Sources of English Legal History
Private Law to 1750

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right that they should pay their testator's debts: for even though the testator is dead, the indebtedness still remains as it was before, and they have the goods to the use of the testator.

FITZHERBERT. You shall not have any action on the case, or any other remedy; for, once the testator is dead, this debt which was due by reason of a simple contract is dead also.

Knightley. The reason why no writ of debt lies against executors is because the testator could have waged his law, and the executors cannot do his law, and therefore they are not chargeable. In the Exchequer it is a common practice for the king's [debtors][3] to have *quominus* against the executors of their own debtors (who are indebted to them by simple contract), supposing that they have not been paid and thereby the king cannot have his debts.[4]

FITZHERBERT. That is not so, for there is no such practice in the Exchequer. The law is quite otherwise. In Michaelmas in the twelfth year of the present king:[5] I was of counsel with one Cleymond[6] of London in an action on the case brought against executors in a similar matter, and the case was adjudged in my favour by Fyneux [C.J.] and Coningsby [J.], against the executors. But I hold that the law is clearly otherwise, and that they acted without taking any advice, but only on their own opinions.

Someone told him that the case was reported in the twelfth year of the present king.

FITZHERBERT. Put that case out of your books, for it is not law without doubt. (Note that.)

NORWOOD v NORWOOD AND REDE (1557)

Record: KB 27/1182, m. 188; Plowd. 180v. Richard Norwood brought a bill of trespass on the case against Thomas Norwood, the elder, and Edward Rede, executors of Thomas Gray, complaining that, whereas on 2 April 1556, in the parish of St Sepulchre, London, he had delivered 40s. to Thomas Gray at his request, and in consideration thereof Gray had faithfully promised and undertaken that he, his executors or assigns would deliver to the plaintiff at Ramsgate, Kent, 50 quarters of wheat for £33. 6s. 8d., to be delivered and paid for in two instalments (in December and March): nevertheless Gray, wickedly scheming to defraud the plaintiff, did not deliver the wheat or any part thereof in his lifetime, though the plaintiff often requested delivery and was ready with the money at the appointed

3 Both texts read 'debtees'.
4 The last clause is garbled in print, but correct in MS.
5 *Cleymond v Vyncent* (1520); see p. 446, above.
6 Reads 'Clement' in print, 'client' in MS.

times and places; and the executors, having assets to satisfy the plaintiff and pay all the testator's debts, did not deliver the wheat either; and as a result the plaintiff was damaged in his credit with various persons, especially Ralph Mannings and Christopher Stransham, to whom he had resold the wheat; to his damage of 200 marks. The defendants demurred to the declaration.

Plowd. 181v.

... And it was argued in Michaelmas term in the fourth and fifth years of the present king and queen [1557], by *Lovelace* and *Gerrard* on behalf of the defendants, and by *Fosset*[7] and *Manwood* on behalf of the plaintiffs—as I heard, for I was not present throughout—whether or not the action on the case lay against executors upon such an undertaking by the testator. On behalf of the defendants it was said that this undertaking was nothing other than a simple contract, and if executors should be charged by such a contract they should for the same reason be charged by any contract executory, both for debt and for other things. For every contract executory is an undertaking in itself. And it would be unfitting to charge them by contracts made in pais by word of mouth, as well as by specialties, for they cannot have knowledge of [the former]. It was further said that there are various precedents in the court here which have been shown to you, my lords the judges, that in such actions brought against executors as ours is here, the executors have pleaded in bar and when the pleas were found in favour of the plaintiffs they have recovered. Nevertheless, this does not prove the law to be against us in our case here, where we have demurred in law ... There is but one case touching our matter which has been ruled. That is the case in 12 Hen. VIII[8] ... As to that, however, it does not appear there whether it was demurred in judgment or not, and perhaps the party pleaded in bar[9]... And even if judgment was given upon demurrer, may it please you to hear what Fitzherbert J. said in 27 Hen. VIII[10] concerning the said case ... Thus (it was said) the authority of that case is impeached by Fitzherbert J., who had been of counsel on behalf of the plaintiff for whom the judgment was given, and who as a judge of great reputation held it to be erroneous. And it was in

7 Sic. Probably Richard Forsett, reader of Gray's Inn.
8 *Cleymond v Vyncent* (1520); see p. 446, above.
9 The record shows that the defendant did plead in bar.
10 See p. 448, opposite.

