2016

Sir Robert Raymond's Common Law Reports (1694-1696)

William Hamilton Bryson
University of Richmond - School of Law, hbryson@richmond.edu

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COMMON LAW REPORTS

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W. H. BRYSON

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INTRODUCTION

Sir Robert Raymond, Lord Raymond

Robert Raymond was born on 20 December 1673 in London. He was the only son of Sir Thomas Raymond (1627-1683), a judge and law reporter. He was formally admitted to Gray's Inn, his father's inn, at the age of nine in 1682. He was a student at Eton College and Christ's College, Cambridge. Raymond was called to the bar of Gray's Inn in November 1697, and he joined *ad eundem* Lincoln's Inn in 1710. He was the Solicitor General from 1710 until 1714 and Attorney General from 1720 to 1724. He was a member of Parliament from 1710 to 1724. He was made a Justice of the Court of King's Bench in 1724 and the Chief Justice from 1725 until his death in 1733. He was raised to the peerage on 15 January 1731. Robert Raymond, Lord Raymond, was married to Anne Northey, the daughter of Sir Edward Northey (1652-1723), the Attorney General. Lord Raymond died at his home in Red Lion Square, London, on 18 March 1733.[1]

Sir Robert Raymond's Reports

The collection of common law cases reported in British Library MS. Add. 35987, part 2, pp. 72-92, another copy being British Library MS. Hargrave 66, part 2, pp. 174-244, is ascribed to Sir Robert Raymond, later Lord Raymond (1673-1733). Some of these cases were incorporated into the printed reports attributed to Lord Raymond. However, these cases were not copied as a discrete block; thus, we can see that this collection was only one of many that was used to compile

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[1] D. Lemmings, 'Raymond, Robert, first Baron Raymond (1673-1733)', *Oxford Dictionary of National Biography*, vol. 46, pp. 191-192; R. Sedgwick, *The History of Parliament The House of Commons 1715-1754* (1970), vol. 2, pp. 379-380; J. Piele, *Biographical Register of Christ's College* (1913), vol. 2, p. 115.

the very good collection of reports that we now call Lord Raymond's reports. Other collections that were used were made *inter alia* by Herbert Jacob (c. 1674-1725), William Salkeld (1671-1715), and Thomas Pengelly (1675-1730), sometimes with attribution, sometimes not.[1]

This present edition of Sir Robert Raymond's reports includes only those that are not already in print. The cases in this manuscript collection that were used in the printed edition, but not here, are as follows:

Philips v. Bury (K.B. 1694), 1 Lord Raymond 5, 91 E.R. 900;
Rex v. Knollys (K.B. 1694), 1 Lord Raymond 10, 91 E.R. 904;
Tipping v. Cozens (K.B. 1695), 1 Lord Raymond 33, 91 E.R. 918;
Waltham v. Sparkes (K.B. 1695), 1 Lord Raymond 41, 91 E.R. 924;
Brittel v. Bade (K.B. 1695), 1 Lord Raymond 43, 91 E.R. 925;
Selway v. Holloway (K.B. 1695), 1 Lord Raymond 46, 91 E.R. 927;
Pryn v. Edward (K.B. 1695), 1 Lord Raymond 47, 91 E.R. 927;
Rex v. Kempe (K.B. 1695), 1 Lord Raymond 49, 91 E.R. 929;
Masters v. Lewis (K.B. 1695), 1 Lord Raymond 56, 91 E.R. 933;
Smith v. Frampton (K.B. 1695), 1 Lord Raymond 62, 91 E.R. 938;
Rex v. Kendal (K.B. 1695), 1 Lord Raymond 65, 91 E.R. 939;
Bovey v. Castleman (K.B. 1696), 1 Lord Raymond 69, 91 E.R. 942;
Lawton v. Ward (K.B. 1696), 1 Lord Raymond 75, 91 E.R. 946;
Chance v. Adams (C.P. 1696), 1 Lord Raymond 77, 91 E.R. 948;
Burghill v. Archbishop of York (C.P. 1696), 1 Lord Raymond 79, 91 E.R. 949;
Makareth v. Pollard (C.P. 1696), 1 Lord Raymond 80, 91 E.R. 950;

[1] J. W. Wallace, *The Reporters* (1882), pp. 401-407.

Knight v. Mayor of Wells (C.P. 1696), 1 Lord Raymond 80, 91 E.R. 950;
Brownlow v. Hewley (C.P. 1696), 1 Lord Raymond 82, 91 E.R. 951;
Ward v. Griffith (C.P. 1696), 1 Lord Raymond 83, 91 E.R. 952;
Smith v. Thwaite (Del. 1696), 1 Lord Raymond 91, 91 E.R. 957;[1]
Palmer v. Branch (C.P. 1697), 1 Lord Raymond 103, 91 E.R. 965.

What these cases have in common is that they are the more fully reported cases and most are from the Court of King's Bench. Thus, the remaining cases, the ones printed here, are primarily from the Court of Common Pleas.

The collection of cases now known as Lord Raymond's reports was first printed in 1743, which was after he and the others were dead. Perhaps, it was Lord Raymond who put the collection together from many sources; the title of the printed edition says that the cases were 'taken and collected' by Lord Raymond. Perhaps, the publisher attributed this collection to Lord Raymond for promotional purposes, he being the most prominent jurist of all of them.

[1] See also Misc. Delegates Cases, p. 80.

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SIR ROBERT RAYMOND'S COMMON LAW REPORTS

Note all the cases from folio 72 to the Case of Hart and Dunning (folio 92) inclusive were taken by Sir R[obert] R[aymond] and transcribed from a copy in the custody of Herbert Jacob of the Inner Temple, Esq.

1

Rex et Regina v. Trowbridge
(K.B. 1694)

A bond to prosecute in the Court of Common Pleas is not removed out of that court by a writ of error.

Michaelmas, 6 Will. & Mar., 1694.

Trowbridge, being indicted for erecting a cottage contrary to the Statute of Elizabeth,[1] traversed the indictment and entered into a recognizance to prosecute with effect. And he brought it to trial, and judgment was given against him, whereupon he brought a writ of error.

And now, the Clerk of the Peace estreated the recognizance into the Exchequer.

And *Sir Bartholomew Shower* moved to stop the estreating, first, because that the recognizance was removed by the writ of error brought against the judgment, for he said, when the judgment is removed by the writ of error out of an inferior court hither, they may here sue a *scire facias* upon the recognizance against the bail, second, upon a writ of error brought against the judgment out of [the Court of] Common Bench, *scire facias* was sued upon the recognizance against the bail; third the writ of error is to remove the record *cum omnibus tangentibus*.

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[1] Stat. 31 Eliz. I, c. 7 (*SR*, IV, 804-805).

But, to the first, the court answered that the reason was because the bail was entered on the plea roll and so removed hither.

To the second, they said that, in that case, the recognizance was removed hither by [a writ of] *certiorari*, and they said the best way if an indictment is removed hither is to have a *certiorari* to remove the recognizance also.

To the third, they said the writ of error did not remove the original [writ] out of the [Court of] Common Bench and the recognizance is a collateral record to the judgment, for which reasons his motion was denied.

