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Fourteen Cases From Herbert Jacob's Queen's Bench Reports

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(1706)

Harvard Law School MS. 4081, vol. 2, ff. 71v-91

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INTRODUCTION

Herbert Jacob was admitted to the Inner Temple on 3 June 1692, called to the bar on 28 June 1699, and called to the bench of the Inner Temple on 22 November 1721. He died in 1725.[1]

Harvard Law School MS. 4081 [formerly MS. 2136] is a collection of Queen's Bench reports dating from 1702 to 1706. This manuscript consists of two books, which are attributed to Herbert Jacob, a barrister of the Inner Temple.[2] The cases in volume one and volume two, ff. 1-71v, are the same reports as 2 Lord Raymond 755-1252, 92 E.R. 4-325. Volume two, ff. 71v-91, are fourteen case reports from 1706 that are not in print, but are first published here.

Yale University Beinecke Library MSS. OSB, MS. Taussig 2002.3.6, contains Jacob's reports as printed at 2 Lord Raymond 755-1253, 92 E.R. 4-326.[3]

British Library MS. Hargrave 66 is a collection of six sets of reports of cases; they are attributed to Herbert Jacob, Lord Raymond, William Salkeld, and Thomas Pengelly. The cases by Lord Raymond are said to have been copied from Jacob. They are dated variously from 1694 to 1705.[4] There is another copy of these reports in British Library MS. Add. 35987. Note Attorney General, *ex rel*. Wells v. Brewster (Ex. 1703-1705), British Library MS. Hargrave 66, f. 150, British Library MS. Add. 35987, f. 110v, Eq. Cases Exch. 480, which is attributed to Herbert Jacob.

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[1] F. A. Inderwick, *Calendar of the Inner Temple Records* (1901), vol. 3, p. 346; R. A. Roberts, *Calendar of the Inner Temple Records* (1933), vol. 4, pp. 80, 120.

[2] J. H. Baker, *English Legal Manuscripts in the U.S.A*. (1990), vol. 2, pp. 166-167.

[3] Sir J. Baker and A. Taussig, *A Catalogue of the Legal Manuscripts of Anthony Taussig* (2007), p. 126.

[4] H. Ellis, *A Catalogue of Manuscripts . . . of Francis Hargrave, Esq*. (1818), p. 18.

Philadelphia Free Library MS. LC 14.66 is a 187 folio collection of reports of cases by Herbert Jacob. They date from 1696 to 1700. A note on the flyleaf of this manuscript states that several of Jacob's cases were taken from Robert Raymond's reports.[5] However, the copying could have been the other way around, as numerous cases in Lord Raymond's printed reports are stated to have been taken from Jacob; note, for example, many of the cases at 1 Lord Raymond 527-671, 91 E.R. 1252-1347, which date from 1700 to 1701. On the other hand, the cases at 2 Lord Raymond 755-1252, 92 E.R. 4-325, as noted above, do not mention Jacob.

It is noted in Wallace's *Reporters* that Lord Raymond used cases from Jacob, Pengelly, and Salkeld, among others.[6] Jacob's report of Turner v. Beale (Q.B. 1706), Case No. 3, herein, was taken in part from Thomas Pengelly's manuscript reports.

Herbert Jacob (d. 1725) was called to the bar of the Inner Temple on 28 June 1699. Robert Raymond, Lord Raymond (1673-1733), was called to the bar of Gray's Inn in November 1697. Sir Thomas Pengelly (1675-1730) was called to the bar of the Inner Temple on 24 November 1700. Thus, they were close contemporaries with each other.

The relationship between Herbert Jacob and Robert Raymond, Lord Raymond, — and also Sir Thomas Pengelly — has yet to be determined. In the meantime, these fourteen case reports, which are not elsewhere in print, are offered here; five of these cases appear not to have been reported anywhere else. This is done with the kind permission of the Historical and Special Collections, Harvard Law School Library.

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[5] J. H. Baker, *English Legal Manuscripts in the U.S.A*. (1990), vol. 2, p. 315.

[6] J. W. Wallace, *The Reporters* (1882), p. 402.

TABLE OF CASES REPORTED

[These references are to case numbers, not page numbers.]

FOURTEEN CASES FROM HERBERT JACOB'S QUEEN'S BENCH REPORTS (1706)

Harvard Law School MS. 4081, vol. 2, ff. 71v-91

1

Dunn, *qui tam* v. Hinchdy
(Q.B. 1706)

In this case, the defendant was found guilty of selling buttons in violations of a statute.

The plaintiff brought an action of debt upon the Statute of the 10 Will. III, c. 2,[1] and narrated that the defendant, at such a place, *fieri causavit et vendidit duodecim duodenas, Anglice* dozen, *fibularum, Anglice* buttons, *de ligno tantum et molinatarum, Anglice* turned, *in imitatione aliarum fibularum contra formam statuti etc. unde etc*. Upon *nil debet* pleaded, the jury found a special verdict that the defendant caused to be made and sold the buttons laid in the *narratio* and that the buttons were made of wood only in all things except the shanks and that the shanks were made of brass *et quod sunt separata fibulae factae de ligno tantum*, but whether these buttons were such as were prohibited by the Act, the jury prayed the advice of the court etc. The words of the Act of Parliament are `that no person shall make, sell, or set on, or cause to be made, sold, or set on any clothes or wearing garments whatsoever any buttons made of cloth etc. or any buttons made of wood only and turned in imitation of other buttons etc.'

It was urged by Mr. Serjeant *Weld* and Mr. *Eyre*, for the defendant, that this Act of Parliament, being a penal law, ought to be taken strictly, and, therefore, it being found by the special verdict that there were buttons made of wood only, this Act ought to be applied to them and not extended to buttons as these made with brass shanks.

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[1] Stat. 10 Will. III, c. 2 (*SR*, VII, 454).

And the Serjeant compared it to the case of the Statute of *Malefactoribus in Parcis*, Will. I, c. 20,[1] which is held not to extend to forests and chases (2 Inst. 199[2]); so the Statute 32 Hen. VIII, c. 33,[3] which saves the entry of the disseisee or his heirs notwithstanding the dying seised of a disseisor if the disseisor had not five years quiet possession, does not extend to an abettor; so the Statute 1 Edw. VI, c. 12, s. 10,[4] takes away clergy from persons feloniously stealing horses, geldings, or mares, and it was held that a person that stole one horse, gelding, or mare was not excluded of his clergy, and, therefore, it was enacted by the [Statute] 2 & 3 Edw. VI, c. 33,[5] that such a person should be excluded his clergy as well as a person that stole two horses etc. And it was urged that this finding in the verdict would differentiate this case from that of the King v. Robins,[6] adjudged in this court the 13th year of King William, wherein this very same case was adjudged to be within the Statute, but the reason of the judgment was because the court could not find that there were any other buttons to which the Act could be applied, which was now supplied by this verdict.[7]

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[1] Stat. 21 Edw. I (*SR*, I, 111-112).

[2] E. Coke, *Second Institute* (1642), p. 199.

[3] Stat. 32 Hen. VIII, c. 33 (*SR*, III, 788).

[4] Stat. 1 Edw. VI, c. 12, s. 9 (*SR*, IV, 20).

[5] Stat. 2 & 3 Edw. VI, c. 33 (*SR*, IV, 74).

[6] *Rex v. Roberts* (1702), 1 Lord Raymond 712, 91 E.R. 1375.

[7] [In margin:] Upon the argument of that case, the Chief Justice [HOLT] said it was such a button as the Act intended to prohibit, being turned in the fashion of silk etc. buttons, according as the Act describes, and the shank is only added to fasten it. If it had been made in imitation of plain, it had been only fit to have been covered, and, therefore, it is necessary to make them within the Act that they should be turned like silk buttons and, upon that reason, the judgment was given in that case for the king.

There were two exceptions taken to the *narratio*: first, that the word `*facto*' was left out, it being only *fieri causavit et vendidit etc*. buttons *de ligno tantum*, whereas it should be *facto de ligno etc*.; second, that it was not averred that these buttons were made for clothes or wearing garments, and no other buttons are within the Statute.

The first exception at first stuck with the Chief Justice [Holt], but after, it was resolved that *fieri causavit etc*. was very good sense, for it must be understood *fieri causavit* the buttons *de ligno tantum* and, when he had so done, *vendidit*. As to the second, upon looking into the Act, it was otherwise, for making and selling and setting on are several distinct offenses, and the words clothes etc. go only to setting on.

And the Chief Justice [HOLT] said that, if Hinchdy sold wooden buttons such as the Act describes for boots, it would be an offense within the Act.

And POWELL said that wearing apparel was the general use for buttons, but that any other sort of buttons would be within the Act.

And as to the main point, they held it was the same case with that of the King v. Robins and, therefore, gave the same judgment.

And POWELL said, if these buttons were not within the Act, it would signify nothing.

And the Chief Justice [HOLT] said that the button was of wood, for all the shank was of brass, for the shank was not the button.

[Other reports of this case: 2 Salkeld 612, 91 E.R. 519, 2 Lord Raymond 1275, 92 E.R. 339, 3 Lord Raymond 356, 92 E.R. 730.]

2

Burr v. Atwood
(Q.B. 1706)

An action against a bail in a case is a different action from the original claim.

