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### Fourteenth-Century Promises

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## FOURTEENTH-CENTURY PROMISES

MORRIS S. ARNOLD \*

WE are all familiar with the paradox that while medieval English society set great store in promises and their performance, the law of its central courts paid them little attention. The marital arrangement, which could be undone only rarely; the system we have learned to call feudalism, infidelity to which was sometimes called felony; the heavy emphasis in medieval literature on keeping faith: all these support the proposition that an important tenet of medieval morality was that promises ought to be kept. Yet the common law of promises was curiously retarded, thus creating what seems an odd gap between law and morality.

Explanations have not been wanting. Local courts, it is said, carried much of the burden, at least until their jurisdictional limit began to interfere with their effectiveness<sup>1</sup>; the church courts supplied a measure of relief, on the sly as it were, under their jurisdiction over breach of faith<sup>2</sup>; and, moreover, promises were in fact vindicated in common-law actions, the most notable of which was debt on a bond, where the promissory element was disguised and subverted but was nevertheless often fundamental to the arrangement being enforced.<sup>3</sup> All these explanations contribute substantially to our understanding of the medieval law of promise, and make less dramatic the apparent inconsistency between the law and the society it was designed to support. But it seemed to me that something might be gained by looking at the fourteenth-century legal remedies avowedly intended to redress the breach of promises, with an eye to discovering how promises were dealt with in the relatively rare circumstances when legal scrutiny was focused on them directly. Along the way we shall see how, if at all, the moral idea that promises should be observed made itself felt.

### I. PROMISES GENERALLY

In 1320, Herle J. said that a covenant was "no more nor less than an agreement between parties"<sup>4</sup>; and that relatively simple iden-

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<sup>1</sup> On the jurisdictional limits of the local courts in the fourteenth century, see Beckerman, "The Forty-Shilling Jurisdictional Limit in Medieval English Personal Actions," in *Legal History Studies 1972* (1975), 110.

<sup>2</sup> See Helmholz, "Assumpsit and Fidei Laesio" (1975) 91 L.Q.R. 406.

<sup>3</sup> This point was first made in Thorne, "Tudor Social Transformation and Legal Change," 26 N.Y.U.L.Rev. 10 (1951).

<sup>4</sup> 2 *Eyre of London* 287 (H. M. Cam, ed., 1969).

tity, between covenant and agreement generally, was reflected in a very wide range of undertakings either being enforced by writs of covenant or being denominated covenant in Year Book discussions. A brief view of some of the arrangements thought of in the fourteenth century in essentially promissory terms will make the point. Agreements about the sale of land were of course very frequent, and so one might make, or be asked to keep, a covenant to levy a fine,<sup>5</sup> to enfeoff,<sup>6</sup> to put someone in seisin,<sup>7</sup> or to make a mortgage.<sup>8</sup> Likewise, a buyer of land will want some title assurance, so a promise to acquit, the forerunner of the modern covenant against encumbrances, might be exacted,<sup>9</sup> or a promise to be free of suit might be asked for.<sup>10</sup> A grantee of a wardship might well demand a warranty, actionable by writ of covenant.<sup>11</sup> Business deals and compromises may be conceived of as covenants: two ecclesiastical institutions may have a dispute over which of them is entitled to the tithes of a certain territory and will make a composition, actionable by writ of covenant, setting out a compromise<sup>12</sup>; or two towns may wish to grant each other immunity from tolls, pontage, murage, and passage—to form a kind of common market in miniature.<sup>13</sup> These were nothing but covenants. Again, personal relationships might be guided by covenants: one may promise another to feed and clothe him, to find her a suitable husband,<sup>14</sup> or, in a prenuptial arrangement, not to alienate certain lands.<sup>15</sup> One may also undertake to receive another's nominees into religious houses,<sup>16</sup> or to be his apprentice<sup>17</sup> or servant.<sup>18</sup> A covenant might be made to stand to arbitration,<sup>19</sup> to be a surety,<sup>20</sup> to build a sea wall,<sup>21</sup> or to pay a

<sup>5</sup> CP/40/403/252v.

<sup>6</sup> CP/40/235/50v; Y.B. 13 Edw. 2, 407, the first unnumbered plea; CP/40/401/276v.; *Year Book II Richard II*, 10 (I. D. Thornley, ed., 1937) (*per* Clopton).

<sup>7</sup> CP/40/207/193v.

<sup>8</sup> Y.B. 47 Edw. 3, f. 3, pl. 4.

<sup>9</sup> CP/40/254/81.

<sup>10</sup> CP/40/390/247v.

<sup>11</sup> CP/40/171/236v.

<sup>12</sup> CP/40/398/299; Y.B. 38 Edw. 3, f. 8, the third unnumbered plea; CP/40/417/39; CP/40/421/219v.

<sup>13</sup> Y.B. 39 Edw. 3, f. 13, the fourth unnumbered plea; CP/40/453/437; CP/40/454/323v.; Y.B. 48 Edw. 3, f. 17, pl. 2.

<sup>14</sup> *Year Book 5 Edward II*, 216 (W. C. Bolland, ed., 1915).

<sup>15</sup> Y.B. 15 Edw. 2, f. 460, the fifth unnumbered plea.

<sup>16</sup> CP/10/443/315; CP/40/453/98v.

