Assess the effectiveness of remedies for unpaid debts (actions of debt, detinue and account) under late medieval common law

Plaintiffs seeking redress regarding unpaid debts had three courses of action under late medieval common law: Debt, Detinue and Account. Debt was contractual in nature, and was confined to money and unspecific goods/fungibles.[1] Detinue related to the recovery of specific chattels, but was not too disparate from that of debt,[2] whilst the action of account sought an accounting of the plaintiff's money whilst in the defendant's charge.[3] Despite attempts to rectify problems, only Debt stayed effective throughout the period.[4] Account, while effective in some aspects – no general issue, auditors were originally keepers of record and could imprison defendant – suffered from issues regarding post-mortem cases, loss of status and procedural awkwardness that meant it soon fell out of use. Detinue was largely ineffective due to problems proving legal right to property and dealing with the destruction/loss of property in the debtor's hands. However, Debt, while suffering due to oral contracts allowing wager of law, defendants being forced to general issue as well as the many potential loopholes (such as incapacity), was generally effective; with the strength of bonds, sureties and post-mortem cases being just a few examples where it succeeded.

Proprietary in nature, 'Account' was designed to force the defendant to account for the plaintiff's money in his possession.[5] Its strength lay in its *praecipe* form of writ, forcing the defendant to come to account.[6] The Statute of Westminster II (1285) extended to auditors in a voluntary case of account, powers to detain defendants in prison until the debt was

[1] Belsheim, p. 469 ; Milsom (1969), p. 263; Baker, p. 321; Barbour, p. 25.
[2] Milson (1969), p. 257.
[3] Belsheim, p. 469; Milson (1969), p. 275.
[4] Schofield, p. 4; Barbour, p. 97.
[5] Belsheim, p. 469; Milson (1969), p. 275.
[6] Milsom (1969), p. 275.

settled.[7] This extension suggests these powers were already granted to court appointed auditors, and the advantage is obvious for plaintiffs; a litigant could ascertain the exact money due and simultaneously retrieve it.[8] Further, an auditor's account was a matter of record and a defendant could not wage law against it.[9] However, once the status of auditors began to decline, it was questioned (such as in Appendix one and two) whether an account was a debt of record if the auditors were not court appointed.[10] This lack of confidence in the action led to plaintiff's seeking alternative redress.

Another strength of account was the lack of wager of law; matters of fact went to jury and matters of law to the court.[11] While an additional advantage was the absence of a general issue for the defendant,[12] he could instead deny being obligated or plea that his obligation had been sated.[13] It was only when a receiver denied being a receiver that wager of law was, in principle, allowed.[14] However, the action of account had weaknesses that threatened its effectiveness and eventually caused its relative abandonment. The greatest of these was procedural inferiority compared to *assumpsit* and the equity courts.[15] The action of account required the plaintiff's count to be exact, and any disparity between the case and the count could be cause for dismissal.[16] Furthermore, account required two judgements, one on whether the defendant should be forced to account, and another for the recovery of the ascertained sum.[17] This made it awkward and unwieldy, made even more so by the degeneration of status for auditors as keepers of record.[18] This loss of status is evidenced by an increase in 'debt on account', which suggests the loss of the power granted to them by the

[7] Milsom (1969), p. 276.
[8] Milsom (1969), p. 276.
[9] Milsom (1969), p. 277; Belsheim, p. 499.
[10] Belsheim, p. 471.
[11] Belsheim, p. 496.
[12] Milsom (1969), p. 279; Belsheim, p. 495.
[13] Belsheim, p. 495.
[14] Milsom (1969), p. 281.
[15] Belsheim, pp. 493, 500.
[16]Belsheim, p. 495 .
[17] Belsheim, pp. 493-94.
[18] Milsom (1969), p. 276.

statutes of Westminster II and Marlborough to detain defendants.[19] With this degeneration in power, a plaintiff was forced to bring a separate action to recover his money; delaying his retrieval of the unpaid debt, increasing legal costs and allowing for the defendant to put forward a new defence in the new action.

