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Abstract
During the fifteenth century, common law courts began to allow plaintiffs to bring actions for breach of informal promises under the trespassory action of assumpsit. The royal courts built evidentiary safeguards into this new use of assumpsit. This article analyzes how the courts’ concern for proof of informal promises had an impact on the shape that the law of contract took on.
PROVING FIFTEENTH CENTURY PROMISES

BY KEVIN TEEVEN*

During the fifteenth century, common law courts began to allow plaintiffs to bring actions for breach of informal promises under the trespassory action of assumpsit. The royal courts built evidentiary safeguards into this new use of assumpsit. This article analyzes how the courts' concern for proof of informal promises had an impact on the shape that the law of contract took on.

Twentieth century common law lawyers know that a plaintiff has a remedy for the breach of a promise to do something in the future. Such a promise was not actionable until the early Renaissance period in England. The common law courts of the Middle Ages resisted adopting this modern theory because of the archaic truth-seeking devices then available. The fifteenth century was a pivotal period in the development of a modern theory of contract.

Contract law in the year 1400 was clinging to unworkable archaic remedies. A common law judge sitting in the year 1400 was comfortable with permitting an action for breach of a well-documented promise to be submitted to a mode of proof then available; but breaches of informal promises were barred from going to trial as those modes of proof were distrusted by the judiciary. The depreciation in the value of money and the manner in which business was transacted necessitated the fashioning of exceptions to the traditionally strict documentary requirements of proof of transactions in order to accommodate the changing commercial world outside Westminster Hall. These departures from earlier contract law were made incrementally throughout the fifteenth century with evidentiary safeguards built into each change so that by the end of the century the groundwork for modern contract theory had been laid. This article

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analyzes how judicial demands for adequate proof of an alleged agreement left its imprint on the form that contract law took as the century progressed.¹

I. THE STATE OF THE LAW OF PROOF

The ancient modes of trial invoking the supernatural as a truth-seeking device had for the most part disappeared by the fifteenth century. Trial by battle and the ordeals of boiling water and the heated iron were largely shadowy memories of an earlier dark age.² However, one ancient procedure known as wager of law was still widely used during the fifteenth century.³

The records⁴ indicate that wager of law was the primary mode of proof in informal debt actions.⁵ In wager the defendant presented eleven oath helpers, or compugators, who swore to the defendant's reputation for credibility rather than to the facts of the transaction before the court.⁶ Wager was effective for unwitnessed, informal transactions heard in the local courts where the common men of the country were aware of the defendant's reputation and often of the alleged transaction.⁷ Wager was


² Trial by battle was not officially ended until 1819 by the Statutes at Large, 59 Geo. III, c. 46, though for all practical purposes it was not used much after the Medieval period.


⁴ A variety of source material generated during this period is available to the legal historian. Two important sources are: (1) the plea rolls of the King's Bench and the Court of Common Pleas, which were records kept by these two royal courts regarding the disputes brought before them sitting in Westminster Hall; and (2) the Year Books, which were in effect the reports of the judicial opinions stated orally during these proceedings and written down by law students from the Inns of Court. The originals of the plea rolls are found today in the Public Record Office in London. Some of the Year Books have been translated by the Selden Society.


⁷ During the Age of Faith of the Middle Ages, the defendant and the compugators were viewed as having imperiled their souls if they perjured themselves. See Simpson, supra, note 6 at 138-40. Even before the waning of the Age of Faith, there were attempts to bar the use of wager of law when the facts were well known to the “folk in the country”: Anon (1303) 19 Selden Soc. 195-96.
least effective in cases heard by the common law courts at Westminster Hall where defendants would hire anonymous oath helpers known as "knights of the post." As wager favoured defendants, promises were going unenforced. Disenchaunted plaintiffs, both men of business and commoners, altered the development of contract theory in their efforts to prevent a defendant from being given the opportunity to wage his law.

Since trial by jury favoured plaintiffs, the plaintiff had to elect an action where only that mode of proof was permitted. The action which plaintiffs utilized to achieve that objective was the tort of trespass. In the view of the royal courts, trial by jury was deficient because jurors were guilty of countless instances of perjury and the courts lacked adequate control over the juries of the Middle Ages. The principal cause of this lack of control was twofold: first, jurors had the right to consider evidence discovered outside the walls of the courtroom; and second, the rules of evidence were, by modern standards, primitive. The jurors' right to consider evidence they observed firsthand originated in the preceding centuries when jurors were essentially witnesses to the event in controversy. Much of the evidence a jury could consider would be inadmissible today under the modern rules of evidence, especially hearsay. The modern notion of a jury is the reverse of its progenitor; the modern juror is selected for lack of knowledge about the transaction, whereas

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8 The two royal courts which formed the modern theory of common law contract were the King's Bench and the Court of Common Pleas. During the period of this study, the non-royal local courts, a continuation of an Anglo-Saxon tradition, carried a heavy caseload of contract cases and had an influence on the contract theory ultimately developed, since the royal courts borrowed workable devices employed by the local courts.

