

Mesne Process in Personal Actions at Common Law and the Power Doctrine

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In 1917, Mr. Justice Holmes delivered the well-known dictum that "The foundation of jurisdiction is physical power"¹ To many persons this statement has constituted an article of faith. In 1956, Professor Albert Ehrenzweig challenged the basis of this faith in a provocative article.² Briefly stated, Ehrenzweig's thesis is that the true basis of jurisdiction at common law was a principle he calls "forum conveniens," based on "contact" of the forum with either the case (*e.g.*, accrual there) or with one of the parties (*e.g.*, domicile of the defendant, or domicile of the plaintiff if the defendant be an alien).³ Under the modern doctrine of forum *non* conveniens, jurisdiction is technically present but is declined because of the inconvenience of the venue. Under Ehrenzweig's doctrine of forum conveniens, jurisdiction is technically *lacking*, not merely declined, when the requisite contacts are absent.

Professor Ehrenzweig's interest in the foundation of jurisdiction seems to stem from his desire to effect reforms in the field of conflicts, particularly in the areas of choice of forum and choice of law. My own concern with the same matter lies in the belief that a knowledge of the history of personal jurisdiction greatly facilitates an understanding of contemporary problems of mesne process⁴ and provisional security.

Ehrenzweig blames *Pennoyer v. Neff*⁵ for the spread of the "myth"

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1. *McDonald v. Mabee*, 243 U.S. 90, 91 (1917). The complete quotation reads: "The foundation of jurisdiction is physical power, although in civilized times it is not necessary to maintain that power throughout proceedings properly begun, and although submission to the jurisdiction by appearance may take the place of service upon the person." *Id.*

2. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 *YALE L.J.* 289 (1956) [hereinafter cited as Ehrenzweig]. Ehrenzweig reiterates these views in his textbook. 1 A. EHRENZWEIG, *CONFLICT OF LAWS* 78-79 (1959).

3. Ehrenzweig 289.

4. "Mesne process" now refers to all process before the "final" process of execution upon judgment. See note 21 *infra*.

5. 95 U.S. 714 (1878). In this landmark decision, the Court held that a judgment against a nonresident defendant (a natural person in the particular case) had been rendered without due process of law and did not bind either the defendant personally or his property within the state of rendition of the judgment because there had been neither personal

that the foundation of jurisdiction is physical power.⁶ He then identifies two results of this "power myth": (1) Personal process erroneously became required for personal jurisdiction;⁷ and (2) "When the law thus came to compel the plaintiff to 'catch' his defendant, it quite consistently began to hold this feat sufficient for the establishment of jurisdiction."⁸ The first of these results is called the "power doctrine"; the second is Ehrenzweig's "transient rule." They must not be confused, for they suggest basically different inquiries: (1) Was physical power over the defendant *necessary* for the exercise of jurisdiction in common law personal actions (the "power doctrine")? (2) Is such power *by itself* a *sufficient* basis for the exercise of such jurisdiction (the "transient rule")?

Ehrenzweig is more concerned with the transient rule than with the power doctrine, since the transient rule would permit the unbridled exercise of jurisdiction based solely on service of process upon the defendant within the sovereign's territory. He believes that the doctrine of *forum non conveniens* was created as a necessary restraint upon such jurisdiction.⁹ Furthermore, he says that the elimination of the transient rule "may help to minimize the problem [of choice of law] by limiting the choice of forum on rational grounds to one having such contacts with the case as will justify the application of the chosen forum's own law."¹⁰ This article is primarily concerned with the power doctrine, for it is this doctrine which lies at the bottom of the structure of mesne process which will be studied herein. A few further comments on the transient rule seem, nevertheless, to be in order at this point.¹¹

Much of Ehrenzweig's attack upon the historical accuracy of the transient rule rests upon an analysis of cases cited by Beale, Goodrich, and Stumberg¹² as support for their adherence to the rule. Ehrenzweig

service upon the defendant within the forum state nor any attachment of the property prior to rendition of the judgment.

6. Ehrenzweig 292, 296.

7. *Id.* 308.

8. *Id.*

9. *Id.* 309.

10. *Id.* 292.

11. It is worth noting, in connection with Ehrenzweig's claim that the transient rule is an historical myth, that the House of Lords in 1867 prohibited its use in the Mayor's Court of London with regard to service on garnishees. The decision, however, was based upon the jurisdictional limitations inherent in the Mayor's Court as an *inferior* court and in no way implies that a transient rule was not being or could not be applied in the superior courts with which we will be concerned here. See *Mayor and Aldermen v. Cox*, L.R. 2 H.L. 239 (1867).

12. I J. BEALE, *CONFLICT OF LAWS* 339 n.6, 340 nn.1 & 2 (1935); Beale, *The Jurisdiction of Courts over Foreigners*, 26 HARV. L. REV. 193, 282 (1912); H. GOODRICH, *HANDBOOK OF THE CONFLICT OF LAWS* 189 (3d ed. 1949); G. STUMBERG, *PRINCIPLES OF CONFLICT OF LAWS* 72 n.21 (2d ed. 1951).

attempts to demonstrate that only two of those cases, neither of which was decided prior to 1870, hold squarely to the transient rule. Even assuming *arguendo* the validity of his premise that there is little case law directly applying the transient rule during the common law period, however, his conclusion that the transient rule is historically incorrect is debatable. Although the supporters of the transient rule have cited *little* common law judicial authority in support of their position, Ehrenzweig has given *none* in support of his; that is, Ehrenzweig gives us no case in which a court has denied the power to take jurisdiction of a transient rule case. It can of course be argued that the scarcity of cases supporting the transient rule must be taken to mean that the rule probably did not exist. It can also be contended, however, that the absence of cases opposing the rule must be taken to mean that the rule *did* exist. While without more than these cases, either conclusion can be argued for, the additional evidence I have found supports the second of these conclusions. Before proceeding with an analysis of that evidence it should be noted that there are better explanations for and conclusions to be drawn from the paucity of common law cases on the subject than those presented by Ehrenzweig. The basic question is not whether the common law courts *did* entertain such suits, but whether they believed they had the power to do so within their concept of jurisdiction.

One may begin by asking whether the transient rule issue ever actually arose in the common law courts. In what situation was there any real likelihood that, in the common law period, one alien would sue another alien in an English court on a cause having no connection with England other than the fact that the suit was brought in England? The only one that suggests itself is the case of a foreign merchant who allegedly owed a mercantile obligation of some sort, and who either was in England himself or who had tangible property situated in England or debts owed him by a party present in England. In such circumstances, however, the suit would almost certainly have taken place, at least until the seventeenth century, not in the common law courts but in the admiralty and local courts where Law Merchant was administered.¹³ In at least one important court applying the Law Merchant, the transient rule actually was utilized for many centuries.¹⁴ There is the further problem that in the absence of any notion of quasi in rem

13. See R. STEFFEN, *CASES ON COMMERCIAL INVESTMENT* 4 (2d ed. 1954); 1 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 530-32, 543 (4th ed. 1936) [hereinafter cited as HOLDSWORTH]; 8 HOLDSWORTH 130, 146, 152.

14. The Mayor's Court of London. See notes 11 & 13 *supra*.

jurisdiction, the very fact of the defendant's transience tended to defeat jurisdiction, since the slowness of service by the sheriff almost certainly would permit the defendant to leave the jurisdiction before he could be "caught." Is it surprising, then, that there are so few common law cases on the subject? The availability of this alternative explanation for the absence of case law on the point weakens Ehrenzweig's argument that failure of the common law courts to assert the power establishes the absence of the power.

But let us assume for the moment that Ehrenzweig is right in his conclusion that the transient rule is historically incorrect. We still must exercise caution as to what conclusion should be drawn from his position that this rule "consistently" grew out of the power doctrine.¹⁵ The danger lies in the possibility of confusing "consistent" with "necessary." One then could reason quite logically that the historical incorrectness of the transient rule proves the historical incorrectness of the power doctrine, since it would seem impossible for the necessary result of an historically correct doctrine to be historically incorrect. It would be perfectly consistent, however, for a court to *require* power for the exercise of jurisdiction, yet to deny the presence of jurisdiction when power over the defendant is the *only* contact the court has with the case. It thus appears that the transient rule could be mythical at the same time that the power doctrine is historically real.

Is the transient rule historically real? My own opinion accords with that of Dean Cowen and with the orthodox view that the rule, while perhaps not a good one, nevertheless has historically been the rule in England, and is the rule today.¹⁶ It must be emphasized, however, that the historical authenticity of the transient rule is by no means the same matter as the authenticity of the power doctrine; and only the latter is the concern of the remainder of this paper.

As to the question of the existence of the power doctrine, Professor Ehrenzweig says:

English legal history furnishes little support for the power doctrine. Even when the King's Bench, in competition with the Common Pleas, began to base its personal jurisdiction upon the physical arrest of the defendant, actual physical power over the defendant was not invariably required.¹⁷

15. Ehrenzweig 308.

16. Cowan, *A British View, in Transient Jurisdiction—Remnant of Pennoyer v. Neff—A Round Table*, 9 J. PUB. L. 281, 303 (1960).

17. Ehrenzweig 297.

His support for the foregoing statement consists of the following footnote:

Constructive custody of a defendant could be acquired by the King's Bench by a mere record of the defendant's bail on the rolls, 3 BLACKSTONE, COMMENTARIES *287, and this in turn was obtainable without the cooperation of the defendant by the use of an elaborate fiction. See 1 HOLDSWORTH, A HISTORY OF ENGLISH LAW 219-220 (1922).¹⁸

As will be shown later,¹⁹ Ehrenzweig has probably misunderstood Holdsworth, and Blackstone offers him little support in this regard. There is, moreover, substantial authority to the effect that physical power *was* necessary for the initial obtaining of jurisdiction over defendants who would not appear to personal actions at common law, without which power no judgment could be rendered for the plaintiff against the defendant.

The first section of this paper will examine the problems growing out of the nonappearance of defendants who *could be found* within the jurisdiction of the court. It begins by demonstrating that the common law courts were in fact unwilling to take jurisdiction over a nonappearing defendant. Later the conclusion will be drawn that Ehrenzweig is wrong in his assertion that the power doctrine is a myth, that is, in his contention that the courts could take jurisdiction over defendants not within reach of personal process. The logic of reasoning from what the courts *did* not do to what they *could* not do, while not beyond attack, is justified in this instance. Although the common law courts seldom if ever considered a pure transient rule situation, they were continually faced with the practical difficulties and miscarriages of justice which resulted from their refusal to exercise jurisdiction in the absence of power over the defendant. Nevertheless they persisted in such refusal until matters were changed by statute in 1725. The conclusion seems unavoidable that the courts *did* not take jurisdiction because they believed they *could* not do so.

We shall consider what was done when such defendants refused to appear voluntarily. Attachment and *distringas*—methods of inducing defendants to appear by seizing certain of their chattels—will be relatively briefly treated because of the much greater importance of arrest of the defendant himself. Arrest not only made attachment and com-

18. *Id.* 297-98 n.60.

19. Pp. 77-78 *infra*.

mon law *distringas* obsolete, it also stimulated the creation of bail procedures and the enactment of the Frivolous Arrest Act of 1725.²⁰ It is my contention that this statute *created* the power of the superior courts to render default judgments against nonappearing defendants not within their custody, but upon whom process had been served.

Two related themes run through our story. We have thus far been discussing the first theme, the problem of obtaining jurisdiction which will support a personal judgment against the defendant. The second theme traces how mesne²¹ process developed from a mere tool for procuring jurisdiction over defendants and became also an instrument for collection by the plaintiff of his debt or damages.²² Three phases of growth of mesne process in the superior courts can be discerned from this study:

1. The flouting of royal authority by defendants who would not appear resulted in forfeiture to the Crown of property seized under mesne process; but the plaintiff was not benefited thereby.
2. Properties acquired by the Crown through mesne process became available to plaintiffs *de grata*, and plaintiffs took assignments of "bail below," but not as a matter of right.
3. Plaintiffs acquired the right to reach properties seized and bail put in.

The second section of the article will take up the problem confronting a plaintiff who *could not find* his defendant for personal service of process within the jurisdiction. This will bring us into the area of outlawry, a subject whose importance is not generally appreciated today. We shall examine the rise and extension of the uses of outlawry, the roundabout procedure by which courts and plaintiffs dealt with recalcitrant defendants, and shall note the important role it played in the collection by plaintiffs from their absconding debtors.²³ This last matter is particularly interesting since outlawry did not result in a judgment for the plaintiff on his own cause of action, but constituted

20. 12 Geo. 1, c. 29.

21. The term "mesne," as used in the law of process, is a source of confusion to many modern students because although the literal meaning of the term is "middle," today we begin our law suits with mesne process. At common law, mesne process was any process between the "original" process of summons under the original Chancery writ and the "final" process of execution upon judgment. With the demise of the writ system, the initial process then came out of the courts of law, but the name "mesne" continued to be used for it.

22. The significance of this second theme may be misunderstood by the modern American legal mind, accustomed to quasi in rem jurisdiction (discussed at note 30 *infra*), for our second theme is not the story of quasi in rem jurisdiction. The common law courts never seem to have embraced such a form of jurisdiction and our second theme may in part explain why.

23. Pp. 80-87 *infra*.

the end of the plaintiff's suit and a change in the status of the defendant. I shall also present a theory as to the contribution of outlawry to the development of *indebitatus assumpsit*. Finally, just as arrest made attachment largely obsolete, new statutory procedures ("statutable" *distringas*) and garnishment execution eventually did away with the necessity for outlawry. We shall examine its displacement by these modes of procedure.

I. Mesne Process and the Defendant Within the Reach of Process

A. *The Early Difficulties in Obtaining Jurisdiction; Summons, Attachment and Distringas*

The early common law personal actions rested on a rather primitive jurisdictional basis. If the judgment sought was personal, the defendant had to make a voluntary appearance in court. As Pollock and Maitland tell us,

One thing our law would not do: the obvious thing. It would exhaust its terrors in the endeavour to make the defendant appear, but it would not give judgment against him until he had appeared, and, if he was obstinate enough to endure imprisonment or outlawry, he could deprive the plaintiff of his remedy Our law would not give judgment against one who had not appeared.²⁴

Holdsworth finds the origin of this attitude to be probably "the idea that recourse to a law court depends upon the consent of the parties,"²⁵ a "consent" frequently obtained through duress. "Instead of saying to the defaulter, 'I do not care whether you appear or not,' it sets its will against his will: 'but you shall appear.'"²⁶ Even Professor Ehrenzweig adheres to this general view.²⁷ It should be noted, however, that this

24. 2 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 592^A (2d ed. 1899) [hereinafter cited as POLLOCK & MAITLAND].

25. 2 HOLDSWORTH 105.

26. *Id.* Holdsworth seems to be paraphrasing Pollock and Maitland. See 2 POLLOCK & MAITLAND 295. See also R. MILLAR, *CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE* 361 (1952) [hereinafter cited as MILLAR]; Millar, *The Formative Principles of Civil Procedure*, 18 ILL. L. REV. 4 (1923); Sutherland, *Mesne Process Upon Personal Actions in the Early Common Law*, 82 L.Q. REV. 482 (1966).