In a writ of error upon an award of execution in a *scire facias* against a bail, the record of the principal judgment was returned etc. The record was very long and was long depending in the court, I think nine years, upon several writs of error, several writs of error having been quashed for mistakes. At last, this exception was taken, that this proceeding against the bail was a new cause and a different record and yet the plaintiff appeared by his old attorney, without any new warrant of attorney, whereas there ought to have been an entry of a *po. lo*. in the plea upon the *scire facias*. See 3 Cro. 154.[1]

And the Chief Justice [HOLT] said that anybody might pray a *scire facias* for the plaintiff against the bail, and, therefore, it would not be material though that were done by the old attorney without a new warrant, but, when the *scire facias* is returned, then the plea commences. And then the new warrant of attorney ought to have been entered, *viz*. that Attwood *po. lo. suo* his attorney. But here, that is omitted, and yet the plaintiff at the return of the *scire facias* appears by his old attorney and prays an *alias* and so appears all through the record by attorney without any warrant of attorney given, but the attorney does it by his old warrant, which is ill and can never be made good.

POWELL: There ought to have been a new warrant of attorney, for the warrant to appear in the action against the principal is no warrant to appear in the *scire facias* against the bail.

And all the court were of this opinion. And so, after all the long travail in this cause, the award of execution was at last this term reversed for this cause.

HOLT said that, upon this writ of error, they ought not to have certified the record of the judgment against the principal.

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[1] *Tytherley v. Welsh* (1589), Croke Eliz. 154, 78 E.R. 413.

[Other reports of this case: Carthew 447, 90 E.R. 858, 1 Salkeld 89, 402, 91 E.R. 83, 347, 2 Salkeld 603, 91 E.R. 511, 3 Salkeld 369, 91 E.R. 879, 1 Lord Raymond 328, 553, 91 E.R. 1114, 1269, 2 Lord Raymond 821, 1252, 92 E.R. 48, 325, 5 Modern 397, 97 E.R. 728, 7 Modern 3, 87 E.R. 1057.]

3

Turner v. Beale
(Q.B. 1706)

Special matter of discharge cannot be pleaded generally by a demurrer.

In an action upon several promises, the promises were laid to be made the first of June *anno* 4th of the Queen [1705]. The defendant, as to all the promises but one and, as to part of that, pleaded *non assumpsit* and, as to the residue, confessed the promise. But, in bar of execution as to his person, wearing apparel, bedding, and tools of his trade not exceeding £10 in value, he pleads the Act of the 2 & 3 [Ann.], c. 16,[1] for the discharge of poor prisoners, and that he was a prisoner in the Marshalsea in Surrey upon the 8th of November 1703 in actual custody and that, at the November sessions for Surrey held the 13th of July the third year of the queen [1704] before A.B. and C.D. and other justices of the peace, the defendant being then also a prisoner in form aforesaid *per eosdem justicies pacis in aperta curia illa virtute ac juxta formam statuti praedicti de et ab imprisonamento tuo praedicto debito modo relaxato et exonerato fuit*, and he traverses any promise after the 8th of November 1703. And to this plea, the plaintiff demurred generally.

And Mr. *Pengelly*, for the plaintiff, argued that it did not appear by the plea that the justices had any jurisdiction and so the discharge was void, for the Act says that the justices, upon a petition of the prisoner, may summon the creditor etc. But they cannot assume a jurisdiction unless the prisoner petitions, nor can they discharge him against his will, nor can they discharge anyone that appears before them by chance, before a summons, which is their process, is awarded

[1] Stat. 2 & 3 Ann., c. 10 (*SR*, VIII, 271-273).

to call in the creditor, and the order is different on his appearance and default. Besides, this general way of pleading involves too many things in an issue, which ought to be on a single point. And the defendant ought to show his qualifications, which are best known to himself, that he has a right to the benefit of the Act. And it ought not to be put upon the plaintiff to show that he is not a person within the intent of the Act. Hereto, the justices' authority is particular and only extends to certain persons within the qualifications of the Act. And the manner of proceeding is specially directed, which not being set out, the plea is ill.

(I took this from Mr. Pengelly's paper book.)

Mr. *Eyre*, for the defendant, [said] that it was well, being said to be *juxta formam statuti*. And he cited 1 Croke 314 and 2 Croke 609[1] that, though, in an indictment, the fact be not laid so precisely and certainly, yet it will be helped by the conclusion *contra formam statuti*. Secondly, if this pleading were ill, yet it ought to have been shown for cause, and it would be good upon this general demurrer. And he compared it to the cases in 1 Levinz 190,[2] in [an action of] trespass, the defendant made title to J.S. and that he died seised and it descended to him as heir without showing how [he was] heir, and it was held good because it was not shown for cause; 194,[3] in [an action of] debt upon a bond conditioned to save the plaintiff harmless, the defendant pleaded that he had saved the plaintiff harmless, and it was held to be good, not being specially demurred upon. 1 Lutwyche 545, 549,[4] an award was to pay money *super vel ante* the 11th of May; in [an action of] debt upon a bond for non-performance of the

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[1] *Rex v. Penn* (1633), Croke Car. 314, 79 E.R. 874, also W. Jones 320, 82 E.R. 169; *Rex v. Johnson* (1621), Croke Jac. 610, 79 E.R. 520, also 2 Rolle Rep. 225, 81 E.R. 765.

[2] *Duke of Newcastle v. Wright* (1666), 1 Levinz 190, 83 E.R. 363, also 2 Keble 110, 114, 84 E.R. 70, 72.

[3] *Cutler v. Southern* (1666), 1 Levinz 194, 83 E.R. 365, also 1 Williams Saunders 113, 116, 85 E.R. 123, 125.

[4] *Lee v. Elkin* (1701), 1 Lutwyche 545, 549, 125 E.R. 286, 289, also 12 Modern 585, 88 E.R. 1536.

award, the breach was assigned that the defendant had not paid the money *secundum formam et effectum arbitrii praedicti*, and it was held to be well enough upon a general demurrer, though it had been formal to have assigned the breach according to the words of the award. And, therefore, in 3 Levinz 245,[1] where, in [an action of] debt upon a bond conditioned to pay money *apud* D. [on] such a day, the defendant pleaded payment at the day *secundum effectum conditionis praedictis*, and, upon a special demurrer, it was held to be naught for want of showing where he paid it.

HOLT, Chief Justice: The plea is ill all through. What have the Justices to do without an application made to them? They have not a general, but only a special, jurisdiction. Where you do not show the fact of your case to be within the Act of Parliament, the averment that you were discharged *secundum formam statuti* will not help. You would have the plaintiff that is a stranger to the discharge show wherein it was deficient.

POWELL: This defect is a matter of substance. It was never thought that such a general way of pleading a discharge was good.

GOULD: You must show in the pleading the circumstances of the case to give the plaintiff an opportunity to traverse them. The Justices have upon this Act of Parliament only a limited jurisdiction and a particular authority, and they must pursue it.

Judgment [was given] for the plaintiff.

This is out of the paper book of Mr. Pengelly.

Note: I was informed that, in Michaelmas term 5 Anne [1706], a judgment was given for the plaintiff upon a demurrer to the like plea in the Common Bench upon the first part of the exception for defect of jurisdiction after it had depended several terms, but the court there held that the defendant need not show the manner of the proceedings, nor that he was within the provisoes, but that it should come on the plaintiff's side.

Pengelly, afterwards, in Hilary Term 5 Anne [1707],[2] [said] the like plea was pleaded to an action of debt upon a bond in the King's Bench, and the counsel for the defendant did not pretend to maintain

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[1] *Norris v. Spicer* (1685), 3 Levinz 245, 83 E.R. 672.

[2] *Woodrington v. Deverell* (1707), Holt K.B. 567, 90 E.R. 1213, 2 Salkeld 521, 91 E.R. 444.

the plea, but urged that, since the case of Turner v. Beale, there was a new Act of Parliament made, and that, by virtue of that Act, this ought to have been shown for cause, and not being so, it was good enough.

The Act is 4 & 5 Ann., c. 16.[1] The words are that, upon a demurrer, the judges shall give judgment accordingly as the very right of the cause and matter in law shall appear unto them without regarding any imperfection, omission, or defect in any writ etc. except those only which the party demurring shall specially and particularly set down and express together with his demurrer as causes of the same etc., so as sufficient matter appear in the said pleadings, upon which the court may give judgment according to the very right of the cause. And, therefore, no advantage or exception shall be taken of or for an immaterial traverse or for default of pledges etc. unless showed for cause.

To this objection, it was answered by Mr. *Pengelly*, for the plaintiff, that, according to this Act, it could never be construed to make this plea good, for there was nothing [that] appeared here in the pleadings by which the court could adjudge this a sufficient discharge, and, therefore, here appearing by the *narratio* a good cause of action in the plaintiff, the court must give judgment for him, and that no issue could be taken upon this plea.

POWELL: This Act does not supply the defect of matter of substance. If this sort of plea should be good, in all cases of particular jurisdictions, we shall never know whether they have executed their authority well or no.

HOLT, Chief Justice: This Act will not supply the defect of setting out the special matter, and that according to the exposition of the Act, it would take the party's issue from him.

And accordingly judgment was given for the plaintiff.

Mr. *Raymond*, of counsel with the defendant, seemed to me to state the true exposition of that Act, that it should extend to such like matters, which were looked upon to be substance upon the Statute of General Demurrers in Queen Elizabeth's time,[2] of like nature with the instances mentioned and particularized in the Act itself.

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[1] Stat. 4 & 5 Ann., c. 3 (*SR*, VIII, 458-461).

[2] Stat. 27 Eliz. I, c. 5 (*SR*, IV, 712).

