

April 2012

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### Recommended Citation

Lloyd Bonfield, *Finding Women in Early Modern English Courts: Evidence from Peter King's Manuscript Reports*, 87 Chi.-Kent L. Rev. 371 (2012).

Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol87/iss2/5>

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## FINDING WOMEN IN EARLY MODERN ENGLISH COURTS: EVIDENCE FROM PETER KING'S MANUSCRIPT REPORTS

LLOYD BONFIELD\*

### INTRODUCTION

This article constitutes a preliminary report, that is to say, initial reflections on cases involving women, on a work in progress: the preparation of an edition of Peter King's Common Pleas manuscript (hereafter "King manuscript") reports to be published by the Selden Society.<sup>1</sup> Before undertaking the "search" for women in early modern English courts, a cursory word about the larger project is in order. The Selden Society volume will reproduce the text of the entire body of the 327 cases reported in considerable detail in the King manuscript.<sup>2</sup> The cases therein run the gamut of the procedural and substantive matters that vexed early modern Englishmen. Many of the cases are actions in contract and debt, that arise out of a variety of business transactions: bankruptcies, arbitrations, maritime insurance policies and stock transfers. Another group concerns disputes over interests in land. To be sure, other decidedly more mundane and even idiosyncratic concerns that also troubled the court appear in King's case extracts. The best example of the latter was a dispute over the terms of a wager lodged in 1703 over whether the Archduke Charles of Austria would become King of Spain; the legal issues that ensued from the bet are painstakingly illuminated and analyzed in the King manuscript.<sup>3</sup>

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1. The edition of the manuscript will be authored by Lloyd Bonfield and L. R. Poos.

2. In this article all cases referenced by name are included in the King Manuscript, *infra* note 3. I shall give explicit manuscript page references only to the cases discussed in detail.

3. LLOYD BONFIELD AND L.R. POOS, PETER KING'S COMMON PLEAS REPORTS (forthcoming) (manuscript at 195-98) (on file with authors) [hereinafter King Manuscript].

While ultimately a fuller disquisition upon the cases King noted will be produced as an introduction to the Selden volume, the agenda here, consistent with the conference mandate, is rather narrower. Instead of considering the entire body of cases King noted and upon which he expounded upon at times at great length, I shall ferret out for detailed discussion only those actions that involved women as parties. By so doing, isolating cases in which women appeared as litigants, we may catalog the legal issues that touched the lives of women during the period and discern the substantive law that these disputes generated.

Like its ambit, the analysis of even the more limited array of cases considered in this article is modest: it is to inform rather than to argue. No sophisticated thesis on the legal position of women during the period teased from the cases will be proffered. My goal is simply to bring to the fore hitherto unprinted cases. That said, I believe that the cases will permit both the author and the reader to achieve a more nuanced and textured understanding of the circumstances of women's participation in the early modern English legal order. Moreover, by observing the legal issues and the context in which they arose in cases that involved women therein, we may relate the narratives illuminated in the cases to the broader role of women as participants in the economy and society during the earlier years of Britain's commercial revolution.

The article is comprised of four parts. It begins with a brief discussion of the life of the manuscript's author, Peter King, and this biography is then followed by a cursory description of the manuscript source. Thereafter, in Part III, a survey of the types of cases reported in the King manuscript ensues. Finally, I shall hone in on the ones, fifty-five in all, in which women are present as parties to the Common Pleas litigation. After a very brief outline of the writs used to commence the actions and an illumination of the legal issues raised in cases that are included in the King manuscript, I shall turn to cases that I regard as gender-specific, those actions which raise issues that are largely related to the legal, social, and economic position of women.

#### I. A BRIEF SUMMARY OF THE LIFE OF PETER KING<sup>4</sup>

Peter King was born in Exeter in 1669, the son of a prosperous grocer. While his legal career spanned the greater part of four decades,

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4. I have relied heavily on 4 JOHN LORD CAMPBELL, *THE LIVES OF THE LORD CHANCELLORS AND KEEPERS OF THE GREAT SEAL OF ENGLAND, FROM THE EARLIEST TIMES TILL THE REIGN OF KING GEORGE IV*, at 567-647 (London, A. Spottiswoode 1846). For a useful summary, see David Lemmings, *Entry on Peter King*, in *OXFORD DICTIONARY OF NATIONAL BIOGRAPHY* (2004).

King may have been originally destined for the dissenting clergy; his first published work, *An Enquiry into the Constitution, Discipline, Unity & Worship of the Primitive Church*,<sup>5</sup> was an inquest into the organization of the early Christian church in which he argued that its governance combined elements of Presbyterianism, as well as the episcopacy. Shortly after its publication, however, King may have had second thoughts on clerical life and embarked on a legal career. He was admitted to the Middle Temple in October of 1694 and called to the bar in June of 1698. While the law remained his vocation, his religious interests and writings continued. King was an early member of the Society for the Propagation of the Gospel in Foreign Parts, founded in 1701, and in 1702 he published *The History of the Apostles Creed: With Critical Observations on its Several Articles*.<sup>6</sup>

Regardless of this dabble into religious matters, King's destiny lay with the law and with its near-relation, politics. Regarding the latter exercise, King appears to have been influenced early in his career by John Locke, his mother's first cousin.<sup>7</sup> Under Locke's tutelage, he entered a circle of Whig politicians led by John Lord Somers. The result of Whig patronage was election in 1711 to a seat in Parliament for Bere Alston, a Devon borough. During his early years in Parliament, King figured prominently amongst country Whigs and was regarded as a driving force behind the notorious trial of Dr Henry Sacheverell in 1709 and 1710.<sup>8</sup>

During the same period, King commenced what was to become a successful career in the law. His practice began on the western circuit; by 1702, however, printed reports demonstrate an active practice at Westminster where he was appearing regularly in King's Bench, both on behalf of private individuals and in pleas of the crown. In July 1705, he received his first judicial appointment, Recorder of Glastonbury, a dignity that might have not been unexpected since it was through his efforts in Parliament that the town had received a royal charter of in-

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5. PETER KING, *AN ENQUIRY INTO THE CONSTITUTION, DISCIPLINE, UNITY & WORSHIP OF THE PRIMITIVE CHURCH* (London, anon. 1691).