Another weakness of account as a remedy was that with the death of a creditor, an accounting became impossible for his heirs.[20] Appendix three shows this clearly, but highlights that there was statutory relief whereby 'the action is given to the executors only' where a bond is available. This relief, however, only affected creditors; if the debtor were to die, an accounting would be impossible – an heir or executor were not expected to know the personal business of the debtor, and thus account for the money?[21]

One final aspect of account that was ineffective was the position a debtor in surplus. If a debtor was in surplus to his creditor, he had no remedy for restitution unless the creditor had brought the action of account.[22] Only once the accounting had been made, could a debtor begin his own action of debt against his creditor.[23] Furthermore, a plaintiff found to owe a defendant was not restrained as a defendant would have been, and was allowed to wager law as 'the auditors were not judges of record over the claimant'.[24] For a debtor in surplus then, the action of account was so ineffective as to be unjust.[25]

Another way for a plaintiff to recover unpaid debts was the 'action of debt' or 'detinue'. These actions were 'scarcely distinguishable' from each other.[26] The distinction lay in the fact that detinue was for specific, personal property, whereas debt was for monetary debts and/or generic goods/fungibles.[27] One of the strengths of debt was that a bond was not

[19] Milsom (1969), pp. 276-77.
[20] Belsheim, p. 487.
[21] Belsheim, pp. 487-88.
[22] Milsom (1969), p. 278.
[23] Milsom (1969), p. 278.
[24] Milsom (1969), p. 277.
[25] Milsom (1969), p. 278.
[26] Baker, p. 321; Milsom (1967), pp. 6, 14; Stoljar, p. 6.
[27] Belsheim, p. 469; Milsom (1969), p. 263; Baker, p. 321.

required to begin the action, it could be brought even if it was an oral transaction or unsealed document.[28] This ensured that the action was available to anyone, and was thus effective at securing unpaid debts, as long as the plaintiff could prove an obligation or contract.[29]

The action of debt's effectiveness though was vastly improved by a sealed bond.[30] An unsealed bond or oral contract could be denied outright and taken to wager of law.[31] As such a sealed bond became increasingly more popular, as it prevented the defendant from denying the obligation, leaving him only with the option of attacking the document itself or claiming payment/completion of obligation.[32] As appendix four shows, as long as the bond was viable, the process of recovery was effective for the plaintiff. Indeed, if a defendant questioned the veracity of a sealed bond and failed, he could be imprisoned.[33] This acted as a deterrent to defendants questioning the bond as a stalling tactic, thus allowing the plaintiff to recover his unpaid debt quicker and more effectively.

The defendant could question the veracity of the bond on a number of issues; such as duress, alteration, minority, marriage etc.[34] The defendant could also claim that the bond was different to the count brought against him, or deny that it was his deed at all.[35] Therefore, while the action of debt was effective in recovering unpaid debts for the plaintiff, it was not to the unfair detriment of the defendant.

The action of debt was effective in its use of personal sureties. As long as the debtor had sureties, the creditor need not fear that the debtor would be unable to pay him.[36] Furthermore, if the debtor was solvent and yet refused to pay the creditor could recover his debts from the sureties or, if the debtor could not pay all of the debt, from both the debtor and

[28] Milsom (1969), p. 250; Baker, p. 322.
[29] Baker, p. 322.
[30] Brand, p. 20; Milsom (1969), p. 250.
[31] Brand, pp. 20, 24, 25.
[32] Brand, pp. 20, 25, 26; Milsom (1969), p. 250; McNall, p. 72.
[33] Milson (1969), p. 250.
[34] Brand, p. 25; Milsom (1969), p. 250.
[35] Brand, p. 25; Milsom (1969), p. 250.
[36] Brand, p. 29; Briggs, p. 92; McIntosh, p. 563.

the sureties.[37] This was a highly efficient part of the action for recovering debts, ensuring that the creditor got his money. It was then up the sureties to take issue with the debtor for the money/fungibles they had been relieved of.[38]

If there were no sureties though and the debtor could not pay, before 1352 a debtor might find himself without remedy. However, in 1352 a statute was passed which extended to personal actions the availability of imprisonment and outlawry.[39] Not only did this speed up the process of bringing a man to judgement faster, but it was especially effective in the cases of joint debtors; as if a man was outlawed he was legally dead and the creditor could pursue the action of debt against the remaining co-defendant.[40]

Death was also factored into the action of debt. For if a creditor died, his executors could recover the debts as long as they could prove their existence during the creditor's lifetime.[41] Whilst if a debtor died, by 1300 a creditor could bring an action of debt against his heirs/executors as long he could prove its existence during the debtor's lifetime, or if it was mentioned in his will.[42] This resulted in an efficient collection of unpaid debts post-mortem; that is, as long as it could be proven. Oral contracts were unenforceable post-mortem, as the executors/heirs could not be expected to have enough knowledge or authority to wager law.[43] In this regard, action of debt was ineffective, but it was easily avoided by using sealed documents as proof.[44]

However, the action of debt had its weaknesses too that affected its ability to recover unpaid debts. The minimum debt of 40s for example, prevented many from accessing the central courts.[45] This limitation was easily gotten around by legal fictions and was not strictly

