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Monstrans de droit, Petition of Right, and Liability for Crown Debt

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This chapter in memory of my friend and colleague Stephen Smith investigates the history of common law remedies for the assertion of debt obligations, notably against the Crown as a subjective person as well as before the Crown as an objective adjudicator and enforcer.

Smith understood a court order to pay a debt generally as replicating a primary contractual duty to pay a specified sum of money. A court might transform a breached duty to pay a sum certain into an adapted duty to pay as best possible after the due date, as a continuation of the original duty. The final curial order to pay then replicated that second, transformed duty. Such a replicative order might be conjoined to a substitutionary order, creating a further liability to pay, for example in damages estimated by the court. A sum awarded to compensate consequential loss following on breach was a stereotypical creative liability, which might be called a 'judgment debt' but really was quite different from a substantive debt set up by the parties as primary duty prior to any court order. In all cases, it made sense to see the issuance of remedies as the exercise of a power by the court, acting on a liability of the obligor, the party subject to the original obligation, on the motion of the obligee.[1]

The elegant Smithian theory, bringing the remedial powers of the court to the fore, has captured the imagination of fellow scholars of private law.[2] I can proudly claim to have been present at or near the theory's genesis. On a perfect Oxford spring day over a decade ago, Steve took the afternoon with me to discuss the historical shape of law judgments and equitable orders, and to think through how those remedies interacted. Steve wanted his models to rest on sound evidence, and he had read carefully into the historical sources.[3] It was a delight to hear his arguments unfold that day, and then to

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[1] SA Smith, 'Duties, Liabilities and Damages' (2012) 125 *Harvard Law Review* 2012; SA Smith, *Rights, Wrongs, and Injustices: The Structure of Remedial Law* (Oxford, Oxford University Press, 2019) esp 96–103.

[2] D Winterton and T Pilkington, 'Examining the Structure of Remedial Law' (2021) 84 *MLR* 1137, helpfully capturing the debate to date.

[3] Smith, *Rights, Wrongs, and Injustices* (n 1) 30–47.

see his brilliant elaborations etched out in the years that followed. It was one of many truly memorable days in Steve's company, which began when we first embarked on our research as graduate students together at the same college last century.

I. Suing the Crown: The Problem of Debt

One way to probe the Smithian approach to judicial remedy is to take it into new terrain. Does his model map onto the historical law of debt payments by the sovereign Crown? To answer this question we must scope the application of the old common law petitions of right laid by subjects to claim Crown debts. Such petitions provided the framework for asserting claims against the sovereign person who could not formally be impleaded in his own courts nor subjected to coercive judicial order; the immunity of the king's person applied also to the Crown as a metaphysical office. There were various routes to lay a petition before the king requesting a remedy, whether before Parliament, the Chancery, the Court of King's Bench, the Council, or some other forum closely associated with the king's government.[4] Where the action in question would validly have lain against a normal subject, the claim against the king was known as a 'petition of right'; and a strong expectation grew from 1300 that the Crown should normally permit the claim to be heard and remedied as if it were an ordinary action, as a voluntary submission to jurisdiction. Where there was no possible analogy to a mandatory duty, as when the Crown was called upon to confirm a promised gift or franchise relied upon or hoped for by the subject, then a so-called 'petition of grace' was laid. A vested right to property withheld from the subject was seen as a stronger claim than an action to enforce an executory or precatory obligation, and as such could be claimed by a summary version of the petition of right known as *monstrans de droit*, a demonstration or plea of right. Afforcing these originating actions, a *mandamus* writ might subsequently be moved against a Crown agent, often the Attorney-General, in order to ensure that a Crown duty to pay or convey was performed by a relevant official. Alternatively, *liberate* writs could compel payment by instruction to a Treasury official, issued by the Barons of Exchequer. Equitable suits, as well as legal proceedings, could be brought against the Crown, for example to enforce or release mortgages, or to respect beneficial interests applying to an escheated estate. This jurisprudence developed in the wake of the Crown Debts Act of 1541, balancing Crown priority in debt recovery with defences.[5] The equity courts early made simple decrees recommending that the king act, or release, without probing how the petitionary procedures might be adapted to bind the king's conscience in his own person. Ultimately these equitable procedures merged with the common law petition of right. This complicated petitionary system lasted down to the 1860s, when a series of statutory reforms subjected the

[4] Sources for the history that follows include W Clode, *Law and Practice of Petition of Right* (London, Clowes, 1887) 1–153; F Relf, *The Petition of Right* (Minneapolis, MN, University of Minnesota Press, 1917); L Ehrlich, *Proceedings against the Crown, 1216–1377* (Oxford, Clarendon Press, 1921) 54; W Holdsworth, 'The History of Remedies Against the Crown' (1922) 38 *LQR* 141, 280; MF Spungin, 'A History of the Petition of Right from the Seventeenth Century' (BLitt thesis, University of Oxford, 1959).

[5] 33 Hen 8, c 39, ss 37–58; *Pawlett v Attorney General* (1667/8) Hardres 465, 145 ER 550 (Ex).