6. PETER KING, *THE HISTORY OF THE APOSTLES CREED: WITH CRITICAL OBSERVATIONS ON ITS SEVERAL ARTICLES* (London, W.B. 1702).

7. The relationship was ongoing until Locke's death in 1704. The pair corresponded with some frequency and Campbell has reproduced a selection of their exchanges in his book, *THE LIVES OF THE LORD CHANCELLORS. CAMPBELL*, *supra* note 4, at 570–83. According to a letter reproduced therein, King claimed to having been executor of Locke's will, and to having received a legacy of £4,500. He also informed his cousin Peter Stratton that Locke's land descended to both of them equally as co-heirs. *See id.* at 583.

8. *See id.* at 586–87.

corporation that same year. Three years later, in 1708, he resigned the Glastonbury post to take up a similar position in London.<sup>9</sup>

Given his Whig associations, it should come as no surprise that both King's political career and his advancement to the bench were stymied by his opposition to Queen Anne's government during the Tory interlude in the latter years of her reign (circa 1710–1714). King's opposition to the Harley government was reported to be vocal, in particular with respect to the heated controversy over lax Admiralty administration.

Not surprisingly, King's fortunes improved with the Hanoverian succession in 1714. When George I made his first journey to London, King gave a speech of welcome to him on behalf of the corporation. Shortly thereafter, judicial preferment followed; when Lord Cowper was returned to the post of Lord Chancellor for a second time in 1714, he nominated King to serve as Lord Chief Justice of Common Pleas. On October 27, 1714, King replaced the disgraced Lord Trevor. Although the King manuscript ends abruptly in 1722, the last entry noting the retirement of Justice John Blencowe (which occurred in June 1722),<sup>10</sup> King remained on the Common Pleas until 1725.

High regard for both King's legal skill and his political acumen can be demonstrated by the fact that when Lord Chancellor Macclesfield was impeached for corruption in May 1725, King was chosen to conduct what turned out to be a thirteen day trial in the Lords that followed. The appointment of King may have been considered a rather odd selection, because though Lord Chief Justice of Common Pleas, King was still a commoner. His role required him to act as Speaker of the House of Lords, but, as a commoner, was nevertheless not permitted actually to speak in the Lords. Regardless of this limitation, King's efforts led to a conviction, and the skill with which he conducted the delicate matter earned him both a peerage and the woosack; four days after the sentence was pronounced, Peter King was made Baron King of Ockham, and on June 1, 1725, he was appointed Lord Chancellor.

The conventional wisdom on King's chancellorship, if one may so regard Lord Campbell as representative thereof, is that King's considerable legal reputation developed during his tenure in Common Pleas declined after he became Lord Chancellor.<sup>11</sup> As we have observed, King spent nearly two decades in the common law. King had not practiced in

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9. *Id.* at 586.

10. King Manuscript, *supra* note 3, at 234.

11. See CAMPBELL, *supra* note 4, at 612–14.

the Court of Chancery, and accordingly, his understanding of equity procedure and doctrine must have been rather limited. Accordingly, his impact in Chancery was more in the area of administration than in its jurisprudence.<sup>12</sup> His tenure in office closed in 1733 when, after having suffered a stroke, he resolved to resign. He retired to his estate at Ockham in Surrey where he died on July 22, 1734.

## II. THE MANUSCRIPT REPORTS

There are at least two extant manuscripts of King's manuscript case reports. One found its way across the Atlantic to the Harvard Law Library;<sup>13</sup> the other remains in the mother country, housed in the Strong Room of the library of Lincoln's Inn.<sup>14</sup> The same 327 cases appear in both manuscripts, and they are set forth in similar sequence. Indeed the near-identical wording of each of the entries suggests that one manuscript was probably a copy of another (or that were both copies of a now-lost or unlocated manuscript). That either of the manuscripts was actually penned by King cannot be demonstrated, although the Lincoln's Inn bound document notes that it is "Lord King's Reports." Indeed, the work may not come from a single hand, because the penmanship changes in the course of each manuscript. But it is very likely that the reports themselves originated with King, because there is the occasional use of the first person therein; for example, it is noted in one notation that "the cause was tried . . . before me."<sup>15</sup> Although some cases are from assizes over which he presided,<sup>16</sup> others are controversies heard in the Guildhall,<sup>17</sup> gaol delivery at Newgate heard at the Old Bailey,<sup>18</sup> and a few report sittings with other members of the bench on important individual cases<sup>19</sup> and appeals.<sup>20</sup> Most of the reported cases, however, came before the Common Pleas.

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12. See *id.* at 617, 638–42.

13. The manuscript, deposited in the Harvard Law School Library, is catalogued as HLS MS 1086.

14. The manuscript, deposited in the Lincoln's Inn Library, is catalogued as Lincoln's Inn Library Hill MS 80. My thanks to Mr. Guy Holborn and his staff for facilitating the use of the manuscript in the Library.

15. *Barnardston v. Chapman and Smith*, King Manuscript, *supra* note 3, at 9.

