for the loan of the said £80, or else the said manor is to be lost and forfeited [by the said Robert]; [and whereas,] moreover the said John, imagining further deceit for the injury of the said Robert, by subtlety caused himself to be bound to the said Robert by an obligation for £300 under a statute merchant at Salisbury dated on the second day of the said month of May, which [obligation] the said Robert delivered to one John Gardner to keep until satisfactory indentures in defeasance thereof were made by learned men between the said Robert and John, that the said condition should be performed,[10] and [whereas], although the said indentures are not yet made and the said obligation remains with the said John Gardner, the said John Hall has sued for execution upon the said obligation for the said £300 and by virtue thereof has taken the said Robert and straitly imprisoned him at Salisbury, so that the said John intends to have from the said Robert £450 and more for the lending of £80, against right and conscience and to the utter ruin of the said Robert, who in this matter has no remedy at common law. [Therefore] may it please your gracious lordship to summon the said John by a writ of *sub poena* to appear before you on a certain day to make answer to the premises, and [may it please] you thereupon to execute justice as required by good faith and conscience—for the love of God and as a work of charity.

[A memorandum of mainprise is written at the foot of the petition, dated 22 January, 1456. Robert Bodenham, Jr., of Ebbesborn, Wilts., gent., and William Cole of the same, yeoman, are the mainpernors.

[The answer is much decayed and faded in places. The defendant admits the debt of £80 and the feoffment of the manor. He complains that the plaintiff has since entered upon the manor, "and wood and underwood growing upon the same manor sold, cut and carried away," and had assaulted the defendant's servants and tenants; also that he the defendant to pay an annuity of five marks charged upon the manor.]

This is the replication of Robert Bodenham to the answer of John Hall to the bill of the said Robert. The said Robert, not knowing anything contained in the said plea as it is pleaded, says that the said plee is not sufficient to put him to answer thereto, for there is nothing contained in the said bill traversed nor confessed and destroyed in the said plea; but for as much as the said John acknowledges by his said plea that the said Robert borrowed of him £80 specified in the said bill, for surety of which the said Robert enfeoffed him by a deed of the manor of Shipton-Bellinger named in the said bill and a deed indented between them under certain conditions and also a statute merchant of £300 specified in the said bill to be made therefor, the said Robert is ready to repay to the said John the said £80 with all his reasonable costs spent therefor, as the court will award, and prays judgment, and that the said John be adjudged to redeliver to him the said deeds and statute and to re-enfeoff him in the said manor in fee, and let him to be delivered out of prison, as good faith and conscience requires.

This is the rejoinder of John Hall to the replication of Robert Bodenham. The said John Hall says that for as much as he has sufficiently answered to the matters comprehended and contained in the bill of the said Robert, to which the said Robert answers not, the said John Hall prays his damages and that he may be dismissed out of the court.

[Endorsed on the bill:] Memorandum that, on February 18 in the thirty-fourth year of the reign of King Henry VI after the Conquest [1456], after the matters in the herein-written petition exhibited before the king

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[8] 33 Henry VI, 1455.

[9] This transaction constituted the mortgage, on the law of which see Holdsworth, *History of English Law*, III, 108 f.

[10] That is to say, Robert signed in favour of John a bond for £300, which was to be cancelled when further agreements had been drawn up in connection with the mortgage. On statutes merchant, see §7B, above.

in his chancery by the herein-written Robert [Bodenham] against the herein-written John Hall, as well as the matters in the answer, replication, and rejoinder ..., had been fully read and made known in the said chancery, and after deliberation and advisement ... had been held with the lord king's justices of both benches and with divers serjeants-at-law and other persons then and there appearing as counsel for the parties aforesaid, by the advice of the said justices, it was then and there decided that, in so far as the said Robert then and there in the same chancery paid to the said John Hall the said £80 ..., the same John Hall should cause the same Robert to be liberated from prison ... and should quash, annul, and cancel the said obligation [for £300], and that the said John Hall should re-enfeoff the said Robert with the said manor and its appurtenances ... and also that the said John Hall should deliver up to the said Robert the deed or charter of feoffment ... and also all other charters and muniments concerning the premises, whcih the said John Hall has of the gift and delivery of the aforesaid Robert.