Crown directly to obligations as if it were a normal subject. The legislative scheme, developed earlier in Commonwealth jurisdictions, provided mandatory rules in place of the older constitutional method whereby the Crown *usually* accepted liability for debts contracted with private persons – unless it saw good policy grounds to refuse liability.[6]

The history of claims against the Crown for debt at common law, before the reforming statutes, thus reveals an interesting conundrum, whereby the Crown as a judicial public person serves as registrar and adjudicator of an obligational or proprietary claim, and yet as an executive public person stands simultaneously as a counterparty to that claim. Is such dualism consistent with the rule of law – to be both adjudicator and one of the adjudicated?[7] And if political concerns overtly inform judicial enforcement of public debts, does that support (or exceed) the Smithian theory that remedies are often replicative and creative, and do not simply 'rubber-stamp' prior substantive duties?[8]

II. '[A]n Obligational or Proprietary Claim' – Damages versus Debt

The word 'proprietary' was slipped into the last paragraph as a deliberate signifier, for pre-modern common lawyers might be hard pressed to distinguish a claim to collect a sum certain raised upon an obligation, from a claim to the proceeds or transfer of some property. The blurring of obligational and proprietary categories was found most intensely in the form of action for debt, which by the late thirteenth century was used extensively to recover fixed money sums due under loan, sale, rent, pledge or bond.[9] A like union of obligational and proprietary enforcement may be detected in the early feudal actions of account, replevin, distress and waste, and also in the later trespassory actions of detinue, trover, conversion, and assumpsit. Through such personal actions, the law was often concerned to effect the recovery of assets or their value, where title had moved to the obligor subject to some reciprocal obligation. The court's judgment might state that the obligor was liable to pay a liquidated sum equivalent to the value of the asset vested with the obligor, whether on an objective measure set by the court or according to the subjective estimate of the parties set by an accompanying agreement.[10]

[6] Petitions of Right Act 1860 (UK); Crown Proceedings Act 1947 (UK), precursed by Claims Against the Government Act 1866 (Qld), Claims Against the Crown Acts 1861–76 (NSW). See further J McLean, *Searching for the State in British Legal Thought* (Cambridge, Cambridge University Press, 2012) 131–64, 204–40; J Getzler, 'Personality and Capacity: Lessons from Legal History' in T Bonyhady (ed), *Finn's Law: An Australian Justice* (Sydney, Federation Press, 2016) 147; W Bateman, *Public Finance and Parliamentary Constitutionalism* (Cambridge, Cambridge University Press, 2020) 63–80.

[7] cf *Dr Bonham's Case* (1610) 8 Co Rep 10, 777 ER 638, articulating the principle *nemo judex in causa sua*, explored further in R Helmholz, 'Bonham's Case, Judicial Review, and the Law of Nature' (2009) 1 *J Legal Analysis* 325.

[8] cf Smith, *Rights, Wrongs, and Injustices* (n 1) 1–16.

[9] F Pollock and FW Maitland, *The History of English Law before the Time of Edward I* (Cambridge, Cambridge University Press, 1895) ii, 208–14.

[10] See further S Stoljar, *History of Contract at Common Law* (Canberra, ANU Press, 1975) 3–15; AWB Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (Oxford, Clarendon Press, 1975) 9–135.

The various narratives or common counts explained why a debt *sur contract* had arisen by the parties' prior conduct. Such claims could be contrasted with debt *sur obligation*, where a covenant deed or bond had been executed stipulating an agreed debt performance. This mirrored the terrain of classical Roman law, deploying the condiction action to enforce the return of an asset or its value, whether in specie or in some fungible or cash equivalent, in order to satisfy the obligee's settled expectation of return for some original act of transfer to the obligor on terms, contrasting with stipulations enforcing unilateral formal promises independent of exchange.[11] At the head of the common law tradition, Glanvill (around 1187–89) overtly draws analogies between the English debt and covenant actions and the Roman real and stipulatory contracts.[12]

Oliver Wendell Holmes traced an alternative non-Roman genesis of English debt. He saw the earliest common law debt actions as emerging from procedures to repress felonious takings of property, whereby holders were put on proof in the country to show a rightful descent of their title to goods or land.[13] On accusation of a wrongful taking or withholding, the holder of an asset would make a compurgation, 'waging his law' in the sense of invoking friendly self-informing witnesses to vouch for the truth of his oath-taking defence of a decent origin of his possession, sometimes by gift or finding, more commonly by voluntary transaction. This procedure developed into a contractual action, where a plaintiff might bring suit or *secta* swearing that a transfer had been conditioned on a reciprocal obligation requiring the defendant to pay a price, so asserting that a debt was owed. In this context, the suit did not address the defendant's title in order to prove or negate a felonious taking, but rather adduced a liability for unperformed payment under a contract. The defendant would then face the jeopardy of finding compurgators to support his denial of, or defence to, liability.[14] If proved or conceded, the debt claim made for an obligation on the person of the defendant to render a transfer of value in cash form, with the pleading showing the circumstances raising the debt *sur contract*, such as a sale or hire of land or goods, a bestowal of personal service, an executed loan, or a surety for the performance or title of another.