Then, *Sir Bartholomew Shower* took exception to the indictment, for that it was *per juratores praesentatum existit* that Trobridge did erect a cottage etc. *et ulterius praesentant quod continuavit* and concludes *contra formam statuti*, for which reasons, the indictment was quashed, because the *ulterius praesentant* has no nominative case and makes a new indictment distinct from the first part and the first indictment, having no *contra formam statuti*, is for a thing which is no offense at common law. But, if the *ulterius praesentant* has been left out, the *contra formam statuti* at the conclusion had referred to the whole, and, then, it had been but one indictment. But, as it is, it cannot, and, therefore, it is naught.

[Other copies of this report: British Library MS. Hargrave 66, pt. 2, p. 188.]

[Other reports of this case: Comberbach 307, 90 E.R. 495, 4 Modern 345, 87 E.R. 434, 1 Salkeld 371, 91 E.R. 322, Holt K.B. 344, 90 E.R. 1090, Skinner 564, 90 E.R. 254.]

2

Rex v. Buggs
(K.B. 1695)

The justices of the peace cannot hold cognisance of any personal statute unless authority be given them by statute and not where there are statutory penalties.

Hilary 6 Will., in the King's Bench, 1694[/95].
An indictment was found before justices of peace against Bugge upon the Stat. 2 & 3 Phil. & Mar., c. 11.[1] And, upon a special verdict, the indictment was quashed, because the justices has no jurisdiction, for they cannot hold cognisance of any personal statute unless authority be given them by the act. But, where penalties are inflicted by an act of Parliament, the cognisance belongs to courts of common law, as justices of oyer and terminer and the courts of Westminster Hall etc.

[Other copies of this report: British Library MS. Hargrave 66, pt. 2, p. 190, pl. 1.]

[Other reports of this case: Comberbach 252, 90 E.R. 460, 4 Modern 379, 87 E.R. 454, Skinner 428, 90 E.R. 190.]

3

Greenwood v. Pigott
(K.B. 1695)

Incorrect pleadings can be amended to conform to a correct plea roll.

Michaelmas 7 Will., in the King's Bench 1695.
[In an action of] trespass [for] assault and battery, the defendant [John Pigott] pleads *de son assault demesne*. The plaintiff [Edward Greenwood] replies *de injuria sua propria absque tali causa et hoc petit quod inquiratur per patriam et praedictum Edwardum similiter* instead of *Johannes*. The original issue was wrong, and the *nisi prius*

[1] Stat. 2 & 3 Phil. & Mar., c. 11 (*SR*, IV, 286-287).

was wrong, but the plea roll was right. And if it was amendable [was the question].

And, upon argument, it was resolved that it should be amended. *Vide* 3 Cr. 437; 2 Cr. 144, 587; 8 Rep. 161; 2 Cr. 157.[1]

[Other copies of this report: British Library MS. Hargrave 66, pt. 2, p. 206, pl. 1.]

[Other reports of this case: 3 Salkeld 31, 91 E.R. 673, Holt K.B. 55, 90 E.R. 928, Skinner 591, 90 E.R. 265.]

4

Rex v. Morris
(K.B. 1695)

The return of a writ of mandamus *must be specific and particular*.

A [writ of] *mandamus* was directed to the Mayor, Bailiff, and Burgesses of The Devizes to restore Morris to the place of a capital burgess. They returned that Morris was drunk twice or thrice a week and divulged the secrets of the corporation, for which they turned him out. But they did not return that they summoned him to appear before them, which *Sir Bartholomew Shower* and Mr. *Northey* took hold of as a fatal exception.

And of that opinion was the court for the reason in Bagg's Case, 11 Rep.[2]

And [it was said] by HOLT, Chief Justice, they ought to have returned the particular secrets the defendant divulged, for which reasons, they adjudged the return naught.

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[1] *Clothworthy v. Clothworthy* (1636), Croke Car. 436, 437, 79 E.R. 979, also Hetley 137, 148, 124 E.R. 404, 413, Hutton 82, 123 E.R. 1116; *Molineux v. Molineux* (1607), Croke Jac. 144, 79 E.R. 126; *Thomas v. Willoughby* (1620), Croke Jac. 587, 79 E.R. 501; *Blackamore's Case* (1610), 8 Coke Rep. 156, 77 E.R. 710; *Piers v. Gore* (1607), Croke Jac. 157, 79 E.R. 138.

[2] *Bagg's Case* (1615), 11 Coke Rep. 93, 77 E.R. 1271.

[Other copies of this report: British Library MS. Hargrave 66, pt. 2, p. 206, pl. 2.]

[Other reports of this case: 4 Modern 37, 87 E.R. 248, Holt K.B. 170, 90 E.R. 992.]

5

Scilly v. Treseagle
(K.B. 1695)

A will is not a deed, and, therefore, need not be pleaded with a profert hic in curia.
A party cannot have oyer of surplusage that has been pleaded.

[In an action of] replevin, the defendant, in his avowry, made title to a rent charge by a will, which he pleads with a *profert hic in curia*.
Carthew, for the plaintiff, demanded oyer by a motion, insisting upon it that the defendant, by his will had no title to so much as he avowed, for that it was the defendant's own folly to plead it with a *profert hic in curia* and that the plaintiff might take advantage of it.
But *per curiam*, a will is not a deed, and, therefore, the defendant need not to have pleaded it with a *profert hic in curia*. But, having done so, it is but surplusage, and the plaintiff shall not have oyer of it.

[Other copies of this report: British Library MS. Hargrave 66, pt. 2, p. 207, pl. 1.]

6

Wickham v. Dunton
(K.B. 1696)

The ecclesiastical courts have jurisdiction over the offense of fornication.
An action of defamation lies for accusing a person falsely of a crime, though the crime may have been pardoned.

Hilary 7 Will., King's Bench, 1695[/96].
Mr. *Mountpesson* moved for a [writ of] prohibition to the spiritual court where the defendant libeled against the plaintiff for saying that he lay with his wife before he was married.
But it was denied *per curiam*, because, though the spiritual court allows a legitimation of children born before marriage by a marriage after, yet they look upon such kindness before marriage as incontinence. And they said they denied a prohibition in this case the rather because, otherwise, a virtuous woman might be scandalized without fear of punishment and the Act of Pardon,[1] in this case, did not help, for, if a man seven years ago stole goods and a pardon comes and pardons the felony, yet, if any man says he stole the goods, an action will lie for the reproach. So, if A. says B. held up his hand at the bar for stealing a horse, it is actionable though no charge is laid upon him of the stealing, for he might hold up his hand at the bar and yet be not guilty.
[It was said] by HOLT, Chief Justice, if the Chief Justice commit a man by his warrant to the Marshalsea [Prison], he cannot be sent for up by a rule of court but by [a writ of] *habeas corpus*.

[Other copies of this report: British Library MS. Hargrave 66, pt. 2, p. 212, pl. 1.]

[1] Stat. 25 Car. II, c. 5 (*SR*, V, 786-791).

7

Dalby v. Champernoon
(K.B. 1696)

In wills and deeds, special provisions modify general ones.

