The word ‘consideration’ began life as a word not merely ordinary but ambiguous. The consideration for a promise could mean that which was given in return for it, or (more largely) the reason why it was made. In the context of contract it was the element of exchange which affected the passing of property, and this sense is encountered in the fifteenth century: ‘a consideration’, said Gregory Ad gore in about 1490, ‘may change the use’.66 But consideration could also mean cause of action, the reason why a promise was actionable: ‘if I promise to make you a house by a certain day, and do not do so, this is only nudum pactum on which you shall not have an action on the case [for] you are not wronged as a result of this nonfeasance...[but] if I give certain money to someone to make me a house by a certain day, and he does not make it by the day, there this is a consideration why I shall have an action on my case for the nonfeasance’.67

In the sixteenth century both senses came together. The cause or consideration for the promise was the cause of action in assumpsit. It therefore had to be shown in pleading; the King’s Bench held in 1539, and again in 1563, that an undertaking was not actionable without causa or consideration.68 From about 1539 onwards pleaders accordingly began to insert in assumpsit declarations an ‘in consideration of...’ clause setting out the prepayment, or quid pro quo, or some act done in reliance on the undertaking. Thus the miscellaneous elements which had been recognised as making nonfeasance tortious all came to be associated with the word consideration as an indispensable requirement in assumpsit. Not only did it become necessary to express a consideration in the declaration; it must be a ‘good’ consideration. Consideration had to be of some value, though the courts would not investigate its adequacy: ‘a penny or a jug of beer is as much obliging in a promise as £100’.69 So long as the parties made their agreement in binding form, they were treated as being the best judges of their own bargains. But it was necessary that the consideration be present or future; something already done could not ‘move’ the promise, and therefore a promise to pay for something past was gratuitous and unenforceable.70 By 1590 a binding contract could be defined, in terms still acceptable today, as ‘a mutual agreement between the parties for something to be performed by the defendant in consideration of some benefit which must depart from the plaintiff, or of some labour or prejudice which must be sustained by the plaintiff’.71

If we ask whether the Tudor doctrine of consideration was based on contractual rather than tortious theory, the principal test might well be the case of executory mutual promises. If D promised to perform a service for P in return for P’s promise to remunerate D if he performed the service, the only consideration for D’s promise was P’s promise. For this consideration to be of value, the law had to treat P’s promise as binding; but P’s promise was supported only by D’s and was also conditional on D’s performance. There was no logical way of breaking the circle, unless it was accepted that mutual promises could make a binding contract by supporting each other. If the problem was never raised in the earlier cases, it may have been because the plaintiff’s promise would have been caught by the evidential rule requiring a deed. But we know that the possibility of an action on mutual promises had occurred early in the sixteenth century, because Fyneux CJ himself brought an action on facts very like those of Duque’s Case except that he had made no prepayment.72 The first reported discussion is found forty years later in Lucy v. Walwyn, and it happens to be the very first reported argument about consideration by that name. Walwyn had promised Lucy to do his best to obtain two masters for him, in consideration that the plaintiff would pay his expenses and give him £5 on completion; in the event Walwyn bought the masters for himself. Unlike the earlier precedents, there was here no prepayment. Yet, despite the argument that there was no consideration, no quid pro quo, the court gave judgment for the plaintiff.73 A counter-promise was as good a consideration as an executed act.74 From this point the English law of contract might truly be said to be consensual; despite its trespassory guise, liability was based on reciprocal agreement.

Assumpsit In Lieu of Debt

Assumpsit for nonfeasance was not in practice very common, at least in medieval times. The principal importance of its establishment was that it prepared assumpsit to storm the great citadel of debt. The failure to pay money owed is a particular species of nonfeasance, sounding in debt rather than covenant. Perhaps it is not an abuse of ordinary language to speak of debt as a wrong. The thirteenth-century treatise Fet Asaver treated debt ‘a tort detene’ as a species of trespass, and the variant English versions of the Lord’s Prayer use the words ‘debt’ and ‘trespass’ interchangeably.75 Yet the lawyer sees a difference between a wrong, which is a spent act requiring redress, and a continuing duty such as a debt, which requires enforcement. ‘[Debt] begins by contract and consent of the parties, and the basis of the action is an indebtedness (dutie); and [trespass] begins by a wrong (tort) and without the consent of the parties, and the demand is to have a wrong punished.’76

66 Reading on uses (Inner Temple): CUL MS. Hh.3-10, fo. 22v. His analysis of bargains (B. & M. 482-483) shows some borrowing from Bracton; by consideration he apparently means quid pro quo.
69 W. Sheppard, Grand Abridgment (1675), vol. 1, p. 64. A penny was said to be valid consideration for a conveyance of land. J. Rastell, Expositiones Terminorum (c. 1525) B. & M. 483; Inner Temple moot (1562) B. & M. 487.

72 Fyneux v. Clifford (1517) 94 SS 268; Laws and Customs, p. 346 n. 42 (= LPLC 379). There was no verdict or judgment.
73 Lucy v. Walwyn (1561) B. & M. 485.
74 See West v. Stowell (1577) B. & M. 494 at 495, per Mounson and Manwood JJ.
76 Somer v. Saparton (1428) B. & M. 234 at 235, per Vampage.
The reasons for wishing to extend *assumpsit* to money claims were not the same as those for extending it to breaches of covenant. There was already a remedy in the royal courts, and a deed was not required. Simple debts could be recovered at common law, and the action of debt had lived on while covenant faded into relative unimportance. But the disadvantages of debt on a contract were outlined in the preceding chapter: wager of law, the uncertain scope of *quid pro quo*, the need for a sum certain, and the lack of a remedy against executors. Thoughts began to turn to *assumpsit* as a means of avoiding these problems in the first decade of the sixteenth century. The first reported case was an action in the Common Pleas in 1505 for non-delivery of sixty quarters of barley bought by the plaintiff. Instead of bringing debt, which would clearly have lain on the facts, the plaintiff argued that ‘scheming fraudulently and craftily to defraud’ him the defendant had converted the barley to his own use and failed to deliver it. The propriety of using case was raised by a demurrer to the evidence; and most of the judges were hostile. The plaintiff had made the mistake of alleging conversion; doubtless he wished to make out a disallowance, but since no particular sixty quarters had been set aside for him there was no property of his to convert. Frowyk CJ, however, saw that the gist of the action was the same as in the nonfeasance cases; there was no need for a change of property, because the prepayment and the deceit met the requirements for an *assumpsit* action. Though no judgment seems to have been given, later generations treated Frowyk CJ’s dissent, rather than the majority opinion, as settling the matter.

Most of the development from this point was the work of the King’s Bench, eager to furnish litigants with an alternative to debt. From the 1510s there was a steady flow of actions of *assumpsit* for money or fungibles. Many of the earliest actions were to enforce payments which could not be recovered in debt: actions by or against sureties, actions against executors, cases where the sum was not fixed in advance, and so on. But in many cases the declaration merely showed that the parties had entered into some specified transaction which resulted in a debt, that the defendant undertook to pay the debt, and that the defendant ‘little regarding his promise but craftily scheming to defraud the plaintiff’ had failed to pay; the plaintiff went on to allege consequential loss in being unable to pay his own debts, or in losing the profits of further bargains which he could have made with the money. These actions were resisted, from at least 1521, on the ground that the facts sounded in debt. But in 1532 the King’s Bench decided that the plaintiff could elect whether to bring debt on the contract or *assumpsit* on the breach of promise. According to Spelman J, ‘the action of debt is founded on *debet et detinet*, whereas this action is founded on another wrong, namely the breach of the promise’. The plaintiff in the 1532 case alleged deceit, and consequential loss in his trade; but the court laid no stress on these trimmings. It now seemed that there was a general remedy in case for any breach of promise causing damage. The possibility of suing for debts without the risk of debtors waging their law attracted creditors to the court in droves. By the middle of the sixteenth century *assumpsit* for money was becoming the principal action on the case; and the King’s Bench, now able to entertain suits on charterparties, insurance contracts, partnerships, and bills of exchange, was rapidly becoming a commercial court for the city of London.

As with the other forms of *assumpsit* for nonfeasance, it became necessary by the mid-sixteenth century to show some consideration for the promise to pay. Various usages developed by Elizabethan times, some of which obviously rested on fictions introduced for the sake of preserving a trespassory formula which did not quite fit the facts. If the jury found for the defendant, that was usually an end of the matter; while, if the jury found for the plaintiff on the general issue *Non assumpsit*, it was impossible to go behind the verdict into the details. The facts could not, of course, be disputed on a demurrer. Therefore the records tell us only the formulae which were acceptable, not the true facts of cases.

One way of framing the action, appropriate where tradesmen or merchants had entered into an account with each other or with customers, was to lay the *assumpsit* ‘in consideration that the parties had accounted together’ (*insimul computasset*) and that the sum was found owing. Another formula was to allege a pre-existing debt and a subsequent promise to pay it (*indebitatus assumpsit*). Without more, both forms were open to the objection that the consideration was past, and that the promise was to do no more than the defendant could be compelled to do by writ of account or of debt. These objections could be met by stating that the account or the contract was entered into at the request of the defendant, and by alleging a consideration over and above the debt itself. For example, the plaintiff might allege a promise by the debtor in return for a forbearance to sue for a certain time. By Elizabeth’s time pleaders were alleging nominal forbearances of a day or so in order to put their cases into this form; and the King’s Bench accepted this minimal consideration, though the Common Pleas did not. Another device was to show that the plaintiff paid for the promise; and here again pleaders without blushing alleged as common form the payment of a few pence as consideration. Sometimes consequential loss was added in the declaration, such as a rise in the price of grain, or even starvation as a result of the non-delivery of grain. Deciet was also alleged routinely: in the artificial imagination of the pleader, every debtor was ‘craftily scheming to defraud’ his creditor.
The King’s Bench invention did not commend itself to the Common Pleas.\(^{83}\) The chief objection, as the court made clear in 1543, was that *assumpsit* for money would deprive defendants of their right to wage law.\(^{84}\) Nor did the court approve of using the action against executors for a simple debt; and in 1535 Fitzherbert J told counsel to take the leading King’s Bench authority out of their books, ‘for without doubt it is not law’.\(^{85}\) The pleading devices were rejected if they smelt of fiction, albeit that the court did not theoretically know the facts; it was not fraud, they said, to fail to pay simply for want of money.\(^{86}\) Forbearance for a few hours was not consideration, because one could not recover a debt in a few hours anyway. And was not the *assumpsit* itself often fictitious? There was usually only one contract, not a debt-creating contract followed or accompanied by a collateral promise with separate consideration. Then again, quite apart from the fiction, there was an objection to the ‘general’ *indebitatus assumpsit* formula, which did not set out the reason for the indebtedness; this put defendants at an unfair disadvantage, since they did not know the nature of the alleged contract until the trial. And finally, even if a plaintiff overcame all these hurdles, he ought not in *assumpsit* to recover the debt as part of his damages, but only the additional loss which could not be recovered by writ of debt.

**SLADE’S CASE**

These differences between the two benches were intolerable for litigants. The King’s Bench welcomed *assumpsit* in lieu of debt, the Common Pleas made its use almost impossible. The practical problem for the plaintiff was that he could not tell in advance what kind of judge would be assigned to try his case at nisi prius. A King’s Bench judge would direct the jury simply to enquire into the debt, a Common Pleas judge would require proof of a collateral promise and consideration.\(^{87}\) And since the judge’s direction was not of record, there could be no subsequent redress in banc at this period. When the statutory Exchequer Chamber\(^{88}\) started to reverse King’s Bench judgments in *assumpsit* in the 1590s, the matter came to a head. The Common Pleas judges sitting in the Exchequer Chamber treated their King’s Bench brethren with open contempt, refusing even to allow argument in support of the King’s Bench judgments.\(^{89}\) Popham CJ, of the King’s Bench, reacted by convoking all the judges of England, to try to end the dispute, in *Slade’s Case*.\(^{90}\)

---

83 See Colman v. Greene (1528) CP 40/1057, m. 338 (defendant bargained and sold grain to plaintiff for an agreed sum, and promised to deliver at Whitman, but scheming to defraud him of the bargain did not do so; demurrer to declaration); Baron v. Wilson (1533) CP 40/1079, m. 344 (similar but without the fraud clause; verdict for plaintiff; court takes advise); Bayly v. Davye (1550) CP 40/11444, m. 425 (promise to pay for goods; demurrer to declaration).

84 Anon. (1543) B. & M. 415, per Shelley J.

85 Anon. (1553) ibid. 447 at 448, referring to Cleymond v. Vincent (1520), p. 342, ante, note 78.

86 See Dappa v. Jones (1602) B. & M. 419.


88 Introduced in 1585: p. 137, ante.

89 Turgrs v. Becher (1596) B. & M. 418, per Anderson CJ.

90 Slade v. Morley (1597-1602) B. & M. 420. See also Ibbetson, 4 OJLS at 299-302.

---

Slade had bargained and sold a crop of wheat and rye to Morley, who (according to the declaration) undertook and then and there promised to pay £16 for it. Slade brought *assumpsit* for non-payment, Morley denied the promise, and the jury found a special verdict that the sale had taken place as alleged but that there was ‘no promise or undertaking besides the bargain aforesaid’. This special verdict was no doubt directed in order to compel the court in banc to face the controversial issue whether case would lie on the very contract which generated the debt, or whether – as the Common Pleas held – a separate express promise was needed. The King’s Bench had no doubts about this, but if they gave judgment for Slade they would certainly be reversed and the battle would be lost. That is why Popham CJ decided to refer the question to all the judges – the procedure used in *Doige’s Case* – so that the King’s Bench judges would have a voice. The case was argued by the best lawyers of the day, including Coke and Bacon, on several occasions over a period of five years; and it seems likely that Popham CJ went on postponing a decision until some of the opposing judges were dead. No real agreement was ever reached, but in 1602 the King’s Bench entered judgment for the plaintiff on the strength of a straw vote.\(^{91}\) The Common Pleas judges were incensed that they were not allowed to deliver arguments, as was usual in such cases, especially since the majority was probably no better than six to five; but Popham CJ’s tough policy ensured that the dispute remained settled for practical purposes. No detailed reasons were given, even in the King’s Bench, but it was stated that two questions had been resolved. First, that actions on the case could sometimes be brought where older actions were available; the duplication of remedies was not in itself an objection to the newer action. Second, every executory contract ‘imported’ in itself an *assumpsit* to pay what was due under it; the man in the street could not be expected to use the precise words ‘I assume’ or ‘I undertake’ when making bargains, but the law would treat the bargain as including a promise. The combination of these two principles rendered a separate promise unnecessary, and so the special verdict entitled Slade to succeed.