16. Two examples will suffice. He tried the case of *Thomas Crouch v. Barbara Raines* at the Hertford Assizes on a writ of cousinage after an issue was discussed in Common Pleas, *id.* at 61–62, and also *Francis Powell, clerk v. William Bull et alii at the Chelmsford*, *id.* at 109–111.

17. The marine insurance case of *Depaiba v. Ludlow*, *id.* at 175–182.

18. The cases were a burglary case, *The King v. Smith*, *id.* at 67–69, and forgery cases *Dominus Rex v. Biggs* and *Dominus Rex v. Dawson*, *id.* at 69–73.

19. The treason trial styles in the Reports as *Francia Case*, *id.* at 73–74.

Finally, a word of justification in both selecting a long-forgotten document for editing and publication, and also in writing an article based upon a single source of law: King's reports are worthy of study as an important source for case law during the period for at least two reasons. The first is simply dearth: there are relatively few printed law reports for the first half of the eighteenth century in England.<sup>21</sup> But more significantly, both the depth and breadth, the analytical quality of King's efforts are extraordinarily high. A perusal of the cases King redacted reveals that frequently the author was not content merely to report the barebones of the case: facts, issue, holding, and justification. Like Sir Edward Coke a century or so earlier, King fancied himself as an historian and as a legal theorist, and in his discourse on many of the cases, he did not feel constrained from roaming beyond the confines of the case to explore the distillation of logic that was the common law. Finally, the manuscript outlived its author by more than a century. Marginalia in the Lincoln's Inn notebook and references to cases decided long after King's death demonstrate that the manuscript was perused well into the nineteenth century.<sup>22</sup>

Perhaps his most interesting ramble through the history and policy of English law came in a marine insurance case, and may serve as an example of the intellectual caliber of the work. The question presented in this case dealt with whether an insured party had to prove that he sustained an actual loss in order to be reimbursed under the terms of a marine insurance policy. Not content merely to resolve the immediate question, King's consideration of the issue commenced with a disquisition on the origins of insurance and the foundation of the Royal Exchange in the City of London by Sir Thomas Gresham in the mid-sixteenth century. When marine insurance policies were first issued, King noted, a policyholder had to prove his ownership interest in goods in a lost shipment in order to collect on a policy. King then proceeded to explain how the increase in both the quantity of shipping and the magnitude of the losses suffered by maritime interests at-

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20. An example of an appeal is the case of *William Christian v. John Corrin* in which a committee of the Privy Council considered whether an appeal lies to the King in council from a decree from the Isle of Man. *Id.* at 66–67.

21. See James Oldham, *Underreported and Underrated: The Court of Common Pleas in the Eighteenth Century*, in *LAW AS CULTURE AND CULTURE AS LAW: ESSAYS IN HONOR OF JOHN PHILLIP REID* 119 (Hendrik Hartog & William E. Nelson eds., 2000).

22. For example, in the margin of the King Manuscript, *supra* note 3, there are numerous notations to Charles Viner's *A GENERAL ABRIDGEMENT OF LAW AND EQUITY* (London, 1741). The volume in the Hale Collection in Lincoln's Inn has manuscript notations which refer to cases in the King Manuscript.

tributed to wars in the late seventeenth century rendered it difficult for merchants to ascertain whether their own goods were aboard a ship that was lost. These circumstances led to the creation of policies that paid 'interest or no,' an alteration, incidentally, that he regarded as dubious policy.

### III. A BRIEF SKETCH OF THE CASES REPORTED

Before considering in detail cases involving women, a brief description of the broader body of Common Pleas cases reported by the King manuscript is necessary in order to place those involving women discussed hereafter in the broader context of the totality of litigation observed in the entire King manuscript. In the early eighteenth century, the writ system that had developed over the previous six centuries continued to direct litigation in the royal courts: the forms of action, which we have been told, reputedly, by F. W. Maitland rule us from their graves, were not as yet moribund.<sup>23</sup> In most, though not all, of the cases he reported, King noted the writ that the plaintiff selected to commence the action. In other entries, *mense process*, the oft-times unending struggle to bring the opposing party into court, was at issue. In many of these cases, however, the original writ laid can be inferred from the extant facts reported. In a more than a few cases, however, no conclusion can be drawn from the reports.<sup>24</sup>

Variety characterizes the forms of action employed to commence cases noted in the King manuscript.<sup>25</sup> Trespass writs predominate in the King manuscript (146 of 327 or 44.6 percent), largely actions on the case (86 of 327 or 26.3 percent). Many lawsuits deal with disputed business transactions. The actions on the case are frequently in *assumpsit*, and the second largest number of cases are laid in debt (39 of 327 or 11.9 percent) resulting from a loan or other transaction.<sup>26</sup> Litigation dealing with real property is also prominent, largely taking the form of trespass to land (20 of 327 or 6.1 percent) and *ejectment* (21 of 327 or 6.4 percent), amongst others.<sup>27</sup> Again what is striking about the cases in King's manuscript is not so much the narrow focus of each individual case, but rather the breadth of subject matter that

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23. F. W. MAITLAND, *THE FORMS OF ACTION AT COMMON LAW* 1 (A. H. Chayton & W. J. Whittaker eds., Syndics of the Cambridge University Press 1971) (1909).

24. Sixty-two entries or about one in eight cases (nineteen percent).

25. A full tabulation is not permitted given space constraint. It will accompany the Selden Society edition, and is currently available from the author.

26. There are also cases in account (1) and covenant (6).

27. Cases were laid in dower (3), entry (2), and waste (1).



was addressed in the lawsuits in the Common Pleas during King's tenure.