(Latin and English) *Ibid*., pp. 137–41.

More Petitions in Chancery

repr. by C.H.S. Fifoot, *History and Sources of the Common Law* (1949), pp. 321–25 from Barbour, *The History of Contract in Early English Equity* (Oxford Studies in Social and Legal History, Vol. IV), pp. 182, 221, 188, 225, 231

BELLERS' CASE (after 1432)[11]

To hise fulgracius Lord the Chaunceller of England right mekely besechith Rauf Bellers [as follows]:—

For as moche as William Harper of Mancestre and Richard Barbour weren endetted to the seyde Rauf in certain sumes of mone withoute specialte to be payed unto the seyde Raut or to hise certain attorne at certain dayes past, at the wheche dayes and longe aftir the seyde William and Richard weren required by the seyde Rauf to make hym payment of the seyde sumes, the wheche request the seyde William and Richard wolde not obeye in any wyse, soo that the seyde Rauf, consideryng that the seyde William and Richard wolde make hor lawe in that partie agens faithe and good conscience, sued to the Archebisshop of Yorke, at that tyme chaunceller of England, for remedie in that caas; apon the wheche suggestion the seyde chaunceller graunted under certain payne writtes severally direct unto the seyde William and Richard to apere afore hym in the chauncery, there to be examyned apon the seyde matere; by force of that oon of the seyde writtes the seyd Richard apered in the seyde chauncerie and there agreed with the seyd suppliant, and the seyde William myght nat be founde, soo that the writ direct unto hym stode in none effect: wherefore liketh to youre gracious lordeship to graunte a writ under a certain payn direct to the seyd William to aper afore yowe in the chauncerie, there to be examyned upon the matere aforeseyd for goddis luf and in werk of charite.

THE CASE OF THE UNIVERSITY OF CAMBRIDGE (1432 X 1443)[12]

To the full reverent Fader in god the Bisshop of Bathe, Chaunceller of England besecheth lowely your pore oratour John Langton, Chaunceller of the universite of Cantebrigge [as follows]:—

Where the seyd Chaunceller and universite by the assent and graunte of our soverain lord the Kyng have late ordeyned to founde and stablisse a college in the same toun, it to be called the universite college, and to endowe it with diverse possessions in relevyng of the sayd universitie and encresing of clergie thereof, And how late acorde took bytwix oon Sir William Bingham that the seyd Chaunceller and scolers shuld have a place of the seyd Sir William adjoyning on every side to the ground of the seyd Chaunceller and universite that they have ordeyned to bild her seyd college upon for the augmencacion and enlargeyng of her seyd college and to edifie upon certain scoles of Civill and other faculteez, and for to gif the seyd Sir William a noder place therfor, Iyeng in the sayd toun betwix the Whit Freres and seint Johns Chirch, and do it to be

[11] The dating here is based on reference in the petition to a previous petition brought before the archbishop of York, John Kemp, when he was chancellor of England, 1426–32. This petition probably dates from the chancellorship of John Stafford, 1432–50. Kemp returned to the chancellorship in 1450 and held the offiice until his death in 1454, so it is possible that this petition was presented after that time, but the phrasing of the petition suggests that Kemp is still alive.

[12] John Stafford, Chancellor from 1432–50, was bishop of Bath from 1424–43.

amorteysed suerly after the intent of the seyd Sir William at the cost of the seyd Chaunceller and universite, as the ful reverent fader in god, the bisshop of Lincoln, in whose presence this covenaunt and acorde was made, wole recorde: And it is so, reverent lord, that the seyd Chaunceller and universite according to this covenaunt have ordeyned the seyd Sir William a sufficeant place Iyeing in the seyd toun of Canterbrigge bytwix the said Whit Freres and seint Johns Chirch and extendyng doun to the Ryver of the same toun wyth a garden therto, which place is of better value then this other place is, and profred to amorteyse it at her own cost acordyng to the covenaunt forseyd, and therupon diverse costes and grete labores have made and doon late therfor: And also required diverses tymes the seyd Sir William to kepe and performe on his parte these seyd covenauntz, the seid Sir William now of self wille and wythoute any cause refusith it and will not doo it in noo wise:

Plese it to your gracious lordship to consider thes premisses and therupon to graunt to your seyd besechers a writ sub pena direct to the seyd Sir William to appere afore yow in the Chauncery of our lord kyng at a certain day upon a certain peyne by yow to be limited, to be examened of these materes forseid and therupon to ordeyne by your gracious lordship that the said Sir William may be compelled to do what trowth, good faith and consciens requiren in this caas, considering that, in alsomich as there is no writing betwix your seyd besechers and the seyd Sir William, their may have noon accion at the comyn lawe, and that for god and in wey of charite.