<sup>17</sup> *Year Book II Edward II*, 124 (J. P. Collas & W. S. Holdsworth, eds., 1942); CP/40/453/319v.

<sup>18</sup> Of course, these contracts were often enforced by writs on the Statute of Labourers, called variously trespass or covenant; but the arrangement itself was regarded as a covenant. Y.B. 40 Edw. 3, f. 24, pl. 27; Y.B. 45 Edw. 3, f. 15, pl. 15; Y.B. 46 Edw. 3, f. 14, pl. 19; Y.B. 47 Edw. 3, f. 14, pl. 15; Y.B. 47 Edw. 3, f. 16, pl. 23.

<sup>19</sup> Y.B. 26 Edw. 3, f. 12, pl. 13.

<sup>20</sup> 2 *Eyre of Kent* 9 (W. C. Bolland, ed., 1912).

<sup>21</sup> 2 *Eyre of Kent* 12 (W. C. Bolland, ed., 1912).

debt.<sup>22</sup> A covenant may even give rise to a debt, as for board<sup>23</sup> or money received by way of loan.<sup>24</sup> An easement in gross was said to be enforceable by way of covenant.<sup>25</sup> And here we enter that twilight zone between right *in rem* and *in personam*: some thought that the burden or benefit of a covenant might become attached to land in some mysterious fashion. But there was no general theory about how and when that could happen; and even Coke's prodigious analytical abilities were not up to producing a believable synthesis.<sup>26</sup> The precedents are paltry and such discussions as are reported are amateurish and tentative.<sup>27</sup>

This rather tedious rehearsal seemed necessary in order to demonstrate the wide range and fairly large number of arrangements that were analysed in terms of promise. Writs of covenant were said in Year Book discussions to be available in the vast majority of these situations and a very large number of them actually gave rise to such actions. Covenant may have been something of a *rara avis*, but the plea rolls reveal that it was not the extinct species sometimes supposed.

## II. THE TERM OF YEARS

But resort to the ideas of promise was most commonly had in that area of the law that we today call landlord and tenant, that is, the relationship between lessor and termor. The lessee's first line of defence was a writ of covenant, for this was his remedy if his landlord should oust him.<sup>28</sup> The reports or records of many such cases indicate that a warranty was contained in the instrument creating the tenancy<sup>29</sup>; but most do not<sup>30</sup> and it seems that the warranty was not necessary.<sup>31</sup> Indeed, the express basis for the remedy is said to be breach of "the covenant," by which, presumably, is meant the lease itself. Phrases like "a covenant for a term of years"<sup>32</sup> are used to describe the term itself, and not merely the negotiations

<sup>22</sup> *Year Book 4 Edward II*, 85 (G. J. Turner, ed., 1914).

<sup>23</sup> CP/40/547/422v.

<sup>24</sup> Y.B. 40 Edw. 3, f. 26, pl. 1.

<sup>25</sup> Y.B. 21 Edw. 3, f. 2, pl. 5.

<sup>26</sup> See *Co. Litt.* 385a; 5 *Rep.* 17-18.

<sup>27</sup> Y.B. 4 Edw. 3, f. 57, pl. 71, continued in 7 Edw. 3, f. 65, pl. 67; Y.B. 42 Edw. 3, f. 3, pl. 14. The former case is discussed in McGovern, "Contract in Medieval Law: Wager of Law and the Effect of Death," 54 *Iowa L.Rev.* 19, 47 *et seq.* (1968).

<sup>28</sup> See, e.g., CP/40/170/94v.; CP/40/176/92v.; CP/40/192/231v.; CP/40/217/134; CP/40/282/130; CP/40/396/276; CP/40/412/53; CP/40/421/170; Y.B. 47 Edw. 3, f. 12, pl. 11; Y.B. 47 Edw. 3, f. 24, pl. 61; CP/40/465/358v. See also Y.B. 19 Edw. 2, f. 642, the second unnumbered plea.

<sup>29</sup> See, e.g., CP/40/172/231v.; CP/40/217/134; CP/40/396/276.

<sup>30</sup> See, e.g., CP/40/170/94v.; CP/40/176/92v.; CP/40/412/53; CP/40/421/170; Y.B. 47 Edw. 3, f. 12, pl. 11; Y.B. 47 Edw. 3, f. 24, pl. 61.

<sup>31</sup> See the remarks of Finchdean J. in Y.B. 48 Edw. 3, f. 1, pl. 4 at f. 2.

<sup>32</sup> *Year Book 4 Edward II*, 148, 149 (G. J. Turner, ed., 1914).

leading up to its creation; and so, at least for some purposes, a lease for years seems to have been regarded, as we would say, as a contract for possession. Indeed, Chief Justice Herle said that a termor had no estate<sup>33</sup>; and while it is not easy to give precise content to that view, one of its functional consequences might have been to make it easier to see a lease as essentially a covenant, or collection of covenants, between lessor and lessee.