27. Early judicial procedure depended upon voluntary subjection of both parties to the court's judgment. The Roman *litiscontestatio*, the medieval trial by ordeal, battle and feud, as well as jurisdictional agreements in (primitive) modern international law, point to the universality of the consent technique. Later developments permitted the courts to obtain consent by inducement and force, but apparently only a comparatively recent growth of the state's general functions has enabled administration of justice to proceed by self-asserted authority. Lack of self-reliance thus seems to have been the original source of the law's lasting insistence on at least symbolical submission to the court's jurisdiction.

Ehrenzweig 296-97.

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attitude of the courts was restricted to personal actions, and did not apply to real actions,²⁸

Except for an early thirteenth century practice noted by Bracton,²⁹ quasi in rem actions in our sense of the term³⁰ seem also to have been unknown to the common law, even though (or perhaps partly because) such jurisdiction was developed quite early in the local courts of a number of cities and ports, including the most important, the Mayor's Court of London.³¹

At common law, service of the original writ was accomplished by two of the sheriff's messengers called "summoners," who gave a notice or "summons" to the defendant to appear in court at the return of the original writ.³² Because no judgment by default would be rendered against them for their disobedience of the summons, it is understand-

28. T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 386 (5th ed. 1956) [hereinafter cited as PLUCKNETT].

29. This practice involved occasional default judgments in cases of debt. 2 POLLOCK & MAITLAND 594 n.5. In the same work, the authors say: "[T]he judgment by default in debt (Note Book, p. 900) may be a sign that the action has been regarded as real." *Id.* 595 n.1. Plucknett, on the other hand, says:

There are no historical grounds for this view. Twelfth-century lawyers in the King's Court were not given to metaphysical speculation, but were just practical administrators who saw a need for enforcing some of the commoner types of debt in the King's Court. They propounded no theory of obligation; they said nothing about mutual grants, consent, consideration or any other theory of contract. All they did was to establish a procedure for compelling debtors to pay their obvious dues.

PLUCKNETT 363.

30. For an excellent discussion of the problem see *Avery v. Bender*, 124 Vt. 309, 313, 204 A.2d 314, 317 (1964). Even the Restatement of Judgments uses "quasi in rem" in two senses:

Proceedings quasi in rem are of two types. In the first type the plaintiff asserts an interest in property and seeks to have his interest established as against the claim of a designated person or designated persons. In this type are included actions to recover possession of land or to establish the title to land, such as an action of ejectment, or one to quiet title or to remove a cloud on title, where the court has jurisdiction to give the relief asked because of its power over the land, even though it has no power over the adverse claimant

In the second type of proceeding quasi in rem the plaintiff does not assert that he has an interest in the property, but asserts a claim against the defendant personally, and seeks to compel to the satisfaction of his claim the application of property of the defendant by attachment or garnishment. . . .

RESTATEMENT OF JUDGMENTS § 32, comment *a* at 128-29 (1942). It is in the second sense of quasi in rem that we will use the term. In my teaching of jurisdiction, I prefer the term "in the nature of in rem" when referring to the first kind of a case, e.g., ejectment against a person over whom there is no personal jurisdiction. An "in rem" action then becomes one whose purpose and effect is the affecting or determination of the status of a res (or something we will allow ourselves to reify conceptually) as to the world at large.

31. N. Levy, *Studies in the History of Mesne Process and Provisional Security* (unpublished J.S.D. dissertation in Yale Law School Library). This study contains a comprehensive and up-to-date treatment of the subject of foreign attachment under the custom of London. Another modern but brief summary is to be found in MILLAR 481.

For older accounts of foreign attachment see W. BOHUN, *PRIVILEGIA LONDINI* (3d ed. 1723); J. PULLING, *CUSTOMS OF LONDON* (2d ed. 1849); T. SERGEANT, *FOREIGN ATTACHMENT* (2d ed. 1840); J. LOCKE, *FOREIGN ATTACHMENT* (1854); R. MORRIS, *SELECT CASES OF THE MAYOR'S COURT OF NEW YORK CITY 1674-1784*, at 16 (1935).

32. 3 BLACKSTONE, *COMMENTARIES* *279 [hereinafter cited as BLACKSTONE].

able that many defendants were less than prompt to obey it. Obedience to the summons was "compelled" through the use of mesne process of attachment, distringas, outlawry, and *capias ad respondendum*, but the "one general characteristic [of mesne process] is its tedious forbearance. Very slowly it turns the screw which brings pressure to bear upon the defendant."³³

If the summons was not obeyed, a writ of attachment (or pone, as it was also known) issued as a judicial or mesne writ, commanding the sheriff to seize goods of the defendant or make the defendant find sureties. The purpose was to compel or, more accurately, to induce a defendant to appear in court, not to seize his property provisionally in aid of any execution that might be forthcoming later.³⁴ If after attachment the defendant still did not appear, the goods attached would be forfeited to the Crown and the sureties amerced (fined),³⁵ leaving the plaintiff without judgment for his debt.³⁶ The failure of the defendant to appear seems to have been considered more an affront to the King's Court than to any principle of justice to the plaintiff.³⁷ The same attitude finds expression in cases of trespass *vi et armis* and of trespass "against the peace," (it was, after all, the King's peace) such a deceit and conspiracy, "where the violence of the wrong requires a more speedy remedy," for attachment could issue therein without previous summons of the defendant.³⁸

Except where *capias ad respondendum* or some other writ for arrest, such as *latitat* or *quo minus*, was available, the failure of attachment to procure the defendant's appearance left the plaintiff with but two further remedies, distringas and outlawry. Under the writ of distringas, the sheriff distrained goods and profits of the defendant's land, which were forfeited to the King if the defendant did not appear.³⁹ From the plaintiff's point of view distringas thus suffered from the same deficiency as attachment. It was distinguished from attachment chiefly in that it reached a kind of property (profits of land) which was not taken under attachment. Outlawry will be discussed in detail later.

33. 2 POLLOCK & MAITLAND 591.

34. Cf. *Grimmett v. Barnwell*, 184 Ga. 461, 192 S.E. 191 (1937); *Watson v. Noblett*, 65 N.J.L. 506, 47 A. 438 (1900); *Penoyar v. Kelsey*, 150 N.Y. 77, 44 N.E. 788 (1896).

35. 3 BLACKSTONE *280.

36. PLUCKNETT 386.

37. See 2 POLLOCK & MAITLAND 595.

38. 3 BLACKSTONE *280.

39. *Id.* The Parliamentary Privilege Act authorized the court to allow the sale of part of the distrained property to defray the plaintiff's costs. 10 Geo. 3, c. 50 (1770). Cf. note 135 *infra*.

B. Arrest Becomes the Leading Process

While the use of attachment and distringas as mesne processes soon expanded into virtually all types of causes at common law, until later times the remedy of arrest of the defendant was neither available in every kind of case nor effective against defendants who could not be found. At first, seizure of the defendant was allowed only in cases involving injury accompanied with force (trespass *vi et armis*) wherein the King's interest in punishing for breach of the peace outweighed the feudal objections to an arrest and imprisonment which might deprive the debtor's lord of the debtor's personal services.⁴⁰ It was this basis for arrest that later provided the second of the tools—the first was outlawry—with which process would be revolutionized long after the apogee of feudalism had been passed.

Because the history of the famous Bill of Middlesex has been set forth by so many writers,⁴¹ I shall recount only enough of the familiar story to put the process problem in perspective for our purposes. Most writers blur the time element⁴² and fail to make adequate distinction between jurisdiction over the subject matter and jurisdiction over the person. The usual focus of interest has been upon the Bill of Middlesex procedure as a method whereby King's Bench perverted the action of trespass in order to exercise jurisdiction over causes which normally were the exclusive domain of Common Pleas. Passing mention has been made of the fact that thereafter arrest became the usual mode of beginning suit, but there has been inadequate appreciation of its natural result: that attachment would decline in frequency of use and cease developing as a common law procedure in England. Little attention has been paid to the reactions to the "frivolous and vexatious arrests"⁴³ which took place regularly under the new procedure. The most important were the eighteenth century development of in personam default judgments in personal actions based on summons alone, in cases in which the defendant was served personally with the summons, and the early nineteenth century procedure of "statu-

40. 3 BLACKSTONE *281. This reluctance to interfere with feudal rights finds a parallel in the early restrictions of execution to goods and chattels only under *feri facias*. 2 POLLOCK & MAITLAND 596; Hulbert v. Hulbert, 216 N.Y. 430, 435-36, 111 N.E. 70 (1916); Hutcheson v. Grubbs, 80 Va. 251, 254 (1885).

41. 3 BLACKSTONE *285-88. For other expositions of the struggle for jurisdiction among Common Pleas, King's Bench and Exchequer, see A. SCOTT & S. SIMPSON, CIVIL PROCEDURE 6-8 (1951); MILLAR 74-76; T. ATKINSON & J. CHADBOURN, CIVIL PROCEDURE 8-10 (1948); 1 HOLDSWORTH 218-22; H. POTTER, HISTORICAL INTRODUCTION TO ENGLISH LAW AND ITS INSTITUTIONS 127 (4th ed. A. Kiralfy 1958) [hereinafter cited as POTTER].

42. See MILLAR 74-76 for an outstanding exception.

43. An Act to Prevent Frivolous and Vexatious Arrests, 12 Geo. 1, c. 29 (1725), regulated bail and other matters discussed herein.

able" distingas and abode service of defendants who had "kept out of the way to avoid service."⁴⁴ Each of these reactions will be seen to have played an influential role in the history of mesne process.

King's Bench cooperated with parties who desired to circumvent the ancient hold exercised by Common Pleas over the older personal actions. At least as early as the first part of the fourteenth century, the King's courts were hearing "bills based upon causes of action arising in the county where the court happened at the time to be sitting,"⁴⁵ against persons "already within the jurisdiction of the court."⁴⁶ Thus a prisoner of such a court could be proceeded against civilly without further preliminaries. In the middle of the fifteenth century, by which time King's Bench had settled down in Middlesex County, that court began to entertain bills against persons arrested on fictitious charges of trespass *vi et armis* supposedly committed in that county. What made this procedure especially efficient was that persons so charged could be arrested anywhere in England and brought within the custody of the Marshal of Marshalsea, the prison of King's Bench. Defendants found in Middlesex County were arrested on *capias*, while those found elsewhere were taken by a writ of *latitat*,⁴⁷ and brought within the custody of the Marshal.⁴⁸ In 1692, a statute even allowed jurisdiction to be based on delivery of declarations to prisoners or their jailers in other jails.⁴⁹

As a result of these developments and other advantages to plaintiffs in King's Bench, such as the availability of ejectment as an alternative to the old real actions, most of the judicial business of Common Pleas went over to King's Bench.⁵⁰ Even Exchequer attracted some of the

44. FIRST REPORT BY THE COMMISSIONERS ON THE PRACTICES AND PROCEEDINGS OF THE COURTS OF COMMON LAW 87 (1829) [hereinafter cited as FIRST REPORT].

45. PLUCKNETT 386; cf. POTTER 127.

46. PLUCKNETT 172; cf. POTTER 127.

47. 3 BLACKSTONE *286. *Latitat* got its name from the allegation therein, directed to the sheriff of a county other than Middlesex, apprising him that the defendant "latitat et discurret," that is, lurks and wanders about, in the county to which the writ was directed, and ordering the sheriff to arrest him. *Id.*

48. PLUCKNETT 172, 386; POTTER 127-28.

49. AN Act for Delivering Declarations to Prisoners, 4 & 5 W. & M., c. 21 (1692). This law also regulated judgments *nil dicit* against such defendants. An interesting discussion of this statute is found in THE PRACTICAL PART OF THE LAW 58 (corr. ed. 1695) (also entitled THE COMPLEAT ATTORNEY AND SOLICITOR). See also *Rules, Orders, and Notices, in the Court of King's Bench* [hereinafter cited as *Rules, K.B.*], Easter, 5 W. & M., Regs. 2 & 3 (1693), in COOKE, COMMON PLEAS (1742).

50. During the same period the action of ejectment became available for the purpose of trying title to land. Whereas the older and cumbersome real actions were the exclusive domain of Common Pleas, ejectment could be brought in all three of the Royal Courts. "[T]he marked declension of the business of the Common Pleas, as compared with that of the King's Bench, must be dated from the virtual supersession of the real actions by the action of ejectment." 7 HOLDSWORTH 9.

matters that formerly had been tried in Common Pleas, by expanding its use of the writ of *quo minus* and predicating its jurisdiction upon the theory (which degenerated into a fiction) that by failing to pay his debt the defendant had rendered the plaintiff less able to pay a debt owed the King. Common Pleas recaptured some of its former business by using the writ of *capias* in connection with a charge of trespass *quare clausum fregit*. Thus, by the latter part of the sixteenth century, the arrest of defendants under writs of *capias* (in Common Pleas), *latitat* (in King's Bench) and *quo minus capias* (in Exchequer) was the way in which most personal actions were begun.⁵¹ Although the vexation of defendants and the loss of revenue to the Crown (through the decline in purchases of original writs from Chancery) elicited attempts at change during the seventeenth century,⁵² by 1683 such proceedings were matters of course in all three superior courts.⁵³

Summons continued to be a theoretical prerequisite to arrest (except in cases of trespass *vi et armis*), the rationale given by Blackstone being that the defendant, "not having obeyed the original summons, . . . had shown a contempt of the court, and was no longer to be trusted at large."⁵⁴ As was so often the case with common law procedures, this "contempt" eventually became fictitious, and the *capias*, *latitat*, or *quo minus* came to be issued without any actual summoning of the defendant.⁵⁵

51. See 9 HOLDSWORTH 250; MILLAR 75-76. "[T]he Latitat is like to Doctor Gifford's water, which serves for all diseases, and so it holds one forme in all cases and actions whatsoever. . . ." T. POWELL, THE ATTORNEY'S ACADEMY 166 (1630).

52. In 1626 Common Pleas reacted against such a perversion of its process and promulgated an order, "That no Attorney or Clerk of this Court hereafter shall sue forth a Writ of Trespass *vi et armis*, where the true cause of Action is debt. . . ; And that no Attorney or Clerk by consent or composition shall take a declaration in Debt, his Clyent being arrested upon an Action of Trespass *vi et armis*; or shall take a Declaration for any greater debt than for which the Defendant was arrested. . . ." *Rules, Orders, and Notices in the Court of Common Pleas* [hereinafter cited as *Rules, C.P.*], Hil. 2 Car. 1 (1626), in COOKE, COMMON PLEAS (1742). This rule was succeeded, in 1661, by a famous statute drastically limiting the plaintiff's right to require special bail unless the writ expressed the true cause of action against the defendant. An act for prevention of vexations and oppressions by arrests and of delays in fruits of law, 13 Car. 2, Stat. 2, c. 2. This act was intended to require plaintiffs to take out original writs from Chancery in order to get special bail, but the attorneys of King's Bench circumvented it by adding an "*ac etiam*" clause (meaning "and also") to the *latitat* and stating the true cause of action therein. Until soon after the appointment of North as Chief Justice of Common Pleas in 1675, the attorneys of that court were required by Chief Justice Vaughn's rule to take out original writs. They looked on in helpless frustration as "the Incroachments of the King's Bench" continued. After the death of Vaughn, Common Pleas developed its own counterpart of the *ac etiam* in an unsuccessful attempt to recover "its ancient Splandour." For a fascinating account written by one who lived through the period, see THE COMPLEAT SOLICITOR, ENTRING-CLERK AND ATTORNEY 64-69 (1683) [hereinafter cited as THE COMPLEAT SOLICITOR].