[An action of] ejectment upon a long special verdict was in substance this. Sir John Powell, seised in fee of divers lands and tenements for life, the reversion, after several mesne estates, in tail to him in fee of the lands in question, *viz*. Boulter Comb, Fowell Comb, and Whit Comb, made his will in writing in these words, *viz*. 'I demise my manors of Longford, Lister, Boswell, and Trevenny in Cornwall and all my other lands wherein I have any estate in fee to trustees' for such and such uses. Then comes the clause upon which the question arose, *viz*. 'and whereas my father settled upon me at my marriage divers other lands [which were Boulter Comb etc.], my will is my trustees shall have the management of the rents, issues, and profits during the minority of my son' etc. And then, at the end of the will, he takes notice that his father had laid an injunction upon him that, if he had no issue, Fowlcomb should go on in the name.

The question was whether Foulcomb, Boultercomb, and Whitcomb passed by the first clause.

[It was] adjudged not, first, because [it was] not the intent of the party, second, where there is a general clause and a special, [the special] shall qualify the general, both in wills and deeds. 8 Rep., Alther's Case.[1]

But [it was] resolved, if his intent had not appeared otherwise, the first words, all his lands in which he had an estate in fee, would have passed this dry reversion.

[Other copies of this report: British Library MS. Hargrave 66, pt. 2, p. 213.]

[Other reports of this case: Skinner 631, 90 E.R. 283, Holt K.B. 228, 90 E.R. 1025.]

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[1] *Lawrence v. Altham* (1610), 8 Coke Rep. 148, 77 E.R. 698, also 1 Brownlow & Goldesborough 62, 123 E.R. 666.

8

Rex v. Manucaptors of Sharp
(K.B. 1696)

This case shows how the death of a judgment debtor should be pleaded.

In a *scire facias* against the bail, the defendant pleaded that the principal died *ante returnam brevis de capias ad satisfaciendum*.

The plaintiff demurs specially and shows for cause that the plea is not *ante returnam alicuius brevis de capias ad satisfaciendum*.

And [it was] adjudged for the plaintiff, for the plaintiff might die before the return of the [writ of] *alias capias ad satisfaciendum*.

And [it was said] by HOLT, Chief Justice, he ought either to set out the writ and show how he died before the return or else say *alicuius brevis de capias ad satisfaciendum*.

[Other copies of this report: British Library MS. Hargrave 66, pt. 2, p. 214.]

9

Towers v. Willing
(C.P. 1696)

The ecclesiastical courts have jurisdiction over defamation for allegations of fornication.

Easter 8 Will., in the Common Bench, 1696.

Willing *et ux*. libeled against Towers for saying of his wife 'Mrs. Willing called for her stallion, Tom Nightingale'. And, on a motion for a [writ of] prohibition, [it was] denied *quia per implicationem* it is to say she is incontinent with Tom Nightingale.

And by Chief Justice TREBY, if a man libels against another for calling him a cuckold, a [writ of] prohibition shall go, but, if he and his wife join, [it is] otherwise. In the spiritual law, they allow of no justification in such cases, but, in our law, they do.

[Other copies of this report: British Library MS. Hargrave 66, pt. 2, p. 215, pl. 1.]

10

Wilkins v. Spendlow
(C.P. 1696)

A rectory includes a dwelling house for the rector.

[In an action of] debt on a bond to perform covenants, the defendant sets out the indenture whereby the plaintiff demised to the defendant two parts of the sale of the rectory of M. and all the houses, structures, and buildings thereon for six years, and the defendant covenants to keep them in repair.

The defendant pleads covenants performed.

The plaintiff replies and assigns a breach that the defendant *non praeservavit dictam domum mansionalem in tenentabili reparatione*, but suffered it to run to decay.

And upon an issue hereupon and a verdict for the plaintiff, it was moved in arrest [of judgment] that the breach is not well assigned because there is no *domus mansionalis* mentioned in the demise.

But *per curiam*, the demise being of the soil of a rectory and, by intendment of law, every rector must be resident upon his rectory and, consequently, must have a mansion house and because the soil of a rectory is the waste ground around the house and upon which the house stands, they c[ould] intend after the verdict that there was a mansion house and that the *domus* and structures etc. were outhouses belonging to it. And, therefore, judgment [was entered] for the plaintiff.

[Other copies of this report: British Library MS. Hargrave 66, pt. 2, p. 215, pl. 2.]

11

Forster v. Fidler
(C.P. 1696)

An administrator of a decedent's estate must sue an action of trover on behalf of the estate in a common law court and not in an ecclesiastical court.

An administratrix sued in the spiritual court for a detainer of the goods of the intestate. And a [writ of] prohibition was granted, because [an action of] trover is at common law.

[Other copies of this report: British Library MS. Hargrave 66, pt. 2, p. 216, pl. 1.]

12

Evans v. Wilcom
(C.P. 1696)

In an action for breach of contract, the plaintiff must allege that he tendered performance and not simply that he was ready to perform.

Wilcom leased to Evans a malt house. And he covenants to take two sacks of him every month during the term at the price which malt should be sold at at the next adjoining market. Evans brings [an action of] covenant and assigns a breach that the defendant, from such a time to such a time, took no malt of him, but that the plaintiff was always ready to deliver it to him etc.

[There was an] issue upon this and a verdict for the plaintiff. And [it was] moved in arrest of judgment that the breach is not well assigned, *quod fuit concessum per curiam*, for Evans ought to have said he gave notice to Wilcom that he had so much malt ready and asked where he would receive it, for Evans is to do the first act, and, therefore, he ought to show he tendered and the defendant refused or that he asked where the defendant would receive it, it being a ponderous thing and

the defendant deemed to assign a place. And judgment was arrested. 1 Inst. 210.[1]

[Other copies of this report: British Library MS. Hargrave 66, pt. 2, p. 216, pl. 2.]

13

Matthews v. Hardy
(C.P. 1696)

A contract of peaceable enjoyment of land is a lease.

If a man leases his house to J.S. until Midsummer and then covenants that he shall peaceably enjoy it until Michaelmas, *per curiam*, this is a continuance of the first lease.

[Other copies of this report: British Library MS. Hargrave 66, pt. 2, p. 217, pl. 1.]

14

Wildbore v. Fothergale
(C.P. 1696)

A contract not to marry is illegal and void.

Per curiam, a covenant not to marry within such a term of years or not to marry such a woman is good, but a general covenant not to marry at all is naught, because it is contrary to the law of nature.

[Other copies of this report: British Library MS. Hargrave 66, pt. 2, p. 218, pl. 1.]

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[1] E. Coke, *First Institute* (1628), f. 211.

15

Love v. Goddard
(C.P. 1696)

A writ of audita querela *does not lie for matters that precede the judgment*.

[In an action of] *assumpsit* for a horse, the defendant paid the plaintiff. And after the plaintiff had a judgment, by *Pemberton*, the defendant cannot have an *audita querela*, because this matter precedes the judgment.

Query if the reason be not because the defendant might have pleaded it *puis darrein continuance*, by Mr. Coleman of Lincoln's Inn.

[Other copies of this report: British Library MS. Hargrave 66, pt. 2, p. 220, pl. 1.]

16

Tildsey v. Cham
(C.P. 1696)

A defendant's plea must respond to the plaintiff's declaration precisely.

