REPORTS

OF

CASES

ARGUED AND DETERMINED

In the Court of King's Bench,

IN THE

NINETEENTH, TWENTIETH, AND TWENTY-FIRST YEARS OF THE REIGN OF GEORGE III.

BY

The Right Hon. SYLVESTER DOUGLAS,
BARON GLENBERVIE.

THE FOURTH EDITION, WITH ADDITIONS:

BY

WILLIAM FRERE,
SERJEANT AT LAW.

VOL. I.

Equidem cum colligo argumenta causarum, non tam ea numerare soleo, quam expendere. CICERO.

London:
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PREFACE.

THERE is no species of publication which demands a more scrupulous accuracy than those histories of judicial proceedings and decisions to which the name of *Reports* has been long appropriated.

The immediate province of the courts of justice is to administer the law in particular cases. But it is equally a branch of their duty, and one of still greater importance to the community, to expound the law they administer upon such principles of argument and construction as may furnish rules which shall govern in all similar or analogous cases.

Such are the various modifications of which property is susceptible, so boundless the diversity of relations which may arise in civil life, so infinite the possible combinations of events and circumstances, that they elude the power of enumeration, and are beyond the reach of human foresight. A moment's reflection, therefore, serves to evince, that it would be impossible, by positive and direct legislative authority, specially to provide for every particular case which may happen.

Hence it has been found expedient to entrust to the wisdom and experience of judges, the

power of deducing, from the more general propositions of the law, such necessary corollaries, as shall appear, though not expressed in words, to be within their intent and meaning.

Deductions thus formed, and established in the adjudication of particular causes, become, in a manner, part of the text of the law. Succeeding judges receive them as such, and, in general, consider themselves as bound to adhere to them no less strictly than to the express dictates of the legislature.

But whether a certain decision was ever pronounced, and, if it was, what were the reasons and principles upon which it was founded, are matters of fact, to be ascertained and authenticated, as all other facts are, by evidence.

The law of this country has been peculiarly watchful to prevent the approaches of falsehood, in the investigation and proof of the particular facts litigated between contending parties. For this purpose many rules have been established relative to the competency or admissibility of evidence, of all which the ultimate object is, to guard the avenues of belief, and to secure the minds of those who are to determine, from imposition and mistake.

It would be natural to expect a caution still more rigid with regard to the evidence of judicial proceedings and decisions. Whether a particular act was done, or contract entered into, by a party to a cause, or not, can only affect him and his opponent, or, at most, those who become their representatives; and should that be pronounced to have happened, which in truth never did, third persons would not be injured. But whether a judgment alleged to have been delivered, was really delivered, and upon the alleged reasons, may affect all persons who are, or shall be, in circumstances

circumstances similar to those of the parties to that cause. Yet it has somehow or other happened, that little or no care has been taken, nor any provisions made, to render the evidence of judicial proceedings certain and authentic.

The records of the court are, indeed, framed in such a manner as to constitute indisputable documents of such parts of the proceedings as are comprised in them, but it is easy to shew that this goes but a very little way.

In the first place, the authority of a decision, for obvious reasons, is held to be next to nothing, if it passes *sub silentio*, without argument at the bar, or by the court; and it is impossible from the record of a judgment to discover whether the case was solemnly decided or not. Records, therefore, even when they contain a sufficient state of the case, do not afford complete evidence of what is requisite to the future authority of the decision.

But, in the second place, it is well known in how few instances the material parts of the state of the case can be gathered from the record. According to the modern usage, by far the greater number of the important questions agitated in the courts of law come before them upon motions for new trials, cases reserved, or summary applications of different sorts. In none of those instances does the record furnish the evidence even of the facts; for which, in such cases, there is no other repository, nor for the arguments and reasoning of the counsel and the court in any case, but the collections made by reporters*. On their fidelity and accuracy, therefore, the evidence of a very great part of the law of *England* almost entirely depends.

* At an early period of our constitution, the reasons of the judgment were set forth in the record, but that practice has long been disused.

The most ancient compilations of this sort were the work of persons specially appointed for the purpose. In what particular manner they exercised their function, how far the courts superintended, or the judges assisted or revised their labours, no where appears; and indeed almost every thing relating to them is involved in so much obscurity, that I believe their very names are totally unknown.

It is probable, however, that the cotemporary judges, and those who immediately followed them, had satisfactory reasons for confiding in the accuracy of those reporters, since their writings, called the *Year-books*, have always possessed a degree of traditional weight and authority superior to what is allowed to any subsequent Reports.

This, indeed, is in some measure owing to the circumstances of their priority in point of time, exclusive of any consideration of peculiar authenticity or excellence, the decisions contained in them forming the basis of that large superstructure of successive determinations which now fills the library of an *English* lawyer.

The special office of reporter was discontinued so long ago as the beginning of the reign of *Henry* VIII. and the history of the judicial proceedings in *Westminster Hall*, from that time till now, would have been lost in oblivion, if it had not been for the voluntary industry of succeeding reporters.

The example was first set by some of the ablest judges and lawyers of the 16th century, who, finding that official accounts were no longer taken of what passed in the courts of justice, were stimulated by a commendable zeal for that science of which they were distinguished ornaments, to commit to writing for the use of posterity, the history of

of the most important decisions which took place within their practice or observation.

Those eminent persons have had a numerous train of followers, of different descriptions, who, with unequal merit, and various success, have continued down to the present times, a pretty regular series of decided cases.

In the reign of *James* I. Lord Chancellor *Bacon* procured the revival of the ancient office of reporter, but it was soon dropped again, and does not seem, while it continued, to have been productive of the advantages expected from it. I know of no Reports attributed to the persons then nominated to the office, except those printed in the name of Serjeant *Hetley*, who, as we are told in the title page, was "*appointed by the King and Judges for one of the Reporters of the Law.*" Whether it was he or the Lord Keeper *Littleton* who was really the author of those Reports, (many of them being exact duplicates of those ascribed to *Littleton,*) they are far from bearing any marks of peculiar skill, information, or authenticity.

Soon after the Restoration, an act of parliament having prohibited the printing of law books without the licence of the Lord Chancellor, the two Chief Justices, and the Chief Baron, it became the practice to prefix such a licence to all Reports published after that period, in which it was usual for the rest of the Judges to concur, and to add to the *imprimatur* a testimonial of *the great judgment and learning* of the author. The act was renewed from time to time, but finally expired in the reign of King *William*. But the same form of licence and testimonial continued in use till not many years ago; when, as the one had become unnecessary, and the other was only a general commendation of the writer, and no voucher for the merit of the work, the Judges, I believe, came to a resolution, not to grant them any longer;

and, accordingly, the more recent Reports have appeared without them.

I leave to others the enquiry into the reasons why the law has not provided some method of handing down its decisions to future times, more solemn and authentic than what is now known, or indeed seems ever to have existed; and I proceed to state to the reader the means I have employed to render the following Reports as faithful, correct, and useful, as it was in my power to make them.

When the question arose upon the pleadings, or was connected with them, there is hardly an instance where I have not been favoured, in the most obliging manner, with the paper-book, as it is called; that is, a copy of the record itself. In like manner, I have been supplied with copies of almost all the special verdicts, cases reserved, and material rules, affidavits, and exhibits. I have also had the most ready access to consult and transcribe whatever I thought necessary, in the Crown Office, or that of the clerk of the rules, as well as the cases sent from the Court of Chancery, and the certificates of the court upon them.

One of the greatest difficulties I had to encounter was, in obtaining a complete state of the facts when the case came on in the shape of a motion for a new trial. I was obliged, on such occasions, to collect them, on the sudden, as they were read from the report of the Judge, and frequently without any previous knowledge of the cause. Some of the most essential circumstances, which had escaped me at first, I was perhaps able to recover afterwards, from the observations made upon them by the counsel or the court. But then, in endeavouring to catch the facts in that manner, I was in great danger of losing the chain of the argument. It has been my study to remedy these inconveniences by every assistance within my reach. The briefs of counsel have never been withheld

withheld from me; but though they are extremely useful and safe, where exhibits are to be set forth or abridged, as deeds, bills of exchange, policies of insurance, &c. they cannot be resorted to, but with the utmost caution, for the parol testimony in a cause. Yet even there, they have often served to explain an ambiguity, or supply an omission, in the notes I had taken in court. In all cases I have had it in my power to collate my own notes of the evidence with those of a great many of my friends at the bar; frequently with those of the counsel who were concerned in the cause.