53. THE COMPLEAT SOLICITOR 66, 67.

54. 3 BLACKSTONE *287.

55. *Id.*

C. *The Development of Special Bail Procedures*

In 1444, a statute was enacted which permitted the defendant arrested "in any action personal, or by cause of indictment of trespass" to procure his release by executing a bail bond (later called "bail below")⁵⁶ to the sheriff with "reasonable sureties of sufficient persons . . . upon condition written, that the said prisoner shall appear at the day contained in the said writ . . ."⁵⁷ At this point we must consider the distinction between bail *below*, executed by the defendant *to the sheriff* in order to procure his freedom until the time came for him to appear in court and thus confer jurisdiction over himself,⁵⁸ and bail *above*, executed *in court* as the formal appearance itself.⁵⁹ Bail above, or "bail to the action," as it was also called, was a recognizance whose condition (in King's Bench) was that

You (calling the Bail by their Names) do jointly and severally undertake, that if the Defendant (naming his Name) shall be condemned in this Action at the Suit of the Plaintiff (naming his Name) he shall satisfy the Costs and Condemnation, or render himself into the Custody of the Marshall of the Marshalsea of the Court of King's Bench, or you will pay the Costs and Condemnation for him.⁶⁰

It should be noted that "condemnation" meant the damages adjudged on behalf of the plaintiff against the defendant.

The Act of 1444 placed the sheriff between two fires. If he failed to release the defendant upon tender of sufficient bail, the Act provided for fine and liability to the defendant for treble damages. On the other hand, the sheriff was liable to amercement (fine) should he not produce the defendant's body at the appointed time and place.⁶¹ The release

56. *Id.* *290-92; 9 HOLDSWORTH 253.

57. 23 Hen. 6, c. 10 (1444). See also 3 BLACKSTONE, app., no. III, § 5.

58. The fact that bail *below* was *not* an appearance, and thus did not authorize the plaintiff to deliver his declaration to the defendant, is shown by the matter quoted in note 66 *infra*.

59. "The manner of appearing in the Kings-Bench, is to file a Bail, written in Parchment with the Master of the Office. . . ." THE COMPLEAT SOLICITOR 302. In 1692, "[f]or the greater ease and benefit of all persons whatsoever, in taking the recognizances of special bails upon all actions and suits depending, or to be depending, in any of the courts of *King's Bench*, *Common Pleas*, or *Exchequer* at *Westminster*," it was enacted that such special bails could be taken "in the country" by commissioners, thus formally eliminating the need for a trip to Westminster for that purpose. "Act for Taking special bails in the country," 4 & 5 W. & M., c. 4 (1692), implemented by *Rules, K.B.*, Trin. 8 W. 3, Reg. 3 (1696), and *Rules, C.P.*, 5 W. & M. (1692).

60. *Rules, K.B.*, Trin. 8 W. 3, Reg. 3 (1696). See also 3 BLACKSTONE *291 & app., no. III, § 5; 9 HOLDSWORTH 253. The right of those providing civil bail to discharge themselves by surrendering the defendant is today found in state statutes. *E.g.*, CONN. GEN. STAT. § 52-319 (1958).

61. *Pickering's Case*, 12 Mod. 447, 88 Eng. Rep. 1442 (K.B. 1701). See note 66 *infra*.

of the defendant on bail constituted no defense to amercement, and it therefore behooved the sheriff to take sufficient bail below for his own indemnification.

The sheriff's liability to the plaintiff was another matter. Until the late seventeenth century any bail, even insufficient bail, would protect the sheriff from liability to the plaintiff in an action of trespass on the case for an escape. Such actions were frequently and unsuccessfully brought by plaintiffs when defendants did not appear to the action.⁶² The persistence of such plaintiffs was finally rewarded in 1699 by a decision that "if the sheriff takes insufficient bail, he is liable to an action, as well as to amercements."⁶³ The law had thus swung from the illogical rule that even a patently insufficient bond (*e.g.*, one for £40 in a suit for £100)⁶⁴ would protect the sheriff from liability to the plaintiff, to the almost opposite position that even a sufficient bail bond—and one the sheriff was required to accept—would afford him, at best, indemnity but not immunity. This latter position may be logical as far as his liability to the plaintiff is concerned, since the penalty of the bail-piece⁶⁵ below ran to the sheriff rather than to the plaintiff; but it also left the sheriff subject to amercement by the Crown and to the risk of loss of indemnity because of the insolvency of the bail occurring after execution of the bail-piece.

Breach of the condition of the bail bond *below* gave the *sheriff* a right of action against the defendant and his bail for recovery of his amercements⁶⁶ (and later for the recovery of losses through action by

62. *See, e.g.*, *Ellis v. Yarborough*, 1 Mod. 227, 86 Eng. Rep. 846 (C.P., 1676); *Posterne v. Hanson*, 2 Wms. Saund. 59, 85 Eng. Rep. 658 (K.B. 1669); *Boles v. Lassels*, Cro. Eliz. 852, 78 Eng. Rep. 1077 (K.B. 1600); *Barton v. Aldeworth*, Cro. Eliz. 624, 78 Eng. Rep. 865 (K.B. 1598).

63. *Ethericke v. Cooper*, 1 Ld. Raym. 425, 91 Eng. Rep. 1182 (K.B. 1699) (Holt, C.J.).

64. *Barton v. Aldeworth*, Cro. Eliz. 624, 78 Eng. Rep. 865 (K.B. 1598).

65. The bail piece was a formal entry or memorandum of the recognizance or undertaking of special bail in civil actions, which, after being signed and acknowledged by the bail before the proper officer, was filed in the court in which the action was pending.

66. When upon a Bill of Middlesex, *Latitat*, or any other Writ, the Defendant or defendants be arrested, and have entered into Bond to the Sheriff for their appearance according to the return of the Writ; then if the party or parties do not appear at the return of the Writ, you must call to the Sheriff for a return of the Writ; and upon a *Cepi corpus* returned, if the party do not appear at the return, you may give the Sheriff a Rule to bring in his body on paid of forty shillings, &c. And then if he appear not, you may have a *Habeas Corpus* upon the *Cepi corpus*. . . . And if the Sheriff will not return this Writ of *Habeas Corpus*, you may amerce him as before; or if he return *Languidus in prisona*, you may have upon that a *Duces tecum licet languidus, &c.*

At the return of all or any of these, you may amerce the Sheriff, and he shall pay it, after those Rules given in the Kings-Bench.

If you will estreat your Amerciements into the Crown-Office, the charge of every Rule estreated is two shillings four pence: and in this course you may both amerce the Sheriff, and prosecute till such time as he doth appear: but if there be any great amerciament, the Defendant will appear, so save himself from the Sheriffs Bond; and

the plaintiff), whereas breach of the condition of the bail *above* gave a right of action to the *plaintiff* for his damages and costs. Eventually, possibly as late as the latter half of the seventeenth century⁶⁷—when so many plaintiffs' rights seem to have developed—plaintiffs began to take assignments of the bail bonds below from the sheriff and to enforce them for their own benefit. In 1705, a statute made this a matter of right on the part of the plaintiff.⁶⁸ Thus the plaintiff acquired an election either to amerce the sheriff or to discharge him by taking an assignment of the bail below. Whether the plaintiff ever received the amercements is a matter of conjecture;⁶⁹ in any event, the new rights of taking an assignment of bail bond and action against the sheriff seem to have made this a moot question. By the early nineteenth century the plaintiff's rights in these matters could be described as follows:

If bail are not put in within due time, or if within the four days there is no justification nor any render of the defendant to custody, the plaintiff, though no longer able . . . to proceed in his action, has for his redress an option of proceeding either against the sheriff or the bail below. If he elects the former method, he obtains certain rules of Court calling on the sheriff, the first to return the writ, and the second to *bring in the body* of the defendant, and on his failure to do so, may obtain, in a summary way by motion, an attachment against him for the whole debt and costs. If on the other hand he chooses to proceed against the bail,

after the amerciements are returned into the Crown-Office, if they be not certified and returned into the Exchequer, which is once in every half year, where they are estreated before that time, if you be sued upon the Sheriffs Bond, you may upon motion of the Court, if the Plaintiffs Attorney (to whose Client the Sheriffs Bond is commonly assigned,) will not consent otherwise, that you are contented to appear as of the same Term the first Writ was returnable, and to accept of a Declaration, and not to delay the Plaintiff in his Suit; the Court will usually order the suit upon the Sheriffs Bond to stay, or if the amerciements be estreated, then upon the same offer, and also to take off those amerciements, the court will order the like.

THE COMPLEAT SOLICITOR 301. *Cf. id.* 85 (specific and parallel treatment of the same problem in Common Pleas).

67. The instructions on amercement of sheriffs found in T. POWELL, *THE ATTORNEY'S ACADEMY* 99 (1630) and in *THE FILACERS OFFICE* 21-24 ff. (1657) make no mention of assignment of bail bonds as an alternative to amercement, whereas *The Compleat Solicitor* says that the bond was "commonly assigned" to the plaintiff. *THE COMPLEAT SOLICITOR* 301. The bail-piece, which was retained by the sheriff, was assigned by the plaintiff's indorsing thereon a promise to save the sheriff harmless against amercements. Case 861, Anonymous, 12 Mod. 516, 88 Eng. Rep. 1488 (1701); Case 888, Anonymous, 12 Mod. 527, 88 Eng. Rep. 1496 (1701).

68. An act for the amendment of the law, and the better advancement of justice, 4 Ann., c. 16, sched. 20 (1705).

69. Amercements were returned into the Crown Office (the criminal side of King's Bench) and were estreated (certified) into the Exchequer every six months. It is possible, but unlikely, that there arose a practice of allowing the plaintiff to receive the amercements just as he was able to receive the benefit of *capias utlagatum*. See *Pinfold v. East-India Co.*, 2 Lev. 49, 83 Eng. Rep. 444 (Ex. 1672). For a modern statute on assignment of special bail below, see *CONN. GEN. STAT.* § 52-318 (1958).

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he demands from the sheriff an assignment of the bail-bond, and institutes an action upon it against the obligors In the event of an attachment being obtained against the sheriff, he looks to the bail or the defendant for his indemnity; and if the bail are compelled to pay, they are also entitled to claim reimbursement from the defendant, as it was on his account that they incurred the liability.⁷⁰

A concomitant of this state of affairs was a bizarre practice reported in the early nineteenth century by which the sheriff would assign his fee in the case to his under-sheriff in consideration of the under-sheriff's agreement to indemnify him as to loss sustained by him through the plaintiff's action—the fee being analogous to an insurance premium paid by the sheriff for his own protection. The under-sheriff would enter into a similar arrangement with the bailiff who actually executed the process of arrest. The bailiff, in turn, would exact a fee from the defendant sufficient to cover his risk in accepting the particular sureties proffered by the defendant for his release.⁷¹

By making the sheriff personally responsible that bail above shall be perfected, or the defendant rendered, it amply consults at all events the security of the plaintiff; while on the other hand, the defendant, by making his bargain with the arresting officer, may procure almost any extent of accommodation as to the acceptance of the bail which he offers, and may even avoid the necessity of finding bail at all; nothing being more common than for the officer to accept (in consideration of a gratuity) the undertaking of the defendant's attorney, or even the defendant's own verbal engagement. The arrest and discharge in this manner frequently take place without the slightest personal inconvenience to the party arrested, and with the greatest privacy.⁷²

Another practice, provided for by statutes⁷³ permitted the defendant to obtain his release inailable cases by posting a cash deposit of the amount demanded, plus additional sums for costs. Upon such deposit, the defendant was required to enter a common appearance. If he failed to do so, the plaintiff could enter it for him. If the plaintiff received judgment in the action, the cash deposit was to be paid over to him in satisfaction. In cases in which it appeared that the plaintiff had lacked reasonable cause to have the defendant arrested, the defendant was awarded costs.⁷⁴

70. FIRST REPORT 103 (1829).

71. *Id.* 105, 106.

72. *Id.* 106.

73. 43 Geo. 3, c. 46 (1803); Imprisonment for Debt Act, 7 & 8 Geo. 4, c. 71 (1827).

74. 43 Geo. 3, c. 46 (1803).

Finally, as a result of the events described below, civil arrest on mesne process—except in one situation—was abolished in 1838.⁷⁵

D. *Common Bail and the Development of Default Judgments Based on Mere Summoning of the Defendant*

The harshness of arresting a defendant on trumped-up charges and forcing him to raise bail, especially in small cases, brought about the development of procedures which helped to mitigate the rigors of the arrest system. At least as early as 1582 in Common Pleas⁷⁶ and possibly earlier in King's Bench,⁷⁷ defendants in smaller cases⁷⁸ were allowed to put in "common bail" above and below, meaning bail with fictitious sureties,⁷⁹ as distinguished from "special bail," which required actual sureties. The term "nonbailable" was used to refer to those cases in which the plaintiff was not entitled to require special bail, but had to content himself with common bail. "Nonbailable" is a misleading word, however, not only because of its different meaning in criminal law,⁸⁰ but also because the actual filing of bail above was required even in so-called nonbailable cases, albeit bail with the fictitious sureties Doe and Roe. Bail *above*, being the formality required for entry of appearance of any defendant not in the actual or constructive custody of the marshal, was considered essential to the jurisdiction of the court, and its entry on the record was necessary to the validity of

75. 1 & 2 Vic. c. 110, §§ 1, 3 (1838). Section 3 permitted arrest of the defendant upon order of a judge in any case involving £20 or more where "there was probable cause for believing that the defendant . . . [was] . . . about to quit England unless he . . . [was] forthwith apprehended. . . ." The statute also greatly enlarged the scope of execution process and created a judgment lien upon realty.

76. "[I]n all other Actions personal where the debt or damages doth not amount to Twenty pounds, the Defendant to be admitted to Common Bayle to be taken and entered only by the Officer from whence the Process upon which the Defendant shall so appear did issue, and by none other . . ." *Rules, C.P.*, Trin. 24 Eliz. (1582). The foregoing refers to a practice whereby the sheriff retained the judicial writ (*capias*, *latitat*, etc.) in his office and issued his own warrant to the bailiff who actually made the arrest. See M. HASTINGS, *THE COURT OF COMMON PLEAS IN FIFTEENTH CENTURY ENGLAND* 163 (1947). This practice was regulated by the rule that "no Sheriff or Sheriffs Deputy, shall deliver or make, or cause or suffer to be delivered or made, any Warrant or Warrants before the Writ or Writs be duly sued forth and delivered to the said Sheriffs or their Deputies respectively." *Rules, C.P.*, Hil. 14 & 15 Car. 2 (1662).

77. Gilbert quotes "The old Rule in the *Compleat Attorney*, printed in 1676, fo. 45," to the effect that such a practice was followed "antiently." GILBERT, *CIVIL ACTIONS IN THE COURT OF COMMON PLEAS* 34, 35 (1761).