*Slade’s Case* thus established the right to recover debts by the action of *assumpsit*, and thereby practically put an end to wager of law. The argument that the damages in *assumpsit* should not include the debt seems to have been given up at the same time. A judgment in *assumpsit* would bar an action in debt on the same contract, and vice versa. One question which the judges expressly left open was whether *assumpsit* would lie against executors to recover their testator’s debts. But in 1611, by another meeting of all the judges, it was resolved that it would. Although the general rule for torts was that actions died with the person (*actio personalis moritur cum persona*), the action of *assumpsit* was by 1611 sufficiently contractual in nature to constitute an exception to the rule.\(^{92}\)

91 The nature of the vote is indicated by the recollections of Walsingham in *Wright v. Swanton* (1604) B. & M. 441. The reason for his outburst was the recent publication of Coke’s report of *Slade’s Case*.

92 Syncorn v. Legat (1611) B. & M. 455. Some Common Pleas judges resisted this to the last: see the tetchy exchange in *Maine v. Peacher* (1610) B. & M. 454.
he shod the horse, without this that he injured it with a nail; ready etc.

PROCES IN ACTIONS ON THE CASE (1504)

19 Hen. VII, c. 9;

Forasmuch as before this time there hath been great delays in actions of the case that hath been sued as well before the king in his Bench as in his Court of Common Bench, because of which delays many persons have been put from their remedy: be it therefore ordained, enacted and established by the king our sovereign lord, by the advice and assent of the lords spiritual and temporal and the commons in this present parliament assembled, and by authority of the same, that like process be had hereafter in actions upon the case, as well sued and hanging as to be sued, in any of the said courts, as in actions of trespass or debt.

A. FITZHERBERT, LA NOVEL NATURA BREVIMUM (1534)

Translated from the 1635 ed., II. 92-95.

There is another form of writ of trespass—upon the case—which is to be sued in the Common Bench or King's Bench; and in this writ he shall not say vi et armis etc., but at the end of the writ he shall say contra pacem etc. A man shall have an action of trespass on the case against his neighbour who has lands between him and the sea, and who ought to build certain banks and clean certain ditches and sewers between him and the sea, and he does not make the banks or clean the ditches as he ought, whereby the man's lands are flooded, he shall have a writ of trespass on his case for this not making or not cleaning.

And if a man is committed to gaol for debt, or arrears of account, and the gaoler of his malice aforethought puts on him so many irons, or puts him in stocks and withholds food from him, whereby he or his flesh is so much spent (exuist) that he becomes decrepit or has some other infirmity, he shall have a writ on his case against the gaoler.

And if a man distrains some prior or other prelate, when he is riding on a journey, by his horse which he is riding, for or upon any contract, debt or trespass committed by him or by his predecessor, when he could have distrained or attached other chattels belonging to the same prior or prelate, he shall have a writ on his case as follows:...

And if a man promises and undertakes to make someone else certain carts for carrying, or some other thing, and takes part of the money for doing this in advance, and then does not do it according to his undertaking or promise, the other shall have a writ of trespass on his case. And the writ shall be as follows:

If W. [shall make you secure concerning the prosecution of his claim] then put [by gage and safe pledges to be before our justices etc.] J. to show why, whereas the same J. had undertaken at S., for a certain sum of money (one part of which he received in advance), to make and build three carriages (curros) for conveying the victuals and equipment of the selfsame W. to parts beyond the sea, within a certain period of time agreed between them, the same J. has not bothered to make and build the aforesaid carriages within the aforesaid period of time, as a result of which the same W. has wholly lost various goods and chattels of his to the value of 100 marks, which he should have conveyed in the aforesaid carriages, for want of the aforesaid carriages, to the grave damage of the selfsame W., as he says. And have [you there the names of the pledges and this writ].

And if a man is harboured or lodged in some inn, and some of his goods are taken from thence by a stranger, he shall have an action of trespass on his case against the innkeeper. And the writ shall be as follows:

The king to the sheriff etc. If A. shall make etc. then put etc. B. that he be etc. [to show] why, whereas according to the law and custom of our realm of England innkeepers who keep common inns to accommodate men travelling in those parts where such inns are, and lodging in the same, are bound day and night to keep intact the goods of such travellers which are deposited within those inns so that no damage in any wise befalls such guests through the fault of the selfsame innkeepers or their servants: certain wrongdoers took and led away a certain horse belonging to the selfsame A., worth 40s.,

6 The statute was held not to extend to other courts: Rogers v Marcal (1665) 1 Sid. 248, 259.
7 I.e. three writs of capias and then outlawry. This process had been available at common law in actions of trespass vi et armis, and was extended to account in 1285 (Statute of Westminster II, c. 11), and to debt, detinue and repliev in 1351 (25 Edw. III, stat. 5, c. 17). In 1531 it was further extended to covenant, annuity, and actions on the 1381 statute of forcible entry: 23 Hen. VIII, c. 14.
8 See Bernardston v Heighyng (1344), p. 338, above; Abbot of Stratford's Case (1406) Y.B. Hil. 7 Hen. IV, fo. 8, pl. 10.

9 Registrum Brevium (1531), fo. 100v.
10 See further pp. 378-405, below.
11 Meaning obscure. Perhaps some kind of barge is intended.
12 See further pp. 352-357, below.
But here he could have an action of detinue. I perceive your purpose however. You brought this action because he shall not wage his law in this action, as he could in an action of detinue. Nevertheless, if we suppose that the action does lie, I am of the same opinion as you that the plea is not good.

This was agreed by Willoughby J.

ANON. (1572)
Dalison 84, pl. 35; BL MS. Add. 24845, fo. 88v.

In an action on the case brought in the King's Bench upon an assumpsit, the plaintiff declared that whereas the defendant was indebted to the plaintiff, he undertook in return for 12d. to pay the debt.

Manwood took exception to the count, because he had not shown what the defendant was indebted for—such as money lent, or merchandize bought, or the like. Also, he should have said that he undertook ‘afterwards’; for if he undertook the time of the contract debt lies on it, and not assumpsit, whereas if he undertook subsequently to the contract, then an action lies on the undertaking, but otherwise not.

This was agreed by Whiddon and Southcote JJ., in the absence of Catlyn C.J.

EDWARDS v BURRE (1573)
Dalison 104, pl. 45; BL MS. Add. 24845, fo. 101; LI MS. Maynard 87, fo. 155; CUL MS. Ll. 3. 8, fo. 169v; HLS MS. Acc. 704755, fo. 144v.

William Edwards brought an action on the case against Edmund Burre and Margaret his wife, administratrix of the goods and chattels of John Sidwell, his late husband, and counted that the testator, in consideration that the plaintiff had lent the testator 40s., undertook to pay him 40s. The defendant pleaded Non assumpsit modo et forma. The plaintiff submitted evidence that he lent the 40s. to the testator.

Wray J. said to the jury: if it be true that the plaintiff lent the said sum, you must find for the plaintiff; for the debt is an undertaking in law.

But note that it was said that this is by reason of the custom of the King’s Bench; for in the Common Pleas he would have to prove the undertaking, and it would not be sufficient to prove the debt alone. For he should have an action of debt for the debt, and not an action on the case, because the common law will not suffer a man to have an action on the case where he could have another remedy; and also because the debtor could have his law, if there is no specialty, and by an action on the case he would be prevented from having it, which is not right. Therefore in the Common Pleas he has to prove the undertaking.11

NORMAN v SOME (1594)
Were’s reports, CUL MS. Ec. 3. 2, fo. 34;
BL MS. Hargrave 7(1), fo. 37 (C.P.).

Note, per curiam, that an action of debt shall not be converted into an action on the case unless the plaintiff has sustained more than ordinary damage: as where wares or grain are sold and not delivered, and the markets rise; for in such special cases of extraordinary damage sustained, debt may be converted into assumpsit.

Kingsmill, who moved this case, cited 20 Hen. VII12 according.

ANON. (1596)
CUL MS. li. 5. 12, fo. 88 (C.P.).13

If a man sells me ten bushels of corn for a certain sum, an action of debt in the detiner lies for the corn, even though no property is there altered, because it is a plain bargain between the parties. And if the vendor is outlawed before the delivery of the corn, he shall forfeit it, and not the vendee. And an action on the case does not lie here, because casus dicitur a cadendo,14 and therefore it only lies

---

11 The HLS MS. ends with the name ‘Rookeby’.
12 Orwell v Mortoif (1505); see p. 406, above.
13 Probably the same as Frisland’s Case (1596) BL MS. Hargrave 51, fo. 66v; MS. Harley 1631, fo. 210; where Walsme J. says, ‘... he ought to have shown some extraordinary damage, for instance if through non-delivery of the wheat his children were starved’.
14 I.e. case is so called from cadendo (falling).
where something more than ordinary falls out: as where the vendee has been half starved for want of the delivery.

Note this, per WALSLEY and BEAUMONT JJ.

TURGYS v BECHER (1596)

Record: KB 27/1354, m. 606. The plaintiff (an administrator) complained that, whereas the defendant was indebted to the intestate in £55 still unpaid for wheat sold and delivered to him in his lifetime, the defendant in consideration thereof undertook and promised to pay the plaintiff £55. The plaintiff recovered £60 damages; and on 25 January 1596 the court received a writ of error for removing the record into the Exchequer Chamber, where the following discussion occurred in Trinity term following.

Were's reports, BL MS. Hargrave 7(1), fo. 204;
LI MS. Misc. 490, fo. 706v.15

Becher brought a writ of error in the Exchequer Chamber against Turgys upon a judgment given in the Queen's Bench. The case was that a man had brought an action on the case upon an indebitatus assumpsit for money due to the plaintiff from the defendant upon a contract for wheat. And the question was whether he could have this action in this case.

All the justices of the Common Pleas, and all the barons of the Exchequer (except CLARKE B., who hesitated somewhat), delivered their opinions severally and confidently that this action did not lie, but an action of debt on the contract, in which the defendant should have had his law, whereof he would be ousted in the other action. And we must adjudge it thus, for otherwise the whole course of the common law would be overturned on this point.

ANDERSON C.J. would not hear argument on the contrary side, for he said there could be no reason whatever made in support of it.

OWEN J. said he had spoken with Wray C.J.Q.B. (who was the chief supporter of that error) and had pointed out to him the inconvenience that if a man bought wares from a merchant, and paid him for them, and they continued to buy from and sell to each other over a period of many years (as many do here in London), and afterwards the merchant brings an action on the assumpsit for all the contracts between them, if the defendant were not received to warge his law he would be in great mischief; for it is not usual for merchants to give an acquittance, and he cannot prove payment, and cannot deny the contract. Thereupon Wray said that he would

never again maintain this action afterwards; and truly he never did adjudge it afterwards.

Afterwards the aforesaid judgment was reversed by consent of all ... but if it had been a promise made after the bargain or contract, then WALSLEY J. and others thought the law would have been otherwise in the principal case.

Other manuscript reports of the case show that the judges also relied on the argument that there was no consideration: (1) 'This is nudum pactum, in that he who made the promise had no benefit from it' (BL MS. Harley 1697, fo. 107v; CUL MS. Gg. 3. 25, fo. 80; MS. Gg. 6. 29, fo. 133) (2) 'The debt being due beforehand, it was a thing executed, per ANDERSON C.J. Similarly, if I promise you £10 for the service if you have done me, an action on the case does not lie: otherwise it is for service to be done' (BL MS. Lansdowne 1084, fo. 120v). (3) 'When he promised to pay upon the contract, this was no more than what the law willed without the promise; and one is not to have a remedy by action on the case except where the law has not provided any other remedy: but here it has' (CUL MS. li. 5. 13, fo. 59).

DUPPA v JONES (1602)16

(a) YLS MS. G. R29.6, fo. 151 (C.P.).

Duppa, a petty servant of the king, arraigned someone in the Marshalsea Court, and from thence it was removed into this court ... and he declared in nature of an action on the case upon assumpsit solvere.

And the justices thought that the action could not be maintained, for an action of debt properly lies; but an action on the case is maintainable only where deceit or fraud is supposed. Nowadays they put the words in deceptione and fraudulentor into the declaration when the facts are quite otherwise. For what fraud can there be if the debtor does not pay the money he borrowed at the day? The purpose of this action, however, is solely to stop the defendant from waging law ...

(b) BL MS. Lansdowne 1074, fo. 413; LI MS. Maynard 87(2), fo. 309; HLS MS. 704774, p. 107 (untr.).

Whereas the defendant was found in arrearages upon an insimul computavit, in consideration that the plaintiff would give day until (etc.) he promised to pay it.

ANDERSON C.J. and WALSLEY J. Clearly the action will not lie, for the debt is hereby not changed. And these new devices of

15 Also reported, very briefly, in Moo. K.B. 694, pl. 962.

16 In Trinity term, the term before the judgment in Slade's Case; see p. 437, below.
actions of the case cannot be maintained, for there ought to be no actions of the case but grounded upon some fraud: for so are the words of the writ, machinans etc. What fraud was here committed?

And they gave day for the defendant to imparl.

**SLADE v MORLEY (1602)**

Record: KB 27/1336, m. 305; 4 Co. Rep. 91. John Slade brought a bill against Humfrey Morley in Michaelmas term 1595 complaining that, whereas he possessed a close called Rack Park in Halberton, Devon, and on 10 November 1594 sowed it with wheat and rye; and on 8 May 1595 the defendant, in consideration that the plaintiff (at the defendant's request) had bargained and sold to him all the ears of wheat and corn then growing on the close, excepting the tithes due to the rector, undertook and faithfully promised the plaintiff to pay him £16 on 24 June 1595: nevertheless the defendant, little regarding his undertaking and promise, but scheming and intending subtly and craftily to deceive and defraud the plaintiff of the £16, did not and still has not paid it, though often requested to do so. The defendant pleaded Non assumpsit, and on 8 March 1596 at Exeter assizes (Walmsley J.C.P., Fenner J.Q.B.) the jury found this special verdict: 'The said Humfrey Morley did buy the wheat and rye growing in ears on the said close from the said John Slade for £16 to be paid on the feast of St John the Baptist [24 June] then next following, as is stated in the declaration; but there was no undertaking or promise between the said John Slade and the said Humfrey Morley besides the bargain aforesaid'. The damages were assessed at £16, if the court held this to be a verdict for the plaintiff. The first reported discussion was in November 1597, by which time it had been referred to all the justices of England in the Exchequer Chamber.  