The extracts from cases in the King manuscript indicate that there was very little controversy in the Common Pleas over the appropriateness of the original writ employed to resolve the legal dispute reported. In only few cases was the form of action selected in issue. One detailed case from the King manuscript can be reported as an example.<sup>28</sup> It was noted in a report that plaintiff, Marriot, was convicted by a justice of the peace, one Mr. Digby, for five offenses against statutes prohibiting coursing in the forests with greyhounds. For each offense, Marriot was fined £5, half to be paid to the informer, and half given to the poor of the parish of Mansfield. Because Marriot on demand did not satisfy the judgment against him, the constable of Mansfield by warrant issued by the same justice of the peace seized his goods. In order to have the goods restored, Marriot subsequently brought an action in replevin in the county court against Digby, the justice of the peace, and the case was subsequently removed to Common Pleas. The defendant Digby, after two rules were entered to allow him more time to plead, challenged the action in replevin on the grounds that the writ was unavailable to a person whose goods had been taken upon the execution of a judgment. According to the defendant's plea, trespass rather than replevin was the correct form of action to controvert such executions. To hold otherwise, defendant maintained, would enable parties to easily defeat all convictions. The court, however, was unmoved, citing precedents to the contrary in cases that dealt with goods taken on summary convictions. In addition, the report also noted that the defendant had been allowed two rules to enlarge his time for pleading. According to the court, that was the juncture, if at all, at which the issue should have been raised.<sup>29</sup>

The appropriateness of writs aside, it was, however, more common in the King manuscript to find discussion regarding clerical errors in the writs, and variances between them and the pleadings than it was to discern controversy over the mis-selection of the appropriate form of action. In cases in which variance was cited, the court does not always appear consistent in resolving perceived defects. For example, in one case, a variance between the date that a trespass was alleged in the writ, and the one noted in the declaration was proffered as grounds to dismiss an action, but instead leave was granted to plaintiff to amend

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28. King Manuscript, *supra* note 3, at 53-54.

29. Richard and John Marriot v. Rowland Shan et alii, *id.* at 54.

the writ.<sup>30</sup> On the other hand, an incorrect place name in a writ in action on the case for disturbance of a right to common was deemed fatal to the action.<sup>31</sup> These cases aside, erroneous entries in the court record were also the cause of numerous controversies. Cases of misprision by a clerk, rather than a miscue by a party to the action, came before the court and were corrected, but those generated by the parties themselves were often, though not always, amended.<sup>32</sup>

If the selection of writs was not frequently opposed, at least in the cases reported in the King manuscript, the vagaries of pleading and process vexed the court with considerable frequency. Sixty-nine cases, or about one in five, dealt with process: the tortuous path followed by a party in order to bring the opposing party or parties into court, or to have a judgment already entered enforced.

A similar number of entries in the King manuscript raised pleading issues. There is little doubt that pleading remained an arcane art in the early eighteenth century, and provided traps for both the unwary and the cautious lawyer. Thus it would not be unexpected to discover that a very large percentage of reported cases arose, and were resolved upon, what appear to be narrow pleading issues. The scenario is generally as follows: the plaintiff or defendant demurs to a plea by the other party, and the King manuscript notes generally the party's supporting arguments; the proffered objections and argument of counsel considered; and the court determines whether to enter judgment on the demurrer, or allow the case to continue, ultimately to be resolved on the merits.

It is not always apparent where and how a distinction between proper and improper pleas was drawn. Entries in the King manuscript abound in which the court seemed to regard a wide array of objections lodged by opposing parties as purely technical, in modern terms, "harmless error," and allowed the cases to proceed to judgment.<sup>33</sup> In others cases, however, the court was not so indulgent, and judgment was entered against the errant pleader, or the case was otherwise dismissed with directions that the plaintiff might bring his action again if

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30. Johnson v. Wells, *id.* at 15.

31. Cook v. Bingham, *id.* at 14.

32. An example is the *Earl of Stafford's Case* where a recovery styled him vicecomes (Viscount) instead of comes (Count or Earl). *Id.* at 226. In one case, a new summons was authorized because the existing documents were destroyed because rain came into the office of the *custos brevium* in the case of *Atterbury, demandant v. Price, tenant v. John Wentworth, vouchee*, *id.* at 100.

33. See, e.g., *Edmunds v. Powell*, *id.* at 111–12.

he so chose, and plead it properly.<sup>34</sup> One of the more perplexing issues confronted in analyzing this body of cases is to understand the line drawn between the two: the cases that are allowed to proceed with a pleading flaw overlooked as harmless error; and those in which the error directs the disposition of the case. A full discussion of this issue is a task for another day, but some hint will emerge from a discussion of the cases discussed hereafter.

Most cases, then, dealt with other matters. The variety is bewildering, and a preliminary count is set out in the Appendix. Finally, it must be noted that not all the reports involved litigation. Other matters that commanded King's attention during the period covered by the reports were noted in the manuscript. For example, King reported that the judges met "Before the Summer Assizes" at Sergeants Inn to discuss the method by which the newly adopted statute on the transportation of convicts (4 Geo c. 1) should be implemented.<sup>35</sup> The part of the statute that evoked the most discussion was how to dispose of convicts if no "Contractor" was present at the time of conviction. In that event, it was decided that the presiding judge should appoint a person to make a contract with "proper Psons," and that the individual so empowered should report back at the next assize for the same county on his efforts. The court also discussed the issue of the performance bonds to be taken from the contractors. Two bonds were required: one to the court, and the other to the "Associates on the Crown side." The sum of £200, jointly and severally, was deemed a sufficient sum, though it was agreed that the presiding judge should have the latitude to alter the amount required "according to Circumstances."<sup>36</sup>

Other entries in the King manuscript note the Common Pleas' supervisory duties. For example, an attachment was issued against the goolor of Ilchester for having allowed a defendant in a case before the court to escape.<sup>37</sup> Another entry allows us to observe the court disciplining individuals. Two parties were arrested, on what grounds, it is not clear from the report, but apparently when they were bailed they gave fictitious names. Two other men came into court at the appointed time under the proffered false names to answer the charges. When the scam was discovered, all four fled. They were apprehended, confessed,

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34. See, e.g., *Bagnell v. Moore*, *id.* at 193-94.

