TORT AND CONTRACT—INTRODUCTION AND THE OLD PERSONAL ACTIONS

1. Background institutional changes of the 14th century:
   a. The development of a bicameral parliament.
   b. The gradual growth of its involvement in taxation and legislation and the custom of consulting it on great matters of the realm.
   c. The growth of the power of the council and of the departments of state.
   d. The attempt of the magnates to control them by controlling appointments.
   e. The attempt of the king to control them through the wardrobe and the chamber.
   f. Statutes that attempt to deal with social change, e.g., the statutes of labourers and statutes concerning livery and maintenance *Mats.* § 6G.
2. General outline of the personal actions
   a. Debt, detinue, covenant, and account are the contract actions, all exist in the thirteenth century, and all are deficient from the point of view of plaintiff:

      Debt—the necessity for a sum certain, the requirement of a *quid pro quo*, and wager of law

      Detinue—only for specific goods, the problem of bailment, wager of law

      Covenant—the requirement of a sealed instrument, no general damages

      Account—eleborate procedure, manorial stewards and guardians in socage

   b. Trepass is the tort action

      Trespass—*vi et armis* and *contra pacem*

      Case—appears mid-14th century, the rise of the notion of negligence?

   c. *Assumpsit*—mysterious if we're thinking in these terms, because it is a trespass action for breach of contract. In the 16th century it comes to replace debt and covenant, a development that is capped by *Slade's Case* 1597-1602.
   d. 16th & 17th centuries—case takes over: trover, nuisance, ejectment—the forms of action you learned in the first year (to the extent that you learned them at all) are all variants of the trespass action
3. Problems with this way of looking at it
   a. Assumes that changes in the forms of action reflect changes in fundamental substantive ideas
   b. It forgets about other courts
   c. Our ideas are not theirs: property (real and personal), tort, and contract; owing vs. owning; obligation vs. property; money vs. fungibles vs. specific goods
4. Debt-detinue
   a. "The King to the sheriff greeting. Command N. that justly and without delay he render to R. one hundred marks which he owes, as he says, and whereof he complains that he unjustly deforces him. And unless he will do this, summon him by good summoners that he be

before me or my justices at Westminster within fifteen days of the close of Easter to show [why he has not done it]." *Glanvill*, *Mats.* p. VII–3.

b. The orginal notion in the action is that you have something of mine—be it because you owe me money or because I lent you my goods but not that I lost them.

c. Paid and so *non debet* is a possible plea, a concession to the jury.

d. Important exceptions to the general rule of availability of wager: the defendant cannot wage his law against his own bond. He must plead *non est factum* (which will go to the jury) or accord and satisfaction, and for this he needs a specialty. The defendant's executor cannot wage the debtor's law. Thus, if your debtor is dead you must have a bond.

e. Debt splits off from detinue probably for remedial reasons in the mid-thirteenth century.

f. By the sixteenth century debt has become an action for a specific sum (no general damages please) of money or fungibles. The action for fungibles is called debt in the *detinet* in the 16th century, maybe a bit earlier. The general action of debt has two important subcategories.

   Debt on an obligation—the penal bond, avoids incidental damage question, non-performance will go to the jury

   Debt on a contract—the medieval idea of contract, what we would call a partially executed contract—the notion of *quid pro quo*—to this the law admits an exception in the 15th c. in the case of sales which need not have a delivery of the goods if the seller could have delivered them.

g. Detinue, the general action for return of goods, e.g., the buyer's action in a sales contract, also has two subcategories:

   Sur bailment—Glanvill suggests that all debts are like the Roman *mutuum*, strict liability (c.13 *Mats*., p. VII-3: "I lend my chattel to you gratuitously to be taken and used in your service. When the term of service is completed, you are bound to return my chattel to me without deterioration, provided that it still exists. But if the chattel itself has perished or has been lost, in whatever way, while in your custody, you are bound absolutely to render me a reasonable price for it."); Bracton gives the opposite answer (*Mats.*, p. VII-5: "he who has taken a loan for use is bound to restore the very thing, and, [though] he is not excused if he shows as much care in its safekeeping as he ordinarily bestows on his own goods if another could have safeguarded the thing with greater care, [he] is not held liable for *force majeure* or accidents unless there has been *culpa* ['fault'] … ."); 14th c. cases tend to follow Bracton but in the late 15th c. liability tightened up as to bailment—only an act of God, or the king's enemies will do because the bailee can sue a robber.