(a) Exchequer Chamber, Mich. 1597:

Dodderidge's speech from LI MS. Maynard 55, fo. 246; and
BL MS. Harley 6809, fo. 43 (untr.);
Coke's reply from BL MS. Hargrave 5, fo. 67v.  

... After the record was read, [John Dodderidge], utter-barrister, opened the case... and said that he took it (under their lordships' favour) that it was no sufficient promise to maintain the said action upon the case. In proof whereof he said that he would hold this course, viz. he would present unto the consideration of the court three several reasons in maintenance of his opinion, which reasons he would confirm and enlarge with authority of book-learning: wherein he said, for that his time of premeditation was very short, he would not be long.

The first reason, he said, was drawn from the nature of the action of debt and that upon the case. The second reason was drawn from the sufficiency of the trial by ley gager in cases where the law alloweth it, and wherein he would speak of the injury offered unto the defendant by ousting him of his law by this devised action. The third and last reason was drawn from the nature of the contract that begetteth the debt, wherein he said he would discourse whether in every contract whereupon an action of debt might be brought there was not included an assumpsit and sufficient promise to maintain an action upon the case.

I As concerning the first reason, he said that he must first call to remembrance before he would enter into it that there are two efficient causes of all actions, et tanguam parentes unde concipiuntur: injuria et damnum, the injury done and the hurt and damage sustained. And touching the sundering of these is breed that disputation de damno absque injuria, et injuria absque damno. The action which ensueth of these is defined by Bracton to be nothing else than jus prosequendi in judicio quod alius debet.  

This is brought to pass and deduced to judgment per istius modii juris formulas quae brevia nuncupantur. Brevia sunt quae rem est et intentionem petentis breviter enarrat. Writs (as concerning the purpose I now have in hand) are of two kinds. Some are of form and framed certain; some are without form, uncertain, and varying with the case. My reason, then, (said he), is this: where there is a ready framed writ of form in the register, sufficiently able to deduce to judgment the wrong and the damage, and thoroughly to punish the one and to satisfy the other, there shall the party plaintiff never have recourse to the writ without form to satisfy the same damage and punish the same wrong. But here is a ready framed writ in the register: the action of debt, the natural remedy, the writ of form. Therefore here is no place for the action upon the case, the writ without form, the usurped remedy. The second part of this argument cannot be denied, for no man can deny but the action of debt [a writ of form] and the action of debt most properly lieth in this case. It is the former part that needeth proof.

I speak not therein without authority. In the Lord Mounteagle's

17 I.e. not the court of error, but an informal assembly. The case was continued on the rolls of the Queen's Bench.

18 There are at least 11 different reports of this debate in MS. Dodderidge's speech circulated in English, and may have been put out by the speaker himself, following the precedent set by Coke with Shelley's Case (1581), p. 143, above.

1 Conjectural insertion.
Case for the trover and conversion of the chain, it is said and affirmed as a rule that where a man hath an ordinary framed writ in the register for to serve his case the action upon the case lieth not; for he shall never have no other form of writ. In 14 Hen. VIII, the last case of the year and the last words of the case, Broke [J.] saith that the action upon the case lieth not where other remedy is provided. Again, an action upon the case is not maintainable where there is other remedy. In the case argued upon the sale of corn in 20 Hen. VII, the most notable case in the law touching the matter in hand, and yet not ruled but left at large, all those judges that hold the side that I do maintain take this for the root of all their reasons: that the action upon the case lieth not where there is another framed and provided remedy. He said that it would be tedious to trouble them with repetition of all the places in the law where that allegation is affirmed; therefore he would surcease with these few, for that he well remembered (as he said) where he was and that he was well understood at a word. But general rules are much impeached, for non est regula quin failit. And although the saying aforesaid were somewhat contradicted somewhere, yet is that contradiction no older than our fathers' memory. But yet he said that he had laid the first proposition of his former reason in such ground and had so hedged it with such limitations as that it could not be much impeached. For he did not deny but that a man might have two actions (and those of several natures) upon one and the self-same fact, crime or offence; but yet in these cases the things deduced into judgment were divers, for either the wrong or the damage (being the grounds of those actions as aforesaid) do differ, and the one action is larger and of more scope than the other:

If a man do enter into my lands and do disseise me, I have an assize or a writ of right. The fact is one; but those actions deduce divers things to judgment. The assize is possessory and of mine own possession; but the writ of right is not only of mine own right but the mere right and possession of him in whom the seisin is alleged (if the demi-mark be tendered).

If a man take away my goods, I may have an action of trespass, a replevin, or an appeal of robbery, if I will. The act done is one; the actions are divers, for they deduce divers things to judgment. The trespass only punisheth the taking, disappointeth property, and recovereth damages only. The replevin affirmeth the property, requireth the deliverance of the thing and damages for the taking and detaining. The appeal is criminal, seeketh a revenge of blood for the violence and villainy done.

If I deliver unto John Style money to be delivered to John Dale or to merchandise for me, I may have an action of debt or an account. Yet the matter is but one that maintaineth the actions; but the demand is different and divers things are deduced to judgment. By the action of debt I do demand the money delivered and my damages for the withholding thereof. But in the action of account I do demand the profit of the money gotten by the use and traffic therewith, for so is the express reason made 28 Hen. VIII, Dyer 22, Core's Case.

If I deliver money to bail over to another, and the bailee converteth the same to his own use, I may have an action of debt, an action upon the case, and an action of account. The fact is one, the actions are divers: debt for the money, an action upon the case for the conversion, and an action of account for the increase and profit of the money.

If I promise unto John Style £20 to marry my daughter, and he doth so accordingly, an action of debt lieth for the money, for the money is a duty arising upon the contract. And therefore an action of debt lieth. Also an action upon the case lieth of an assumpsit, but yet upon an actual promise, for the promise in this case is not implied, but expressed.

And were it that the action of the case argued in 20 Hen. VII were ruled (which is this: a man did sell corn for £20 and after the vendor converteth the corn to his own use in deceit of the bargainee, and he brought an action upon the case): allow, I say, that it were adjudged that this action would lie (whereas the case is left at large), yet the same would not impeach mine assertion. For the action upon the case there brought is grounded upon another wrong, namely the deceit which is wrought by the conversion of the corn by the vendor to his own use. But if the vendor had brought an action upon the case for his money, without any actual promise, then it had been more near, nay our case in effect.

But to return to the case in question, from whence we have digressed. The case here is of no more value than is the action of debt, neither can it bring to judgment any other thing touching the wrong and damage in this case sustained than the action of debt doth. For by the action of debt the plaintiff shall recover his money

---

2 (1555); see p. 531, below.
4 See p. 587, below.
5 Orwell v Mortolo (1505); see p. 406, above.
6 Holygrave v Knyghtysbyrge (1555), p. 413, above (cited in margin of MS.).

---

7 Core v May (1536); see p. 243, above.
8 Anon. (1438); see p. 236, above.
due and his damages for the detainer. In the action of the case he shall recover all in damages, which shall be no more than the value of the debt and damages for the detainer. There is no more wrought by the one than by the other. In vain, then, it is to have liberty of choice where there is no choosing for the better. Therefore, where the home-made and free-born will serve the turn, let the stranger and late-made denizen be excluded.

That reason, would it should be so, see otherwise a mischief: if the action upon the case have thus encroached upon the action of debt, why should it not encroach hereafter upon the other actions of form, and so make a confusion of the register, which is said in the Commentaries⁹ to be for such matters of writs the foundation and grounds of the law. And here let me speak somewhat of the antiquity of the register and the use thereof. I do suppose that in ancient time the forms of writs were devised by counsel, as are now the pleas; for that divers of the writs in Glanvill (in the time of King Henry II) vary in form from many of those which Bracton hath, and those which he hath do vary from the register. But in King Edward I’s time it is likely they came in to be registered. For that king, as saith Pryosot C.J. in 35 Hen. VI,¹⁰ caused divers books of the law to be written and purposed to have reformed the law, as it were the English Justinian. Because, therefore, it is a matter of no small moment to begin well, and that the writ is the foundation of the future action, the policy of England hath from this time which I speak of cast this care upon him that is great next the greatest,¹¹ adjoining unto him a college of clerks (whom the register calleth sometimes clericis di cursus) for the framing and bringing into form of those formulæ juris: whereof some of them (in a memorial of those discreet men that devised and framed them) have annexed unto them in the register a note of their authors’ names, and carry it in their forehead as a mark by whom they were devised. This seemeth to resemble the ancient policy of the Romans, who cast the care of those formulæ juris upon their pontifices and that college at whose hands their lawyers received them, as we do of the Chancellor, and at length were collected into a volume by Gnaeus Flavius, which volume thereof was afterwards called Lex Flaviana.¹²

Thus you see the propositions proved, and thereof do observe the conclusion. And thus much for the first reason.

II The second reason is the consideration of the efficacy of ley gager, which I will consider in parts.

1 First, it is right worthy of observation which is spoken 33 Hen. VIII, Brooke [Abr.], Triallis,¹³ that the trials of law are dispatched by a complete number: 12 judges to try and determine matters in law, 12 jurors to try matters in fact, and ley gager is determined by 12 (viz. duodena manu, every of which must swear: 9 Hen. III, Fitz. [Abr.], Ley, 78). And in 33 Hen. VI, where it is debated whether non-summons (which is usually tried by ley gager) should be tried by pais, it is said in express terms that ley gager is equivalent unto the trial by jury, for that the one and the other is duodena manu;¹⁴ and therefore in presumption of law the trial by ley gager is as effectual, as satisfactory, and ordained to breed such content, as the trial by country. For ley gager is not allowed in every action, nor for every defendant, nor against every plaintiff; and therefore bounden within his limits it is in all presumption of law as sufficient, as full, and as convenient, as the other trial, that is by the country.

2 Secondly, how the law esteemeth of ley gager and of what benefit it is appeareth partly hereby. If a man bring an action of debt upon a contract, the defendant shall no: traverse the contract, for that he may wage his law. But in those actions of debt, detinue or account in the which he cannot wage his law, he shall not answer to the point of the writ (for that he is ousted of his benefit by ley gager) but shall traverse the conveyance,¹⁵ which otherwise is not traversable, for the law taketh from him no benefit but giveth him as good. For taking from him his ley gager it doth allow him to traverse the conveyance, which otherwise is not traversable.

3 Thirdly, how much the law esteemeth the loss of ley gager where it is due it may thus appear. The queen in her excellent estate of highness for the care of the common-wealth cast upon her and in ease of that burthen is enriched above all others with many favours of the law. And yet nevertheless where otherwise her poor subject should be put from his law by her prerogative, she shall lose her highness’s benefit rather than she shall sustain such hard measure: for if a man be outlawed, and have many men indebted unto him upon simple contracts, the queen shall not have these debts, for if she should then should the party be put from his law (for none can

---

⁹ Plowd. 77, 228v.
¹⁰ Y.B. Hil. 35 Hen. VI, fo. 42, pl. 2.
¹¹ Presumably meaning the lord chancellor, but perhaps the master of the rolls. Bacon L.K. had formed the cursitors into a company in 1573, but Dodderidge is here speculating about the medieval Chancery.
¹² Actually Jus Flaviatum: D.1.2.6, 7. This occurred in or shortly before 304 B.C.; see H. F. Jolowicz, Historical Introduction to the Study of Roman Law (3rd ed., 1972), p. 91.
¹³ Presumably Brooke Abr., Triallis, pl. 143, which does not mention the number 12.
¹⁴ Y.B. Hil. 33 Hen. VI, fo. 8, pl. 23.
¹⁵ I.e. the introductory recital.
wage his law against the queen), the which rather than it should be
suffered the crown shall lose the benefit of those debts.

4 Lastly, I do observe that it hath been attempted in ancient
times to put defendants from their law by divers devices, but none
have long stood in favour. First, they used to bring supposed
actions of debt upon arrearages of an account, until the statute of
[5] Hen. IV\textsuperscript{16} ordained this examination. Also, they used to bring a
quominus in the Exchequer, supposing themselves to be indebted to
the queen to the intent to participate with her prerogative and to
oust the defendant of his law,\textsuperscript{17} but these were devised and endured
but their time.

And thus much for the second reason.

III As to the third reason, we are to consider whether in every
contract whereupon an action of debt doth lie there be included an
assumption or promise, and whether such a promise be sufficient
to maintain an action of debt. True it is that is said in the Commentaries,
in Rede and Norwood's Case,\textsuperscript{18} that in every contract is included a
promise: but will that promise maintain an action upon the case?
I verily think no, for many reasons.

1 First, as hath been said, actions are grounded upon wrongs
and injuries. But included, implied or imaginary wrongs are no
causes of action. They must be actual, real and express. An action
upon the case upon the assumpsit is grounded upon the assumpsit,
upon the promise. But in our case the jury have found no actual
promise, but an implied and included promise; therefore no
sufficient promise, for that injuries whereof actions do arise ought
to be imminent and evident.

2 Secondly, there is nothing found but the contract, but the
bare stipulation (as Bracton,\textsuperscript{19} borrowing the word out of the civil
law, calles him): that is, I, agree you shall have my wares, and you
agree that I shall have your money. This is nothing but the very
contract itself, out of which resulteth properly the action of debt,
which is the only legitimate son of that marriage. For there is no
case where the action of debt lieth more properly, more peculiarly.
For the stipulation is the contract, which is said of contrahto, and is
quasi actus contra actum. Therefore the action upon the case in this
case intrudeth upon the proper inheritance of another.

3 Thirdly, that your action upon the case lieth not without an
actual promise may be proved by the declaration. For every
declaration containeth two parts, the cause of grief and the
damage. And when you come to set forth your damage in such
actions (for there is your recovery, for you recover all in damages)
you ground not yourself upon the contract but upon the deceit.
fidem adhibens promissioni, which must be an actual promise
whereunto you gave credit and some other thing than the contract
out of which ariseth only the debt in his proper kind.

4 Lastly, it is evident that those actions upon the case which are
grounded upon an actual promise in case where the debt doth lie
are nothing in effect but the debt. They go no further than the debt.
For a bar by ley gager in the action of debt is bar in such actions
upon the case: as 33 Hen. VIII is in Brooke [Abr.], Action sur le
case.\textsuperscript{20} Which is a proof that they are but of one effect, for
otherwise the bar in the one would not be a bar in the other. As, a
bar in detinue by the ley gager is no bar in account thereof: 2 Ric.
III.\textsuperscript{1} But the cause why in the one case the action upon the case
doth lie, and not in the other, is the actual promise.