Thus, whether there was direct influence or not, English law debt functionally echoed the Roman condictions, covering many discrete sources of obligation, unified by the core pleading that a reciprocal liquid sum was due to the plaintiff from the patrimony of the defendant. Despite its cumbersome procedures of suit and compurgation, debt provided the key form of contractual action down to the late fourteenth century. The debt action then faded in importance, displaced by actions of covenant, account and assumpsit, which used formal writing, audit and jury trial respectively as superior

[11] Gaius, *Institutes*, 4.1.-9 et seq; Justinian, *Institutes*, 4.6; P Birks, *The Roman Law of Obligations* (Oxford, Oxford University Press, 2014) 27–36, 65–155.

[12] R de Glanvill, *The Treatise on the Laws and Customs of the Realm of England*, ed GDG Hall (London, Nelson, 1965) X, 116–32; D Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford, Oxford University Press, 2001) 17–21; J Hudson, *The Oxford History of the Laws of England*, vol II: *871–1216* (Oxford, Oxford University Press, 2012) 696–703.

[13] OW Holmes Jr, *The Common Law* (London, Macmillan, 1882) 251–88.

[14] Simpson (n 10) 137–44.

modes of proof of payment obligations.[15] A turning point came with *Slade's Case*,[16] which provided that any contractual agreement hitherto sounding in debt could be brought in the alternative as trespass on the case for assumpsit. The court 'commanded judgment to be entered for the plaintiff', covering payment for damage caused by non-performance as assessed by the jury, plus costs, thus in effect constituting the remedy after weighing the causative facts. The implication was that damage or harm to the claimant's fortune caused by contractual misfeasance now lay at the heart of voluntary liabilities; and this displaced the older mode, seeing debt as the expected return on an executed transfer or performance.

To put all of this in Smithian terms, the creative liability of damages-driven assumpsit was quite different from court discovery of a debt obligation. Under the debt form, parties brought suit to prove (or deny) that, in the opinion of witness-jurors, local people who knew the parties best, a sum certain was owed because that was what the parties had already likely set up. If the obligee was successful, the court would 'adjudge that the plaintiff should recover his whole debt and damages taxed by the court' or 'adjudge the debt proved and amerce for costs'; if not, 'the court adjudges that you take nothing by your writ but be amerced [pay costs], and that [the defendant] go quit'. In either case of judgment, the court purports to discover and maintain the status quo between the parties – who owes what to whom. By contrast, the assumpsit form involved the court in acting to create and impose liability and vary the parties' status after observing what had passed between them post-agreement. A general proof would be offered by plaintiff, showing that on such and such a day a consideration was offered (money or performance) with an expectation of reciprocity defined by agreement, and that no adequate return on the deal had been made, causing damage calling for redress; the defendant could then rebut. If the contract was proved, the court would 'enter judgment for the plaintiff' to 'recover damages and costs' as assessed *ex post*, which might be more or less than any prior agreed contractual exchange.[17] The court set the correct level of payment, not the parties.

III. Restitution of Property from, and Payment of Money by, the Crown

From the later eleventh century, any free subject in England could ask the king's courts to protect seisin in land, or to enforce the due performance of covenants and debts, in a claim brought against another of the king's subjects. The duty holder might be a lord who himself held court with mediate jurisdiction over the plaintiff as a manorial tenant,

[15] RC Palmer, *English Law in the Age of the Black Death, 1348–1381: A Transformation of Governance and Law* (Chapel Hill, NC, UNC Press, 1993) esp 64–78, 140–213, 328–64.

[16] *Slade v Morley* (1598–1602) 4 Co Rep 91, 76 ER 1072; Yelv 21, 80 ER 15; Moo KB 433, 467, 72 ER 677; JH Baker, *Baker and Milsom's Sources of English History: Private Law to 1750*, 2nd ed (Oxford, Oxford University Press, 2019) 460–79; AWB Simpson, 'The Place of Slade's Case in the History of Contract' (1958) 74 *LQR* 381; JH Baker, 'New Light on Slade's Case' (1971) 29 *CLJ* 51, 213; D Ibbetson, 'Sixteenth Century Contract Law: Slade's Case in Context' (1984) 4 *OJLS* 295.

[17] Examples of entries taken from Baker, *Baker and Milsom's Sources of English History* (n 16) 233–34, 475.

in which case the royal court action had qualities of a judicial review, requiring that right be done by lord to tenant within the subordinate feudal forum.[18] But there could also be a non-mediated protection of individual rights in the king's courts, arising from the Crown's core duties to give subjects their dues, to keep courts and officials within the law, and to maintain the peace of the realm. These were the rights common to all Crown subjects, that is, the common law.

