VII

THE HISTORY OF CONTRACT IN EARLY ENGLISH EQUITY

BY

W. T. BARBOUR, A.M., LL.B., B.LITT.

ASSISTANT-PROFESSOR OF LAW IN THE UNIVERSITY OF MICHIGAN, U.S.A.

NOTE

THIS essay has been materially abridged in order to bring it within a reasonable length. Had I followed out the plan originally projected, it would have contained an additional hundred pages. Part I stands as originally written ; Part II has been somewhat condensed. I should have liked to include more extracts from the petitions and to submit a greater number of cases, but it seemed desirable to make this study as brief as possible. As it is, I have burdened the text with numerous quotations, but, as the chancery material is not available in published form, a mere reference to a petition by number without indicating its content would not be convincing. I hope, however, that I have not obscured the argument by too frequent quotation.

The chancery petitions are cited by indicating the bundle number in Roman numerals and the number of the petition in Arabic numerals. Thus, XII. 10 means Bundle twelve, Petition number ten.

In the Appendix I have given a few select petitions. They were chosen from among some 500 transcripts which I made at the Public Record Office.

ANALYSIS

PART II. CONTRACT IN EQUITY

INTRODUCTION

THERE is scarcely a subject in legal history which has occasioned more discussion than the history of contract. Particularly in English law it has excited the attention of many able investigators;[1] and as so much has been written, it may seem presumptuous to undertake to say anything more. The only excuse for such an essay as this is that the material upon which it is based is new and, so far as I am aware, has never been published.

I propose to discuss the history of contract in chancery in the fifteenth century, and I shall base my argument largely upon the petitions which were brought before the chancellor during that period. It is my purpose not alone to show what was actually done in equity, but also to determine so far as possible the principles upon which the chancellor acted. Our chief interest lies in the development of parol contract, but it seemed to me desirable to give some consideration to the contract under seal as well. My reasons for so doing will appear later.

[1] e. g. Holmes, The Common Law, Lecture VII; Pollock and Maitland, History of English Law, vol. ii, chap. v; Ames, History of Assumpsit, *Harvard Law Review*, vol. ii, pp. 1–19, 53–69; Ames, Parol Contracts, *idem*, vol. viii, pp. 252–64; Salmond, History of Contract, *Law Quarterly Review*, vol. iii, pp. 166–79; Salmond, Essays in Jurisprudence and Legal History, Essay IV; Jenks, The Doctrine of Consideration (Yorke Prize Essay, 1891); Holdsworth, History of English Law, vol. iii, chap. iii. See also Holmes, Early English Equity, *Law Quarterly Review*, vol. i, pp. 162–74; Vinogradoff, Reason and Conscience in Sixteenth-Century Jurisprudence, *idem*, vol. xxiv, pp. 373–83.

This essay then deals chiefly with the development of contract in equity. But it is impossible to consider equitable doctrines alone and by themselves. Their significance is apparent only when they are placed side by side, and contrasted with the doctrines of the common law. Accordingly I have divided this essay into two parts. Part I, which is introductory, gives a brief review of the history of contract in the common law. Part II is an attempt to set forth the equitable doctrines with regard to contract.

PART I

CONTRACT IN THE COMMON LAW

CHAPTER I

INTRODUCTORY

THE theory of contract as it existed in the common law must be found in the history of the common law actions. 'So great is the ascendancy of the Law of Actions in the Courts of Justice', remarked Sir Henry Maine,[1] 'that substantive law has at first the look of being gradually secreted in the interstices of procedure.' And so we find it in the common law in the fourteenth and fifteenth centuries. Accordingly I have based the discussion of contract on the actions of Account, Covenant, Debt, Detinue, and Assumpsit. These are practically the only common law actions which had any effect upon the development of the substantive law so far as contract is concerned.

As one looks at the common law as a whole, one must continually notice the insistent testimony which it bears to its feudal origin. This appears in the division of society into classes of men, upon whom certain liabilities are imposed. It will become very evident in our discussion of assumpsit. Again, it is seen in the dominating position given to the land law. For example, in 1285 a new rule was introduced by statute, that an Assize of Novel Disseisin would lie for a corody. A corody is really a benefit derived from contract; yet the right to receive it is treated as if it were a right in land.[2] This situation must have had its effect in the development of contract. I merely wish to call attention to it here.

[1] Early Law and Custom, 389 (quoted, Maitland, Equity, 295).
[2] See P. and M., ii. 135.

In reviewing the common law I am considering a subject which has been very fully discussed elsewhere. Hence I shall be as brief as possible. I have treated at some length cases which do not seem to have been considered heretofore; and in one or two places I have sought to put a different interpretation upon cases that are well known. In general, however, what is said here is merely a summary of the work of previous writers.