If the termor were ousted by one claiming by purchase through his lessor, rather than by the lessor himself, the usual remedy was by *quare eiecit*, or *occasione cuius vendicionis* as it was otherwise known, against the ejector.<sup>34</sup> But he might also sue his lessor in covenant, and this again evidently without a supporting warranty or express promise not to enfeoff or lease to another.<sup>35</sup> Chief Justice Belknap suggests that the writ of covenant ought to be counted on specially in this case, but he does not say precisely what matter should be included.<sup>36</sup> What we have here is a kind of embryonic implied covenant of quiet enjoyment; but there is no evidence in the fourteenth century that the implication would extend so far as to include ejectments by persons claiming under paramount title. Of course, if the ejectment were by a total stranger, then no action would lie against the lessor on the "implied covenant" or even on an express warranty, even though the latter warranted against *omnes gentes*.<sup>37</sup> The remedy was against the ejector and was a special writ *en son cas*,<sup>38</sup> although some argued that in this circumstance it was up to the lessor to recover the freehold by novel disseisin and then the term was recoverable from him in covenant.<sup>39</sup> Later in the century the remedy became ejectment which could be brought against anyone ejecting, even the lessor himself. Thereafter covenant seems less often used to remedy an ouster, perhaps because the courts would, intermittently at least, allow the term

<sup>33</sup> Y.B. 7 Edw. 3, f. 45, pl. 8.

<sup>34</sup> T. F. T. Plucknett, *A Concise History of the Common Law* (5th ed., 1956) p. 571.

<sup>35</sup> See Y.B. 46 Edw. 3, f. 4, pl. 12, where the action is expressly upheld. The action is also said to be available during the course of the argument in *Year Book 6 Edward II*, 222 (P. Vinogradoff & L. Ehrlich, eds., 1918) (*per Scrope*).

<sup>36</sup> Y.B. 6 Rich. 2, Lincoln's Inn Hale MS. 77, f. 200. But he also says that if one is ejected by a stranger, by which I take it he means someone altogether unconnected with the parties to the lease, the remedy is *quare eiecit*. This is almost surely wrong and makes his other remarks somewhat suspect.

<sup>37</sup> But see *Year Book 2 & 3 Edward II*, 84, 87 (F. W. Maitland, ed., 1904) where Herle seems to say that covenant lies against the lessor if a stranger ousts the termor.

<sup>38</sup> In *Year Book 6 Edward II*, 226 (P. Vinogradoff & L. Ehrlich, eds., 1918) such a writ was expressly upheld against the objection that it was against common form and was not approved by the council.

<sup>39</sup> *Idem.* (*per Miggeley*).

itself to be recovered in ejectment. To my knowledge, this was first allowed in 1389.<sup>40</sup>

Because leaseholds were regarded as essentially contracts for possession, their devolution at death gave a problem at first. In 1311 a lessee's heir sued in covenant, apparently for possession of the leasehold, and was met with the objection that it was his ancestor who was evicted and thus no wrong was done to him. Staunton J. said that some of his associates believed that there was such a thing as a perpetual covenant, but "a covenant for a term of years is like a chattel" and recovery might rather belong to the executors of the lessee than to his heir.<sup>41</sup> And in later years, while it is admitted that the benefit of some covenants survive death in favour of heirs,<sup>42</sup> executors are seen bringing actions of ejectment.<sup>43</sup> Assignees of the termor seem to have been recognised very early as capable of bringing actions for possession in covenant,<sup>44</sup> and while there seems no reason why they should have been denied the other remedies, I have no examples. Similarly, the heirs of lessors became liable in covenant not only for evictions made by their ancestors<sup>45</sup> or persons claiming under them,<sup>46</sup> but also for their own acts of eviction.<sup>47</sup> Despite the common-law reluctance to allow assignment of promises, the lessor's assigns were as well bound by the lease, although Percy, in a fit of adversarial heat, seems to have opined in 1374 that if the lessor's assignee ousted the tenant, the only action was against the original lessor.<sup>48</sup> Finchdean J. said that was a surprising error for so wise a man as he was to make.<sup>49</sup> What we have here is an example of how all the phenomena of property can be counterfeited by resort to the idea of promise. Common lawyers had learned to do that two centuries earlier when the attributes of alienability and heritability had been manufactured by laying them at the door of warranty.<sup>50</sup>

<sup>40</sup> CP/40/519/113. Only a few years earlier, in the sixth year of Richard II, Chief Justice Belknap had said that such a result was impossible because ejectment was only a writ of trespass and neither the term nor future damages were recoverable in it. Y.B. 6 Rich. 2, Lincoln's Inn Hale MS. 77, f. 200.

<sup>41</sup> *Year Book 4 Edward II*, 148 (G. J. Turner, ed., 1914).

<sup>42</sup> See, e.g., Y.B. 2 Edw. 3, f. 3, pl. 14. See also Herle's remarks in Y.B. 7 Edw. 3, f. 65, pl. 67, where he talks of "perpetual covenants."

<sup>43</sup> See CP/40/482/118; CP/40/484/287v.

<sup>44</sup> In *Year Book 4 Edward II*, 173 (G. J. Turner, ed., 1926) it is admitted that a lease was assigned and in Y.B. 19 Edw. 2, f. 654, the first unnumbered plea, an action is brought by an assignee of an estate for years. In CP/40/475/358v. a lease is said to have been assigned, and assigns are expressly warranted in CP/40/483/512v. <sup>45</sup> *Year Book 4 Edward II*, 148 (G. J. Turner ed., 1914).

<sup>46</sup> Y.B. 19 Edw. 2, f. 654, the first unnumbered plea.

<sup>47</sup> Y.B. 15 Edw. 2, f. 454v., the first unnumbered plea. <sup>48</sup> Y.B. 48 Edw. 3, f. 1, pl. 4.