It was more difficult to ask the king himself to surrender property or debt wrongly withheld from the subject by resort to law, whether feudal or common. The Court of Exchequer early had a jurisdiction to reckon and enforce the imposition of taxes, such as scutage or military imposts, but this was closer to administrative accounting than legal action.[19] Frederic Maitland adduced plentiful evidence that from around 1300, petitions were addressed to the king seeking redress when the king had failed to pay wages or otherwise honour contracts, or where it was alleged that the king's officers had wrongfully seized lands. Such matters touching the king's own affairs might be dealt with extra-legally in panels of notable barons and clerics advising the king, or be sent to a wider council of influential commoners. Petitionary councils often convened in Westminster Hall alongside the sittings of the established courts of law. Larger gatherings of lords, prelates, and commons might be called by the Crown to handle the most important petitionary business, including Crown requests for aids, a kind of petition from king to subjects. These gatherings were called *parlements* or occasions for speech and discussion; and as parliament came to meet regularly, it became a specially potent court with high political and adjudicative authority.[20]

The adjudication of petitions affecting the king's own interests overlapped with the jurisdiction of the *curia coram rege*, the court in the presence of the king, where a personalised and discretionary justice emanated from the king's person, guided by considerations of policy and favour as much as law or convention. There were curbs on the exercise of such a political or prerogative equity where the cause in the petition closely resembled the kind of private legal claims decided in the regular courts, pre-eminently contracts and conveyances. In the thirteenth century, the royal lawyers began searching for ways to uphold proprietary, promissory, and debt obligations directly touching the Crown, whilst respecting the king's special constitutional position that removed him from the forms of action and the modes of proof available to private litigants.

The starting principle was that one could not sue nor implead a lord in his own court, and this applied *a fortiori* to the Crown. Bracton in around 1230 puts this as follows:

> Among other things we must see who it is that ejects, a prince by virtue of his power or another in his name, or a judge who has decided improperly, or a private person. If it is the

[18] P Brand, 'The Origins of English Land Law: Milsom and After' in P Brand, *The Making of the Common Law* (London, Hambledon, 1992) 203.

[19] R FitzNeal, *Dialogus de Scaccario* [*The Dialogue of the Exchequer*], circa 1180, trs E Amt and S Church (Oxford, Oxford University Press, 2007); SK Mitchell, *Taxation in Medieval England* (New Haven, CT, Yale University Press, 1951); J Sabapathy, *Officers and Accountability in Medieval England 1170–1300* (Oxford, Oxford University Press, 2014).

[20] FW Maitland (ed), *Memoranda de Parliamento 1305* (London, HMSO 1893; Cambridge, Cambridge University Press, 2012).

> prince or king or another who has no superior except God, the remedy by assise will not lie against him; there will only be opportunity for a petition, that he correct and amend his act. If he fails so to do, let it suffice him for punishment that he await God the Avenger …[21]

This passage both states the royal immunity, and notes the countervailing convention that the king might grant a petition at his discretion, allowing a remedy to correct his own breach of obligation or withholding of property. The discretionary procedure was well established by the 1300s, and by 1400 came to divide between a petition of grace, bestowed at the king's mercy without legal formality, and a petition of right, where there was an expectation that the king should grant a litigant a licence to pursue a claim against the Crown in the king's own courts, in cases where a like claim would have been be viable if brought by one private subject against another.[22] In the latter case, the king would be represented in court by an agent such as the king's attorney, with curial remedy to be addressed to that agent. The king provided redress using the formula '*fiat justitia*', 'let justice [or right] be done', or, to paraphrase, 'I accept the right of the claimant and I accept this to apply to my royal self as a just party as well as the fount of justice'. By this procedure, the king's two bodies both came within the compass of law and acted reciprocally upon each other – the constitutional and juridical Crown applying law to the political person of the king, who *elects* to do no wrong and submits to his own formal justice.[23]

One particular stress point in the medieval system of voluntaristic Crown liability concerned warranty of title. The king might have granted a fee to a tenant by infeudation, but a rival claimant might then challenge the tenant, showing an alternative descent of title. Such conflicts were common enough, as seisins might be lost by escheats, forfeitures, and secretive conveyances in times of civil unrest and divided authority, with possession then restored in new political circumstances. Parties might reach to higher authority to warrant their descent of title in such turbulent conditions. A tenant *in capite* holding directly of the king's grant could not obviously bring the king into a royal court to warrant the tenant's title against the rival. So how was the correct descent of title to be shown? Some lawyers claimed that in the mists of time the king could be compelled to vouch title for tenants in his own court, but this was to idealise practices in the time of Edward the Confessor and the Saxon kings prior to the Norman yoke, and had little to do with the realities of Angevin and Plantagenet monarchy. The better theory was that the king was expected to prevent his own court system from being used to derogate from his own grant; the petition of right served to restrain the king as legal enforcer from undermining rights the king himself should warrant or protect as lord or assignee. William Staunford, a justice of Common Pleas writing in the mid-1500s, put the idea as follows:

> Petition is al the remedy the subject hath when the king seiseth his land or taketh away his goods from him havinge no title by ordre of his lawes so to do. … And therefore is his peticion

[21] H de Bracton, *De Legibus et Consuetudinibus Angliae* [*On the Laws and Customs of England*], tr SE Thorne (Cambridge, MA, Belknap Press, 1977) f 171b, iii, 42–43.