And as I apprehended by a case the Chief Justice [HOLT] put, which I did not hear fully enough to put after him, he seemed to give the same interpretation of it.

[Other reports of this case: Holt K.B. 565, 566, 90 E.R. 1212, 1213, 2 Lord Raymond 1262, 92 E.R. 330, 3 Lord Raymond 350, 92 E.R. 727, 2 Salkeld 521, 91 E.R. 444.]

4

Smith v. Gould
(Q.B. 1706)

Slavery is not a part of the common law of England.

In [an action of] trover, the plaintiff narrated that he was possessed of several goods and, among others, *de uno Aethiope vocato* a Negro boy *ut de bonis et catallis suis propriis etc*. On a case put, there was a verdict for the plaintiff and several damages, so much for the Negro boy and so much for the rest of the goods. And upon a motion by Mr. *Eyre*, the *postea* was stayed until a motion of the other side.

And now, Mr. *Salkeld* moved on the behalf of the plaintiff for judgment. He said that trover would lie for a Negro, for trover would lie for anything wherein a man had a property if his property were a chattel property and a personal chattel property. He said a man might be said to have a property in anything if he could use and sell it and that he might do [in] a man. The esplees of a villein, he said, were laid in laboring him and that it was not necessary to make a property, that a man should have a power to destroy the subject of his property, but that was only a consequence of his property, that, in things corporeal, a man might destroy the subject of his property, but not in things incorporeal, that the Levitical law went a great way towards allowing a master to destroy his slave. 21 Exodus 20, 21,[1] `if a man smite his servant or his maid with a rod and he die under his hand, he shall be surely punished; notwithstanding, if he continue [alive] a day or two, he shall not be punished, for he is his money.' [He said] that

[1] Exodus, chapter 21, verses 20-21.

there was a great deal of difference between a servant and a slave, that it was held in a case Trinity, 13 Will. III, King's Bench, 1701, between the parishes of Castor and Aicles,[1] that an assignment of an apprentice did not work away any alteration in point of property, but it is otherwise of a slave, as a villein is assignable, cl. 85, for he is but his master's chattel. F., Discontinuance, 16,[2] if a villein be granted to a man and his heirs, it shall go to his executors, *per* Thorpe. He urged that the law took notice that there was such a condition as bondage. Coke, *Second Inst*. 28, on the 14th chapter of Magna Charta, about amercing villeins, interprets villeins by bond men.[3] By 1 Hen. VI, cap. 5,[4] it appears that the captains were accountable to the king for his proportion of the prisoners taken in the war in France in the time of his father, and the prisoners are accounted part of the gains of war, and, by that Act, the captains and their executors were to be allowed the king's part on their account in the Exchequer, in part of their arrears of wages due to them from the king's father, Henry V. And by 1 Edw. VI, c. 3,[5] vagabonds were made slaves and given to the prosecutor to have and to hold to him, his executors, and assigns for two years.

Here the Chief Justice [HOLT] interrupted him, for that he was got beside the question, which was not whether, by the law of England, any person could in any case be a slave and, as such, might be a subject of property, but whether they could take notice that a Negro *qua* Negro was a slave. Villeins, he agreed, were known in the law; otherwise of Negroes.

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[1] *Parish of Castor v. Parish of Aicles* (1701), 1 Salkeld 68, 91 E.R. 63.

[2] YB Trin. 24 Edw. III (1350), Fitzherbert, *Abridgment*, `Discontinuans divers', pl. 16.

[3] E. Coke, *Second Institute* (1642), p. 28; Stat. 25 Edw. I, c. 14 (*SR*, I, 116).

[4] Stat. 1 Hen. VI, c. 5 (*SR*, II, 215).

[5] Stat. 1 Edw. VI, c. 3 (*SR*, IV, 5-8).

Then, Mr. *Salkeld* left this point and applied himself to prove this general allegation in the *narratio* to be sufficient. And to prove this, he cited 2 Croke 262, 1 Bulstrode 95,[1] [an action of] trover for 100 musk cats and 60 monkeys and the *narratio* was held to be good without showing that they were reclaimed because they would take notice by the name that they were merchandise; so of trover for parrots, but otherwise of trover for a hawk; it is necessary there to show in the *narratio* that it is reclaimed. By the same reason, he said the court would take notice in the case that Negroes are slaves. And in trover, a special title is never set out in the *narratio*. And for a case in point, he concluded with 46 Edw. III, 6a,[2] an action of trespass for taking the plaintiff's *niefe*.

Mr. *Eyre*, for the defendant: The only question here is if the court will take notice that all Negroes are the property of somebody. Presumptions are always in favor of liberty. The court has nothing whereby they can judge that no Negro can be master of himself, neither can they consider one man differently from another upon account of his color, because one is black and the other white. We have but few blacks here in England. Indeed, they are very common in the plantations. And if the court will take notice of the condition of them there in order to determine this case, they will find of them of both conditions. In Virginia, they are most of them free and protected by the laws, both in their persons and properties, and such as are slaves are called in the laws Negro slaves, and not Negroes generally. Laws of Virginia, 69, 169, 272.[3] In Barbados, where, by the laws, they are slaves, they are in many cases real estates, in either of which cases, trover will not lie for them. He said that, in the case of Butts v. Penny, the court were of opinion that trover would lie for a Negro, 2

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[1] *Grymes v. Shack* (1610), Croke Jac. 262, 79 E.R. 226, 1 Bulstrode 95, 80 E.R. 794.

[2] *Assohorp v. M*. (1372), YB Hil. 46 Edw. III, f. 6, pl. 17.

[3] *A Complete Collection of All the Laws of Virginia Now in Force* [1684], pp. 169, 272.

Levinz 201.[1] But since that, in the case of Danvers v. Beverley, Trinity 5 Will. & Mar. [1693], in [an action of] trover for a Negro, there was a special verdict found, but the plaintiff had never the courage to draw it up, that, since that, in the case of Chamberlaine v. Harvey, in this court,[2] in [an action of] trespass for taking the plaintiff's Negro, there was a special verdict found and, after argument, by the judgment of the court, the bill was abated, that, if trespass will not lie, which is founded upon the possession, *a fortiori* trover will not lie, which is founded upon a property. Trover and trespass are very different actions. And it was yet never seen that trover was brought for a captive or a villein. Trover will not lie for a hawk without alleging that he is reclaimed, but otherwise of trespass, which shows that there is a great diversity between the actions. 1 Croke 18, 544; March 12.[3] And that case of the trover disproves that allegation of Mr. Salkeld that it is never necessary in trover to show a title, for it appears by that case that those qualifications which are the ground of the plaintiff's property must be set out in the *narratio*. The case in 2 Croke 262 is a single case, and it differs from this in this respect, that all Negroes are not merchandise.

Salkeld, by way of reply, insisted that the averment in the *narratio* that the plaintiff was possessed of the Negro *ut de bonis suis propriis*, which was now found by the verdict, excluded all intendment that the Negro could be free, for, if he were, the plaintiff could not be possessed of him *ut* etc. He appealed likewise to Mr. Stone, the Clerk of the Papers, that there never was any rule for judgment in the case of Chamberlain v. Harvey.

But he contradicted him in it and said that there was a rule made in that case *quod querens nil capiat per billam*.

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[1] *Butts v. Penny* (1677), 2 Levinz 201, 83 E.R. 518, also 3 Keble 785, 84 E.R. 1011.

[2] *Chamberlain v. Harvey* (1697), Carthew 396, 90 E.R. 830, 1 Lord Raymond 146, 91 E.R. 994, 3 Lord Raymond 129, 92 E.R. 603, 5 Modern 182, 87 E.R. 596.

[3] *Vincent v. Lesney* (1625), Croke Car. 18, 79 E.R. 621; *Lyster v. Home* (1639), Croke Car. 544, 79 E.R. 1069, March 12, 82 E.R. 389.

HOLT, Chief Justice: The law of England has not defined an Aethiopian to be a slave. In the case of Chamberlain v. Harvey, the *narratio* was *quare hominem suum Aethiopem cepit*. Now, *suum* in that *narratio* implies as much a property in the plaintiff in the thing said to be *suum* as *de bonis et catallis suis propriis* does in this case. The thing we went upon in that case is that no man can have a property in another unless under some special qualifications and denomination and that only to some special purposes. As a man that has a villein has a property in him to work him and to have everything that he gets etc., but he cannot kill him. So in the case of a captive taken in war, the captor has a property in him to keep him to make money of him for his redemption. We have no notion of a slave in our law. We have of a servant, and trespass will lie for taking and detaining a man's servant. But that action is not founded upon any property the plaintiff is supposed to have in his servant, but upon the loss of his work. I know no reason why trespass or trover should lie anymore for an Aethiopian than for a Frenchman, nor why a man should anymore declare that he was possessed *de uno Aethiope homine* than *de uno Gallico homine*. But it is a quite different thing for a man to bring trespass and narrate *quare* the defendant *captivum suum cepit*. The law takes no general notice that all Aethiopians are slaves. When they come into England, the law takes no other notice of them but as men who are capable of having property. Mr. Salkeld says that no man can be a villein in gross, but one that has been a villein regardant. But that is otherwise, for a man may confess himself to be the villein of J.S. in a court of record and that will make him a villein in gross.