In considering what is the best *method* of reporting, I found that different writers had proceeded upon plans widely different from one another.

Some have prefixed, to all the leading cases, a full copy of the pleadings, thereby rendering their work at the same time a book of *entries*, and of reports. It was once my intention to have done so, but I was dissuaded from it by much better opinions than my own.

Some have not only stated the facts at great length, but have given the arguments of counsel almost as diffusely as they were delivered at the bar, distinguishing the speeches of the different advocates on the same side, separately, under the names of each.

Others, on the contrary, have only given a very abridged state of the case, together with the mere point decided, omitting not only all the arguments at the bar, but also most of the reasoning of the court.

Each of these two methods has its partizans, and each has its peculiar advantages and disadvantages.

The first is more instructive for the younger part of

of the profession; it exhibits a more complete picture of the case, and does more justice to the learning and ingenuity of the several advocates.

But, on the other hand, its prolixity fatigues the attention, it abounds with repetitions, and often disgusts the experienced lawyer, by a detail of elementary principles, trivial arguments, and hackneyed authorities.

I have endeavoured to steer a middle course between those two extremes.

1. I have been particularly attentive to state whatever was material in the pleadings or evidence; and sometimes, where I was afraid of omitting what might be deemed essential, I have set forth *verbatim*, a case, a plea, or a special verdict.

2. I have thrown together, into one discourse, the arguments which were used by all the different counsel who spoke on the same side, digesting them in the order which seemed to me to give them the greatest effect. In following this plan, as I have been often obliged to cloath the thoughts of others in language of my own, so I have been rather solicitous to preserve what appeared weighty and important in point of reasoning and authority, than anxious to retain every thing that was said. But I have taken care to omit no cited cases which I have found upon examination to be materially applicable to the point in question.

3. The judgments of the court I could have wished to give in the words in which they were delivered. But this I often found to be impracticable, as I neither write short-hand, nor very quickly. Memory, however, while the case was recent, supplied at home, many of the chasms which I had left in court; and, by comparing, and as it were confronting a variety of notes taken by others, with my own, I was frequently enabled

enabled to recal, and insert in my report, material passages which I should otherwise have lost. Thus I have profited in several respects by the liberal communications and concurrent labours of others of the profession, some of them persons of the first eminence at the bar. I acknowledge the assistance I have received from them with satisfaction and pride. If this book should meet with any degree of approbation, they are fairly entitled to a great share of it; and I should with pleasure declare that some of my friends ought, almost as much as myself, to be considered as the authors, were it not that I might thereby seem desirous to involve them in my responsibility for its imperfections.

4. I have carefully consulted the original authors for all the cases cited, and have bestowed all possible attention to see the names and references correctly printed.

5. To avoid unnecessary repetition, I have omitted the frequent conclusions of "*per cur.* "*unanimiter,*" "unanimously," &c. and therefore I take this opportunity of mentioning, that the unanimity of the court is to be understood, in every case where I have not expressly stated a difference of opinion.

6. It is usual with some reporters to give an account of different stages of the same cause, or of arguments in the same case, but delivered at different times, in different parts of their Reports, according to strict chronological order. This seems to me to give them too much the appearance of being the mere transcripts of their note-books. I have, therefore, thought it more adviseable to bring every thing respecting the same case into one point of view, by stating the whole together, and inserting it on the day on which the case was ultimately disposed of; distinguishing, however, the different stages of the cause, and marking the particular dates of each.

7. It

7. It may be proper to mention the reason why I have so rarely given any account of decisions relative to the granting or refusing discretionary costs: it is, because such decisions depend for the most part on particular circumstances, and therefore cannot operate as precedents or authorities on other occasions.

8. One or two cases reported by me have come on, at first, in the court of *King's Bench*, or elsewhere, at a time prior to the period to which I have confined myself, and one or two have been heard again and decided upon, in another form, or some subsequent stage, posterior to that period. Of these, where I have been able, I have completed the history, by stating the more early or later proceedings in the notes.

9. I have also printed in the notes several original cases which were either cited, or seemed to me applicable to the point of the case I was then reporting. For this I trust no apology is necessary, though many of them will soon probably be laid before the public, more fully and correctly, in Reports now preparing by another gentleman, and appropriated to the period in which they were determined*.

10. But I am not without the apprehension of meeting with some degree of censure for having on different occasions given a place, in the notes, to arguments and observations of my own. I trust I have throughout avoided the appearance, as I certainly never entertained the design, of discussing or controverting the solemn judgments of the court. This, it is true, was both recommended and practised by Mr. Justice *Foster*, in his Reports, but I cannot help thinking it is very far from being any part of the reporter's province. At least, what might become a Judge of

* Mr. *Cowper*'s Reports were published soon after these, and are often referred to in this edition.

his

his established reputation, would have been extremely unbecoming in me. I have merely attempted, in some places, to illustrate or confirm the doctrines laid down in the text, by authorities which have occurred to me in the course of my reading, or arguments which the subject matter may have suggested. Sometimes, though rarely, I have entered into the consideration of general legal questions; but if the reader is not too severe a critic, he will have some indulgence for that part of the notes, as no ideas of my own have been suffered to obtrude themselves upon him in the text. I own I thought it unnecessary, as I should have felt it to be an irksome restraint, in a work consisting of near 800 folio pages, and containing such a variety of reasoning on subjects extremely diversified, and often highly interesting to a lawyer, to confine myself so rigidly to the mere business of reporting, as never once, even at the bottom of the page, to have mentioned what might occur to myself on any of those subjects.

11. To attain in some degree the advantages already hinted at of the more concise species of Reports, I have, after the example of some of my predecessors, inserted, on the margin, an abstract of the principal point or points of every case. The plan on which I have formed those abstracts has been, to state the point as a general rule or position. This method, upon the whole, seems to be the most useful, though it has its inconveniencies. Where a case turns upon a complication of facts, not likely ever again to be combined together, a proposition including all those facts, and purporting to be a general rule of law, has an uncouth and awkward appearance. However, in such cases, I have sacrificed particular propriety to general uniformity.

12. The table of matters has been framed with a view to render it a sort of alphabetical Digest of

of the contents, and as I wish, that on many occasions, these Reports may save the reader the trouble of recurring to others, I have mentioned not only the points adjudged in the cases I have reported, but also those cited from prior authorities and determinations. There are times when this may prove of considerable use to the practising lawyer. It is unnecessary to tell the student, that he ought always to find leisure to consult the originals.

13. In addition to the usual* Index of cases reported, I have prefixed another of those cited or stated at large in the text or notes. If this should not prove of the advantage I intended, I shall have to regret that I employed a good deal of time upon it, in a manner certainly extremely dry and unentertaining. But I cannot but flatter myself that it will furnish an useful *Repertorium* of all the important cases that were cited and relied upon in the court of *King's Bench* during a period of three years, which must amount to a great proportion of the principal common law authorities. Besides, as, in most instances, the material parts of the cited cases are abstracted in some one of the reported cases, and in many parts of the work several of them are observed upon, and explained, this Index, by enabling the reader to bring every thing relative to the same case under his review at once, will supply him with valuable *Readings* and commentaries upon most of them.

Thus I have explained the nature and plan of this volume. I now dedicate and consign it to the use of my profession. If it has at all done justice to the great judicial qualities of those who at present fill the Bench, it will be acceptable to my cotemporaries and posterity. If I have

* In this fourth edition all the cases of which an original Report is given are thrown together into one Index.

failed

failed in that respect, those qualities are so universally felt and acknowledged, that no reputation can suffer but my own. Even with regard to myself, whatever may be the success of the work, the intention, at least, cannot meet with disapprobation; being no other than to render some service to the public, by communicating to lawyers in general, the fruits of my private industry and labour. The nature of the undertaking precludes that sort of ambition by which authors are so often animated; and my utmost aim will be attained, if I shall be found to have merited, in any degree, the humble praise of useful accuracy: *Ubi ingenio non erat locus, curæ testimonium promeruisse contentus.*

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TO THE

SECOND EDITION.