[22] Holdsworth (n 4) 147–56.

[23] For further exploration, see E Kantorowicz, *The King's Two Bodies: A Study in Mediaeval Political Theology* (Princeton, NJ, Princeton University Press, 1957).

> called a peticion of right, because of the right the subject hath against the king by the ordre of his lawes to the thing he sueth for.[24]

Petitions of right were regularly heard in a mesne procedure from around 1400 in Chancery or alternatively in Court of King's Bench, as institutions seen to administer the king's prerogative. Those courts could triage cases and send them on for decision in the appropriate fact-finding tribunal, often the Court of Exchequer.[25] A common situation where the subject might petition the king to recover property as of right would involve mistakes in the taking of evidence or some other procedural irregularity in the course of an enquiry known as an 'office', launched by royal officials to justify a recovery of a franchise or presentation in the grant of the king, or to effect an escheat or forfeiture on death, treason, or lunacy. Royal officials, and notably the chief law officers, being the Lord Chancellor, the Attorney-General and Solicitor-General, were highly active pursuing such offices as an important source of royal finance. In the late medieval and Tudor periods, forfeitures by attainders and impeachments channelled through Parliament were joined to executive offices of escheat as methods of raising money for the Crown; and to this day the Crown vigorously pursues escheats to maintain income.[26] Alleviating obvious irregularities in the confiscatory process was an important safety valve protecting the legitimacy of the system.

If the office or inquest into Crown resumption of title was traversed, that is shown to have mistaken the facts or muddied the procedure of notice and witness, then the dispossessed holder or his descendant would petition to recover the estate on the basis that title had never truly departed from the family. The traverse of office to establish an existing property right wrongly held by the Crown came to be known as a 'demonstration of right', or in the law French, a *monstrans de droit*.[27] A variation might occur where the Crown purposed to restore lands to heirs after a felon or traitor was attainted, thus overlooking the theoretical corruption of blood that would normally bar the family inheritance; indeed the wheel of fortune could turn rapidly for landed families as rival dynasts battled to control the Crown, and might offer favour to disgraced families to bind them back into loyalty. A prior forfeiture might then be cut down to a confiscation of a mere life estate, and the remainderman might bring *monstrans de droit* to have the restored estate recognised or perfected. If the pardon had not been formalised then a petition of grace would be the correct remedy, being a request for the king to show favour where the subject had no provable title or right to title. The practice of regular mercy offered by the Crown to the family of a disgraced landholder seems to have been very common up to 1400, using letters patent of pardon, with tens of thousands of

[24] *An exposicion of the kinges prerogatiue* (London, Tottel, 1567) f 72b.

[25] Holdsworth (n 4) 151–53.

[26] For a late example of an office of escheat, see *Burgess v Wheate* (1759) 1 Eden 177, 28 ER 652; W Bl 123, 96 ER 67, where the Attorney-General argued for escheat of a beneficial fee simple, a claim supported in court only by the executive-minded Lord Mansfield, but much later adopted by Parliament: Intestate Estates Act 1884, s 4. Today there are some 7,000 cases of escheat pending before the Crown Estate, which are dealt with at arm's length by the Treasury and private lawyers acting for the Crown, which can register such resumed land as a grant in fee to Himself: Land Registration Act 2002, s 79(1). Controversially, takings of estates by *bona vacantia* continue to enrich the Crown directly within the royal duchies.

[27] *The Sadlers' Case* (1588) 4 Co Rep 54b; 76 ER 1012 (Ch); *Reynel's Case* (1612) 9 Co Rep 95; 77 ER 871.

examples surviving.[28] After that date, personal pardons and restitution of estates generally required a parliamentary bill to reverse or vary a bill of attainder, on the initiative of the Crown or its ministers.[29] Following any such act of mercy, a further petition of right directed to the Crown could be brought to lever the regrant of title following the pardon.

The development of the *monstrans de droit* procedure was entrenched by legislation in 1360–62, helping litigants adduce and review the facts of escheats in order to traverse an office making findings of capacity or title adverse to them.[30] In 1549, Parliament removed delays and simplified procedures to facilitate *monstrans* and traverse-of-office claims, eliminating the need to present a petition to Chancery and have a special inquisitorial commission constituted.[31] Lawyers analogised these remodelled actions to the writ of entry, a speedier method of asserting title that cut away the need for proof of lengthy chain of title, rather focusing parties on recent facts establishing a right to durable possession.

