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Reports of Cases in the Court of Exchequer in the Time of King Charles I (1625 to 1648)

William Hamilton Bryson
University of Richmond, Hbryson@richmond.edu

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REPORTS OF CASES
IN THE COURT OF EXCHEQUER
IN THE TIME OF KING CHARLES I
(1625 to 1648)

Edited by
W. Hamilton Bryson

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FOREWORD

This collection by Hamilton Bryson of previously unreported ple­side cases from the Court of Exchequer in the seventeenth century will be welcomed by legal historians. What we know about the growth of the common law in the early modern era has been largely derived from printed sources. The reality, however, is that a great many of the decisions of England’s common law courts in the seventeenth and eighteenth centuries were never reported. No official court reporting existed until well into the nineteenth century. For the most part in earlier times, judicial decisions were brought into print only when enterprising individuals (often young barristers or attorneys) attended court, took notes of the cases, and arranged for their publication.

By the mid-seventeenth century, the three common law courts in England (King’s Bench, Common Pleas, and Exchequer) had a largely coextensive jurisdiction in non-criminal cases. The Court of Exchequer, however, maintained a dual jurisdiction—a common law (plea) side, and an equity side. 1 The work of the equity side of the Court of Exchequer has been brought to light by Professor Bryson in his earlier work. 2 In the present volume, he introduces us to the plea side of the court during the reign of Charles I, 1625 to 1648. This was a formative period in the common law, yet because there are no printed reports, much of what the court was doing on the plea side during this time has been a blank. 3 Indeed no printed reports exist for

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3 In 1657, Richard Lane published Exchequer reports for the years 1605 to 1612 during the reign of James I. On the title page, Lane described his publication as follows: “Reports of the Court of Exchequer, beginning in the Third, and ending
the Court of Exchequer for over three-quarters of the seventeenth century. 1

Professor Bryson's transcriptions from the reign of Charles I reveal that, despite the absence of printed reports, important matters were deliberated in and decided by the Court of Exchequer. The standout case is Rex v. Vermuyden, popularly known as the Sutton Marsh case. 2 Competing claims to riparian land, river bottomland, tidal marshland, and the seashore were common in the seventeenth century. This is evident, for example, in seminal essays by Sir Matthew Hale that were first published in the eighteenth century by Francis Hargrave, 3 and in Stuart Moore's classic, thousand-page, nineteenth-century treatise, A History of the Foreshore. 4 Moore's thirteenth, fourteenth, and fifteenth chapters are devoted entirely to the reign of Charles I and to Hale's manuscripts. Moore observed that

in the Ninth Year of the Reign of the late King James. By the honourable Richard Lane, late of the Middle Temple, an eminent Professor of the Law, sometime Attorney General to the late Prince Charles. Being the first Collections in that court hitherto extant. 5

1 In addition to Lane's Reports, the only seventeenth-century printed reports devoted to Exchequer cases are Hardres' Reports, covering the years 1655 to 1669. Reporting in the Court of Exchequer was somewhat better during the eighteenth century, but the printed record remains grossly incomplete. There are no printed Exchequer reports whatever for thirty-seven years in the eighteenth century; for twelve additional years there is only one reported case per year, and for nine more years there are only two per year.

2 Case No. 45, below.

7 Hale's three works, written in the 1660s, were De Jure Maris, De Portibus Maris, and Concerning the Customs of Goods Imported and Exported. See F. Hargrave, A Collection of Tracts Relative to the Law of England (London, 1787).

4 Stuart A. Moore, A History of the Foreshore and the Law Relating Thereto (London, 1888). Moore's title page adds: "With a Hitherto Unpublished Treatise by Lord Hale, Lord Hale's "De Jure Maris." Moore later explained that what he was printing was what he determined to be Hale's first draft of the three essays that had been previously published by Hargrave. Id. at pp. xl, 318.

According to Moore, the Sutton Marsh litigation is not addressed in the text of the Lansdowne version. Professor Brooks is the first to quote the full text of Rex v. Vermuyden. Moore at pp. xi, 318.

2 According to Moore, the Sutton Marsh judgment in Rex v. Vermuyden, but the second part, concerning the first round of the Sutton Marsh litigation in 1636/37. It was followed in Trin,
the second part, concerning the right of the king to the shore, of 
Hale’s first treatise, a legal and historical narrative touching the 
customs, “would appear to be an argument prepared for the case of 
Rex v. Oldsworth, concerning Sutton Marsh.” 1 Rex v. Oldsworth was 
the first round of the Sutton Marsh litigation, heard in Hilary Term 
1636/37. It was followed in Trinity Term 1637 by Rex v. Vermuyden. 
Moore’s treatment of Rex v. Vermuyden is taken from the Lansdowne 
manuscripts and is incomplete, even though lengthy excerpts are 
quoted. In the present volume, Professor Bryson brings out for the 
first time the full text of Rex v. Vermuyden. His source is a manu-
script report of the case by Hardres, which is more detailed than the 
Lansdowne version. Professor Bryson’s transcription of this phase of 
the Sutton Marsh litigation is a substantial contribution to the 
historical record.2

Other cases in the transcriptions that follow are of interest. We 
take for granted today the utility of statutes of limitation, but, in the 
early seventeenth century, the concept was new and undeveloped. 
Enacted in 1624 for the purpose of quieting estates and avoiding 
lawsuits, the Statute of 21 James I, c. 16, established differing limita-
tion periods for designated causes of action, ranging from twenty 
years down to two years. Questions of pleading and procedure were 
not addressed in the text of the statute, and these came before the 
Court of Exchequer in the years 1639 to 1641. The court determined 
that a claim that an action was untimely had to be affirmatively 