At the same time I have adopted a different point of view. I have sought to show not so much the efficiency of the common law as its inefficiency; I have stressed the defects of the actions, and have attempted to set forth the important types of contract for which there was no remedy. In the second place, the study of the common law is not carried beyond the year 1504, when assumpsit first obtained general recognition as an action on contract. In that respect it is fragmentary, but it suffices for the present purpose. In equity I have considered only the fifteenth century, and in consequence the contrast is with the common law of the same period. By the action of assumpsit the common law was able in the sixteenth century to retrieve its lost jurisdiction over contract, but we are here dealing with an earlier period. In brief, I have treated the common law as a means of approaching chancery, and in this light I have attempted to sketch the history of the different actions.

CHAPTER II

THE COMMON LAW ACTIONS

SECTION I. ACCOUNT

THE precise moment when the action of Account made its first appearance cannot be fixed with certainty, but one of the earliest known cases in which it was used was in 1232.[1] From that time onward it appears with greater frequency, until at length it succumbed to the competition with chancery; but in the Year Books it is a common form of action. The form of the writ[2] shows that it was modelled upon the proprietary writs; the 'command' was that the defendant should render the plaintiff an account, while the plaintiff in stating his case must show how the liability to account arose, and how and where the money claimed was received.[3]

According to the theory of the common law the action existed for one purpose only:[4] to enforce the obligation to account. It becomes important, therefore, to inquire into the precise nature of this obligation. It was not founded upon contract; rather was it an independent creation of the law itself, and though a bond were conditioned to render an account, it would not support the action unless the necessary conditions which created the obligation to account did exist.[5]

[1] P. and M., ii. 221; Note Book, pl. 859.

[2] 'Precipe A quod iusta et sine dilatione reddat B rationabile compotum suum de tempore quo fuit ballivus suus in C receptorum denariorum ipsius B ut dicit . . .' Pollock, H. L. R., vi. 401. See Maitland, Equity, 382.

[3] e.g. 'Un homme porta un bref d'acompte vers un autre et assigna les resseites par my la mayn un tiel.' Y. B. 11 & 12 Ed. III [R. S.] 315.

[4] For this statement of the obligation to account I am indebted to Langdell, H. L. R., ii. 242–57.

[5] H. L. R., ii. 243, and cases cited.

We may enumerate four essentials, without the concurrence of which the action did not lie: [1]

(1) The person on whom the obligation is to be imposed must have received property not his own, of which the person imposing the obligation is owner.

(2) The receipt of the property must not amount to a bailment.

(3) The receiver must have possession, as distinguished from custody.

(4) There must be privity between the parties.

It will be obvious, then, that account was confined to a narrow orbit. Indeed, the common law recognized as accountable only three classes of persons: guardians, bailiffs, and receivers, and the extension by statute [2] to the guardian in socage was not a material enlargement. In none of these cases does contract, as such, have any function.

It should be noted, however, that the law was making an attempt, confessedly awkward, to meet the widening demands of commerce. There is some indication in the early cases that primitive arrangements, which to the modern eye suggest partnership [3] or agency, were attempting to take shelter beneath the mantle of account. Thus, where two embarked on a commercial venture, one sought to hold the other to an account for the time when he 'fuit receptor denariorum ipsius A ex quacumque causa et contractu ad communem utilitatem A et B proveniencium'. [4] In 1340 [5] a plaintiff seeks to compel a defendant to account for money received to trade with. But such instances are comparatively rare. The action never acquired sufficient flexibility to serve any useful purpose for

[1] See more fully H. L. R., ii. 243–8.

[2] Prov. Westm. (1259), c. 12; Stat. Marlb. (1267), c. 17, and see Y.B.B. 12 & 13 Ed. III [R.S.] 321; 18 & 19 Ed. III [R.S.] 325 (action does not lie till heir is of full age); 19 Ed. III [R.S.] 449.

[3] In later common law co-partners as such were not accountable to each other (see Langdell, H.L.R., ii. 265, citing Lindley, Partn. [4th ed.] 1022 n. R.), but I am referring to the early cases.

[4] Y.B. 33–5 Ed. I [R.S.] 295.

[5] Y.B. 14 Ed. III [R.S.] 283; and note a curious case in 16 Ed. III (pt. i) 191, where an action was brought against the keeper of a marsh who dug turves and sold them, keeping the profits himself.

merchants or traders, and we note the above cases as exemplifying a tendency, and nothing more.