Significantly, this left as a residuum the generic petition of right, now taken to be a process allowing assertion of executory claims, where the king was not wrongfully in possession of an estate in contradiction of a subject's right yet the subject had an inchoate right against the Crown that would have been litigable had that right been held against a common person. The claim to a royal warranty of title against a third party was a core example, as the petitioner could have had a straight claim against a normal or non-royal assignor for a personal guarantee. The king could also resist a *monstrans* or traverse if the controversy over an escheated title concerned a matter of legal record rather than a challenged finding of fact under some royal office.[32]

Other examples of the petition of right emerged on the borderline of contract and property, as where incorporeal hereditaments issuing out of lands led to claims against the Crown. Here the remedy sought might be payment from the profits of land in royal hands, or compensation for harm to easements attached to lands in the tenant's hands. One could not say the payment was a right vested already in the tenant and withheld from him by the king; a petition procedure must first establish the existence and extent of the right to payment. So a claim for rents or corrodies, or for compensation for harm to enjoyment of easements and commons that would normally be effected by *quod permittat* or nuisance writs, would rightly attract a petition of right procedure, and not the more focused *monstrans de droit* for transfer of a right wrongly retained. As Staunford recorded in his treatise,[33] by the mid-sixteenth century the petition of right was being used to pursue a wide range of disseisin and nuisance claims against the Crown, and also for recovery of chattels and protection of incorporeal hereditaments. In the seventeenth century, the petition of right procedure was enlarged on the Latin side

[28] H Lacey, *The Royal Pardon: Access to Mercy in Fourteenth-Century England* (Woodbridge, Boydell & Brewer Press, 2009).

[29] M Steilen, 'Bills of Attainder' (2016) 53 *Houston Law Review* 767, 774–826; Steilen shows how English practice was developed to provide Art III of the US Constitution, s 3: 'no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted'.

[30] 34 Edw III, c 14 (1360); 36 Edw III, c 13 (1362).

[31] 2 & 3 Edw VI, c 8 (1549).

[32] Holdsworth (n 4) 161–64.

[33] *An exposicion of the kinges prerogatiue* (n 24).

of the Exchequer, and later in Chancery, to allow decrees protecting mortgage and trust beneficiary interests where the Crown came into a title subject to an equitable claim or security.[34] But personal torts were still out of range of the petitionary procedure, defeated by the motto that the king could do no wrong, even if he could be petitioned to do right. We must next explore the contractual implications of the bar on recognition of royal torts.

IV. Debt, *Monstrans de droit*, and Traverses

We have noted that by the early seventeenth century, the Court of King's Bench managed to wrest the lucrative enforcement of normal contractual debt away from the Court of Common Pleas by creative use of the trespassory, damage-based assumpsit action. But what if the promisor were the Crown, who could do no wrong? The king could never be petitioned to pay damages for a tortious breach of a personal duty, including a contractual duty under the trespass procedures recognised in *Slade's Case*. Legal logic pointed back to older debt actions as more congruent with a petition of right procedure, but the core action for debt with wager of law was hardly suitable for royal litigation; and covenant and account were also poor fits, for the Crown would not seal deeds or be subject to auditors to bind over payment of a sum certain.

The road that ended up being taken to sue the Crown *sur contract* was the claim to debt as withheld property. In the 1450s, the notion that a pardoned forfeiture of estate could result in a petition to assert the title of the restored family was engrafted into the field of contractual debt. For example, the king might assert a judgment debt and take payment, but then rescind the underlying contract or otherwise compromise the debt in an *ex post* settlement. The courts held that petition of right, if not *monstrans*, would lie in such cases to return the value of the judgment debt. From the late 1500s to the mid-1800s, dozens of litigations were brought exploring such distinctions, as litigants navigated between petitions of grace, of right, *monstrans* and traverses. All of these methods were used to extract debt payments from the Crown, with *monstrans* for specifically withheld property taking the leading role.[35]

At the same time, the Crown as debtor was special because it could not be forced to pay after judgment or decree by the threat of debtor's prison or bankruptcy, nor could the bailiff or sheriff be sent in to execute against Crown assets. Other levers for enforcement had to be found, taking place at the stage after recognition of primary right and assessment of secondary liquidated remedy. By the later sixteenth century, claims against the Crown to effect payment came to be enforced by the issuing of *liberate* writs within the Exchequer, whereby the Lord Treasurer or the Barons would order officials to 'deliver' a sum of money to satisfy a finding under a petition or *monstrans*. It was unclear

[34] *Hicks v Attorney General* (1661) Hardres 176; 145 ER 439 (Ex); *Pawlett v Attorney General* (1667/8) Hardres 465; 145 ER 550 (Ex). Later authorities are collected in J Mitford, *A Treatise on the Pleadings in Suits in the Court of Chancery, by English Bill*, 2nd edn (Dublin, Lunch, 1789); *Brown v Harris* (1807) 13 Ves Jr 552, 33 ER 401 (Ch) per Lord Eldon LC.