GOLDSMYTH'S CASE (1443 X 1450)[13]

To the most reverent Fader in God John Erchbysshop of Caunterbury Chauncellere of England besechuth humbully youre pore and contynuell oratoure, Conrade Goldsmyth,[as follows]:—

Where oon Laurence Walkere the Saturday next before the Fest of the Purification of oure lady, the yere of the regne of the Kyng oure sovereyne lord,[14] that is to say Kyng Harry the Sixte, att Teukesbury bought of youre seide besechere ii clothes and half of blankett for vii l. to be payode to the same besechere in the Fest of the Anunciacon of oure lady thenne next sewyng, for which payement as well and trewely to be made oon Symkyn Bakere of Teukesbury undertoke and bykame borowe[15] for the seide Laurence, in as muche as the seide supliant wolde nothur have solde nor delyverode the seide clothe unto the seide Laurence butt only uppon trust of the seide Symkyn and that he wolde undertake for payement of the seide sume, which he feythfully promyttode unto the seide supliant that he schulde be satisfiode and payode therof atte his day, of which sume remayneth yett iii l. unpayode which nothur the seide Laurence nor the seide Symkyn yett hath satisfiode nor payode unto youre seide besecher; and the seide Laurence is wythdrawen to strange places unknowen, so that youre seide besecher may noo remedye have agenst hym, thaughe he sewe hym by wrytte, nor agenst the seide Symkyn by the cours of the comyn lawe:

Pleasith youre gracious Lordship to consyder these premissez and ther uppon to do the seide Conrade to have dewe remedye agenest the seide Symkyn, for the love of God and in Wey of Charyte.

Plegii de prosequendo: Ricardus Bury de Solbe in Com' Glouc.' Henricus Wakfeld de Camden in eadem Com'.

WHITEHEAD'S CASE (1474 X 1485)[16]

To the right reverent Fader in god the Bisshop of Lincoln Chaunceller of England mekely besecheth youre good and gracious lordship John Whithed, Esquier [as follows]:—

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[13] John Stafford, Chancellor from 1432–50, was archbishop of Canterbury from 1443–52.

[14] The regnal year, which would have allowed more precise dating, is omitted.

[15] I.e., *borgh*, "surety," a Middle English word that did not make it into modern English. See *Middle English Dictionary*, s.v.

[16] Two bishops of Lincoln were chancellors in this period, Thomas Rotherham, 1474–5, 1475–83. (He became archbishop of York in 1480.) And John Russell, 1483–5.

Wheras oon Robert Orchard late in an accion of waste suyd by the seid John Whitehed ageyn the seid Robert before the kinges Justices of his comone benche for brenning[17] of a water Mill, whiche the seid John Whithed had before leten to ferme to the seid Robert for terme of certeyn yeres, was condempnyd to the seid John Whithed in xxx l., and the seid Robert Orchard also at the suyte of the seid John Whithed, by processe thereuppon had, was for the same xxx l. in prison and execucon unto the tyme that John Spryng of Suthampton, Peautrer, grauntyd and feithefully promysed to the seid John Whithed that, if he wold relesse and discharge the seid Robert Orchard of his seid imprisonment and execucon and suffere hym to go at his liberte, that then the seid John Spryng at his owne propre cost and charge wold sufficiently and substancially edifie and bilde the seid mill ageyne bothe in tymber werk and stonys to the same expedient by a certeyn day nowe long tyme past: Wheruppon the seid John Whitehed, trystyng the promysse of the seid John Spryng, at his desire immediatly relessyd and discharged the seid Robert Orchard of his seid execucon and lete hym go at large at his liberte, and howe be hit that the seid John Spryng before the seid day reedified not the seid Mill in fourme aforseid nor no part thereof, and that the seid John Whithed often tymes sythe the seid day hathe requyred the seid John Spryng to reedifie and bilde the seid Mill as ys aforeseid acordyng to his seid promyse, that to do at all tymes as yet he hath refusyd, contrairie to his seyd promysse, good feithe and conciens, of whiche youre seid besecher hathe no remedie by the comone law of this land:

Wherefor pleaseth hit youre good and gracious lordship, the premissis tenderly considered, to graunt a writ Suppena to be directed to the seid John Spryng, comandyng hym by the same to appere before the kyng in his Chauncery at a certayne day and undur a certeyne payne by your lordship to be Iymitted, and ther to be rewled and Juged as good conciens requyreth, for the love of god and in wey of cheryte.

Plegii de prosequendo: Johannes Purvyer de London, Iremonger, Thomas Clyfton de eadem, Draper.

GODEMOND'S CASE (1480–1)

To the right reverend Fader in god and my gode lorde the Bisshope of Lyncoln Chauncellar of Englonde mekely besecheth your gode and gracious lordshipp youre Poure Oratour Roger Godemond [as follows]:—

Where he afore this tyme uppon a X yere past and more was bounde to one Alice Reme, Wedowe, by his syngle Obligacion in X marke sterlyng paiable at a certeyn day in the said Obligacion specified, and afterward the same Alice made her executours John Hale and one Thomas Plane and died, after whos dethe youre seid Oratour truely paied and full contented the seid executours of the dewete Of the seid Obligacion, trustyng by that payment to be discharged of the seid Obligacion, and lefte the same Obligacion in the handys of the seid executours, trustyng that the seid executours wolde have delyvered the seid Obligacion to your seid besecher at all tymes when they hadde ben therto requyred; And afterward the seid John Hale died, after whos dethe the seid Thomas Plane as executour of the seid Alice, not withstandyng the seid payment hadde and contentacion of the Obligacion made, suethe an accion of dette nowe late afore the kyngis Justice of the Comen Place upon the seid Obligacion agenst your seid besecher, not dredyng god ne th'offens of his owne consciens intendyng bi the same accion shortly to condempne your seid besecher in the seid X marke, because the seid payment can make no barr at the comen lawe, and so to be twys satisfied upon the same Obligacion for one dewte, contrary to all reason and gode conscience, whereof your seid besecher is withoute remedy be the Comen lawe without your gode and gracious lordship to him be shewed in this behalf:

Please it therfor your gode and gracious lordship the premysses tenderly to consyder and to graunte a writte Suppena to be directe to the seid Thomas Plane, comaundyng hym bi the same to appere afore the kyng in his Court of Chauncerie at a certeyn day and upon a certeyn peyn by your lordshipp to be lemette, there to answer to the premysses and to bryng afore your seid lordshipp the seid Obligacion to be cancelled, and ferthermore that he may have ynyongcion[18] no further to procede in the seid accion at Comen lawe till

[17] i.e., burning.

[18] i.e., injunction.

your seid lordshipp have examyned the premysses and sett such rewle and direction in the same as shall accorde with reason and gode consciens, and this for the love of god and in the Wey of Charite.

Plegii de prosequendo: Ricardus Somer de London, Gentilman, Thomas Mey de London, Gent'.

This is the answere of Thomas Plane oon of the executours of Alice Reme, Wedowe, to the bill of complaynt of Roger Godmond. The seid Thomas Plane by protestacon sayeth that the mater conteigned in the bill of compleynt of the seid Roger is not sufficient in lawe to put hym to answere to the same; for plee, he sayeth that the seid Roger paid not the seid X marcs nor non parcell thereof to the seid Thomas Plane ne to John Hale his coexecutour in maner and forme as the seid Roger bi his seid bille of complaynt hath surmyttyd; all whiche maters the seid Thomas Plane is redy to averre as this court will award, and askith iuggement and prayeth to be dysmyssed out of this court wyth his resonable costys and expenses for his wrongfull hurte and vexacon in that behalf don, had or susteyned.