And so, upon all the whole matter, it seemeth that the action will
not lie.

Coke Att.-Gen. to the contrary. It has been said that this action
on the case is an imaginary and a deformed action, and a usurper. I
will maintain that it is a regular and ancient action. But first I will
confute the other side, and then confirm my own side.

1 He who has just argued drew his first argument from Lord
Mounteagle's Case in 3 Mar., but the book is adjudged against that
argument, and is thus a plain authority in my favour. In 14 Hen.
VIII, fo. 31, it is said that an action on the case lies for stopping a
way in part; and yet the asises of nuisance lies ... And an action on
the case is a formal action, for it is in the register. And the register
was not made in Edward I's time, for many writs are there
expressed which were made after Edward I's time. [Pryse C.J. in]
35 Hen. VI meant Britton, not the register. The register, however,
does mention an action on the case on a promise.

2 The second reason advanced on the other side is petitio
principis, for if the action on the case lies in law it follows that it
does not deprive the defendant of any benefit. For trespass to
goods a man may have an action of trespass, or a replevin, upon
which wahr of law does not lie; but in detinue it does lie. So if the
plaintiff here has an election to have which action he wishes,

\textsuperscript{16} 5 Hen. IV, c. 8.
\textsuperscript{17} Y.B. Trin. 11 Hen. VII, fo. 26, pl. 9. See also p. 218, fn. 10 below.
\textsuperscript{18} Norwood v Norwood and Rede (1557); see p. 448, below.
\textsuperscript{20} Brooke Abr., Action sur le case, pl. 105.
\textsuperscript{1} Mich. 2 Ric. III, fo. 14, pl. 39.
nothing is taken from the defendant. The benefit of the queen will take it away: for 8 Hen. V, [Fitz. Abr.], Ley, 10, and temp. Hen. VIII, hold that in quominus for debt the defendant shall not wage his law, for the bringing of such an action takes it away. And the queen shall have debt on a contract upon a forfeiture: and that is the experience, if it is something certain it shall be forfeited, otherwise if it is uncertain. Hence that is no reason.

3 For the third reason which has been put forward: here this is a real and actual promise. But this action will lie on a promise in law.

Now to my own argument. I hold that this action lies. My reason is that here is an express promise, for that is my case and I shall have an action on it. Here it is said, ‘You shall have my money’: that is a promise, for put it in writing and covenant lies on it. Promises and agreement are all one, for every agreement executory is a promise. A man shall not have an action on the case for nonfeasance without consideration, but it is otherwise for misfeasance; for if a man undertakes to build a house without consideration, and spoils it, an action on the case lies for that.

Now for authorities in this case… Moreover, precedents have always been respected, and here in this case there are many precedents in books of entries and elsewhere. In ejectione firmae a man could not recover possession until 14 Hen. VII, but now it is allowed without any question, inasmuch as there are many precedents in point.

Thus, for these reasons, he concluded that judgment ought to be given for the plaintiff.

(b) Serjeants’ Inn, Mich, 1598:
BL MS. Add. 25203, fo. 12.

Before all the justices of England, assembled at Serjeants’ Inn, Tanfield… prayed judgment for the plaintiff.

2 Anon. (1535); see p. 448, below.
3 Cf. report of the same speech in IT MS. Petit 516.5, fo. 121: ‘When the plaintiff said, “You shall have my corn” and the other said, “You shall have so much money for your corn”, these were express promises. These words assumpsit, promissit, and agreevit are all synonomous and of one signification. Would you have every plain man use the proper words “I promise” or “I take upon myself”? It is unnecessary. If he says “I promise” or “I agree” it is tantamount, and all one. If you will deny that there was any promise here, there is no contract either, for in every contract there is a reciprocal agreement: actus contra actum’.
4 These reported cases are discussed below.
5 ‘Precedents’ here means records, rather than reports.
6 See pp. 179-180, above.

First, I must answer the objections which have earlier been made against my side. First, it has been said that there is no express promise in this case, and therefore the action on the case does not lie. As to this, I will demonstrate what an assumption is. As I have learned, an assumption is nothing other than a mutual agreement between the parties for something to be performed by the defendant in consideration of some benefit which must depart from the plaintiff, or of some labour or prejudice which must be sustained by the plaintiff. It suffices if some benefit leaves the plaintiff, whether it goes to the defendant or to a stranger, for it shall be presumed to have been at the defendant’s request. For example, if a man undertakes to do something in consideration that I will give £20 to John Style, that is a good assumpsit. Likewise, in consideration that I will go to York for the defendant, he undertakes to do something, that is a good assumpsit: for it is a labour to me. In the same way, if, in consideration that I forbear my debt, he undertakes, for that is a prejudice. And in our case the undertaking comes within this definition, and so I hold it to be good.

Although countrymen do not always use apt words, the construction of the law will make them effectual. For this see 5 Hen. VII, where a man (being indebted to another) licensed the debtee to take his gold chain and to retain it until he paid the money: although no apt words had been used there, the law says that it is a pledge. It is similarly held there that if a man licenses me to enter into his land and occupy it for one month, this is a lease and not a licence, and it must be pleaded as such. Here, in our case, countrymen do not know what are the apt words to use; for it is not usual among them to say ‘in consideration that you will do such and such a thing, I undertake to pay you such and such a sum’. Nevertheless the law will make their words effectual. For this see 21 Hen. VII, where Frowyk C.J. put the case of a man having a rentcharge who commanded the tenant to pay someone else, and he paid it; and this payment is no bar in an avowry, but the party is driven to bring his action on the case: and that must be an action on the case on a promise, and although there are no words expressly proving the promise the law makes it a sufficient undertaking.

Another matter has been objected: that a man shall not have two actions upon one wrong where both reduce the same thing to
judgment, but in the action of debt and in the action on the case the same thing is reduced in judgment, and so the action on the case does not lie. This objection, however, is not true. For in the action of debt the debt itself is to be recovered, but in the action on the case only damages. And it may be that the jury would give less damages than the sum to which the debt amounts, and if they do so no attaint lies for giving too little in damages. Thus the actions do reduce several things in judgment.

Another matter has been objected: that where a man has a proper action framed in the register he must not resort to an action on the case. As to this, however, the law is contrary. For sometimes one may have an action on the case where one could have an assize of disseisin (being a real action), as appears in 4 Edw. IV. Likewise in 21 Hen. VII in Lord Grey’s Case, if someone makes a trench whereby the running to another person’s mill is put out of its course, the party aggrieved may have an action on the case or an assize of nuisance. And the case in 20 Hen. VII was that a man bought 20 quarters of barley to be delivered at a place and day, and the vendor did not perform the contract, and the action on the case was maintainable. And although in the book at large some opinion seems to impugn this, ye: by the record the rule is thus, and so it is cited by Fitzjames C.J. in the case between Core and Wodey. And in the book of 20 Hen. VII, Frowyk C.J. puts the case, if I deliver money to someone to deliver over to my attorney, and he delivers it to my adversary, an action on the case lies. In 33 Hen. VIII it is held that if a man brings a writ of debt and is barred by wager of law, and then brings an action on the case for the same money, the defendant may plead that he had already barred the plaintiff by wager of law. So it is not doubted that an action on the case lies. In 2 and 3 Phil. and Mar., between Peck and Redman, the case was that two bargained together that one would deliver to the other the 20 quarters of barley every year during their lives, and that the plaintiff would pay four shillings for each quarter; and there it is doubted, in an action on the case brought for the non-performance of this bargain, whether the plaintiff should recover damages for the entire bargain or only in recompense for what was past. But it was not questioned that the action well lay.

Moreover there are various precedents in this case on my side, and I vouch several in the King’s Bench: in Trinity term 12 Hen. VIII, rol 78, Hilary term 22 Hen. VIII, rol 66, Trinity term 22 Hen. VIII, rol 64, 32 Hen. VIII and 30 Hen. VIII, and various others. All of which were ruled upon this reason, inasmuch as the law gives the party his double remedy. This action on the case was brought into use once men were found too unreliable (dangerous) in taking their oath. Moreover, since the course of the court has been thus for so long a time, it would seem hard if all their precedents should be overturned; for it has always been usual for one court to yield to the customs of another. So I think that in our case the party has two remedies, and therefore he may make election as to which he will use. And so, for these reasons, I pray judgment for the plaintiff.

Bacon to the contrary.

e (Serjeants’ Inn, 13 May 1602:
BL MS. Add. 25203, fo. 496.

Before all the justices of England assembled at Serjeants’ Inn on Ascension Day, 13 May, Bacon recited the case and it seemed to him that the action on the case does not lie. And in arguing this he proved his point by three arguments. First, that there wants substance and matter here on which to base an action on the case. Secondly, that the action lacks form, and therefore where there is a writ in the register framed and formed for this case, this action on

18 Blanke v Spina (1520) KB 27/1036, m. 75. The plaintiff sued on an assumpsit to pay £150 in Flemish money in exchange for £100 in English money paid by him to the defendant, and recovered £104 damages.
19 Turnor v Nelethropp (1531) KB 27/1078, m. 66. An action of assumpsit for the price of goods and services: see [1791] C.L.J. 58, fn. 43.
20 Whitehead v Elderton (1530) KB 27/1076, m. 64. This was an indebitatus assumpsit for the price of goods, though the declaration avoided reciting a sale: [1791] C.L.J. 58, fn. 44.
1 According to CUL MS. Dd. 8. 48, fo. 33: ‘... he cited about 30 precedents between 21 Hen. VII and the present time, that an action on the case brought for a debt will lie...’ For examples of such precedents, see Selden Soc. vol. 94, pp. 272–281.
2 Bacon’s argument is not given in this text. A brief summary of it is printed in [1791] C.L.J., at 59–60. His points were made more fully in the argument which follows.
the case does not lie. Thirdly, the subject is hereby ousted from the benefit of law if an action on the case should be maintained, and so on account of this mischief he ought to sue an action of debt.

As to the first reason, a contract is no basis for an action on the case. For an action on the case must be based on deceit or breach of promise, whereas in debt on a contract no deceit or breach of promise is supposed. A bargain, of whatever kind, is something executed and not executory (as an *assumpsit* is); for a bargain changes the property on each side. Therefore in an action of debt it is alleged that the defendant withholds the money or thing demanded as if it were his already: in other words, that the plaintiff had the property thereof by reason of the contract. For this reason Bracton says that *contractus est permutatio rerum*. When, therefore, the plaintiff only demands what was already his, it cannot be said that he has been deceived by the defendant, but only that the defendant withholds something whereof the property was in the plaintiff. In 3 Hen. VI and 11 Hen. IV an *assumpsit* is called a parol covenant. Thus when a man covenants by writing to pay a sum of money, the person to whom the covenant is made shall have an action of debt and not an action of covenant, since the deed is a pure obligation. Likewise, on the other side, when this covenant is made by parol it sounds only in the nature of a contract and not in the nature of a promise, and therefore the plaintiff shall be put to his action of debt and be ousted from the action on the case. Suppose a man, in consideration of certain corn delivered to him by the plaintiff, acknowledges himself to be indebted in £20: those are the usual words of a bond, and it is clear that had they been put into writing no action except an action of debt could have been maintained upon them. For the same reason, when such a promise or acknowledgment is made by parol, without any writing, it is nevertheless solely in the nature of a debt and therefore no other action lies for it than a writ of debt. In 45 Edw. III it is said that upon a broken promise a man shall have suit in Court Christian *pro laesione fidei*; but it is clear that if a man makes a contract with another, then even if the money is not paid at the day no suit *pro laesione fidei* lies for this in Court Christian. And in 21 Hen. VII it is held that if a man promises to enfeoff me with certain land and does not do so accordingly, I shall have an action on the case or a *subpoena* in Chancery at my election; and by the one I shall recover damages, and by the other the chancellor will compel the party by imprisonment to execute the feoffment. But if a man contracts with another to give him a certain sum of money in return for a certain quantity of corn, and the money is not paid, nevertheless no *subpoena* lies to compel the defendant to pay the money, but he must sue for it by writ of debt.

Thus it appears that there is a great difference between the nature of the action of debt and the nature of an action on the case. For the action on the case implies a wrong, bad conscience, and deceit, and therefore in 20 Hen. VII Frowyk C.J. calls it a misdemeanour. And the action on the case is an action of trespass, and for that reason the law does not allow the defendant to wage his law in this action. Thus, when the nature and basis of these actions is so different, it is not right that an action on the case should be maintained on a contract, for which properly an action of debt lies.

He said, however, that sometimes when a contract is mixed with collateral matter an action on the case shall be maintained upon it. For instance, if a man contracts to pay me £10 in angels or crowns, or in some other special coin, I may have an action on the case, since it is not here a bare contract but is mixed with some other collateral circumstance. Similarly, if I sell a horse to someone else, he shall have an action of debt for the horse; but if it be added on to the contract that the horse shall be broken and taught ready for the field, there he shall have an action on the case. Likewise if a special place of delivery or payment is added to the contract, namely that the defendant must deliver the thing or pay the money at such and such a place, an action on the case lies. For in a writ of debt the plaintiff shall recover the money, but neither the place nor the other collateral circumstances just mentioned shall be regarded in the action of debt. It also seemed to him that if a contract is broken down and divided into several days [of payment], an action on the case shall lie perfectly well. And these distinctions, he said, will reconcile all the cases objected on the opposing side. Such as the case in 21 Hen. VI, there was a contract for two pipes of wine, and this was to be delivered at a certain place. And in *Norwood's Case*, there was a place appointed for the delivery of the corn, and also the contract was broken down into several days. And in *Peck and Redman's Case*, the barley was to be delivered to the plaintiff annually, so that there was again a breaking down of the contract.

---

3 Watkins' Case (1425); see p. 380, above.
4 See p. 379, above.
5 Untraced.
6 Fyneux C.J.'s dictum of 1499; see p. 401, above.
7 See p. 408, above.
8 *Tailboys v Sherman* (1443); see p. 395, above.
9 *Norwood v Norwood and Rede* (1557); see p. 448, below.
10 *Peck v Redman* (1555) Dyer 113; see p. 430, above; p. 440 below.
The same reasons can be attributed to 5 Mar., Brooke [Abr.], *Action sur le case*, pl. 108, for there the marriage-money was to be paid over four years. But it seems that if a man contracts to pay money at one day, even if a certain time is limited, this is not so forcible to change the nature of the action as the limiting of the place or the breaking down of the contract into several days. The reason why the law allows an action on the case in those cases is that it will not put him to two actions, namely the action of debt to recover the money and then the action on the case [to recover damages] because it was not paid at the due place.