9 J.H. Baker, An Introduction to English Legal History, 2d ed. (London: Butterworths, 1979) at 88. There was not even a procedure for punishing the defendant for perjury. Hence an unscrupulous defendant had an easy route avoiding liability. Such instances increased as the Age of Faith waned during the fifteenth century. See W.T. Barbour, The History of Contract in Early English Equity (Oxford: Clarendon Press, 1914) at 55, 99 for a discussion of when Chancery would grant relief in harsh cases to plaintiffs who lost to defendants who waged their law in common law actions. Res judicata did not appear to present a problem for Chancery's court of conscience. See also St. Germain's Doctor and Student (1530) 91 Selden Soc. 232: the student said, "And in lyke wyse yf a man wage his law vntrulye in an accyon of dette vpon a contracte in the kynges courte/ yet he shall not be suyd for that periury in the spyrituall courte/and yet noo remedye lyeth for that periurye in the kynges courte. . . ."

10 Several Medieval statutes refer to "the perjury which horribly continues and daily increases in the common jurors of the kingdom." Statute of Westminster, 5 Edw. III, c. 10; Statute of Westminster, 34 Edw. III, c. 8 and Statute of Westminster, 38 Edw. III, c. 12.

11 J. Fortescue, De Laudibus Legum Anglie, trans. T. Smith (New York: Garland, 1979) ch. s 27, 21, where Fortescue writes about jurors in the fifteenth century: "These know all that the witnesses admit in their dispositions. . . . [N]othing, provided it be within human ken, can be concealed or unknown to such jurors." See also M. Hale, The History of the Common Law, 4th ed. by C. Runnington (London: Strahan & Woodfall, 1779) at 292-93, where even into the seventeenth century, Hale could say "for the trial is NOT simply BY WITNESSES, but by jury; nay, it may fall out, that the jury upon their Own Knowledge may Know a thing to be false. . . ."
the essential character of an ancient juror was intimate knowledge of the facts in question.

Furthermore, the evidence introduced in a trial by jury proceeding was not subject to an effective set of exclusionary rules in any way resembling the modern law of evidence. Witnesses rarely testified in court prior to the fifteenth century, and the testimony of the parties themselves was inadmissible. Medieval judges preferred the evidence of interested witnesses to disinterested witnesses; again, it was the reverse of the modern approach which views interested testimony with suspicion.

Control over the jury was also restricted by the judicial custom of requiring that a general verdict be given in trespass. This problem was created by the judiciary's reluctance to bear sole responsibility for the trial verdict. There was not the analysis of facts that there would have been in a special verdict. The jury was given a freer rein in decision-making, thus further exacerbating the problem of the favourable treatment of plaintiffs in trespass actions on informal agreements. Without a step-by-step analysis of the facts through a series of special verdicts, as at an assize, the court had no way of knowing upon what the jury based its verdict. This may help explain why the courts tenaciously maintained the requirement of a sealed covenant, as will be examined below.

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13 This remained the case in the sixteenth century and later. See Dymoke's Case (1582), Savile 34 pl. 81.

14 In Anon (1613), 1 Bulstrode 202, as late as this date interested witnesses were still allowed to testify. A witness committed the tort of maintenance if he testified to a jury without an interest in the outcome of the case. See Anon, supra, note 12; *Pomeroy v. Abbot of Bukfast* (1442), Y.B. 21 Hen. VI f. 15, pl. 30. See Thayer, supra, note 6 at 127.

15 Anon (1407), Y.B. 7 Hen. VI f. 11, pl. 3.

16 S.F.C. Milsom, *"Law and Fact in Legal Development"* (1967) 17 U. Toronto LJ. 1 at 10-16.

17 A general verdict is a finding by the jury either for the plaintiff or for the defendant. In a special verdict the jury finds the facts at issue, and the court then applies the law to those facts. As early as 1285 jurors were given the statutory right to state the facts and leave it to the court to determine if there had been a disseisin. *Statute of Westminster*, 13 Edw. I, c. 30.

18 M.A. Arnold, *"Law and Fact in the Medieval Jury: Out of Sight, Out of Mind"* (1974) 18 Am. J. Leg. Hist. 267. The *Statute of Westminster II*, 38 Edw. III, c. 30 had encouraged special verdicts at the assize, but the statute had not been construed to apply to trespass. On the procedures in an assize, again see Sutherland, supra, note 11 at 73.
Due to the shortcomings of wager of law and trial by jury, the common law courts demanded strict proof of the existence of an agreement before it could be submitted to a mode of proof. These evidentiary demands led to the lack of enforcement of many parol promises. There had to be an allegation of something more than a mere promise in order to avoid a demurrer. Plaintiffs would allege a writing or a *quid pro quo* or even a tortious wrong in order to convince the court that there was adequate evidence of the agreement to allow it to a mode of proof.

II. DOCUMENTARY EVIDENCE

The most effective method for the plaintiff to comply with the common law courts' demand for strict proof of an agreement was to produce formal written evidence of the defendant's promise — for example, a covenant, conditioned bond, recognizance, or account. Men of wealth and of business experience were well acquainted with the success of these devices in the courts and documented their agreements accordingly. In the common law courts at the beginning of the fifteenth century, plaintiffs who failed to properly document transactions went away empty handed. It is curious that during an Age of Faith there was such a gap in the royal courts between contract law and the moral principle of keeping one's promises.