   Sur trover—an odd ball which doesn't fit our emerging scheme that is at once contractual and proprietary. This one seems to be purely proprietary. Perhaps the first case involves a woman named Haliday (1355) (*Mats.*, p. VII-10), and the process of fictions leads to the proposition that the loss and finding alleged in the count cannot be traversed. The development is related to the *devenit ad manus* count in detinue of charters and to *de re adirata*, an action in the local courts for recovery of stolen goods. Detinue *sur trover* is not fixed until mid-15th c. (*Carles v. Malpas*; *Mats.*, p. VII-11). The key thing about it is that in detinue *sur trover* it is a total defense that the defendant does not have the thing .

5. When did English law perceive the property/obligation distinction the way we do?

a. Not at the time of the origins of the debt/detinue action, for there property and obligation were merged.

b. Not at the time that debt and detinue split in the mid-thirteenth century, because then debt is available only for money as between the original parties to the transaction.

c. *Bracton* probably perceives the distinction between property and obligation, but *Britton* does not (*Mats.*, p. VII–7): "[An obligation] is clothed by a material thing, when anything is lent and borrowed, to be restored on a certain day; and by such loans the debtors are bound to restore to the creditors the things borrowed in as good or better condition than they received them, or else their value, unless by accident of fire, water, robbery or larceny, they have lost them; for against such accidents no one ought to answer for things lost, unless they happened by his own fault or negligence. But if a debtor carries money about him, and foolishly shows it among thieves, and is robbed of it, it does not follow that he is not bound to the creditor; because he did not use his diligence to keep the money, for he might have taken better care of it."

d. At the end of the 15th century the notion that property passes with sale will give the seller an action for the money even if he has not delivered, but after some hesitancy the buyer will not have an action in detinue for the goods unless he has paid. On the one hand, the rule about passage of property suggests that the property-obligation distinction is being perceived but, on the other hand, the imbalance in the two actions suggests that the emerging idea has still not been integrated into the actions.

e. Bracton's rule about the bailee's liability is followed in the 14th century, so that there is little need in this situation to distinguish between the bailee or the finder. When the bailee's liability becomes stricter in the 15th century we also see the emergence of a distinction between detinue sur bailment and detinue sur trover. In the latter the trover is fictional (property), and the defendant has no liability if he or she doesn't have the goods.

f. CONCLUSION: The original idea is imbalance of accounts and this can be seen most clearly in the admittedly relatively few restitution cases in the 14th century. Hints of the distinction between property and obligation emerge at the end of the 15th century in both sales and bailment cases, but the original idea is never completely lost. This is a problem to which we will have to return when we ask the question whether England had really developed a unified notion of contract by the time of or shortly after *Slade's Case*. The dramatic thing about this development is how it parallels what happened about real property. Property emerges out of obligation.

6. Covenant.

a. The tyranny of words: contract is not contract as we understand it but covenant does come pretty close to what we mean by contract.

b. The problem of proof may account for the emergence of the sealed instrument requirement early in the 14th century. The S/Wales (*Mats.* pp. VII-12; 1284) tells us that covenant goes to the jury but there's a problem with the jury unless they know both ends of the story. The problem is quite dramatically illustrated in the *Waltham Hay Carrier's Case* (*Mats*, p. VII–13) from the eyre of London of 1321. The defendant was alleged to have agreed to carry a carry a barge load of hay from Waltham, which is in Essex, to London. Indeed, he was alleged to have received the hay in Waltham, but to have failed to have carried it to London. The defendant's counsel points out that Waltham was outside the court's jurisdiction, but

the Chief Justice bullies him into taking another plea, and he asks what the plaintiff has to show for his covenant. The latter replies that it was a simple agreement. The defendant alleges that the plaintiff must show a specialty, to which the plaintiff replies: "For a cartload of hay?" But the CJ has the last word: "We shall not undo the law for a cartload of hay. Covenant is none other than the assent of parties that lies in specialty." And the plaintiff was non-suited.

c. The remedy is performance, perhaps specific performance, then the value of the performance. No incidental or consequential damages and that fact perhaps more than the need for a seal is what causes the rise of the penal bond. Building contracts seem to lead the way. In 1352 the availability of *capias* is extended to debt actions but not to covenant actions, but by that time the action is dead, except for leases and apprenticeship.

7. Account. Another you have my money action, but with the extra attraction of obligation to account. The procedure is complicated. One first establishes the obligation to account. The taking of the account is then committed to auditors. The result of their accounting could then be recovered by way of writ of debt. The action was at first available, it would seem, only against manorial bailiffs, who had an obligation to account to their principals. In 1267 the action was extended to guardians in socage, who had a similar obligation. Early in the 14th century, it became available against receivers more generally, particularly mercantile ones, perhaps as a result of the statute of Westminster II of 1285. At various periods in the later Middle Ages and early modern periods the action seems to have been used for quasi-contractual recoveries, but for reasons that are not completely clear, the action died out in the 16th century. Perhaps its complexity did it in, but the problem may be that the central royal courts did not trust the merchants.