POWELL, Justice: I was here in court when that case of Butts v. Penny was argued, and the court went upon the case of the musk cats and monkeys. But I thought it was a strange opinion, for admitting a man might have a property in a man, yet it is not such a sort of property as he has in a monkey. A man may have a property in another by taking him in war, and that was the beginning of the property one man has in another. And Littleton[1] says our villeinage began so. There are several sorts of villeins. A man may claim a villein by prescription, but he must prescribe in him and his ancestors and cannot prescribe in a *que* estate. And a man may sell himself at

[1] E. Coke, *First Institute* (1628), f. 118.

this day and, by confessing himself a villein in a court of record, make him and his heirs slaves. But replevin or detinue was never brought for a villein. These Negroes are, for the most part, persons taken in war, and they do not cease to be captives by being sold, but then in an action brought for taking them away, they must be named so. But an action might as well be brought for a white man as the action in this case. He said that the plaintiff might bring trespass and narrate *quare* the defendant *servum suum captivum cepit*, and the buying him with money would be evidence of his being a captive.

But the Chief Justice [HOLT] said that the word *servum* implied a contract.

A rule was given that, as for the damages given for the Negro, the plaintiff *nil capiat per billam*. And judgment was given for him for the rest.

[Other reports of this case: 2 Lord Raymond 1274, 92 E.R. 338, 2 Salkeld 666, 91 E.R. 567.]

5

Regina v. Baines
(Q.B. 1706)

A Clerk of the Peace has a freehold in his office.

A freehold cannot be divested by force of a condition without an entry.

A criminal charge must be certain to be sufficiently pleaded.

An accusation of extortion must be pleaded to be extorsive.

After the quashing of the [writ of] *certiorari* by the court, of which you find a report *ante* 44, n. 2,[1] the defendant took out a new *certiorari*. And the order was removed, which was in these words:

> Whereas by a complaint and charge in writing at this sessions held the said 14th day of July preferred and exhibited to this court against Richard Baines of

[1] Harvard Law School MS. 4081, vol. 2, f. 44, pl. 2, 2 Lord Raymond 1199, 92 E.R. 292.

Appleby in the County of Westmoreland, Gent., Clerk of the Peace for the said County, who the 10th day of April last past and during the whole last general quarter sessions of the peace held for the said County did claim and exercise the said Office of Clerk of the Peace for this County, the said Richard Baines was charged with diverse misdemeanors by him committed in the execution of his said office of Clerk of the Peace for this County, *viz*., that he, the said Richard Baines, the said 10th day of April last did exact from one prisoner Langhorne and compel him to pay and expend the sum of 8s. 6d. for a subpoena to summon four witnesses to give evidence for him in the sessions which subpoena contained but twelve lines, and that the said Richard Baines also did at the last general quarter sessions held for this county exact of one John Scott of Woodside, a poor laborer, and force him to pay the sum of 9s. more than his just fees, and also that the said Richard Baines had committed divers other exactions and extortions particularly mentioned in the said charge in writing and now at this general quarter sessions held by adjournment on the said 28th day of August upon due examination in open court of the said matters alleged against the said Richard Baines, who by order of this Court has been duly summoned to answer the same and did attend in person and had particular notice of each charge against him and made defense by his counsel thereunto and upon full proof of the premises made in open court, it does appear to this court that the said Richard Baines has misdemeaned himself in his said office of Clerk of the Peace of this County and in the execution thereof by exacting and extorting by color of the said office from the said prisoner Langhorne the said 10th day of April last past the sum of six shillings for the said subpoena to summon the said four witnesses, which is three shillings and six pence more than the accustomed fee of right due for the same, and by exacting and extorting by color of the said office at the said last general quarter sessions from the said John Scott nine shillings more than his just fees, and, thereupon, this court does openly in court

> discharge and remove the said Richard Baines from the Office of Clerk of the Peace of this County of Westmoreland and he is hereby by this court discharged from the same accordingly.

The Act and Clause upon which this order was founded is 1 Will. & Mar., session 1, c. 21, s. 4,[1] that, if any clerk of the peace etc.:

> shall misdemean himself in the execution of the said office and thereupon a complaint and charge in writing of such misdemeanor shall be exhibited against him to the justices of the peace in their general quarter sessions, it shall be lawful for the said justices or the major part of them from time to time upon examination and due proof thereof openly in their said general quarter sessions to suspend or discharge him from the said office.

After this case had been several times argued at the bar, both before the quashing the *certiorari* and after, the court this term delivered their opinions *seriatim*.

GOULD, Justice, held that it was a good order. The question, he said, was whether the order was good in form, for it was accepted that it was for the matter sufficient because what he had done was extortion. And as to the form, the question was whether the order contained such sufficient certainty as the law required. He agreed that, for one of the instances, the order was uncertain, but, for the other, it was certain, and, for the first, it was morally certain. He agreed [with] Dr. Manning's Case, 2 Brownlow 151,[2] that, in a bill in the Star Chamber for extortion, particular instances must be alleged, and a general charge is not sufficient. He said that here was enough charged in the premises, for it was said in the order that Baines was charged with divers misdemeanors by him committed in the execution of his office of the Clerk of the Peace. The only question is if what follows after the *viz*. be certain enough. And he thought it was, for the

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[1] Stat. 1 Will. & Mar., sess. 1, c. 21, s. 5 (*SR*, VI, 86).

[2] *Golding v. Manning* (1612), 2 Brownlow & Goldesborough 151, 123 E.R. 867.

instances which follow the *viz*. are plainly extortion. He said it was objected that this order was to turn the defendant out of his freehold, which is favored in law, and, therefore, the order ought to be taken strictly. But he said this case differs from those cases in which this rule had taken place, inasmuch as that very act which created it a freehold subjected it to be dissolved in this manner, and in this too, that it might be created without a deed, as it was resolved in the case of Owen v. Saunders.[1]

He recited the words of the Act, and said that the Justices had pursued the directions of it exactly. First, there had been a complaint exhibited against him in writing and he had been summoned and had appeared and been heard by his counsel and the charge had been fully proved against him and, these circumstances being pursued, the Act of Parliament empowers the Justices to discharge him. He applied himself to the instance of Scott, waiving that of Prisoner Langhorne, as he said before. And, as to that, he said that the *viz*. carried on the general charge at the beginning and explained by a particular instance how the defendant had misdemeaned himself in his office, which he was said in general before to have done and connected the general charge and the particular instances together, so as to make up one charge. And this, he said, was the office of a *viz*., and a *viz*. should always be allowed to this purpose and should be good and be taken as a precise allegation, where it is consistent with, and not repugnant to, the matter precedent. And for this he cited 1 Saunders 169, Lenthall v. Cook,[2] debt upon an obligation conditioned to perform an award *ita quod* it be made upon or before the 16th March; the defendant pleads *nul agard fait*; the plaintiff replies that, after the making of the obligation and before the exhibiting of the bill, *scilicet* the 16th March, the arbitrators made their award etc., and, on a demurrer, it was held well because, the *scilicet* being agreeable with the matter precedent, it shall be taken that the award was made upon the 16th March, the day mentioned under the *scilicet* and not upon

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[1] *Owen v. Saunders* (1697), 1 Lord Raymond 158, 91 E.R. 1002, Colles 70, 1 E.R. 185.

[2] *Lenthall v. Cooke* (1668), 1 Williams Saunders 156, 85 E.R. 162, also 1 Levinz 254, 83 E.R. 394, 1 Siderfin 383, 82 E.R. 1170, 2 Keble 422, 84 E.R. 265.

any other day, and it is as well as if it had been pleaded *quod post confectionem etc. et super* the 16th March without a *scilicet*. And 1 Ventris 107, Dacon's Case,[1] the caption of a presentment at a court leet was `at a court held *infra unum mensem Sancti Michaelis, viz*. the 12th of November,' and the presentment was quashed because the 12th of November was above a month after Michaelmas, though that time was mentioned only under a *viz*., and it was expressly alleged that the court was held *infra unum mensem* etc. before.

He said it was objected that it was not said that the defendant did exact etc. of John Scott, *colore officii*. But, in answer to that, he said that the justices must not be tied up to precise forms in their orders, but, if the order contained sufficient matter in substance, it ought to be confirmed, for else the justices would be never able to make orders nor execute the laws entrusted to them. He agreed that indictments were tied to precise forms, but that was because they are drawn up by men of art and skill, and, therefore, it was reasonable to quash them for want of form, but not so of the other.

POWYS, Justice, said that, before, he was of opinion that this order was naught because it was to turn the defendant out of his freehold, but, now, he was of opinion it was good. As to the matter of the freehold, he said that the Act of Parliament did not give the Clerk of the Peace a freehold in his office by express words, but only by consequence, by putting the determination of his office upon his misdemeaning himself, the determining of which is by the Act of Parliament subjected to the Justices; and, therefore, is there no need of a trial by jury in this case no more than in the case of a fellow of a college, which seems to be very like this case, where, though he has a freehold, yet he is subject to be turned out and have his freehold determined by the visitor that the founder has appointed. And he thought this power was [more] proper to be lodged in the Justices than anywhere else because he is their officer and, being so, they are better judges of his behavior than anybody else. But then, if this order were good, and as to that he said that nicety was not required in orders of Justices of Peace. And for that he cited 1 Ventris 37,[2] where

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[1] *Dacon's Case* (1671), 1 Ventris 107, 86 E.R. 74, also 2 Keble 731, 84 E.R. 462, 2 Williams Saunders 290, 85 E.R. 1077.

