Cases in the Printed Abridgements from Years 21–23 of Richard II Not Found in the Whittick Edition

This is a list of cases that are found in the printed abridgements attributed to years 21, 22, and, in one case, 23, but are not found in the Whittick edition. It was compiled and annotated by David Seipp (DS) in 2018. The numbers are consecutive with ‘a’ and ‘b’ used for what is clearly the same case. Charles Donahue (CD) did some editing and annotating and wrote some thoughts about how Case 1 might be described in a proper edition. References to Statham are to the 1490 edition (nrs.harvard.edu/urn-3:HLS.LIBR:5120760); those to Fitzherbert are to the 1516 edition (ProQuest, Early English Books Online, by subscription). Since this list was compiled, we think that we have identified Case 8 with a case that is in the Whittick ed. Hence the number of abridgements that have not been found in manuscripts arranged by year and term from years 21–23 is eight.

A comparison of the abridgements that are both in Statham and in Fitzherbert reveals that in most cases Fitzherbert’s version is close to that of 1490 edition of Statham, but it is not quite the same. In one case (9b), it is very different. There are manuscript versions of what looks like Statham 1490, but are not the same. It seems likely that Fitzherbert was using one of those versions or, perhaps, one similar that has not survived.

Cases Attributed to Michaelmas Term in Year 21 (1397)

1a

Statham, *Issue* 47, fol. 117v:[1]

Mich’lis.xxi.R.ii. En *quare impedit* l’issue fuist pris que l’esglise ne voida *per* [or *par*] *privacion’* quar le court ne voill’ eux suffre pur prendre l’issue .s. que il ne fuist deprive etc. *tamen quere* quar il semble qu’il est *negativa pregnans* etc. *credo* que ils fir’ ency par cause del trielle etc. et d^{r} m’ le ple que mesque home mr’ bulles le pape del privacion ils ne sera allowes en court le roy nient plus que bulles d’excommengement etc.

1b

Fitzherbert, *Issue* 147, fol. 2.208v:

M.21.R2. En Quare impedit l’issu fuit pris que l’eslglise ne void’ per [or par] privac’ quar la court ne voi’ eux suffre de prendre l’issue que il ne fuit deprive, credo la cause fuit po^{r} le triel, et dr’ m’ le ple que mesque l’home mr’e bulles del Pape del privacion que ils ne serr’ allowes en court le Roy nient pluis que bulles D’excommengement.

[We have given both abridgements largely unextended; they are quite problematic. Extended, Statham’s may be:]

En *quare impedit* l’issue fuist pris que l’esglise ne voida *per privacionem* quar le court ne voilla eux suffre pur prendre l’issue, *scilicet* que il ne fuist deprive etc. *tamen quere* quar il semble qu’il est *negativa pregnans* etc. *credo* que ils fierent ency par cause del trielle etc. et *dicebatur* mesme le ple que mesque home monstre bulles le pape del privacion ils ne sera [sic] allowes en court le roy nient plus que bulles d’excommengement etc.

[In English (CD):]

In *quare impedit* issue was taken that the church was not void *per privacionem* because the court did not want to let them take this issue, to wit, that he was not deprived, etc. Query, however,

[1] DS: check 1382.048am re Pope.

because it seems that it [the issue taken] is a negative pregnant, etc. I believe that they did so for the sake of the trial, etc. And it was said [of] the same plea that even if someone shows papal bulls of deprivation, they will not be allowed in a court of the king, any more than bulls of excommunication, etc.

[Klingelsmith trans.[2] p. 2.835]

(47) **In a quare impedit**, the issue was taken that the church was not vacant by deprivation, for the Court would not suffer them to take the issue , to wit: that he was not deprived , etc. But yet , query, for it seems that it is a negative pregnant , etc. (I believe that they did this by reason of the trial , etc.)

And it was said in the same plea, that although one shows bulls of the Pope of the deprivation , they shall not be allowed in the King's Court no more than bulls of excommunication, etc.

[So extended, there is only one outright error in the French text: *sera* should be *serront* to match the plural pronoun that precedes and the plural adjective that follows it. Admittedly, this rendering uses quite a bit of Latin, in particular, extending *d^{r}* to *dicebatur*, but Statham is fond of mixing in Latin with his French. If we assume that Fitzherbert was copying Statham (a probable but not certain assumption),[3] what did he do with Statham? He corrected the mistake of *sera*. He left out the argument about negative pregnant. He may not have been able to make any sense of *d^{r} m' le ple* because he left it pretty much as it was.