<sup>49</sup> *Idem*. The exact meaning of Percy's and Finchdean's remarks is not free from doubt.

<sup>50</sup> See generally, Thorne, "English Feudalism and Estates in Land" (1959) 17 C.L.J. 193.

That leases were promises may also account for the odd fact that in a disproportionate number of fourteenth-century leases, perhaps a majority, a religious house was the lessor. Canon law regulated the disposition of church property, and religious houses may have been restricted to alienation by lease in most circumstances. But it is likely that a more influential factor was that leases were somewhat precarious affairs and were not likely to be acceptable in certain feudal circumstances; for if the lessor died leaving a minor heir, the lease was no good against the lord.<sup>51</sup> This result is attributable to the essentially contractual nature of leases: the duty to deliver possession or pay damages descended to the lessor's heir, but the lord, who was not privy to the promise, could exert his paramount title. The lessee was but a promisee, not a full-fledged grantee.<sup>52</sup> Of course if there was a warranty, the heir would be liable to the lessee on it<sup>53</sup> and, even without a warranty, the heir would be obligated to put the termor back in possession, if any of the term remained after he reached his majority, because he was liable on his ancestor's lease.<sup>54</sup> But the termor obviously did not want this kind of nuisance and that may account for the fact that so many leases were given by religious houses: those institutions never died and thus never had their lands taken into their lords' hands for minority.<sup>55</sup>

<sup>51</sup> *Year Book 2 & 3 Edward II*, 84 (F. W. Maitland, ed., 1904) is an example.

<sup>52</sup> One ruse devised to evade the lord's right was to enfeoff the termor in fee "in insurance of the term"; but if the jury found bad faith the lord could enter anyway. See Y.B. 18 Edw. 2, f. 602, the third unnumbered plea, and Y.B. 15 Edw. 2, f. 454v, the first unnumbered plea. For other evasive tactics, see J. M. W. Bean, *The Decline of English Feudalism* (1968) p. 21 *et seq.* Professor Bean there indicates his belief that the lord's ability to ignore his tenant's leases disappeared in the early fourteenth century.

<sup>53</sup> *Year Book 2 & 3 Edward II*, 84, 87 (F. W. Maitland, ed., 1904) (*per Westcote*).

<sup>54</sup> See the discussion in Y.B. 18 Edw. 2, f. 602, the third unnumbered plea.

<sup>55</sup> The lord's ability to oust a termor also probably explains why most leases were for a short term: a long term increases the possibility of the lease being interrupted by the lessor's death. A sampling of plea roll and Year Book cases involving leases reveals the following terms: Two years: CP/40/412/53. Three years: CP/40/552/345. Four years: CP/40/183/512v.; CP/40/287/39. Six years: CP/40/170/99v.; CP/40/387/161; CP/40/503/629v.; *Year Book 11 Richard II*, 36 (I. D. Thornley, ed., 1937). Seven years: *Year Book 6 Edward II*, 222 (P. Vinogradoff & L. Ehrlich, eds., 1918); CP/40/282/130; CP/40/446/136v.; *Year Book 11 Richard II*, 211 (I. D. Thornley, ed., 1937); CP/40/475/255. Eight years: *Year Book 2 & 3 Edward II*, 84 (F. Maitland, ed., 1904); CP/40/192/231v.; *Year Book 10 Edward II*, 57 (M. D. Legge & W. S. Holdsworth, eds., 1935). Ten years: CP/40/176/92v.; Y.B. 19 Edw. 2, f. 654, the first unnumbered plea; Y.B. 40 Edw. 3, f. 5, pl. 11; CP/40/429/496; CP/40/453/165; Y.B. 47 Edw. 3, f. 12, pl. 11; Y.B. 38 Edw. 3, f. 33, the second unnumbered plea. Eleven years: CP/40/441/234v. Twelve years: *Year Book 6 Edward II*, 226 (P. Vinogradoff & L. Ehrlich, eds., 1918). Thirteen years: *Year Book 10 Edward II*, 4 (M. D. Legge & W. S. Holdsworth, eds., 1935); CP/40/217/89. Twenty years: *Year Book 4 Edward II*, 148 (G. J. Turner, ed., 1914); *Year Book 4 Edward II*, 173 (G. J. Turner, ed., 1926); Y.B. 19 Edw. 2, f. 642, the second unnumbered plea; CP/40/396/276; CP/40/421/170; Y.B. 47 Edw. 3, f. 24, pl. 61; CP/40/465/358v.; CP/40/519/113. Twenty-one years: Y.B. 6 Rich. 2, Lincoln's Inn Hale MS. 77, f. 190v. But see CP/40/482/118 for a lease of 100 years.