[2] *Rex v. Nelson* (1669), 1 Ventris 37, 86 E.R. 26.

the caption of an order was *ad sessionem pacis tenebatur in comitatu praedicto* and not *pro comitatu*, and, for that reason, it was held to be well enough. And with this, he said, consistent experience did agree. And it was very reasonable, for they are to make orders upon new acts of Parliament for which they have no precedents. But he agreed they must contain sufficient matter in substance, which this order, he said, did.

He made the same observations upon the manner of the proceeding that had been made by Gould. He said that the certainty of the charge was in the beginning of the order in these words, `was charged in writing with divers misdemeanors etc.' and the particular misdemeanors come in under the *viz*., which couples all together and incorporates the particular facts into the general words that went before and make them as one sentence, that an answer in Chancery or an affidavit in this manner would be well and if the particular fact were not done as it is laid to be in the general words, the person that swore the answer or an affidavit might be indicted of perjury, that, if the words `in the execution of his office' had not been in the general charge, they must have come in under the *viz*., and that, if the *viz*. were left out, the charge would be nonsense.

He said he had looked among the precedents of indictments and had found two precedents in West 5, 97, and 130,[1] where the charge is first laid in general words and then particularized and applied to the particular facts by a *viz*., from whence he concluded that *videlicet*s were no strangers to indictments, that it could not be expected to find many instances of this kind because indictments commonly comprised only single facts. He cited also 1 Siderfin 91, the King v. Cover,[2] an indictment for extortion against the defendant, who was bailiff of a hundred, was that the defendant *colore officii* had taken 40s. and, after a verdict for the queen, the indictment was removed into the King's Bench and exception taken to it because the cause for which he took the 40s. was not expressed in the indictment, yet [it

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[1] W. West, *The Second Part of Symboleography*.

[2] *Rex v. Cover* (1662), 1 Siderfin 91, 82 E.R. 989, also *sub nom. Rex v. Gover*, 1 Keble 357, 83 E.R. 992.

was] held to be well because it was *colore officii*. 1 Keble 357, the same case.[1]

(Note, in Keble, the words *extorsive injuriose* are added.)

My Brother Gould goes upon the instance of Scott, but I think they are both sufficient. That of Prisoner Langhorne is said to be in the execution of his office. It is objected that it is not laid in the charge how much twelve lines are worth. But the answer to that is that the Justices have power to determine the worth and they have done it accordingly in their adjudication, where they say that it is 3s. 6d. too much, and that makes the order as to that matter certain enough, which, otherwise, without the value had been ascertained, would not have been so. But it is not necessary to lay the value in the charge. It is also in both instances in the adjudication said expressly that the money was taken *colore officii*, which will make the charge good if it should be thought to be defective otherwise.

He said the fact must be taken to be true, for, otherwise, the defendant would have controverted it by affidavits, that the Justices were a court to this purpose by Act of Parliament and they must countenance and support their proceedings, that the charge must be understood *secundum subjectam materiam*, that the defendant did exact of Prisoner Langhorne and John Scott and compel them to pay the money in the charge, which must be understood as Clerk of the Peace by color of his office upon the whole matter taken together, for that it could be as attorney, is a foreign intendment.

POWELL, Justice, argued that the order was naught, for the insufficiency of the charge. He premised that the Clerk of the Peace had a freehold in his office, which is an interest to which the law has more regard than to any other. And, therefore, a freehold shall not be divested by force of a condition, without an entry. And, as to the answer to this, that this is a new freehold and subjected to be divested this way by the same Act by which it was created, that will not make any difference, for the law makes no difference between a new and an old freehold, only as the Act of Parliament has vested this authority in the Justices, if they have pursued it, the order will be good. But, as to what Powys says, that this is a better way of determining the question than the old one, by jury, I think it is much worse. The way of determining men's rights by trials by juries is the best way. Juries

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[1] *Rex v. Cover* (1662), *ut supra*.

are a hindrance to arbitrary proceedings if a court would assume upon them[selves] to act so and are a great security to the liberties and estates of the subjects. It does not follow that, because the Parliament makes a freehold, therefore, it can be taken away without solemnity anymore than that, because a man gets a child, therefore, he may kill it. Though it must be agreed that, if the Justices have pursued their authority, the defendant is well removed. But that is what is to be inquired into.

First, the Act of Parliament directs that there must be a charge in writing and that charge must comprise misdemeanors committed by the Clerk of the Peace in the execution of his office, and that, my brothers say, this charge does. But I think not. The general part of the charge can never be good because every charge must be particular because the intent of a charge is that the defendant may have notice what he is accused of that he may answer it, which he can never be able to do to a general charge. A general charge is allowed in no case, but in barretry, and the reason why it is allowed in that case is because that is an offense which consists of a multitude of acts which, for the great number of them, are impossible to be set out particularly, but then to prevent the before-mentioned inconvenience, the court always takes care in that case to have articles exhibited before the trial.

But then my brothers hold that this defect is supplied by what follows under the *viz*. But that cannot be for the nature of a *viz*. is to show in particular instances what was before charged in general terms. But these particular facts as they are here set forth do not appear to be misdemeanors, as they ought to do. And the two sentences cannot be tacked together, but the particulars must be laid to be done in the execution of his office, as if a man should be indicted that he had feloniously taken away *diversa bona et catalla* and then should follow a *viz*. that he had taken away such and such goods in particular, naming then. But omitting *felonice*, the indictment would be ill for, unless the instance be of a thing of the same nature with what is charged before in general words, the *viz*. is not *ad idem*.

This order ought to be as certain as an indictment. Orders of justices of peace are favored indeed. But yet they must contain sufficient matter in substance and especially in this case where the defendant by this order is to be turned out of his freehold. An indictment for extortion in this manner would be ill. And shall less a

certainty be required in this order, which is to deprive the defendant of his freehold? There never was an indictment for extortion without *colore officii*. `In the execution of his office', which is the phrase certainty be required used here, is looser, for the misdemeanors charged might be done at the same time he was executing his office of Clerk of the Peace, and, upon that account, may be said to have been done in the execution of his office. But *colore officii* is the proper phrase, and that is wanting all through the charge, but is in in all indictments for extortion.

Secondly, here are two facts charged. As to that of Prisoner Langhorne, it should have been said that the defendant did *extorsive* take of him the money charged, as it is in the charge it is but loosely expressed. And though in the adjudication, the matter is more fully and certainly expressed, yet that will not mend the order because there ought to be a certain charge. Besides, it does not appear that the money was exacted from Prisoner Langhorne by the defendant in the execution of his office. Neither does it appear at what sessions it was exacted. And how should the defendant be able to give any answer to it without knowing at what sessions it was taken?

My Brother Gould gives up the instance of Prisoner Langhorne, but insists that that of John Scott is sufficient. But that will not hold neither, for it is not said that the money he exacted was for fees for sessions business, but no more appears but that it was exacted at the sessions, and, unless it were for sessions business, it is no crime.

He said that accusations must be certain. And he cited Hutton 70, Linley's Case, an information against the defendant upon 23 Hen. VI,[1] for that, he being Under Sheriff of York, a [writ of] *capias ad satisfaciendum* was delivered to him etc. and that he, *colore officii*, took of the plaintiff 30s. for making a warrant upon it etc.; after verdict, judgment was arrested because it was not said that the *capias ad satisfaciendum* was directed to the Sheriff of York, for, if it were directed to any other sheriff, or to no sheriff at all, and the defendant made a warrant upon it and took 30s. for so doing, that is not within the Statute. And informations, like indictments, ought to be certain to

[1] *Linley's Case* (1623), Hutton 70, 123 E.R. 1108; Stat. 23 Hen. VI, c. 10 (*SR*, II, 336-337).

all common intents. 3 Leonard 268;[1] an indictment for extortion was discharged because it was not said in the indictment what was the defendant's due fee. So, if no fee at all be due, it ought to be laid so in the indictment.

He said that he doubted whether one misdemeanor were sufficient to give the Justices a power to turn out the defendant because the words of the Statute are `misdemeanors' in the plural number, and the Act for the reasons before alleged ought to be taken strictly.[2]

He concluded that the Justices must pursue the authority which is given them by the Act of Parliament, and, if they do not, their order is void. And they had not done it here because the charge, being uncertain, was insufficient and as no charge, and, consequently, the Statute was not pursued.

HOLT, Chief Justice, argued that the order ought to be quashed. He said he would consider two things: first, the particular charges; secondly, the recital upon which his two brothers grounded their opinion. As to the first, he premised that, though it was not necessary that such a charge as this should be precisely formal, yet it ought to be certain, for it is a charge of a misdemeanor and every charge of a misdemeanor ought to be certain and also it ought to be certain to the intent that the cause of removal may appear that the defendant who is removed from his office may have the benefit of appealing above. Besides, informations ought to be as certain as indictments, and these articles are in the nature of several informations. And further, why does the Act order articles to be exhibited, but only that the defendant may have a certain matter to make answer to. The unskillfulness of the Justices of the Peace in legal forms is no reason to make this order good, for the Justices are to judge upon the articles by the law of the land, and their judgments are to be examined here in this court. If a man be to lose but any part of his property, he must have a certain

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[1] *Lake's Case* (1590), 3 Leonard 268, 74 E.R. 677.

[2] [In margin:] Note, the printed Statute is `misdemeanor'. The Chief Justice [HOLT], upon the argument of this case, said that this Act, being in derogation of Magna Charta by depriving the defendant of the benefit of having his right tried by his peers, ought to be taken strictly.

charge against him, much more where he is to be divested of his freehold. Why should the Act order the articles to be in writing, but that the misdemeanor might appear upon the writing and that it was a misdemeanor in the execution of his office.