The writ of covenant, one of the oldest actions in the King's courts, was older still in the local courts. The old writs bear the closest resemblance to modern contract. Covenant remedied the breach of an executory promise to do something in the future; but the action would not succeed unless the plaintiff could provide the jury with a contractual

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19 One is not on secure ground in attempting to draw direct parallels between Medieval and modern court procedures. Nonetheless, it may be easier for the modern lawyer to envision the parallel of the Medieval courts' demand for proof of an informal promise as a motion for dismissal of a suit for lack of a cause of action or for summary judgment.

20 M.S. Arnold, "Fourteenth Century Promises" (1976) 35 Camb. L.J. 321. The explanation was partially because the local courts and the ecclesiastical courts were granting relief in many of these cases. R.H. Helmholz, "Assumpsit and Fidei Laesio" (1975) 91 L.Q. Rev. 406.


22 *Ibid.* at 246-47. One must be cautious not to read "contract" in the year books to mean what the modern lawyer understands by that term. The Year Books used "contract" to mean the narrow focus of an informal agreement giving rise to an action of debt for a sum certain. There was no recognition of a comprehensive action for breach of an informal agreement. Such agreements were only partially actionable through procedural forms within which they had to work. Furthermore, there was no consideration requirement until the sixteenth century and no doctrine of offer and acceptance until the nineteenth century. The Medieval lawyer was thinking about a consensual transaction which transferred property or generated a debt. See Simpson, *supra*, note 6 at 5-6, 185-87.
document sealed\(^23\) by the defendant.\(^24\) As Finchden C.J. said, "... the action is taken on the deed and without a deed it cannot be maintained."\(^25\)

The sealed deed seemed an ideal solution to the royal courts' demand for persuasive evidence of a contractual relationship. In Medieval England the question was not one of substantive law but rather one of what kind of proof the plaintiff must tender. The common law courts viewed the sealed covenant as evidence of the contract and receipt of the instrument was proof. The document witnessed the covenant just as witnesses served to prove other types of agreements.\(^26\)

Although covenant seemed an ideal remedy, in time it was marred by the courts' unyielding demand for a sealed covenant.\(^27\) The inflexibility of this archaic ritual was not covenant's only shortcoming. The rigorous process of capias, which authorized the arrest of an incompliant defendant, was not available in covenant.\(^28\) The writ used to resolve these two objections was debt sur obligation (on an obligation). Debt sur obligation was a well-accepted common law remedy by the beginning of the fifteenth century.\(^29\)

The plaintiff's burden of proof in debt sur obligation was less extensive than in covenant\(^30\) and it qualified for capias.\(^31\) Due to the procedural advantages of debt sur obligation over covenant, the greatest number of cases appearing in plea rolls were of this kind.\(^32\) In order to sustain the burden of proof, a plaintiff using this form of action produced a sealed document referred to as a conditioned bond.\(^33\) In the bond the

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\(^23\) The seal was roughly equivalent to a signature in an illiterate age.

\(^24\) See Milsom, supra, note 21 at 248. In the twelfth century the royal courts followed the local courts' lead and entertained actions for the breach of informal covenants. Since most cases in the fourteenth century were decided in Westminster, often a great distance from the local witnesses and compurgators who knew of the defendant and possibly of the transaction, the royal courts began to require a sealed deed before the writ of covenant could be used. See Baker, supra, note 9 at 265; See Sutherland, supra, note 12 at 198. In the Case of the Waltham Carrier (1321) 86 Selden Soc. 286 at 287, Herle J. said, "The law will not be changed for a cartload of hay; for a covenant is neither more nor less than an agreement between parties which cannot be taken to law without specialty."

\(^25\) The Prior of Bradstock's Case (1371), Y.B. 44 Edw. III f. 42, pl. 46.

\(^26\) Thayer, supra, note 6 at 13.

\(^27\) Simpson, supra, note 6 at 43-47.

\(^28\) The Statute of Purveyors, 25 Edw. III, c. 17. Capias, originally available in pleas of the Crown as trespass and criminal law, was in the form of a writ for arrest of a defendant who failed to appear (capias ad respondendum). There was also a procedure for an arrest of a defendant who failed to satisfy a judgment (capias ad satisfaciendum).

\(^29\) Arnold, supra, note 20.

\(^30\) S.F.C. Milsom, "Reason in the Development of the Common Law" (1965) 81 L.Q. Rev. 496 at 509-10.

\(^31\) Supra, note 28.


\(^33\) Simpson, supra, note 6 at 90.
defendant confessed to be bound to the plaintiff in a liquidated amount of twice the underlying contract obligation, thus alleviating the problems of proving up damages in covenant.\(^{34}\) Production of the bond by the plaintiff to the jury was viewed as dispositive.\(^{35}\) The courts did not allow wager of law since it was irrational to hear testimony regarding the defendant's reputation for veracity in the face of his bond.\(^{36}\)

While discussing the use of debt actions by men of commerce it is appropriate to mention recognizance — a popular device for documenting a consensual relationship.\(^{37}\) This was perhaps the most foolproof way for creditors to prove their claims. Debtors voluntarily appeared before the court to acknowledge their obligations to pay money at the onset of the agreement. The court's enrollment of this acknowledgment was treated as a debt judgment. In the event of a default there was no trial; liability was established and execution ordered by producing the court records.\(^{38}\) These procedures began in the law merchant courts sitting at the annual fairs and were later adopted by the common law courts and formalized by Parliament.\(^{39}\)