Other obligations and rights arising in the landlord-tenant relationship were gathered around the idea of promise. Covenants to repair provided the most litigation, and in one form or another they were included in many leases. Of course the termor was under a common-law duty not to commit waste and was subject to the statutory waste actions.<sup>56</sup> A mere covenant not to commit waste, therefore, would add nothing to his duty; indeed, in 1310 or thereabouts an action of covenant was brought by a lessor against a termor who had forfeited his estate to the remainderman on account of waste, and it was allowed even without specialty<sup>57</sup>: since this was a common-law duty absent an express undertaking anyway, a covenant would be implied. Otherwise the forfeiting termor would escape liability to his lessor, and this, Chief Justice Bereford said, "would be great hardship."<sup>58</sup>

Usually, then, a covenant to repair was included in a lease to give more precise definition to the termor's responsibility than was to be gleaned from the rather vague law of waste. What we call permissive waste was a particularly unsettled area; and a covenant would naturally be helpful in defining this kind of duty.<sup>59</sup> So a provision precisely describing the buildings to be repaired and the kinds of repairs generally expected might be framed. Usually repairs were made at the tenant's expense, but some leases provided that certain unusually burdensome repairs as, for instance, of sea walls, might be made by the lessee at his landlord's expense<sup>60</sup>; and sometimes the lease would provide for deduction from the rent of reasonable expenses so incurred. But it was apparently the rule that such expenses could be withheld from the rent even without a specific covenant to that effect; when in 1389 it was asserted that "the deed does not prove that he was to repair [the house] out of the rent,"<sup>61</sup> Chief Justice Belknap asked rhetorically: "Do you wish to put him to his action when he has a penny already in hand?"<sup>62</sup> Often the covenants would provide what state each parcel of the leasehold was to be left in, that is, whether planted and if so with what,<sup>63</sup> and what stock and furniture was to be there at the end of the term.<sup>64</sup>

<sup>56</sup> The provision most frequently employed against termors was the Statute of Gloucester, 6 Edw. 1, c. 5 (1278).

<sup>57</sup> *Year Book 4 Edward II*, 171 (G. J. Turner, ed., 1926).

<sup>58</sup> *Idem* at 172. An abridged version of the case appears in *idem* at 192.

<sup>59</sup> There was no implied covenant to return the premises in the state in which they had been leased. See *Year Book 7 Edward II*, 32 (W. C. Bolland, ed., 1922).

<sup>60</sup> See, e.g., the leases in CP/40/475/255 and CP/40/483/512v.

<sup>61</sup> *Year Book 11 Richard II*, 36, 37 (I. D. Thornley, ed., 1937).

<sup>62</sup> *Idem*.

<sup>63</sup> See, e.g., CP/40/381/161; Y.B. 40 Edw. 3, f. 5, pl. 11.

<sup>64</sup> CP/40/387/161.

But the most common covenant provided that the termor was to leave the premises *in adeo bono statu . . . sicut ea recepit*.<sup>65</sup> This one caused a great deal of trouble, because the courts were reluctant to apply the language literally when the loss complained of was caused by an act of God or "sudden adventure"—lightning, storms, or great winds. The rule was that in waste, even if the lease contained such a covenant, no such insurer's liability would be enforced<sup>66</sup>; but if the action were one of covenant the promise was obviously to the forefront and discussion centred on the scope of the risk assumed. The defendant would say that he was liable only for fault or lack of due care; the plaintiff would say the lessee by his covenant assumed all risk of destruction.<sup>67</sup> No definite resolution of the difficulty was arrived at in the fourteenth century.<sup>68</sup>

As with the duty to repair on the tenant's part, a lessor's duty to acquit of services demanded by a chief lord was sometimes vindicated by resort to the idea of promise. Of course there was a general duty of this sort incumbent on a lord to a tenant in fee, "as in the right between lord and tenant" as Scrope J. had it in 1311<sup>69</sup>; but if there was no landlord-tenant relationship, then covenant had to be resorted to,<sup>70</sup> or, probably, in any case if the estate was only a term of years. Thus, as Scrope J. said: "There is . . . also another sort of acquittance where a man binds himself by his own deed."<sup>71</sup> As we would say, the duty might arise by status or contract; and in the latter case "the tenant shall have a writ of covenant by virtue of the deed."<sup>72</sup> In the former case, the writ of mesne was available, but covenant was said to be an acceptable alternative.<sup>73</sup> Furthermore, privity of contract with the original lessor survived a grant of the reversion even after attornment.<sup>74</sup> The covenant to acquit was one of the so-called "perpetual covenants" of which the Year Books occasionally speak; indeed, Belknap said in 1368 "that it runs with [or rather lies on] the land"<sup>75</sup>; but the heir was not bound unless he had assets by descent in fee simple from his ancestor.<sup>76</sup>

<sup>65</sup> Y.B. 50 Edw. 3, f. 27, the first unnumbered plea is an example.

<sup>66</sup> Y.B. 43 Edw. 3, f. 6, pl. 16; cf. Y.B. 49 Edw. 3, f. 1, pl. 1.

<sup>67</sup> For discussions, see Y.B. 40 Edw. 3, f. 5, pl. 11.

<sup>68</sup> In *Year Book 11 Richard II*, 211 (I. D. Thornley, ed., 1937), such a covenant was relied on, but when the defendant pleaded an act of God (lightning) the plaintiff traversed, thus avoiding the issue of the legal sufficiency of the plea.

<sup>69</sup> *Year Book 5 Edward II*, 281, 283 (G. J. Turner, ed., 1947).

<sup>70</sup> In *Year Book 4 Edward II*, 102 (G. J. Turner, ed., 1914), Friskenev tried to maintain that "reversion binds a man to . . . acquittance" but his view was not accepted.

<sup>71</sup> *Year Book 5 Edward II*, 281, 283 (G. J. Turner, ed., 1947).

<sup>72</sup> *Idem*. See also Y.B. 45 Edw. 3, f. 27, pl. 20 at f. 28, where Finchdean speaks of the duty to acquit in terms of covenant.