35. *Id.* at 137-38.

36. *Id.* at 138.

37. *Bonner v. Langham*, *id.* at 6.

and were all committed to spend an hour in the pillory on the last day of term with “a Paper over their Heads, Bail by false Names.”<sup>38</sup>

Some cases in the King manuscript came before the court as matters ancillary to an existing case. For example, witnesses in litigation might claim immunity from arrest on their way to and from court. In a particularly well-noted case in the King manuscript, one Lee, a witness in an action in ejectment, was arrested by the bailiff on his way home from court or so he alleged. He insisted upon privilege “in laying the Matter by Motion before the Court.” He further charged that the arrest was by “Connivance of one of the Attorney’s in the case,” and asked for his costs, a request which was granted. No action was taken against the bailiff, because at the moment of apprehension, Lee did not produce “the Ticket of the Spa to verify his Allegation of being Subpaend a Witness.”<sup>39</sup>

#### IV. WOMEN IN THE COURT OF COMMON PLEAS

Turing now to our more specific agenda, women in the King manuscript, about 17 percent of the cases (55 out of 327) extracted by King involved women as parties. Table 1 indicates the alarming equality in the distribution: the mix between women who appeared as plaintiffs or defendants was nearly identical, and only slightly more women parties sued or were sued in their own name than were women who were joined with their husbands.<sup>40</sup>

*Table 1: Woman Appearing as Parties: King’s Reports*

N=62

<i>Plaintiff</i>		<i>Defendant</i>	
<b>Woman</b>	<b>Married Couple</b>	<b>Woman</b>	<b>Married Couple</b>
<b>18</b>	<b>14</b>	<b>16</b>	<b>14</b>

38. Hodgeson v Mosely, *id.* at 210.

39. Frost v. Lee, *id.* at 115.

40. Although fifty-five cases involved women, the number of women appearing as a party (sixty-two) exceeded that number because in some cases both plaintiff and defendant were women.

As Table 2 indicates, the fifty-five cases involving women as parties in the King manuscript were brought to the court via a variety of forms of action. While a significant number of cases (about one in five) involved rights in land, most litigation involved personal actions on the case or in debt. A comparison between the percentages of writs employed in all cases reported in the King manuscript and those with women as parties do not reveal striking differences. However, as we shall see, there were a robust number of cases involving defamation noted in the King manuscript that were either brought as actions on the case in the Common Pleas or pending in church courts for which writs of prohibition were sought in Common Pleas.

*Table 2: Woman Appearing as Parties: Forms of Action*

N=55

<b>Writ</b>	<b>N</b>	<b>%</b>
<b>Case</b>	<b>17</b>	<b>30.9</b>
<b>Debt</b>	<b>11</b>	<b>20</b>
<b>Trespass Assault</b>	<b>3</b>	<b>5.5</b>
<b>Trespass Land</b>	<b>3</b>	<b>5.5</b>
<b>Fine</b>	<b>2</b>	<b>3.6</b>
<b>Dower</b>	<b>3</b>	<b>5.5</b>
<b>Deceit</b>	<b>1</b>	<b>1.8</b>
<b>Cousinage</b>	<b>1</b>	<b>1.8</b>
<b>Homine Replegiando</b>	<b>1</b>	<b>1.8</b>
<b>Prohibition</b>	<b>6</b>	<b>10.9</b>
<b>Error</b>	<b>1</b>	<b>1.8</b>
<b>Appeal</b>	<b>3</b>	<b>5.5</b>
<b>Trover</b>	<b>1</b>	<b>1.8</b>
<b>Unknown</b>	<b>2</b>	<b>3.6</b>
<b>Totals</b>	<b>55</b>	<b>100</b>

Before turning to the substance of some of the cases involving women in the King manuscript, another set of numbers is in order. Table 3 indicates that a variety of particular subject matters that came before the court in the fifty-five cases that involved women as par-

ties.<sup>41</sup> While about slightly more than one in ten of the cases that came before the Court with women as parties raised procedural issues, most produced substantive questions of applicable law. Many of the issues mooted were not gender specific, that is they did not directly address matters particular to women. For example, the largest number of cases in our data set (15 or 21.4 percent) involved a woman who sued or was sued as an executrix or administratrix of their late husband's estate either on their own or joined by her current husband. The involvement of these women in litigation in most of the cases did not involve gender specific issues; their appearance can be attributed to the propensity of men, which I have noted elsewhere, to select wives as executrices of their estates.<sup>42</sup> The same could be said about most of the cases that involve promissory notes, debt, rights in land and the proper calculation of damages. Yet, perhaps oddly, gender differences were at work, albeit clandestinely: all of the cases involving testamentary matters have a woman as a party; there is no case in the collection involving estate administration in which parties were exclusively men.

Other cases, however, did raise what one might regard as gender-specific issues. Space constraints permits a discussion of only three subject matter areas in the law in which women were parties in such cases: defamation, marriage cases, and issues that fall under the legal rubric baron and feme.

