Sources of English Legal History
Private Law to 1750

J. H. Baker, LL.D., F.B.A.
Reader in English Legal History and
Fellow of St Catharine's College,
Cambridge

S. F. C. Milsom, Q.C., F.B.A.
Professor of Law and
Fellow of St John's College,
Cambridge

London · Butterworths · 1986

17 Assumpsit against executors for money

CLEYMOND v VYNCENT (1520)

Record: KB 27/1037, m. 40. Oliver Cleymond brought a bill of 'trespass and deceit' against Robert and Tamsin Vyncent complaining that, whereas a discussion took place on 20 February 1519 in Cornhill between himself and Roger Penson for the sale to Roger of six barrels of salted salmon worth £6, and Tamsin's former husband Robert Penson[1] spontaneously requested Oliver to deliver the salmon to Roger, promising that if Roger did not pay within a year he (or his executors) would; and whereas Oliver, trusting in Robert's promise, sold and delivered the salmon to Roger for £6, which he did not pay:[2] nevertheless Tamsin, as Robert's executrix, had not paid the £6 as promised. The defendants pleaded *Non promisit*, and on 27 November 1520 at the Guildhall, London, before Fyneux C.J., the jury found for the plaintiff with £6 damages and £1. 6s. 8d. costs

(a) Y.B. Mich. 12 Hen. VIII, fo. 11, pl. 3.

... The question of law was, shall he have this action against the executors or not? It was adjudged by all the justices that he should recover by this action, for two reasons: (1) because he has no other remedy at common law save by this action; and (2) because the plaintiff delivered the goods upon the testator's promise, and it is not right that the testator's soul should be in danger if he had sufficient to pay him, since the plaintiff was prejudiced by relying on his promise.

And thus was judgment given.

1 Port (see p. 447, opposite) says that he was Roger's father, a fact not mentioned in the record.

2 The Y.B. says he died unable to pay, another fact not mentioned in the record.

FYNEUX [C.J.] said that this is outside the principle *Actio moritur cum persona*, for that is where the hurt or damage is corporal. For if someone beats me and dies, my action is gone—or, if I die, my executors shall have no action—because the party cannot be punished when he is dead. In this case, however, the plaintiff can have what he would have had if the party had been alive, namely the price of his goods; and therefore this action does not die, for each party may have his remedy. It is not so in battery, because the writ cannot say that the executors beat him and they shall not answer for another's act.

(Query: if the testator had been alive, would the plaintiff have had this action against him, or could he have waged his law in this case?)

(b) John Port's notebook, HEHL MS. HM 46980, fo. 21v.

... Exception was taken, that these facts would not have been sufficient at common law to maintain this action without specialty if the father had been alive, because the father had no recompense and did not make the contract. A fortiori the action does not lie against his executors.

MORE J.K.B. said that in London a writ of covenant lies without specialty. And by the custom there executors may in some cases wage their law ...

This action was maintained, and the plaintiff had his judgment to recover.

The record shows that judgment was given on 24 January 1521 for £6 damages and £3 costs, the latter having been increased by the court after the motion in arrest of judgment. For a criticism of this decision by Sir Anthony Fitzherbert, who had been counsel for Cleymond, see p. 448, below; and for doubts expressed by Shelley J., see *Sukley v Wyte* (1542), p. 404, above.

ANON. (1535)

Y.B. Trin. 27 Hen. VIII, fo. 23, pl. 21;
LC MS. Acc. LL 52960, 27 Hen. VIII, fo. 40v.

Knightley asked FITZHERBERT: if a man is indebted to me because he made a simple contract with me, and he dies, leaving assets to his executors, shall I—after the debts which the executors are chargeable to pay have been paid, and the legacies performed—have an action on the case against the executors? Since the executors have assets in their hands of the testator's goods, it is