1 Id. at pp. xl-xli.

2 According to Moore, the Sutton Marsh matter was not settled by the 1637 
judgment in Rex v. Vermuyden, but the litigation “dragged on till the Revolution, 
the last order being made on 13 October, 16 Charles I, A.D. 1640, and the Crown, 
so far as we can discover, never got into possession.” Moore, A History of the 
Foreshore, p. 304.
pleaded by the defendant,¹ and that the defendant’s plea must allege the time when the plaintiff’s cause of action accrued.²

In some of the cases transcribed by Professor Bryson, only arguments of counsel are given, yet they are nevertheless noteworthy. In Smart v. Cheney, for example, the question involved whether there was a condition precedent to a contract obligation by the defendant to pay money owed. Smart and his wife had paid £60 to Cheney in exchange for a promise by Cheney to pay a sum³ to Alice, Smart’s stepdaughter and his wife’s daughter by a previous marriage, within one month of Alice’s marriage or after her 21st birthday, whichever occurred first. The agreement also provided that, if Alice’s marriage came before her 21st birthday, the marriage must be with the consent of either Smart’s wife or of the defendant Cheney. Alice married one Ball before she was twenty-one with Smart’s wife’s consent. In the lawsuit, Proctor argued for defendant Cheney that notice was required to be given to Cheney of Smart’s wife’s consent to the marriage, and that this had to be alleged in the declaration. Hale argued for the plaintiff that no notice need be given, citing Beresford v. Gooderidge,⁴ in which it was held that defendant’s promise to pay plaintiff £100 if plaintiff married the defendant’s daughter was enforceable despite the absence of notice of the marriage, since in the circumstances involved in the case, giving notice was not material. The court in Beresford observed, however, that, where a collateral thing was to be done upon a marriage day, notice ought to be given of that, and it would seem arguable that, in Smart v. Cheney, the notice in question was of “a collateral thing,” that is, of the consent of Smart’s wife to the marriage. In any event, the issue in Smart v. Cheney appears to have been an early encounter with problems of dependent and independent contracts.

Another important exchange that follow is laid out in Tooke v. Emery,² where the question was whether the town of Oxford could bar a person from following a trade carried on by counsel for both the Keswick and Insturates. In the earlier case of Uvedale v. Prescott,³ judgment after a verdict that the respondent be regulated by the City, argued that the holder to submit to a particular place, even though from practicing a lawful occupation.

Yet another case of importance is whether an action for defamation by the defendant for filing a petition in Parliament against the plaintiff. Defendant claimed what would later be known as the Parliamentary privilege, arguing that the words in the petition writing had been published without his consent. The court responded by saying that, if a petition had been given to a stranger who was not a member of Parliament, no action would lie. The court held that the representative body of the nation, Parliament automatically conferred privilege. How this case was resolved will be surprising to note that it had been established.
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³ No. 55; Buttolph v. Cole (1641),

dependent and independent covenants and conditions, a puzzle that was famously addressed by Lord Mansfield in the late eighteenth century in Kingston v. Preston.¹

Another important exchange of arguments in the transcriptions that follow is laid out in Town of Kingston’s Case,² in which the question was whether the town could, through a bylaw, prohibit a person from following a trade therein. The principal authorities relied upon by counsel for both sides were Coke’s decisions and his Institutes. In the earlier case of Weavers of London,³ Noy moved for judgment after a verdict that had found silk weaving to be subject to regulation by the City, arguing that a patent from the crown could require the holder to submit to the regulation of the occupation in a particular place, even though the patent could not prohibit a person from practicing a lawful occupation.

Yet another case of interest is Longe v. Dorrell,⁴ involving whether an action for defamation could be sustained against a defendant for filing a petition in Parliament that contained defamatory words. Both Longe and Dorrell were Justices of the Peace, and defendant claimed what would later become known as Parliamentary privilege, arguing that the words in dispute were preferred in a petition in Parliament against the plaintiff. Plaintiff, however, claimed that the writing had been published to various other persons. Defendant responded by saying that, if a copy of the Parliamentary petition had been given to a stranger who was not a member of the House of Parliament, no action would lie; nevertheless, because Parliament was the representative body of the entire realm, publication by petition in Parliament automatically constituted publication to the entire realm. How this case was resolved is not revealed, but it is interesting to note that it had been established in the prior century that words

¹ (1773), 2 Douglas 689, 99 E.R. 437.
² (1646), Case No. 66.
³ (1629), Case No. 12.
⁴ (1629), Case No. 14.
spoke as a legitimate part of legal proceedings were considered privileged. 1 William Holdsworth, after acknowledging that “It was settled, by the first quarter of the seventeenth century, that no action lay against judges, witnesses, or counsel for defamatory statements made in the conduct of litigation,” added that “It was settled by the case of Lake v. King in 1668, after considerable debate and conflict of judicial opinion, that a similar rule must be applied to documents, circulated to members of a committee of the House of Commons, and dealing with the matters which that committee was appointed to consider.” 2 But even though Lake, according to Holdsworth, determined that “documents connected with Parliamentary proceedings and published to members of Parliament had the same privilege as had already been accorded to judicial proceedings,” it was decided at the end of the seventeenth century “that there was no privilege for those who published documents connected with these proceedings to the world at large.” 3

Readers of this volume will find additional cases of significance to their particular interests or expertise. Certainly, the transcriptions demonstrate the active engagement during the reign of Charles I of the Court of Exchequer’s plea side with fundamental questions of both substance and procedure. Those who study or are interested in how such questions were addressed in the courts during times for which there are no printed reports are in Professor Bryson’s debt.

James Oldham
St. Thomas More Professor of Law and Legal History
Georgetown University Law Center
Washington, D.C.


3 Id., citing Rex v. Salisbury (1699), 1 Lord Raymond 341, 91 E.R. 1124.