78. "Smaller" cases were those under £20 or, later, those under £10 as well as those in which the damages were too uncertain or "precarious" for the plaintiff to swear that they exceeded such sum. The amount went back up to £20 in the 19th century. See note 76 *supra*; *THE FILACERS OFFICE* 27 (1657); *THE COMPLEAT ATTORNEY AND SOLICITOR* 314 (CORT. ed. 1695); 3 BLACKSTONE *292; Frivolous Arrest Act, 12 Geo. 1, c. 29 (1725), and the later statutes cited in note 84 *infra*.

79. 3 BLACKSTONE *287; 9 HOLDSWORTH 253.

80. In criminal law, a nonbailable case is one in which the defendant has no right to be released on bail pending trial.

the plaintiff's judgment.⁸¹ The King's Bench Rules of 1692⁸² indicate that the upsetting of plaintiffs' causes because of the failure of the defendant to file common bail above was a current problem.

The Frivolous Arrest Act of 1725⁸³ empowered the plaintiff to enter common bail above or a "common appearance" for the defendant in nonbailable cases, meaning cases in superior courts in which the sum sued for was under ten pounds. Authorizing the plaintiff to effectuate the defendant's appearance by putting in common bail above for him in those cases in which the defendant had been served with a copy of the writ must have seemed a significant step to practitioners raised in the tradition that no declaration or judgment could be delivered until the defendant either was in custody or had put in his own appearance. The historical importance of this new plaintiffs' right, however, is that *it marks the practical transition from arrest to summons in the beginning of personal civil actions in the superior courts.*⁸⁴

The Frivolous Arrest Act also provided that if

. . . any writ or process shall issue for the sum of ten pounds or upwards, and no affidavit and indorsement shall be made as aforesaid, the plaintiff or plaintiffs shall not proceed to arrest the body of the defendant or defendants, but shall proceed in like manner, as is by this act directed in cases where the cause of action does not amount to the sum of ten pounds . . . as aforesaid.⁸⁵

The plaintiff suing for £10 or more could, by making affidavit of the sum due, have the defendant arrested as before. Once he had elected to proceed in such a manner, however, he bore the risk that, if the bail above should be rejected or fail to "justify," *i.e.*, prove their sufficiency as sureties when formally called upon to do so, "there can be no declaration or farther prosecution of the suit; and the plaintiff has no course left but to abandon his action, and institute a new proceeding against the sheriff or against the *bail below* . . ."⁸⁶

81. *Dennis v. Mannaring*, Poph. 146, 79 Eng. Rep. 1246 (K.B. 1617) (*see note 94 infra* for discussion of dictum that a defendant might be required to enter bail in order to make a plaintiff's judgment valid). *See also* W. STYLES, PRACTICAL REGISTER 77, 208 (1707).

82. *Rules, K.B., Trin. 4 W. & M.* (1692). *See also id.*, Trin. 1. Geo. 2 (1727).

83. 12 Geo. 1, c. 29. This basic statute was amended and its life extended a number of times: 5 Geo. 2, c. 27 (1732); 21 Geo. 2, c. 3 (1748); 19 Geo. 3, c. 70 (1779); 43 Geo. 3, c. 46 (1803); 51 Geo. 3, c. 124 (1811); 57 Geo. 3, c. 101 (1817); 7 & 8 Geo. 4, c. 71 (1827).

84. Such a transition simply and forthrightly occurred in Plymouth Colony in 1644, while the mother country still was struggling with the niceties and complexities of bail. Act of June 5, 1644, Plymouth Colony. "That it shalbe lawfull for the Gounor and Majestrats or any of them to direct a summons to any pson within the Goument to answere to any suits comenced against them. and it shalbe as authentical as if it were donn by warrant to attach or arrest them."

85. 12 Geo. 1, c. 29, § 2 (1725).

86. FIRST REPORT 90. The reader who would dismiss our concern with special bail as

It is a central contention of this article that the Frivolous Arrest Act of 1725, although in part a codification of prior practice, originated the plaintiff's right to enter common bail for his defendant: that, prior to 1725, there was no such option open to a plaintiff whose defendant refused to appear or to consent to an appearance being made for him.⁸⁷ Proof of a negative is almost always difficult—particularly so when the issues in question are buried in the past and involved with a literature that is partly a recital of actualities and partly a formalistic recording of fictitious events. The student of the common law must deal with probabilities, carefully weighing the inferences to be drawn from such available evidence as appears to be grounded in reality.

Perhaps the most telling piece of evidence against the existence of a plaintiffs' right, prior to 1725, to avoid the delays and dangers of the full and formal bail procedure by simply entering common bail themselves for defendants, is the complete failure of the practitioners' texts of the period to mention any such possibility.⁸⁸ Such a right, if available, would have been of obvious importance to plaintiffs and their attorneys, and could hardly have escaped mention in the practical handbooks of the day.

Nor have I been able to find a pre-1725 case setting forth such a practice in England. In fact, a case as late as 1718 illustrates the impotence of the courts of law to render judgment for a plaintiff against a non-appearing defendant—even one put "out of the protection of the law" by outlawry upon mesne process. In *Balch v. Wastall*⁸⁹ the plaintiff, being owed money by bond, procured the outlawry of the defendant upon mesne process. Because the defendant was entitled to an annuity from personalty held in trust for him by one C, plaintiff brought a bill in chancery to subject this annuity to the payment of the bond. The plaintiff argued that, since he "had gone as far as he could at law, and was hindered by the contempt of the defendant, and this being a matter of trust, and a creature of equity, the plaintiff ought rather to

moot is directed to the statutes of Connecticut which preserve, in cases begun by "body attachment," the old procedures of bail below executed to the arresting officer and bail above filed with the clerk of court as the entry of appearance by the defendant. CONN. GEN. STAT §§ 52-312 to 52-319 (1958). CONN. PRAC. BK. § 40 (1963).

87. Pollock and Maitland, writing in the late nineteenth century, and Millar, in the mid-twentieth, seem to agree with this conclusion. POLLOCK & MAITLAND 594-95; MILLAR 361. Nevertheless, particularly in the face of Ehrenzweig's contrary opinion, it is worth examining the available evidence in greater detail than has heretofore been attempted.

88. See generally T. POWELL, THE ATTORNEY'S ACADEMY (1630); T. G. OF STAPLE INNE, THE ATTORNEY OF THE COURT OF COMMON PLEAS (1642); THE FILAGERS OFFICE (1657); THE COMPLEAT SOLICITOR, THE PRACTICK PART OF THE LAW (COTT. ed. 1695); THE PRACTICK PART OF THE LAW (ed. 1711).

89. 1 Peere Wms. 445, 24 Eng. Rep. 465 (Ch. 1718).

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be relieved here, than sent to another court” Although the court denied the relief sought, it did *not* deny that the plaintiff had gone as far as he could at law. Rather, the court observed that

by the outlawry all the defendant’s interest, as well equitable as legal, was forfeited to the Crown; and though the plaintiff was entitled to a grant thereof from the Crown, which upon application to the Court of Exchequer, he would of course have, yet, since this trust continued in the Crown until taken out, they directed the plaintiff to get such grant, and make the Attorney-General a party, and then to come again.

The suggested application to the Court of Exchequer is not a further *judicial proceeding at law*, but is instead an application for administrative relief from the Exchequer, as the minister concerned with the King’s revenue, for a grant which was not formally a matter of legal right.

Just as the practitioners’ texts mentioned above were concerned with actual practice, so were the Rules of Court and the reports reflections of actuality—in contrast with the fictions often found in the formal records of proceedings.⁹⁰ We have seen that the sixteenth century practice of common bail described in the Rules of Common Pleas,⁹¹ as well as the “antient” practice of the same in King’s Bench described by Gilbert,⁹² permitted the defendant to file common bail in order to obtain relief from the burden of arrest in small cases. There is persuasive evidence that this privilege was for the defendant’s relief alone, and was not one to be exercised by the plaintiff for his own advantage, except in certain special situations where, in effect, the defendant had consented to such entry of bail on his behalf.

An important series of developments grew out of irregular practices found in the seventeenth and early eighteenth century sources described below. Plaintiffs’ attorneys, sometimes because they were lulled

90. A frank recognition of the fictitiousness of certain entries of record is given by Powell:

For as the Capias hath an original Writ to goe before it? [*sic*] So the *latitat* supposeth and pretendeth a Bill of Middlesex to lead it also, For that is granted in the Kings Bench, because it is intended that the Defendant vpon returne of a Bill of Middlesex precedent doth Latitare in valluatur, &c.

. . . .

But the Original must containe the true cause of action, and be exactly set downe and drawn, that all the following Processe and proceeding, may be tyed to agree with it punctuatin.

T. POWELL, *THE ATTORNEY’S ACADEMY* 166 (1630).

91. See note 76 *supra*.

92. GILBERT, *supra* note 77, at 35.

by the promises of defendants' attorneys to appear⁹³ for their clients, were accepting responsive pleadings and even going to trial without having seen to it that their defendants had put in the bail that was a necessary part of the record to support the court's jurisdiction over the defendant.⁹⁴

In 1657, King's Bench promulgated a rule "For the Preventing of many Inconveniences which daily happen to the Plaintiffs by the Defendants omitting the filing of Common Bails, according to the ancient Usage and Course of the Court." This rule ordered

[t]hat all Clerks of the Office, Philizars and Attorneys at large, do within ten Days after the end of every Term, deliver to the Secondary, a Note of all such Appearances as have been made unto them the Term before, and by whom they were made; so that he that is appointed to enter the Bails, may see whether Bails be filed for every such Appearance or not.⁹⁵

93. It is worth heading off a troublesome semantic problem at this point. Unfortunately, the word "appearance" has two meanings in the materials we must next examine. It continues to be used in the strict sense of a formal submission to the court's jurisdiction, but we also find the same word used to refer to the act of physically showing up in court, sometimes irregularly as previously noted. A good example of such double use of the word "appearance" is the following:

There can be no appearance in this Court but either by special or common Bail, for it is the putting in of Bail that attacheth the Cause in Court. 7 Maij, 1650. B.S.

If an Attorney promiseth to appear for his Client, the Court will compel him to put in common Bail for him. For the promise to appear implies the other.

.....

If the Attorney appears for his Client, but *de bene esse*, that is, if his Client shall like and approve of it; if his Client shall refuse to appear, he may in some short time afterwards return the Declaration to the Plaintiffs Attorney, with his answer, that his Client will not appear, and then he is not bound to plead unto it, 14 Nov. 1650 B.S. *For this was not an absolute, but a conditional appearance.*

W. STYLE, STYLE'S PRACTICAL REGISTER 79 (1707).

94. In *Dennis v. Mannaring*, Pop. 146, 79 Eng. Rep. 1246 (K.B. 1617), it was the plaintiff who benefited from the absence of an entry of bail for the defendant. In that case the plaintiff was "not bound to stand to the verdict" since there was a want of jurisdiction over the defendant. In the report of the case Doderidge, J., is reported as saying:

I have seen in this Court, where, upon a writ of error brought in such a case, we have compelled him to put in his bail, because he should not take advantage of his own folly: but because that here no fraud appeared to be in the plaintiff, he shall not be bound to stand to the verdict . . .

Since *Dennis* itself involved, as the reporter put it, a "great case between" the parties, and since the dispute was over entry of verdict, it appears that the defendant had participated in the trial. Likewise, Doderidge's comparison of *Dennis* with his remembered instance, and the fact that the former case involved a writ of error (which always comes after judgment), strongly suggest that the defendant had participated in the action rather than resisting jurisdiction from the outset. The two cases may be reconciled as follows: In the earlier case the court refused to vacate a judgment formally entered against a defendant who had committed the "folly" of not entering bail, but who had otherwise fully appeared. In *Dennis* the court, not yet having proceeded to judgment, refused to enter judgment against a plaintiff when the defendant had not put in bail. Thus, Doderidge's recollected case, if correctly reported by him, appears to be an early instance in which a defendant was deemed to consent to jurisdiction through his acts in connection with the case. Other instances are discussed later in the text.

95. *Rules, K.B., East.*, 9 Car. 2 (1657).

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In 1661, King's Bench ordered

[t]hat every Attorney of this Court who shall put in any Bail by Recognizance before the Chief Justice or any of the other Justices of this Court, and the Plaintiff or his Attorney shall accept of such Bail, that then the Attorney who puts in such Bail shall cause that Bail to be filed within twenty Days after such acceptance under the Penalty of 40s. and that all Bails now taken *de bene esse* and which are accepted by the Plaintiff's Attorney and now remaining with any Judge of this Court, shall likewise be filed within twenty Days now next following, on the like Penalty of 40s.⁹⁶

In 1664, a further rule of King's Bench ordered

that every Attorney of this Court, who shall appear for any Defendant in any Action in which special Bail is not required, shall file common Bail for such Defendant within six Days next after the end of the same Term of which he appeared.⁹⁷

No reference at all is made to entry of common bail by the plaintiff for the defendant, in case the defendant should fail to do so.

In spite of the foregoing rules and orders, plaintiffs must have continued to have trouble with defendants who failed to put in bail, for we find, in 1689, the Court of King's Bench ordering

[t]hat for every Judgment acknowledged by Warrant of Attorney, Bail shall be filed for the Defendant to Warrant such Judgment, or in Default thereof the Attorney who ought to file the said Bail, shall forfeit and pay to the Court Box 10s. for every such Bail not filed. And for every other Common Bail which ought to be filed, and is not filed, *the Attorney for the Defendant* shall forfeit and pay to the Box of the Court 10s. And the same respective Attorneys shall be punished as to the Justices of the Court shall seem meet.⁹⁸

In 1692, a Rule of Court of King's Bench was promulgated which observed once again that the neglect of clerks and attorneys of the court to file common bails operated "to the great Danger of the Plaintiffs," and the court ordered

that every Clerk and Attorney of this Court, who shall be an Attorney for the Defendant shall pay to the Plaintiff's Attorney upon joining of every issue 1s. 6d. for common Bail, unless the said Attorney for the Defendant shall make it appear to the Plaintiff's Attorney that common or special Bail is filed.

96. *Rules, K.B.*, Trin. 13 Car. 2 (1661) (footnotes omitted).

97. *Rules, K.B.*, Mich. 16 Car. 2 (1664) (footnotes omitted).

98. *Rules, K.B.*, Hil. 1 W. & M. (1689) (footnotes omitted; emphasis added).

And it is further Ordered, that every Clerk for the Plaintiff on his Account for his Entries shall pay to the Secondary of this Court the 1s. 6d. so by him received, and that every Clerk and Attorney who shall act contrary to this Rule in any Behalf, shall respectively forfeit 10s. for every such Default, to be paid to the Box of this Court.⁹⁹

Although this last rule implies that the plaintiff could cause common bail to be entered for the defendant, it should be noted that this was after joining of issue and payment of the filing fee for bail, both of which clearly imply consent by the defendant that bail be entered for him.