[35] I count some 80 cases in the *English Reports* dealing with *monstrans de droit* alone from 1550–1860; the numbers spiral if one searches for traverse of office, petitions of right and petitions of grace.

if this was an administrative instruction within the Treasury to facilitate payment, or a mandatory order to satisfy a royal debt. The Crown had a hazy prerogative power to block payments by overruling the *liberate*, and the Lord Treasurer also retained a discretion akin to a delegated prerogative power to delay, suspend or remould payment orders independently of the Crown, if he saw fit to do so as a question of policy. The intricacies of such mandatory, permissive, and suspended payment orders were a large part of an intricate and mysterious body of law and custom known as the Course of the Exchequer, and by the late sixteenth and early seventeenth centuries, this had become a highly specialised area of professional legal practice.[36]

V. War, Revolution and Crown Banking (1660–1701)

The breakdown of the constitution in the 1640s, followed by republic in the 1650s, then a restoration of the Stuarts in 1660 and a revolution against them in 1688, led to great changes in the organisation and enforcement of Crown finance and debt. Charles II had agreed to stay within the bounds of parliamentary control of taxation as a condition of his return, but in the 1670s he used extra-parliamentary debt financing, as devised by his courtier George Downing, to maintain his lavish court and launch imperial wars against the Dutch. Downing copied Dutch and French models to promote a prerogative assignment of the excise, being a sizeable revenue that was accorded to the Crown in the 1660 settlement. Bonds staked against anticipated Crown income streams were issued to the London goldsmiths in return for loans brokered from syndicates of secondary creditors. The bond claims in the hands of primary and secondary creditors were then traded to fresh assignees, allowing the income stream to be capitalised by sale onwards to new entrants. The new bond markets depended on the Crown maintaining the flow of interest on the original issues to fix expectations of future value, with pricing varying according to shifts in anticipated default risk and opportunity cost. However, in 1672 the Crown found itself in military and fiscal crisis following defeats inflicted by the Dutch; and on the advice of the Cabal of Tory ministers, the Crown imposed the infamous Stop on the Exchequer, suspending payments on bonds for an entire year, with a promise of heightened compensatory interest to follow. The Stop was then extended indefinitely, and only a trickle of interest was ever paid, with the Crown picking out a few favoured financiers to support and letting others go to the wall, taking the secondary creditors and assignees down with them. Severe disruption to credit and concomitant weakening of faith in government stability contributed to the Monmouth rebellion of 1685, launched by Whig lords opposing Charles' brother James' accession to power.[37]

James II's unpopular regime lasted only three years before imploding. His favouring of Catholic interests at home and abroad, his suspension of legislation, and his attempts to control elections piled political and religious conflict onto financial chaos.

[36] A Graham, 'The "ancient course" and the feudal law: history, ideology and the English Exchequer, 1660–1715' (MS 2022, on file with author).

[37] JK Horsefield, 'The "Stop of the Exchequer" Revisited' (1982) 35 *Economic History Review* 511.

In late 1688, James fled to France, and his daughter Mary and her spouse (and James' cousin) William were installed as dual monarchs. A perpetual Protestant succession and the autonomy and supremacy of Parliament were entrenched by legislation of the revolutionary Convention Parliament. The Glorious Revolution may have successfully rebalanced the constitution, but it did not solve the fiscal crisis of the Crown. The new regime launched fresh and expensive wars against the French, funded by massive new bond issues. The Treasury neglected to pay the old bondholders who had financed the earlier Stuart wars, and in Parliament it was implied that the bonds issued by the prior regime were a kind of odious debt, an illegitimate impost on the present generation who had rightly expelled the rogue kings who had launched a ruinous war against a Protestant neighbour.

The bankers responded to this default by commencing in 1690 a multiparty litigation known as the *Bankers' Case*. The intricacies of the litigation, one of the greatest (and lengthiest) in English legal history, can only be summarised here.[38] Almost all the judges agreed in 1691 that the issue of assignable bonds by letters patent with interest charged against identified taxes was a valid use of the prerogative power. In 1696, the judges also largely agreed that once the Crown had given charters dedicating expected taxes to support specific bond issues and even directing issue of talleys to instigate payment, then the law notionally segregated the funds on accrual in the Treasury, ready to be paid over to the bondholders. Litigants could demand the assigned debt owed to them as a property right now inhering in funds in the hands of the Crown, suing under the non-discretionary *monstrans de droit* procedure. This was a more direct claim even than a real lien affecting freehold lands, as where a creditor brought *elegit* to enforce a registered judgment debt.[39] This is because in the Crown bond case, the property in the excise funds was supposed to have been charged by a prerogative act, requiring no further court action to constitute the claim beyond a payment order internal to Exchequer. In contrast, the judgment creditor had to be constituted a tenant of a moiety of the debtor's lands by the local sheriff charged with executing the *elegit* writ; only then were possessory rights vested.

However, in the *Bankers' Case* the judges ended up dividing over whether the prerogative bond issues backed by letters patent gave the holders a right to extract payment without further authorisation from a judicial or executive official. The majority, led by Holt LJKB, held that sixteenth-century precedents showed that the Barons of Exchequer could enforce the *monstrans de droit* by ordering the Lord Treasurer and his officials via *liberate* writs to appropriate funds and pay out the bonds in order to satisfy the Crown's promises. Opposing Holt, Treby LJCP held that the precedents only showed how *liberate* writs might go to lower officials to activate a Treasury payment mechanism, and further, that without a higher order from the Lord Treasurer using a delegated political

[38] See *Petition of Hornbee* (1691) 1 Freeman 331, 89 ER 246 (Ex); *R & R v Hornby* (1694) Comberbach 270, 90 ER 472 (Ex Ch); (1695) 1 Salkeld 58, 91 ER 56; *R v Hornely & Williams* (1696) (1701) Carthew 388; 90 ER 825; *R v Hornby* (1700) 5 Modern 29, 87 ER 500; *The Bankers Case in Cam Scacc* (1700) Skinner 601, 90 ER 270; *The Argument of the Lord Keeper Sommers … in the Bankers Case* [1696] (Savoy, London, Billingsley, 1733); a fuller analysis of the judges' arguments is offered in my pending study, 'The Bankers' Case Revisited' (MS, 2024, on file with author).