*Table 3: Woman Appearing as Parties: Subject Matter*

N=70

<b>Subject Matter</b>	<b>N</b>	<b>%</b>
<b>Estate Administration</b>	<b>15</b>	<b>21.4</b>
<b>Baron and Feme</b>	<b>9</b>	<b>12.9</b>
<b>Promissory Note</b>	<b>4</b>	<b>5.7</b>
<b>Defamation</b>	<b>8</b>	<b>11.4</b>
<b>Guardianship</b>	<b>2</b>	<b>2.9</b>
<b>Case</b>	<b>1</b>	<b>1.4</b>
<b>Damages</b>	<b>2</b>	<b>2.9</b>
<b>Pleading</b>	<b>8</b>	<b>11.4</b>
<b>Marriage</b>	<b>4</b>	<b>5.7</b>

41. Because some of the cases in King's manuscript involving women raised more than a single issue, seventy entries are noted in Table 3 from the fifty-five cases involving women.

42. I have made this point, the presence of women in court, in my study of probate litigation. LLOYD BONFIELD, *DEVISING, DYING AND DISPUTE: PROBATE LITIGATION IN EARLY MODERN ENGLAND* (United Kingdom, Ashgate 2012).

<b>Land</b>	<b>4</b>	<b>5.7</b>
<b>Trespass Assault</b>	<b>2</b>	<b>2.9</b>
<b>Debt</b>	<b>1</b>	<b>1.4</b>
<b>Procedural</b>	<b>10</b>	<b>14.3</b>
<b>Total</b>	<b>70</b>	<b>100.3</b>

Perhaps the most interesting of these gender-specific cases were the ones that dealt with defamation. Of course, men defamed men, and some cases in the manuscript so illustrate. For example, John Palmer, a serge maker and soap baylor, alleged in an action on the case that one Pullen had related to others that Palmer's financial circumstances were dire: "doth John Palmer of Bradninch owe you any money; if so now is your time to look sharp for the bailiffs have seized all his goods and are about to sell them in the public market;" "doth John Palmer of Bradninch owe you any money; if so now is your time to look after it, for he is torn abroad and his landlord has seized all that he hath;" "doth John Palmer owe you any money; if so now is your time to look after it, for he is broken and run away."<sup>43</sup> In at least half of the defamation cases in the King manuscript, women can be identified as the speakers, while in the other half, the Christian name of the party is not given and it is not possible to determine from the report whether the alleged speaker was a woman.

The cases involving defamation extracted in the King manuscript came to Common Pleas in one of two procedural guises: actions on the case in defamation, and writs of prohibition. In the former, plaintiff sued for damages in the Common Pleas, while in the latter plaintiff sought to terminate a proceeding commenced in an ecclesiastical court. What made the defamation cases noted in the King manuscript in which women were involved gender-specific is that with a lone exception all the controversies involved statements describing feminine sexual incontinence. Of seven cases that did have sexual overtones, four involved women being called a "whore," generally with further literary embellishment.<sup>44</sup> Regarding the other cases, in one the speaker refrained from the "w" word, but uttered the following about the defendant: "that she went into Fleet Street and picked up a man and brought him to her house and carried him upstairs and suffered him to throw

43. Palmer v. Pullen, King Manuscript, *supra* note 3, at 55.

44. Davy v. Jones, *id.* at 51; John Wills and Susan uxor v. Richard Wills and Mary uxor, *id.* at 136; Dalton v. Barret, *id.* at 221; and Watts v. Blackerby, *id.* at 236.

or lay upon her, etc.”<sup>45</sup> While to the modern reader that recitation might appear close enough, the failure to use the word “whore” was fatal. The court discharged the writ on the grounds that for an action on the case to be brought in London it was necessary for the “express calling a woman [a whore] and not to words from whence she may be collected to be so.” Of the other two defamation cases, Nancy Pope was accused of bearing a “bastard”; and it was charged that the married Sarah Haddock was “as familiar with... [her bondsman]... as any man.”<sup>46</sup>

A second group of cases noted in the King manuscript involving women as parties and touched what I have called gender-specific issues dealt with marriage. Three were brought by women against men with whom they alleged that they had entered into mutual promises to marry, while the fourth case was an action by a husband and wife in which both sought a prohibition from a prosecution in a church court for marrying within the Levitical degrees.<sup>47</sup> In the latter case, the prohibition was discharged on the grounds that, while marrying a wife’s niece was not expressly prohibited in scripture, it was nevertheless within the general understanding of the ambit of the ecclesiastical ban.

The three breach of promise cases noted in the King manuscript were variations on the same theme, a disappointed bride suing a reluctant groom, but they raised decidedly different legal issues. In one case, a man promised to marry a woman after the death of his father, an event that had since occurred, but instead of marrying the plaintiff, it was alleged that he had married another. The disappointed bride brought an action on the case for breach of promise. While the man contended that the promise was not valid because it was founded upon on a contingency of death, the court did not find the promise invalid on the grounds alleged and both the verdict for the plaintiff was upheld and the award of damages in the amount of £300 sustained in denying a motion in arrest of verdict.<sup>48</sup> In a second case, a man married another woman allegedly in disregard of alleged mutual promises to marry each other and not another. When the disappointed bride brought an action against the alleged promisor and prevailed, the errant groom attempted to set aside a general verdict for the plaintiff and damages in the amount of £1000 in a motion in arrest of judgment on the grounds

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45. Notter Allen and Dorothy uxor v. Catherine Steward, *id.* at 40.

