institutions are no model for the general run of disputes. Simpler solutions are needed.

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INDEBITATUS ASSUMPSIT IN 1447

IT might not have been foreseen that computer technology would revolutionise the study of legal history; but the ability to take digital photographs in libraries and record offices has begun to affect profoundly the work English legal historians. And the most useful publicly available mine of previously unpublished legal information is the enormous collection of photographs of all the plea rolls of the King's Bench and Common Pleas from the earliest times to the 1620s, assembled through the unflagging industry of Professor Robert Palmer and his colleagues on the "Anglo-American Legal Tradition" (AALT) website. The rolls are not indexed, but AALT has added a growing number of term-indexes based on the images, and also a calendar by Professor Palmer of all the error cases in the King's Bench rolls. These aids have recently enabled us to make a significant addition to the history of *assumpsit*.

It has long been well established from the year books and plea rolls that the King's Bench, after consulting all the judges of England, reached the landmark decision in *Doige's Case* (1442) that an action on the case would lie for failing to perform an undertaking or promise. The decision had seemingly been anticipated by a remark made in the Common Pleas in 1440 by Thomas Brown, the second prothonotary. This was discovered some time ago by Professor Simpson in a manuscript yearbook at Harvard (HLS MS 156, fo. 51); and one of the new AALT indexes revealed that the case was almost certainly brought between the same parties. It was *Doige's Case* (No. 1) (see Baker and Milsom, *Sources of English Legal History* (revised edition, Oxford, 2019), 432). It seems that Brown was all in favour of allowing the new action, with its promise of more court fees, but the court was against it, and therefore the plaintiff went to the other side of Westminster Hall. Perhaps a little more delving in the rolls will clarify the chronology; but it is only a detail in the longer story. A much larger historical question raised by *Doige's Case* is why it was another 60 years and more before the next step was taken of bringing actions on the case for failing to pay debts. If the basis of the decision of 1442 was that bargains were of their very nature reciprocal, why should not an unpaid Mrs. Dogge have been allowed to bring *assumpsit* against a purchaser who had undertaken to pay her?

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We know with hindsight that recovering debts was to be the principal use of *assumpsit* between the early sixteenth century and the abolition of the forms of action. One textbook suggests that the principal importance of the decision of 1442 was to prepare the way "to storm the great citadel of debt", adding nevertheless that "This brave feat seems not to have been contemplated before 1500". The word "seems" perhaps covered a nagging doubt as to how this could possibly be so. Debt collection has always been and still is, numerically, the principal function of the civil courts of law; and the demerits of the old action of debt were no less apparent in 1440 than they were in 1500. There were, it is true, technical arguments against allowing *assumpsit* for money; and we know what they were, since they were pressed so forcefully and repeatedly by the Common Pleas judges in the debates with the King's Bench leading to *Slade's Case* (1602). But they did not deter the plaintiffs who began to bring such actions in the early 1500s. Did it really not occur to anyone to try earlier?

The AALT calendar of error cases has now thrown up the answer: an attempt was indeed made, and it was made within a mere three years of *Doige's Case*. In November 1447 the King's Bench was invited by writ of error to reverse a judgment given before the mayor and sheriffs of Lincoln in the guildhall there on 13 September 1445 (*Patrington v Killingholme*, KB27/745, m. 66; AALT image 0137). The plaintiff, John Patrington, alleged in his plaint that the defendant, Robert Killingholme, had undertaken (*assumpsisset*) to pay him within a certain time four marks and thirteen pence (£2. 14s. 1d.), in which sum he was indebted (*indebitatus existit*) to the plaintiff, but then refused to pay. The defendant pleaded the general issue, *Non assumpsit*, the jury found for the plaintiff, and the court gave judgment for Patrington to recover the aforesaid £2. 14s. 1d. and also 10d. damages. This admittedly looks more like a judgment in debt than in case, since a judgment in trespass ought to have been for unliquidated damages. But the judgment was to recover a sum of money, not the "debt", and both the plaint formula and the plea clearly showed that this was conceived as an action of *assumpsit*. No attorneys are mentioned, any more than they were in *Doige's Case* (1442). (In the 1440 action in the Common Pleas, the plaintiff was represented by the Kentish attorney Hugh Brent of Clifford's Inn; his counsel is unknown.) But local courts were by this time using the same forms of action as the central courts, there was no shortage of Common Pleas attorneys in Lincoln, and it is evident that some legal thinking lay behind the innovation. (It is possible that it was not a unique experiment; but the rolls of local courts are not yet online.) Not only was *assumpsit* being used to enforce an undertaking to pay off a debt, but our Lincolnshire lawyer had also managed to invent the general *indebitatus assumpsit* formula – previously considered by legal historians to have been a mid-Tudor innovation. The advantage of the general formula was that there was no need to set out in the plaint

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the contract which gave rise to the debt. But legal thinking in Lincoln was not limited to adventurous plaintiffs. It also persuaded Killingholme to challenge the judgment by bringing the writ of error in the King's Bench. Three errors were assigned. The first was a procedural defect, that there was no mention of process against Killingholme before he pleaded. The second hit the main target: "John has declared against Robert that Robert took upon himself to pay John the aforesaid four marks and thirteen pence, whereas the aforesaid plaint ought by right to have been of the debt (*de debito*) of the same four marks and thirteen pence and not of an undertaking (*de assumptione*)." The third assigned error was that issue had been joined on the *assumpsit* rather than the debt. This last seems to have been a fallback argument in case the court considered that the plaint really was in substance an action of debt. The record then shows us only that Killingholme did not appear in the King's Bench and was not represented; and the court, without even adjourning for advisement, reversed the judgment. Without a report we can only guess at the reason. It could have been one of the three assigned, or a different one. It is likely, however, that the successful objection was the second one, which later divided the two benches: that *assumpsit* would not lie where a writ of debt was available.

A judgment on a writ of error was an even more effective precedent than a judgment on demurrer, and it bound the Common Pleas in the sense that a judgment in that court would be open to reversal on the same grounds. But it was only effective as a precedent so long as it was remembered. We do not yet know whether the formula was replicated in other local courts. But one consequence of a random, unofficial tradition of law reporting is that some significant cases were forgotten by the profession. While *Doige's Case* has been known through the centuries from the yearbook report, *Patrington v Killingholme* was unreported and faded into the obscurity which befell most of the unindexed parchment heaps piled into the basement of Westminster Hall, later to be consigned to the Tower of London and now in the Public Record Office. It is plausible to suppose that, at the time, the judgment was enough to stifle thoughts of similar experimentation at Westminster. But it did not survive long enough in the collective memory to stop the development for good. Digital photography is another matter. Our nagging puzzlement has finally been dispelled. And the textbooks will have to be adjusted.

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