THE additions which have been made to the following work will be obvious to the reader. As a new impression was called for, it would have been unpardonable not to aim at improvement. But it was due to those who are possessed of the former edition, to render this as little prejudicial to its value as possible. On that account, the new cases, notes, and references, have been printed in a detached pamphlet, on paper of the same size with the first edition. From the length of some of the additional notes, new pages were found necessary, otherwise the same *number* would have extended sometimes to several leaves, and, though that has been practised in the enlarged editions of some law books, it is a method which seems to me not fit to be imitated; because it defeats, in a great degree, the end of numbering the pages. But the pages of the former edition are printed on the margin of this, and the pages of this may be written on the margin of the former: by which means, cases or passages cited according to the one or the other, will be found without difficulty in either. Some may think, the enlarged size of the work has rendered it too bulky for one volume; two title pages, therefore, are printed, that those who choose may have it bound up in two.

LINCOLN'S INN,
Jan. 1, 1786.

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TO THE

THIRD EDITION.

A NEW impression of these Reports being called for, it has been thought adviseable to print them in octavo, as that form seems now to be generally thought the most convenient. The reader will find some additional notes and references in this edition, but they are not numerous enough, nor of sufficient importance, to be printed apart, as was done with respect to the former additions.

LINCOLN'S INN,
Jan. 1, 1791.

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TO THIS

FOURTH EDITION.

THE former editions of these Reports having been out of print, the noble and learned person who originally compiled them was requested to publish a fourth; and had commenced the task of preparing it for the press. Finding, however, that his occupation in public business did not allow sufficient time for such an undertaking, Lord Glenbervie was obliged to devolve that task upon another.

The present editor is very sensible of its importance, even if considered merely as the re-production of an original work so high in character and authority, and which has become so combined and interwoven with the learned works of other authors, and with the subsequent decisions of the Courts. He has been careful to preserve the original with accuracy, and in such a form that references made to former editions may apply with equal facility to the present.

His object has been, in the notes which he has added, to point out where and in what manner the authority of the original cases has been affected since their publication: whether they have been confirmed, explained, modified, or over-ruled by subsequent decisions in the courts of law; and, in some instances, by the observation of text-writers: but he has chiefly confined himself to those cases in which the originals have been expressly cited. In the execution of this

plan he will only claim the merit of having consulted and studied for himself every case, and every passage, to which he has given a reference. Those who are most conversant with this species of task, will be most sensible of its extent; and will be aware how small a proportion the produce actually exhibited to the reader, bears to the labour employed by an editor, who is anxious to ascertain all the authorities that may, by possibility, apply to his subject. Where search has been fruitless, the editor has taken care to save the reader's trouble, by omitting the reference.

The editor is well convinced of the imperfection of his work, even upon this limited plan.

The Indexes have been with much pains remoulded and combined. The original cases are now arranged all together in one index, and the cited cases in another, whether the report or reference is contained in the first, or subsequent editions.

The Table of Contents is reprinted as before; the editor not thinking such species of reference of much utility in a book of reports; but being unwilling to deprive the work of that, which might be thought an advantage by some readers.

No. 3, King's Bench Walk,
July, 1812.

JUDGES

JUDGES of the Court of KING's BENCH during the Period of these Reports.

WILLIAM Earl of MANSFIELD, Lord Chief Justice.
EDWARD WILLES, Esq.
Sir WILLIAM HENRY ASHHURST, Knt.
FRANCIS BULLER, Esq.

ATTORNEYS GENERAL.

ALEXANDER WEDDERBURNE, Esq.
JAMES WALLACE, Esq. (appointed *Aug.* 1780.)

SOLICITORS GENERAL.

JAMES WALLACE, Esq.
JAMES MANSFIELD, Esq. (appointed *Sept.* 1780.)

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OF

ORIGINAL CASES

CONTAINED IN THIS WORK,

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N.

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CASES

ARGUED AND DETERMINED

IN THE

COURT OF KING's BENCH,

IN

MICHAELMAS TERM,

IN THE NINETEENTH YEAR OF THE REIGN OF GEORGE III.

WALKER and Others, Assignees of BEAN, a Bankrupt, and MACKENZIE, and Others, Assignees of CUTHBERT, a Bankrupt, *against* WITTER.

1778. Saturday, 7th Nov.

THIS was an action of debt brought in the county of *Middlesex*, on a judgment in the supreme court in *Jamaica*.—The first count of the *declaration* was in the following words: "*William Witter*, late of the parish of *St. Mary le Bone*, in the county of *Middlesex*, Esq. was summoned to answer *Isaac Walker*, *Francis Newton*, and *John Colvill*, assignees of the estate and effects of *Samuel Bean*, a bankrupt, within the true intent and meaning of the statutes made and provided, and now in force, concerning bankrupts, and *Colin Mackenzie*, *Thomas Bell*, and *Alexander Grant*, assignees of the estate and effects of *Lewis Cuthbert*, a bankrupt, *&c.* that he render to them £594 0*s.* 4*d.*

An action of debt will lie on a foreign judgment, and the plaintiff need not shew the ground of the judgment.—If he conclude "prout patet per recordum," that is to be rejected as surplusage, and the defendant cannot plead nul tiel record.

1778.

WALKER against WITTER.

of lawful money of *Great Britain*, which he owes to, and unjustly detains from, them.—For that whereas the said *Samuel, Lewis*, * and also one *David Bean*, since deceased, in the life-time of the said *David*, and which said *David*, afterwards, and before the said *Samuel* and *Lewis* became bankrupt, died, and the said *Samuel* and *Lewis* survived him; that is to say, at *Westminster* in the county of *Middlesex*, heretofore, to wit, on the last *Tuesday* in *May*, in the sixth year of the reign of our sovereign lord the now king, and in the year 1766, in a certain court *of record* of our said lord the king, called the supreme court of judicature held for our said lord the king, at the town of *St. Jago de la Vega*, in the county of *Middlesex*, in and for the island of *Jamaica*, and within the jurisdiction of the said court, on the said last *Tuesday* of *May*, in the said sixth year of our said lord the now king, and in the year 1766, before the honourable *Thomas Beach*, Esq. chief judge of the said court, and his associates then sitting judges of the same court, by the consideration and judgment of the same court, recovered against the said *William* a certain debt of £220 current money of the said island of *Jamaica*, and also £1 16*s*. 3*d*. for their costs and charges by them, about their suit, in that behalf expended, to the said *Samuel, Lewis*, and *David Bean*, in the life-time of the said *David*, by the said court, of their assent adjudged, whereof the said *William* is convicted, *as by the record and proceedings thereof remaining in the said court at the town of* St. Jago de la Vega *more fully appears*; which said judgment still remains in that court in full force, unreversed, unpaid, and unsatisfied; that is to say, at *Westminster* in the said county of *Middlesex*; and that neither the said *Samuel, Lewis*, and *David*, or either of them, in the life-time of the said *David*, nor the said *Samuel* and *Lewis*, or either of them, since his decease, nor the said *Isaac, Francis, John, Colin, Thomas*, and *Alexander*, as assignees as aforesaid, or either of them, have yet obtained execution of the aforesaid judgment, and the said *Isaac, Francis, John, Colin, Thomas*, and *Alexander*, in fact say, that the debt, costs, and charges aforesaid, so recovered as aforesaid, amount to a large sum of money, to wit, to the sum of £158 8*s*. 9*d*. of like lawful money of *Great Britain*, that is to say, at *Westminster* aforesaid, in the said county of *Middlesex*, whereby an action hath accrued to the said *Isaac, Francis, John, Colin, Thomas*, and *Alexander*, as assignees as aforesaid, to demand and have, of and from the said *William*, the said sum of £158 8*s*. 9*d*. of lawful money of *Great Britain*, parcel of the sum of £594 0*s*. 4*d*. above demanded."—Then there was a second count in the same form, stating a like judgment of the court in *Jamaica* for £608, and £1 16*s*. 3*d*. costs, of *Jamaica* currency, or £435 11*s*. 7*d*. sterling, being the residue of the sum of £594

*[2]

£594 0s. 4d. demanded in the action.—The defendant, besides *nil debet*, *pleaded* also to the first count, "*That there is not any such record* of the recovery of the said debt, costs, and charges, in the said first count of the said declaration mentioned * against him the said *William*, in the said court *of record* of our said lord the king, called the supreme court of judicature held for our said lord the king at the said town of *St. Jago de la Vega*, in the said county of *Middlesex*, in and for the said island of *Jamaica*, and within the jurisdiction of the said court, before the honourable *Thomas Beach*, Esq. chief judge of the said court, and his associates, then sitting judges of the same court, as the said plaintiffs have, in the said first count of their said declaration, alleged, and this he is ready to verify; wherefore, *&c.*"—There was a similar plea to the second count.—Upon the *nil debet*, the plaintiffs took issue, and the trial coming on at the sittings in *Westminster Hall*, after *Easter Term* 1778, a verdict was found for the plaintiffs.—To the pleas of *nul tiel record*, the plaintiffs *replied*, that there was such record, *&c.* (in the words of the pleas) "and this they the said plaintiffs are ready to verify *by the said record*; and thereupon a day is given to the said plaintiffs on, *&c.* to come before our said lord the king wherever, *&c. to produce the said record*, and the same day is given to the said defendant."