A court will take judicial notice of the privileges of its own officers.

[In an action of] *assumpsit* by a bill against an attorney of this court for goods sold and delivered and money lent, the defendant pleads *non assumpsit infra sex annos ante impetrationem brevis originalis*.

The plaintiff replies that he sued out a bill *infra sex annos* after the *assumpsit*.

The defendant takes issue upon it.

The plaintiff demurs.

And [it was] adjudged for the plaintiff that the pleas were ill, because it does not answer the declaration, which is upon a bill, and the defendant pleads *non assumpsit infra sex annos ante impetrationem brevis originalis*.

Then, *Levinz* took exception to the declaration because the plaintiff has not laid a prescription to sue attorneys in the [Court of] Common Bench by a bill.

Sed non allocatur, for, *per curiam*, if the defendant pleads by privilege in another court, then, he must show the course of the court. But, here, the court will take notice of the privilege of their officers.

And [it was said] by POWELL, Jr., Justice, a man cannot sue an attorney otherwise than by a bill, because he is always present in court, which TREBY, Chief Justice, and POWELL, Sr., denied, for, if a man arrest an attorney upon an original [writ] and obtain a judgment, it is good enough if he does not plead his privilege.

[Other copies of this report: British Library MS. Hargrave 66, pt. 2, p. 220, pl. 2.]

17

Kingford v. Lloyd
(C.P. 1696)

In this case, the question was whether an action upon the case for dilapidations filed by a successor lies against his predecessor.

Entered Hilary 7 Will., rot. 1362.

[In an] action upon the case by the successor against his predecessor for dilapidations, [there was] a verdict for the plaintiff.

And Serjeant *Darnall* moves in arrest [of judgment] that the action does not lie, as appears by the precedents, Michaelmas 3 Jac. II, Day v. Harrington; Trinity 1 Will. & Mar., rot. 1730, Hill v. Jones,[1] in which last case, judgment was given by the court and entered upon the *postea* and execution taken out, and judgment [was given] for the defendant.

[Other copies of this report: British Library MS. Hargrave 66, pt. 2, p. 221, pl. 1.]

[Record printed at 1 Lutwyche 117, 125 E.R. 62.]

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[1] *Jones v. Hill* (1690), 3 Levinz 268, 83 E.R. 683, Carthew 224, 90 E.R. 734.

18

Midwin's Case
(C.P. 1696)

An action lies for malicious prosecution for conspiracy.

A. brings an action upon the case against B. for *malitiose et falso* indicting him for conspiring to lay a bastard child to B., of which indictment, A. was acquitted.

And [it was] adjudged that it well lies, because the conspiracy was punishable at common law.

Ex relatione Mr. Daley.

[Other copies of this report: British Library MS. Hargrave 66, pt. 2, p. 221, pl. 2.]

19

Astling v. Bird *alias* Sparrow
(C.P. 1696)

Appointing an attorney of record is not a general appearance that confers personal jurisdiction on the court.

Upon a motion for a [writ of] prohibition to the Court of the Mayor and Aldermen of London for not allowing a plea of privilege to sue and be sued in Chancery, [it was said] by the two justices POWELL the naming of an attorney is no such admitting of the jurisdiction of the court but that the party may after[wards] *in propria persona* plead to the jurisdiction, which TREBY, Chief Justice, denied.

Second, [it was said] by POWELL, Jr., Justice, the party may plead a *dilatione* at any time before an imparlance. But [it was said] by Chief Justice [TREBY] and POWELL, Sr., Justice, it must be the first day.

[Other copies of this report: British Library MS. Hargrave 66, pt. 2, p. 222, pl. 1.]

20

Cattlin v. Millner
(C.P. 1696)

An error in pleading cannot be cured by a demurrer, though it may be cured by a verdict.

Entered Trinity 7 Will., rot. 1213.

The plaintiff declares that Mary, the wife of the defendant, 8 November 5 Will. & Mar., *vi et armis fregit domum* of the plaintiff and took out goods etc.

The defendant, as to all the trespass except the breaking of the house and carrying away of the goods, pleads *quod ipsi non sunt inde culpabiles* and, *quoad* the breaking the house and taking the goods, they pleaded that the defendant John Millner was seised in fee of the house in the right of Mary, his wife, and, being so seised, the 16th March 1690, he demised the house to the plaintiff for a year, rendering rent, and so from year to year *quamdiu* [*blank*] *partibus placuient* and that the plaintiff entered and was and [*blank*] *est inde possessionatus virtute dimissionis praedictis* and that, for so much in arrear at Michaelmas 5 Will. & Mar., the defendant Mary entered and took the goods *nomine districtionibus*.

The [plaintiff], *protestando* that the plea was ill, says that the defendant, after the distress, converted the goods to her own use and sold them and is thus a *transgressor ab initio*.

The defendant rejoins that, after the distress, Mary left a notice at the house of the plaintiff of the taking and the cause of it and that the plaintiff did not replevy them within five days and that the defendant, with John Jackson, then constable of the hundred of Harborough, caused the goods to be appraised by A., B., and C., appraisers sworn by the constable, for £7 10s. 0d. and that the defendant, in his own right, and his wife, as his servant, sold them *prout eis bene licuit absque hoc quod* the defendant, before the five days expired, occupied or converted them to his own use.

The plaintiff demurs.

Serjeant *Lutwyche*: The bar is ill, because the plaintiff charges the defendant Mary only with the trespass and the defendant pleads *quod ipsi non sunt culpabiles*. 3 Cr. 833, Cox v. Cropwell, 2 Cr. 5.[1]

Second, the defendant pleads that he was seised in the right of his wife, where he ought to have pleaded that he and his wife were seised as in the right of his wife.

But [it was said] by POWELL, Jr., Justice, that is only a matter of form. *Vide* 2 Saund. 283, Poole v. Longville.[2]

Third, the rejoinder is a departure from the bar. When the first plea is at the common law, the defendant shall never make it good by a statute in the rejoinder. 21 Hen. VII, 25b; C.L. 304.[3]

Fourth, the defendant says the goods were appraised by A., B., and C. where the Statute[4] appoints but two appraisers.

Serjeant *Levinz*, for the defendants: If the plaintiff had declared of all at the beginning, then we ought to have answered the whole by our plea, as if he had declared that the defendant *cepit et asportavit et in usum suum convertit*, but when he only says *cepit et asportavit*, to which our plea is a good justification, and, then, in his replication, he says *in usum suum convertit*, we give a further answer. So, if it be a departure in us, it is so in them.

Per curiam, quod ipsi non sunt culpabiles is fatal. And, though it is something helped by the verdict, it is never helped by a demurrer. And judgment [is given] for the plaintiff for cert[ain] cause.

[Other copies of this report: British Library MS. Hargrave 66, pt. 2, p. 224.]

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[1] *Cox v. Crapnel* (1602-1603), Croke Eliz. 883, 78 E.R. 1108, Croke Jac. 5, 79 E.R. 5.

[2] *Poole v. Longuevill* (1670-1671), 2 Williams Saunders 282, 85 E.R. 1063, also 3 Salkeld 166, 91 E.R. 755, 2 Keble 660, 680, 729, 84 E.R. 415, 428, 460.