[37] Brand, p. 29.
[38] Brand, p. 29.
[39] Milsom (1969), p. 252; McNall, p. 69.
[40] Milsom (1969), p. 252.
[41] Brand, p. 32.
[42] Brand, p. 32.
[43] Brand, p. 32; Milsom (1969), pp. 254, 257.
[44] Milsom (1969), p. 257.
[45] Brand, p. 23.

followed at all, but other such problems were not so easily solved.[46] Appendix five provides such an example; here a creditor is unable to recover his debt without his co-creditor. Or a defendant might plead incapacity, whether due to marriage or minority – such as in appendix six – at the time the contract was made.[47] In the case of contractual incapacity and that of co-creditors, the action leaves itself open to abuse. A debtor might bribe the second co-creditor into not making suit, a defendant might successfully wage law that he was in his minority when he was not, or a husband might have his wife engage in business knowing he can void any debt as a result.

Then there was the problem with oral agreements and the subsequent possibility of wager of law. Wager of law was open to misuse; in the central courts it was illogical, as there was no guarantee that knowledgeable locals could be brought to court on the suitor's behalf, and by the 1300s most people had were hiring oath helpers.[48] This of course meant that it could possibly became a case of who could, or was willing to, hire the most oath-helpers – rendering the process of collection of unpaid debts ineffective in any fair sense, and hampering legal growth.[49] Arguably though, if a suitor was rich enough and willing, it was a highly effective method for him.

What compounded this weakness was *Quid Pro Quo*. This was not a learned doctrine, and when put to the question a consensus on definition could not be made.[50] In essence though, *Qui Pro* Quo involved being able to prove that you had conferred on another 'valuable recompense' for a duty.[51] This could be done by simple suit, and it is here that the effectiveness of the action fails.[52] By 1343 this suit required to bring a case without bond was not examined and, if the veracity of the suit need not be judged, a plaintiff could bring a false

[46] Briggs, p. 58.
[47] Brand, p. 25.
[48] Baker, p. 326.
[49] Milsom, p. 4.
[50] Baker, p. 322.
[51] Baker, p. 322.
[52] Baker, p. 323.

charge and then rely upon wager of law to win it. [53] This was rare, however, with most defendants choosing jury trial due to the extended time it granted and the lesser financial burden.[54]

Action of debt without a bond was further weakened by the near insistence that, if he chose Jury trial, the defendant plead the general issue.[55] This meant the defendant could not take issue with facts in a case, law could not develop to help either side, and the action became ineffective in ascertaining the truth. Arguably though, this did not negatively affect a plaintiff's claim – though it surely prevented legal development, which may have in the future benefited him.[56]

The final action available in the recovery of debts was 'Detinue'. This was not dissimilar to debt, and shared many of its strengths and weaknesses – especially in regard to the strength of a bond, and the fallibility of wager of law.[57] Detinue could be brought because of a contractual bailment, or because of an obligation (such as a widow/heir bringing action for their inheritance).

A strength particular to Detinue on a bailment was the issue of goods that perished under the debtors care. Originally accidental loss was an acceptable plea, however by the middle of the fourteenth century this was not the case.[58] By then the defendant could only use that defence if it was done by 'an act of God or the King's enemies', including unknown parties.[59] This ensured the remedy was effective in recovering unpaid debts for the plaintiff, with the understanding that the defendants could seek compensation from the party responsible for the loss – e.g. a robber.[60]

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[53] *Canon Warren's Case (1343)*, in Baker, p. 234; Baker, p. 323.
[54] Baker, p. 323.
[55] Milsom (1969), p. 255.
[56] Milsom (1969), p. 256.
[57] Belsheim, p. 469; Milsom (1969), p. 263; Baker, pp. 321, 394; Stoljar, p. 6.
[58] Milsom (1969), pp. 268-9; Milsom (1967), p. 8; Stoljar, p. 7; Arteburn, p. 479.
[59] Milsom (1969), p. 268; Baker, p. 392; Stoljar, pp. 6, 20; Arteburn, p. 482.
[60] Milsom (1969), pp. 268-69.