fact contrary to the principles of the law, because such an undertaking is but a contract in pais, as a contract of debt is . . .[11]

But it was said on the other side that in this case the testator could not have waged his law; and where he could not have done so the action lies against executors by the rule of the common law: for it is not right that, if they have assets to pay the debts and legacies and also to satisfy the plaintiff, they should retain the residue of the goods for their own use. And there is no prejudice in paying this, but it is charitable, and beneficial to the testator's soul; whereas to leave it unpaid is no good to anyone except the executors, and they ought not to have the benefit of it, for that was not the testator's intent; for they are but ministers and distributors of the goods of the deceased, and in taking a benefit themselves they break the trust of the deceased. And the judgment in 12 Hen. VIII, given by the court, is not to be so easily rejected by the dictum of Fitzherbert . . .

All the justices agreed that the declaration was good, and that the executors should be charged to the plaintiff. And so, without solemn argument,[12] they gave judgment for the plaintiff and that he should have a writ to inquire of the damages . . .[13]

The record shows that judgment was given accordingly in Michaelmas term 1557.

ANON. (1571)

BL MS. Add. 25211, fo. 100.

Note that the Lord DYER C.J.C.P. would not allow trespass on the case against executors on an *assumpsit* of the testator; and he said that Mountague C.J.[14] had first allowed them in the Common Bench, and that he brought the course with him when he was removed here out of the King's Bench.

11 Counsel then attacked the declaration for not saying that the executors had assets to pay legacies as well as debts.

12 I.e. without a full speech from each judge.

13 Plowden adds at the end: 'It has been greatly doubted since the ruling in the said case of 12 Hen. VIII whether the action will lie here by the law, and whether the said case in the year 12 Hen. VIII was well adjudged or not. And it seemed to many wise men who were well learned in our law that by the old law the action was not maintainable against executors in the above case; but that conscience had encroached this case on the common law. But it seems that this is not so . . .' Such doubts in the 1540s are noted in Brooke Abr., *Action sur le case*, pl. 4, 106.

14 Sir Edward Mountague (d. 1557), C.J.K.B. 1539–45, C.J.C.P. 1545–53.

COTTINGTON v HULETT (1587)

Record: KB 27/1301, m. 186. Margery Cottington, widow, brought a bill of trespass on the case against Anne Hulett, widow and executrix of Robert Hulett, complaining that, whereas the deceased, on 25 March 1576 at Wells, Somerset, in consideration that the plaintiff had lent him £200 at his request, undertook to pay her back at the next Lady Day: nevertheless neither he nor his executrix had paid back the £200. The defendant pleaded *Non assumpsit*; and on 7 August 1587 at Taunton assizes (Anderson C.J.C.P., Gent B.) the jury found for the plaintiff with £200 damages. The defendant moved in arrest of judgment the following Michaelmas term.

HLS MS. 16, fo. 401v; CUL MS. Ii. 5. 38, fo. 249.[15]

It was moved whether the plaintiff in an action on the case against executors upon their testator's *assumpsit* ought to aver that they have assets to discharge all other debts and legacies. And it was in effect agreed that he need not aver that they have assets to discharge legacies; but it was doubted whether or not he ought to aver that they have assets to discharge other debts as well.

Coke. Conscience has encroached the whole of this action upon the common law,[16] for such an action did not lie under the old law. And (according to him) it is not like the case of an action of debt against an heir, for there the action is in the *debet et detinet* and there is no need to aver assets . . . In the case of 12 Hen. VIII[17] there was an averment of assets to content him and also to pay other debts . . .

WRAY C.J. The assets are not traversable; and what mischief is there for the defendant? For he may plead Nothing in hand, or Fully administered; and if he pleads *Non assumpsit*, still the judgment shall be in respect of the testator's goods.

Coke. He has no title without assets.

WRAY C.J. If they do not have assets, they may plead Nothing in hand.

GAWDY J. thought he ought to aver assets, to the intent that it may appear to the court that he has a cause of action.

Coke. At common law one could not have an action on the case if he could have a remedy by some other action; but that old law is now altered, and it is now taken to be a rule that for matters whereupon he can have his bill and *subpoena* in the Chancery, he can now have an action on the case upon *assumpsit* at common law.

15 Anonymous here, but identified from the shorter report in Cro. Eliz. 59.

16 A quotation from Plowden; see p. 450, fn. 13, opposite.

17 *Cleymond v Vyncent* (1520); see p. 446, above.