... but Tacitus thus speaks

There were other implausibles, too.3

But the most dastardly—not only did he research the issue, he used antique law books!—came from Professor Colin K. Kaufman of St. Mary's School of Law.4 He begins (rather directly for a law professor, I thought) with these definitions from his first edition of Black's Law Dictionary (1891): "day," as used in pleadings and practice, was short for "day in bank" (from the Latin "dies en banco")—and "days in bank," according to 3 Blackstone's Commentaries 277, means "certain stated days in term appointed for the appearance of parties, the return of process, etc., originally peculiar to the court of the common bench, or bench, (bank) as it was anciently called."

Fortunately, for him, Professor Kaufman had an 1854 Edition of Blackstone's Commentaries—and fortunately, for us, he continues with his analysis of the Going Hence Question:

And surely enough, Vol. 3, p. 277 [of the Commentaries], after discussing novel disseizin, mort d'ancestor and darrein presentment, goes on to discuss at great, nay astonishing length, the 'stated days called day in bank, dies en banco.' The first day in bank is the return day; 'as, for instance, the octave of St. Hilary, or the eighth day inclusive after the feast of that saint; which, falling on the thirteenth of January, is the twentieth of January.' Blackstone then discusses 'essoigns,' and then points out, 'on every return day in the term, the person summoned has three days of grace, beyond the day named in the writ.' The reason? 'For our sturdy ancestors held it beneath the condition of a freeman to appear, or to do any other act at the precise time appointed. The feudal law, therefore, always allowed three distinct days of citation before the defendant was adjudged contumacious for not appearing; preserving, in this respect, the German custom, of which Tacitus thus speaks . . .'

and then there follows a footnote 6 on p. 278 which explains that they also had a return day for 'sittings at Nisi Prius.'

Well, you can imagine how fascinated I was to discover this, and of course I immediately checked into the question why somebody would want to go hence without being summoned for appearance at Nisi Prius. By your great good fortune (surely there is a just God somewhere) I just happen to own a copy of Buller on Nisi Prius by Francis Buller, Esq. of the Middle Temple (Dublin 1791). This worthy work discusses the operation of the "rule nisi" in the chapter on "New Trials" (Ch. VII, beginning at P. 325), where at p. 327 the learned Mr. Buller explains that, unfortunately with a bit of a lisp (use of 'f' for 's' was common in books printed before 1800—the usage is not at random, though it often appears so to the first glance) a rule nisi is a rule granted to 'fhew cause, and then the puife (law French, 'puisne' was pronounced 'puny' and is the source of the latter word in English) judge of the court spakes to the judge who tried the caufe (if it be not one of the fame court) and obtains a report from him of the trial, and alfo a signification of what his sentiments are upon it. If the judge declare himfelf satisfied with the verdict, it hath been ufual not to grant a new trial . . .'

Professor Kaufman concludes: "So you see that if
someone wants to go hence without day, evidently he wants to go hence without the court granting a new trial and making him have to appear again. And, if you are wondering why pleadings do not close with 'and deny all plaintiff's motions for rehearing and new trial' instead of 'and go hence without day,' I am afraid that (Blackstone being silent on that point, and Buller unenlightening) you will just have to take Tacitus' word that this is the right way to plead it."

... and a disaster averted

Finally, Waller Collie—an ex-Dallas Bar President, State Bar Director, and the Charter Member of footnote 2 (even though he does not write in cosmetic paragraphs)—confesses to An Almost Horrendous Experience. Waller was reviewing a general denial his secretary had just finished typing and something seemed out of kilter:

I discovered that the defendant had not 'put himself upon the country,' but instead had 'put himself upon the county!' (Emphasis supplied.)

At first, the full implication of this small error did not strike me (after all, the defendant was being sued in County Court, but on serious reflection the enormity of the error became apparent. I had intended that my defendant 'put himself upon the country'—the whole country, from the mountains to the prairies, to the oceans white with foam. But instead, here my defendant was 'putting himself upon the county—one small little old grubby county—almost as if he were saying 'I'll leave this whole thing up to the Commissioner's Court.'

This seemed to me to be intolerable, and to be depriving my client of rights guaranteed him by countless eons of Anglo-Saxon law. I quickly directed that the error be corrected, and, once corrected, I felt quite relieved. When finally my defendant was 'putting himself upon the country'

once again he was standing proudly and honestly, head held high, submitting the rightness of his position to the entire, majestic machinery of justice of the whole country—from sea to shining sea! This, I said to myself, is how it should be, and I felt immeasurably better.

3. Other implausibles were submitted by Steve Maris of the Passman, Jones firm in Dallas ("Day, you see, is a small gnome-like creature with unruly orange hair and a somewhat frog-like body" that lurks in the courthouse basement and that must be taken, fed and maintained by the losing defendant "until some other defendant is found guilty of acts of an equally heinous nature"); and Robert L. Meyers of the Jones, Day storefront office in Dallas ("I made inquiry of the more knowledgeable coffee drinkers hanging out in the clerk's office and hallways of the courthouse, and the consensus was that the judge should send the plaintiff away without giving him a day in court").

4. This note was handwritten on the back of Professor Kaufman's envelope: "PS. T. Fortesque Clemmons was one of our finest students and credit to his alma mater."

5. The same answer to the Going Hence question came from Rufus N. McNight, Jr. of Dallas. However, he was unable to proceed with the Tacitus analysis "since someone several years ago made off with my late father's black, leatherbound copy of Blackstone (over which I poured as a youngster—wondering what it all meant, and which I had hoped some day to inherit)."

6. "Blackstone quotes a bunch of Latin, discusses the Gothic Constitution, also quoted in Latin; discusses the 'great popish festival of Corpus Christi' which alters the fourth day default rule and makes it a fifth day rule for the Trinity term of court, with certain exceptions such as occurred in 1614, 1698, 1709 and again in 1791."