[3] YB Trin. 21 Hen. VII, f. 25, pl. 2 (1506); E. Coke, *First Institute* (1628), f. 304.

[4] Stat. 2 Will. & Mar., c. 5, s. 1 (*SR*, VI, 169).

21

Brome (or Proby) v. Edwards
(C.P. 1696)

A plaintiff may join in one action separate causes of action of trespass and parco fracto.

[In an action of] trespass and *parco fracto* joined, the plaintiff counts that he had distrained five hogs for arrears of rent and that he had impounded one of them and was driving the others to the pound and the defendant took these four and broke the pound and took out the other and drove them away with him.

And [it was] adjudged these actions may well be joined.

[Other copies of this report: British Library MS. Hargrave 66, pt. 2, p. 226, pl. 2.]

[Other reports of this case: *sub nom*. Allways v. Broom, 1 Lord Raymond 83, 91 E.R. 952, 2 Lutwyche 1259, 125 E.R. 698.]

22

Blackwill v. Arscott
(C.P. 1696)

A power of appointment must be strictly executed, and an act of God preventing it will not aid the attempt.

The question on a special verdict in [an action of] ejectment was Mr. Roberts had a power to make leases for three lives or ninety years determinable upon three lives upon an indenture signed and sealed by him. The jury found that he, by an indenture, made a lease for three lives and sealed and delivered it but that he did not sign it, being disabled by the gout.

Et per curiam, it is impossible to make this a good execution of the power, though here is the act of God, for powers shall be taken strictly.

In this case was cited the Case of Leman and Staples, Easter 33 Car. II, Common Bench, rot. [*blank*]; a man sealed his will in the presence of three witnesses but did not sign it, and yet [it was] resolved it was

good within the Statute 29 Car. II, c. 3, for signing is comprehended in sealing,[1] *quod curia concessit*, for that Act says only 'signed', but here the power says 'signed and sealed', which shows it meant two distinct things.

[Other copies of this report: British Library MS. Hargrave 66, pt. 2, p. 227, pl. 1.]

23

Saunders v. Jerson
(C.P. 1696)

In pleading, the defendant's response must refer precisely to the plaintiff's claim.

[In an action of] trespass for entering his close containing an acre of land and three acres of pasture, the defendant justifies that J.S. was seised of ten acres of land and two acres of pastures *unde* the *locus in quo* is parcel.
[It was] adjudged ill, because three acres of pasture cannot be parcel of two.

[Other copies of this report: British Library MS. Hargrave 66, pt. 2, p. 227, pl. 3.]

24

Gray v. Murray
(C.P. 1696)

In an action of a contract where there are mutual promises, the plaintiff need not allege his own performance in the initial pleading.

[In an action of] covenant, the plaintiff counts that the defendant, in consideration the plaintiff covenanted to pay the defendant £300, he covenanted in a convenient *et parvo tempore* to erect a post office etc.

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[1] Stat. 29 Car. II, c. 3, s. 5 (*SR*, V, 840).

And he assigns for breach that the defendant has not erected a post office.

The defendant demurs, first, because the plaintiff does not aver that he paid the £300.

Sed non allocatur quia there are mutual remedies and a covenant for a covenant.

And, by TREBY, Chief Justice, if a man covenants in consideration of an act to be performed, the act ought to be performed. But, when it is in consideration that the plaintiff covenants to do an act, there are mutual covenants and the plaintiff has no need to allege performance of it.

But [it was said] by POWELL, Jr., Justice, both cases are the same, because there are mutual remedies.

Second, the breach is ill assigned because '*parvo*' is omitted, *quod curia concessit*, but others being well assigned, the plaintiff had a judgment for them.

[Other copies of this report: British Library MS. Hargrave 66, pt. 2, p. 228, pl. 2.]

25

Anonymous
(C.P. 1696)

A poor debtor cannot be defeated of his statutory right to release from debtors' prison by a motion to remove the action.

A. was in execution in the Stafforshire jail, and he petitioned the justices to be discharged upon the Act of Poor Prisoners,[1] his debt being but £15. The plaintiff removed him by [a writ of] *habeas corpus* into the [Court of] Common Bench. And he moves to have him turned over to the Fleet [Prison].

But it was denied, for, then, he should lose the benefit of the Act for Discharging Poor Prisoners, for he ought to swear before the jailor and justices of the county in which he is in execution. And, for this reason, he was remanded.

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[1] Stat. 7 & 8 Will. III, c. 12 (*SR*, VII, 75-77).

[Other copies of this report: British Library MS. Hargrave 66, pt. 2, p. 229.]

26

Wright v. Inhabitants of the Hundred of Benhurst
(C.P. 1696)

A writ of venire *can be amended to cure a variance with the plea roll*.

[It was] moved to amend a *venire* and *habeas corpus* and *distringas*. By the plea roll, it was *in placito hutesii et clamoris* where it ought to be amended *in placito contemptu et transgressii contra formam statuti*.
And [it was] resolved it is amendable by the Statute.[1]

[Other copies of this report: British Library MS. Hargrave 66, pt. 2, p. 230, pl. 1.]

27

Anonymous
(N.P. 1696)

A witness who is a Jew must be sworn on the Old Testament.

At the *nisi prius* [sitting] in London at the Guildhall, *coram* JOHN HOLT, Chief Justice of the King's Bench.
If a Jew is produced as a witness, he must be sworn on the Old Testament.
In an action against an executor, *plene administravit* [was] pleaded. Upon the trial, the plaintiff gives in evidence goods come from the West Indies.
And [it was said] by HOLT, Chief Justice, the defendant must be allowed what he paid for freight.

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[1] Stat. 32 Hen. VIII, c. 30 (*SR*, III, 786-787); Stat. 18 Eliz. I, c. 14 (*SR*, IV, 625).

[Other copies of this report: British Library MS. Hargrave 66, pt. 2, p. 230, pl. 2.]

28

Rex et Regina v. Bishop of Chester, Scrope, etc.
(C.P. 1696)

A judgment can be amended with leave of court.

The king and queen bring an [action of] *quare impedit*. And, pending the writ, the queen dies. And then judgment is given for them, and the entry was *recuperet*. And [it was] moved to amend, because it should be *recuperent*.

And the court gave them leave to amend but doubted if it will not make an error, the queen being dead before the judgment.

[Other copies of this report: British Library MS. Hargrave 66, pt. 2, p. 231, pl. 2.]

[Affirmed on appeal in the King's Bench and reversed in the House of Lords: 5 Modern 297, 87 E.R. 666, 12 Modern 185, 88 E.R. 1251, 2 Salkeld 560, 91 E.R. 472, 3 Salkeld 24, 40, 236, 91 E.R. 669, 679, 798, 1 Lord Raymond 292, 91 E.R. 1091, 3 Lord Raymond 252, 92 E.R. 672, Skinner 651, 90 E.R. 291, Carthew 440, 90 E.R. 855, Holt K.B. 493, 90 E.R. 1172, Shower P.C. 212, 1 E.R. 141.]

29

Woodbridge v. Stukeville
(C.P. 1696)

When an administrator of a decedent's estate alleges a judgment debt that is greater than the assets of the estate, the date of the judgment must be pleaded.