As to the particular facts contained in the charge, he said neither of them did relate to the defendant's office. As to the first, that of Prisoner Langhorne, it is not alleged that the 8s. was paid to the defendant. Besides, for what appears in the charge, 8s. might be the defendant's due, for the Clerk of the Peace has a fee. Neither is it said that the defendant did exact it etc. *colore officii extorsive et injuriose*. If it had, that would have been well, according to the case of the King v. Cover, cited by Powys,[1] for, if the money that was taken by the defendant was no more than his due, it could not be taken so. And those words are necessary words. If a man will take money *quatenus* he is an officer where none is due, it is extortion, all one as if something were due and the officer should take more. Extortion is an odious offense and an offense known in the law. And, in an accusation of extortion, *extorsive* is as necessary to be put in as *felonice* and *proditorie* in indictments of felony and treason, from all which it appears that either in the charge there must be a special fact shown which appears to be extortion or else the money must be said to be taken *extorsive*.

As to the second instance, that of John Scott, that is not sufficient neither. The 9s. might be paid to the defendant upon another account. Besides, it has the same flaw with the former instance, *viz*. that it is not said that the defendant did exact it etc. *colore officii*, nor *extorsive* to conclude when the Act ordered there should be a charge in writing, it was intended it should be a certain charge. Second, my two brothers agree that the particular matters without more would not be sufficient, and, therefore, they take in the general words going before. And that brings me to consider them.

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[1] [In margin:] HOLT, upon the argument of this case, denied what is said in that case, that it would have been ill upon demurrer, but that it was well now after verdict for that a verdict could not supply a defective charge, but the power of verdicts in civil cases was founded upon the statutes of jeofails, which did not extend to indictments. He said he had a report of the case of his own, and seemed then to think it a hard case.

And I take it to be nothing but a recital and collection of the Justices of the Peace from the articles which had been exhibited against the defendant. But the articles contain no matter of misdemeanors committed by the defendant in the execution of his office, nor do they any way relate to his office. And, therefore, the inference of the justices, which is all the general words insisted upon amount to, is without foundation and ill. Besides, taking them upon that foot, they are no part of the articles, and, consequently, there is no sufficient charge in writing against the defendant which the Statute directs and without which the Justices have no authority to proceed to remove the defendant from his office. And though the Justices understand the particular facts mentioned in the articles to be misdemeanors committed by the defendant in the execution of his office, yet, when upon looking into them, they appear not to be so. The conclusion of the justices will signify nothing, nor can they ever make that a certain charge which is uncertain in itself. The *viz*.[1] which contains the charge does not answer what the justices say before the charge is, for the misdemeanors alleged under it are not misdemeanors in his office. Therefore, there being no sufficient charge in writing exhibited against the defendant, the justices had no authority to displace him and the order must be quashed. He said if one misdemeanor had been sufficiently charged, it would have been enough.

He said the general words were but the title of the articles. Upon the argument of this case, the Chief Justice [HOLT] said that, for the future in proceedings against a Clerk of the Peace upon this Act, he would advise that the charge should be recited *in haec verba* in the order.

The court being divided, this case was adjourned into the Exchequer Chamber and argued before all the judges of England. And, upon their conferring together, TREVOR, Chief Justice, WARD, Chief Baron, and SMITH, Baron, concurred with GOULD and POWYS, but the other five concurred with the Chief Justice [HOLT] and POWELL. And, therefore, there being seven against five, the judges here consented that the order should be quashed. The Chief Justice

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[1] [In margin:] Upon the argument of that case, the Chief Justice [HOLT] said that the charge began at the *viz*. and that, if the general words that go before were in the charge, yet they could only be taken as the inference of the person that drew the charge.

[HOLT] said that this order being set aside, the justices could no more refuse to admit the defendant than a lord of a manor can a copyholder.

[Other reports of this case: 2 Lord Raymond 1199, 1265, 92 E.R. 292, 332, 3 Lord Raymond 353, 92 E.R. 729, 6 Modern 192, 87 E.R. 946, Holt K.B. 512, 514, 90 E.R. 1182, 1183, 2 Salkeld 680, 91 E.R. 579.]

6

Regina v. Inhabitants of Barking, Needham Market, and Darmesdon
(Q.B. 1706)

A writ will be quashed where a place name in it is mistaken.

A [writ of] *certiorari* was awarded to the Justices of Peace to remove all orders concerning the inhabitants of the parish of Barking and Needham Market and Darmesdon, hamlets in the parish of Barking (*quibuscunque nominibus etc.*). And the orders returned were between the inhabitants of the parish of Barking and Needham (omitting `Market') and Darmesdon.

And *Sir James Montagu* moved that the *certiorari* might be quashed because Needham Market and Needham without `Market' must be taken to be different places, and consequently, the order being made concerning Needham, it cannot be removed by a *certiorari* to remove orders concerning Needham Market.

Serjeant *Weld*, to maintain the *certiorari*, said, that the *certiorari* was to remove all orders concerning the inhabitants of the parish of Barking *quibuscunque nominibus*, and Needham is part of the parish of Barking by another name; second, that Needham and Needham Market must be taken to be the same hamlet. And, for that, he cited 1 Siderfin 64, Barrow v. Huit;[1] a writ was directed to the Justice of Chester or his deputy and returned by the name of J.B., Chief Justice, and, notwithstanding the addition of `Chief', the court took him to be the same person, and the return was held to be good. And the court will not intend a plurality of places if it does not appear

[1] *Barrow v. Huit* (1637), 1 Siderfin 64, 82 E.R. 971, also 1 Levinz 50, 83 E.R. 291, 1 Keble 165, 187, 210, 83 E.R. 877, 891, 904.

to them. And, for that, he cited 1 Rolle Reports 334, Oglethorpe v. Ascue,[1] where a trespass was laid *in Warda Australi et infra libertatem de Lincolniae* and the *venire facias* was *de vicineto libertatis civitatis praedictis*, and upon objection that the *venire* ought to have been from the ward and not from the liberty of the city because that was larger than the ward, it appeared that there were several wards. Because this was called *Warda Australis*, it was resolved to be well because it should be intended that the liberty of the city and the ward were all one.

To which *Sir James Montagu* answered that the addition of `Market' to Needham supposed that there was a hamlet called Needham only, and, therefore, if there could be three hamlets in a parish, the court must take it to be so in the parish.

HOLT, Chief Justice: As to the case of the Chief Justice of Chester, in his patent, he is only styled *justiciarius*, and, anciently, there was but one. But by the 18 Eliz., c. 8,[2] the queen had power given her to make another, and he is styled *alter justiciarius*, and the old one is *justiciarius*. And the style of Chief Justice is only nominal, but the writs issued to him out of the courts here are always directed *justiciario*. We take notice of the constitution of counties palatine, and, therefore, do not regard his calling himself Chief Justice.

As to the case of the ward, the reason of that is because a ward of a city is no venue, and, therefore, the venue must be from the whole city. For a ward is but a *lieu conus* in a city, but a jury cannot come out of a *lieu conus* within a city, though they may from a *lieu conus* out of a city. If the *certiorari* in that case had been to remove all orders concerning the inhabitants of the parish of Barking indefinitely, all orders concerning any of the hamlets had been removed. But here, this *certiorari* being to remove all orders concerning the inhabitants of the parish of Barking and the hamlets of Needham Market and Darmesdon, the *certiorari* is restrained and no orders are removed but such as concern the parish as it is contra-distinguished from the hamlets of Needham Market and Darmesdon. There may be another hamlet in the parish of Barking called Needham only, and, if Needham and Needham Market are the same

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[1] *Oglethorp v. Askue* (1616), 1 Rolle Rep. 334, 81 E.R. 525.

[2] Stat. 18 Eliz. I, c. 8 (*SR*, IV, 618-619).

hamlet, that should have been returned, and, then, it would have been well. But we cannot take notice there is no such hamlet in the parish of Barking as Needham Market. If a man had narrated for breaking his close at Needham and had proved a breaking of his close at Needham Market, he must have been nonsuited.

POWELL agreed. And he said that, if [an action of] trespass had been brought for breaking his close at Needham Market in the parish of Barking and, upon evidence, the plaintiff had proved a trespass in Needham in Barking, the plaintiff must have been nonsuited.

The *certiorari* was quashed.

[Other reports of this case: 2 Salkeld 452, 91 E.R. 391, 2 Lord Raymond 1280, 92 E.R. 341.]

7

Hutchins v. Sutton
(Q.B. 1706)

In this contract case, there was no consideration upon which to ground an action at law.

A legal obligation is created by the acceptance of a bill of exchange.

An action upon the case [was brought] upon several promises. And, upon [a plea of] *non assumpsit*, a verdict [was given] for the plaintiff and entire damages.

It was now moved in arrest of judgment that one of the counts was that, whereas the defendant was indebted to one Pye in so much money for work done and Pye was indebted to the intestate in so much money for work done, the defendant, in consideration that Pye had requested him the defendant *solvere* so much money to the intestate *super compoto et pro debito necnon in exoneratione* of the debt to Pye, promised to pay the intestate the said sum and that it was no consideration for the plaintiff to maintain an action against the defendant because there was nothing due from the defendant to the intestate and Pye might have sued the defendant for all the request he made that he would pay the intestate, which HOLT agreed.

And he said that it was no discharge of the defendant against Pye until payment, but, then, it would because it would be payment

to him. But, if Pye had drawn a bill upon the defendant and the defendant had accepted it, that would have given the intestate and the plaintiff, in his right, a good cause of action, it being the consideration of all actions upon bills.