[Can we go from this to what Statham and Fitzherbert meant, or even to what the court actually did? Perhaps. Both authors seem willing to accept that what happened was that the court insisted that the parties take issue on whether the church was not void *per privacionem*, and refused to allow them to take issue on whether the incumbent was not deprived. Statham, but not Fitzherbert, points out that the issue that was taken leads to the possibility of a negative pregnant: If the issue is answered in the affirmative, a possible inference from that finding is that the church was void in some other way. Be that as it may be, Statham and Fitzherbert both speculate that the reason that the court did this was that a papal bull of deprivation could not be introduced at trial, any more than a bull of excommunication could be. Statham's support for this speculation is that this evidentiary principle was mentioned in the context of the plea. Fitzherbert is less clear that it was so said.

[What is probably involved here is Belknap, CJCB's ruling in Rex v. Gallon, Y.B. 6 Ric. 2, pl. M10 (Ames Fdn.) that deprivation could be tried by a local English jury. How they were to do this, Belknap does not say. Apparently fifteen years later the court did not overrule this holding, but made clear that whatever the jury was to consider in reaching its conclusion, it could not consider the actual document that did the depriving. Whether this indicates a movement away from Belknap's approach to the problem, if not from his actual holding, is perhaps not a question that can be decided on the basis of such cryptic entries.]

2a

Statham, *Villenage* 14, fol. 187r:[4]

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[2] CD: For Margaret Center Klingelsmith and her translation of Statham's abridgement, first published in two volumes in 1915, see the introduction to the Foundation's 'metadata' for Statham: https://amesfoundation.law.harvard.edu/digital/Statham/StathamMetadata.html.

[3] CD: Klingelsmith suggests that he was; certainly the wording is close.

[4] DS: ?= Whittick Pasch. 21 Ric. 2 (1398), pl. 6, Trespass v villein et lord for goods not land.

Mich'lis.xxi.R.ii. Si accion soit port vers le seignior et le villeyne lou seignior n'ad my seisi le terre et le tenant plede une ple et le seignior une autre ple et ple del seignior sera receu et nemi le ple del villeyne per oppinionem curie en precipe quod reddat autre est del t- en fait et pernor des profits en assise etc. mes si le seignior ne dit riens et le villein plede en barre le demandant responde al le ple le villein etc. mesme le ple

[Klingelsmith trans., 2.1300] (14) **If an action** be brought against the lord and the villein, where the lord had not seisin of the land, and the tenant pleads one plea and the lord another plea, the plea of the lord shall be received and not the plea of the villein: By the opinion of the COURT in a *Præcipe quod Reddat*. It is otherwise of the tenant in fact and taker of the profits. In an Assize , etc. But if the lord does not say anything , and the villein pleads in bar, the demandant shall answer to the plea of the villein, etc. In the same plea.[5]

2b

Fitzherbert, *Briefe* 788, fol. 1.192v:

M.21.R.2. Si accion soit port vers le seignior et le villein lou seignior n'ad my seisi del terre, et le tenant plede un plee et le seignior auter plee le plee del seignior serra resceu et nemie le plee del vyllen, par oppinionem curie en precipe quod reddat, auter est del tenant en fait et pernon des profits en assise etc. mes si le seignior ne dit riens et le villein plede en barre le demandant responde al plee del vyllen etc. mesme le plee vide 7 Hen. 6 avaunt de ceo.[6]

3a

Case Attributed to Easter Term in Year 21 (1398)

Statham, *Nuper obiit* 6, fol. 129v:

Pasche.xxi.R.ii. En Nuper obiit le demandant avera jugement de tener en severalte etc.

[Klingelsmith trans., 2.909] (6) **In a nuper obiit**, the demandant shall have judgment to hold in severalty, etc.

3b

Fitzherbert, *Judgement* 227, fol. 2.227:

P.21.R.2. En Nuper obiit le tenant aver judgement de tener en severalte etc.[7]

4a

Cases Attributed to No Term in Year 21 (1397–1398)

Statham, *Joynder en accion* 4, fol. 110v:

Anno.xx.R.ii.[8] Si un obligacione soit fait a roy et a son custumiers ils joindront en accion ove le roy come fuist adjuge en l'escheker en dette etc.

[Klingelsmith trans., 2.784] (4) If an obligation be made to the king and his suitors,[9] they shall join in an action with the king: as was adjudged in the Exchequer in Debt, etc.