*[3]

In *Trinity Term*, 18 *Geo.* 3. these issues in law came on to be argued; the judgment on which the action was brought having been brought into court, under the seal of the court of *Jamaica*.

The *Solicitor-General (Wallace,)* and *Dunning*, for the plaintiffs; *Graham*, *Bower*, and *S. Heywood*, for the defendant.—The case stood over till this day, when it was again argued by the same counsel.

For the defendant, several grounds were taken. It was contended, that an action of debt could not be maintained on a judgment in a foreign court; or, that, if debt would lie, yet it could not be maintained as on a specialty, but that the consideration of the judgment ought to be shewn in the declaration. That, if this judgment were to be considered as a specialty, the court had no jurisdiction, because actions on judgments are local, and must be tried in the county where the judgment is given.—These objections, if successful, would have entitled the defendant to an arrest of judgment on the verdict found for the plaintiffs on the *nil debet*.—On the issues joined on the *nul tiel record*, it was insisted, that there must be judgment for the defendant, because the judgment in *Jamaica* was not a record, in the proper legal sense of the word.

For the plaintiffs, it was said, that it is an established maxim, that, where *indebitatus assumpsit* will lie, debt will also lie; and that this court had determined, in the case of

1778.

WALKER against WITTER.

Crawford v. *Whittal (a)* [1], that *indebitatus assumpsit* may be maintained on a foreign judgment [F. 1]. That it was also determined, in that case, that the judgment is, of itself, *primâ facie* evidence of the debt, and, therefore, the plaintiff is not bound to shew any other consideration. That in *Sinclair* v. *Fraser (b)*, which was an appeal from the court of session in *Scotland* to the house of lords, in the case of an action brought in that court on a judgment in *Jamaica*, it was

(a) H. 13 *Geo.* 3. *B. R.*

[1] The Case of *Crawford* v. *Whittal* was argued and determined in *B. R. H.* 13 *G.* 3. It was an action of *indebitatus assumpsit*, brought by *Crawford*, as administrator of one *Hargrave*, in which he declared, that the defendant was indebted to him, as administrator, "in the sum of £747 sterling, for 6904 rupees 10 annas and 9 pice, of current money of *Bengal* in the *East Indies*, by a certain judgment of the honourable the mayor's court at *Calcutta*, at *Fort William* in *Bengal* aforesaid, holden before, &c. before that time, *viz.* on, &c. adjudged and awarded to be paid by the said defendant to the said plaintiff, as administrator as aforesaid, for a certain demand of the said plaintiff, as administrator as aforesaid, sued and prosecuted in the same court, of 5801 rupees, &c. together with interest due thereon from, &c. till, &c. at the rate of, &c. being, &c. current money of *Bengal* aforesaid, and costs of suit, being, &c. making together the said sum of 6904 rupees, &c. which said judgment is in force and unsatisfied; and which said 6904 rupees, &c. at the time of recovering the said judgment, were and yet are of the value of the said £747; and being so indebted, the defendant, afterwards, in consideration of the premises, undertook to pay."—There were other counts to the like effect; some of them stating the sum only in *East India* money,—some varying the amount,—and some stating the judgment, without adding, "for a certain demand, &c."—The defendant demurred specially to this declaration, and shewed for cause, that there was no *profert* of the letters of administration.—It was argued, on *Tuesday*, the 9th of *February*, by *Fearnley* for the defendant, and *Mansfield* for the plaintiff.—Two points were made for the defendant: 1. *That* assigned for cause of demurrer; 2. An objection to the *substance* of the declaration, *viz.* that the grounds of the judgment abroad, and the cause of action there, ought to

(b) Cited in the *Duchess of Kingston's Case*, p. 64.

[F. 1]. But if in assumpsit on a foreign judgment by default, it appears on the face of the proceedings, that the party was only summoned by nailing up a copy of the declaration on the court-house door, no action will lie: although it be a law of the colony in which the judgment was given, that such summons shall be good against all persons *absent from the colony*. For it shall be taken that such law was intended only to apply to persons present within the jurisdiction at the commencement of the suit; and if the law expressly purported to apply to all persons not present in the colony, such law could not be binding on the rest of the world. *Buchanan* v. *Rucker*, 9 *East*, 192.

was laid down, as a general principle, that such a judgment is *primâ facie* evidence of a debt, though it is competent to the defendant to impeach the justice of the judgment, by shewing it to have been irregularly, or unduly, obtained. That the plea of *nul tiel record* was absurd, and that the judgment ought to be the same as if there had been no such plea.

Upon this, and the former occasion were cited (among other authorities) besides *Crawford* v. *Whittal*, and *Sinclair* v. *Fraser*, the cases of *Olive* v. *Gwin (c)*, *Otway* v. *Ramsey (d)*, and *Campbell* v. *Hall (e)*. †1

Lord

to have been shewn. The cases of *Duplein* v. *De Roven (f)*, and *Bowles* v. *Bradshaw (g)*, (which was *indebitatus assumpsit* on a judgment in the court of *Exchequer* in *Ireland*) were cited. As to the first point, the court said, that *profert* of the letters of administration was unnecessary; because, in this action, the plaintiff had no occasion to have described himself as administrator [☞].—Second point; *Aston*, Just. The declaration is sufficient; we are not to suppose it an unlawful debt. *Ashhurst*, Just. I have never seen this doubted; I have often known *assumpsit* brought on judgments in foreign courts; the judgment is a sufficient consideration to support the implied promise.—Judgment for the plaintiff.——In the case of *Sinclair* v. *Fraser*, an action had been brought by *Sinclair* in the court of session in *Scotland*, upon a judgment of the supreme court in *Jamaica*. The court of session determined that the plaintiff was bound to prove before them the ground, nature, and extent, of the demand on which the judgment in *Jamaica* had been obtained. But, upon an appeal to the house of lords, they reversed the decision of the court below, pronouncing the following special order of reversal: "It is declared, that the judgment of the supreme court of *Jamaica* ought to be received as evidence *primâ facie*, of the debt, and that it lies upon the defendant to impeach the justice thereof, or to shew the same to have been irregularly or unduly obtained: it is therefore ordered and adjudged, that the said several interlocutors complained of be, and the same are hereby reversed." *(h)*—While the case of *Walker* v. *Witter* was depending, a writ of error was to have been argued in the *Exchequer* chamber, in a cause of *Plaistow* v. *Van Uxem*, which is the last case that has arisen upon this question relative to foreign judgments. It was an action of *indebitatus assumpsit* in *B. R.* on a judgment in a court called the court of ordinance at *Ghent*. The plaintiff *Van Uxem* had a verdict, and judgment, upon the second count of his declaration, which only stated that the defendant was indebted to the plaintiff in, *&c.* upon and by virtue of a judgment obtained in the said court; "and "being so indebted," *&c.* without saying any thing of any demand for which the judgment was given.—

Bearcroft

(c) *T.* 1658. *Hard.* 118.
(d) *E.* 11 *G.* 2. *B. R.* 2 *Str.* 1090.
(e) *M.* 15 *G.* 3. *B. R.*
† 1 Since reported, *Cowp.* 204.
(f) 2 *Vern.* 540.
(g) *M.* 22 *Geo.* 2. *MSS.*

[☞] S. P. *Bonafous* v. *Walker*, *B. R. M.* 28 *Geo.* 3. 2 *Term Rep.* 126. 128, n. *(a)*.

(h) 4th *March*, 1771, cited in *the Duchess of Kingston's Trial*, 11 *Hargr. St. Tr.* 122, col. 2.

