

Chapter 2

A Note on the Curious Incidents of Debt

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Debt is one of the oldest actions at common law, in place well before 1189. It took the form of a royal command “to render what is owed”. And it remains a most important action at law today. Even after the likes of negligence and contract or even statutory causes have left the field, it is the liquidation of damages into a sum by a court that gives rise to a judgment debt, and it is that debt which is ultimately enforced.

The Latin verb *debere* has a sense somewhere between the English “ought” and “owe”: as in Bracton’s maxim, *sapiens esse debet qui iudicat*, “he who judges ought to be wise”,¹ or Celsus’ definition of a legal action, *ius persequendi in iudicio quod sibi debetur*, “pursuing in court a right which one is owed”.² Much like the word *aequitas* (equity), a particular history of professional usage has produced a narrower, technical meaning. The connecting thread of that history is more obviously an institution than an idea, namely, the writ of debt. In Milsom’s assessment, “[w]e can identify the underlying idea of covenant: it was that of agreement. What is the idea underlying debt? It is a harder question”.³

At least as between citizens, there was an old belief that a private exchange of goods was fair and just only if equal, that is, only if neither party gained more than the other. Debt was an action that restored balance to an unequal exchange. But in the increasingly mercantile 17th century, a new interpretation was proposed – that to be just it was enough that an exchange be *consensual*. Persons owed whatever they agreed to give. The shift in thinking from *exchange* to a focus on the importance of the *promise* itself in private law, and the use of executive and legislative authority to impose taxes and penalties, tended to distort that original idea. In the end, the common element seems rather to be that debt gives effect to the conclusion – a duty to pay – not the factual or legal

1 *Bracton on the Laws and Customs of England*, Vol I, Thorne (trans) (HUP, Cambridge MA, 1968), f 1b.

2 Quoted in *Justinian’s Institutes*, 4.6, or “a right to go to court to get one’s due”, Birks & McLeod (trans) (Duckworth, London, 1987), 129.

3 Milsom, *Historical Foundations of the Common Law* (2nd ed, OUP, Oxford, 1981), 258-259.

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