Plaintiffs also relied on the records of the court in the writ of account. This writ was issued against third parties who held property of the plaintiff and were called on to account for it. The writ required an audit of third parties (such as in the management of property by a manorial bailiff) or an audit of the affairs of other types of fiduciaries (such as agents, trustees, and later, partners).\(^{40}\) The accounting would be completed by two court-appointed auditors, acting in a special fact-finding role, which is reminiscent in function to a master-in-chancery. If a balance was found due the plaintiff, a debt action was established in which wager was excluded.\(^{41}\)

In a debt action on the accounting and a debt action on a recognizance the proof of debt was a matter of court record\(^{42}\) — in account by the

\(^{34}\) Ibid. at 90-95.

\(^{35}\) See Milsom, supra, note 21 at 250. The only defence generally permitted was that the bond was invalid. Anon (1485), Y.B. 1 Hen. VII f. 14, pl. 2.

\(^{36}\) Facts that were well known to the men of the countryside could not be rebutted by wager. "All that which lies within the notice of the country shall be tried by the country." Anon (1454-55), Y.B. 33 Hen. VI f. 7, pl. 23.

\(^{37}\) Simpson, supra, note 6 at 126.

\(^{38}\) The enforceability of a confession of judgment clause bears a resemblance to these shortcut procedures available to creditors in the fifteenth century.


\(^{41}\) Milsom, supra, note 5 at 260-61.

\(^{42}\) Wager was not permitted in these types of debt actions since the only method of trial allowed was comparison of documentation. See Simpson, supra, note 6 at 126-28.
court's adoption of the auditors' report\textsuperscript{43} and in recognizance by the court's enrollment of the debt earlier recognized by the debtor.\textsuperscript{44} It would have been illogical to allow the defendant to deny the debt via wager in the face of the court records.

The mode of trial for a debt action on the account was trial by jury, whereas the trial for debt on a recognizance was by a comparison of the plaintiff's documents and the court's enrollment. This difference existed because the auditors could have been negligent or guilty of a connivance; but, the defendant's admission of the debt in open court needed no such scrutiny. Account's use of trial by jury in a debt action\textsuperscript{45} was one of two instances where trial by jury replaced wager. In the other, a debt action for rent on a lease of land, the physical presence of the defendant on the plaintiff's land was too notorious a fact to the community to permit its denial through wager of law.\textsuperscript{46}

Other attempts of the parties to provide proof of debt transactions bear mentioning only in passing because of their lack of long term success in the royal courts. First was the mercantile tally. The tally was a piece of wood recording the debt with notches. The creditor retained the stock and the debtor the foil.\textsuperscript{47} The tally fell into disuse since because it was unsealed, wager was allowed.\textsuperscript{48} Second was the use of merchants' records, but this proof was also diluted by wager of law.\textsuperscript{49} Finally, a party to the transaction could produce witnesses to testify. Although this testimony was permitted by the local courts, the royal courts did not accept this type of evidence in the case of unsealed covenants, and wager was again allowed.\textsuperscript{50}

\begin{itemize}
\item \textsuperscript{43} Milsom, supra, note 5 at 260-61.
\item \textsuperscript{44} Simpson, supra, note 6 at 126-28.
\item \textsuperscript{45} Account was not devoid of written evidence of the obligation since the accounting before the auditors was a matter of record.
\item \textsuperscript{46} Anon (1495), Y.B. 10 Hen. VII f. 4, pl. 4.
\item \textsuperscript{47} Beneyr v. Lodewyk (1310) 20 Selden Soc. 46 and Finchingfeld v. Bycho (1311) 26 Selden Soc. 153.
\item \textsuperscript{48} Plucknett, supra, note 3 at 633n.
\item \textsuperscript{49} With respect to merchants' records, wager became a statutory right for the citizens of London in 1364. See Statute of Westminster, 38 Edw. III, c. 5.
\item \textsuperscript{50} Milsom, supra, note 21 at 254. Baker, supra, note 9 at 265. See Anon (1248) 90 Selden Soc. 119, where transaction witnesses had earlier been sufficient in royal courts to prove an informal covenant. In London, if there were witnesses to a statement of the balance due, wager was precluded. This was not followed by the royal courts. S.F.C. Milsom, "Account Stated in the Action of Debt" (1966) 82 L.Q. Rev. 534. In the assize, witnesses to a deed would be called into court to testify before the jury. See Sutherland, supra, note 12 at 71.
\end{itemize}
III. DEFENDANT'S RECEIPT OF MONEY OR GOODS

When the plaintiff lacked documentary evidence to prove the defendant's obligation, the plaintiff had to point to some other tangible evidence of the agreement in order to avoid a demurrer. Throughout most of the fifteenth century, the royal courts were too distrustful of the primitive modes of proof then available to enforce an alleged informal agreement without something more than an oral covenant.\(^5\)

The courts viewed a partially performed transaction, such as a loan, a sale, or a bailment, as something more than mere words. The loan or sale was an act done and provable, and liability was based on a transaction rather than on a formal documentary acknowledgment.\(^5\) The writs used to establish liability for these informal agreements were the related writs of debt *sur contract* (on a contract) and detinue. Under the writ of debt, defendants could generally wage their law.