And upon this exception, the judgment was ordered to stay. 1 Saunders 210, Forth v. Staunton,[1] and the same case in effect with this difference only, that the defendant in this case was an executor and, on account of this, it will be a charge to the plaintiff if this promise was good *de bonis propriis*, where he was chargeable to the original debtee, except as executor.

Mr. *Eyre* was of counsel with the defendant.

8

Jackson v. Humphrys
(Q.B. 1706)

A person who is in prison is in the custody of the sheriff.

In an action upon the case for an escape against the defendants, Sheriffs of London, for an escape out of the Counter [Prison], the *narratio*, as to the point in question, was that the plaintiff levied a plaint against J.S., being then in custody in the Counter upon a plaint levied against him by J.N., and that the said J.S. was charged in the custody of the defendants upon the plaint levied by the plaintiff etc.

And the defendant demurred to the *narratio*. The exception was taken to the *narratio* that the plaintiff ought to have showed that process issued upon the plaint and, upon that process, that J.S. was arrested, for else he was not lawfully in custody at the plaintiff's suit.

And, at first, the court seemed strongly with the objection.

And the Chief Justice [HOLT] said that, if this manner of declaring was good, it would be enough to say that a plaint was levied against the defendant being in custody, which could not be, but you must always show a plaint levied and that, thereupon, process issued and the defendant was arrested and, then, declare against him, that a *narratio* is not good against a man in custody anywhere but in this

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[1] *Forth v. Stanton* (1670), 1 Williams Saunders 210, 85 E.R. 217, also 1 Levinz 262, 83 E.R. 398, 2 Keble 465, 84 E.R. 292.

court, that, before the Act of 4 & 5 Will. and Mar., c. 21,[1] which gives liberty to narrate against a man in custody, if a man had been in the custody of the Warden of the Fleet, the plaintiff could not have declared against him without having a [writ of] *habeas corpus* to bring him to the bar and there have charged him, that it may seem unnecessary to have a process awarded to the Sheriff to take a man that is already in his custody, but the reason is because the defendant has no day in court upon the plaint, but that is upon the process, that the judge cannot take notice that the person against whom the plaint is levied is the same person that is in custody, but that there ought to be a *cepi corpus* returned by the Serjeant at Mace, that, if the defendant, in regard he is in the Sheriff's custody, cannot be taken by the Serjeant, he cannot be charged at all, that, if a man be in the Sheriff's custody at the suit of J.S., you cannot charge him in his custody at the suit of J.N. without taking out a writ against a man directed to the Sheriff. But the delivering the writ to the Sheriff is an arrest in law, and, immediately, upon the delivery, a man is in his custody upon that writ. But, if you would narrate in an action of escape in such a case, you must narrate that he was arrested upon that writ, for you must narrate according to the operation of law, and not according to the fact, as, if a tenant for life grants to him in reversion, you must plead it as a surrender, and not as a grant.

Note this seems to be right in all cases but the case in question, for the reasons upon which after the judgment was given, and, therefore, in Frost's Case, 5 Coke 89,[2] where the case was that J.S. being in the custody of a Serjeant at Mace by process out of the Sheriff's Court, the plaintiff delivered to the Serjeant a warrant of the Sheriff to arrest him upon a [writ of] *capias utlagatum* and the declaration supposed that the Sheriffs arrested J.S. by force of the *capias utlagatum*, and this matter being found by a special verdict, it was, upon an exception, returned that the verdict well warranted the *narratio*.

After this cause had depended two terms, judgment was given for the plaintiff.

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[1] Stat. 4 Will. & Mar., c. 21 (*SR*, VI, 413).

[2] *Frost's Case* (1599), 5 Coke Rep. 89, 77 E.R. 190.

And HOLT, Chief Justice, said look upon Mackally's Case, 9 Co. 63b.[1] Upon entering a plaint in the Counter, there never is any precept awarded, but the Serjeant at Mace, by his general authority, arrests the defendant, and, therefore, nothing more can be done than is set forth in this *narratio*, for the defendant cannot be arrested. And the defendant, upon entering the plaint and then being charged in custody in the Counter, was immediately in the actual custody of the Sheriffs, the defendants, at the plaintiff's suit.

He cited a case in King Charles II's time between Andrews and Bradshaw,[2] in Hale's time, where it was resolved that, if the Sheriff of Northumberland have a man in custody in Northumberland and the Sheriff is here in town[3] and a writ be delivered to him against the man, the man is in his custody immediately upon that writ. But if a Sheriff be bringing a man up to Westminster upon a [writ of] *habeas corpus* and, after a man is come out of the county where the Sheriff is Sheriff, a writ is delivered to the Sheriff against a man, that is no charge upon the Sheriff to make a man in his custody upon that writ.

POWELL, Justice, agreed.

Upon the return of the writ of inquiry, the same exception was moved on the behalf of the defendants in arrest of judgment, but the court would not hear it because it was irregular, after judgment had been for the plaintiff upon demurrer.

[Other reports of this case: Holt K.B. 280, 90 E.R. 1054, 1 Salkeld 273, 91 E.R. 239, 11 Modern 69, 88 E.R. 893.]

9

Regina v. Browne
(Q.B. 1706)

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[1] *Mackally's Case* (1611), 9 Coke Rep. 61, 77 E.R. 824, also Croke Jac. 279, 79 E.R. 239, Jenkins 291, 145 E.R. 211.

[2] Perhaps *Andrews v. Bradshaw* (1675), 3 Keble 557, 561, 599, 84 E.R. 877, 879, 901 (*re* Sheriff of Galway in Dublin).

[3] I.e. Westminster.

Whether a writing was made with an intent to defame is a question for a jury to decide.

An information was preferred by Mr. Attorney General against the defendant, for that the defendant intending to scandalize Charles, duke of Somerset, and several other lords, naming them, did write and publish a false and scandalous libel concerning them *in quo etc. continentur diversae ironicae materiae sequentes, viz.*:

> Be wise as Somerset, as Somers brave,
> as Pembroke airy, and as Richmond grave.

The libel was entitled *Advice to the Lord Keeper*.[1] And the libel was tied up by innuendos to the persons laid to be scandalized in the inducement of the information. There was more verses wherein, after the same manner, epithets were affixed to the names of the other lords, which, as those before mentioned, were in the common construction of the words matter of praise, or at least did not import any matter of scandal, yet being directly contrary to the character the persons of whom they were affirmed had at that time among the generality of people were as significant of the contrary vices as if proper words to signify those vices or weaknesses had been made use of.

The defendant pleaded not guilty and was found guilty. And judgment was entered for the queen.

And the defendant, when he was brought up to be fined, moved by his counsel in arrest of judgment.

But that was opposed by Mr. Attorney General [*Northey*] because judgment was regularly signed in the Office and so the defendant was too late to make that motion. But the court seeming to incline that the defendant might move any matter in arrest of judgment before the fine be set and to take time to consider of it, Mr. Attorney General [*Northey*] consented that the defendant's counsel should be heard in arrest of judgment.

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[1] Joseph Browne, *The Country Parson's Honest Advice to That Judicious Lawyer, and Worthy Minister of State, My Lord Keeper* [1706].

Then, it was objected on the behalf of the defendant that the words of the libel did not import any scandalous matter, and, to make them of such import, they must be taken in a sense directly contrary to their obvious signification, and, therefore, it ought to have been averred in the information that they were meant in the scandalous sense, as that by wise was meant foolish etc. or else the court could not understand them in that sense.

And it was compared to the case in 2 Rolle Rep. 345, Palmer 367, Godbolt 345,[1] where four men were indicted for erecting four several inns and putting up signs to their several houses and selling victuals *equitantibus etc. ad communem nocumentum*. And the indictment was quashed because it was not shown that the place was dangerous or that there were too many or that they harbored dissolute persons, for without some such circumstance, the erecting of an inn is lawful and what every man may do by the common law, and, therefore, to make it an offense, some such circumstance ought to have been shown in the indictment. And the difference was taken that, when a man is indicted for the doing of a thing which in itself is unlawful, there, such a general conclusion *ad communem nocumentum* is ill. But when the thing in itself is lawful, as the erection of an inn, except by reason of some particular circumstance, there, it is necessary to show the particular annoyance.

Note, in the report in Godbolt, it is reported that *ad communem nocumentum* was not in. And query if that be not the better law.

HOLT, Chief Justice: How would you have it be? You cannot mend it, and, therefore, you must allow it to be good.

Attorney General [*Northey*]: It is laid to be done with an intent to scandalize the noble lords mentioned, and, if the defendant meant it in a good sense, that might have been shown upon the trial, and it would have made the defendant not guilty.

The jury have found *quo animo* it was done, by HOLT, Chief Justice. And judgment was given against the defendant, and he was fined and set in the pillory.

[Other reports of this case: Holt K.B. 425, 90 E.R. 1134, 11 Modern 86, 88 E.R. 911.]

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[1] *Anonymous* (1623), 2 Rolle Rep. 345, 81 E.R. 842, Palmer 367, 81 E.R. 1127, Godbolt 345, 78 E.R. 203.

10

Newman v. Smith
(Q.B. 1706)

In an action for a tort, a separate but related tort can be alleged and proved in aggravation of the damages of the claim.