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[5] CD: Fitzherbert's abridgement suggest that he was using one of the many manuscripts that seem to contain Statham or similar abridgements, because he fills out the last line with a cross-reference.

[6] DS: cross reference to 1429.003 = Hil. 7 Hen. 6, pl. [3], fol. 19b-20a and 1428.026 = Mich. 7 Hen. 6, pl. 26, fol. 16b-18a.

[7] DS: in 1389.026am = Hil. 12 Ric. 2, pl. 26, Ames 136–137, Charleton said that the view did not lie in Nuper obiit.

[8] CD: This would be 1396–1397. We preferred the date in Fitzherbert on the ground that a printer was more likely to omit an 'i' than he was to confuse '1' with '0'.

4b

Fitzherbert, *Joynder en accion* 3, fol. 2.198v:

A°.21.R.2. Si obligacion soit fait al roye et a ces customers, ils joyndront ove le roye come fuit ajudge en l'eschequer chamber etc.

5a

Statham, *Liveree* 11, fol. 120v:

Anno.xxi.Rii. Devaunt que le tenant le roy eit liverie il covient de suer briefe de etate probanda que sera directe al vicount del comitate ou il fuist nee non obstante que le terre fuist en autre comitate. Et chescucn que passera en l'enquest sera del age de xlii ans alle meins issint que il fuist de pleyne age al temps que cestuy que sue le briefe fuist nee et ils dirront signes de prover le temps de son nestre .s. que mesme l'anne fuist un graunde thondre ou pestilence et si qua sint similia. Et touts ceux signes sera retournes per le vicount et c. quere si meyns que sii poient estre en l'enquerre eo que le trialle est per proves et c. Et auxint tiel briefe de etate probanda ad souvent foits estre directe alle eschetour etc.

[Klingelsmith trans., 2.854–855] (11) **Before the tenant** of the king shall have livery he should sue a writ of *ætate probanda*, which shall be directed to the sheriff of the county where he was born, notwithstanding the lands are in another county. And each one who shall be included in the inquest shall be forty-two years old at least , so that he was of full age at the time when he who sues the writ was born . And they shall tell of signs to prove the time of his birth, to wit: that that year there was a great thunder or pestilence, and things like that. And all those signs shall be returned by the sheriff, etc. Query, if there can be less than twelve in the inquest, since the trial is by proof,[10] etc.? And also such a writ of *ætate probanda* has often been directed to the escheator, etc.

5b

Fitzherbert, *Liverye* 5, fol. 2.235v:

A°.21.R.2. Devant que le tenant le Roy aiet liverie il covient suer briefe de Etate probanda que serra direct al vicount del comitate ou il fuit nees non obstant que la terre fuit en auter countie, et chescun que pass- del enquest serra d age de xlii. ans al meins issint que il fuit de plein age al temps que cestuy que suit le briefe fuit nees, et il done signes de prover son neister, s. que mesme l'an fuit un graund tempest ou pestilence, et si que sont similia et touts ceux signes serra return per le vicount, et auxint tiel briefe de Etate probanda ad este souvent direct al Eschetor etc. quere si meins que xii. purront estre en l'enquest eo que le trial est par proves.

Cases Attributed to Michaelmas Term in Year 22 (1398)

6

Fitzherbert, *Execution* 165, fol. 2.127r:

M.22.R. Si feme port briefe de dower et le vicount liver al feme en execution le moity des terres dount el demande dower, si cesty vers que el recover vient en court et monstre ceo matter al court et preia sur ceo remedy, sur son suggestion il aver Scire vadias vers le feme que recover si

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[9] CD: This translation is not correct. See Baker, *Manual*, s.v.: "customary tenant", "customs official." The latter would seem to be what is involved here.

[10] CD: We probably should preserve the plural in both Statham and Fitzherbert. The argument would seem to be that the trial is by 'proofs', i.e., evidence presented rather than the inscrutable sworn inquest of twelve.

el sache riens dire pur que el ne serra recoupe etc. et ceo agarde Mich. 22 Ric. 2 et dit fuit per Skreene[11] que le tenant ne purra aver l'assise pur le judgement done.

7

Fitzherbert, *Disseisin* 8, fol. 2.37v:

M.22.R.2. Si le roy grant ma terre per patent a un autre, et il entre jeo aver assise vers luy per le comen ley per opinione curie, mes per le statut Anno 1 Hen. 4, ca. 8. jeo aver assise lou jeo soy oustre par colour de tiel patent et recover mes damages a treble, et vide 20 Ric. 2 en title de assise l'oppinion del court accorde etc.