[In an action of] debt upon an obligation of the intestate, the defendant [Stukeville, administrator of Clerke] pleads a judgment recovered against him for rent *ultra quod non habet* assets. And he

shows when the action was commenced, but does not show in what term judgment was given.

The plaintiff demurred.

And [it was] adjudged for the plaintiff for this cause, because he cannot reply *nul tiel record*.

[Other copies of this report: British Library MS. Hargrave 66, pt. 2, p. 232, pl. 1.]

30

Shorter v. Friend
(C.P. 1689-1690)

A writ of prohibition lies to remove a case out of an ecclesiastical court into a common law court where the ecclesiastical court refuses to admit a legacy on the evidence of a single witness.

A child of a legatee is not a competent witness to prove a will, the child being an interested witness.

Entered 1 Wil. & Mar., rot. 39; reported by Serjeant Gould in a case in the Common Bench.

John Friend, by a will, gave ten acres to Martha Friend, and he made Shorter executor, and he died, who paid Martha Friend the legacy. Martha Friend made Friend, the now defendant, executor and died, who sued Shorter for this legacy in the spiritual court. And because they would not admit the proof of one witness, a [writ of] prohibition was granted.

And, after a declaration upon it and solemn debate, a [writ of] consultation was denied.

[It was said] by POWELL, Jr., Justice, if the spiritual court refuse the evidence of the son to prove a will wherein the father has a legacy, no prohibition is grantable.

But query.

[Other copies of this report: British Library MS. Hargrave 66, pt. 2, p. 233, pl. 1.]

[Other reports of this case: 2 Salkeld 547, 91 E.R. 462, Comberbach 160, 90 E.R. 404, 1 Shower K.B 158, 89 E.R. 510, 3 Modern 283, 87 E.R. 188, Carthew 142, 90 E.R. 687, Holt K.B. 752, 90 E.R. 1313.]

31

Randall v. Abbott
(C.P. 1696)

A plaintiff's reply by way of a traverse to the defendant's plea of tender should conclude with a demand for a trial.

[In an] action upon an *indebitatus assumpsit*, as to part, he pleads *non assumpsit*, and, as to all the rest, he pleads tender with a *profert in curia*.

The plaintiff replied that he sued out an original [writ] 28 *Septembris Williami regis* and that the defendant had not tendered before that and so *petit quod inquiratur per patriam*.

The defendant demurs.

And judgment [was given] for the plaintiff because the conclusion is good.

[Other copies of this report: British Library MS. Hargrave 66, pt. 2, p. 234, pl. 1.]

32

Foy v. Welsted
(C.P. 1696)

In pleading, an averment by implication is as sufficient as an express statement.

Foy, executor of John Bridgeman, brings [an action of] debt against the defendant for rent arrears. And he counts that S.W., by indenture, demised the land etc. to John Bridgeman and Broxall for ninety-nine years if Elizabeth Bridgeman, wife of John Bridgeman, should so long live and that Bridgeman and Broxall demised the lands to the defendant Welsted for eighty-eight years, rendering £77 *per annum virtute cuius intrationis Welsted intravit et fuit et adhuc est inde*

possessionatus and that Broxall died and that Bridgeman made the plaintiff his executor and died, who proved the will and *qui adhuc est possessionatus de reversione* and brings this action for rent arrears.

The defendant pleads entry and suspension.

The plaintiff traverses the entry etc.

The defendant demurs.

And [it was] adjudged for the plaintiff, because an averment by implication of the life is as good as if it were express, as well after verdict as upon a demurrer and the defendant has admitted that the plaintiff was possessed by virtue of this lease by his pleading over.

Vide 2 Jones 227; 3 Cr. 746, Whitchcombe v. Shepeard; 2 Leo. 94, Edward v. Hallinder; 10 Edw. IV, 18; 2 Buls. 67, Arnold v. Bridges; 263, Thompson v. Withers; Winch 53; 10 Rep. 54, 59; 1 R. rep. 50, Harwood v. Paramour; 10 Rep. 52; 2 Keb. 279 or 729, Poole v. Longville; Palmer 267, 327.[1]

Serjeant *Lutwyche* cited this case, that, where a lease for years is made determinable upon a life out of a greater lease, rendering rent, the first lessee brings [an action of] debt for the rent and says he is *adhuc possessionatus de reversione*, this was a sufficient averment of the continuance of the life.

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[1] *Scamler v. Johnson* (1682), T. Jones 227, 84 E.R. 1230, also 2 Shower K.B. 248, 89 E.R 919; *Winchcomb v. Shepheard* (1600), Croke Eliz. 746, 78 E.R. 78, also Hetley 118, 124 E.R. 389; *Edwards v. Halinder* (1594), 2 Leonard 93, 74 E.R. 385, also Popham 46, 79 E.R. 1163; YB Mich. 10 Edw. IV (49 Hen. VI), f. 18, pl. 22 (1470); *Arnold v. Bridgood* (1613), 2 Bulstrode 65, 80 E.R. 963, also Croke Jac. 318, 79 E.R. 272; *Tompson v. Withers* (1614), 2 Bulstrode 263, 80 E.R. 1109; *Anonymous* (1622), Winch 53, 124 E.R. 45; *Chancellor of Oxford v. Bishop of Coventry* (1613), 10 Coke Rep. 53, 77 E.R. 1006; *Stanton v. Green* (1613), 10 Coke Rep. 58, 77 E.R. 1013; *Harwood v. Paramour* (1614), 1 Rolle Rep. 50, 81 E.R. 319; *Lampet v. Starkey* (1612), 10 Coke Rep. 46, 77 E.R. 994, also 2 Brownlow & Goldesborough 172, 123 E.R. 880; *Poole v. Longuevill* (1670-1671), 2 Keble 660, 680, 729, 84 E.R. 415, 428, 460, also 2 Williams Saunders 282, 85 E.R. 1063, 3 Salkeld 166, 91 E.R. 755; *Arundell v. Meade* (1621), Palmer 267, 327, 81 E.R. 1076, 1106, also Croke Jac. 622, 79 E.R. 535.

[Other copies of this report: British Library MS. Hargrave 66, pt. 2, p. 234, pl. 2.]

33

Butler v. Fowkes
(C.P. 1696)

Where a jury finds contrary to the evidence, a new trial will be granted.
A right of way of necessity must be specially pleaded.

Michaelmas 8 Will. in the Common Bench 1696.
[In an action of] trespass *quare clausum fregit etc*., the defendant justified under a prescription for a way over the *locus in quo*.
The plaintiff took issue upon the prescription etc.
And a verdict [was found] for the defendant.
Serjeant *Gould* moved for a new trial, because the verdict was given against the evidence, for the plaintiff at the trial proved a unity of possession which destroyed the prescription, it being a way of convenience, not of necessity.
And TREBY, Chief Justice, remembering the fact to be so, granted a new trial *nisi*.
And [it was said] by POWELL, Jr., Justice, if this had been a way of necessity, it must have been specially pleaded.

[Other copies of this report: British Library MS. Hargrave 66, pt. 2, p. 235, pl. 1.]