And so he concluded his first argument, that the matter is insufficient to bring an action on the case.

As to the second, it seemed to him that the action is not maintainable because it wants form. The law favours order and abhors confusion. Therefore the register must not be confounded, but men must sue by the writs in the register and not frame actions out of their own heads. So when the register appoints debt as a proper action to give the plaintiff a remedy for his grievance, he must not pursue an action on the case. He agreed that often a man can, at his election, sue several actions for one same thing; for, as is commonly said, *bonum est simplex et malum est multiplex*. Therefore the same act can in several respects give cause for several actions. But he said that no action on the case lies where there is any other remedy. For it is only a supplemental action, and for that reason it does not lie in cases where there is a proper action: unless the matter digresses in some way from the nature of the proper action. For instance, 11 Hen. IV and 33 Hen. VI, if a man stops my way I shall have an assize of nuisance, but if he narrows the way and does not stop it completely, an action on the case lies, since this digresses somewhat from the nature of the assize of nuisance. In the case of the stopped way, if it is done by a stranger and not by the terre-tenant no assize lies, and therefore I shall have an action on the case.

He also agreed that sometimes an action on the case lies in cases where there is also a formal writ in the register. But that is where the writ in the register is of a higher nature and more penal to the defendant than an action on the case. For the law will not compel any man to pursue his wrong in extremity, but (if he will) he may well refuse the remedy which is more penal to the defendant and pursue a milder action. Therefore, when a man has cause to pursue an appeal of mayhem, he may have an action on the case. Similarly,

where he has cause to sue a writ of rescue he may well have an action on the case. Likewise, where he can have an assize of nuisance or trespass *quaer vi et armis*, he may waive it and take an action on the case. In these cases the other actions are greater and higher than an action on the case. But an action on the case is greater and higher, and more penal to the defendant, than an action of debt. For in an action of debt the defendant wages his law, but not in an action on the case: which proves that it is the higher action. Also, an action on the case supposes a wrong and a deceit in the defendant. Therefore, although the plaintiff may forego his right in taking his remedy by an inferior action, he may nevertheless not at his pleasure use an action superior to that which is proper to his case.

As to the last reason, he objected that the action on the case does not lie because then the defendant would be ousted from his law, which is a defence whereof the law is very tender. Therefore he observed three reasons why the law principally allows the defendant to discharge himself of a debt by doing his law. The first is for expedition, for several matters are briefly determined by wager of law which would depend longer if they were tried by inquest. The second reason is so that the defendant shall not be surprised in his proof. For contracts are often made in secret, and it would be most inconvenient if for every private bargain between men they were compelled to call unto them a notary or witnesses to prove the bargain. Therefore the law has allowed the defendant in such cases to discharge himself by his oath. The third reason is that such private contracts are difficult to be tried by juries. And the law has great regard of this, for trials by juries are in our law stricter than trials in any other law. An inquest must necessarily give a verdict, and (whether or not the parties give evidence) it cannot say 'it does not appear'. Secondly, a majority of voices does not carry the verdict, but it behoves them all to agree in their verdict or else it is not good. Thirdly, the jurors are in duress until they have given their verdict. When all these matters are considered, it is a strong argument for providing that as far as may be all the issues to be tried by juries should be on plain and clear matter. Therefore the law allows a man to discharge himself of these secret contracts by wager of law rather than put him upon trial by an inquest. For even if the contract was made in the presence of witnesses, the proof of it is nevertheless dangerous and uncertain, when the wresting or mistaking of a word may alter the whole substance of the contract. Therefore it is very reasonable to submit this to the oath of the party himself. That accords with the law of God, for *finis omnis

11 Y. B. Trin. 11 Hen. IV, fo. 82, pl. 28; Trin. 33 Hen. VI, fo. 26, pl. 10; see p. 584, below.
And whereas it is said that this trial by wager of law is an occasion of much perjury, when the party for his own profit is tempted to speak contrary to the truth, surely the mischief is not so great on this side as on the other? For whereas by wager of law the defendant himself may be perjured, the trial of such secret matters by inquest gives occasion for 12 jurors and also several witnesses to be forsworn. For these reasons the law gives much favour to trial by wager of law. Therefore the queen's prerogative shall not oust a man from his law, as appears from 49 Edw. III, 16 Edw. IV and 9 Eliz. Dyer 262:13 if I am indebted to someone else upon a simple contract, and the debter commits suicide or is outlawed, the debt shall nevertheless not be forfeited, because the debtor must not be ousted from his law.

Popham C.J.Q.B. That is not law.

Walmsley J.C.P. Nevertheless, it is what the books say.

Popham C.J.Q.B. The books are against law. (To which several other justices assented.)14

Bacon. And it is no wonder that this trial has obtained such respect in law, being as indifferent as it is. The law has provided that it shall be done by the oath of a true and credible person, for one who has been attainted of a false oath by writ of attainder shall not be received to do his law: as in 33 Hen. VI.15 Also it must be done duodena manu, for the oath of the party himself is not sufficient, but he must be sworn with 11 others who will swear that they think the oath of the party himself is true. Thus it seems, in respect of the mischief which would ensue to the defendant in this case by being ousted from his wager of law, that the action on the case does not lie.

As to the precedents, he confessed that several had been shown him, of which the oldest are in 8 Hen. VI, and after. But all the precedents until 22 Hen. VIII are on an assumptis to deliver, and not on an assumptis to pay. After 22 Hen. VIII, however, there have been several precedents that an action on the case has been maintained on an assumptis to pay; but these have been adjudged solely in the King's Bench, and also several of them may be answered with the distinctions set out before, such as where a place of payment was appointed or where the contract was broken down into several separate days of payment.

So he concluded that the action on the case did not lie.

(d) Queen's Bench, 9 November 1602:
BL MS. Add. 25203, fo. 607.

Remember that on 9 November this term, Coke A.-G. moved the case ... and since the case had depended a long time, and had been argued and debated in this court and also so often before all the justices of England and the barons of the Exchequer, who had conferred about it amongst themselves, he prayed their resolution and judgment in the case.

Popham C.J. answered that they had conferred and advised concerning the case, and that they had resolved it, and were agreed:

First, that every contract executory implies in itself a promise or assumptis.

Secondly, that although an action of debt lies upon such a contract to recover the duty, the plaintiff may nevertheless have an action on the case upon the assumptis.

He said they had resolved this not only upon the precedents of this court, but also upon reason, and upon the precedents of all the courts which the queen has: for there are several precedents both in the Common Bench and in the Exchequer which concur with this resolution. (But whether an action on the case would lie on such an assumptis against the executors of him who made it, he said they were not resolved.)

All this that was delivered by the Chief Justice was affirmed by the other justices to have been so agreed.

So Popham C.J., ex assensu sociorum, commanded judgment to be entered for the plaintiff.

The record shows that judgment was given this term for the £16 damages and 20s costs assessed by the jury, and an additional £9 costs assessed by the court, making £26 in all.

(e) Coke's retrospective summary: 4 Co. Rep. 92;
collated with Coke's autograph report,
BL MS. Harley 6686, ff. 526-530v.

John Slade brought an action on the case in the Queen's Bench against Humphrey Morley ... and against the maintenance of this action various objections were made by John Dodderidge, of counsel with the defendant:

1 That the plaintiff upon this bargain could have an ordinary remedy by an 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

12 Hebrews, VI. 16.
13 (4 Co. Rep. 93) said it had been recently resolved in the Exchequer that such debts are forfeited.
14 Y. B. 33 Hen. VI, fo. 32, pl. 6.
form in the register. For *ubi cessat remedium ordinarium ibi decurrit ad extraordinarium, et nunquam decurrit ad extraordinarium ubi valet ordinarium:* as appears by all our books. 16 *Et nullus debet agere actionem de dolo ubi alia actio subest.* 17

2 The second objection was that the maintenance 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 between them, and he has no witness of this payment or satisfaction, and therefore it would be mischievous if he should not wage his law in such a case. And that was the reason (as it was said) why debts by simple contract were not to be forfeited to the king by outlawry or attainder, because then by the king’s prerogative the subject would be ousted from his wager of law, which is his birthright: as is held in 40 Edw. III, fo. 5; 50 [Lib.] Ass., [pl.] 1; 16 Edw. IV, fo. 4; and 9 Eliz. Dyer 262. And if the king should lose the forfeiture and the debt in such a case, and by the judgment of the law the debtor should rather be discharged of his debt than deprived of the benefit which the law gives him for his discharge, even if in truth the debt was due and payable: a fortiori, in the case at bar, the defendant should not be charged in an action in which he would be ousted from his law, when he may charge him in an action in which he could have the benefit of it.

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 was maintainable, notwithstanding such objections; and the justices of the Common Pleas held the contrary. And for the honour of the law, and for the repose of the subject to put an end to this difference of opinion, *quia nil in lege intolerabilis est eandem rem diverso jure censeri,* 18 the case was openly argued before all the justices of England and barons of the Exchequer, namely John Popham C.J. of England, Sir Edmund Anderson C.J.C.P., Sir William Peryam C.B. of the Exchequer, Clarke B., Gawdy J.Q.B., Walsmsley J.C.P., Fenner J.Q.B., Kingsmill J.C.P., Savile B., Warburton J.C.P., and Yelverton J.Q.B., 19 in the Exchequer Chamber, by the queen’s attorney general for the plaintiff and by John Dodderidge for the defendant; and at another time the case was argued at Serjeants’ Inn before all the said justices and barons, 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 20 that the action was maintainable and that the plaintiff should have judgment. And in this case these points were resolved:

1 That although an action of debt lies upon the contract, the bargainor may nevertheless have an action on the case or an action of debt at his election, and that for three reasons or causes:

1 In respect of infinite precedents (which George Kemp, esquire, secondary of the prothonotaries of the King’s Bench showed me) 1 both in the Court of Common Pleas and in the Court of King’s Bench, in the reigns of King Henry VI, Edward IV, Henry VII and Henry VIII, by which it appears that the plaintiffs declared that the defendants, in consideration of a sale to them of certain goods, promised to pay so much money etc., in which cases the plaintiffs had judgment. 2 To which precedents and judgments, being so great in 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. And so did the justices in olden times, and from time to time, both in matters of form and in deciding doubts and questions of law (both at common law and in construing acts of parliament) 3 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 proved that in the case at bar the action was maintainable.

2 The second cause of their resolution was various judgments and cases resolved in our books where such an action on the case on an *assumpsit* has been maintainable, when the party might have had an action of debt... 4

3 It was resolved that every contract executory imports in itself an *assumpsit*. For when one agrees to pay money or to deliver something, he thereby assumes or promises to pay or deliver it.

16 Coke MS. cites only Dyer 121.

17 This is not in Coke MS.

18 ‘Nothing in law is more intolerable than to decide the same thing according to different rules’: The maxim is not in Coke MS.

19 These names were added in print, and are not a correct list of the judges in 1597, when Coke argued against Dodderidge, but are a list of the judges in 1602. It seems from MS. reports of other cases that Anderson C.J., Peryam C.B., Walsmsley and Kingsmill J.J. and Savile B. were against the action on the case, so the majority was probably only 6:5.

20 This expression was objected to by the judges who dissented: see p. 442, below.

1 Words in parentheses added in print.

2 Scholars have been unable to find any such precedents before the time of Henry VIII.

3 Here follows a lengthy discourse on the value of precedents (i.e. of entries on the plea rolls).

4 These are fully discussed above.

5 Altered in MS, from ‘implies’.
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 and such a day, in that case both parties may have an action of debt or an action on the case upon *assumpsit*, for the mutual executory agreement of both parties imports in itself reciprocal actions on the case as well as actions of debt. Therewith agrees the judgment in *Rede and Norwood’s Case*, Plowd. 182.

4 It was resolved that the plaintiff in this action on the case upon *assumpsit* should recover damages not only for the special loss which he has suffered (if any) but also for the entire debt; so that a recovery or bar in this action would be a good bar in an action of debt brought on the same contract, and so *vice versa* a recovery or bar in an action of debt is a good bar in an action on the case on the *assumpsit*...

5 In some cases it would be mischievous if an action of debt only should be brought, and not an action on the case. For instance, in the case between *Redman and Peck* (2 & 3 Phil. & Mar.), Dyer 113, they bargained together that for a certain consideration Redman should deliver to Peck 20 quarters of barley yearly during his life, and it was adjudged that an action well lay for non-delivery in one year, for it would otherwise 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 or administrators, since debt does not lie in such a case until all the days have been incurred, and that would be contrary to the bargain and intention of the parties, for Peck provides it yearly for his necessary use... Also, it is good nowadays to oust the defendant from his law whenever it may be done by law and to try it by the country, for it would otherwise occasion much perjury.

6 It was said that an action on the case on an *assumpsit* is just as well formed an action and contained in the register as an action of debt; for its form there appears. It appears also in various other cases in the register that an action on the case will lie even though 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 at the party’s election to take the one writ or the other. But the register has two several actions, namely an action on the case on an *assumpsit* and also an action of debt; and therefore the party may elect the one or the other.

---

And as to the objection which has been made, that it would be mischievous to the defendant that he should not wage his law, since he might pay it in secret: to it that it was answered that it should be accounted his folly that he did not take sufficient witnesses with him to prove the payment which he made. But the mischief would rather be on the other side, for experience now proves that men’s consciences grow so large that the respect of their private advantage rather induces men to perjury, and principally those with declining estates. For *jurore in propria causa* (as someone said) *est saepenumber hoc saeculo praeceptum diaboli ad detrudendas miserorum animas ad infernum*. For this reason, in debt, or other actions 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 note, reader, this resolution agrees with the judicial law of God, on which our law is in every point founded. For it appears from the 22nd chapter of *Exodus*, verse 7, ‘If a man shall deliver unto his neighbour money or stuff to keep, and it be stolen out of the man’s house, if the thief be found he shall pay double’. And verse 10, ‘If a man deliver to his neighbour an ass, or an ox, or a sheep, or any beast, to keep, and it dies or is hurt or driven away, no man seeing it, the oath of the Lord shall be between them both whether he hath not put his hand unto his neighbour’s goods; and the owner thereof shall accept it, and he shall not make restitution’. From which it appears that it is in the plaintiff’s election either to charge the defendant by witnesses, if he will, and to oust him from his law, or to refer it to the defendant’s oath: for the text says, ‘no man seeing it’. Similarly by our law, in the same case as is put in the text, the owner has an election either to bring an action on the case in which the defendant cannot wage his law, or an action of detinue in which he may: *et jusjurandum in hoc casu est finis*, for the plaintiff is bound thereby and it is the end of the controversy. And I am surprised that in these days so little consideration is given to an oath, as I observe from day to day...