The Rule of King's Bench of 1692 cited above contains an additional provision which can easily be misconstrued as evidence of a power in the plaintiff to effect an appearance for a defaulting defendant. After the above language, the Rule went on to provide that

all Clerks and Attorneys for the plaintiff upon signing of Judgment by Default, or on *Non Sum Informatus*, shall pay to the Secondary of this Court 1s. 6d. for the common Bail, unless it was before filed, and the said 1s. 6d. shall be allowed the Plaintiff in his Costs.¹⁰⁰

It has been noted that the promise of the defendant's attorney to appear could be enforced as an appearance by the defendant,¹⁰¹ and that the defendant could consent to entry of bail by paying the fee therefor to the plaintiff. In an age of concern over the "danger" to the plaintiff's cause (and to the revenue of the Secondary of the Court) if bail were not put in by defendants, it is quite natural that the court should expand the number of situations in which it would infer consent of the defendant to the entry of his bail (and payment of his fee) by the plaintiff. The last-quoted portion of the rule of 1692 apparently reflects such an expansion based upon consent to jurisdiction inferred from the defendant's taking steps in the cause rather than resisting jurisdiction from the outset. In fact, this seems to be the common principle running through all three situations treated by the 1692 rule. Judgment on *non sum informatus* fits in almost as naturally as does the payment of the bail fee to the plaintiff, for it is a judgment based upon an announcement in court, or plea, by the attorney for the defendant that

99. *Rules, K.B.*, Trin. 4 W. & M. II (1692) (footnotes omitted).

100. *Id.*

101. See note 93 *supra*. There is evidence, however, that enforcement of such promises was restricted to situations in which an original writ had been issued. See, e.g., *THE FILACERS OFFICE* 30 (1657); Case 54, *Anonymous*, 6 Mod. 42, 87 Eng. Rep. 804 (K.B. 1703).

he is not informed of any answer to be given by him, usually pursuant to a previous agreement between the parties.¹⁰² "Judgment by default" is best understood by first noting that the term "default" was used to refer to the defendant's failure to act *after* appearance as well as his failure to appear at all.¹⁰³ Stephen points out the traditional difference between real actions and personal actions in the matter of defaults *before* appearance:

Thus, in a real (though not in a personal) action, if *the defendant* holds out against the process, judgment may be given against him for *default of appearance*, . . . So, in actions real, mixed, or personal, if after appearance he neither pleads nor demurs, or if after plea he fails to maintain his pleading till issue joined, by rejoinder, rebutter, &c., judgment will be given against him for *want of plea*, which is called judgment *nil dicit*.¹⁰⁴

Stephen then states that he will give an example of a "judgment by default,"¹⁰⁵ which turns out to be a judgment "*nil dicit*."¹⁰⁶ This is quite consistent with a passage in *The Compleat Solicitor* in which the terms "*nihil dicit*" and "judgment by default" are used as synonyms. The first term is used to refer to judgment entered when no plea is pleaded after an appearance and imparlance by the defendant. The latter is used to refer to a judgment entered for a plaintiff after a defendant had neither joined issue nor demurred to the plaintiff's traverse of the defendant's plea.¹⁰⁷

It thus appears that the rule of 1692 was not an introduction of a completely new concept of jurisdiction based upon mere summoning of a resisting defendant, but was, as suggested, an expansion of the principle of jurisdiction based upon the express or implied consent of the defendant to the putting in of his bail.

102. H. STEPHEN, PRINCIPLES OF PLEADING 136 (3d American ed. 1895); BLACK'S LAW DICTIONARY 1205 (4th ed. 1951).

103. The following passage illustrates the use of "default" both in a post-appearance setting and in connection with the entry of judgment as a result of such default:

The Imparlance is a Time of Leave, or License given from one Term to the Term succeeding by the Plaintiff to the Defendant, either to plead to his Action brought, or to let it pass by Default; and to that Purpose, the next Term after the Imparlance had, as aforesaid, the Attorney for the Plaintiff may call to the Attorney of the Defendant to answer to the Declaration, and if he do not plead in due Time, give him Rule to answer; which done, and the Rule expired, he may enter Judgment as before is declared by *Nihil Dicit*.

THE PRACTICK PART OF THE LAW 44 (1711).

104. H. STEPHEN, PRINCIPLES OF PLEADING 135-36 (3d American ed. 1895).

105. *Id.* 139.

106. *Id.* 140.

107. THE COMPLEAT SOLICITOR 336 (1683). See also 3 BLACKSTONE *296, where he uses "judgment by default" and "judgment *nihil dicit*" as synonyms.

The one other instance, prior to 1725, in which common bail was put in by someone other than the defendant or his attorney, only emphasizes the necessity for obtaining the defendant's consent to bail. In a 1616 case in King's Bench¹⁰⁸ entry of common bail was made by order of the court upon a showing that the defendant's attorney, having been paid his fee for entering common bail, had died before he could enter it. Had the plaintiff been privileged to enter common bail as a matter of course, independent of the wishes of the defendant, no such showing would have been required before bail was entered.

The first unequivocal reference in the Rules of Court to the entry of bail by the plaintiff for a totally non-appearing defendant, who had done nothing (such as paying his attorney his fee for entering common bail) to consent to entry of bail, appears in 1727,¹⁰⁹ and refers to the Frivolous Arrest Act of 1725. The timing of this initial reference in the Rules of Court is particularly significant in light of the care with which the earlier rules, described above, had dealt with the details of contemporary bail procedure.

The Frivolous Arrest Act of 1725 marked an important change from earlier practice.¹¹⁰ The statute was entitled "An act to prevent frivolous and vexatious arrest," and it achieved its purpose, not by permitting an arrested defendant to enter common bail in smaller cases generally and in larger cases in which the plaintiff had waived special bail, but by *replacing* arrest in such cases with service of a copy of the writ on the defendant and by expressly authorizing the plaintiff to enter bail for the defendant.

Thus the evidence I have found of a pre-1725 practice of permitting the plaintiff to effect the defendant's appearance through filing common bail for him is slight indeed. The only situations found in which common bail was entered by other than the defendant or his attorney have, I believe, been shown to be perfectly consistent with the view that plaintiffs were not, before 1725, permitted to file bail for defendants without their consent. In one instance, the defendant's attorney had promised to appear.¹¹¹ In another case, the defendant obviously had consented to entry of bail by paying his attorney to do so;¹¹² in the

108. *Denham v. Cumber*, 1 Rolle 372, 81 Eng. Rep. 543 (K.B. 1616), translated from the French in 3 Vin. Abr. 464.

109. *Rules, K.B.*, Trin. 1 Geo. 2 (1727).

110. 12 Geo. 1, c. 29.

111. See pp. 71-72 *supra*.

112. *Denham v. Cumber*, 1 Rolle 372, 81 Eng. Rep. 543 (K.B. 1616), translated from the French in 3 Vin. Abr. 464.

other, the entry of bail pursuant to Rule of Court applied to defendants who were already in court.¹¹³

Despite appearances to the contrary, Holdsworth does not contradict this interpretation of the creation of the plaintiff's right to effect appearances for non-appearing defendants. A reading of Holdsworth's text without analysis of the accompanying footnotes can lead one to conclude erroneously that he views the arrest of defendants during this period as entirely fictitious and that he states unequivocally that this fictitious arrest was accompanied by entry of bail by the plaintiff for the defendant prior to 1725. In fact Holdsworth asserts neither of these views. After detailing the fictitious character of the Bill of Middlesex, he states:

If [the defendant] did not appear to the bill or the *latitat* he was liable to be arrested for contempt of court in not appearing. But as all the proceedings were fictitious, the contempt would seem to share the fictitious character. To arrest a man for a merely fictitious contempt was clearly a hardship.¹¹⁴

A reading of Holdsworth's note to this passage reveals that by "all the proceedings were fictitious," he was referring to all the proceedings (with the exception of the *latitat* itself) prior to the "contempt," and not to the arrest itself, for the note says: "Many statutes were passed to free defendants sued by this process from this liability to arrest, 12 George I. c. 29 [and later statutes]."¹¹⁵ Had the arrests been fictitious, the statutes would have been unnecessary. Even as late as 1829 arrest was a very real and important matter. The Parliamentary Commissioners reported that, during the five years of 1823 through 1827, when 398,464 actions were brought in the superior courts at Westminster, 162,263 of which wereailable, there were 39,962 cases in which special bail was put in and 17,059 cases in which defendants remained prisoners in custody of sheriffs on mesne process. The "large majority" of the remaining 105,242 defendants "against whom process of arrest is taken out are driven by it to immediate payment or terms of compromise, and either avoid any commitment to actual custody, or obtain a speedy discharge."¹¹⁶

Holdsworth's main text continues:

Therefore, in the event of non-appearance, the plaintiff was al-

113. See p. 74 & note 99 *supra*.

114. 1 HOLDSWORTH 220.

115. *Id.* n.5.

116. FIRST REPORT 71, 156, 202, 203 (1829).

lowed to enter an appearance for him, and to give as sureties for his appearance his friends John Doe and Richard Roe. This was called giving "common bail."¹¹⁷

Several comments are in order. First, Holdsworth—as is characteristic of much historical writing about this problem—does not say just when the plaintiff first acquired the right to enter a common appearance for the defendant. Second, although his text when read straight through without attention to the footnotes does give one the false impression, he does not state that this right originated outside the statutes. Third, the only authority he cites in support of the above passage is as follows: "Coke, Fourth Instit. 72; Bl. Comm. iii 287."¹¹⁸ An examination of Blackstone reveals him to be ambiguous as to the origin of the right of the plaintiff to enter common bail for the defendant. He says:

But when the summons fell into disuse and the *capias* became in fact the first process, it was thought hard to imprison a man for a contempt which was only supposed: and therefore in common cases by the gradual indulgence of the courts, (at length authorized by . . . [the Frivolous Arrest Act of 1725 and amendments thereto¹¹⁹]) the sheriff or proper officer can now only personally serve the defendant with the copy of the writ or process [I]f the defendant does not appear upon the return of the writ . . . the plaintiff may enter an appearance to him, as if he had really appeared; and may file common bail in the defendant's name, and proceed thereupon as if the defendant had done it himself.¹²⁰

It should be observed that Blackstone cites no pre-1725 authority and is unspecific as to which party was granted the "gradual indulgences." The context suggests the defendant more than the plaintiff, since the phrase is used within a sentence referring to the reduction of the plaintiff's right from arrest to mere service of process. Even if Blackstone is referring to indulgences granted the plaintiff, it is possible that he means the pre-1725 practices already discussed in which plaintiffs were allowed to enter bail for defendants whose acts in connection with the case had already implied consent to the court's jurisdiction.

Reference to Coke's *Institutes* reveals support only for the existence of an institution of common bail, and not for the right of the plaintiff to enter it for the defendant.¹²¹

117. 1 HOLDSWORTH 220.

118. *Id.* n.6.

119. See note 84 *supra*.

120. 3 BLACKSTONE *287.

121. After setting forth a plea containing the clause, "hus et haut in plegio ad standum

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Thus it seems likely, as argued above, that the Frivolous Arrest Act of 1725 truly marked the raising of summons to jurisdictional efficacy in England, and that Professor Ehrenzweig's "power doctrine" is no myth at all. The full exercise of jurisdiction in personal actions *at common law* did require the plaintiff to "catch" his defendant in England in a very tangible sense.

E. *The Decline of Attachment in England*

Common law attachment, being restricted to the purpose of inducing appearance by the defendant,¹²² obviously could compete neither with arrest (especially when the defendant was insolvent) as that procedure became available in virtually all cases in which debtors could be found, nor with outlawry of defendants who could not be found, once forfeited property of the outlaw became available to plaintiffs without judgments.¹²³ In addition, the availability of default judgment against defendants who could be served with process undoubtedly played a role in forestalling further development of common law attachment after outlawry had been somewhat tamed by statutes.¹²⁴ Finally, local courts in important commercial centers were already offering garnishment as well as attachment, and were exercising quasi *in rem* jurisdiction. "As Marius points out in his Preface, 'the right dealing merchant doth not care how little he hath to do in the common law or things of that nature.'"¹²⁵

Although cases involving bills of exchange do not begin to appear in the common law courts until 1603,¹²⁶ it did not take long, following *Slade's Case*,¹²⁷ for the flow of commercial cases into the common law courts to become a torrent.

recto," Coke says: "This plea was after the statute of Magna Charta, anno 9 H. 3. Of these words *hus* and *haut*, two French words. *Hus* signifying an elder-tree, and *haut* the staffe of halbert, &c, I leave the conjecture that some have made thereof to themselves: we think it was then common bail now changed to *Do* and *Ro* . . ." 4 COKE'S INSTITUTES 72.

122. See p. 60 *supra*.

123. *Distringas*, rather than *capias*, sometimes was used when the defendant possessed a freehold within the shire. Hastings explains this on the basis that, "To a freeholder, the prospect of long-continued loss of small amounts in distraint would probably be quite as unpleasant as would be the prospect of arrest to a man unencumbered by worldly goods." M. HASTINGS, *THE COURT OF COMMON PLEAS IN FIFTEENTH CENTURY ENGLAND 171-72* (1947).

124. See p. 83 *infra*.

125. R. STEFFEN, *CASES ON COMMERCIAL INVESTMENT PAPER 4* (2d ed. 1954).

126. *Id.* 1. The case is *Martin v. Bourne*, Cro. Jac. 6, 79 Eng. Rep. 6 (K.B. 1602-03). Professor Aigler says that this apparently is the first such case. R. AIGLER, *CASES ON THE LAW OF BILLS AND NOTES 4* (2d ed. 1955).

127. 4 Co. Rep. 92b, 76 Eng. Rep. 1074 (K.B. 1602-03). The same case is reported in Sty. 138, 82 Eng. Rep. 592.

During the seventeenth century the decisions of Lord Holt and Lord Mansfield introduced into English Common Law most of the customs and usages of English merchants, and the Law Merchant became an integral part of the common law of the realm, and the common law courts practically the only courts where commercial cases were decided . . . England had by the seventeenth century already begun to transfer the jurisdiction over commercial cases to the ordinary law courts, and by the eighteenth century the process was practically complete . . .¹²⁸

It is my belief that the merchants who brought these cases to the common law courts generated much of the pressure that resulted in increases in the effectiveness of mesne process, and that such improvements in turn hastened the flow of mercantile cases to the common law courts. We shall next examine a common law procedure whose importance in this latter respect is too often ignored today: the process of outlawry.

II. Outlawry and the Defendant Beyond the Reach of Process

A. *Outlawry: Its Early Form as Criminal Process*

Outlawry was "the last terrible weapon of ancient law,"¹²⁹ and was a remedy "as clumsy as it was terrible."¹³⁰ It was one of two tools—the other was arrest—by which the law of civil process was drastically and dramatically changed during the common law period. It came into the law of England long prior to the Norman Conquest¹³¹ as a crude and barbaric method of dealing with criminals, both actual and suspected. By the early thirteenth century it had become restricted to cases in which defendants accused of felony or treason failed to appear to appeals or indictments after having been "exacted" or commanded to come in for the requisite number of terms of court. Upon the dread proclamation of outlawry, such dire consequences resulted as corruption of blood, escheat of lands, forfeiture of chattels, and, as if that were not enough, a one-way trip to the gallows without further trial. The outlaw was so far beyond the protection of the law that he could—at least prior to the thirteenth century—be slain on sight and with impunity by any person.¹³²

128. Tudsberry, *Law Merchant and the Common Law*, 34 L.Q. REV. 392, 399 (1918), quoting W. MITCHELL, AN ESSAY ON THE EARLY HISTORY OF THE LAW MERCHANT 77 (1904).