34

Strode's Case
(C.P. 1696)

A serjeant at law has a privilege not to be elected a tithingman.

[It was] moved for a writ of privilege for Serjeant Strode, he being chosen tithingman at Taunton Dean in Somersetshire for five years.

And 1 Cr. 389, Prouse's Case,[1] was cited as express in the point and that Serjeant [John] Maynard [1602-1690] had a writ of privilege granted him for the same cause.

Curia: The serjeant must have [a writ of] privilege granted him in all such cases, unless they are bound by tenure or custom, to excuse such officer here. Therefore, being only an election, the writ must be granted.

Pemberton and *Lutwyche*, serjeants, *obiter*: Customs will not deprive us of our privileges, because they are time out of mind as well as custom, and, then, this shall be preferred before the custom, because they concern the administration of justice. *Vide* 1 Ven. 29, Stone's Case.[2] A privilege was allowed to an attorney though [he was] bound by tenure to be the lord's reeve, for the reasons given by Lutwyche and Pemberton.

[Other copies of this report: British Library MS. Hargrave 66, pt. 2, p. 235, pl. 2.]

35

Page v. Price
(C.P. 1696)

Neither an administrator of a decedent's estate nor an executor need put up special bail in reference to paying a judgment for the decedent's debts, but he must do so in reference to his own appearance and to any claim against himself for waste of the assets.

The plaintiff levied a plaint against the defendant as administratrix in the Town Court of Oxford in the nature of an action upon the case upon a promise by the intestate. The defendant was arrested thereupon, and she put in special bail below and removed the cause into [the Court of] Common Bench by [a writ of] *habeas corpus*.

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[1] *Prouse's Case* (1634), Croke Car. 389, 79 E.R. 940.

[2] *Stone's Case* (1669), 1 Ventris 16, 29, 86 E.R. 12, 21, also T. Raymond 179, 83 E.R. 95, 1 Levinz 265, 83 E.R. 399, 2 Keble 477, 486, 491, 508, 84 E.R. 299, 305, 308, 319.

And *Birch* moved that the defendant might be discharged upon common bail upon an affidavit that she owed the plaintiff nothing in her own right.

POWELL, Jr., Justice: In all inferior courts, they hold the defendant in all cases to special bail, because their jurisdiction is limited so that he might easily get out of their power and the court could have no hand over the party unless he had put in special bail to compel him to do justice, but regularly with us, an executor is not liable to find special bail, and, therefore, [it is] out of the general rule of special bail in all cases of removal. And, therefore, common bail ought to be accepted.

TREBY, Chief Justice: There is a diversity between putting in special bail to appear to a new original [writ], so as it be brought within two terms, and special bail to pay the condemnation, the last of which, an executor shall not be compelled to do, because the debt is *in autre droit, quod fuit concessum* by POWELL, Justice, and a rule is made that the defendant should put in special bail to appear to a new original [writ] to be brought within two terms.

[It was said] by TREBY and POWELL, if the plaintiff has obtained judgment against the testator or the intestate or the executor or the administrator then in debt in the *debet et detinet* upon the judgment upon a suggestion of a *devastavit* against the executor or administrator, they shall be forced to find special bail, but, if the cause of action be a bond the testator only not reduced to a judgment in which case the action must be in the *detinet* only and not in the *debet et detinet*, upon a suggestion of a *devastavit*, the executor shall not find special bail, as he shall not in any case where he is charged in the *detinet* only.

[Other copies of this report: British Library MS. Hargrave 66, pt. 2, p. 236.]

[Other reports of this case: Holt K.B. 308, 90 E.R. 1070, 1 Salkeld 98, 91 E.R. 90, 3 Salkeld 57, 91 E.R. 689.]

36

Leech v. Stephenson
(C.P. 1696)

A codefendant against whom no process was ever issued is a competent witness in the case.

[In an action of] trespass for assault and battery and imprisonment against Stephenson *simil cum* A. and C., [there was a] verdict for the plaintiff. And *Lutwyche* moved for a new trial, because the plaintiff had but one witness and he had an indictment of perjury found against him by the grand jury for swearing that very fact.

But [it was said] *per curiam* it is not a sufficient cause, for the grand jury will find the indictment upon the oath of the party aggrieved. But, if he were convicted, that would be a good cause to grant a new trial.

Second, *Lutwyche* urged that the plaintiff had put the defendant's two material witnesses in the *simul cum* and so the judge of the assize would not permit them to give evidence, though nothing was proved nor ever any warrant taken out against them.

Curia: The witnesses, though in the *simul cum*, are to be admitted to give evidence if nothing be proved against them, not that any warrants were taken out against them.

[Other copies of this report: British Library MS. Hargrave 66, pt. 2, p. 237.]

37

Bains v. Grey
(C.P. 1696)

It is defamation to say that a person is incompetent in his profession.

[In an action of] case for words, the plaintiff declares that he was expert in surgery and that the defendant having a *colloquium* of him with J.S. said in disparagement of him and his art these words 'Bains is no surgeon nor ever was apprentice to a surgeon.' And, afterwards, at another day, he said of him 'I will make it appear that Bains was never apprentice to a surgeon, but a gentleman's groom.'

The general issue was pleaded. [There was a] verdict for the plaintiff and entire damages [were found].

Levinz moved in arrest [of judgment]:

First, that the plaintiff does not say he was a surgeon but expert etc.;

Second, the *colloquium* here is laid of him but not of his art.

Sed non allocatur, for, *per curiam*, that is all one.

But [it was said] by TREBY, Chief Justice, here, the words themselves show that I speak of his art and so there need be no *colloquium* laid of it, but, if I say such a one is unskillful etc., there, you must lay a *colloquium* of his art.

Third, here are entire damages given, and the words [were] spoken at several times, and the last words are not actionable, and, therefore, ill.

Quod fuit concessum per curiam, and [it was] adjudged to look into the *postea*.

And [it was said] by *Levinz*, now the court have made this rule, the plaintiff cannot have judgment without moving the court.

[Other copies of this report: British Library MS. Hargrave 66, pt. 2, p. 238.]

38

Brackley v. Smith
(C.P. 1696)

A warrant to confess a judgment is void where the attorney is not present.

The defendant was arrested last vacation. And he gave a warrant to confess a judgment, his attorney not being present; for that reason, [it] was irregular. Afterwards, he was arrested again at the same party's suit for the same cause. And, being under arrest, he gave a regular warrant to confess a judgment with a *cesset executio* until after Easter term. The plaintiff threatened to enter up judgment on the first warrant and to take out execution presently.

Coward moved to set aside the warrant and to stay all proceedings.

Curia: Though this motion is only *quia timet* and we should, if the plaintiff proceeds, set all aside, yet you may take the rule *nisi* etc.

[Other copies of this report: British Library MS. Hargrave 66, pt. 2, p. 239, pl. 1.]

39

Dawson v. Howard
(C.P. 1696)

A jury in the country at nisi prius *cannot be compelled to go to Westminster to hear the case, but a local jury at Westminster can be summoned to hear a trial at the bar of the court*.