The writ of debt *sur contract* was a money obligation such as a loan or a purchase of fungible goods. Detinue indicated a property interest held by the plaintiff and was brought by a buyer of ascertainable goods or by a bailor for unreturned property. The defendant was held liable under these two writs not because he orally covenanted but because he had received money or property to which the plaintiff had a proprietary interest.\(^5\)

In the action of debt *sur contrat* the evidence of the informal agreement was the proof of the defendant's receipt of a sum or certain benefit from the plaintiff. This benefit, known as the *quid pro quo*, evidenced the existence of an agreement. The defendant was not obligated because he or she had agreed to buy the plaintiff's horse but because he or she had received the horse.\(^6\) If the defendant merely agreed to buy the horse, the plaintiff could not use debt *sur contrat* because this action was not available for executory agreements.\(^7\) The only fifteenth

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\(^{51}\) See *St. Germain's Doctor and Student*, supra, note 9 at 228-9. The student emphasized that an executory informal contract was enforceable if it was executed on one side.

\(^{52}\) Baker, *supra*, note 9 at 267-68.

\(^{53}\) Milsom, *supra*, note 21 at 260.

\(^{54}\) Ibid.

\(^{55}\) J.B. Ames, "The History of Parol Contracts Prior to Assumpsit" in E. Freund et al., eds., *Select Essays in Anglo-American Legal History*, vol. 3 (Boston: Little, Brown, 1901) 304 at 316-17.

\(^{56}\) See Simpson, *supra*, note 6 at 153-54. Debt was the granting of something to the plaintiff/creditor. This could be claimed by the plaintiff because the transaction entitled him or her to it. The action was based on a traditional proprietary right rather than the modern enforcement of a promise. Despite debt *sur contrat*’s shortcomings, it was the most commonly used Medieval remedy for the breach of informal obligations.

\(^{57}\) See Ames, *supra*, note 55 at 306. In *Anon* (1488), Y.B. 18 Edw. IV f. 5, pl. 30, Vavasour J. said, “It will be contrary to reason to compel him to pay money... where he has had nothing...”
century remedy for an executory promise was to produce a sealed covenant or a conditioned bond.

There were obvious limitations to the plaintiff of the value of debt *sur contrat*. One already mentioned was its unavailability for executory promises. A second was that guaranty contracts were unenforceable. In a 1431 guaranty case it was stated that there was no liability in the guarantor because he had received nothing. Since no benefit flowed to the defendant, the court was unwilling to find that an agreement existed. Another limitation of debt *sur contrat* was that despite the fact that the defendant was in possession of a benefit received from the plaintiff, the defendant could successfully deny the allegation and wage his law. In time some courts began to question the unrestricted traditional right of wager in certain cases. One example of the irrationality of wager was in an action brought by a plaintiff against a deceased debtor's estate. An executor was not liable for the debts of the decedent because only the decedent could use wager. This conclusion was consistent with the notion that only the decedent had the knowledge of any alleged private transaction for which he or she was obligated; but, if there had been a sealed covenant the executor would have been held liable.

Wager was also permitted in detinue. The allowance of wager seemed an irrational proof to use in cases such as detinue on a bailment where the local community was aware of the defendant's possession of the plaintiff's property. However, by the fifteenth century wager became important to protect the defendant against baseless allegations prompted...
by the easing of the burden of proof in actions brought by buyers of ascertainable goods.

Detinue's evidentiary logic of requiring that the plaintiff have a property interest in the goods in the defendant's possession collapsed in actions brought by the buyer of undelivered goods. Plaintiffs convinced the courts that their interest was present through the legal fiction that a property interest passed from the seller to the buyer/plaintiff by way of a constructive delivery of the goods at the date of the sale. Thereafter, the seller held the goods for the plaintiff's benefit. In time the passage of property fiction was extended from bailment cases to informal executory sales contracts — which did not require production of either a sealed covenant or evidence of part performance. Were it not for the availability of wager, the passage of property fiction could be viewed as the birth of a modern theory of the enforceability of informal executory promises.

Since alternatives available to plaintiffs under contractual writs seemed to have been exhausted, plaintiffs looked to tort theory for assistance. Trespass writs attracted plaintiffs because the mode of trial was trial by jury and thus defendants could not rely upon wager of law.

IV. TORTIOUS MISFEASANCE

By the early 1400s, the royal courts occasionally allowed plaintiffs to claim the trespassory tort of *assumpsit* for misfeasance based on damages suffered as a consequence of a consensual relationship with the defendant. By the end of the fifteenth century the King's Bench had extended trespass to cover the nonfeasance of the promisor for failure to perform. An action in trespass was favoured by plaintiffs over covenant and debt actions because of procedural advantages, especially the preclusion of wager of law.

In 1400, *assumpsit* for a misfeasance was a subspecies of the trespass action for nonforcible wrongs of trespass on the case. The early decisions permitting a trespass on the case action for performing an obligation poorly involved defendants engaged in a common calling who not only committed a private wrong, but were also guilty of the breach of a

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64 Milsom, *supra*, note 5 at 274.