8. *Paris v. Page*, (*Mats*. p. VII–1). We may not have time for this, but if we do, it's a great case to illustrate how personal actions worked throughout the Middle Ages.

PARIS v. PAGE[1]
Y.B., Pasch., 1 Edw. II, pl. 1 (1308)
ed. F.W. MAITLAND, YEARBOOKS 1 & 2 EDW. II: 1307–9, Selden Society, 17 (London, 1903), pp. 11–12[†]

Simon of Paris brought a writ of trespass against Walter Page, bailiff of Sir Robert Tony, and divers others, and complained that on a certain day they took and imprisoned him etc. wrongfully and against the peace etc.

a. Simon of Paris brought a writ of trespass against Walter Page, bailiff of Sir Robert Tony and various others. Here's the writ. And complained [here's the count] that on a certain day they took and imprisoned him etc. wrongfully and against the peace, etc.

Passeley for all, except [Walter] the bailiff, answered that they had done nothing against the peace. And for the bailiff he avowed the arrest for the reason that Simon is the villein of Robert, whose bailiff Walter is, and was found at Necton in his nest,[2] and Walter tendered to him the office of reeve and he refused and would not submit to justice etc.

b. *Passeley* for all, except the bailiff, answered that they had done nothing against the peace. A general denial. We have no idea what was going on here. And for the bailiff he avowed [a strange word in this context, normally used in replevin] the arrest for the reason that Simon

[1] Proper names are taken from the record.

[†] <Public domain?>

[2] For this phrase, see Y.B. 21–2 Edw. I, p. 449; 33–5 Edw. I, p. 205.

is the villein of Robert, whose bailiff Walter is, and was found at Necton in his nest [which would, under certain circumstances, justify the seizure] and Walter tendered to him the office of reeve [which only a villein could have] and he refused and would not submit to justice etc.

Toudeby rehearsed the avowry and said that to this avowry he ought not to be answered, for that Simon is a free citizen of London and such has been these ten years and has been the king's sheriff in the said city and has rendered account at the Exchequer;[3] and this (said he) we will aver by record; and to this very day he is an alderman of the town, and we demand judgment whether they can allege villeinage in his person.

c. *Toudeby* rehearsed the avowry and said that to this avowry he ought not to be answered, for that Simon is a free citizen of London and such has been these ten years [a year and a day] and has been the king's sheriff in the said city and has rendered account at the Exchequer; and this we will aver by record; and to this very day he is an alderman of the town, and we demand judgment whether they can allege villeinage in his person. [There's no triable issue of fact here because the contrary appears as a matter of record.]

Herle. With what they say about his being a citizen of London[4] we have nothing to do; but we tell you that from granddam and granddam's granddam he is the villein of Robert, and he and all his ancestors, grandsire and grandsire's grandsire, and all those who held his lands in the manor of Necton; and Robert's ancestors were seised of the villein services of Simon's ancestors, such as ransom of flesh and blood, marriage of their daughters, tallaging them high and low, and Robert is still seised of Simon's brothers by the same father and same mother. And we demand judgment whether Robert cannot make avowry upon him as upon his villein found in his nest.

d. *Herle* [senior serjeant, about to become chief justice]. With what they say about his being a citzen of London we have nothing to do [essentially he admits the allegation], but we tell you; but we tell you that from granddam and granddam's granddam he is the villein of Robert, and he and all his ancestors, grandsire and grandsire's grandsire, and all those who held his lands in the manor of Necton; and Robert's ancestors were seised of the villein services of Simon's ancestors, such as ransom of flesh and blood, marriage of their daughters, tallaging them high and low, and Robert is still seised of Simon's brothers by the same father and same mother. And we demand judgment whether Robert cannot make avowry upon him as upon his villein found in his nest. Pleading in the right of villeinage. Can't I make this avowry?

Toudeby. We are ready to aver that he is a free man and of free estate, and they not seised of him as of their villein.

e. *Toudeby*. We are ready to aver that he is a free man and of free estate, and they not seised of him as of their villein. Backs off, he concedes that the avowry may be proper under certain circumstances. Mentions this strange word 'seisin'.

BEREFORD, J. I have heard tell that a man was taken in a brothel and hanged, and if he had stayed at home no ill would have befallen him. So here. If he was a free citizen, why did not he remain in the city?

f. BEREFORD. I have heard tell that a man was taken in a brothel and hanged, and if he had stayed at home no ill would have befallen him. So here. If he was a free citizen, why did not

[3] Simon of Paris was sheriff of London in 1302–3. For his election see R. Sharpe, Letter Book C, p. 114. It appears from the civic Letter Books that he was mercer, alderman, chamberlain and a very active citizen. For his will see Sharpe, Calendar of Wills, i, 309.