[Endorsement on the Petition.] Memorandum quod termino Sancti Michaelis, videlicet sexto die Novembris Anno, etc. XIX§, iniunctum fuit Thome Sharp, attorn' infranominati Thome Plane, quod ipse sub pena Centum marcarum minime prosequatur versus infranominatum Rogerum Godemond in quodam placito debiti super demandum decem marcarum coram Justiciis Regis de Banco suo, quousque materia infraspecificata plene determinata fuerit et discussa.

[Be it remembered that in Michaelmas term, that is to say, on the 6th day of November, etc., 19th [year of Edward IV, 1479, suggesting that the editor has misdated the case], it was enjoined upon Thomas Sharp, attorney of the within-named Thomas Plane, that, on the penalty of 100 marks, he [Thomas] should not proceed against the within-named Roger Godemond in a certain plea of debt on a demand of ten marks before the justices of the king of his Bench, until the matter within-specified is fully determined and discussed.]

Chancery in the Yearbooks

ed. C.H.S. Fifoot, *History and Sources of the Common Law* (1949), pp. 325–26

ANON.

Y.B. Pasch. 22 Edw. 4, fol. 6, pl. 18 (1482)

In the Exchequer Chamber before all the Justices of the one Bench and the other and in the presence of several Serjeants and Apprentices, the Archbishop of York, then Chancellor of England,[19] sought the advice of the Justices upon the grant of a Subpoena.

And he said that a complaint had been made to him that one was under obligation by Statute Merchant to another and had paid the money but had taken no release; and, notwithstanding this payment, the creditor sued out execution.

And he said that the creditor, if he were examined, could not deny the payment.

How then, Sirs, should I grant a Subpoena or not?

FAIRFAX, J.: It seems to me against all reason to grant a Subpoena, and by the evidence of two witnesses to subvert matter of record. For, where one is bound in this manner, he need not pay without acquittance or release. So, where a man is obliged on an obligation, he need not discharge his duty unless the obligee will make him an acquittance; and so it seems to me that this is his folly.

THE CHANCELLOR said that it was the common course in the Chancery to grant relief against an obligation; just as in the case of a feoffment upon trust, where the heir of the feoffee is in by descent or otherwise. For we find record of such cases in the Chancery.

HUSSEY, the Chief Justice of the King's Bench: When I first came into Court, which is not yet thirty years ago, it was agreed in a case by all the Court that, if a man had enfeoffed another on trust and if he died seised, so that the heir was in by descent, then the Subpoena would not lie; and there is good reason for this.

[19] Thomas Rotherham, Chancellor 1474–1483.

For, just as, by a Subpoena, one descent might be disproved in the Chancery by two witnesses, so by the same reasoning twenty descents might be disproved; which is against reason and conscience. And so it seems to me that it is less harmful to make him who suffers his feoffee to die seised of his land to lose his land than to work a disinheritance by evidence in Chancery. And so, in the case of the Statute Merchant and also in that of the obligation, it is less harmful to make him pay again through his negligence than by two witnesses in the Chancery to disprove a matter of record or a matter in specialty. For it is all due to his negligence, since he need not have paid on the obligation before taking an acquittance or release from the plaintiff. Such is the law.

Whereupon the Chancellor said that it would seem great folly to enfeoff others of one's land.

And then the Chancellor agreed to the Statute Merchant, because it was matter of record.

ANON

Y.B. Hil. 4 Hen. 7, fol. 4, pl. 8 (1489)

A *Subpoena* was sued in the Chancery on this, that there were two executors and one, without the assent of his companion, released a man who was indebted to their testator. And it was argued that his intent should not in these circumstances be fulfilled, and a Subpoena was sued against the executor who released and against the debtor who was thus released.

Fineux[20] said that no remedy lay here; for each executor has full and complete power and one may do everything that his companion might do, and so the release made by him was good.

THE CHANCELLOR[21]: *Nullus recedat a Curia Cancellariae sine remedio* [No one leaves the Chancery without a remedy]; and it is against reason that one executor shall have all the goods and shall make a release by himself.

Fineux: *Si nullus recedat sine remedio, ergo nullus indiget esse confessus*. [If no one leaves without a remedy, then no one has to go to confession. (Loose trans., but I think it captures the gist of it. CD)] But, Sir, the Law of the Land covers many things, and many things are sued here which are without remedy at the Common Law, and so these latter lie in conscience between a man and his confessor; and this is such a case.