<sup>73</sup> *Year Book 10 Edward II*, 2 (M. D. Legge & W. S. Holdsworth, ed. 1934).

<sup>74</sup> *Year Book 4 Edward II*, 99 (G. J. Turner, ed., 1914) (*per* Malberthorpe).

<sup>75</sup> Y.B. 42 Edw. 3, f. 3, pl. 14.

<sup>76</sup> See CP/40/506/120.

Of course there were other kinds of undertakings that might find their way into leases. A lessee might promise not to lease the premises to another,<sup>77</sup> to lease only to a certain group of persons,<sup>78</sup> personally to inhabit the premises,<sup>79</sup> to build a house on the premises to certain specifications,<sup>80</sup> to manure the lands of the manor,<sup>81</sup> or to pay part of the rent to someone other than the landlord.<sup>82</sup> All these were, of course, actionable by writ of covenant.

Rent itself, however, was only rarely claimed by way of covenant; in fact, I have seen only one such instance.<sup>83</sup> Rent was so real, so corporeal, that an action of debt was the usual remedy; rent was "reserved" like an estate, and one fourteenth-century lawyer even said that mere non-payment was a sufficient disseisin to give rise to the assize. Even though it was admitted that a rent charge, unlike a rent service, commenced by covenant,<sup>84</sup> rent charges were not, strictly speaking, conceived of as promises but as rights *in rem*; and we ought probably to resist the temptation, as some legal historians have not, to call them "covenants that run with the land."<sup>85</sup> But in any event, leases very often provided methods of assuring rent payment; and sometimes the rent was made a charge on the land so that distress was possible,<sup>86</sup> or a provision doubling the rent upon failure to pay might be included.<sup>87</sup> But usually a right of entry for condition broken was reserved<sup>88</sup>; and this was commonly done as well in the case of other duties or covenants.<sup>89</sup> These are all framed as rights of entry, and not as possibilities of reverter; and often a grace period is given to allow cure of the breach. Even when no such period was provided, it may have been the rule that formal demand was necessary prior to entry.<sup>90</sup> But even with these rights of entry we may have not as yet abandoned the idea of

<sup>77</sup> CP/40/548/306.

<sup>78</sup> Y.B. 38 Edw. 3, f. 33, the second unnumbered plea.

<sup>79</sup> CP/40/548/306.

<sup>80</sup> CP/40/429/495. The specifications were in another indenture which was incorporated by reference into the main indenture setting forth the lease.

<sup>81</sup> CP/40/505/400v.

<sup>82</sup> CP/40/217/134. See also *Year Book 10 Edward II*, 4 (M. D. Legge & W. S. Holdsworth, eds., 1935).

<sup>83</sup> CP/40/387/161.

<sup>84</sup> Y.B. 8 Edw. 3, f. 47, pl. 28 (*per Scrope*).

<sup>85</sup> The cases in *Year Book 12 Edward II*, 4 and 86 (J. P. Collas & T. F. T. Plucknett, eds., 1950), involving rent charges, are indexed as "covenants that run with the land."

<sup>86</sup> CP/40/421/373. See also Y.B. 45 Edw. 3, f. 11, p. 17 at f. 8 (*per Kirton*).

<sup>87</sup> Y.B. 45 Edw. 3, f. 11, p. 17 at f. 8 (*per Kirton*).

<sup>88</sup> CP/40/396/276; Y.B. 38 Edw. 3, f. 33, the second unnumbered plea; CP/40/441/234v. Y.B. 47 Edw. 3, f. 12, pl. 11; Y.B. 47 Edw. 3, f. 24, pl. 61; CP/40/475/358v.; CP/40/483/512v.; CP/40/548/306 (life estate).

<sup>89</sup> Y.B. 38 Edw. 3, f. 33, the second unnumbered plea (promise not to lease a mill to anyone but a villein of the lessor or a miller); CP/40/441/234v. (covenant against commission of waste); CP/40/548/306 (life estate; covenants to repair and against assignment).

<sup>90</sup> See Y.B. 47 Edw. 3, f. 12, pl. 11.

promise. For in the reign of Edward II a termor whose lease allowed the lord to distrain would not let him do so, and the indignant lessor brought an action of covenant to enforce the right.<sup>91</sup> It may be, then, that rights of entry could have been enforced in the same way, as we would say on the theory that the right of entry implied a promise on the part of the lessee to move aside.<sup>92</sup> But I have seen no example of the employment of such a theory.

### III. SOME MORE PROMISES

A few words ought to be said about *assumpsit* and actions on warranties of quality in the sale of goods, both of which appeared in the common-law courts in the fourteenth century. When in 1364 issue was reached for the first time in an *assumpsit* writ in the King's Bench, the plaintiff claimed the defendant had faithfully promised (*fideliter promississet*) to make his hand as sound as any London surgeon could make it; and he said that he had lost his hand through the defendant's negligence or malice, thus highlighting in a dramatic way the tortious, trespassory element of the defendant's activity.<sup>93</sup> The cases in the King's Bench immediately succeeding contain essentially the same allegations, except the alternative accusation of malice is sometimes omitted.<sup>94</sup> In one, the defendant's answer uses interchangeably the verbs "to promise" (*promittere*), "to covenant" (*convenire*), and "to undertake" (*manucapere*), to describe the plaintiff's allegation, which, of course, the defendant denied. Even when tortious elements are included in the writ, then, issue may be taken on the promise alone.