[4] Or 'a citizen of the king.'

he remain in the city? It looks like he's going to go the other way. Typical Bereford remark. The 3d year law students loved it. But it's misleading. The court refuses to decide, and adjourns.

At another day *Toudeby* held to the assertion 'not seised of him as of his villein nor of his villein services.'

Passeley. Whereas he says that we were not seised of him as of our villein, he was born in our villeinage, and there our seisin began, and we found him in his nest, and so our seisin is continued. We demand judgment.

BEREFORD, J. One side pleads on the seisin, and the other pleads on the right; in that way you will never have an issue.

Herle. Seised in the manner that we have alleged.

BEREFORD, J. The court will not receive such a traverse. You must say that you are seised of him as your villein and of his villein services.

And so [the defendant's counsel] did. Issue.

g. The next exchange is hard to follow. Let me assert to you that the way Bereford sets it up, there's no way that Walter can win. And he doesn't as the record tells us. It took four years to get the jury, and by the time they get it, Sir Robert Tony is dead, and his heir is perhaps an infant. But the jury came in and rendered a verdict on behalf of Simon for 100 pounds, a huge sum.

A GLIMPSE AT THE LOCAL COURTS

9. Contracts in courts other than K.B/C.P. We could do number on tort, but it would be a lot harder. These are wonderful cases to write papers about if you are still looking for a paper topic.

10. The Fair court of St. Ives — late 13th century — (the place is in Huntingdonshire); franchisal court of the abbot of Ramsey by charter of 1110; for reasons that are not entirely clear (it may be related to the rise of the Staple courts) the court declined in the 14th century).

11. *Ribaud v. Russell*, *Mats.* p. VII-33 (1287)

Gilbert Ribaud complains of William Russell and Walter Clerk of Haddenham [Cambs.]. Pledge to prosecute, his faith; pledge of the defendants, feathers.

And Gilbert appears and complains of the said William and Walter, for that they unjustly detain from him and do not pay him 9s. 6d.; and unjustly because, whereas it was covenanted between him, Gilbert, and the said William and Walter, in the town of Bury St. Edmunds [Suffolk] in the house of Alice Coterun, on the Monday before the feast of St. Nicholas last past, a year ago [3 December 1285], that the said Gilbert should sell eleven sacks of feathers and that he should receive as his stipend 12d. for each sack, the said Gilbert as broker of the said William and Walter sold these sacks to a certain John Waterbailie of Provins [dép. Seine-et-Marne]. And after the said sale had been made the said Gilbert firmly believed that his stipend, 9s. 6d., would be paid to him according to the covenant (*secundum convencionem*); but the said William and Walter have detained the said money from him and still detain it, to his damage a half-mark. And he produces suit.

The said Walter and William are present and deny all which should be denied word for word, and they are at their law. [i.e., wager of law] And because they cannot find pledges to make their law [these guys not only failed at wager of law; they couldn't even find people to stand surety for them while they went out and tried to find oath-helpers], the said Gilbert craves judgment against them, as against those who are convicted, both for the damages and for the principal.

Wherefore it is awarded that the said William and Walter make satisfaction to the said Gilbert and be in mercy for the unjust detention. They are poor: pledge, their bodies. And afterwards they were liberated, each on his own pledge of faith.

a. The use of the words covenant and detain

b. Another wager case. p. VII–33 *Eltisley v. Barber*

John, son of John of Eltisley [Cambs.], complains of Roger Barber, for that he has unjustly broken a covenant with him; and unjustly because, whereas the said John was in the vill of Ramsey [Hunts] on the Monday after Epiphany last past, a year ago [7 January 1286], in the house of Thomas Buck, the said Roger came there and undertook (*manucepit*) to cure his, John's, head of baldness for 9d., which the said John paid in advance.

The said Roger was present and denied tort and force, etc., and put himself on his law; and in finding pledges of his law withdrew from the bar without leave. Therefore the said John craved judgment against him as against one who is convicted.

Wherefore it is awarded that the said Roger make satisfaction to the said John for 9d., the sum claimed, and for his damages, which are remitted, and that he be in mercy 6d. for the trespass.

c. Note that on p. VII-33 (the Rogaine case *Eltisley v. Barber*), the defendant leaves the bar in attempting to find pledges.

Peter Long of London complains of Geoffrey of Cam [probably Caen in Normandy] and says that he unjustly detains from him 600 ells of canvas, which he, Peter, through his broker Hamon of Bury St. Edmunds, bespoke [i.e., ordered] and bought from him in his booth in the vill of St. Ives, on the Friday after the feast of St. John before the Latin Gate [6 May or 13 May 1300], for 29s. the hundred and a farthing as a God's penny, to his damage 40s. And he produces suit.