46. Pope v. Corbet, *id.* at 136; and Sarah Haddock v. Jefferson, *id.* at 235.

47. Ellerton et uxor v. Gastrell, *id.* at 190.

48. Elizabeth Corke v. John Baker, *id.* at 77.



that there was no consideration for his promise. The court disagreed; it found consideration for his promise on the grounds that her mutual promise limited her "liberty which she would otherwise have to prefer herself in marriage." The contract to marry was therefore binding, and the man, having broken his promise by marrying another, the damages assessed were an appropriate remedy.<sup>49</sup> A final case can be offered that involved mutual promises to marry which the plaintiff, another disappointed bride, alleged that defendant recalcitrant groom broke.<sup>50</sup> The man argued that the alleged promise to marry was not in writing, and was therefore unenforceable under Section 4 of the Statute of Frauds.<sup>51</sup> The court, however, found that the statute had not been interpreted to apply to contracts to marry<sup>52</sup>, but rather to agreements made upon consideration of marriage, "something collateral to the marriage." Thus parol evidence of the actual verbal exchange could be admitted to prove the undertaking to marry.

Finally, we turn to cases in which issues relating to coverture were raised and resolved in the Court of Common Pleas during the period covered by King's manuscript. As historians of pre-modern England will attest, whether of they are of the legal or social and economic stripe, the mysteries of the law of coverture, that curious English juridical construct, is not an easy topic into which to wade. Some indication of the investment required to familiarize oneself with the learning on the subject during our period can be surmised by glancing at the sheer girth of a contemporary treatment on the subject aptly titled *Baron and Feme*, a learned treatise which runs to 485 pages excluding the index.<sup>53</sup> The nine cases which were actually litigated and appear in the King manuscript can, of course, only scratch the surface of myriad of issues that were raised by the doctrine in the early eighteenth century; nevertheless the controversies presented are illustrative some of the timely matters that coverture raised during our period.

The most frequent issue that the Common Pleas faced relating to coverture dealt with matters relating to the joinder of a husband to claims involving a married woman when the latter appeared as a party to litigation. As a general matter, the husband of a married woman in

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49. Ann Goddard v. William Strode, *id.* at 158.

50. Hopkins v. Mayton, *id.* at 220-21.

51. Statute of Frauds, 1677, 29 Car. 2 c. 3 § 4 (Eng.).

52. Admitting that there was a case to the contrary which the court "held not be law." Hopkins v. Mayton, King manuscript, *supra* note 3, at 220.

53. BARON AND FEME: A TREATISE OF LAW AND EQUITY CONCERNING HUSBANDS AND WIVES (London, 3d ed., 1738).

the cases in the King manuscript brought an action in his name *et uxor* on a cause of action that arose from an obligation owed to the spouse, even in circumstances in which the transaction had occurred prior to marriage. Thus, for example, in a case in which a married woman held a bond *dum sola* and the defendant had failed to tender a quarterly payment to her, an action of debt was brought by husband *et uxor*.<sup>54</sup> Yet, as might be expected, a case brought against husband and wife was not regarded as having the same party defendant as a case brought exclusively against the husband. In one case in the King manuscript, plaintiff brought an action in Kent against the defendant, an attorney, for fees. Upon delivering a declaration against defendant, it was the practice of the court to allow plaintiff by “usage” to bring other actions that he wished to pursue against defendant in that court. While, under that practice, the court allowed an action in trover against the husband alone, it refused to allow a separate one in covenant brought by the plaintiff against both husband and wife. The latter action was quite simply viewed as a suit as between different parties.<sup>55</sup> In another case, the court confirmed existing practice that coverture did not generally preclude married women from suing or being sued in the church courts. Prohibition was sought by baron and feme in the Common Pleas on the grounds that the husband was not joined in an action for a legacy with interest that was lodged in the Archbishop of York’s court. The attention of Common Pleas was directed to the fact that the action was one that included interest, and therefore it might be brought in a temporal jurisdiction. However, the judges were unprepared to regard that fact as dispositive of the gravamen of the action before them. Plaintiff commenced his action in Common Pleas to require the church court to dismiss an existing action on the ground the husband was not joined in a church court. The court was unprepared to interfere with existing practice by sanctioning a derogation from the “usage of the spiritual court to sue *feme covert*s by themselves.”<sup>56</sup>

Cases noted in King’s manuscript produced other interesting wrinkles on the necessity of joinder of husband to a case brought by a married woman. Although a more detailed exploration of doctrine must be undertaken to be certain, the Common Pleas may not have always been averse to bending the rules to allow cases to proceed to judgment. In an action of trespass assault and battery and conver-

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54. *Herne et uxor v. Sir John Holland*, King Manuscript, *supra* note 3, at 76.

55. *John Tasker v. Thomas Underhill et idem et Elizabeth uxor v. eundem*, *id.* at 204.

56. *Wood ex uxor v. Roosby*, *id.* at 18.

sion,<sup>57</sup> both husband and wife and another party were joined as defendants. In a motion in arrest of judgment for the plaintiff, it was claimed by the defendant that if a married woman was joined in this manner, she might well be answering for the trespass of her husband. The court dismissed the argument based on coverture by simply noting that in a joint trespass the act of which plaintiff complains is one "of everyone." Regardless of whether the parties were married, therefore, his (husband's) trespass would also be that of hers (wife's). As to the second issue raised in the case, that of conversion, the court seemed prepared to overlook the coverture dilemma on the grounds that conversion was merely added to the underlying cause of trespass as an "aggravation" of the trespass.<sup>58</sup> Likewise, when an action was brought by a husband and wife for trespass, breaking and entering, it was also argued in a motion in arrest of judgment brought by plaintiff that the joinder of the wife was improper because the action should have been brought exclusively by the husband. The court declined on the grounds that a verdict by the jury must have assumed that the parties were joint tenants, and given that supposition, joinder was proper. Finally, in an action in trespass for assault brought against husband and wife, the wife pleaded that she acted in self-defense. Verdict for the plaintiff followed, and defendant moved to arrest the verdict on the grounds that the plaintiff's replication alleged that both husband and wife made the assault and that neither had such cause: that is, that the assault was in self-defense. Thus the defendant argued that plaintiff's response was a discontinuance, because it was the wife who pleaded self-defense and the replication was phrased in such a way so as to imply that both spouses had pleaded self-defense. The court dismissed the defendants' argument and focused on the issue in the plaintiff's cause of action, the wife's trespass, and considered the wife's plea as sufficient to place self-defense in issue. That the jury found for the plaintiff simply meant that they found her plea false, which is what the plaintiff had stated in the replication.<sup>59</sup>