[In an action of] ejectment, the defendant pleaded not guilty. And the plaintiff, after the [writ of] *venire facias*, took out a [writ of] *habeas corpus* and a [writ of] *distringas* with a *nisi prius* and went down to the trial to the assizes at Northumberland. And, after the jury were sworn and charged with the evidence, the judge of assize made a rule by consent of both parties that the cause, for difficulty, should be adjourned into bank and that the jurors, which were sworn and charged with the evidence, should appear in bank *ad diem tres Michaelis subpoena* £50 a man to give a verdict between the said parties *si justiciariis ita*.

Pemberton moved to make this a rule of court.

Curia: This is an extraordinary motion, and such a rule was never been before. And, if the court should admit of this adjournment, it would be error, for the return is conditional unless the justices of assize come, so that here will be no warrant to proceed in bank, for the justices of assize did come and swore the jury. It is true it is originally a cause of this court. But, when it is carried down by *nisi prius* and the jury [are] sworn, it must be made at the *nisi prius*. But, in case of difficulty or for want of time, the judge of assize adjourns it, but it is by consent of parties by withdrawing a juror. But they cannot adjourn it any other way. Now, in this case, no juror was withdrawn, and, therefore, the adjournment was irregular.

Second, there is no law [that] will warrant imposing a fine upon the jury because the plaintiff and defendant consent. And, therefore, the motion was denied.

The next day, *Levinz* moved for a trial at bar in this case, which he said might be done without making any error by suing out a new *habeas corpus* and having the same jury at the day in bank as if nothing had been done upon the former *habeas corpus*. And, though there is a *habeas corpus* upon the roll, yet there may be a new one *nullo habito respectu* to that on the roll.

POWELL, Justice: After a [writ of] *venire facias* with *nisi prius*, a man cannot have a *habeas corpus* in bank, but this [is a] common *venire facias*, and the *nisi prius* is in the *habeas corpus*. Formerly, the *nisi prius* used to be in the *venire facias*, but, now, it is in the *habeas corpus* to hinder the casting of essoins, which must be upon the return of the first process, so that, now, a new *habeas corpus* may be granted in bank.

TREBY, Chief Justice: Here is an issue joined in this court which is not tried. Now, if the judge of assize had not come, it might have been tried at bar. But, though he did come, yet I suppose the *habeas corpus* is not filed, so that it is now as if none had been granted. Then, they may take out a new *habeas corpus teste* the return of the *venire* and return the beginning of this term so that a trial at the bar may be granted.

The court did grant a trial at bar, but, for security, the parties entered into a rule of court by consent to take no advantage of any error in process.

[Other copies of this report: British Library MS. Hargrave 66, pt. 2, p. 239, pl. 2.]

[Other reports of this case: 1 Lord Raymond 129, 91 E.R. 982.]

40

Richards v. Walter
(C.P. 1696)

Separate incidents of defamation on the same day are separate and individual torts.

Calling someone a bastard is not defamation per se.

[In an] action for Welsh words 'You are a whore's son, bastard, thief of the axe and hatchet', *innuendo* an axe and hatchet of the defendant that was stolen, these words were laid to be spoken of the plaintiff three several times on the same day with a *postea*, but, the two first times, they were laid without any reference to the plaintiff. [There was a] verdict for the plaintiff. [It was] moved in arrest of judgment that there were words spoken at distinct times, part actionable and part not,

and entire damages [were] given and, therefore, the plaintiff could not have his judgment.

Levinz, for the plaintiff, cited a case between Vernon and Bryan, Easter 15 Car. II, King's Bench, where the diversity was taken where words were spoken on several days and were on several times the same day, for, in a day in the judgment of the law, there are no fractions, and, therefore, where they are laid to be spoken on the same day, though with a *postea*, yet the court will intend them to be spoken at the same time. And, then, if some are actionable and some not, the court will intend the damage given [are] for those that are. 3 Cr. 328, Brooke v. Clerke.[1]

Per curiam: Though they are laid to be spoken on the same day, yet it is with a *postea*, which shows they were spoken at several times and the defendant might have pleaded several plead to them. And the court inclined strongly for the defendant. But by reason of the case cited by Levinz, it was adjourned.

The court held that the words 'whore's son, bastard' are not actionable without special damages, but the words 'thief of the axe and hatchet' are actionable, for they must be taken according to the Welsh idiom.

[Other copies of this report: British Library MS. Hargrave 66, pt. 2, p. 242.]

41

Note
(C.P. 1696)

A defendant who is already in court having been sued by one person can be sued by another person in the same court without further service of process.

The course of declaring by the by is thus. If A. appear at the suit of B. and C. sues out a writ against A. returnable of the same term of which the appearance is and shows it the same term, he may deliver a declaration to A. upon this appearance to the action of B., and the

[1] *Brooke v. Clarke* (1594), Croke Eliz. 328, 78 E.R. 578.

attorney of A. must appear to all causes the same term. And so is the course in [the Court of] King's Bench.

[Other copies of this report: British Library MS. Hargrave 66, pt. 2, p. 243, pl. 1.]

42

Watkins v. Nicholls
(C.P. 1696)

A motion for arrest of judgment will be granted where the plaintiff has not pleaded a good cause of action.

[In a] case for words 'nobody stole my wheat but Watkins', [there was a] verdict for the plaintiff. And [it was] moved in arrest [of judgment]:

First, because he does not say the corn is severed from the freehold, for, if it were growing, it is but a bare trespass;

Second, it is not said what was stolen.

POWELL, Justice: To say a man stole wood is actionable, because the rule is *arbor dum cressit lignum dum crescere cressit*. But, here, it is indifferent whether the wheat was standing or no. But to say a man stole an acre of corn is not actionable because the word 'acre' shows it was standing. [It is] otherwise if a man say such a one 'is a thief, for he stole my corn', for that shall be intended of such wheat as can be stolen. In this case, the plaintiff has not laid that any wheat was stolen. Therefore, stay until, etc.

[Other copies of this report: British Library MS. Hargrave 66, pt. 2, p. 243, pl. 2.]

43

Hart v. Dunning
(C.P. 1696)

After issue is joined and a venire *is filed and returned and the plaintiff takes out a* habeas corpus *with a* nisi prius *and, at the assizes, the trial goes off, the defendant may take out a new* habeas corpus *by proviso and continue on to trial*.

In a special action upon the case, the plaintiff took out a [writ of] *venire facias* Trinity term 7 [Will., 1695] and carried the cause down to trial. But, at the assizes, it was put off. Last Trinity term [1696], the defendant took out a new *venire* by proviso and carried the cause down to trial and got a verdict.

And *Gould* moved to set it aside.

POWELL, Justice: When issue is joined and a *venire* [is] filed and returned, the plaintiff takes out a *habeas corpus* with a *nisi prius*, and, at the assizes, the trial goes off, the defendant may take out a new *habeas corpus* by proviso and carry down to trial. But he cannot take a new *venire* because the first is returned and filed, and, therefore, the verdict must be set aside. *Vide* the new Statute.[1]

[Other copies of this report: British Library MS. Hargrave 66, pt. 2, p. 244.]

[1] Stat. 32 Hen. VIII, c. 30 (*SR*, III, 786-787); Stat. 18 Eliz. I, c. 14 (*SR*, IV, 625).

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