The said Geoffrey is present and denies tort and force, etc., and says that he never sold the said canvas to the said Peter or to any broker of his; but he says that the said Hamon came to his booth and offered him 27s. for each hundred ells of the canvas and thereupon threw down a farthing as a God's penny,[i.e., earnest money, called 'the God's penny' all over Europe] against the will and without the assent of Geoffrey. And that this is true he craves may be inquired, and the adverse party does likewise; and a day is given them on Monday.

On that day the inquest comes and says that the said Geoffrey of Cam never granted the said canvas to the said Peter at the price alleged by the said Hamon, his broker. Therefore it is awarded that the said Peter be in mercy for his false claim. He is pardoned by Brother John of Eton (Warden of the Fair).

d. In *Long's Case* (p. VII-34), an inquest is used to determine what happened in a sales action. It may be that we have a survival here of the notion that real function of the judge is to determine who is to prove what and how.

12. *Colne v. Marshall*, *Mats*. p. VII-33 (1287). No problem with damages in covenant.

> John, son of Alan of Colne, complains of Robert Marshall and his son Adam, and says that, whereas on Wednesday last he brought a certain horse of his to the workshop of the said Robert and Adam to have three of the said horse's feet shod with new shoes and to have a fourth shoe removed for 2d., the said Robert and Adam removed the shoe from one foot of the said horse and put a new shoe on another foot, but they broke their covenant as to the other two feet; wherefore the said John by the delay of the said Robert and Adam lost the sale of his horse on that day from the third to the ninth hour, to his damage a half-mark.

13. *Spicer v. Chapman*, *Mats*. p. VII-34 (1300).

a. John Spicer, Sat before Candlemas 24 Edw I, 1295/6 February; Peter Chapman gave J 60s, J gave P a horse worth 30s; 2d journey gave him another horse worth 25s; 3d journey lost 33 marks (433s, 4d), demands 1/3 of the loss (146s 8d), delivers 10s plus 50s worth of land (which must be a wash) and 10.5d to his great damage 100s; what we have below suggests that the damages claimed should have been 146s 8d, i.e., 11 marks

Spicer		Chapman		For
+60s		-60s		initial capital
-30s		+30s		horse
-25s		+25s		horse + saddle
+55s	10.5d			C's share of gain
-146s	8d			C's share of loss
-60s		+60s		messuage + cash
	-10.5d		+10.5d	cash

Bottom line Chapman owes Spicer 11 marks (146s 8d) but he's only claiming 100s, why?

Jury's version:

Spicer	Chapman	For
+60	-60	initial capital
-40	+40	land
-20	+20	2 horses

One way to reconcile the figures in the complaint: the jury is right about the numbers and Spicer is right about the deal. If so, Chapman to Spicer 60s:

Chapman is owed: 60s + 55s 10.5d. (profit) =	115s	10.5d
Spicer has paid	60s	
Spicer owes	55s	10.5d
Chapman owes	148s	8d
Net (Chapman owes)	93s	2d

(add 6s 10d for costs or rounding and you get 100s)

b. Can we speculate as to why this deal went bad? The jury's ultimate verdict is implausible. Chapman (the word means merchant) is almost certainly not lending Spicer money gratuitously. Either they agreed to share in the profits and losses, in which case (assuming that the jury's evaluations are right) Chapman owes Spicer 93s 2d, or Chapman was to get

profits but not share in losses, in which case Spicer owes Chapman 55s 10.5d. Hence the jury split the difference. Why?

c. Clearly the sale of porret seed in Scotland was a high-risk enterprise, but the potential rewards were also great. The first two trips (assuming that Spicer put in 120s to match the 60s) yielded a profit of 165s on an investment of 180s. That's a 92% return. Of course, the third trip, if we believe Spicer's numbers, yielded roughly a 360% loss. (Hard to imagine how that could have happened unless the 120s was only for buying the porret seed, and the Scots not only stole the seed but also stole Spicer's animals, etc., on the third trip.)

d. The principal thrust, however, of Spicer's argument may not have anything to do with the harshness of the deal. It may be that if you (Chapman) are going to avoid the usury prohibition by taking a share of profits rather than direct interest, you have to share in the losses as well. This, then, is the proposition that the jury refuses to buy. One of the reasons, however, why it refuses to buy it is that it is able to see the transaction as wash for Chapman. If we take the jury's evaluations, then Chapman got no profits, so we don't have to get into the question whether he should share the losses as well.

e. Apart from this speculation we can add a few solid legal points:

No rule about single claim

Complex cases can be brought

Account, partnership

14. The City of London (*Whittington*, Mat. p. VII-35) —special jury —big deal —debt in a jury (blue-ribbon jury)

15. Staple courts —cutting out a certain class of cases

16. Royal courts with a special arrangement for big deals, e.g., Assizes at Southhampton (*Dunstable v. Le Bal*, 1278, p. VII-37):

> The lord King commanded his beloved and trusty Salomon of Rochester and Master Thomas de Sutherington[2] that, whereas from the grave complaint of William of Dunstable, his citizen of Winchester, he had understood that, whereas the same William had bought from Robert le Bal' of Winchester 103 sacks of good merchantable wool sewn up in 86 sarplers,[3] namely, every sack out of 53 sacks for 8 marks and every sack out of the remaining 50 sacks for 6 marks, of which sarplers the same Robert in the presence of the aforesaid William caused 8 sarplers to be opened, namely 4 of the greater and 4 of the lesser price, whereof the same William had been content, and faithfully promised that the remaining wool sewn up in the sarplers was like the wool opened; and whereas the said William, attaching faith to the statements of the said Robert herein, carried the whole of the wool aforesaid, save two sacks and a half which were stolen in the custody of the said Robert, to St. Omer: yet, when the same William caused it to be opened and exposed for sale at St. Omer, he found the wool sewn up in 68 sarplers. Of which he had not made inspection, vile and useless and altogether differing from his agreement; whereby the same William, through the default of the aforesaid Robert herein, incurred a loss in his goods and merchandises of a hundred pounds.

[2] Justices itinerant, holding the Assises in the County of Southampton.

[3] Sarpler = a large canvas sack for packing wool: used also as a measure of wool.

> And because the lord King is unwilling to leave such great malice unpunished, if it should have been perpetrated, he has appointed the aforesaid Salomon and Thomas to inquire in the presence of lawful and discreet merchants and citizens of Winchester by the oath of good and lawful men of the same city through whom the truth of the matter can best be known in the premises, and for swift and competent amends thereof to be made according to the law merchant. Wherefore the aforesaid Salomon and Master Thomas commanded the Sheriff of Southampton that he should cause to come before them at Winchester in the Feast of St. Vincent in the sixth year so many and such good and lawful men of the city aforesaid as through them the truth of the matter might best and most fully be known and inquired.

a. The record is an extract from an assize roll of 1278. The commissioners of assize are one Solomon of Rochester and Mr. Thomas de Sutherington were almost certainly to take the assizes in Hampshire and perhaps also to deliver the jails. Our case, is heard pursuant to a commision of oyer and terminer that issued out of the chancery, which tells the commissioners, in effect, "oh, by the way, as long as you're out there, hear this case too."

b. The writ is not one of the standard writs in the register for beginning litigation (though G.D.G. Hall's edition for the Selden Society of *Early Registers of Writs* does contain a couple of writs in which matters are to be determined "according to the law merchant"). The writ recites, in a long "whereas" clause (foreshadowings of the famous "whereas" clause in trespass on the case), the basics of Dunstable's complaint. The king orders his commissioners to inquire into the matter in a rather precise way: They are to do it in the presence of lawful and discreet merchants and citizens of Winchester and by the oath of upright and lawful men of Winchester. By these two groups the commissioners are to find out the truth of the matter and swift and appropriate amends are to be made in accordance with their findings and in accordance with the law merchant.

c. Is the "law merchant" a set of substantive rules or whether it is simply a set a procedures. That the procedure/substance distinction does not come easily to the men of this period makes it all the harder. We can read the writ in two ways: (1) if you find this to be true, then make an award according to the law merchant (in which case the law merchant simply tells you how to calculate the remedy for something that has already been determined to be actionable), or (2) if you find this to be true and if it is the sort of thing for which the law merchant provides redress, then supply redress. I lean toward the first interpretation, but you don't have to.

d. What's Dunstable's gripe? He bought wool on the basis of samples. When he opened up the wool in a foreign market (S. Omer, Artois, modern Pas de Calais, close to the border of Flanders), it did not conform to his samples, indeed it was "vile, useless and altogether differing from his agreement." Hence, he lost £100.

e. What kind of action is this? An action for breach of warranty of quality in sales of goods. One hundred years later such actions will be heard in the CB using a variety of the action on the case. In 1307, such an action was maintained in King's Bench on the theory of deceit (*Ferrers v. Dodford*, *Mats*, p. VII-19), but that case had a special royal interest. In all probability this action could not have been maintained in the central royal courts in this period, at least not as a matter of course.

f. There was probably one or more merchant or local court which would have been competent to hear this case, and the writ itself shows that there is nothing about the case that is

conceptually beyond what the men of this era could conceive of as actionable. So why the special procedure?

g. We know that Edward I was interested in providing a forum for merchants. Whether this is because he perceived, if dimly, that an effective court structure is an important element of commercial infrastructure or whether he had more personal reasons is perhaps unknowable, but the fact is that he did this.

h. Some clue as to the reason for royal intervention in this case can be found in the numbers. If my arithmetic is right, the total sales price is £482 13s 4d, or 724 marks. This is a huge deal. You could hire 241 carpenters for a year for this amount of money.

i. The numbers also tell us something else. "Vile and useless" is almost certainly an exaggeration. Even the plaintiff is only claiming a 20% reduction in value. The jury, as we will see, puts the loss at less than ten percent.