THE CHANCELLOR: Sir, I know well that each Law is, or ought to be, in accord with the Law of God; and the Law of God is that an executor, who is of evil disposition, must not waste all the goods, etc. And I know well that if he does so waste and makes no amends or satisfaction, so far as he is able, or will not make restitution, so far as he is able, he shall be damned in Hell.

And to make remedy for such an act as this, as I think, is well done according to conscience. And the will says, *constituo tales esse executores meos, ut ipsi disponant*, etc. [I make such and such persons my executors, so that they may dispose, etc.]; and so their powers are joint and not several, and, if one acts without his companion, he does so without authority. ...

Doctor and Student on Naked Promises

ed. C.H.S. Fifoot, *History and Sources of the Common Law* (1949), pp. 326–29

DIALOGUE II—CHAP. XXIV[22]

What is a nude contract or naked promise after the laws of England, and whether any action may lie thereon.

Stud. ... A nude contract is, when a man maketh a bargain or a sale of his goods or lands without any recompence appointed for it: as if I say to another, I sell thee all my land, or else my goods, and nothing is

[20] Serjeant from 1486, later CJKB, 1495–1525.

[21] John Morton, Archbishop of Canterbury.

[22] The Second Dialogue of the Doctor and Student was first published, in English, in 1530. The edition cited above is that of William Muchall (1787).

assigned that the other shall give or pay for it; this is a nude contract, and, as I take it, it is void in the law and conscience. And a nude or naked promise is, where a man promiseth another to give him certain money such a day or to build an house or to do him such certain service, and nothing is assigned for the money, for the building, nor for the service; these be called naked promises, because there is nothing assigned why they should be made; and I think no action lieth in those cases, though they be not performed. Also if I promise to another to keep him such certain goods safely to such a time, and after I refuse to take them, there lieth no action against me for it. But if I take them, and after they be lost or impaired through my negligent keeping, there an action lieth.

Doct. But what opinion hold they that be learned in the law of England in such promises that be called naked or nude promises? Whether do they hold that they that make the promise be bounden in conscience to perform their promise, though they cannot be compelled thereto by the law, or not?

Stud. The books of the law of England entreat little thereof, for it is left to the determination of doctors; and therefore I pray thee shew me somewhat now of thy mind therein, and then I shall shew thee somewhat therein of the minds of divers that be learned in the law of the realm.

Doct. To declare the matter plainly after the saying of doctors, it would ask a long time, and therefore I will touch it briefly, to give thee occasion to desire to hear more therein hereafter. First, thou shall understand that there is a promise that is called an *Advow*, and that is a promise made to God; and he that doth make such a vow upon a deliberate mind, intending to perform it, is bound in conscience to do it, though it be only made in the heart, without pronouncing of words. And of other promises made to a man upon a certain consideration, if the promise be not against the law, as if A. promise to give B. £20 because he hath made him such an house or hath lent him such a thing or other such like, I think him bound to keep his promise. But if his promise be so naked that there is no manner of consideration why it should be made, then I think him not bound to perform it: for it is to suppose that there were some error in the making of the promise. But if such a promise be made to an university, to a city, to the church, to the clergy, or to poor men of such a place and to the honour of God or such other cause like, as for maintenance of learning, of the commonwealth, of the service of God or in relief of poverty, or such other; then I think that he is bounden in conscience to perform it, though there be no consideration of worldly profit that the grantor hath had or intended to have for it. And in all such promises it must be understood that he that made the promise intended to be bound by his promise; for else commonly, after all doctors, he is not bound unless he were bound to it before his promise: as if a man promise to give his father a gown that hath need of it to keep him from cold, and yet thinketh not to give it him, nevertheless he is bound to give it, for he was bound thereto before. And, after some doctors a man may be excused of such a promise in conscience by casualty that cometh after the promise, if it be so that if he had known of the casualty at the making of the promise he would not have made it. And also such promises, if they shall bind, they must be honest, lawful and possible, and else they are not to be holden in conscience, though there be a cause, etc. And if the promise be good and with a cause, though no worldly profit shall grow thereby to him that maketh the profit, but only a spiritual profit, as in the case before rehearsed of a promise made to an university, to a city, to the church or such other, and with a cause as to the honour of God, there it is most commonly holden that an action upon those promises lieth in the law canon.