65 The King's Bench was attempting to increase its business in contract-related matters, within the domain of the Court of Common Pleas through its debt jurisdiction. The King's Bench could not hear debt writs but could hear trespass writs.

66 Other advantages to the plaintiff in trespass included procedures developed in actions to keep the King's peace, such as the process and execution procedures of *capias*, *outlawry*, and *imprisonment*.

67 Simpson, *supra*, note 6 at 219-20. It was proposed that trial by jury be imposed in covenant in 1284 in *Statute of Wales*, 12 Edw. I, c. 10.
customary duty considered to be an offence against the public authority. These common callings included ferrymen, veterinarians, farriers, surgeons, merchants, innkeepers, and common carriers.

In light of defendants' arguments that these consensual relationships sounded in covenant and should be dismissed because of a lack of documentation, the common law courts began to allow these actions on the evidence of the local residents' knowledge of customary transactions. The proof of the transaction was the locals' knowledge of both the poorly performed transaction and the plaintiff's resultant consequential damages. A few examples of consensual relationships between plaintiffs and defendants engaged in common callings are: the drowning of the plaintiff's mare as a result of falling from the defendant's ferry, the death of the plaintiff's horse at the hands of the veterinarian, the death of the plaintiff's horse after the farrier's shoeing, the plaintiff's injury caused by the surgeon's malpractice, the plaintiff's possession of defective goods purchased from the merchant, the theft of the plaintiff's goods while a guest in the defendant's inn, the damage to the plaintiff's goods while being hauled by the defendant common carrier, and so on.

V. TORTIOUS NONFEASANCE

As the fifteenth century progressed, the use of a trespass action for the misfeasance of performing poorly was extended to cover the nonfeasance of failing to perform the promised act. The courts took most of the fifteenth century to arrive at the logical conclusion that if
assumpsit was available for performing poorly it should also be available for the wrong of not performing at all.82

Nevertheless, the unassailable logic of allowing assumpsit to encompass both types of wrongs did not of itself assuage the royal courts’ distrust of trial by jury. Due to the lack of judicial control over the jury, the royal courts would not allow a case to go the jury on the mere allegation of the nonfeasance of an informal promise. The courts wanted concrete evidence of the promise, of which there was none.

Notwithstanding the royal courts’ evidentiary concerns, pressure mounted on the courts to formulate a remedy for the increasing number of unanswered pleas of nonfeasance appearing on the plea rolls. The increase in nonfeasance cases was due to two major economic changes. First, a market economy was emerging following the demise of the feudal system and a new class was developing based on money rather than land. With the onset of Tudor stability, England’s economy was improving. Just as the volume of agreements formed by this new class was increasing, so was the number of contract cases appearing in the common law courts.

Second, during the inflationary fifteenth and sixteenth centuries the fall in the value of money forced most cases to be brought to the royal courts as the local courts had been statutorily barred from hearing disputes in excess of forty shillings since 1278.83 With the decline in the value of money, commoners and small business owners found that disputes over their customarily informal transactions could no longer be litigated in the local courts where informal promises had traditionally been enforceable.

In the local courts at the community level, trying these informal covenant actions by wager of law was effective.84 A commoner was not in the custom of formally documenting promises and did not have access to the legal counsel necessary for the execution of a covenant or a conditioned bond. In addition, the literacy rate, though improving, is estimated at about 15 percent of the laity in the countryside and perhaps

82 See Baker, supra, note 9 at 266, 275. The use of tort law to provide a remedy for the passive failure to act is an invasion of the province of contract law. An active wrong causing injury naturally is covered by trespass, but liability for failing to perform an obligation created by agreement is another matter.
84 It should be noted, however, that not all local courts were effective in enforcing informal promises. Consequently, there are instances of fifteenth century plaintiffs trumping up a forty shilling claim in order to obtain royal court jurisdiction. See Milsom, supra, note 5 at 258-59.
in excess of 30 percent in the cities.\textsuperscript{85} Acknowledging these factors, the royal courts began to reevaluate their refusal to grant relief for nonfeasance.

The first Year Book report of a case of \textit{assumpsit} for nonfeasance was in 1400.\textsuperscript{86} The plaintiff alleged that a carpenter had promised to build a house but had failed to perform. The defendant demurred because there was no sealed covenant, and the court agreed. One judge stated, "Because you have counted on a covenant and shown nothing for it, you shall take nothing for it. . . ." The common law courts were understandably reluctant to allow a jury to consider an allegation of an informal executory promise for which there was no third party evidence due to the private nature of the transaction. The result might have been different had the carpenter been governed by the \textit{Ordinance and Statute of Labourers}.\textsuperscript{87} The \textit{Statute of Labourers} was passed as a dying gasp of the feudal system in order to ensure compulsory agricultural services. Feudal status had the nature of a property right enforceable in the courts. This idea of status was extended to duties recognized by custom in the towns independent of tenurial relationships — for example, the surgeon or the seller of goods. When disputes arose in the courts regarding the failure of these workers and artisans to perform, witnesses in the community or countryside would testify as to the employment. Liability for this special type of nonfeasance would arise pursuant to the \textit{Statute of Labourers}.