I want to close with two cases that raise the implications of coverture, and ones that illustrate married women in roles as commercial actors, both working with and without their husbands. One can be presented straightforwardly; the other is more complex, and requires

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57. The declaration was specifically for breaking and entering the close, treading on grass and grain, and carry away apples. Pullen v. Palmer and Melony, his wife, and Amos Palmer, *id.* at 62.

58. *Id.*

59. Benjamin Joseph v. John and Margaret Gregory, *id.* at 64.

more elaboration. In the first, a woman, one Sarah Maddocks, brought an action as endorsee for payment on a note against Robert Gardner. However, the note at issue was written by Gardner's wife, Joyce. The defendant claimed that he was not obligated to pay under the terms of the note. His assertion was based on the fact that he was not bound to pay on the note as an endorsee, because it was not a note within the 3 and 4 A. c. 8 (1704). That act, he claimed, extended only to promissory notes made by individuals and by their servants entrusted by them to do so. The court held for the plaintiff. The court noted that the declaration claimed the wife was entrusted to receive and to make payments on behalf of her husband, and though the making of promissory notes was not specifically mentioned in the plea, it held that the jury verdict for the plaintiff must have assumed so and therefore considered the note within the statute.<sup>60</sup>

In a second case, Margaret Gregory was sued by one Benjamin Joseph with her husband, John, joined. According to the report of the case, Margaret Gregory previously had been sued by the same plaintiff as a *feme sole*, presumably because, since she operated a shop in Taunton, he did not realize that she was married, her husband living in the East Indies. But when she pleaded coverture to abate the plea, the plaintiff discontinued his action. The plaintiff then moved to outlaw both husband and wife and seized his goods. When she moved to set aside the outlawry as irregular, her husband "beyond the seas," the Court refused unless she would put in bail, which she was unprepared to do. This tangle proved unnecessary because her husband by this time was in fact already dead. But given the difficulties with communication from the East Indies, it took approximately eight months for the sad news about her husband's demise to be brought to her attention. When she learned of his death, she took up administration of his goods, and had the outlawry set aside in the prothonotary's office because of the plaintiff's error: outlawing a man already deceased. The plaintiff moved to set aside the reversal, and ultimately the Common Pleas decided that the plaintiff ought to be able to contest the reversal. The court thought that the action should be stayed until it had the wisdom of the Attorney General on the statute, after which time it would give judgment. While consultation may have occurred, the case, sadly, disappears from the manuscript.

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60. Sarah Maddocks v. Robert Gardiner, *id.* at 75–76.

## CONCLUSION

My research based upon the entries in the King Manuscript is at a formative rather than a conclusory phase; but conclude, at least in some fashion, we must. My goal here has been modest: to present cases exhumed from King's manuscript involving women. Ultimately, these cases in Common Pleas must be correlated with other contemporary cases and treatises literature to present a more definitive picture of the common law at the Hanovarian succession and beyond. Suffice it to say, that even at this early stage in digesting the cases noted by King, "commercial cases," and in particular these "new" types of business-related cases, found their way to the Court of Common Pleas. In these cases, as well as numerous others that King noted, the court was in the process of updating a body of common law. This process of "modernization" was, like this paper, a work in progress. At the same time, the law seemed constrained by the nuances of pleading from moving forward more expeditiously. The court was wont to resolve a case on the pleadings, thereby avoiding a decision on the merits.

As to women in the court, two points can be made by way of conclusion. The first is the important one: *they were there*. Women, married or otherwise, were legal actors in English courts. To be sure, their presence pales in comparison with those of their male counterparts, but present they nevertheless were, actively engaging in litigation in the Common Pleas. Second, and perhaps closely related to the first, is that women, perhaps defamation cases aside, can be seen through the lens of litigation in Common Pleas because they were economic actors. Many of the cases extracted in the King manuscript arise because women were engaged in commercial tasks in concert with their husbands, and even where necessity dictated, without them. Then as now, it is economic activity that is a primary factor that prompts the sort of disputes that end up in the courts.

APPENDIX: SUBJECT MATTER IN CASES IN KING MANUSCRIPT<sup>61</sup>

Process 69  
 Pleading 69  
 Jurisdiction 4  
 Execution of Judgment 11  
 Statutory Interpretation 60  
 Misprison 6  
 Clerical error 10  
 Statutes of Limitations 3  
 Arbitration 6  
 Promissory Notes 20  
 Bills of Exchange 1  
 Bankruptcy 7  
 Stock Transfers 3  
 Maritime Insurance 7  
 Other Commercial 11  
 Contract 13  
 Debts 64  
 Testamentary 15  
 Baron and Feme 8  
 Marriage 6  
 Infancy 6  
 Real Property 31  
 Rent 2  
 Waste 1  
 Common Rights 3  
 Custom 9  
 Court costs 12  
 Attorneys 3  
 Arrests 8  
 Habeas Corpus 2  
 Criminal 3  
 Treason 1  
 Eco Reg/Apprentice 2  
 Defamation 22  
 Church related (advowson, tithes) 4  
 Recusancy 2

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61. The categorization of cases offered herein is tentative. A fuller breakdown of the cases will be part of the Introduction to the Selden volume.