Stud. Whether dost thou mean, in such promises made to an university, to a city or to such other as thou hast rehearsed before, and with a cause as to the honour of God or such other, that the party should be bound by his promise, if he intended not to be bound thereby, yea or nay?

Doct. I think nay, no more than upon promises made unto common persons.

Stud. And then methinketh clearly that no action can lie against him upon such promises, for it is a secret in his own conscience whether he intended for it to be bound or nay. And of the intent inward in the heart man's law cannot judge, and that is one of the causes why the law of God is necessary, that is to say, to judge inward things; and if an action should lie in that case in the law canon, then should the law canon judge upon the inward intent of the heart, which cannot be, as me seemeth. And therefore, after divers that

be learned in the laws of the realm, all promises shall be taken in this manner: that is to say, if he to whom the promise is made have a charge by reason of the promise, which he hath also performed, then in that case he shall have an action for that thing that was promised, though he that made the promise have no worldly profit by it. And if a man say to another, heal such a poor man of his disease or make an highway, and I will give thee thus much, and if he do it, I think an action lieth at the Common Law; and, moreover, though the thing that he should do be all spiritual, yet, if he perform it, I think an action lieth at the Common Law. As if a man say to another, fast for me all the next Lent and I will give thee twenty pounds, and he performeth it; I think an action lieth at the Common Law. And likewise if a man say to another, marry my daughter and I will give thee twenty pounds; upon this promise an action lieth, if he marry his daughter.[23] And in this case he cannot discharge the promise though he thought not to be bound thereby; for it is a good contract, and he may have quid pro quo, that is to say, the preferment of his daughter for his money. But in those promises made to an university or such other as thou hast remembered before, with such causes as thou hast shewed, that is to say, to the honour of God or to the increase of learning or such other like, where the party to whom the promise was made is bound to no new charge by reason of the promise made to him, but as he was bound to before; there they think that no action lieth against him though he perform not his promise, for it is no contract, and so his own conscience must be his judge whether he intended to be bound by his promise or not. And if he intended it not, then he offended for his dissimulation only; but if he intended to be bound, then if he perform it not, untruth is in him and he proveth himself to be a liar, which is prohibited as well by the law of God as by the law of reason. And furthermore, many that be learned in the law of England hold that a man is as much bounden in conscience by a promise made to a common person, if he intended to be bound by his promise, as he is in the other cases that thou hast remembered of a promise made to the church or the clergy or such other; for they say as much untruth is in the breaking of the one as of the other, and they say that the untruth is more to be pondered than the person to whom the promises are made.

Doct. But what hold they if a promise be made for a thing past, as I promise thee forty pounds for that thou hast builded me such a house; lieth an action there?

Stud. They suppose nay; but he shall be bound in conscience to perform it after his intent, as is before said.

Doct. And if a man promise to give another forty pounds in recompence for such a trespass that he hath done him, lieth an action there?

Stud. I suppose nay; and the cause is for that such promises be no perfect contracts. For a contract is properly where a man for his money shall have by assent of the other party certain goods or some other profit at the time of the contract or after; but if the thing be promised for a cause that is past by way of recompense, then it is rather an accord than a contract; but then the law is that upon such accord the thing that is promised in recompense must be paid, or delivered in hand, for upon an accord there lieth no action. ...

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[23] See Anon, Y.B. 37 Hen. 6, f. 8. pl. 18, [Fifoot, *History and Sources*], p. 249.

D. THE AGE OF IMPROVISATION, 1642–1789

in A. HARDING, A SOCIAL HISTORY OF ENGLISH LAW
(London 1966, repr. Gloucester, MA 1973) 265–97 [footnotes omitted]

THE INTERREGNUM: A LOST OPPORTUNITY

IN 1641, Parliament destroyed a sizeable part of the legal system and put nothing in its place: consequently the reform which the lawyers feared became more necessary still. Moreover, the Common Law was as unpopular with the lower classes feeling their way towards political power as the conciliar courts had been unpopular with the Common Lawyers. After 1641, the lawyers were no longer the political