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Lord MANSFIELD, now and on the former occasion, said, that the plea of *nul tiel record* was improper. Though the plaintiffs had called the judgment, a record, yet by the additional words in the declaration, it was clear they did not mean that sort of record to which implicit faith is given by the courts of *Westminster Hall*. They had not misled the court, nor the defendant, for they spoke of it as a record of a court in *Jamaica*. The question was brought to a narrow point, for it was admitted on the part of the defendant, that *indebitatus assumpsit* would have lain, [F. 2.] and on the part of the plaintiffs, that the judgment was only *primâ facie* evidence of the debt. *That* being so, the judgment was not a specialty, but the debt only a simple-contract debt; for *assumpsit* will not lie on a specialty. The [6] difficulty in the case had arisen from not fixing accurately what a court of record is in the eye of the law. That description is confined properly to certain courts in *England*, and their judgments cannot be controverted. Foreign courts [☞ 1], and courts in *England* not of record, have not that privilege, nor the courts in *Wales*, *&c.* but the doctrine in the case of *Sinclair* v. *Fraser*, was unquestionable [† 2]. Foreign judgments are a ground of action every where, but they are examinable, [F. 3]. He recollected a case of

Bearcroft had moved the court of *B. R.* in arrest of judgment, but was refused a rule to shew cause.—The plaintiff in error assigned for errors, specially, That it did not appear by this second count upon what account the judgment abroad was given; and that it did not appear that it was given on account of any just debt, or for any other good and sufficient cause of action.—The cause was set down for argument on the 26th of *June*, *T.* 18 *Geo.* 3. but no body appeared to argue on the part of the plaintiff in error: and the judgment was affirmed of course.

[☞ 1] According to his lordship's opinion in *Bernardi* v. *Motteux* (*infra* 581.) the judgments of foreign courts of *admiralty*, as to matters within their jurisdiction, cannot be controverted.

[† 2] S. P. in the *Court of Session*, *Cochran* v. *The Earl of Buchan*, *June* 1698. *Sir H. Dalr. Decisions* 1.

[F. 2] In *Herries* v. *Jamieson*, 5 *T. R.* 553. it was said by the court, that debt will lie for interest of money; and this case was referred to as an authority, to shew that wherever *indebitatus assumpsit* will lie, debt will also lie.

[F. 3.] S. P. *per Buller*, J. in *Messin* v. *Lord Massareene and Wife*; in which case the court refused to refer to the Master to see what was due, and to permit the plaintiff to enter up final judgment without a writ of inquiry. 4 *T. R.* 498.

But in an action on a foreign judgment recovered on bond, the plaintiff may recover damages beyond the penalty of the bond, as well as in an action on a judgment in a court of record here. *M'Clure* v. *Dunkin*, 1 *East*, 436.

In pleading a justification under the authority of a foreign court, it is not sufficient to allege, generally, that the

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of a decree on the chancery side in one of the courts of great sessions in *Wales*, from which there was an appeal to the house of lords, and the decree affirmed there; afterwards, a bill was filed in the court of chancery, on the foundation of the decree so affirmed, and Lord *Hardwicke* thought himself entitled to examine into the justice of the decision of the house of lords, because the original decree was in the court of *Wales*, whose decisions were clearly liable to be examined [† 3].—[☞ 2] (He also mentioned a case on the mortmain

[† 3] 1 *Eq. Ca. Abr.* 83. *pl.* 3. *Isquierdo* v. *Forbes*, *B. R. H.* 24 *Geo.* 3.

[☞ 2] *Galbraith* v. *Neville*, *B. R. E.* 29 *Geo* 3. Action of debt on a judgment in the supreme court of Jamaica. Verdict for the plaintiff; and a rule to shew cause why there should not be a new trial. *Law*, for the plaintiff; *Bower*, for the defendant.

Lord *Kenyon*, I cannot help entertaining very serious doubts concerning the doctrine laid down in *Walker* v. *Witter*, that foreign judgments are not binding on the parties here. But when I am told that Lord Hardwicke did not hold himself bound by a decree on the chancery side of the court of great sessions in *Wales*, affirmed in the house of lords, I own I am quite lost in a maze. How such a decree could have come in revision before Lord Hardwicke, as chancellor, I cannot conjecture. It is perfectly well known, that the court of great sessions is an independent tribunal, from which no appeal lies to the court of chancery. There certainly must have been something else stated that does not appear in the report. The proceedings in *Wales* might possibly have affected the rights of persons living out of that jurisdiction. In such a case, a prohibition would be granted, and the rights of such persons would not be bound. Perhaps when those rights afterwards came in question, on a similar ground, in the court of chancery, Lord Hardwicke might say, that he should not consider himself as bound by the decree in Wales, except as far as any deference might be due to the personal authority of the judges who had determined the question there. But to say, that he could alter or open the discussion of those rights which had been finally and lawfully settled there, is a position against which I must enter my protest. In *Moses* v. *Macferlan* (1), Lord Mansfield said, "The merits of a judgment can never be over-haled by an original suit, either at law or in equity. Till the judgment is set aside, or reversed, it is conclusive, as to the subject matter of it, to all intents and purposes (2)." And though, in the *Duchess of Kingston's Case*, it was held, that the judgment of the ecclesiastical court might be examined, yet that was on the ground of fraud. The judges, there, were of opinion, that you might reply *per fraudem* to a judgment. That is not an authority for

(1) *B. R. E.* 33 *Geo.* 2. 2 *Burr.* 1005. (2) *Burr.* 1009.

the defendant acted by the orders of such court, and that the subject was within its jurisdiction, without shewing whether he acted as party or officer of the court, what the jurisdiction was, or what the nature of the proceeding, or whether the act justified were an absolute or only a temporary seizure. *Collett* v. *Lord Keith*, 2 *East.* 260.

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mortmain acts to the same purpose)—Debt may be brought for a sum capable of being ascertained, though not ascertained at the time of the action brought.—(It had been said at the bar, that the value of *Jamaica* currency was fluctuating and uncertain)—It is not necessary that the plaintiff in debt, should recover the exact sum demanded [† 4].

WILLES, *Justice*, of the same opinion.

ASHHURST,

for saying, that we can revise the judgments of the lowest courts in foreign countries, where they have competent jurisdiction.— His lordship then made some observations on the particular evidence in the case, which it is unnecessary to state.

Buller, *Justice*, The doctrine which was laid down in *Sinclair* v. *Fraser* has always been considered as the true line ever since; namely, that the foreign judgment shall be *primâ facie* evidence of the debt, and conclusive till it be impeached by the other party. I have often heard Lord *Mansfield* repeat what was said by Lord *Hardwicke* in the case alluded to from *Wales*; and the ground of his lordship's opinion was this: when you call for my assistance to carry into effect the decision of some other tribunal, you shall not have it, if it appears that you are in the wrong; and it was on that account, that he said, he would examine into the propriety of the decree. As to actions of this sort, see how far the court could go, if what was said in *Walker* v. *Witter* were departed from. It was there held, that the foreign judgment was only to be taken to be right *primâ facie*; that is, we will allow the same force to a foreign judgment, that we do to those of our own courts not of record. But, if the matter was carried farther, we should give them more credit; we should give them equal force with those of courts of record here. Now a foreign judgment has never been considered as a record. It cannot be declared on as such, and a plea of *nul tiel record*, in such a case, is a mere nullity. How then can it have the same obligatory force? In short the result is this; that it is *primâ facie* evidence of the justice of the demand in an action of *assumpsit*, having no more credit than is given to every species of written agreement, *viz.* that it shall be considered as good till it is impeached.— He then also remarked on the particular evidence.

The rule made absolute; the court recommending, that the question of law should be put on the record, if it should arise again on the second trial [F. 4].

Vide, as to the conclusive nature of foreign judgments, *Burroughs* v. *Jamineau*, *Canc. M.* 13 *Geo.* 1. 12 *Vin.* 87. *pl.* 9. *Ca. Temp. Hardw.* 87. *Boucher* v. *Lawson*, *B R. H.* 8 *Geo.* 2. *Ca. Temp. Hardw.* 85. 89.

[† 4] *Aylett* v. *Low*, *C. B. T.* 18 *Geo.* 3. 2 *Blackst.* 1221.

[F. 4]. Mr. East, in the 5th vol. of his Reports, p. 475, says, "according to my note of the case, the rule "stood over from Easter 29th to "Mich. 31st *G.* 3. for the court to "advise upon it; when Lord Kenyon, "C. J. said, that the court had considered the matter, and were all of "opinion that no new trial ought to "be granted. He added, that without entering into the question how "far a foreign judgment was impeachable, it was at all events clear, "that it was *primâ facie* evidence of "the debt; and they were of opinion "that no evidence had been adduced "to impeach this; and therefore discharged the rule."