The actions in the nature of trespass and covenant\textsuperscript{88} brought under the \textit{Statute of Labourers} add some confusion to the study of the development of trespass liability for nonfeasance because the basis for these actions was statutory law rather than contract theory.\textsuperscript{89} The common law courts were comfortable with providing relief in cases involving a status well known to the countryside; however, one must be wary of

\begin{footnotesize}
\begin{enumerate}

\item Watton v. Brinth (1400), Y.B. 2 Hen. IV f. 3.

\item 23 Edw. III and 25 Edw. III. A carpenter was not covered because the statute was intended for permanent contracts for services with an employer and not the activities of an independent contractor.

\item There was a controversy during this period as to whether actions under the statute were in trespass or covenant. One judge expressly took the position that it was covenant. \textit{Anon} (1409), Y.B. 11 Hen. IV f. 33, pl. 60.

\item Thelnetham v. Penne (1378) 88 Selden Soc. 7.
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directly analogizing these cases to private agreements not based on status or custom.

Re-addressing the independent contractor cases not governed by status or custom, plaintiffs bringing an *assumpsit* for nonfeasance began to succeed at trial during the second quarter of the fifteenth century. In the first cases granting relief, dated 1424 and 1436, the plaintiff’s property was entrusted to the defendant for repair. In these cases the defendants began the work and then abandoned the project. In the 1424 case the Chief Justice pointed to the resultant damages of an abandonment that could be suffered by a plaintiff, such as the damage to a house if the roof repair was not completed and the client’s damage if his lawyer failed to plead. The entrustment, abandonment, and damages were evidence observable to the fact-finder of the existence of the agreement. In the 1436 case one justice said, “And the cause in all these cases (of misfeasance) is that there is an undertaking and a matter in fact beyond that which sounds in covenant.” The “matter in fact,” being the abandonment and damages, was sufficient evidence for the court. A sealed document for what otherwise was a covenant action was not required. Martin J. registered his concern in his dissent to the 1424 case, “Everyone would then have an action of trespass on every broken covenant in the world.” Martin J. may have been worried about forsaking the formalities of contract law in light of the serious deficiencies of trial by jury.

These isolated cases of entrustment and abandonment were in the nature of a misfeasance since physical damage was still an ingredient of the action. Near the middle of the fifteenth century royal courts no longer demanded evidence of the entrustment and physical damage to the plaintiff’s property. The plaintiff’s prepayment of money to the non-performing defendant became a new means of proof of partial execution of an informal agreement. This approach was followed in the well-known *Doige’s Case*, decided in 1440. While closer to a pure nonfeasance fact situation, the case still had elements of a misfeasance. The defendant had promised to sell her land to the plaintiff but conveyed it to a third person. The defendant committed more than nonfeasance since she was

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90 *Watkin’s Case* (1424), Y.B. 3 Hen. VI pl. 33, f. 36 and *Anon* (1436), Y.B. 14 Hen. VI f. 18, pl. 58.
91 *Anon*, *ibid*.
92 *Watkins Case*, *supra*, note 90.
93 *Simpson*, *supra*, note 6 at 223.
94 (1442), Y.B. 20 Hen VI f. 34, pl. 4, 51 Selden Soc. 97.
found liable for the active, deceitful\(^5\) wrong of disabling herself from selling to the plaintiff. However, this was a step forward because *assumpsit* was allowed for a broken promise in which there were no resultant physical damages.

If there were no physical damages in *Doige*, where was the proof of the transaction which the courts had demanded in past *assumpsit* actions? The answer was the evidence of the plaintiff's execution of his part of the bargain by prepayment of 110 pounds to the defendant. Paston J. supported the plaintiff's position because, "The bargain proves the agreement, namely when the money was paid."\(^6\) But Ayscoghe J. dissented, "... for it was his folly that he should have taken an estate which could be defeated, where he might have waived that estate and relied on his writ of covenant. ..."\(^7\)

Thereafter, if there was a disablement and prepayment, plaintiffs could prevail. *Doige* is usually cited for its disablement theory, but it is submitted that the emphasis on disablement was due to a jurisdictional squabble. Newton C.J. emphasized disablement because otherwise the plaintiff had a remedy in Chancery.\(^8\) Chancery would not grant specific performance in a disablement fact situation because the defendant no longer had the property.\(^9\) The common law courts were competing with Chancery for business and were vigilant in their search for opportunities to expand their jurisdiction if there was no direct overlap with Chancery. Disablement, without the evidence of prepayment, would not have been remediable since the defendant's sale of the property to a third party was not proof of an agreement between the plaintiff and the defendant.

Disablement coupled with prepayment became actionable as a rule of thumb.\(^10\) By the end of the fifteenth century, common sense again demanded the actionability of a broken promise where there was prepayment regardless of disablement.\(^11\) The first reported recognition of liability for prepayment alone was in a 1499 statement of the Chief

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\(^5\) Prior to *Doige's Case* there had been trespass actions allowed for the deceit of a sellers of goods in breaching their warranties. *Langham v. Spencer* (1414) 88 Selden Soc. 222.

\(^6\) *Doige's Case*, supra, note 94 at 98.

\(^7\) Ibid. at 100.

\(^8\) Ibid. at 99.