Case Attributed to No Term in Year 22

8

Bellewe, *Variance* 5, p. 327–328 (72 Eng. Rep. 145):[12]

Variance inter le fine et Scire fac' de execut [p. 328] ceo, et vncor bon, non obstat le varians, p[er] Hank. 22. R. 2. hic tit Bre. p[ro]pe finem.

Case Attributed to ?Hilary Term in Year 23

9a

Statham, *Countreplee de voucher* 20, fol. 49r:

Hillarii.xxiii.R.ii.[13] En dower le tenant vouche une estraunge et le demandant dit que cestuy etc. fuist le primer que abate apres l'e moert nostre baron de que possession etc. et l'oppinion que ceo nest counter ple pur ceo que son title ne comensa tant solement per le murant son baron qur puit estre que son baron fist feoffement al vouche et puis avient al terre et murust seisi per que ele dit que cestuy que etc. naver etc. puis l'espousals. Rikkille ceo nest counter ple qar le title le demandant puit comencer apres l'espouselx per pur/chace le baron donques vous covient dire en ceo cas q il naver riens puis le title de briefe pur ceo que vostre title nest pas certein quar vostre title est l'espousals le possession et le murant. Et en chescun cas lou le title est noncertein le counter ple sera puis le title come en brief d entre sur disseisinvous dirres puis le title de vostre briefe et ceo sera entre le possession devaunt le disseisin Mes lou le title est certeyne autre est come en fourmdone en descendre il drra puis le donne Et en briefe d eschete puis l'felony fait et sic de singulis et adjourn.

[Klingelsmith trans. 1.380–381] **In dower**, the tenant vouched a stranger, and the demandant said that he, who, etc. was the first who [*381] abated after the death of our husband, of whose possession etc. And the opinion was that that was not a counterplea, because his title did not commence solely on the death of her husband, for it might be that her husband made a feoffment to the vouchee, and then came to the land and died seised. Wherefore she said that he who, etc., had nothing, etc., after the marriage. RIKHILL: That is no counterplea, for the title of the demandant could commence after the marriage by the purchase of the husband. Then you should

[11] DS: Sjt William Skrene.

[12] DS: ?= Whittick Pasch. 21 Ric. 2 (1398), pl. 14, Scire facias, execution of fine. DS: perhaps this from 22 Ric. 2? CD: This would seem to be a reference to Bellewe, p. 84, Hankford, JCB's speech in Fitzherbert, *Briefe* 936, which is, in turn an abridgement of Whittick ed. 22M3.

[13] DS: not in Whittick. Hil. 23 Ric. 2 was not a regnal year of Ric. 2, so must be 22? 1399? CD: There is a Common Bench plea roll for Trinity term of 1399 headed: 'anno regni Ricardi regis Anglie et Francie vicesimo tercio incipiente' (http://aalt.law.uh.edu/AALT4/R2/CP40no554/aCP40no554fronts/IMG_0003.htm). Hence, the attribution to year 23 is not impossible, but the attribution to Hilary term is.

say, in that case, that he had nothing after the title of the writ as your title is not certain, for your title is the marriage, the possession, and the dying. And in any case where the title is uncertain the counterplea shall be after the title; as in a writ of entry upon a disseisin, you shall say "after the title of your writ" and this shall be understood to be the possession before the disseisin. But where the title is certain it is otherwise, as in formedon in the descender, he shall say, "after the gift." And in a writ of escheat, "after the felony done," and so in each case. And they adjourned.

9b

Fitzherbert, *Countrple de vouche* 100, fol. 1.249r:[14]

H.23R.2.[15] Dower le tenant vouche estraunge, et le demandant dit que cestuy etc. fuit le primer que abate apres le mort nostre baron etc. de que possession etc. et l'oppinion que ceo ne fuit counterple pur ceo que son title ne commense solement per moreant son baron car puit estre que son baron fist feffement al vouchee et puis avient al terre et murrust seisi, pur que il dit que cestuy etc. n'aver riens puis les espousal Rok:[16] vous covient dire puis le title del brief etc.

[14] CD: Unlike most of Fitzherbert abridgements that are also found in Statham in this list, Fitzherbert's language here is not very close to Statham's. They seem to have been abridging from different sources. Statham's abridgement makes somewhat more sense.

[15] CD: '3' is somewhat faded on the image of the 1516 ed., but it certainly looks like '3' rather than '2'. See note 13, above.

[16] DS: Rok = William Rikhill JCP 1389–1407.