It is sometimes asserted that Debt, and later Indebitatus Assumpsit, superseded Account. Such an assertion rests upon a confusion of ideas; for a *debt* was necessary to support either of those actions, and obviously an obligation to account could not constitute a debt.[1]

Circumstances might of course arise in which the receiver had so dealt with the property [2] that the obligation to account could be treated as having been converted into a debt; in such case the plaintiff would have the option of holding the receiver to account or of waiving the account and bringing debt. Thus, where a receiver granted by deed that he had received £46 of the plaintiff, to be employed to his use, and further granted to repay the £46 to the plaintiff; there account might be brought, or if the account were waived, debt would lie on the grant to repay.[3] This became important if there were a death on one side; for account would not lie against the executor or heir of the receiver, whereas debt would, provided there were a deed.[4]

The suspension of the action in case of death was a vital defect. Though by statute [5] it was extended in favour of the executor of the obligee, the common law never regarded the executor or administrator of the obligor as answerable in account.[6] Furthermore, damages were not recoverable,[7] nor could a receiver be held accountable for profits,[8] and if the plaintiff counted of a receipt by his own hand, the defendant might wage his law and acquit himself by oath.[9] But, in

[1] The point is fully discussed in Core's Case, 28 H. VIII, Dyer, 20 (*a*).

[2] e. g. by converting it to his own use.

[3] See Y.B. 16 Ed. III (pt. ii) [R.S.] 383.

[4] 'Tut fut ceo a derener par voie d'acompte en sa vie ceo q'il devoit, apres sa mort il ne poet aver accion forsqe par voie de dette.' Kershuile J. in Y.B. 16 Ed. III (pt. ii) [R.S.] 383.

[5] 13 Ed. I (Westm. ii), chap. xxiii: and see Coke, 2nd Inst., 404.

[6] Y.B. 16 Ed. III (pt. ii) [R.S.] 383. This was remedied by statute, but not till 1705: 4 Anne, c. 16, s. 27.

[7] Y.B. 14 Ed. III [R.S.] 287 (per Schard J.).

[8] Langdell, H.L.R., ii. 247; Rol. Abr. *Accompt* (o) pl. 14, 15.

[9] Y.B. 13 & 14 Ed. III [R.S.] 289; otherwise where receipt could be proven by deed, Y.B. 16 Ed. III (pt. i) [R.S.] 5.

addition to these technical defects, there was one still more grave. The only adequate remedy was specific performance; that is, the defendant must be compelled to account; to the accomplishment of such a purpose the machinery of the common law was ill adapted.[1] Doubtless this occasioned the early intervention of equity; for in the Bill for account the chancellor had a more efficient remedy.[2]

An application to equity was made as early as 1385.[3] No reason is mentioned for applying to the chancellor, but the explanation may lie in the fact that the complainant was a 'clerc de la Chauncellerie'. Thenceforth appeals to equity become more frequent. In the early cases the complainant usually assigns his poverty,[4] or inability to get hold of the defendant by common law process,[5] as the occasion for coming to chancery; but at length the subject-matter of an account itself was treated as a sufficient cause.[6]

From this brief consideration of the action, it is apparent that account could do little for the law of contract. Founded upon an obligation which was essentially a creation of the

[1] Sometimes the common law endeavoured to coerce an obstinate defendant by putting him in irons. By statute (St. Westm. ii, c. 10) auditors had power to award a defendant to prison if he were found in arrearages and refused to account. See Termes de la Ley, fol. 4; in Y. B. 18 & 19 Ed. III [R. S.] 413 it was held that a defendant should be put in irons.

[2] A defect in the action arising from its being purely legal is well stated in the words of Mr. Hening: 'The plaintiff in account was compelled to undergo the delay of two distinct trials, the first before a jury to determine his right to an accounting, the judgment for the plaintiff being that the defendant do account (*quod computet*), and the second trial being the accounting itself before the court-appointed auditors.' Anglo-Am. iii. 350.

[3] III. i (10 S. S. 1).

[4] XI. 358 (where a complainant says that because of his poverty and the defendant's wealth he has no power to sue the common law).

[5] Thus in VI. 168 it is alleged that the defendant 'luy purpose de passer hors de jurisdiccon dicest Royalme', and by no process of law can he be restrained. The prayer asks for a writ of subpoena in a penalty of £1000.

[6] It is not always easy to distinguish Bills for accounting from other applications; for commonly the relief sought is 'general', i.e. the complainant trusts to the chancellor's discretion. See VII. 186; IX. 382. If the true intent of XVII. 335 (10 S. S. 107) is to have an account, it would seem that the common law requirement of privity was not strictly enforced in equity. However, the jurisdiction of equity in account is scarcely within the range of this essay.

law, and restricted even within its narrow sphere by procedural disadvantages, it could not be the source of any important substantive doctrine. For the common law theory of contract we must look elsewhere.

SECTION II. COVENANT AND THE CONTRACT UNDER SEAL

The Action of Covenant.

Nothing shows more forcibly the insistent conservatism of the common law than the development of the action of Covenant. Here was an action which drew its name and being from agreement (*conventio*), and remained throughout the early period the most purely contractual action of English law,[1] indeed for two centuries and more the only vehicle for enforcing executory contracts which gave unliquidated damages[2]; and yet when its claims are evaluated it will be found that it contributed very little to the substantive law of contract. Even its position as a contractual remedy was attained only by a struggle.