At which day the aforesaid Salomon and Thomas came there. William and Robert came before them. And William complains of the aforesaid Robert and says that, whereas he should have bought from the aforesaid Robert 103 sacks of good merchantable wool sewn up in 86 sacks, namely every sack out of 53 sacks for 8 marks and every sack out of the remaining 50 sacks for 6 marks, of which sarplers the same Robert in the presence of William himself caused 8 sarplers to be opened, namely 4 of the greater and 4 of the lesser price, of which he himself had been content, and faithfully promised that the remaining wool sewn up in the sarplers was like the wool opened; and whereas the same William, attaching faith to the statements of the said Robert, carried the whole wool aforesaid, save two sacks and a half which were stolen in the custody of the said Robert, to St. Omer; yet, when he had caused it to be opened there and exposed for sale, he found the wool sewn up in 68 sarplers, of which he had not made inspection, vile and useless and wholly differing from his agreement; whereby the same William and his men stood in peril of death in the foreign parts aforesaid. And moreover he complains that, whereas he had bought the aforesaid 103 sacks of wool from the aforesaid Robert and had in good faith and according to the custom of the country handed them to him to be kept until he had sent for them, two sacks and a half, of the price of 20 marks, were abstracted thence by the aforesaid Robert and his household. Whereby he says that he is damaged and has loss to the value of a hundred pounds. And thereof he brings suit.

j. When the parties are present before the court, the plaintiff counts. We may be in the strange world of the law merchant and a special royal authorization for something that is called an inquest, but there are some constants. Lawsuits begin with the plaintiff laying out his claim orally before the court. The claim is basically the same as in the writ, except that Dunstable adds that when the S. Omer merchants discovered that they were being cheated, he, Dunstable, stood in peril of his life.

And Robert comes and says that he was not summoned nor attached; indeed, he says that now he was brought from his house by force to come before the aforesaid Justices to answer the aforesaid William. And hereupon it is said to him that every man is free, and ought to be, from all force and coercion in coming to the court of the lord King and in departing thence at his own will. And the sheriff testifies that he was sufficiently warned, and that he used no force or coercion to him in coming now before the aforesaid Justices, namely by three days before the aforesaid day. And the citizens and other merchants of Winchester present testify that such previous notice suffices for answering a merchant according to the law merchant. Therefore it

is said to the aforesaid Robert that he must answer. And he says that he will not answer; but he departed in contempt of the court. Therefore let an inquest be taken upon the aforesaid trespass.

k. The next thing that happens is strange (this is in the full record not in Fifoot's extracts). Ball challenges the jurisdiction of the court on the ground that he was not properly summoned. He also says that the sheriff forced him to come. The justices (apparently) say that coercion should not be used in this type of case (their statement is very broad, and cannot be maintained as a general matter). Then the sheriff denies coercion and says that he gave Ball three days' notice, which the assessors say is adequate under the law merchant. The speed with which a case in law merchant can proceed is one of its chief characteristics. Ball then leaves court in a huff, but the justices make no attempt to bring him back; they simply call his departure contempt and proceed to take the jury's verdict.

The jurors says upon their oath that the aforesaid Robert le Bal' sold to the aforesaid William of Dunstable five score and three sacks of wool, namely fifty and three sacks, every sack for eight marks, and every sack of fifty sacks for six marks; so that the same Robert in the presence of the aforesaid William caused eight sacks to be opened, namely four sacks of the greater price and four of a lower price, asserting in good faith, according to the law merchant and the custom of merchants, that it [the wool] was alike and of the same clip, wherefore the same William on the statement and faith of the aforesaid Robert accepted the rest of the wool, which he had not previously seen, and settled with him for it. And afterwards he deposited the aforesaid hundred and three sacks in the custody of the aforesaid Robert, who received them to be kept until the aforesaid William should have sent for them. And they say that in the custody of the aforesaid Robert and by his household one sack and a half was abstracted, of the value of 12 marks. And they say that the aforesaid William received the residue of the aforesaid wood from the aforesaid Robert on the faithful promise as is aforesaid, and when he exposed the aforesaid wool for sale in parts beyond sea, namely at S. Omer, the merchants buying the same on his testimony, because he understood that it was true to sample as aforesaid, found it false and useless, whereby the same William on every sack of fifty-three sacks incurs a loss of ten shillings, except on four sacks of the same price. And of the residue of the five score and three sacks, except four sacks of the lower price, he had a loss of half a mark.

