Sources of English Legal History
Private Law to 1750

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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.