129. 1 POLLOCK & MAITLAND 476.

130. 2 *id.* 581.

131. 1 *id.* 476.

132. *Id.*

B. *Outlawry Becomes Part of Civil Process*

Trespass is often described as "the mother of actions"; it spawned the action of trespass on the case, from which grew such causes as *assumpsit* and *trover*, supplanting older and less efficient forms of *action*. It is less known as the bridge by which outlawry made its way from the criminal law into the law of civil process and partially replaced less efficient forms of *process*, such as *attachment* and *distringas*. Because of the close affinity of the criminal and the civil actions of trespass¹³³ it is not surprising that, in the thirteenth century, a modified form of outlawry should become available in personal actions of trespass *vi et armis* in which the defendant contumaciously refused to surrender himself to the law when required to do so—either on mesne process (*capias ad respondendum*) or on the final process (*capias ad satisfaciendum*). Outlawry in civil cases was "shorn of such terrors as peril of life, corruption of blood and escheat of lands,"¹³⁴ but it still entailed a number of severe punitive results. The outlaw was subject to arrest under a "general" writ of *capias utlagatum* or under a "special" *capias utlagatum* which authorized, in addition to arrest, the confiscation of his goods, chattels, the profits of his land, and, at least by the late sixteenth century, a *scire facias* proceeding through which debts owed to him were confiscated.¹³⁵ The outlaw who attempted to sue could be met with either a plea in abatement based upon his disability to sue while an outlaw, or a plea in bar because the cause of action which had been forfeited was no longer his to sue upon.¹³⁶

It is thus easy to understand why, given the power to "reverse" the outlawry by appearing to the plaintiff's action¹³⁷ and conferring jurisdiction over himself, a defendant might choose to appear rather than to remain an outlaw. Outlawry was made ever more available by stat-

133. Holdsworth calls the civil action of trespass "semi-criminal." 3 HOLDSWORTH 626 (3d ed. 1927).

134. PLUCKNETT 385.

135. E.g., *Beverley's Case*, Moo. K.B. 241, 72 Eng. Rep. 555 (K.B. 1587), wherein the Queen, as successor to the property forfeited by Beverley when he was outlawed, successfully maintained *scire facias* to execute a judgment which had been obtained by Beverley prior to outlawry. An intimation that specialty debts were forfeited at an earlier date is to be found in a nameless case in 3 Dyer 262a, 73 Eng. Rep. 582 (Star Ch. 1567), wherein it was argued that there should be no forfeiture to the Crown of a debt "upon a contract and not be specialty" when a man becomes a *felo de se* (a "felon of himself" by suicide). See also W. TIDD, THE PRACTICE OF THE COURT OF KING'S BENCH 55, 64 (1791); T.G. OF STAPLE INNE, *supra* note 88, at 33. As will be seen later, until the early 17th century some cases held that debts on simple contracts did not pass to the Crown. See p. 87 *infra*.

136. See *Markham v. Pitts*, 3 Leo. 205, 74 Eng. Rep. 635 (K.B. 1588); *Barnard's Case*, Ow. 22, 74 Eng. Rep. 871 (K.B. 1595).

137. T.G. OF STAPLE INNE, *supra* note 88, at 33; 3 BLACKSTONE *284. For an excellent discussion of the various methods of reversal of outlawry in the fifteenth century, see HASTINGS, *supra* note 123, at 180.

ute in actions of account (1285),¹³⁸ debt, detinue and replevin (1350),¹⁴⁰ trespass on the case (1503),¹⁴⁰ and covenant, annuity and forcible entry (1531),¹⁴¹ and the reports swelled with cases of outlawry upon civil process.

C. *Further Development of Outlawry as a Plaintiff's Remedy*

"Even in the thirteenth century there were many cases in which a person might be outlawed without ever having heard of the proceedings."¹⁴² By 1589, the practice of procuring "secret outlawries in actions personal against the Queen's subjects" through proceedings and proclamations "remote from their dwellings" where "they have not any convenient notice of such suits against them" had become so widespread as to evoke a statute¹⁴³ setting forth elaborate procedures designed to overcome the oppression of defendants. This statute not only added to the clumsiness of outlawry procedure but contained the seeds of its own partial destruction. After setting forth the procedure to be followed, it provided that

before any writ of error, or reversing of any outlawry be had by plea or otherwise, through or by want of any proclamation to be had or made according to the form of this statute, . . . the defendant . . . in the original action shall be put in bail, not only to appear and answer to the plaintiff in the former suit, in a new action to be commenced by said plaintiff for the cause mentioned in the first action, but also to satisfy the condemnation

Thus, although it relieved defendants from the abuses of secret outlawry, the statute at the same time tended to compel submission to other forms of process.¹⁴⁴ The plaintiff was in theory required to follow the statute, but if he failed to do so and instead secretly outlawed the defendant, the defendant was in a dilemma. If he failed to procure the setting aside of the outlawry or its reversal, he might suffer forfeiture; to reverse the outlawry or have it set aside for want of proclamation, he must furnish bail to an action on the plaintiff's cause, thereby subjecting himself to possible judgment. And the bail required of the defendant under the Act of 1589 was extraordinary in its nature.

138. The Statute of Westminster The Second of 1285, 13 Edw. 1, stat. 1, c. 11.

139. 25 Edw. 3, stat. 5, c. 17.

140. 19 Hen. 7, c. 9.

141. 23 Hen. 8, c. 14.

142. 3 HOLDSWORTH 605 (3d ed. 1927).

143. 31 Eliz. 1, c. 3 (1589).

144. This result was recognized in the case of *Wilbraham v. Doley*, 12 Mod. 545, 88 Eng. Rep. 1508 (K.B. 1701).

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Whereas ordinary bail above (sureties) agreed to surrender the defendant or to pay the condemnation,¹⁴⁵ the Act of 1589 denied the bail such an election, and required them to be answerable at all events for the condemnation money in the new action.¹⁴⁶ Although the defendant could avoid the requirement of such "absolute" bail by reversing the outlawry through writ of error asserting some "common law error in fact" such as his having been "beyond the sea" during the outlawry proceedings, he was still required to put in bail "in ordinary form; giving the bail the power of rendering."¹⁴⁷ This has been referred to as "a very good project to get bail from a foreigner."¹⁴⁸

These procedures gave rise to such abuses of process that, in 1692, Parliament noted that

divers persons are prosecuted in said court of King's Bench to outlawries for debts, trespasses, and other misdemeanors, and there is no reversing such outlawries but by the personal appearance of the persons outlawed, so that the persons arrested upon such outlawries (if poor) lie in prison till their deaths, but if able, it costs them very dear to reverse the same outlawries¹⁴⁹

The Act of 1692 permitted persons outlawed in civil actions to appear by attorney and reverse their outlawries without bail "except where special bail shall be ordered by the said court," and permitted persons already in custody to obtain their freedom by making special bail. It was thus undoubtedly a product of the same sentiments that later resulted in the Frivolous Arrest Act of 1725.¹⁵⁰

145. In *Wilbraham v. Doley*, 12 Mod. 545, 88 Eng. Rep. 1508 (K.B. 1701), an outlaw was permitted to reverse his outlawry by writ of error upon putting in "bail to answer the condemnation, or render his body." The court contrasted this bail with the absolute bail under 31 Eliz. 1, c. 3 (1589), saying, "for as the statute made a new error for the advantage of the outlawed person, so it thought to recompense that with another to the creditor, that in that case he should have good bail to his action." The reader should be cautioned not to infer that, because the bail under 31 Eliz. 1, c. 3 is referred to as "good bail," the bail actually ordered upon writ of error in *Wilbraham v. Doley* in law was "bad" bail. As indicated by the text, a more proper description of bail under the Statute of 31 Eliz. 1 would be "better bail," since the bail thereunder could not avoid liability for the defendant's debt by surrendering him.

146. This feature of 31 Eliz. 1, c. 3 precipitated much litigation and judicial comment. See, e.g., *Hide's Case*, Het. 147, 124 Eng. Rep. 412 (C.P. 1629); *Havelock v. Geddes*, 12 East. 622, 104 Eng. Rep. 242 (K.B. 1810); *Mathews v. Gibson*, 8 East. 527, 103 Eng. Rep. 445 (K.B. 1807); *Campbell v. Daley*, 3 Burr. 1920, 97 Eng. Rep. 1169 (K.B. 1766); *Wilbraham v. Doley*, 12 Mod. 545, 88 Eng. Rep. 1508 (K.B. 1701); *Mathews v. Erbo, Carth.* 459, 90 Eng. Rep. 865 (K.B. 1698). See also C. PETERSDORF, A PRACTICAL TREATISE ON THE LAW OF BAIL IN CIVIL & CRIMINAL PROCEEDINGS 444 (1835) [hereinafter cited as PETERSDORF]; SCHRODER, LAW OF BAIL 178 (1824).

147. *Havelock v. Geddes*, 12 East. 622, 104 Eng. Rep. 242 (K.B. 1810).

148. *Mathews v. Erbo, Carth.* 459, 90 Eng. Rep. 865 (K.B. 1698).

149. 4 & 5 W. & M., c. 18 (1692).

150. It is only in the light of this statute that a time-blurring statement by Holdsworth can be understood:

D. *The Sheriff's Liability*

If the outlaw were taken into custody and the sheriff allowed him to escape, the plaintiff could maintain an action against the sheriff. If the outlawry were upon mesne process, an action of trespass on the case *qui tam* would lie because of the possibility of damage to the plaintiff occasioned by the delay of recovery of his debt—since the outlaw might have procured his release from imprisonment by furnishing security for an appearance to a new original writ brought by the plaintiff on his debt.¹⁵¹ If the outlawry were upon final process, the judgment creditor could maintain an action of debt against the sheriff under statutory provisions of long standing¹⁵² which had been judicially construed as applicable beyond their narrow wording.¹⁵³

E. *Outlawry and Property Beyond the Reach of Other Common Law Process*

Let us now consider the manner in which the law of outlawry became the method by which a plaintiff could eventually reach both the property of a debtor who would not appear to the action or one who would not surrender to *capias ad satisfaciendum*, and debts owed to such a debtor.

It has been pointed out above that, under a special *capias utlagatum*, the goods and profits of land owned by an outlaw could be seized by the Crown, and that upon *scire facias* the Crown could collect debts owed to the outlaw. The extraordinary nature of *capias utlagatum* is illustrated by a case in which the court of King's Bench, while upholding the right of a householder to deny admission to his home to a sheriff armed with a *capias ad satisfaciendum*, observed that had the writ

It is true that, if application were made to set aside the outlawry [on the ground that the defendant was not within the kingdom when the proceedings took place], he must pay the costs of the outlawry, and enter an appearance, so that the object of the outlawry was secured. But, if he chose to take proceedings to get it reversed by a writ of error he need neither pay costs nor enter an appearance; so that "the plaintiff was left in a worse position than he was before the proceedings to outlawry was instituted."

9 HOLDSWORTH 255. Such a "worse position" resulted only as a result of the Statute of 4 & 5 W. & M., c. 18 (1692), and then only in cases in which the court, in its exercise of discretion, denied bail. See PETERSDORF 444.

151. *Bonner v. Stokeley*, Cro. Eliz. 652, 78 Eng. Rep. 891 (K.B. 1599); see also *Whitacres v. Onsley*, 3 Dyer 322b, 73 Eng. Rep. 729 (K.B. 1574).

152. The Statute of Westminster the Second of 1285, 13 Edw. 1, stat. 1, c. 11; 1 Rich. 2, c. 12 (1377).

153. See *Platt v. Lock*, 1 Plow. 35, 75 Eng. Rep. 57 (Ex. 1550). In this case the Barons of Exchequer held that the Statute of 1 Rich. 2, c. 12, which authorized the action of debt against the Warden of the Fleet for the escape of a prisoner taken on execution of judgment, could be "extended by equity" to permit recovery for such an escape from the custody of the Gaolers of Ludgate.

been a *capias utlagatum* the defendant's door legally could have been broken down, because an outlaw is "out of the protection of the law."¹⁵⁴ It is only natural that creditors should have pressed for more direct benefits from such a potent process than its use to induce the defendant to appear or to surrender to *capias*. How much more efficient and certain would be their remedy if they could (1) avoid the necessity of appearance by their debtors, (2) resort directly to the property forfeited to the Crown, and (3) have access to debts owed their debtors, a kind of property which they could not reach by any existing common law process. All three of these objectives had been accomplished by the beginning of the seventeenth century.

We must remember that outlawry could be upon mesne as well as upon final process. It was the combination of outlawry on mesne process and a willingness on the part of the Crown to permit the plaintiff to recover his debt out of the forfeited property, even when the outlawry was upon mesne process,¹⁵⁵ that enabled the accomplishment of the first two of the objectives stated above. By 1602 counsel for a plaintiff could state to the court that "if the Queen by virtue of the *capias utlagatum* has any goods, she is to satisfy the party at whose suit the outlawry came," and Chief Justice Popham did not disagree with the notion of satisfying the plaintiff out of the forfeited goods, although he pointed out that such a procedure was "*de grata* and not *de jure*."¹⁵⁶

By 1718 this procedure had become so commonplace that we find the Lord Chancellor directing the plaintiff (who had brought a bill to subject the outlawed defendant's beneficial interest in an annuity to payment of the plaintiff's debt) to go first and obtain a grant of the annuity from the Crown, which, although "upon application to the Court of Exchequer, he would of course have," he still was required to procure before returning to Chancery for relief.¹⁵⁷ In 1720 we find counsel stating in argument that outlawry "had been held by very learned men to be at first *ex gratia regis* and not *de jure* . . .,"¹⁵⁸ and in 1725 Chancery held that a plaintiff could not maintain a bill of dis-

154. *Seyman v. Gresham*, Cro. Eliz. 908, 78 Eng. Rep. 1131 (K.B. 1602).

155. *Pinfold v. East-India Co.*, 2 Lev. 49, 83 Eng. Rep. 444 (K.B. 1672).

156. *Jennings v. Hatley*, Yelv. 20, 80 Eng. Rep. 14 (K.B. 1602). Cf. *Pimb's Case*, Moore. 196, 72 Eng. Rep. 528 (K.B. 1585), translated in W. CRUISE, AN ESSAY OF USES 47, and found in H. SCOTT & A. SCOTT, CASES ON TRUSTS 286 (5th ed. 1966). In that case land was conveyed to Scudamore and his wife through the medium of a fine to one Throckmorton to the use of Scudamore and wife. Later, Throckmorton was attainted of treason committed prior to the conveyance, and his "instantaneous seisin" was held sufficient to cause the land to be forfeited to the Queen free of the use to the Scudamores. Queen Elizabeth, however, "much to her honor, granted the land to the *cestui que use* by patent."

157. *Balch v. Wastall*, 1 Peere Wms. 445, 446, 24 Eng. Rep. 465 (Ch. 1718).