In England of the early twelfth century the dominating force, juristically considered, was the land law; it is not surprising, therefore, that Covenant first manifests itself in connexion with agreements relating to land. We find it in the earliest extant plea roll,[3] which comes from the reign of John, and by the time of Henry III[4] it was a common form of action and might be had 'as of course'.[5] 'En auncien temps', remarks one of counsel of a later period, 'homme soleit lever fynes par bref de covenant,'[6] a practice which may account for its popularity, but the occasion of its invention was not a desire to simplify conveyance, but to protect the termor. For while the termor had at this time no real right, he was allowed the benefit of a covenant;[7] the need for

[1] Holdsworth, iii. 326.
[2] Holdsworth, ii. 310.
[3] Select Civil Pleas (3 S. S., pl. 89); P. & M., ii. 216.
[4] See Maitland, Register of Writs, H. L. R., iii. 113–15 (especially p. 115, No. 6).
[5] P. & M., ii. 216.
[6] Y. B. 16 Ed. III (pt. ii) 523.
[7] P. & M., ii. 106.

protection of leases brought the writ into existence. Bracton[1] says that it had become the ordinary remedy of the lessee, who might thereby obtain a judgement for specific performance: that he recover possession of the land.

Gradually the action was extended to covenants not relating to land, though in the time of Glanville[2] the king's court showed great reluctance to concern itself with mere private agreements (*privatae conventiones*). By the time of Bracton,[3] however, Covenant was regarded as a general remedy, and any doubt which might have remained was set at rest by the Statute of Wales[4] (1284), where the action is treated as co-extensive with agreements. This looks as if a flexible and elastic contractual remedy had been evolved in the thirteenth century;[5] indeed it had possibilities, which were, however, negatived by two limitations, and its sphere of action was materially restricted.

These limitations are curious, but at the same time characteristic of the common law. The first appears from the rules of evidence, when we inquire as to what was necessary to support the action. Could the plaintiff sustain his case by the production of suit? There is a time (e. g. in the middle period of Edward I's reign)[6] when the judges show some uncertainty, but it was ultimately settled that Covenant could not be maintained without a deed.[7] This decision was fraught

[1] 'Solent aliquando tales cum eiecti essent infra terminum suum perquirere sibi per breve de conventione.' Bracton (R. S. ed. Twiss), iii. 468 (bk. iv, chap. xxxvi, fol. 220); and see Digby, Hist. R. P. (5th ed.), 176, 178. See also Y. B. B. 20 & 21 Ed. I [R. S.] 279; 2 & 3 Ed. II [S. S.] 84; 18 & 19 Ed. III [R. S.] 409; 19 Ed. III [R. S.] 17; 20 Ed. III (pt. i) [R. S.] 107; and cf. Y. B. 18 & 19 Ed. III [R. S.] 523.

[2] Glanville, x, cap. 8; 'privatas conventiones non solet curia domini Regis tueri . . .' (*idem*, x, cap. 18).

[3] P. & M., ii. 218, n. 3.

[4] Holdsworth, iii. 325.

[5] Maitland, Equity, 358.

[6] Y. B. 20 & 21 Ed. I [R. S.] 223. Mr. Salmond (Essays in Jurisprudence, 184) cites this case as deciding 'that a writing was the only admissible proof of an agreement'. It is submitted that the case makes no such decision. Witness the dialogue: '*Lowiere*: Quey avez del covenant? *Spigurnel*: Sute bone. *Lowiere*: Avez autre chosse? *Spigurnel*: dit ke non. *Lowiere*: Jugement, si nus devum respundre a sa sute sans escrit, &c.' Here the case ends. The reporters leave us uncertain as to the decision, but it was evidently still doubtful whether or no suit would support an action of Covenant.

[7] Y. B. 32 & 33 Ed. I [R. S.] 201; see P. & M., ii. 220, n. 1.

with tremendous consequences. It swept to one side and gave a peculiar character to obligations under seal; it left executory parol contracts helpless until the rise of Assumpsit restored them to their rightful position.

These remarks apply only to the king's court. Though the authority is very meagre, it seems to be pretty clearly established that a different rule prevailed by special custom. In London[1] and probably in Bristol,[2] Covenant lay without a sealed instrument. The origin of this peculiar custom has occasioned much speculation, with which we are not here concerned. We may note in passing, however, that there is some significance in the fact that the custom subsisted in communities which were essentially mercantile and affected by commerce. Perhaps it is more than a coincidence that Covenant without specialty abode in the same county with gavelkind. At all events the special custom had small effect on the substantive law; it never received recognition in the royal courts, and from the frequency with which citizens of London appeal to the chancellor when they wish to bring Covenant but have no deed, one may well doubt whether it ever obtained general recognition.