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ASHHURST, *Justice*, of the same opinion.—He said, that, in *indebitatus assumpsit* on a foreign judgment, the judgment is shewn as a *consideration*; and, wherever *indebitatus assumpsit* can be maintained, debt will lie.

BULLER, *Justice*, of the same opinion.—He observed, that all the old cases shew, that, whenever *indebitatus assumpsit* is maintainable, debt also is. 'Till *Slade's* case, a notion prevailed, that, on a simple contract for a sum certain, the action must be debt: but it was held in that case, that the plaintiff had his election either to bring *assumpsit*, or debt. By the arguments in *Vaughan (a)*, it seems the doctrine of *Slade's* case was not approved of at first, and from the manner in which the statute of 3 *Jac.* 1. *c.* 8. is penned, it is probable the action of *assumpsit* was not then much in use in such cases. Afterwards, however, it became very general, and that is the reason why we meet with no instances in [7] the books, of debt brought on foreign judgments. As to the point that the judgment is not a record, and that the defendant must have judgment on the pleas of *nul tiel record*, there is no foundation for it, because it is stated to be a judgment of a court in *Jamaica*. As such it is to be tried by the country, (as it might have been in this case, on the *nil debet*,) and not by the court. The *prout patet per recordum* in the declaration, is absurd and may be rejected, and the plea of *nul tiel record* is a mere nullity [F. 5]. The plaintiffs have done right to state the judgment in the manner they have done, because that is matter of description.

Judgment for the plaintiffs.

(a) 101.

[F. 5]. So where it was alleged in a declaration in case for an escape, that *J. S.* being in custody on mesne process, was brought by a habeas corpus before a judge, and committed to the marshall, "as by the record thereof "now remaining in the court of our "said lord the now king, before the "king himself manifestly appears," the court held, on the authority of this case, that the allegation was either impertinent, and to be rejected without requiring proof; or at any rate that the production of the writ and return, which are quasi of record, was sufficient proof. *Wigley* v. *Jones*, 5 *East*. 440.

The plea of *nul tiel* record is good, since the union, to an action on an Irish judgment; but it must conclude to the country, and not with a verification. *Collins* v. *Lord Mathew*, 5 *East*. 475.

SIMPSON

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Friday, 13th Nov.

SIMPSON and Others, *against* JOHNSON and Others.

When a bastard having a different settlement from the mother, lives with her for nurture, the parish where the bastard's settlement is, must maintain it.

THIS was a case reserved for the opinion of the court, on an action of debt, on a bond.—The cause was tried before EYRE, *Baron*, at the last assizes for the county of *Essex*. The substance of the pleadings was as follows: —The plaintiffs having declared in the usual form, the defendants craved oyer of the condition of the bond, which was in these words;—"Whereas *Jemima Wass*, of *Wickham* "*St. Paul* aforesaid, single woman, hath by her voluntary "examination taken upon oath before *Charles Hurrel*, Esq. "one of his Majesty's justices of the peace in and for the "said county, declared herself to be with child, and that "the said child is likely to be born a bastard, and to be "chargeable to the said parish of *Wickham St. Paul*, and "that *James Johnson* above named, wheelwright, is father "of the said child; now the condition of the above obliga- "tion is such, that if the said *James Johnson*, his heirs, exe- "cutors, or administrators, do, and shall from time to time, "and at all times hereafter, fully and clearly *indemnify*, "*and save harmless, as well the abovenamed churchwardens* "*and overseers of the poor of the said* parish of *Wickham* "*St. Paul*, and their successors for the time being, as also "*all and singular the other parishioners and inhabitants of* "*the said parish of Wickham St. Paul*, which now are, or "hereafter shall be for the time being, of and from all manner "of costs, taxes, rates, assessments, and charges whatsoever, for "or by reason of the birth, education, and maintenance of the "said child, and of and from all actions, suits, troubles, "and other demands and charges whatsoever touching and [8] "concerning the same;—Then this obligation to be void, "otherwise to remain in full force."—They then pleaded that, after the execution of the bond, and after the woman had declared that she was with child, that the child was likely to be born a bastard, and to be chargeable to the parish of *Wickham St. Paul*, and that *Johnson* was the father, she removed herself voluntarily from *Wickham St. Paul*, to the parish of *Guestingthorpe*, and was there delivered of the same bastard child, by reason whereof the said child *was lawfully settled in the parish of Guestingthorpe, and was not, nor at any time since its birth had been chargeable to, or lawfully settled in the parish of Wickham St. Paul*; and that if the abovenamed churchwardens and overseers of the parish of *Wickham St. Paul*, and their successors for the time being, and

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and the parishioners and inhabitants of the said parish, or any of them for the time being, had, at any time, from the making of the bond, been damnified by reason of the birth, education, and maintenance of the child, or by reason of any action, suit, trouble, and other charge whatsoever touching the same, they had been so damnified of their own proper and voluntary acts, and wrongs, and against the will of the said *Johnson* the reputed father of the said bastard child. The plaintiffs replied, that the parish of *Wickham St. Paul*, before, and at the time of the birth of the child, was, and still continued to be, *the place of the mother's legal settlement*, and that, soon after her delivery, she returned to *Wickham St. Paul, and brought the child with her*, to be *there nursed and nurtured*, that the child had remained there ever since, being still under three years of age, and that from the return of the mother with the child, till the bringing the action, neither *Johnson*, nor any other person on his behalf, had found any provision for the child; by reason whereof the inhabitants and parishioners of *Wickham St. Paul* during that time, lest the child should die for want of necessary food and nurture, were forced to expend, and did expend, the sum of, *&c.* in providing necessary food for the said child, and so were, otherwise than of their own wrong, damnified by reason of the maintenance of the said bastard child. The defendants in their rejoinder said (as before) that the inhabitants and parishioners of *Wickham St. Paul* had laid out the money mentioned in their replication, of their own wrong, and were damnified of their own wrong; on which rejoinder issue was joined. The jury found a verdict for the plaintiffs with one shilling damages.—The facts, as stated in the case, were these: The defendant *Johnson* being apprehended by virtue of a warrant under the statute of 6 *Geo.* 2. *c.* 3. gave the bond [9] in question to indemnify the parish of *Wickham St. Paul*. Afterwards *Jemima Wass* was delivered of the child mentioned in the pleadings, which was born a bastard in the parish of *Guestingthorpe*. After her delivery, she returned to the parish of *Wickham St. Paul*, where she was legally settled, carrying her child with her, in a state of perfect health, and received one shilling and sixpence *per* week from the plaintiff *Simpson*, one of the overseers of the poor of the parish, for the maintenance of herself *and her child*. No demand was made at any time on *Johnson*, who lived in the adjoining parish of *Guestingthorpe*, but a demand was made by *Simpson* on *Robert Dolbey* (one of the co-obligors) to defray the expence above stated, which he refused to do. Lastly, there was no order made by a justice or justices of the peace, directing the allowance of one shilling and sixpence, or any other sum, to be made by the parish officers of *Wickham St. Paul*.

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Peckham for the plaintiffs.——*Rous* for the defendants.

The court were so clearly of opinion with the defendants, that they would not hear their counsel.—Lord *Mansfield* said, that the payment by the parish officers of *Wickham* was doubly voluntary: first, because there had been no order upon them to pay [☞]; and secondly, because *they* were not liable to maintain the child, but the parish where it was born; and they should have applied to the officers of that parish [2].

Judgment for the defendants.

[☞] But if the child had been born in their parish, and they had paid for its maintenance, without an order, the action would have lain. *Hays* v. *Bryant*, C. B. T. 29 *Geo.* 3. *H. Bl.* 253 [1].