In [an action of] trespass, the plaintiff narrated that the defendants *tiel jour et an apud* W. upon the plaintiff *insultum fecerent* the plaintiff *verberavere etc. et domum* of the plaintiff *apud W. praedictum adtunc et ibidem fregint et intraverint* and the plaintiff in quiet *usu et occupatione domus praedicti disturbavere et impedivere necnon* the plaintiff *et T.N. filium suum et M.N. et R.N. filias praedictas* the plaintiff *et E.N. servam suam minas de verberatione eorum adtunc et ibidem imposuere et ipsos injuriis et gravaminibus, viz. insultis et affraiis adtunc et ibidem affecere et alia enormia eidem* the plaintiff *adtunc et ibidem intulere contra pacem etc*. Upon a case put, there was a verdict for the plaintiff.

And Mr. *King* moved in arrest of judgment that the action here was among other things for beating the plaintiff's servant, for which he could have no action without a special damage by the loss of her service, and, therefore, it ought to have been laid *per quod servitium amisit*, but being without it, no action would lie by the plaintiff for it and, consequently, damages being given for it, it is ill. And he compared it to the case of Guy v. Livesay, 2 Croke 501,[1] where the husband brought an action for assaulting and beating himself, *necnon* for assaulting and beating his wife *per quod consortium amisit* and upon a motion in arrest of judgment, judgment was given for the plaintiff. And so, he said, it ought to have been here.

Mr. *Eyre*, for the plaintiff, said that this was only a description of the trespass, and an instance of the disturbance the defendant made in the plaintiff's family and laid in aggravation of damages, that it might have been given in evidence upon the disturbance of the plaintiff's possession laid in the *narratio*, and, therefore, though it

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[1] *Guy v. Livesey* (1618), Croke Jac. 501, 79 E.R. 428, also 2 Rolle Rep. 51, 81 E.R. 653.

were laid specially, it would be well. And he cited the case of Dent v. Oliver, 2 Croke 122;[1] trespass *quare vi et armis apud manerium suum de H. erexit quoddam velabram, Anglice* a toll booth, *et vi et armis cepit tolnetum et adtunc et ibidem insultum fecit super J.S. servientem suum* and disturbed him in gathering toll *ad feriam ipsius* the plaintiff *spectantam* and upon exception in arrest of judgment that this action is brought for assaulting his servant, which lies not without battery *per quod servitium amisit*, it was held to be well because the action was not brought for the assault but because, by that means, he was disturbed in collecting the profits of his fair. Same book 664, Thomlins v. Hoe *et ux*.,[2] trespass by a husband and wife for the battery and false imprisonment of the wife; in the conclusion of the *narratio*, it was said *et alia enormia eis intulit* and, on an exception that the *narratio* was for a tort to the husband and damages given for a tort to the husband and the wife cannot join in such an action, it was held to [be] well because it was only laid in aggravation of damages, but did not alter the substance of the *narratio* and the husband may have wrong by the battery of the wife. Michaelmas 2 Queen Anne, King's Bench, Russell v. Corne, D, nr. 69;[3] trespass by a husband and wife for the battery of the wife *per quod diversa ardua negotia* of the husband *infecta remanserunt ad damnum ipsorum* and, upon a motion in arrest of judgment because the wife could not be joined in the action brought by the husband for the damage he had by the delay of his business, yet, because it was only laid in aggravation of damages, the plaintiff had judgment.

(Note in my report of that case, Holt put the case in question, *viz*., that a man might have an action of trespass for entering his house and beating his servant without saying *per quod servitium amisit* because the beating the servant is part of the same trespass and only a description of it by way of aggravation.)

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[1] *Dent v. Oliver* (1606), Croke Jac. 43, 122, 79 E.R. 35, 106.

[2] *Thomlins v. Hoe* (1623), Croke Jac. 664, 79 E.R. 574.

[3] *Russell v. Corne* (1704), Holt K.B. 699, 90 E.R. 1286, 1 Salkeld 119, 91 E.R. 111, 6 Modern 127, 87 E.R. 884, 2 Lord Raymond 1031, 92 E.R. 185.

HOLT, Chief Justice, said that no action lay for the master in this case because it was not said that he lost his service by the battery. If that had been laid in that case, it had been ill because a different action lies for that. This only makes the trespass more enormous. If a man breaks another's house and lies with his daughter, no action lies for lying with his daughter, yet it is a great aggravation of the trespass. This might have been given in evidence upon the *alia enormia* in the *narratio*; so may laying with a man's daughter in the other case. And the expressing of it can do no harm. It only goes in aggravation of the damages. And upon this *narratio*, no damages could be given for the loss of the servant's service, but the beating the servant is only a circumstance to describe the manner of the entering the house and the trespass, and a man may aggravate damages.

POWELL, Justice: This is not an action *per quod servitium amisit*, and loss of service could not have been given in evidence in this action because a different action lay for that. But no action lies for this. The disturbing the plaintiff in the quiet possession of his house and frightening and beating his children and servants is an aggravation of the entry.

The Chief Justice stirred an objection that, instead of *ibidem*, it should have been said *in domo praedicto* for that there would be a difference between a *narratio* for entering his house and beating his servants there and beating them generally. In the last case, it would be ill.

Mr. *Eyre* said that it was *adtunc et ibidem* and, the *adtunc* tying it up to the same instant of time, it must necessarily be in the same place.

Mr. *King*: The last time the case was stirred, when judgment was given, [he] mentioned that exception again and said *ibidem* referred to the vill, and Mr. *Eyre* gave the answer before.

Judgment was given for the plaintiff.

[Other reports of this case: Holt K.B. 699, 90 E.R. 1286, 2 Salkeld 642, 91 E.R. 542.]

11

Lord Wharton v. Skipwith
(Q.B. 1706)

Where a party has released errors, the proper judgment upon a writ of error is that the writ of error is barred, not that the judgment below is affirmed.

In a writ of error, want of an original [writ] was assigned for error. The defendant pleaded a release of errors and concluded his plea *unde petit judicium si* the plaintiff *praedicto breve suum de errore corrigendo contra* his deed of release against the defendant *prosequi debeat et quod judicium affirmetur*. And the plaintiff demurred.

And upon an exception to the plea because it prayed that the judgment might be affirmed, whereas the judgment must be that the plaintiff shall be barred of his writ of error, the court agreed that it was an improper conclusion because the defendant, by pleading the release, had confessed the error, and, therefore, the court must give judgment that the plaintiff shall be barred of his writ of error, but cannot affirm the judgment, yet they held that it was only a prayer of what the court could not do. And there being a proper conclusion of the plea before, this improper conclusion should be rejected.

And the Chief Justice [HOLT] said that the judgment that the plaintiff should be barred of his writ of error was the more beneficial judgment for the plaintiff in error because the defendant could have no costs, as he should have had upon affirming the judgment.

12

Bowden v. Prissick
(Q.B. 1706)

Where a verdict is for a sum greater than what was requested as damages in the plaintiff's pleading, the excess can be remitted.

[An action of] debt [was brought] for a penalty in a charter party. And several breaches [were] assigned upon the new Act of

Parliament, 8 & 9 Will. III, c. 10.[1] And the jury, in assessing the damages upon the several breaches, assessed more damages upon one of them than the plaintiff had narrated of. And this was moved in arrest of judgment.

But HOLT said that it was no cause to arrest the judgment because the judgment must be for the defendant as it should have been before the Act, and the damages found by the jury upon the breaches go only in defeasance of the judgment, and the plaintiff may remit so much of the damages as is more than he has alleged or he may remit the whole damages upon that breach and take judgment only for the rest or, if any of the breaches be insufficiently alleged, he may remit the damages for that etc. The best way is always to take several damages upon the several breaches upon this Statute.

POWELL agreed.

Judgment [was given] for the plaintiff.

13

Athrop v. Gosling
(Q.B. 1706)

Surplusage in a pleading will be ignored by the court.

In an action upon the case against a carrier, the *narratio* was that, in consideration the plaintiff *super se assumpsit et eidem* the plaintiff *fideliter promisit* to pay to the defendant such a sum, the defendant promised to carry the goods etc.

And, upon a demurrer, an exception was taken because the promise was laid to the plaintiff himself, and so [it was] no consideration.

But the court said that they would reject the nonsense and take the sense and then the *narratio* would be well. And they gave judgment for the plaintiff.

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[1] Stat. 8 & 9 Will. III, c. 25, ss. 13, 14 (*SR*, VII, 268).

14

Johnson v. Dove
(Q.B. 1706)

The question in this case was whether the execution of a judgment upon the goods of an executor was wrongful or not.

In an action upon the case, the plaintiff narrated that D[ove] recovered a judgment against C., executor of B., in [an action of] debt. And a [writ of] *fieri facias* was awarded upon it to levy the debt *de bonis testatoris* and the damages *de bonis testatoris si tantum etc. et si non de bonis propriis* of the executor and delivered to the Sheriff. And he made a warrant upon it to the plaintiff, being a Serjeant at Mace, to execute, which warrant was delivered to the plaintiff. And he took the goods of the executor in execution for the damages. And, thereupon, the defendant, in consideration the plaintiff at his request would discharge the goods out of execution and leave them in the possession of the executor, promised to pay etc.

And upon a demurrer to the *narratio*, two exceptions were taken, first, that the taking of the goods was wrongful, inasmuch as it is not said in the *narratio* that there were no goods of the testator in the hands of the executor whereof the damages might have been levied and the judgment and execution being only conditional *si non* if there were any, the executor's goods could not be taken in execution, and, if the taking of them was wrongful, the discharge of them is no consideration.

SUBJECT INDEX

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