The second limitation upon the action is so curious as to excite some surprise. Covenant did not lie for a sum certain, but only for the recovery of damages for the breach of a promise in writing. The remedy to enforce a covenant to pay a definite amount of money or chattels was Debt, and not Covenant.[3] Hence though a debt be proved by a writing under seal, Covenant would not lie upon it. This rule persisted till the late sixteenth century, and even in 1613 the

[1] 'And note well that no writ of covenant shal be mayntenable wythout especialty, but in the Cytie of London or in other suche place privileged, by the custome and use.' Termes de la Ley, *sub tit.* Covenant; and see F. N. B., 146 A; Liber Albus (ed. Riley), 181, 189. It would seem that the whole transaction must have taken place within the City of London. See XIX. 354 *b*, XIX. 354 *c*, *Appendix of Cases*, p. 205, XIX. 493, *ibid.*, p. 209. In Y. B. 48 Ed. III. 6. 11 Candish J. called trespass on the case an 'action de covenant', and said it was maintainable without specialty. There appears to have been some confusion in the learned judge's mind.

[2] *Wade and Bemboe's Case* (H. 25 Eliz.), 1 Leon. 2.

[3] Ames, H. L. R., ii. 56.

judges of the Common Bench remarked[1]: 'If a man covenant to pay £10 at a day certain, an action of Debt lieth for the money and not an action of Covenant.' The common law was ever chary of allowing concurrent remedies. There was already in existence an action the function of which was the recovery of specific sums, and the judges consequently restricted Covenant to claims for unliquidated damages.[2]

The advantages and disadvantages of Covenant may be briefly summarized. The proof required was simply the production of the deed itself[3]; and as the action was supported by specialty it lay against the executors or administrators of the original covenantor, and even against his heir if he were named in the covenant.[4] On the other hand, a plaintiff could never recover a greater sum than he claimed[5]; the exact point in which each covenant was broken, and how and wherein damage was sustained, must be stated with great particularity; and the necessity for the assessment of damages required the presence of a jury.

The Contract under Seal.[6]

Our discussion would be incomplete without some detailed consideration of the obligation which was the basis of the action of Covenant—the contract under seal.[7] It is true that the sealed instrument was broader than Covenant, and, as we have already seen, in certain cases would support Debt, but it is proposed for the time being to drop the procedural point of view, and to look at the substantive law.

[1] *Chawner* v. *Bowes*, Godb. 217 (cited Ames, H. L. R., ii. 56).

[2] '. . . cety bref de Covenant, ke est naturelement done a recoverir damages . . .' (Aseby, in Y. B. 21 & 22 Ed. I [R. S.] 183).

[3] e. g. '*Tiltone*: Quey avez de covenant. *Rauf*: Bone escrit.' Y. B. 20 & 21 Ed. I [R. S.] 181 (sp. ref. 183).

[4] Britton, i. 29. 15; Jenks, 162.

[5] Y. B. 16 Ed. III (pt. i) [R. S.] 183.

[6] The discussion of the contract under seal is put here for the sake of convenience. Of course in a great many cases a deed was the basis of the action of Debt. These remarks apply to Debt as well as Covenant, in all cases in which the former was brought on a sealed instrument.

[7] There is a curious remark in the Kentish Eyre (6 Ed. II), wherein a deed (*fet*) is distinguished from a specialty (*especialte*). The plaintiff in support of his claim had introduced a tally. Counsel for the defendant calls the tally a 'deed' and remarks: 'Jugement si par tiel fet qe nest especialte deit estre response.' *Anon.* v. *Anon*, Y. B. 6 & 7 Ed. II [S. S.] 35.

A distinguished writer has objected to the term 'formal contract' when applied to the sealed writing. 'Consideration', he remarks,[1] 'is as much a form as a seal.' Doubtless this is true to-day, when modern law, especially in the United States, has practically abolished all distinctions between sealed and unsealed writings, but any such proposition would have received scant appreciation from a mediaeval lawyer. His eye never penetrated beyond the seal into the genesis of the contract; to him a deed was more than evidence, it was *the contract itself*.[2]

We are not concerned here with the origin of the doctrine which gave a sacramental importance to the presence of a seal. To be able to write was in the twelfth century a tremendous accomplishment, and any written document was bound to be impressive to the ordinary person. Moreover, the belief certainly existed at this time that the Romans did stipulate by writing, and this belief was fostered by the confused account of 'stipulatio' in the Institutes,[3] wherein substance and proof are hopelessly confounded. Doubtless these elements combined to give peculiar significance to any written document; and apparently such writings were always sealed, for when an attorney or judge speaks of a writing he means a sealed instrument.[4] At all events, the contract under seal attained a peculiar position, of which we must note two consequences.