\(^9\) See Milsom, *supra*, note 21 at 328-29 and Baker, *supra*, note 9 at 278-9. The common law courts were competing both with Chancery and each other for business. The Court of Common Pleas could hear writ of covenant on a sealed document. The King's Bench tried to drum up business for itself in informal covenant cases that the Court of Common Pleas did not accept due to their lack of documentation by hearing them under a bill of trespass. See Milsom, *ibid.* at 316-17.

\(^10\) Milsom, *ibid.* at 331-32.

\(^11\) Ibid.
Justice of the King's Bench, Fyneux, in another failure-to-convey case brought in *assumpsit*.\(^{102}\) Fyneux C.J. stated that the plaintiff who had made payment to the seller had an *assumpsit* action. The absence of disablement had no effect on the evidence of the agreement susceptible of knowledge by the "men of the country."

Were it not for the jurisdictional overlap with Chancery, the royal courts might have sooner followed the suggestion of a clerk named Brown who had argued in 1441 for the actionability of a case involving prepayment without disablement. Brown declared, "If a man prepays any sum of money that a house be built for him . . . and he does not do it, now he will have an action of trespass on his case because the defendant has *quid pro quo* and so the plaintiff is damaged."\(^{103}\) Brown's reasoning did not persuade the court, but his logic was adopted by the end of the century, notwithstanding the overlap with Chancery.

This common sense approach adopted by the King's Bench in 1499 was followed by the Court of Common Pleas in a 1505 non-disablement case.\(^{104}\) Thus the common law courts were united in their support of Brown's 1441 argument.\(^{105}\) An essential element of proof required was prepayment, as posed in a hypothetical in the Common Pleas case. Frowyke C.J. remarked, "If I covenant with a carpenter to build a house and pay him 20 pounds to build the house by a certain day, and he does not build the house by the day, now I shall have a good action on my case because of the payment of my money; and yet it sounds only in covenant, and without the payment of money in this there is no remedy." The judge concluded that if the defendant had the plaintiff's money in an arms-length transaction, then surely there had been an agreement and a loss upon breach of that agreement.\(^{106}\) In the next century the requirement of the payment of money would be formalized into the requirement of consideration.

The 1499 King's Bench case and its companion 1505 Court of Common Pleas case were landmarks in the development of a remedy replacing the unworkable writ of covenant for the defendant's nonfeasance. This new theory did not foment an evidentiary crisis because

\(^{102}\) Anon (1506), Y.B. 21 Hen. VII f. 41, pl. 66.

\(^{103}\) Anon (1441), Y.B. 19 Hen VI, Harvard Ms. 156 (unfoliated); Simpson, *supra*, note 6 at 626. The report adds that Brown's view was privately denied.


\(^{105}\) The late fifteenth century shift of the courts was well recognized. In the mid-sixteenth century, Brooke in his Abridgement explained that the fifteenth century cases that had denied liability for nonfeasance had done so because there was no payment by the plaintiff. Brooke, *supra*, note 59 at pl. 7 and pl. 40.

\(^{106}\) Simpson, *supra*, note 6 at 239-40.
of the requirement of prepayment. The final step toward a unified modern theory of contract was the extension of this new remedy for partially executed agreements to agreements which were wholly executory. This extension would be adopted during the succeeding century but not without problems as the courts were unable to design a remedy for the breach of a parol executory promise without procedural evidentiary difficulties.

VI. CONCLUSION

Fifteenth century records reflect the transition from the refusal of the royal courts to grant relief in cases lacking the documentary requirements of the ancient remedies to permitting trial by jury for the breach of an informal promise. During this process, the courts maintained control of the embryonic Medieval jury by not allowing a case before the jury without prima facie evidence that a promise had been made and breached.

The courts preferred the documentary evidence afforded by either a sealed covenant or a conditioned bond. If that was not present, court records documenting a recognizance or an account were satisfactory. The actions of debt sur contract and detinue for the breach of informal promises were actionable on evidence of part performance although defendants could still wage their law.

As plaintiffs turned to assumpsit to prevent a defendant from using wager of law, the courts resisted these actions on informal promises unless demands for solid evidence of the transaction could be fulfilled. In assumpsit for misfeasance plaintiffs convinced the courts that the entrustment of the property to the defendant and subsequent damage was adequate evidence to permit the case to the jury. In the late fifteenth century the courts' ultimate allowance of assumpsit for nonfeasance was conditioned upon evidence of the plaintiff's prepayment. Assumpsit actions were thus recognized by the courts for the enforcement of informal promises, as long as either entrustment or prepayment was proven.

The theme linking the contract decisions of the fifteenth century analyzed in this article was not always clearly articulated in the plea rolls or the Year Book reports of those cases. The common law courts had jurisdictional squabbles, precedent, and the pressures of a changing

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107 Slade v. Morley (1602), 4 Coke Rep. 91a, 92b. In effect Slade's case permitted the action of assumpsit to supplant debt sur contrat.

economy to contend with in addition to the proof problems presented by plaintiffs bringing actions for breaches of parol promises. There can, however, be found a consistent judicial concern that evidentiary safeguards be built into the new use of *assumpsit*. The requirement of these safeguards as an element in the enforceability of informal promises left an imprint on contract law well after the fifteenth century.