In the Court of Common Pleas, the first such case to come to issue was against a carrier who, it is said, agreed (*assumpsit*) to carry grain safe and sound (*salvo et secure*) from Hedon to Holderness in York. In this case no allegation of the defendant's malice is made; the count says that the boat ended up on a sandbar because the defendant *navem . . . tam incaute et negligenter . . . gubernavit quod per defectum regiminis navis illius frumentum predictum . . . totaliter amissum fuit*. But there is also included a count of assault and battery *vi et armis*. The plaintiff was evidently on the boat and was injured; and probably he seized on this to give trespassory colour to his action.<sup>95</sup> The use of the word *assumpsit*,

<sup>91</sup> CP/40/180/156v.

<sup>92</sup> See McGovern, "The Enforcement of Oral Covenants Prior to Assumpsit," 65 Northwestern L. Rev. 576, 591 *et seq.*, where the author argues convincingly that in the fourteenth century rights of entry were conceived of as covenants and not as rights *in rem*.

<sup>93</sup> KB/27/414/37v.

<sup>94</sup> *E.g.*, KB/27/449/88.

<sup>95</sup> CP/40/423/134v.

in the place of *promisit*, too, was perhaps motivated by a wish to give the writ as tortious a cast as possible. *Assumptere* (*emprendre* in French) was what someone did when he took a duty on himself; as, for instance, when a person entered a religious order,<sup>96</sup> or one of several defendants claimed the entire interest in a property in litigation.<sup>97</sup> Moreover, an embracer was defined in 1366 as one *que emprent sur luy de faire lenquest comparer*; and a maintainer was someone who took it upon himself to defend suits in return for a share of the proceeds.<sup>98</sup> The idea, then, is one of a duty voluntarily undertaken, a risk one puts on one's self. I am not suggesting that the idea is significantly different from promise at bottom. But the pleaders needed all the help they could get to avoid the effect of the objections that were raised anyway: that this was really an action on a covenant and therefore a specialty ought to be produced, or that wager of law should lie.<sup>99</sup> Indeed, Cavendish J. in 1374 said *assumpsit* was a writ of covenant.<sup>1</sup> In any case, by the end of the century we find *assumpsit* used to recover consequential damages for promises not performed on time, and without allegations of negligence or lack of care. The promissory element was beginning to take on a life of its own and allegations of trespass were apparently thought by some to be unnecessary for a good cause of action.

Warranties of the quality of goods initially faced the same kind of difficulties. The writ claimed that the seller while warranting the goods to be sound knew they were in fact defective in some particular. A Year Book reporter tells us that the first time a warranty writ in common form was upheld was in the sixth year of Richard II.<sup>2</sup> The report of that case<sup>3</sup> reveals that the objections immediately taken were that it was a writ of covenant and therefore should have been commenced by summons and not attachment; that a specialty was required; and that wager of law should lie. These challenges were held unsound because the action was not taken on the warranty but on the defendant's deceit. Much the same objections were raised when the action next was attempted, and the plaintiff's response was that it was a writ of trespass on the case which sounded in falseness and deceit; and the defendant *nosa pas*

<sup>96</sup> See, e.g., Y.B. 40 Edw. 3, f. 37, pl. 11: ". . . quia habitum religionis assumpsit . . ."

<sup>97</sup> See, e.g., Y.B. 41 Edw. 3, f. 20, pl. 6: ". . . emprist tenancy del entirety . . ."

<sup>98</sup> See the Statute of Westminster I, 3 Edw. I, c. 25 (1275). The word "covenant" is also used in this statute to describe the agreement between maintainer and litigant.

<sup>99</sup> See, e.g., Y.B. 41 Edw. 3, f. 6, pl. 11.

<sup>1</sup> *Idem.*

<sup>2</sup> See Y.B. 7 Rich. 2, Lincoln's Inn Hale MS. 77, f. 206: "Similis materia anno sexto regis . . . ou tiel bref fuit primez maintainable come ieo crey etc."

<sup>3</sup> Y.B. 6 Rich. 2, Lincoln's Inn Hale MS. 77, f. 192.

*demourer*.<sup>4</sup> Thereafter the rolls reveal a sprinkling of such actions, mostly on sales of horses<sup>5</sup> but occasionally on sales of wool,<sup>6</sup> wine,<sup>7</sup> or fish.<sup>8</sup> The only substantive issue joined is on the fact of the warranty,<sup>9</sup> although a seller will sometimes save the issue of the existence of the defect by way of a clause of *protestando* or *non cognoscendo*.<sup>10</sup> Everyone seemed to know, then, that these were really promise cases only very thinly disguised as torts; and that probably accounts for the fact that no such cases seem to have appeared in the King's Bench. That court had no jurisdiction over promises.

#### IV. CONCLUSION

It was of course conceded by all fourteenth-century lawyers that common-law actions on mere promises should be supported by a writing. Partly, no doubt, this was a concession to the shortness of time and a desire to reserve for the already over-worked and understaffed central courts only important cases. But it may mainly have had to do with an uneasiness about proof of unwritten undertakings; and soon the rule requiring a written instrument came to have a theoretical basis: duties to act beyond those imposed by common right, that is longstanding social arrangement, required a "specialty"—*i.e.*, evidence of the special exception to the ordinary order of things—just as an exception to common law required a *special ley*.<sup>11</sup> All this is well enough for professional lawyers, but it must have produced a great deal of distress in ordinary people who wanted their promise cases, for one reason or another, in the king's court. For them, the jurisdictional barrier must have seemed nonsensical and unjust.