1. The mere attaching of the seal to a writing bound the party to whom the seal belonged. Even if one carelessly lost his seal,[5] and another made improper use of it, there was no defence. It follows that the use of the seal bound the owner, whether he were actually a party to the contract or not. This

[1] Holmes, 273.

[2] 'En dette sur contract le plaintiff monstra in son count pur quel cause le defendant devient son dettour; autrement in dette sur obligation, *car l'obligation est contract in luy mesme*.' Bellewe, 8 Rich. II, 111 (ed. 1869); see Salmond, Anglo-Am., iii. 323, n. 2.

[3] Institutes, iii. 21; see Girard, Manuel élémentaire de Droit romain (4th ed.) 500. Of course in Roman law the written instrument does not bind; it is merely evidence, and the binding force comes from the stipulation which it attests. Thus Paulus, Dig. xliv. 7. 38 'non figura litterarum, sed oratione, quam exprimunt litterae, obligamur.'

[4] See Williams, R. P. (20th ed.), 149–50, and authority there cited.

[5] Glanville, x. 12. But cf. Britton, i. 29. 21.

situation is well illustrated by a case in 6 Ed. II, *Bokelande* v. *Leanore*.[1] An agreement was made between one Peter the Mason and John Bokelande (the plaintiff) that the said Peter should build two mills for the plaintiff. When the deed which recited the transaction was read, it appeared that the original agreement was made between Bokelande and Peter the Mason only, but that for greater security the names of Roger Leanore and others were added, and that they affixed their seals. Obviously this was a clumsy attempt to produce a relation of suretyship. The mills were not built according to the covenant, whereupon the plaintiff sued a writ of Covenant against Roger Leanore, who objected that he was not a party to the contract, and that he attached his seal only 'for further security'. Spigurnel J. disposed of this defence summarily and said: 'Si un home se oblige a vous en dette par escrit et die en l'escrit, "et a greignour surte ieo troef un tiel qe se oblige" et il met le seal al escrit, *coment q'il ne parlent pas ceo* que l'autre parle, il afferme par le mettre du seal, par quei responez au fet.' The judge, arguing from the analogy of a covenant to pay money, compelled the defendant to answer to the deed. He could not contradict by extrinsic evidence what he 'affirmed' by his seal. There could scarcely be a better example of the strict and relentless logic of the common law.

2. The second consequence is really only another phase of the first. The written instrument was interpreted very strictly; the obligor was taken to mean exactly what he said. As he could not show that he was not a party to the contract, if he had attached his seal, so he could not deny nor explain anything he had written. 'By a writing,' says Fleta,[2] '. . . any one will be bound, so that if he has written that he owes it, *whether money was paid or not*, he is bound by the writing, and he will not have an *exceptio pecuniae non numeratae* against the writing, because *he said he owed the money*.'[3] Fleta is not a compelling authority, but his statement finds support in the

[1] Y. B. 6 & 7 Ed. II [S. S.] 9.
[2] Fleta (Selden), ii. 56, § 20.
[3] Bracton makes practically the same statement; see f. 100 b.

Year Books. A promise to pay money was enforceable though conditional upon the happening of an impossible event, as some defendants, who wrote not wisely but too well, must have learned to their cost. Indeed such a situation was explained by the use of a delictual maxim, when a reporter[1] remarks: 'Note that the Law will suffer a man of his own folly to bind himself to pay on a certain day if he do not make the Tower of London come to Westminster; whereof said Bereford C. J.: "*Volenti non fit iniuria*[2] although the written law says, *Nemo obligatur ad impossible*".' We thus see that the fundamental principle of the sealed writing is its absolute conclusiveness against the obligor.

A graphic illustration of this principle is afforded by a consideration of the defences which might be brought forward. We might better say defence; for there was scarcely more than one real defence. However grievous might have been the misconduct of the obligee in procuring the obligation, it was of no avail to the obligor, save in one case;[3] for the common law made an exception in favour of duress.[4] But fraud,[5] failure of consideration[5] and accord and satisfaction[6] were not pleadable against a specialty. It was, of course, open to the defendant to deny the authenticity of the writing and tender an averment to the country that it was not his deed, a plea technically described as 'nient son fait'.[7] Otherwise he must show a sealed release or acquittance; for what was