158. *Throgmorton v. Church*, 1 Peere Wms. 685, 690, 24 Eng. Rep. 571, 573 (H.L. 1720).

covery against the defendant whom he had had outlawed until he had received a grant of the forfeited goods or debts from the Crown.

[T]he Crown is not a trustee for the plaintiff, but it is merely out of grace that the King makes such grant of the goods of persons outlawed to the Plaintiffs who have no manner of right in these goods, until the grant obtained from the Crown¹⁵⁹

By 1829, however, the Parliamentary Commission could report that plaintiffs' petitions to the Lords of the Treasury were consented to by the attorney general "as of course."¹⁶⁰ One can only conjecture as to the exact time when the Crown began to grant the outlaw's forfeited property to the plaintiff so routinely as to render the grant a matter of course. It seems clear, however, that such administrative grants continued to be a necessary formality for plaintiffs to enjoy full judicial status as to the forfeitures well into the nineteenth century.

To turn now to debts, by 1576 it had been established that the Queen was entitled, as successor to the property forfeited by an outlaw, to maintain a *scire facias* to execute a judgment which had been obtained by him prior to outlawry,¹⁶¹ and a dictum in 1587¹⁶² suggests that the King had been taking debts upon specialties upon outlawry of their owners.¹⁶³ When added to the tangible property forfeited by the outlaw, such intangibles sometimes made up sufficient assets to pay the plaintiff.

Possibly by 1655,¹⁶⁴ and at least by 1725,¹⁶⁵ outlawry had become sufficiently recognized as a formal creditor's remedy to enable the plaintiff to maintain a bill in equity to discover what goods of the outlaw were in the hands of a third party, even though the plaintiff did not show by his bill that he had yet received from the Crown a grant of these goods or of any debt owed the outlaw. This procedure was called, in 1867, a "barbarous and roundabout sort of foreign attachment."¹⁶⁶ The plaintiff also could obtain from Exchequer a lease

159. ——— v. Bromley, 2 Peere Wms. 269, 24 Eng. Rep. 725 (1725).

160. FIRST REPORT 91.

161. See *Beverley's Case*, Moo. 241, 72 Eng. Rep. 555 (K.B. 1576).

162. *Markham v. Pitts*, 3 Leo. 205, 74 Eng. Rep. 635 (K.B. 1588).

163. The forfeiture of debts upon simple contracts was in doubt until the beginning of the seventeenth century. See pp. 87-89 & notes 169-77 *infra*.

164. In *The Protector v. Lumley*, Hardr. 22, 145 Eng. Rep. 360 (Ex. 1655), it was held that the Attorney General could maintain a bill against an outlaw to discover his estate and his fraudulent conveyances, "because the Protector is entitled to his estate by course of law; and the outlawry is in the nature of a gift to the King, or a judgment for him. And a common person may have a bill of discovery in the like case, to enable him to take out execution"

165. ——— v. Bromley, 2 Peere Wms. 269, 24 Eng. Rep. 725 (1725).

166. *Mayor and Aldermen v. Cox*, L.R. 2 H.L. 239, 272 (1867).

of the outlaw's lands or a grant of the King's right to levy upon the profits. Money in the sheriff's hands as the result of forfeiture incidental to outlawry could be obtained by the plaintiff through application to the Court of Exchequer for an order to the sheriff to pay what he held to the plaintiff in satisfaction of his debt. If the amount sought by the plaintiff exceeded £50, he was required to obtain approval of an application to the Lords of the Treasury prior to procuring Exchequer's order to the sheriff to pay him the money.¹⁶⁷ Such a procedure is reminiscent of the return of stolen property to the owner after a successful claim of robbery or larceny brought by him, and well may have grown out of such a practice, or out of the same philosophy.¹⁶⁸

F. *Outlawry's Possible Role in the Development of Indebitatus Assumpsit*

Although debts upon specialties were forfeited to the Crown upon the outlawry of the creditor, some cases prior to the seventeenth century had held that debts upon sealed contracts were not so forfeited.¹⁶⁹ The distinction grew out of the difference in mode of trial of the several different pleas of general issue which were used in actions of debt on a specialty and debt on a contract. It is at least possible that this difference of treatment in outlawry was partly responsible for the revolutionary development of the *indebitatus assumpsit* action in the handling of contract cases.

In debt on a specialty, if the instrument was valid at law, the plea of general issue, *non est factum*, put in issue only the question whether the seal on the instrument was that of the defendant.¹⁷⁰ This issue was tried by a jury composed of persons at least some of whom probably would know the seal of the defendant.¹⁷¹ In debt on a contract, on the other hand, the plea of general issue, *nihil debet*, permitted the defendant to "wage his law," that is, to deny the indebtedness by oath aided by compurgators or "oath-helpers" who would swear that they believed the defendant's oath.¹⁷² Such a practice probably made sense in its

167. W. TIDD, *supra* note 135. FIRST REPORT 91.

168. See generally 2 HOLDSWORTH 361. It is interesting to note that, until 1529, the stolen property went to the Crown when the conviction was upon indictment. See also 21 Hen. 8, c. 11 (1529).

169. *Shaw v. Cutteris*, Cro. Eliz. 850, 78 Eng. Rep. 1076 (K.B. 1599); *Barnard's Case*, 74 Eng. Rep. 871 (K.B. 1595) (dictum); *Markham v. Pitts*, 3 Leo. 205, 74 Eng. Rep. 635 (K.B. 1588) (dictum). See also authorities cited note 177 *infra*.

170. H. STEPHEN, PLEADINGS 279 (2d ed. J. Andrews 1901); PLUCKNETT 633, n.3; C. FIFOOT, HISTORY AND SOURCES OF THE COMMON LAW 232 (1949).

171. H. STEPHEN, *supra* note 168, at 261.

172. *Id.* 235-36.

original context, when such contracts and their satisfaction were likely to be oral and witnessed only by the parties, and when oaths were not lightly taken.¹⁷³ The development of *indebitatus assumpsit* is generally explained as a device for circumventing wager of law which, by the time of *Slade's Case* in 1601,¹⁷⁴ had become an unreliable mode of trial because "in these days so little consideration is made of an oath . . ."¹⁷⁵ *Slade's Case* decided that every debt imports an "assumpsit" or promise to pay, and made the action of *indebitatus assumpsit* available as an alternative remedy to debt on an unsealed contract to pay a sum certain. This new remedy, as an outgrowth of trespass on the case, did not permit the defendant to wage law as a defense, but put the issues to a trial by jury. The desirability, from the plaintiff's point of view, of avoiding the risk of wager of law is of course undeniable. There may, however, have been an additional reason for circumventing such an important defendant's right.

Since a party could not wage his law against the King,¹⁷⁶ a forfeiture to the Crown of debts upon simple unsealed contracts owed to outlaws would deprive their debtors of the valuable right to wage law as a defense against the claims of the Crown. The obvious unfairness of depriving such debtors of this right solely because of the misconduct of their outlawed creditors resulted in decisions that debts subject to wager of law were not forfeited to the Crown. With the appearance of *indebitatus assumpsit* there no longer was any reason for such debts not to go to the King, and the old rule to the contrary disappeared.

It is possible, of course, that this extension of forfeiture was simply an incidental byproduct of the new remedy. But it seems reasonable to assume that the justices in *Slade's Case* were at least influenced by the Crown's and creditors' interest in making it possible for debts owed to outlaws on unsealed contracts to be forfeited. I suggest that the possibilities of new forfeitures played their part in precipitating *Slade's Case*, although dissatisfaction with compurgation probably was the principal moving force behind the decision. An examination of the report of the case reveals that the participants discussed at some length

173. For a fine exposition of this subject see *id.* 537. See also POTTER 318.

174. 4 Co. Rep. 92b, 76 Eng. Rep. 1074 (K.B. 1601). Fifoot places the case in the year 1602 and Ames places it in 1603. C. FIFOOT, *supra* note 170, at 371; J. AMES, *LECTURES ON LEGAL HISTORY* 145 (1913). Coke's Reports, however, gives the term at which the pleadings were settled as Hillary, 38 Elizabeth, which would be in January, 1595, and the term at which the opinion was rendered as Trinity, 44 Elizabeth, which would be May-June, 1601. For dating of English cases, see M. PRICE AND H. BITNER, *EFFECTIVE LEGAL RESEARCH* 421 (1953).

175. *Slade's Case*, 4 Co. Rep. 92b, 95b, 76 Eng. Rep. 1074, at 1079 (K.B. 1601).

176. *Id.*

the interrelationship between wager of law and forfeiture of property which has been described above, and that forfeiture upon outlawry was expressly considered. The report also indicates that earlier instances had been adduced of forfeitures which had caused debtors to be "ousted of their law." These obscure cases,¹⁷⁷ none of which is stated to be a case of forfeiture upon outlawry, were apparently referred to as the source of a "doubt in our books" on the subject at hand, to help explain the significance of the resolution of that doubt through approval of a procedure which it was clearly understood would result in a forfeiture of simple contract debts. I would emphasize that the court, in permitting trespass on the case to be used as an alternative remedy to debt on a contract, demonstrated in its opinion a complete awareness of the effect its decision would have in approving, if not establishing for the first time, the forfeiture of such debts. Is it not reasonable to assume that this wholly anticipated *effect* was in fact one of the *causes* of the decision?

G. *The Deficiencies of Outlawry as a Civil Process*

Many of the deficiencies of outlawry should be clear from the foregoing discussion. Writing in 1829, a Parliamentary Commission commented that "[t]he practice of Outlawry is one of those abuses which are prejudicial to the rights of *both* the contending parties. If it inflicts on the plaintiff the evils of delay and expense, it subjects the defendant on the other hand, to surprise and oppression."¹⁷⁸ As to delay, it appears that the process of outlawry required at least twelve and sometimes thirty months,¹⁷⁹ during which time insolvency of the defendant could destroy the plaintiff's chances of collecting his debt and leave him with a large bill for court costs.¹⁸⁰ In the early nineteenth century, merely to proceed to outlawry cost the plaintiff, exclusive of the price of his original writ (and a plaintiff who would outlaw his defendant was *required* to proceed by original writ rather than by bill¹⁸¹) a "low average" of £17.¹⁸² To proceed all the way to a final collection through outlawry would cost him £40 or more.¹⁸³ Outlawry also entailed the

177. The following are cited in *Slade's Case* as "sudden opinions" apparently against forfeiture of simple contract debts: "49 E. 3. 5. 50 Ass. 1. 16 E. 4. 4. and 9 Eliz. 262" 4 Co. Rep. at 95a, 76 Eng. Rep. at 1079. A footnote tells us that the last citation is Dyer 262 (73 Eng. Rep. 582 (Star. Ch. 1567)).

178. FIRST REPORT 93.

179. 1 POLLOCK & MAITLAND 539.

180. FIRST REPORT 92.

181. *Id.* 90.

182. *Id.* 92.

183. *Id.*

possibility of reversal by the defendant, who could obtain restoration of his property or its proceeds up to the very time they were transferred to the plaintiff.¹⁸⁴ Outlawry was thus unfair, expensive, dilatory, and uncertain. Yet for centuries it was the most effective process available against defendants in some situations.

H. *Jurisdiction Over Defendants Not Personally Served With Process*

By the seventeenth century, then, outlawry had become a means whereby a plaintiff could reach property, including debts, confiscated under special *capias utlagatum* in cases where (in theory but not always in actuality) the defendant was evading arrest.¹⁸⁵ As we have seen, however, there were great disadvantages to such a procedure from the plaintiff's point of view. An alternative in the superior courts was finally established in 1811¹⁸⁶ by a statute which provided that, in cases begun by original writ in which no *capias* was issued, where the defendant could not be met with for personal service, the plaintiff was permitted to obtain a writ of *distringas* under which the defendant's chattels and the issues of his land were seized, and the summons left at his abode. After taking such steps, the plaintiff was authorized to enter an appearance for the defendant and to obtain both an *in personam* judgment against him and satisfaction out of the property distrained. Constructions of this statute and its 1827 successor¹⁸⁷ in Common Pleas and in Exchequer, however, rendered them cumbrous in application to all defendants and useless as against defendants who were merely absent, as, for example, those abroad on protracted business. These courts required an affidavit from the plaintiff stating "that he believes the defendant has kept out of the way to avoid service," and required three attempts to serve the defendant personally at his abode, the last time being on the return day, before the writ of *distringas* would issue.¹⁸⁸ It is reported that, as a result plaintiffs often preferred the older method of common law *distringas* with its writ of *distress infinite*.¹⁸⁹

The situation as it existed in 1829 was described as follows by a Parliamentary Commission:

184. *Id.*

185. *Pinfold v. East-India Co.*, 2 Lev. 49, 83 Eng. Rep. 444 (Ex. 1672).

186. 51 Geo. 3, c. 124 (1811). The statute was extended to November 1, 1823, and thence to the end of the next session of Parliament by 57 Geo. 3, c. 101 (1817).

187. 7 & 8 Geo. 4, c. 71 (1827).

188. FIRST REPORT 87.

189. *Id.*

It will be observed, that the different modes of . . . operation [of statutory and common law *distringas*], as above explained, all suppose, either that the defendant may be personally found within the jurisdiction (that is, within the limits of England and Wales, and Berwick-upon-Tweed,) or that he has some known place of abode there, and some property against which a statuable *distringas* may issue; or that he at least has property on which the plaintiff may act by the method of distress infinite. But if the case be supposed of his being absent from the realm, and without a known place of abode or property in this country, on which a *distringas*, either statuable or at common law, can be executed, the plaintiff has then no means of compelling an appearance, except by proceeding to *Outlawry*.¹⁹⁰

Although the Uniformity of Process Act of 1832¹⁹¹ permitted the plaintiff to proceed to judgment and execution against defendants not personally served, even though the writ of *distringas* were returned *non est inventus* and *nulla bona*, it was still tied to a *distringas* procedure. Such a tie-in, while not expressly restricting the operation of the statute to residents of England, quite likely was intended to do so, for *distringas* is the kind of remedy which by its very nature seems to be directed at residents.¹⁹² Twenty years later, in contrast, the Common Law Procedure Act of 1852 provided for initiating actions for breach of contracts "made within the jurisdiction" against British subjects and aliens residing beyond the jurisdiction of the Superior Courts (except in Scotland or Ireland).¹⁹³ Upon affidavit that the writ had been personally served or that "reasonable Efforts were made to effect personal Service . . . and . . . it came to his [defendant's] knowledge," and that the defendant either "wilfully neglects to appear" or is "living out of the Jurisdiction . . . in order to defeat and delay his Creditors," the court could proceed to have the amount of the debt or damages ascertained by a jury under a writ of inquiry or by a master, according to the nature of the case, and render judgment accordingly.¹⁹⁴ "Bracton indeed had argued that debts and damages ought to be levied from a defaulter's personal property, but (as Maitland remarked) it took six hundred years for his view to prevail,"¹⁹⁵ except by the tortuous route of outlawry.

190. FIRST REPORT 90.

191. Uniformity of Process Act of 1832, 2 Will. 4, c. 39.

192. See note 123 *supra*.

193. 15 & 16 Vict., c. 76, §§ 18, 19. The modern version of this act is to be found in Rules of the Supreme Court of Judicature, Part XII, Order XI. This modern version is much broader than the original, and permits jurisdiction to be based on a wide variety of situations giving England a substantial connection with the cause.