The *assumpsit* and warranty cases became the vehicles by which this injustice was overcome. *Assumpsit* was usually used in the case of a promise negligently performed; but the rolls of Richard II's reign reveal a number of pleaded cases of what in the fifteenth century would be called non-feasance.<sup>12</sup> It is true that most of these cases contained a tricky allegation that could have been used to

<sup>4</sup> Y.B. 7 Rich. 2, Lincoln's Inn Hale MS. 77, f. 206.

<sup>5</sup> See, *e.g.*, CP/40/529/197v.

<sup>6</sup> CP/40/548/234v.

<sup>7</sup> CP/40/527/410.

<sup>8</sup> CP/40/548/157.

<sup>9</sup> See, *e.g.*, CP/40/501/485v.

<sup>10</sup> See, *e.g.*, CP/40/510/465. I take it this is done in order to allow evidence of the quality of the goods to be submitted to the jury.

<sup>11</sup> The idea that a promise was a private law finds occasional expression in the Year Books. See, *e.g.*, *Year Book 5 Edward II*, 30, 31 (G. J. Turner & T. F. T. Plucknett, eds., 1947).

<sup>12</sup> I will deal with these fully in my projected volume of fourteenth-century trespass cases now in preparation for the Selden Society.

good purpose: they alleged that the promise had not been performed *on time*.<sup>13</sup> Of course, if it were performed, but performed late, the plaintiff could easily argue that it was not a case of pure non-feasance. If no work were performed at all, however, the plaintiff's difficulty seems greater; but he might argue that the defendant has disabled himself because he can now never perform the promise precisely since the time has run out, and thus is guilty of something more than mere inactivity. All these arguments might have been made, but nothing even remotely like this is in evidence in the Year Books until the fifteenth century.<sup>14</sup> Besides, there is an occasional case in the rolls for breaches that could not even colourably be called misfeasance, as against a landlord for failing in his undertaking to repair.<sup>15</sup>

The warranty actions are always taken on writs alleging fraud, but the invariable issue was on the warranty; and it is not likely that a jury which found an express warranty would be terribly scrupulous about the *scienter* element. Besides, the issue on the warranty seems to exclude consideration of knowledge of the defect. We all know, anyway, how human it is to feel cheated or mistreated when an expectation raised by the statement of another is disappointed, how easy it is, in other words, to make a tort out of what may have been only a breach of contract. But the main point to be made about the *assumpsit* and warranty cases must surely be the same: in them the strong ethical tenet, that promises should be kept, overcomes the technical barrier of a writing which professional lawyers had erected. Ethical ideas have a way of being avenged; and the success of the warranty cases and particularly of *assumpsit* is nothing more nor less than covenant taking its revenge. In relatively modern times we have seen another instance of the same kind in the ill treatment received by the Statute of Frauds.

Left to its own devices, that is freed of the rule of the seal, the idea of promise would probably have thrown out the same kind of penumbra that trespass did. We in fact do hear tentatively of "covenant on the case"; and are told, occasionally, that some actions not called covenant really *are* actions of covenant. What we must come to see is that all these actions discussed ought to be viewed intellectually as a unit, as the manifestation of an assumption about the way the world ought to be ordered and the way people are expected to behave. I have tried to show what may seem to be very little, no more, perhaps, than that the capital "C" ought

<sup>13</sup> See, e.g., CP/40/547/530.

<sup>14</sup> The cases are collected in C. H. S. Fifoot, *History and Sources of the Common Law: Tort and Contract* (1949), pp. 340-357.

<sup>15</sup> KB/27/506/8v.

to be dropped from the phrase "Action of Covenant." But we have only recently learned not to be beguiled by the intricate grid of the writ system and to look beneath to the elementary ethical principles the law was designed in some measure to support.<sup>16</sup> It is imperative that we cultivate this hard-won insight into a genuine habit of mind since medieval juries often had unbridled power to decide cases; and we must always keep it squarely in mind that common-law rules of liability are to be discovered by reconstructing the common social assumptions on which the jury relied. One such assumption, that promises should be kept, requires that we make of covenant not a writ, but a category for the source of obligations.<sup>17</sup> Unless we do that, I do not think that we can ever hope to see the main outlines of Maitland's seamless web, or penetrate the mystery of that undifferentiated wrong, that *injuria*, that accused tortfeasor and debtor alike were forced to deny.<sup>18</sup>

<sup>16</sup> Professor Milsom has urged this point in many of his writings. See e.g., "Reason in the Development of the Common Law" (1964) 81 L.Q.R. 496.

<sup>17</sup> A similar point is made in Milsom, "Not Doing is no Trespass: A view of the Boundaries of Case" [1954] C.L.J. 105.

<sup>18</sup> *Injuria* is rendered *tort* in Year Book French. The transcendent character of the word is illustrated by Westcote's remarks in *Year Book 2 & 3 Edward II*, 84, 85 (F. W. Maitland, ed., 1904): "We say that you yourself leased the house etc. and by your deed bound yourself to warrant and defend. That you have not done, and so we do affirm a wrong [*tort*] in your person, namely a breach of covenant."