[2] This question, *viz.* "Whether "children under seven years of age, "who are living with their mother for "nurture, at the place of the mother's "settlement, but whose own settle-
"ment is in another parish,
*[10] "are to be maintained by the
"parish where the mother "lives and is settled, and from whence "they are irremovable, or by the parish "where they are settled;" came on, and was determined in the court of *B. R.* in *H.* 17 *Geo.* 3. in the case of *the King* v. *the Inhabitants of Hemlington*. The case was this: — *Elizabeth*, a single woman, with her child *Mary*, went under a certificate, from *Hemlington* to *Darlington*, in which last parish she had two bastard children, and there became chargeable. An order being thereupon made for the removal of her and *Mary* to *Hemlington*, she took the two children who were born in *Darlington* with her, they being both under the age of emancipation. Two justices made an order on the parish of *Darlington* for the maintenance of the two children born in that parish; which order, upon an appeal, was quashed. *Davenport* shewed cause in support of the order of sessions. After mentioning the cases of *Wangford* v. *Brandon*, and others stated in *Burn*, *(i)* he made similar observations upon them, to those which are to be found in *Burn*'s note, *viz.* that what had been said in those cases relative to the present question, was only matter of argument, * the point in dispute in all those cases having been the *settlement*, not the *maintenance*. He mentioned that *Burn*, in another place *(k)*, seemed fully of opinion, that the parish of the mother is liable; and contended, that it was contrary to the spirit and intention of the 18 *El.* c. 3. to burthen the parish where bastards are born with their support. That the inconvenience of such a practice would be very great, in many cases where the two parishes might be situated at opposite extremities of the kingdom. That there is no statute which gives the justices any authority to make an order for the maintenance of children on a parish where they do not actually reside. That there are only two instances where a power of

(i) 3 *Burn*'s Just. p. 336, 337, 13th *Ed.* *(k)* p. 326.

[1] In which this case was referred to as an authority for the point here first stated by Lord *Mansfield*, and over-ruled by the Court.

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of that nature is vested in justices, viz. 1. Where it is necessary to assess one parish in aid of the poor-rate of another; and 2. in the cases of paupers improperly removed. That it would be much more expedient, that the parish which is bound to maintain the mother, should also maintain, as casual poor, the children which she had a right to bring with her, and which could not be taken from her before the age of seven; and that he had been informed, that the practice had been conformable to what he contended for. *Wallace* was going to answer *Davenport*, but the court stopped him, and said that the point was clear and settled.—Lord *Mansfield*.—Mr. *Davenport* has cited no authorities in support of Dr. *Burn*'s proposition, and there are many against it, *viz.* "*Rex* v. *St. Giles's in the Fields* (*l*), *Rex* v. *Wangford* (*m*), "and *Rex* v. *Saxmundham*" (*n*), which is directly in point. The practice is also agreeable to those cases.—*Aston*, Just. cited another case, where it was directly held that the parish where the settlement of the nurture child is, shall maintain it.—Judgment to quash the order of sessions and confirm the original order by which the parish of *Darlington* was charged.

The case of *Saxmundham* is very short in *Fortescue* (*o*), and the point is merely stated as a position, without the facts or orders, or the reasoning of the court. But the case of the inhabitants of *Shermandbury* v. *Bolney* (*o*), which Mr. *Davenport* mentioned in his argument, was exactly the same with the present, for there can be no distinction (as to this question) between bastards and legitimate children, who have a different settlement from their mother. In that case, a woman with three children, all under seven, being settled in *Shermandbury*, married a person settled in *Bolney*. After the marriage, the mother and the three children were sent to *Bolney*. The parish of *Shermandbury*, before the marriage, allowed three shillings *per* week for three children; and the payment being discontinued after the marriage, on complaint of the parish of *Bolney*, two justices made an order that *Shermandbury* should continue to pay the three shillings. The sessions, and afterwards the court of *B. R.* confirmed the order of the justices. And the court said, "This case is within "the equity of the statute for the "relief of the poor, and there is no "reason that *Shermandbury* should be "discharged of the children by their "mother's marriage." This case is cited in *Bott* from *Carthew*, but for another point. It has been supposed that there might be difficulties in obtaining and enforcing an order, in a case like the present. But the case of *Shermandbury* v. *Bolney* shews, that the justices of the county in which the parish liable is situated, ought to make the order, on the complaint of the parish officers of the parish where the mother lives. The order in the case of *Hemlington* was probably made in the same manner. The inconvenience when the two parishes are at a great distance from each other, is only similar to what is experienced on appeals brought on removals from parishes at a great distance. As to the method of enforcing the order, it may be done by indictment, or perhaps the parish officers, in whose behalf it is made, might maintain a special action of *assumpsit* against those upon whom it was made, *Vide Rann* v. *Green*, *B. R. M.* 17 *Geo.* 3. [†5], where the court held, that when persons

(*l*) *T.* 6 & 7 *Geo.* 2. *Burr.* Settl. Cases, No. 2.

(*m*) 12 *Wil.* 3. *Fortesc.* 307.

(*n*) Transcribed by *Bott*, p. 254.

(*o*) *Carth.* 279.

[†5] *Rex* v. *Toms. E.* 20 *Geo.* 3. *Infra*, p. 401. *Rann* v. *Green*, since reported, *Cowp.* 474.

1778.

BEAN *against* STUPART.

A warranty on the margin of a policy must be strictly followed, as much as if written in the body of the instrument.—"Thirty seamen besides passengers," means thirty persons belonging to the ship's company, including cook, surgeon, boys, &c.

THE plaintiff insured the ship called the *Martha*, at and from *London* to *New York*, the voyage to commence from a day specified; and, *on the margin* of the policy were written these words,——"Eight nine-pounders "with close quarters, six six-pounders on her upper decks, "*thirty seamen, besides passengers.*"——The ship sailed from the *Downs* on the 1st of *March*, and was taken on the 10th, by an *American* privateer, and was sent, with a prize-master on board, to make the port of *Boston*. On the 30th of *May*, the plaintiff brought this action against *Stupart*, an underwriter on the policy; on which *Stupart* paid the premium into court, and pleaded the general issue. About the 6th of *July*, and before the trial, accounts were received that the ship had been retaken some time in *May* and carried into *Halifax*.—The cause came on for trial before Lord MANSFIELD, and a special jury, at *Guildhall*, at the Sittings after *Trinity* Term, 18 *Geo.* 3. The defence set up was, that there were not thirty *seamen* on board the ship, according to the terms of the stipulation in the margin of the policy: and, in fact, it appeared upon the evidence, that, to make up that number, the plaintiff reckoned the steward, cook, surgeon, some boys, and apprentices, and some persons described as men learning to be seamen; and that only twenty-six persons had signed the ship's articles. It also appeared that there were seven or eight passengers on board.

Bearcroft, of counsel for the defendant, contended, That this was a warranty, not a representation, and that being so, it must be literally and strictly complied with. That seamen meant men trained to the occupation of mariners, either such as are called able-bodied, or at least ordinary seamen, in opposition to landmen, and could never include boys, or

sons acting under a *private* act of parliament, make an order by authority of such act for the payment of money, the law raises an *assumpsit*. The same reason must hold in the case of a *public* act [F. 2].

[F. 2.] In these cases there is a legal liability arising from the statute. For cases in which there is only a moral obligation, and upon which it is argued by the learned reporters, that an action cannot be supported, even upon an express promise, and for a full discussion of these points, see the note to *Wennall* v. *Adney*, 3 *B.* & *P.* 249.

or the steward, cook, and surgeon, of a ship. That, at any rate, none but those who had signed the articles were to be considered as seamen, and then the number warranted was not compleat. That, in the late case of *Pawson* against *Ewer* [3], it had been determined, that the * strict words of a representation need not be fulfilled, provided the departure from them is not materially to the prejudice of the insurers, but that, in the case of a warranty, it is otherwise, *that* being a condition, and taken as part of the policy; and that the circumstance of the stipulation, in this instance, being written on the margin, made no sort of dif-

*[12]

[3] *Pawson* v. *Ewer*, *Pawson* v. *Snell*, and *Pawson* v. *Watson* [†6], which were all actions on the same policy, were argued on a motion for a new trial in the court of *King's Bench* in *Easter* term, 18 *Geo.* 3. The case was shortly this:—The broker who made the insurance shewed to one of the underwriters a paper *detached* from the policy, containing instructions relative to the force the ship was to sail with, *viz.* "12 *guns*, "and 20 *men*." There were no guns or men on board, when the policy was subscribed. Mr. *Thornton*, the first underwriter on the policy, had seen the paper (and he had paid). *Watson* and *Snell* had not seen it. *Ewer*, who had subscribed after them, had; but they all underwrote at the same premium, which was proved to be the premium for such a vessel as that in question, when sailing without force. The ship actually sailed with only ten guns (four-pounders) and six swivels, and with only sixteen men and seven boys, besides passengers. It was proved that *boys* are entered on the ship's books, and considered on ship-board as men; and that ten guns and six swivels are of greater force than twelve guns. That upon the whole, the ship was of more force than she would have been, if the written instructions had been specifically adhered to. There were verdicts for the plaintiffs; but on the motion for a new trial in one of the causes, which was to determine the rest, it was contended on the part of the defendant, that the instructions shewn to the first underwriter (upon whom in general all the others rely) being in writing, were to be considered as a warranty, which must be strictly complied with; and that it had not been complied with in this case. The counsel for the plaintiff on the contrary maintained, in the first place, that the written paper being separate from the policy, was only a representation, and that it was sufficient to comply with it in substance, or to do what was equally beneficial to the underwriters; but, in the second place, that the terms had been strictly complied with, for that swivels were a species of guns, and that boys, in the maritime sense, were reckoned men or seamen, as opposed to passengers. The court were of opinion, that the word men in the marine language does include boys; but they chiefly went upon the distinction between a *warranty* and a *representation*, and held that in this case, the instructions, though in writing, yet being on a separate paper from the policy, were only a representation; and as they had not been departed from fraudulently, nor in a manner detrimental to the underwriters, the policy was in force against them.