194. *Id.*

195. PLUCKNETT 386.

The problem of defendants beyond the jurisdiction of the court elicited similar developments in Chancery procedure during the nineteenth century. In 1832, Parliament enacted a statute to correct the "great inconvenience and delays of justice" arising "from the defect of jurisdiction in courts of Equity to effectuate the service of their process" in parts of the United Kingdom which were beyond their jurisdiction.¹⁹⁶ Although this statute and an 1834 act extending its scope¹⁹⁷ were restricted to specified classes of suits concerning land or government and public corporations, further extensions of jurisdiction over nonresident defendants were not long in coming. An act of 1840¹⁹⁸ granted the Lord Chancellor authority to promulgate rules and orders of court, including rules effecting changes "generally in the form and mode of proceeding to obtain relief, and in the general practice of the Court in relation thereto."¹⁹⁹ In 1845, pursuant to this statute, the Chancellor promulgated a general order unqualifiedly permitting a plaintiff to enter an appearance for a defendant who had failed to enter one for himself after service of subpoena upon him in any "place or country."²⁰⁰ It should be noted that this 1845 order was broader than the 1832 and 1834 statutes mentioned above in two particulars. First, it was not restricted as to the kind of suit to which it applied; second, it permitted service of subpoena anywhere in the world. Until the case of *Drummond v. Drummond*²⁰¹ in 1866, however, judicial thought was split as to whether the general orders of 1845, as incorporated in a general order of 1860,²⁰² was effective according to its broad terms or whether it was to be restricted to the kinds of suits specified in the 1832 and 1834 statutes. *Drummond v. Drummond* held that Parliament had in fact delegated the more general power to the Chancellor and that the orders were effective as written. The opinion of Sir G. J. Turner, L.J., in that case is of particular interest in its discussion of the limits upon the *inherent* power of the court:

[prior to the 1845 rule based upon the 1840 Act] subpoenas could be and were served out of the jurisdiction of the Court, and

196. 2 Will. 4, c. 33.

197. 4 & 5 Will. 4, c. 82.

198. 3 & 4 Vict., c. 94. This law was amended in 1841 in particulars not relevant here.

4 & 5 Vict., c. 52.

199. Under this statute, such rules and orders were "of like Force and Effect, as if the Provisions contained therein had been expressly enacted by Parliament, unless the same shall, by Vote of either House of Parliament, be objected to."

200. General Orders in Chancery of May 8, 1845, Order 33.

201. L.R. 2 Ch. App. 32 (1866). See this case for a review of the conflicting authorities on the subject.

202. In 1860, the 33rd General Order of May 8, 1845 was brought forward as Rule 7 of Order 10 of the Consolidated Orders in Chancery of 1860.

. . . if the party served appeared to the suit in consequence of the service, the service was effectual, and the suit could proceed against the party, but . . . if the party served did not appear upon the subpoena, the service could not be made effectual, and the suit could not be proceeded in against the party served. There was at this time no such practice as that introduced by the Orders of the 8th of May, 1845, of entering an appearance for a Defendant at the instance of the Plaintiff.

. . . Was it then competent to the Court, by force of its general powers to alter this practice, and to render the service of a subpoena out of the jurisdiction of the Court effectual, either by authorizing an attachment to be issued in default of appearance, or by giving the Plaintiff the right to enter an appearance upon default? I am disposed to think that it was not, for to have done so would have been not to alter the process of the Court, but to give an effect to the subpoena, the Queen's writ, which the writ, not being available beyond the jurisdiction, did not of itself possess. So far, therefore, as this order rested upon the *general* powers of the Court, I think it was of no avail, and the validity of the order must, therefore, depend upon the statutes.²⁰³

I. *Garnishment Execution Becomes Available; the Demise of Outlawry in Civil Cases*

As we saw earlier, it was only by way of outlawry that debts owed to a defendant could be reached at common law—at first as a purely confiscatory procedure by the Crown, and later as a collection procedure by the plaintiff.²⁰⁴ We also have observed that this was not an entirely satisfactory procedure, because it could be unfair, expensive, cumbersome and uncertain. Nevertheless, it continued to be used for a long time because of the pressure it exerted upon the defendant who could not be served with process to appear and confer jurisdiction over himself, and because of its eventual use as a means of collecting from non-appearing defendants.

With the passage of the Statute of 1811,²⁰⁵ however, followed by the Statute of 1827,²⁰⁶ the Uniformity of Process Act of 1832,²⁰⁷ and the Common Law Procedure Act of 1852,²⁰⁸ making possible *in personam* judgments against non-appearing defendants not personally served within the jurisdiction, the first of these needs for outlawry disappeared. It did not take long for the practice to disappear as well. In the five

203. *Drummond v. Drummond*, L.R. 2 Ch. App. 32, 43 (1866) (emphasis added).

204. Pp. 85-86 *supra*.

205. 51 Geo. 3, c. 124. See p. 90 *supra*.

206. 7 & 8 Geo. 4, c. 71.

207. 2 Will. 4, c. 39.

208. 15 & 16 Vict., c. 76.

years between 1823 and 1827, out of a total of 398,464 actions brought in the superior courts in England, only 788 cases resulted in outlawry of the defendants.²⁰⁹ In 1854 Parliament finally provided formally for garnishment execution²¹⁰ and, in 1879, outlawry was abolished in the United Kingdom "in or in consequence of any civil proceeding . . ."²¹¹

Although garnishment execution (a *final* process) was provided for in 1854, garnishment as a *mesne* process has not yet been established in the superior courts. This omission has been explained by a member of the House of Lords as follows:

Indeed there is good reason to believe that the Legislature advisedly abstained from adopting foreign attachment [garnishment] upon mesne process, as being a retrograde step toward imprisonment for debt before judgment, in cases where the debt was disputed.²¹²

III. Conclusion

The evidence I have been able to examine convinces me that Professor Ehrenzweig's "power myth" thesis is incorrect, especially as regards his belief that the "power doctrine" of *Pennoyer v. Neff* is historically wrong. The common law courts neither exercised nor believed they could exercise jurisdiction in personal actions without either physical custody of the defendant or an appearance by him. The history of mesne process at common law is largely concerned with the methods by which one or the other of these events was brought about.

The principal common law mesne processes were attachment, distringas, arrest, and outlawry. Once arrest had displaced attachment and distringas as the leading mesne process of the superior courts, there were two popular methods of proceeding against one's debtor. If the debtor could be found, arrest in connection with a Bill of Middlesex or its equivalent was the preferred procedure in most cases. If the debtor could not be reached in person, outlawry was the plaintiff's only recourse until the nineteenth century. From both the plaintiffs' and the defendants' standpoints these processes were unsatisfactory in many respects and were slow to improve. Prior to the advent of the Bill of

209. FIRST REPORT 202.

210. Common Law Procedure Act of 1854, 17 & 18 Vict., c. 125, §§ 60-67; modified by Common Law Procedure Act of 1860, 23 & 24 Vict., c. 126, §§ 28-31.

211. Civil Procedure Acts Repeal Act of 1879, 42 & 43 Vict., c. 59, § 3. Outlawry was not abolished in criminal proceedings until 1938. Administration of Justice (Mis.) 1 & 2 Geo. 6, c. 63, § 12.

212. *Mayor and Aldermen v. Cox*, L.R. 2 H.L. 239, 272 (1867) (Willies, J.).

Mesne Process in Personal Actions

Middlesex, arrest was not available to most plaintiffs, and prior to the statutes extending the scope of civil outlawry, the same was true of that process. Both processes could be, and often were, slow, expensive, involved, and uncertain of outcome. Moreover, until the coming, probably in the late sixteenth century, of *de grata* application to the plaintiff's debt of property forfeited by outlaws,²¹³ and the early nineteenth century statutable distringas and cash deposit procedures,²¹⁴ the flouting of process enriched the King, but not the plaintiff. Until the Frivolous Arrest Act of 1725,²¹⁵ no judgment *nihil dicit* could be rendered for the plaintiff against a defendant in a personal action unless he either was in custody of the law or had entered an appearance, which the plaintiff could not do for him without his consent. Until the Act of 1811,²¹⁶ no judgment save of outlawry could be rendered against a defendant who could not be served personally, and even then only against persons resident within the jurisdiction of the superior courts, who had distrainable property and were evading process.²¹⁷ Jurisdiction over non-residents who could not be served within the realm was provided for by statute in 1852 as to contracts made by them within the jurisdiction.²¹⁸

Garnishment, as such, was not provided for in superior court procedures, although garnishment execution was authorized by the Common Law Procedure Act of 1854.²¹⁹ There was, however, a sort of round-about garnishment and garnishment execution with the advent, probably in the late sixteenth century, of *scire facias* in connection with outlawry of persons owing debts,²²⁰ although then only as to defendants who would not render their bodies in response to mesne or final process. Attachments, moreover, could be dissolved by a defendant's entering an appearance. If the defendant was arrested, special bail could be required; but special bail might be little aid to plaintiff, for the bail could discharge themselves by arresting the defendant and rendering him into custody. Furthermore, the special bail might themselves become insolvent, or the surrendered and imprisoned debtor's assets might not be discoverable and the debtor might prefer jail to payment of his debt. There is dramatic evidence that, until *peine forte et dure*

213. Cf. *Pinfold v. East-India Co.*, 2 Lev. 49, 83 Eng. Rep. 444 (Ex. 1672).

214. 43 Geo. 3, c. 46 (1803); The Imprisonment for Debt Act, 7 & 8 Geo. 4, c. 71 (1827).

215. 12 Geo. 1, c. 29.

216. 51 Geo. 3, c. 124.

217. See FIRST REPORT 87.

218. The Common Law Procedure Act of 1852, 15 & 16 Vict., c. 76.

219. 17 & 18 Vict., c. 125, §§ 60-67.

220. See *Beverley's Case*, Moo. 241, 72 Eng. Rep. 555 (K.B. 1576).

was abolished in 1772,²²¹ some persons accused of crime preferred torture and even death to the risk of conviction by jury and forfeiture of property to the Crown.²²²

Thus we find that the only way property of a debtor could be reached for *direct* satisfaction of an unsecured debt was through some form of execution. But execution required a judgment, and judgment required jurisdiction, and the exercise of jurisdiction over a non-appearing defendant was late to arrive on the legal scene. The reluctance of the common law courts to exercise such jurisdiction stemmed in part from a feeling that, until the debt was proved, the plaintiff had no business disturbing the property of the defendant²²³ (at least so long as he had not been outlawed). The King (as represented by his court) could seize the defendant's property to redress the contempt of his authority represented by the defendant's failure to obey the summons or exigent, but by entering an early appearance, the defendant could prevent even this molestation of his property as well as his possible outlawry. Attachment and *distringas* might eventually, to be sure, have been modified so as to provide provisional security which would survive the appearance of the defendant and be available for satisfaction of any judgment obtained against him. The rise of arrest and the consequent disuse of attachment and *distringas*, however, effectively prevented such an expansion of their use.

When we look back upon the long and tortuous evolution of efficient creditors' remedies under the common law, we can understand why local courts, which had been acting quasi in rem for many years, which acted with dispatch, and which allowed garnishment of debts owed a defendant, were popular with creditors seeking simple debt collection.

The seventeenth and eighteenth centuries saw the steady development of more effective process, but it was a development by evolution, nearly always involving modifications of and accretions to existing forms. As a result, the reforms in process which were achieved were heavily burdened with barnacles of the past. A good example of this

221. "An Act for the more effective proceeding against persons standing mute on their arraignment for felony or piracy." 12 Geo. III, c. 20 (1772).

222. See PLUCKNETT 126; J. MARKE, *VIGNETTES OF LEGAL HISTORY* 209 (1965).

223. 1 W. WADE, *ATTACHMENTS* § 2 (1887). *Penoyar v. Kelsey*, 150 N.Y. 77, 44 N.E. 788 (1896). Except for the New England states and Hawaii, where attachment and garnishment are allowed as of right in most actions for monetary relief (e.g., *CONN. GEN. STAT.* § 52-279 (1958)), the same attitude is reflected in the reluctance of American jurisdictions today to grant such provisional relief without special grounds such as the non-residence, absence or absconding of the debtor. See, e.g., *MISS. CODE ANN.* §§ 2679, 2729 (1942). Under the *UNIFORM ENFORCEMENT OF FOREIGN JUDGMENTS ACT* (1948), levy is allowed immediately after registration of the foreign judgment, undoubtedly in recognition of the fact that the debtor already has had his opportunity to contest the original cause of action.

Mesne Process in Personal Actions

deference to old forms was the insistence of the courts upon the formality of bail entered of record—even in cases of common bail with fictitious sureties—in order to support the court's jurisdiction. The presence of the defendant and his participation in the proceedings were not enough, although they eventually became enough to enable the plaintiff to enter bail for the defendant; the bail entry had to appear of record if the judgment rendered was to be valid. The Frivolous Arrest Act of 1725, while it provided the machinery for a plaintiff to effect his defendant's appearance in court by mere "serviceable" (non-bailable) process, did so within the framework of the old arrest and bail procedure. Not until the enactment of the great nineteenth century procedural statutes and the promulgation of new court rules under their authority did the old forms change in any fundamental respect. With the new statutes and rules, however, there finally came a more direct and candid approach to the old problems of getting jurisdiction over defendants who could be found for service of process, as well as over defendants who could not be found and over debts owed to them.

Appendix

SUPERIOR COURT CHRONOLOGY

Century

- 13th Civil outlawry in trespass.
Civil outlawry in account (1285 Act).
- 14th Jurisdiction asserted over prisoners on bills for personal actions.
Civil outlawry in debt, detinue & replevin (1350 Act).
- 15th Special bail as right of defendant (1444 Act).
Bill of Middlesex.
- 16th Civil outlawry in trespass on the case (1503 Act).
Civil outlawry in forcible entry (1531 Act).
Debts of outlaws forfeited to Crown: judgments (by 1576); specialties (by ?).
Common bail in cases under £10 (by 1582 Rule of C.P.).
"Absolute" bail required to reverse outlawry for want of proclamation (1589 Act).
Forfeited property available to satisfy plaintiff, *de grata*.
- 17th *Slade's Case* (1601): assumpsit for contract debt; contract debts forfeited by outlaws.
Assignment of bail bond when D does not appear; becomes commonplace (by 1683).
Arrest becomes usual mode of process (by 1683).
Outlaw can reverse (a) through attorney, (b) without bail, unless ordered by court (1692 Act).

- Sheriff liable in trespass on the case when D, out on bail, fails to appear (1699).
- 18th Assignment of bail bond below, when D defaults, becomes P's right (1705).
- Frivolous Arrest Act of 1725—"serviceable" process; default judgment.
- 19th Cash deposit by D permitted in lieu of bail; P can enter D's appearance, apply deposit to judgment (1803 Act).
- Distringas & abode service v. D, with distrainable property, evading service (1811 Act).
- Distringas & abode service v. D, without distrainable property, evading service (1832 Act).
- Civil arrest abolished except by court order; summons begins nearly all civil actions (1838 Act).
- Garnishment execution (1854 Act).
- Outlawry abolished in civil cases (1879 Act).

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