And therefore it is awarded that the aforesaid William do recover the aforesaid price, namely [...],[4] against the aforesaid Robert, and likewise his losses, which are taxed by good and lawful citizens and merchants at twenty marks. And let the aforesaid Robert be taken and safely, etc.

l. The jury basically confirms Dunstable's story. They do say that the amount of wool delivered to Dunstable was only one and half sacks short rather than two and half as Dunstable had claimed. They also considerably reduce Dunstable's claimed damages. Assuming that Hall's arithmetic is right, the total loss on the whole shipment is £39 16s 8d, to which the assessors (note the shift here between the jury and the assessors) add 20 marks in costs (£13 6s 8d). The justices enter the judgment (except that, whether by clerical error or by design we cannot tell, the sum is left out), and Ball is to be arrested (a rather harsh

[4] Blank in MS. Apparently the sum should be £39 16*s*. 8*d*. It will be noticed that only one and half sacks were found by the inquest to be missing instead of two and a half sacks as claimed.

process for execution of judgment, at least as an initial matter, but the justices probably were not too pleased when Ball walked out on them).

m. We emphasize, on the one hand, that the ideas are sophisticated and the jury seems to know what it's doing. Yes, you got fewer sacks than you were entitled to but not as many fewer as you claim. Yes, the wool was worth less than you it would have been if it had been what was warranted, but it wasn't worth that much less. How does the jury know this? Clearly, they're "plugged in" to some kind of mercantile gossip market; perhaps it is provided by the assessors. It is possible that Ball was not a crook but simply that the wool deteriorated while it was in his hands, but I think it unlikely. The fact that the wool in the sample sacks was worth what he said it was worth suggests that he deliberately put his best sacks forward. It's an old trick. There are provisions in the Roman law of sale about this.

n. On the other hand, and ultimately, we don't know how effective this process was. We've got a sophisticated judgment but the defendant is no place to be found. Without more we cannot tell whether Dunstable ever collected and that is the ultimate test of whether the process is effective. The procedures in the Statute of Merchants and the Statute of Staple give more assurance of collection, but they involve restructuring the deal into the form of penal bonds. That is, of course, the story of how big-time commercial deals were handled in the later Middle Ages, and it is also one of the reasons why it took so long for the common law to develop a sophisticated commercial law.

17. Exchequer — Note the jurisdictional gimmick in *Pylate* (1299, p. VII-40): "James Pylate, yeoman of Walter, Bishop of Coventry and Lichfield, Treasurer of the lord King," while the case makes clear that Pylate is merchant of Douai. Note the bearer paper in *Le Feytur's Case* (1309, p. VII–43) (unclear how jd. was obtained here): "Richard acknowledges himself bound to Betinus de Friscobaldis and Coppus Cottene and their fellows of the Society of Friscobaldi in £55 for 22 cloths of ray of Ghent bought from them in the Fair of St. Botulph, to be paid to the same Betinus or to his fellows or to anyone bearing this letter at London on the Eve of Christmas in the year of Grace 1304."

18. The ecclesiastical courts: *Chart c. Foster*, York BI CP.F. 321 (1511), p. VII-41:

> The aforesaid Oliver Foster, at a time before the feast of St. Lawrence recently past, bought and received from the aforesaid George Chart forty sheep, forty lambs and twenty hogs worth £6 6s 8d.
>
> The same Oliver on the day of delivery and receipt of the said sheep, lambs and hogs, paid 26s 8d in part payment of the said sum of £6 6s 8d.
>
> The same Oliver by his oath faithfully promised the same George to pay £5 the rest of the same L6 6s 8d on a certain day now past.
>
> The aforesaid George by himself and his men long before the present suit duly requested the said Oliver to pay to the same George the said £5, the rest of the £6 6s 8d.
>
> The aforesaid Oliver, thus requested as is aforesaid has delayed and refused to pay or deliver to the same George the said £5, just as he delays and refuses at the present time
>
> The aforesaid are true, public notorious, and manifest, etc.

a. There are lots of these. The number runs into the 100s on the records, in the 1000s in reality.

b. This case is typical. The elements.

c. In the early decades of the 16th century the number declines precipitously.

d. We will see tomorrow that competition from the king's courts may not be the answer.

e. Why would Foster Chart bring his case in the York consistory? Why would Foster allow it to stay there?