---

**WRIGHT v SWANTON (1604)**

Record: CP 40/1716, m. 544. Daniel and Alice Wright brought an action on the case against William Swanton and declared that, whereas on 24 June 1601 at Hartest, Suffolk, in consideration that Alice (who was then single) would bring and deliver 12 cartloads of wood to the defendant’s house, the defendant undertook and promised to pay her 5s. 6d. for each load; and afterwards on 20 August she delivered 12 loads: nevertheless the defendant,
scheming to defraud her, did not pay the 66s., although requested to do so on 1 October. The defendant, protesting that he did not make the undertaking, pleaded that Alice did not deliver the wood. On 11 July 1604 at Newmarket assizes (Popham C.J., Clarke B.) the jury found for the plaintiffs with £4 damages and 5s. costs.

(a) BL MS. Hargrave 29, fo. 94.

Note, by WALMSLEY J. this term, that a man shall not have an action on the case where he might have an action of debt. The first reason is because the defendant is by that means ousted from the benefit of his law, which has always been allowed. The second reason is because in an action on the case the plaintiff shall recover everything in damages; and that is uncertain, because the jury may give him a greater or lesser sum in damages, while in an action of debt he shall recover the debt certain. Thus by such means the law is reduced from certainty to uncertainty: which had been seen several times this term upon error brought in respect of judgments given in the King’s Bench. It seems to me that this is a great mischief, and it is apparent what will ensue. As for the case of Slade v Morley, which is reported by the attorney general, it was not resolved upon argument or reasons delivered; but the justices were assembled and each was asked for his opinion, and thus it was resolved by the opinion of the greater number.

(b) HLS MS. 2069, fo. 20v.

Action on the case upon assumpsit was brought in respect of a simple contract, and it was found for the plaintiff.

Croke demanded judgment, according to the resolution in Slade v Morley ... which was agreed by all the justices of England.

WALMSLEY J. denied that it was agreed by them in the Exchequer [Chamber]; but their opinion was asked in Serjeants’ Inn, without any argument ... and as to the policy, which was to prevent wagers of law, he said that men ought to trust in wager of law where the law willed it.

ANDERSON C.J. said it lay [only] where no other action would lie; and by this means all actions could be made actions on the case.

The other justices seemed to be of the same opinion.

(c) CUL Cholmondeley (Houghton) MSS.

Pell Papers 7(1), fo. 14v.

... It was now moved in arrest of judgment that ... an action on the case does not lie, but an action of debt.

On the first motion, the opinion of the court was in accordance; for by this means the subjects would be ousted from their law, which would be a great inconvenience: for where a man has paid his debt and has no witness thereof, he shall be compelled to pay it again by this action of assumpsit. And they denied the case of Slade v Morley, and said that it was never resolved, but only the opinion of the judges given obiter at Serjeants’ Inn.

ANDERSON C.J. said that actions on the case were not at common law, but were first given by the Statute of Westminster II, c. 2411 ... from whence it appears that an action on the case does not lie except in cases where the law is defective of a remedy and where there is no writ in the register: then an action on the case lies, but not otherwise.

So they were for giving judgment that the plaintiff take nothing by her writ; but by reason of the case of Slade v Morley they would be advised.

At another day, however, when it was moved again, the opinion of all the justices (except WALMSLEY J.) was that the plaintiff should have her judgment: for this is not a perfect bargain and contract whereon an action of debt lies, but only an assumpsit. For it is in consideration that she should bring and deliver, so that the carrying is a labour and charge, and the money is to be paid for the carriage as well as for the cartloads of wood; and she should have recompense for it ...

WALMSLEY J. ... was strongly of opinion that the action on the case did not lie in the [present] case; for this putting in of [the words] ‘should bring and deliver’ was only a device to take away actions of debt and wager of law, which is a benefit to which every subject is born. And he said that the money was given principally for the wood, and not for the bringing and delivery thereof, and therefore it is a good bargain.

Notwithstanding his opinion, however, judgment was given that the plaintiff should recover ...

The record confirms that judgment was entered for the plaintiffs in Michaelmas term 1604 for £4 damages and £6 10s. costs. Anderson C.J. died the following August, and (although Walmsley J. survived until 1612) there is little doubt that thereafter the Common Pleas gave way to the

8 Coke’s report (printed in 1604) is abstracted at pp. 437–441, above.
9 This refers to formal speeches by the judges.
10 I.e. of the judges; cf. fn. 9, above.
11 Cf. p. 590, below.
majority view in *Slade's Case.* The one remaining problem was whether the action lay against executors; see pp. 446–457, below.

**ANON. (1672)**

Treby’s reports, MT MS., p. 747 (untr.).

In this case tried before HALE C.J. he said an executor was charged in his own right upon a promise pretended to be made by him, without any cause or truth. He said he would always require marvellous strong evidence for such a promise and charge; for it was become a great grievance, two men could hardly talk together but a promise is sprung. He said it were well if a law were made that no promise should bind unless there were some signal ceremony, or that wager of law did lie upon a promise. For the common law was a wise law, that men should wage their law in debt on a contract, and if they proved their reputation *duodena manu* should be discharged, that so things might be reduced to writing and brought to certainty. And *Slade's Case,* which was hardly brought in (for it was by a capitulation and agreement among the judges) has done more hurt than ever it did or will do good.

In *Buckeridge v Sherly* (1671), at p. 651 of the same reports, HALE C.J. said: ‘... actions on the case are become one of the great grievances of the nation; for two men cannot talk together but one fellow or other who stands in a corner swears a promise and cause of action. These catching promises must not be encouraged. It were very well if a law were made whereby some ceremony, as striking hands etc., were required to every promise that should bind.’ In that case William Buckeridge had been awarded £200 damages against Ralph Sherly at Abingdon assizes (before Turner C.B. and Archer J.) for breach of an *assumpsit* to pay that sum in consideration of marriage. Judgment was later entered for the plaintiff, with £15 costs: KB 27/1919, m. 608. It will be noticed that promises in consideration of marriage, and promises by executors (as in the principal case) were both expressly included in the provisions of the Statute of Frauds.

---

13 Cf. *Anon.* (1672), at p. 775 of the same reports: ‘...It were very well that some solemnity, as the delivery of a piece of money or something like livery of seisin, were requisite to the making of every promise. It was the wisdom of the law to require a solemnity in contracts (as well as marriages), which if not observed the party should have liberty to wage his law’.
14 I.e. with 12 hands (with compurgators).
15 I.e. treaty.

---

**THE STATUTE OF FRAUDS (1677)**

29 Car. II, c. 3; *Statutes of the Realm,* vol. V, p. 840 (untr.).

For prevention of many fraudulent practices which are commonly endeavoured to be upheld by perjury and subornation of perjury, be it enacted by the king’s most excellent majesty, by and with the advice and consent of the lords spiritual and temporal and the commons in this present parliament assembled, and by the authority of the same...

4 ... that from and after the said four and twentieth day of June [1677] no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate; or whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person; or to charge any person upon any agreement made upon consideration of marriage; or upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised...

17 And be it further enacted by the authority aforesaid, that from and after the said four and twentieth day of June no contract for the sale of any goods, wares and merchandises for the price of ten pounds sterling or upwards shall be allowed to be good, except the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorised...

17 For ss. 5-8, see p. 131, above.
3. The Superior Courts of Common Law

Westminster Hall, built for William Rufus in about 1099 and enlarged under Richard II around 1395, was the home of the superior English courts until they moved to the Strand in 1882. The interior of the hall is still best viewed from the great north door. On the far side is a flight of steps which used to divide the Court of King’s Bench from the Court of Chancery. On the west side of the hall, near the door, was the Court of Common Pleas. The Exchequer was a large adjacent chamber which connected with the hall through a passage. Each court occupied a space marked out by a wooden bar at which counsel stood, and in the centre was a massive oak table covered with green cloth 1 at which cour officials sat and spread their records. Against the wall, on a raised platform or bench beneath tapestries with the royal arms, sat the judges. Until the eighteenth century there were no seats for counsel, nor any walls to divide the courts from the open thoroughfare; each court was scarcely out of earshot of the others, and speakers had to compete with the noise made by the throng of suitors, lawyers, shopkeepers, cutpurse and sightseers in the body of the hall. 2 This arrangement, seemingly impracticable to modern eyes, was a feature of English public life for six centuries. It survived two civil wars, and even in times of rebellion the judges and counsel kept up their attendance, sometimes with armour beneath their robes. Only in times of plague or flood did the courts leave Westminster Hall, and then only after a formal adjournment by proclamation. A story, doubtless apocryphal, is told of Sir Orlando Bridgman, chief justice of the Common Pleas in the 1660s, that he would not have his court moved back a few feet to avoid the draught from the north door, lest the relocation infringed Magna Carta. 3

The conservative attachment of lawyers to all the old forms gave them the appearance of complete immunity to change. Yet, beneath this timeless exterior, there occurred between the thirteenth and the seventeenth centuries changes in the common-law system as far-reaching as any brought about by the Norman conquest or the procedural reforms of the nineteenth century.

---

1 Or a chequered covering in the case of the Exchequer.
2 For the courts in Westminster Hall see CLT 247-262.
3 R. North, The Life of Francis North (1742), p. 97. In fact the old court was demolished and rebuilt in 1741. For the procedure on flooding, see Memorandum (1629) Hutton 108.
Magna Carta and Common Pleas

We have seen that the result of clause 17 of Magna Carta was the permanent fission of the two benches. The Court of King's Bench was in contemplation of law held 'before the lord king wheresoever he should be in England' (coram domino rege ubicumque fuerit in Anglia), and was therefore excluded from hearing 'common pleas'. Common pleas for this purpose were all suits in which the king had no interest. As a corollary, the Common Bench (or Court of Common Pleas) had an exclusive jurisdiction over such suits; and they included all praecipe actions to recover property or debts, the greater part of all civil cases. The petty assizes were not caught by Magna Carta, and could in proper cases be brought in the King's Bench, but they were more usually brought before commissioners and in cases of difficulty adjourned into the Common Pleas for argument. Actions of trespass and replevin were shared with the King's Bench. There was nothing in Magna Carta to prevent the Common Pleas from sharing pleas of the Crown as well, since the prohibition was in one direction only, and in its early days it did indeed sometimes entertain appeals of felony; but its traditional jurisdiction, as settled in the fourteenth century, excluded felony. It nevertheless continued to be used by the king for his own civil actions. It also had a supervisory jurisdiction over inferior courts not of record.

By the fourteenth century the jurisdiction of the King's Bench was equally settled. The Crown side had unlimited criminal jurisdiction throughout the realm, either as a court of first instance or as a forum into which indictments could be removed from other courts for legal discussion. The 'plea' side was occupied mainly with actions of trespass, appeals of felony, and suits to correct errors by courts of record (including the Common Pleas). Since the criminal jurisdiction was in practice only exercised in a small proportion of cases, the work-load of the King's Bench before Tudor times was slender. Its records filed only a few hundred skins of parchment a year, whereas those of the Common Pleas filled a thousand or two.

The Common Pleas was the court which more than any other shaped the medieval common law. It had usually four or five judges, a select bar of serjeants at law, and a large staff of officers: the keeper of the writs (custos brevium), who filed the original writs, the prothonotaries and filazers (who kept the rolls and the files of judicial writs), the exighenters (who enrolled outlawries), and numerous other clerks and under-clerks. It was the place where the young students attended to learn their law, huddled in a wooden box or gallery. Whatever of note fell from a judge or serjeant in the Common Pleas was likely to be remembered or written down for future reference; the year-books were taken up almost exclusively with the debates in this court, and it was not until the sixteenth century that the work of other courts was regularly reported.

Changing Functions of the Medieval King's Bench

This uneven sharing of business made sense while the King's Bench was literally coram rege, since it was in effect a meeting of the king's council for occasional business of importance. But under Edward I the king's personal presence ceased to be usual, and in 1305-18 the court settled down in Westminster Hall. In the century after 1318 it sometimes embarked on judicial expeditions: at its 'trailbaston' sessions in the country it investigated pleas of the Crown, assizes and private complaints (brought by bill) in the counties where it stopped, with all the energy of an eyre. In this peripatetic phase of its history, the King's Bench filled part of the gap left by the demise of the eyre system. But the need for moving royal justice of that irregular kind was fast being removed by the regularisation of the assizes, and most of the court's time in the fourteenth century was in fact spent at Westminster. For the whole of Henry IV's reign (1399-1413) it was stationary, and its last local visitations were in 1414 (Leicestershire, Staffordshire and Shropshire) and 1421 (Northamptonshire). Thereafter the King's Bench settled down in Westminster Hall for good, and its first-instance criminal jurisdiction became confined to Middlesex cases and other cases removed by certiorari. De facto it had come to rest in a certain place, and the spirit of Magna Carta would hardly have been infringed had it then assumed a share of the work of the Common Bench; yet the fact of its domicile was one of which the law took no notice whatsoever. The style of the court remained coram rege; its process continued to be returnable 'before the lord king wheresoever he should be in England', and until 1876 the full designation of a judge of the court was 'one of the justices assigned to hold the pleas before the queen herself'. Whatever the reality, therefore, the King's Bench was not in law held in a certain place and was therefore still restrained by Magna Carta from hearing common pleas.

The Common-Law Courts Challenged

During the fifteenth century the superiority of the ancient common-law courts was challenged by the jurisdictions associated with the king's council and the chancellor. Some have seen these rising jurisdictions as threats to the common law itself. The medieval chancellors were Oxford doctors of law, and in the

---

4 It was usually called 'the Bench' or 'the Place' in medieval times. The name Court of Common Pleas, presumably alluding to Magna Carta, was not used until Tudor times. It avoided the confusion which still sometimes arises from such expressions as 'the king's justices of the bench' (which means the Common Pleas, not the King's Bench).