However, Detinue on a bailment was ineffective if the bailee wasted, misused or altered the property.[61] The praecipe form of writ forced the defendant to return the goods, but did not cover any subsequent damages.[62] If the defendant had altered it significantly (e.g. a bag of wheat into flour), the Plaintiff could not be sure of recovery either.[63]

Detinue not based upon a contract posed a problem for the plaintiff as well. The claimant could either wage law that the thing was theirs or, in their count, trace the ownership to prove it. This was ineffective, as in wager of law the defendant was essentially 'his own judge', and in *Devenit ad Manus* (tracing ownership) the defendant merely had to disprove one part of the count.[64] This severely affected the effectiveness of the action, and a remedy was sort. Milsom claims that by 1355 *devenit ad manus* had been altered to become a mere assertion of ownership, and that the count of *sur trover* was just a convenient by-product.[65] Whilst Baker claims that *sur trover* was the answer to the problems of *devenit ad manus*.[66] Regardless, during the 15th century *sur trover* was the common count, where the Plaintiff alleged a legal fiction that he had lost his property and the defendant had found it.[67] Although this too could be ineffective, as the defendant was not obligated to hold onto, nor protect the property – and was able, therefore, to sell, lose, damage it as they wished.[68]

In summation, the three actions available to recover unpaid debts were account, debt and detinue. Account was effective in that there was no general issue, auditors were originally keepers of record and they also possessed the power to imprison defendants. However, it was generally ineffective and soon fell out of use, as the auditors lost their status as keepers of

[61] Baker, p. 394.
[62] Barbour, p. 33.
[63] Baker, p. 394.
[64] Baker, p. 394; Arteburn, p. 480.
[65] Milsom (1969), pp. 272-73.
[66] Baker, p. 394; Milsom (1969), p. 273.
[67] Baker, p. 394.
[68] Baker, p. 393.

record, the death of a debtor rendered it impossible and it was procedurally awkward.. Detinue shared many of the faults and strengths of debt, but was mainly ineffective and soon lost relevance because of the problems a plaintiff faced proving legal right to the object, and a lack of ability to deal with the destruction/loss in the debtor's possession. Debt was the most effective action, in that bonds were the superior form of proof, sureties could ensure payment, death did not necessarily prevent action being brought and defendants could be imprisoned until they paid. Although it too could be ineffective in that it allowed wager of law, bonds could be questioned on the grounds of incapacity, and regarding oral debts, the defendant was forced to plead the general issue.

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Written for *Law and justice in medieval England (HIH3311)*

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Appendixes

A1

Humberstone vs. Hertfield

T.F.T. Plucknett, ed., *Year Books of Richard II: 13 Richard II, 1389-1390* (London, 1929), pp. 20-22.

In an action of debt, the defendant questioned whether the Plaintiff could sue on an account 'rendered to himself' as he would 'be his own judge'. No answer was given, and the case developed upon another point.

A2

Shymplyng v. Parfey

T.F.T. Plucknett, ed., *Year Books of Richard II: 13 Richard II, 1389-1390* (London, 1929), pp. 95-96.

In a writ of debt, the plaintiff refers to a voluntary account between the two parties which show that the defendant is in areas. The defendant argues that 'auditors are not judges of record', and calls for judgement because the plaintiff refused the wager of law.

A3

Hilary Term, No.5

A. J. Horwood and L. O. Pike, eds., *Year Books of the Reign of King Edward III 18-19, 1344-1345*, (London : Longman : 1883 H.M.S.O.), pp. 406-408.

In an action of account it was outlined that ‘By common law neither heir nor executor had a writ of account; and by statute [Westminster II] the action is given to executors only’. J is the heir of A, and is bringing a case of account against B, who was receiver to A.

A4

35. Wyclewode v. Waunforde

F. W. Maitland, ed., *The Year Books of Edward II : 1&2 Edward 2, A.D. 1307-1309* (London, 1903), p. 91.

R brings an action of debt against and a man and his wife, on a sealed conditional bond. If they did not ‘come at the quindene of easter’ and levy a fine, it stated R was owed 12 marks. They did not come, he demanded payment. ‘Because [A.] could not deny they did not come […] and because he could not deny the deed’ R won his case.

A5

35. Anon.

F. W. Maitland, ed., *The Year Books of Edward II : 2&3 Edward 2, A.D. 1308-9* and 1309-10 (London, 1904), p. 140.

A brings a case of debt against a debtor on the basis of a recognisance the debtor made. However, the debtor argues that the recognisance is for a debt to both creditors, and therefore A cannot enforce it without his co-creditor. This concludes that ‘one of two joint creditos cannot sue without the other’, and the plaintiff’s case is dismissed.

A6

55.a Goldington v Berewyse

F. W. Maitland, ed., *The Year Books of Edward II : 2&3 Edward 2, A.D. 1308-9 and 1309-10* (London, 1904) p. 152.

A defendant pleas that ‘the deed (which was produced to prove the debt) was made while he was within age. On this issue was joined.’ Here the defendant attacks the deed, which he can’t refute, on the grounds of his minority at time of writing.