[1] Y. B. 3 & 4 Ed. II [S. S.] 199.
[2] To-day the maxim is interpreted to mean that damage suffered by consent is not a cause of action. Broom, Legal Maxims, 217 ff.
[3] Ames, H. L. R., ix. 57.
[4] Britton, i. 29. 20. The mere fact that the obligor made a bond in prison in order to obtain his freedom was not evidence of duress. *Anon.* v. *Anon.*, Y. B. 6 & 7 Ed. II [S. S.] 36.
[5] Ames, H. L. R., ix. 51. Fraud was not an admissible defence at common law until the Common Law Procedure Act (1854).
[6] Y. B. 3 & 4 Ed. II [S. S.] 145. And though the obligee has already brought suit and recovered, the obligor has no defence, unless he can show acquittance. *Anon.* v. *Anon.*, Y. B. 6 & 7 Ed. II [27 S. S. 37]. In such a case Shardelow J. said: 'He charges you by an obligation; why then was it not cancelled? (i. e. in the previous action). And you do not produce any acquittance of the debt.' Y. B. 17 Ed. III [R. S.] 297.
[7] Y. B. 3 H. IV. 2. 8. Where a seal was 'glue al fait', the court held it to be suspicious and declared the deed void. Y. B. 7 H. VI. 18. 27.

done by deed could only be undone by deed.[1] 'Quand un homme conust un fait et ne monstra especial matier de voider ceo, le plaintif ad cause de recouvrer meintenant sans plus.'[2]

Perhaps it was not always so. Some judges, particularly in the early cases, show an inclination to go behind the seal, and allow parol evidence to be introduced. Thus where Debt was brought on a deed to recover £10 for a lease, the defendant was permitted to show that as a matter of fact he had been ousted.[3] This looks like an attempt to apply the doctrine of *quid pro quo* to sealed instruments. In 1292 a plaintiff was allowed to bring Debt for chattels which were given by deed unconditionally, and to aver that the gift was conditional upon the defendant's marrying her.[4] 'Fut ceo la cause du don ke vous la dussez esposer ou non?' was the incisive question put by Metingham J., and issue was joined on the condition. These are early and isolated cases and cannot be said to affect the trend of judicial opinion. If they indicate anything, it is that the rigid enforcement of the general rule produced so much hardship that occasional attempts were made to consider a particular case upon its merits. But there was never any general admission of parol evidence to engraft a condition upon a deed. To do so the defendant must show 'lettre del plaintiff ou enroullement de court qe porte record[5].' Parol evidence was of no avail. In *Esthalle et Herlison* v. *Esthalle*[6] the defendant bound himself in a simple obligation, but there was a separate defeasance bond, bearing a condition. Both these obligations were delivered to one G. for safe-keeping. The condition was performed, and after G.'s death the obligations

[1] Y. B. 3 & 4 Ed. II [S. S.] 145. 'Rien luy doit' cannot be pleaded against a deed. Y. B. 9 Ed. IV. 48. 3 (continued, 53. 17).
[2] Paston J. in Y. B. 9 H. VI. 37. 12.
[3] Bereford J. said: 'When the Parson ought to have had an estate by the grant of the Prior, he had nothing. (And he drove them to answer over.)' Y. B. 1 & 2 Ed. II [S. S.] 160. See Holdsworth, iii. 327, n. 3.
[4] Y. B. 20 & 21 Ed. I [R. S.] 367. But see Fitz. Abr. *Debt*, 169 (T. 4 Ed. II), where it was held that no evidence of a condition could be introduced 'sans monstre fait del condicion'. If a condition were endorsed on the deed, parol evidence was admissible to prove performance of the condition. Y. B. 20 H. VI. 23.
[5] Britton, i. 29. 22.
[6] Y. B. 6 & 7 Ed. II [S. S.] 19 [22].

came into the hands of his executors, one of whom was an obligee in the simple obligation. The executor brought suit against the defendant, who endeavoured to set up the condition. Then ensued the following dialogue:

Spigurnel J.: Ou est le fet devenuz qe tesmoigne la condicion?
Malmerthorpe: Geoffrei l'avoit en garde et nous avoms bille pendaunt vers ses executours, cesti Reynaud (*the plaintiff*) et altres, de cel escrit et des autres.
Spigurnel J.: Ceo fut folie a lesser vostre bastoun hors de vostre main.

The court refused to stay judgement till the defendant could recover his defeasance bond and put it in evidence, deciding rigidly on principle: 'pur ceo qe J. et R. mettent avaunt le fet Richard de E., q'est simple, et il allege une condicioun destourtre de la dette et de ceo ne moustre rien &c. ne nul autre chose qe luy peuse valer encountre l'obligacion q'est son fait, si agard la curt qe J. et R. recovere les C li vers Richard de E. et lour damages de C s. et Richard en la merci.' If one had an acquittance and lost it, he would be in the same unenviable position. It was his folly; the court turned a deaf ear to his plaint.