5 See pp. 57–59, post.

6 See p. 16, ante; pp. 73, 233–234, post.

7 But only for property in the county where the court was sitting: 57 SS xiii.


9 See p. 159, post.

10 See pp. 180, 184, 412, post.

11 During the king's personal absence in 1253-54 its style did become coram consilio (before the council): the word coram still indicated the literal truth.

12 At first the coram rege formula was modified to indicate his absence, but by the 14th century it was routinely fictitious: 57 SS ixiii-lixv. Cf. Articuli super Cariss 1300, c. 5, which required the court to follow the king's person; this seems to have been ignored, except in time of parliament.

13 So named from the club-wielding gangsters (trailbastons) whom they were primarily appointed to suppress: see 74 SS lv-lxvi.

14 Leicester because a parliament was held there, Shropshire because of reports that it had the highest homicide rate in the country.
The Resurgence of the King's Bench

Bill Procedure
The recovery of the King's Bench was effected by the exploitation of its bill procedure. A bill, in this sense, was a petition addressed directly to a court in order to commence an action. Procedure by bill was more convenient for litigants than writ procedure, since the latter required the first complaint to be made in Chancery so that an authorising writ could be addressed to the court where proceedings were to be taken. There was nothing new about procedure by bill when it blossomed in Chancery and council between 1350 and 1450. It had an older history in parliament and in eyre, and had been taken over by the King's Bench in its first trialbason sessions of 1305-07. When an eyre, or the King's Bench, sat in a county, the sheriff of that county was personally attendant and there was no need to apply to the Chancery for a writ ordering the sheriff to initiate proceedings. When the King's Bench settled at Westminster, the bill procedure remained available for Middlesex cases, and was commonly so used by 1420; cases from other counties required writs.

Bills could also be used in the King's Bench, as in the other superior courts, to commence actions against its personnel and prisoners. Such persons were deemed to be already present in court, and therefore no process was needed to bring them in. For that reason, Magna Carta did not apply; and so a clerk of the King's Bench, or a prisoner in the custody of the marshal of the Marshalsen, could be sued in personal actions such as debt, detinue or covenant. Wise attorneys kept a careful watch on the gaol calendar, because they might be able to save their own clients' time and money by taking advantage of process commenced by someone else. Plaintiffs could also combine the procedures themselves. If A wished to sue B for trespass, detinue and debt, he need only sue a writ of trespass, upon which B would be arrested and committed to the marshal; A could then start his debt and detinue actions by bill, avoiding the expense of a writ. Around the middle of the fifteenth century attorneys discovered that the like advantage could be obtained even if there

15 The question put, and tentatively answered, by F. W. Maitland in English Law and the Renaissance (1901).
16 Since 1901 the so-called Reception of Roman Law on the continent has been reinterpreted; it now seems not to have been an importation of Roman law so much as the introduction of Roman legal method by university-educated judges. See also 94 SS 23-51.
17 For their history, see chs 6 and 7, post.
18 See Brooks, Petrifoggers and Vipers, pp. 85-87.
19 Sargfer's Case (1481) B. & M. 513 at 515.
20 For original writs, see pp. 57-64, post.
21 See further p. 98, post.
22 The marshal was the galler to the court, appointed by the earl marshal of England. The Marshalsea Prison was in Southwark, but the marshal attended the court and his prisoners were deemed to be always 'before the king himself'.
23 Thus in 1442 a creditor brought a bill of debt against a prisoner who had been arrested in another suit brought by Fortescue CJ: 6 JLIH 91.
was no genuine complaint of trespass: the writ secured the arrest, whatever the facts. Some encouragement for the use of a fictitious action may have been taken from decisions under Fortescue CJ, around 1450, that a bill lay against anyone in de facto custody and that the court would not enquire into how the defendant came to be there. The custody was secured by an unworn ex parte complaint in Chancery of an imaginary trespass; once the defendant was in custody – which included being out on bail – and had been impleaded by bill, the action of trespass could be quietly discontinued before it came to trial. The falseness of the complaint of trespass was therefore never officially discovered. By the 1480s the practice, if ethically questionable, had become common form, and had given the King’s Bench a jurisdiction over common pleas such as debt.

In order to utilise this jurisdictional dodge, the defendant had to be put into the Marshalsea. An original writ of the Chancery would do it, but there was a means of short-circuiting the Chancery altogether, a procedural dodge which followed from the jurisdictional. Since the alleged trespass was fictional, the plaintiff might as well make it a trespass in Middlesex, the county in which Westminster Hall was situated and in which the court now invariably sat. The defendant could then be arrested on the mere presentation of a bill of trespass, known as the bill of Middlesex. By the use of two bills, the first alleging an imaginary trespass to secure arrest, the second a genuine complaint against the person arrested, the King’s Bench litigant could thus sue in debt without writ. This device was coeval with the other, as is evident from the disproportionate number of filed bills alleging trespasses to land in Westminster (later Hendon). It mattered not whether the plaintiff or defendant had ever set foot in Hendon, or even Middlesex; yet the logic which required the first writ for arresting the defendant to go to the sheriff of Middlesex necessitated one further ruse: the defendant or his proxy had to be in gaol in Westminster (later Hendon).

The new King’s Bench bill procedure offered the plaintiff some of the advantages of Chancery bill procedure, particularly in that the litigant (unlike an original writ) did not tie the plaintiff to any particular cause of action, and so defendants could be arrested to answer whatever kind of complaint the plaintiff chose to put into his true bill, or even a multitude of complaints. The avoidance of a writ also saved fees in Chancery, although that particular advantage was partly curtailed, first by means of Chancery injunctions to stay suits until a fine was paid, and then (after 1608) by collection of a fine in the King’s Bench itself. But this was not the main point of the new procedure, the principal benefit of which was that ‘money need not be spent upon advice till it appeared upon the arrest that the defendant would stand suit’. As one attorney put it, ‘the latitute is like to Doctor Gifford’s water, which serves for all diseases, and so it holds one form in all cases and actions whatsoever’. Well might a Common Pleas attorney associate the latitute disparagingly with quack medicine, for it provided an antidote to Magna Carta and made the King’s Bench almost as popular a tribunal for common pleas as the Common Pleas itself. The Common Pleas litigant still needed an original writ from the Chancery, for which he paid a fine proportional to the debt claimed; when the defendant was in court, more ink and parchment was required than in the other court, and technical slips more often threatened disaster. The King’s Bench wooed litigants with competitive costs, and sometimes even lowered its fees in order to increase the overall takings. By 1600 the effect on its jurisdiction was dramatically apparent. From a trickle of latitats at the end of the fifteenth century, and a few hundred rolls a year, within a century the court was issuing – according to a contemporary estimate – 20,000 latitats a year and filling 6,000 rolls. Between 1560 and 1640, in particular, the number of King’s Bench suits rose as much as tenfold.

SUBSTANTIVE REFORMS IN THE KING’S BENCH

In conjunction with the procedural campaign to redistribute business in its own favour, the King’s Bench also improved and broadened the range of substantive remedies available at common law. This was the technique which Fairfax J had recommended in 1481; and, as he had also suggested, the main vehicle of reform was the action on the case. Actions on the case were extended by 1499 to enable the enforcement of parol promises. Fyneux CJ, in announcing this reform, took care to stress that it rendered unnecessary a Chancery suit by subpoena. Also in the time of Fyneux CJ were developed the action on the case for not paying debts, which had procedural advantages over the older action of debt, and another for defamatory words, which had previously been remedied only in the

24 Kempe’s Case (1448) Y.B. Mich. 27 Hen. VI, fo. 5, pl. 35 (a bill lies against a prisoner unlawfully arrested); Anon. (1452) Y.B. Mich. 31 Hen. VI, fo. 10, pl. 5 (a bill lies against a prisoner bailed from the Marshalsea, even if there is no record of his first committal).
25 Bail were people who took the party into their custody and gave security for producing him when required. In most civil actions a defendant was entitled to ‘reasonable bail’. In minor cases the sureties became fictitious (John Doe and Richard Roe), and release was therefore automatic. In many cases, however, the plaintiff could hold the defendant to ‘special bail’, and if he could not find real sureties he remained in gaol.
26 Some plaintiffs even sought to cover their traces by bringing the fictitious suit in the name of someone else: an abuse ended by Stat. 8 Eliz. I. c. 2.
27 When the court adjourned to Hertford or St Albans in time of plague, the invented trespass was set in Hertfordshire.
28 Note that this second dodge had no bearing on geographical jurisdiction: the court always had jurisdiction throughout England, but the bill procedure (where the defendant was not in custody) was only available for actions laid in Middlesex. Once the defendant was in custody, he could sued by bill in respect of matters arising in any county in England.
29 In suits by writ, any ‘variance’ between the writ and the plaintiff’s subsequent pleading was fatal, because the writ was the only warrant for the subsequent litigation and had to be followed to the letter.
30 Dr Jones has shown that this was a common practice between the 1550s and the 1590s, when Egerton LR stopped it. However, injunctions were used only in a small minority of cases.
31 North CJCP in Yale, Lord Nottingham’s Two Treatises, p. 171.
33 BL MS. Lansdowne 155, fo. 35.
34 For the development of actions on the case, see pp. 61–64, post.
35 Dictum in Gray’s Inn, Fitz. Abr., Action sur le case, pl. 45; B. & M. 401; p. 338, post.
36 See pp. 341, 342, post. Wager of law was not available in an action on the case.
17. Other Interests in Land

Not all interests in land were subject to the developments described in the preceding chapters. Several kinds of interest grew up outside the feudal scheme of real property, but since they did so for different reasons they are a miscellaneous collection. The kind of property which was the subject of seisin, and was protected by the real actions, was known as real property (reality), because there was a remedy in rem: that is, an action to recover the property (or res) itself. Some kinds of property which did not fit into this scheme, such as leases for years, were distinguished as ‘personal property’ (personalty), because the remedy for infringement lay in personam: usually an action for damages. Other kinds of property were outside the common law altogether. Unfree tenancies were at first protected only by real actions in seigniorial courts, and the interests which came to be classified as equitable by personal actions in Chancery.

Classifications are only as good as the purpose they serve, and these legal classifications of property do not always hold good over time. Some interests which began outside the common law subsequently gained protection within it – for example, copyholds, or uses executed by the Statute of Uses. A more conceptual difficulty is that some forms of personality came eventually to achieve substantial protection in rem while retaining some of the characteristics of chattels (such as being uninheritable). They became known as ‘chattels real’. The prime example is the term of years.

The Term of Years

A term of years – or lease for years – is an estate in land for a fixed period of time, usually not necessarily a number of years. Such a term was not a freehold interest and was therefore exempt from the feudal notions of seisin and tenure, inheritance and future interests. It may surprise today’s student to learn that an estate in land for nine hundred and ninety-nine years is a chattel, whereas an estate which lasts only for one man’s lifetime is a freehold. The distinction obviously does not represent the quantity of an estate, as measured in terms of duration; it is a distinction of quality which lost its rational basis many centuries ago.

5 This was not invariably so. For some 12th-century examples of ecclesiastical leases for years see J. Hudson, *Land, Law and Lordship* (1994), pp. 59, 239. For an 11th-century example see 106 SS 22.
6 See further p. 311, post.
7 For the form of the writ, see p. 545, post. For the date, see 100 SS lxxiii.
8 Herle CJ even said that it was not an estate in law: *Anon.* (1333) Y.B. Mich. 7 Edw. III, fo. 45, pl. 8.
more than the term: if he purported to do so, it was a disseisin of the lessor, who could bring an assize against the aliener. Most of these rules remained inviolate for centuries; but there occurred nevertheless a fundamental change in the term of years.

CHANGE IN NATURE OF TERM OF YEARS

Most leases at the present day involve letting the beneficial enjoyment of land at a rent. The lessee is regarded as the owner of the land for many purposes, and the lessor as the owner of a reversion which entitles him during the term to the rent. Here is a parallel with the sort of arrangement achieved before 1290 by subinfeudation at a rent, which was called ‘fee farm’ (from the Latin word *firma*, rent). The purpose of the fee farm was usually to produce a regular periodic income for the feudal lord. The farmer (*firmarius*), though he might have paid a premium, was primarily a rent-payer; like the lessee of today he wanted possession of land for his own use, and that is what he was paying for. He had no funds to buy the fee outright, so he bought it for a rent and became a tenant farmer.

When the statute *Quia emptores* ended subinfeudation in 1290, it incidentally deprived landowners of this method of securing an income. They could still alienate their property in fee farm by substitution, reserving the rent as a charge on the land rather than as a feudal service; but they would then have to part with their property permanently, with the result that their manors would be diminished. A similar effect to subinfeudation could, however, be achieved by leasing the land for years to a rent-paying tenant; and within a century of *Quia emptores* the husbandry lease to farm (*dimissio ad firmam*) became very common.

At the same time as the husbandry lease grew in popularity, the mortgage by way of a term declined. By the fifteenth century the typical lessee for years was not a money-lender but a farmer in the later sense, a husbandman with insufficient capital to buy an estate in fee but able to pay rent out of the fruits of his labour. The lease for years had thus come to imitate some of the features of feudalism; the lessee began to be called the landlord, the lessee his tenant; the landlord could distrain, and it was said that the lessee owed him fealty. In these changed circumstances, the farmer tenant needed legal protection as much as the freehold tenant, and the fact that the subject of his ownership was classed as a chattel was an historical accident which seemed to deny him a just remedy. He had the action of ejectment; but that, being a form of trespass, properly lay only for damages. Although a precedent has been found as early as 1390 in which a lessee recovered his term in such an action, a technical objection to such recovery was that a trespass action was concerned only with past wrongs and not with continuing rights; inability to recover seems therefore to have been the orthodox view until 1499, at any rate as against strangers. The reversal of this orthodoxy may have been accelerated by knowledge that the fifteenth-century Chancery was giving protection to the lessee. Whatever the explanation, the reversal is taken to have been settled by a King’s Bench decision of 1499. The form of judgment in the action of ejectment, where the term had not expired, was now that the plaintiff recover his term as well as damages for the trespass. The award of possession could be enforced by the judicial writ *habere facias possessionem*, giving the plaintiff the effect of a real action. The result was to transform the character of the term of years. It had become real property, recoverable in specie: a chattel still, but a chattel real.