[39] See 4 Will & Mar c 20 (1692) for the contemporary registration requirement.

prerogative from the king, no payments could legally be coerced out of Treasury, not even by the Barons of the Exchequer addressing their fiscal brethren from within the institution. Treby added that to do otherwise would interfere in the most sensitive political discretions of the Government in allocating scarce finance to deal with war and peace emergencies in real time.

Treby's line was then amplified in a further Exchequer Chamber decision by Lord Keeper Somers, who gave a vast judgment taking up more than 130 pages of tightly researched material on the Course of the Exchequer, delivered around half a year after the other judges in late 1696. Somers argued that the assignable debt issued by the Crown against the excise might well constitute a property right suitable for claim under a petition of right or *monstrans*, and the issuing charters were 'sufficient warrant' for payment; but the Lord Treasurer was always left with a choice whether to make the appropriations and payments by *liberate* order, and could not be compelled by any curial process; authority to act was not compulsion. Somers noted that the Lord Treasurer was a high official coequal with the Lord Chancellor, wielding a political discretion as keeper of the king's fiscal conscience to withhold or restrain payments inimical to statecraft or the public interest. On review by the House of Lords in 1699, Holt's analysis binding the Crown and its officers all the way through to the execution stage was preferred; but this still left a further public-law requirement for appropriations to supply the Exchequer, and the Commons delayed voting the necessary funds. Finally a finance bill was passed in 1701 including a clause compromising and reducing the bankers' claims.[40] The remaining creditors were to receive just half the promised interest rate, reduced from 6 per cent to 3 per cent, with no return of capital. Desultory payments were made up to the time of the 1720 South Sea Bubble, and by that late stage most of the bankers were out of business, and political attention had moved elsewhere.

VI. Debt Enforcement, Risk and the Rule of Law

After 1720, new generations of bankers made fresh profits from Crown finance, underpinned by the Bank of England as an independent guarantor of bond payments, as well as swelling incomes from imperial trade. But past credit crises still cast a shadow, and the *Bankers' Case* was studied carefully by lenders for the next two centuries, anxious to understand if there were continuing legal risks in lending to the Crown.[41] The answer seemed to lie in the shrewd risk management of the Bank of England, interacting with deepened bond markets that discounted and priced government debt through constant trading, so determining the costs and supply of fresh finance. The certainties of law and the discretions of politics as determinants of finance were replaced with the probabilities of economics.[42]

[40] 12 & 13 Will 3, c 12, s 15.

[41] See the upholding of the Somers line in *Macbeath v Haldimand* (1786) 1 Term Reports 172, 176–77; 99 ER 1036, 1038 per Lord Mansfield LJKB.

[42] PGM Dickson, *The Financial Revolution in England: A Study in the Development of Public Credit, 1688–1756* (London, Macmillan, 1967); D Kynaston, *Till Time's Last Sand: A History of the Bank of England, 1694–2013* (London, Bloomsbury, 2017).

The history of *monstrans* and petitions, of the delicate balancing of rules and discretions in the recognition and enforcement of Crown debts and assignments, underlines the creative power of judges to create or deny liability – the very factor exposed so brilliantly in Stephen Smith's work. It turns out that his private-law model of curial powers and liabilities, of discretions and remedial orders, also raises basic questions concerning constitutionalism and the rule of law – how power may best be constrained where the public authority is itself adjudged in its private relations. The *Bankers' Case* ultimately showed that no matter how clearly the law specified a primary debt claim against the Crown, or provided secondary remedies to back the claim, the creditor was always prone to defeat at the execution stage. The case is disturbing because it demonstrates how policy pragmatism in the higher courts could provide a path for the ruling authority to evade its promises, with the judges excusing and justifying weakened enforcement in order to protect the fiscal prerogatives of the state. We can see a like move in modern cases where remedies are denied from a concern that strong curial defence of rights might trigger a cascade of unsustainable losses and financial chaos.[43] But as we have seen in our historical account, such selective enforcement is really a story of picking winners, with the more powerful actors proving too important, too 'systemic', too valued to be disciplined by the normal rules. Whether the law should participate in such statecraft has puzzled good legal minds for centuries, and it troubles us still.

[43] Examples may include *Tito v Waddell (No 2)* [1974] Ch 106; *Abbey Life plc v Office of Fair Trading* [2009] UKSC 6; *Pearson v Lehman* [2010] EWHC 2914 (Ch), [2011] EWCA 1544.