In the end, we come back to the remark of Lord Bacon: 'The law will not couple and mingle matter of specialty, which is of higher account, with matter of averment, which is of inferior account in law.'[1]

Section III. Debt and Detinue

Debt and Detinue were intimately related, and may profitably be considered together. While it would be venturesome to say that the latter action descended from the former,[2] there was a close connexion between them which was recognized after they had become distinct forms of action; for Detinue was held to be within the purview of a statute[3] which referred

[1] Bacon, Maxims of the Law, Reg. 25 [cited, Salmond, Essays in Jurisprudence, 57].
[2] See P. & M., ii. 177.
[3] 9 Ed. III, st. 1, c. 3.

or *ex quasi contractu*, &c., but there are dicta and decisions the other way. . . . The last case I know of is *Clemens* v. *Flight* (16 M. & W. 42). This clearly holds that the action is founded on a tortious detention. I should therefore come to the same conclusion if these considerations governed the case.'

On the other hand, Brett L.J. (who concurred with Bramwell in the decision of the case) said: '. . . the action of detinue is technically an action founded on contract. The action was invented to avoid the technicalities of the old law: the invention was to state a contract which could not be traversed. Therefore I think the action of detinue, or the form of the action of detinue, so far as the remedy is concerned in its legal significance, was founded on contract.'

NOTE B

Trespass sur le Cas [1]

Un R. suist un bref de trespas sur le cas et counta coment le plaintif avoit bargaine certein terre pur certein some del defendant et monstre tout en certein, et que le covenaunt le defendant fut que il doit faire estraunge person avoir releas a luy deinz certein terme, le quell ne relessa poynt; issint l'accion accrue a luy.

Elleker: cest accion sowne en nature d'un covenaunt, en quell cas il duist avoir ewe un bref de Covenaunt et non ce Accion: iugement de bref.

Newton: et en taunt que le trespas est conuz de vous et [vous] [2] ne monstrez autre matier, [nous] demandons iugement, etc.

Elleker: semble que le bref abatera; qar divers cases devant cel iour ont estre tenuz pur ley en semble maniere, come en cas que ieo face covenaunt ove un Carpenter pur moy faire un meason deinz certein iour, il ne fait moy le meason, ieo n'avera null accion sinon bref de Covenaunt. Et mesme le ley est s'un emprent sur luy de shoer mon chivall et ne face, Autre accion n'avera ieo sinon bref de covenaunt, s'il issint soit q'il ne face et faille l'especialte faille l'accion; issint icy il ad empreint sur luy de faire estraunge per-

[1] This transcript is taken from MS. Harl. 4557, 112 verso; the case is also reported in MS. Harl. 5159, 150 recto, but as there are only slight verbal variations they have not been noted. For the Year Book report, see 14 H. VI. 18. 58.

[2] The words in square brackets are supplied.

sone relesser, le quell est un covenaunt, et est monstre que eux n'ount relesse le quell n'est autre que covenaunt enfreint, pur que semble [que] le bref abatera.

Newton: semble le contrarie et que le bref est bon; qar en cas de Carpenter que *Elleker* ad mys ieo voill bien q'il soit ley, mes s'un Carpenter moy face covenaunt de moy faire meason bon et fort sur un fourme en certein et il moy face meason que est deble et male et sur autre fourme, i'avera bon accion de trespas sur le cas. Auxi s'un ferrour face un covenaunt ove moy pur shoer mon chivalle bien et congeablement et il eux shoe et encludd i'avera bon Accion sur mon cas. Auxint si un leche emprent sur luy de moy sayner de mez lessez, et il done A moy medicynez mes ne moy ensana, i'avera bon accion sur mon cas; auxint s'un home face covenaunt ove moy pur arer mon terre en temps sesonable et il ce are en temps que ne sesonable, i'Avera accion sur mon cas; et le cause est en toutz lez casez il ad enpris sur luy un matier en fait pluis que ceo que soune en Covenaunt et issint est il en cas al barre, il ad emprise sur luy q'un estraunger relesse al plaintif, le quel est un empris et en taunt que ce ne fait le plaintif ad tort come en lez casez avaunt rehersez, par que. . . .

Paston, J.: semble a mesme l'entent; et A ceo que est dit que un Carpenter face ove moy un covenaunt de faire a moy un meason, s'il ne face ieo n'avera Accion sur mon cas, ieo die que si un oster ou ferrour face covenaunt ove moy de shoer mon chivalle et il ne face, pur que ieo passa Avaunt et mon chival n'ad solers et est perdu pur defaut de solers, i'avera accion sur mon cas; et si vous que estes ad leges empristes sur vous par que i'ay perde i'avera accion sur mon cas issint semble A moy en le cas Al barre que le bref est bon.

June, J.: semble a mesme l'entent, et come *Paston* ad dit, coment que mon ferrour ne shoe mon chivalle i'avera accion sibien s'il luy avoit shoe et cludd, quar tout ceo est dependaunt sur le covenaunt et en taunt que ne forsque accessorie et dependant sur ceo que est le covenaunt sibien come i'avera accion de ceo que n'est forsque accessorie, sibien avera ieo Accion de ceo que est principalle, par que. . . .

Paston, J.: c'est tresbien dit.