FURTHER SECURITY OF THE TERMOR

The judges and the legislature took further steps to protect the termor in the first half of the sixteenth century. There were two common situations in which the term of years was liable to destruction without the consent of the termor, and if the termor was to be treated as a property owner these had to be remedied. The first problem was that a lease was precarious as against the lessor’s lord: if the lessor died leaving an infant heir in ward, the guardian could evict the lessee during the warship, on the ground that the seignory existed before the lease and therefore the lord’s rights took priority. This harsh rule was reversed by the King’s Bench in 1514, then restored (at least in the Common Pleas) by the opinion of Fitzherbert J and others, until finally laid to rest in the 1540s. The second problem was that a lease could be destroyed by a common recovery of the reversion. If the lessee knew that a recovery was under way, he could intervene to protect his interest; but if the lessor suffered a recovery without the lessee’s knowledge, it was too late to help the latter. The remedy in this case came from parliament, which passed a statute in 1529 enabling a lessee to ‘falsify’ such a recovery by bringing *quare eject* or ejectment.

USE OF EJECTMENT TO TRY FREEHOLD TITLE

The action of ejectment not only gave the leasholder a remedy, but it was a remedy superior in practice to anything available to the freeholder. He could recover possession by a form of action free from the technicalities of the writs of entry and the possessory assizes, with the speedy mesne process appropriate to a trespass action, and in which trial was by jury. The position of a lessee plaintiff in litigation therefore excited the envy of plaintiffs claiming fee or freehold, and by about 1565–70 they had adopted ejectment as their own standard

---

9 See p. 242, ante. For the implications in this context, see Milsom HFCL, pp. 116-117.
10 See pp. 311-312, post.
11 Littleton, *Tenures*, s. 143.
12 Plucknett CHCL, p. 373 n. 5; Arnold, 100 SS lxxxii n. 560. A later example is *Pynchemore v. Brewyn* (1481) Kiralfy SB, p. 110; and see *Trussell v. Maydeford* (1493) Caryll Rep. 156 at 157, per Kebell and Wode sjts. These seem all to be actions against lessors.
13 There is a clear statement to this effect in *Brancaster v. Master of Royston Hospital* (1383) Y.B. Pas. 6 Ric. II, p. 208, pl. 2, per Bekknop CL. For later statements to the same effect, see B. & M. 179; Port 127.
14 *Gerner v. Smyth* (1499) B. & M. 179-180 n. 2 (affirming a judgment of the Common Pleas). As late as 1574 Dyer CJ said this was not good law: BL MS. Hargrave 374, fo. 125v.
15 B. & M. 183-185; *Corbet’s Case* (1599) 4 Co. Rep. 81. See also Arnold, [1976] CLJ at 326; 94 SS 182.
16 Anon. (1507) Caryll Rep. 561. See also the Inner Temple discussion of the 1480s in 105 SS 75.
17 94 SS 182-183; Stat. 21 Hen. VIII, c. 15.
remedy. By the beginning of the seventeenth century, according to Sir Thomas Egeron, this innovation had caused 'a great decay of the true knowledge and learning of the law in real actions', and had 'almost utterly overthrown' the assizes and writs of entry. By 1670, according to a judge, 'real actions were so much out of use that there was ne'er a judge in Westminster Hall did know what to make of them'.

The trick was as follows. The freeholder would lease the land in question to a friend for the purpose of bringing the action, and would contrive to put him in possession so that he would be ejected by the defendant. The nominal lessee would then bring ejectment against the ejector, who would plead his title, and so the question of title would be tried by jury. If the plaintiff succeeded, he would surrender to his lessor, who thereby obtained possession of the land. This procedure was so much more convenient than the older actions that the courts facilitated its use by refusing to allow defendants to evade the issue of title by disputing the details of the lessee’s entry and physical ejectment. Indeed, by the middle of the seventeenth century the whole process was simplified, with judicial connivance, by means of a remarkable fiction.

In its perfected form, the action of ejectment to try freehold title was brought by a wholly imaginary lessee (usually called John Doe) against an equally imaginary person (often called Richard Roe, or given a pejorative name such as Shamtitle) who was supposed to be the lessee of the person in possession and to have ejected John Doe. These fictitious creatures were puppets of the real claimant, who could pull their strings without incurring the trouble, and possible danger, of making a physical entry, putting the lessee in possession, and waiting for him to be personally ejected by the real defendant. The real plaintiff could at the same time avoid the expense of a writ and of process to procure the fictitious defendant’s appearance. Since he controlled the fictitious, he could make the defendant enter an appearance. His attorney then wrote a letter from the fictitious defendant to inform the real defendant that an action had been commenced against him, enclosing a copy of the declaration, and inviting him to come and defend his title. This was the point where the real litigation began. The court allowed the real defendant to intervene as reversoner, but only on condition that he signed the ‘consent rule’. This was an order of court which obliged the defendant to accept the fictitious and to enter a plea of Not guilty. As a result, questions of title were raised in evidence to the jury on the general issue, and the more slippery technicalities associated with the pleading of title were eliminated.

Ejectment replaced the old real actions and assizes in all the cases where it would lie, but it was not quite universal because the fictions enabled the plaintiff to take a short cut only where he could have gone the long way. Since a valid lease could only be granted by a person entitled to enter, the fictitious apparatus could not be se: up if the real plaintiff had no right of entry. The action was therefore not available if the plaintiff's right of entry had been 'toll'd' – lost in law – through failure to exercise it in time; for instance, after a descent from a disseisor to his heir, or after the expiration of the twenty-one year limitation period ordained in 1624. Furthermore, ejectment would not lie for those types of property which in their nature could not be entered upon and leased: for instance, advowsons, rights of way, and unassigned dower.

For nearly three centuries from Elizabeth I to Victoria the usual action to recover real property thus involved two non-existent parties. The very title of an ejectment action – for example, Doe v. Smith v. Roe – concealed the truth. In 1833 ejectment was raised to the status of being the only permissible real action, except for the writ of right of dower and the action of quare impedit for advowsons. John Doe and Richard Roe were finally retired in 1852 when fictitious actions were abolished. The present action to recover possession of land is nevertheless the direct successor of ejectment, and the rules about proof of title are, with statutory alterations, those developed in that action rather than in the old real actions.

LEASES AND SETTLEMENTS

The usual husbandry lease was not for a long period; twenty-one years would have been normal. The ninety-nine year lease was the longest beneficial term created in the ordinary course of events before the mid-sixteenth century. In medieval times longer leases may have been regarded as unsafe because they were precarious; but the protection extended to the lessee in the first third of the sixteenth century opened the way to using long leases as a conveyancing device. The lease was now an estate in land with many of the attributes, and none of the burdens, of feudal tenure. Leases for as long as a thousand years began to appear, perhaps with the intention of avoiding feudal incidents. It also occurred to conveyancers that if long leases could be used in creating settlements, there might be a way of avoiding the rules about contingent remainders and executory interests. Moreover, the splitting of ownership between a long-term lessee and a reversoner, neither of whom could convey the freehold in possession, brought perpetuities again within reach.

An obstacle in the way of using leases as the basis of family settlements was that estates could not be created in chattels. It was, however, possible to settle the use of chattels, and such uses were not executed by the Statute of Uses. In the 1550s it was held that a testator could in consequence devise a term of years to X, and if X should die during the term then to Y. Y's interest could not technically be a remainder, since at law there could be no remainder in a

18 B. & M. 180 (c. 1602). Cf. Dyer CJ's similar complaint in 1573: 3 Leo. 51.
19 Treby's manuscript reports in Middle Temple Library, p. 278, per Twissan J.
20 For the forms used, see B. & M. 180-182. For their origin see The Law's Two Bodies, pp. 51 n. 21, 123-124.
21 Statute of Limitations 1624, 2: Jac. 1. c. 16.
22 I.e. Doe (nominal plaintiff) on the demise of Smith (real plaintiff) against Roe (casual ejector).
23 Real Property Limitation Act 1833, 3 & 4 Will. IV, c. 27; Common Law Procedure Act 1852, 15 & 16 Vict., c. 76.
25 See p. 389, post.
26 Maynall's Case (a. 1553) cit. in BL MS. Harley 1691, fo. 91v. See also p. 290, ante; and p. 390, post.
27 Anon. (1550) B. & M. 186; Anon. (1553) BL MS. Harley 5141, fo. 6v; Anon. (1572) B. & M. 187.
thereupon the defendant sued a writ of error, and the judgment was
affirmed and execution awarded to the plaintiff.2
And in the year 17 Hen. VIII a similar judgment was given in the
Common Bench, that he should recover his term and his damages.3

ANON. (c. 1602)
CUL. MS. Gg. 2. 31, fo. 480v, pl. 185 (untr.).4

My Lord Keeper [EGERTON] calls this ejectione firmae whereby
titles are tried 'pick-purse actions', because he cannot come to
know the plaintiff's title; but, having held a possession of long
time, shall be turned out upon a quirk in law, against which the
defendant hath no defence. And though titles are also tried by
actions of trespass quaere clausum fregit, upon Not guilty pleaded,
yet there is no loss of possession in that action as in the other.5

PROCEDURE IN THE QUEEN'S BENCH (1703)
Lilly, Entries (3rd ed.), p. 203.6

(a) Declaration.

Hilary term in the first year of the reign of Queen Anne.
Middlesex. Lawrence Legawe, late of London, gentleman, was
attached to answer Thomas Leake, gentleman, in a plea why with
force and arms he entered into 3 messuages, 30 acres of land, 20
acres of meadow and 10 acres of pasture with the appurtenances in
Hadley, which the Honourable Vere Booth, spinster, demised to
the same Thomas for a term which is not yet past, and ejected
him from his farm aforesaid, and committed other outrage on
him, to the great damage of the said Thomas and against the peace
of the now lady the queen etc. And thereupon the said Thomas
Leake, by John Lilly his attorney, complains that, whereas the said
Vere Booth on the twentieth day of November [1702] in the first
year of the reign of the lady Anne now queen of England etc.
demised to the same Thomas the tenements aforesaid with the
appurtenances, to have and to hold the tenements aforesaid with
the appurtenances unto the same Thomas and his assigns from the
seventeenth day of the same month of November then last past
unto the end and term of five years from then next ensuing and
fully to be completed and ended, by virtue of which demise the
same Thomas entered into the tenements aforesaid with the appur-
tenances and was thereof possessed: the said Lawrence (the said
Thomas being so possessed thereof) afterwards, namely on the
same twenty day of November in the first year above aforesaid, with
force and arms etc., entered into the tenements aforesaid with the
appurtenances, which the said Vere Booth demised to the same
Thomas in form aforesaid for the term aforesaid, which is not yet
past, and ejected him the said Thomas from his farm aforesaid, and
other outrages etc., to the great damage etc., and against the peace
etc.; whereby he says that he is the worse, and has damage to the
amount of £40. And thereof he produces suit etc.

(b) Letter to defendant from casual ejector.7

To Sir William Buck, Bart.

I am informed that you are in
possession or claim title to the premises in this declaration of
ejectment mentioned, or to some part thereof; and, being sued in
this action as a casual ejector, and having no claim or title to the

7 This letter was delivered with a copy of the declaration. In the 18th century, both
documents were obtainable from law stationers as standard forms, with blanks,
printed on the same sheet of paper. This document effectively initiated the suit,
since the usual means process was unnecessary.
same, do advise you to appear the first day of the next Hilary term in Her Majesty's Court of Queen's Bench at Westminster, by some attorney of that court, and then and there by rule of the same court to cause yourself to be made defendant in my stead; otherwise I shall suffer a judgment to be entered against me, and you will be turned out of possession.

Your loving friend,
Lawrence Legawe.

(Date.)

(c) Rule nisi to enter judgment.

Unless the tenant in possession shall appear and plead to issue within one week next after the end of this term, let judgment be entered for the plaintiff against the now defendant Legawe. On the motion of Mr. Brodrick.

By the court.

(d) The consent rule.

It is ordered by the consent of the parties that William Buck, baronet, be made a defendant in the place of the now defendant Legawe, and shall appear without delay at the suit of the plaintiff, and shall receive a declaration in a plea of trespass and ejectment for the tenements in question, and shall without delay plead thereto. Not guilty; and on the trial of the issue aforesaid shall confess the lease, entry and actual ejectment from the tenements in question, and shall insist on the title only, otherwise judgment to be entered for the plaintiff against the now defendant Legawe by default; and if on the trial of the issue aforesaid the same William shall not confess the lease, entry and ejectment, whereby the plaintiff shall not be able to prosecute his writ against the said William, then no costs or charges shall be assessed upon such non prosecution be adjudged, but that the said William shall pay to the said plaintiff the costs and charges thereon to be taxed; and it is further ordered that if on trial of the issue a verdict shall be given for the defendant William, or if it shall happen that the plaintiff shall not further prosecute his writ aforesaid against the said William for any other cause than for not confessing the lease, entry and actual ejectment aforesaid, that then the lessor of the plaintiff aforesaid shall pay to the said William the costs and charges by the court here to be taxed.

John Powell* for costs £12.

H. for the plaintiff.

L. for the defendant.

Printed in Lilly, Entries before (a), with the name of Henry Plumer (here altered to William Buck) as the real defendant.

Signature of judge in chambers.

(2) Protection against the lessor's lord

ANON. (1306)


Note that if the tenant leases his land for a term of years, and dies, leaving his heir under age, the lord shall oust the termee* and have it in ward; and the termee shall have a writ of covenant against the heir at his full age for this term: adjudged by the justices...

This doctrine is repeated, without further dispute, throughout the year books (see 4 Co. Rep., at p. 82) and at inns of court readings (see Selden Soc. vol. 93, pp. 144, 176) until the first decade of the 16th century.

ANON. (c. 1514)

(a) GL MS. 25, fo. 172 (K.B.).*

It was argued whether the lord shall oust the tenant for term of years made by the heir's father.**

Coningsby J. It seems not, for just as one may make a feoffment for life, and the lord shall not oust [the life-tenant], for the same reason he shall not oust the tenant for years. If one charges the land with a rentcharge for years, the lord shall hold charged. (This was conceded by all the justices.) . . . Here he is lord, and he claims from the day of the tenant’s dying and not before, for the writ says, ’he died in his homage’: therefore the lease precedes his title; to the wardship, and so he shall not oust [the lessee].

Brudenell J. to the same effect. Here priority and posteriority

---

* I.e. lessee, or termor.
** After 1509 (when Coningsby became a judge), and before 1520 (when Brudenell became C.J.C.P.); probably before 1516, since a reading of 1516 follows in the MS. Cf. the date of (b), below.
10 I.e. a. is freehold tenant of B. and leases for years to C. A. dies, leaving an infant heir D. Does B. have the land (as D.’s guardian), or does C. have it as A.’s lessee?