[†6] Since reported, *Cowp.* 785.

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*[13]

difference [4]. He said the nature of the voyage, which * was of a very dangerous sort, explained the condition, and that real seamen must have been meant. He also argued (though but slightly) that, whatever might be the construction of the policy, the plaintiff was not entitled to recover as for a total loss, because the ship had been retaken, and had never been *infra præsidia hostium*. Witnesses were examined to explain what is generally understood by the word *seamen*, and it was either in proof, or admitted, that, at the custom-house and *Greenwich* hospital, boys are included in that word.

Lord

[4] At the Sittings at *Guildhall* after *M.* 19 *Geo.* 3. in a cause of *Kenyon and another* v. *Berthon*, the following words were written transversely on the margin of the policy: "In port 20th of *July*, 1776."—— The ship was proved to have sailed the 18th of *July*, and Lord *Mansfield* held that this was clearly a warranty; and though the difference of two days might not make any material difference in the risk, yet as the condition had not been complied with, the underwriter was not liable. But, 1. though a written paper be wrapt up in the policy, when it is brought to the underwriters to subscribe, and shewn to them at that time; or, 2. even though it be wafered to the policy at the time of subscribing, still it is not, in either case, a warranty, or to be considered as part of the policy itself, but only as a representation. The first of those points occurred in a cause of *Pawson* v. *Barnevelt (p)*, tried before Lord *Mansfield* at *Guildhall* at the Sittings in *Trinity* Term, 18 *Geo.* 3. where the policy was the same as in the case of *Pawson* v. *Ewer*. The counsel for the defendant offered to produce witnesses to prove, that a written memorandum inclosed, was always considered as part of the policy. But his lordship said, it was a mere question of law, and would not hear the evidence; but decided, that a written paper did not become a strict warranty by being folded up in the policy. The second occurred in *Bize* v. *Fletcher (q)* [†7], tried at *Guildhall*, after *E.* 19 *Geo.* 3. where it appeared, that, at the time when the insurers underwrote the policy, a slip of paper was wafered to it, describing the state of the ship as to repairs and strength, and also mentioned several particulars of her intended voyage, which particulars, in the event, had not been complied with. Lord *Mansfield* ruled, that this was only a representation; and, if the jury should think there was no fraud intended, and that the variance between the intended voyage as described in the slip of paper, and the actual voyage as performed, did not tend to encrease the risk to the underwriters, he directed them to find for the plaintiff, who accordingly had a verdict [F. 1].

(p) Thursday, 25 *July*, 1779.
(q) Monday, 31 *May*, 1779.

[†7] *Infra*, *M.* 20 *Geo.* 3. p. 271.

[F. 1] But if a policy under seal *refer* to certain conditions contained in a printed paper without seal or signature, these conditions become part of the contract between the parties, and must be complied with, before the assured can recover. *Routledge* v. *Burrell*, 1 *H. Bl.* 254. *Worsley* v. *Wood*, 6 *T. R.* 710.

See also *Bowden* v. *Vaughan*, 10 *East.* 415.

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Lord MANSFIELD observed, in summing up to the jury, that the import of words must be collected from the subject, to which they are applied. That if, in the present case, the insured had stipulated for thirty seamen, *besides boys and landmen*, then it would have been clear that the terms had not been complied with; but that, in this policy, *seamen* were contrasted with passengers, and, in that sense, the word seemed to include boys as well as men: but he left the construction to the jury.

The jury having found a verdict for the plaintiff as for a total loss, the defendant, in this term, obtained a rule to shew cause why there should not be a new trial.

On the day for shewing cause, Lord MANSFIELD, after reporting the facts as above related, and that he had left the construction of the word "*seamen*" to the jury, observed, that he himself had thought there was little doubt on the question, after what had passed in the cause of *Pawson* v. *Ewer*. That the warranty might have been so worded as only to include able seamen (as if seamen had been opposed to landmen); but that, as expressed here, the contrast being with passengers, the whole of the crew or ship's company appeared to be meant. That this was the general maritime sense of the word.

Bearcroft, and *Lee*, argued in support of the rule for a new trial. They observed, that, although the *Solicitor-General*, who had conducted the cause for the plaintiff, had [14] not opened the stipulation in the policy expressly either as a warranty, or as a representation, but had insisted that it had been complied with, his lordship had assumed it to be a warranty; as they said it certainly was. That, being a warranty, the case of *Pawson* v. *Ewer* did not apply. That the sense of the word "*seamen*" is well understood, and the distinction between seamen and landmen or boys, as fully established as that between clergymen and laymen. That a seaman is only such a person as is liable to be pressed. As to the question, whether it was a total or an average loss, they cited the case of *Hamilton* v. *Mendez* (r), and contended, that the jury had never taken that point into their consideration.

Lord MANSFIELD.—The whole argument for the defendant turns upon begging the question. There is no doubt, but that this is a warranty. Its being written on the margin makes no difference. Being a warranty, there is no doubt but that the underwriters would not be liable, if it were not complied with, because it is a condition on which the contract is founded. But the question is, whether, in this warranty, the word "*seamen*" was used in the strict literal sense or not. If it was, the warranty has not been complied with.

(r) *B. R. T.* 1 *G.* 3. 2 *Burr.* 1198.

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It is a matter of construction. Boys are reckoned seamen, not only at the custom-house, and *Greenwich* hospital, but in the distribution of prizes. I think the parties were not sanguine at the trial. The special jury, and the bye-standers, were perfectly clear. They hardly seemed to think it a serious question in this cause. There is scarcely now such a thing as a ship entirely manned with seamen strictly so called. Even on board the King's ships, they are satisfied with a few strict seamen, and able-bodied landmen make up the rest of the crew. I had no doubt of the sense of the word in this policy, and the jury decided it. With regard to the other question, it was stated as a forlorn hope; but certainly, when the action was brought, there was no prospect of a recapture of the ship; she was considered as totally lost in a remote part of the world. The report which afterwards prevailed of her being retaken, some months after the capture, was loose and general;—no circumstances known, no account of her situation, nor of what part of the cargo might be saved. In short there is no doubt, but that it was a case where the owner might abandon [F 2].

The rule discharged.

[15]

LAYTON *against* PEARCE.

Under an agreement to perform one or two things, the option is, in the person who is to perform.—If one of the two things is prohibited under a penalty, no action will lie for the penalty, until the party makes his election by performing the prohibited part of the contract.

BY the Lottery act of 1777, (17 *Geo.* 3. *c.* 46.) a penalty of £500 was given to be recovered in a *qui tam* action against

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[F 2] This case, and those referred to in the notes, have always been considered as leading and decisive authorities. In the case of *De Hahn* v. *Hartley*, however, an attempt was made to bring them in question, but without success. In that case the insurance was at and from Africa, with a warranty in the margin, that the ship sailed from Liverpool with fifty hands. It was found by the special verdict, that the ship sailed from Liverpool with only forty-six hands, and took in six more at Beaumaris; and that the voyage from Liverpool to Beaumaris was as safe as if there had been fifty. And the court decided that this was a breach of *warranty*; which must be strictly and literally complied with, not merely equitably and substantially, as a *representation* must: though it was attempted to distinguish that case from this of *Bean* v. *Stupart*, by urging that what was there written in the margin related to the state of the ship at Liverpool, before the commencement of the voyage insured, and was therefore unconnected with the risk, and to be considered merely as a representation. And the decision of *De Hahn* v. *Hartley* was afterwards unanimously affirmed in the Exchequer Chamber. 1 *T. R.* 343.

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against any person—"*Who should receive any money whatsoever* in consideration of *repayment of any sum or sums of money*, in case any ticket or tickets in the said lottery should prove fortunate, or in case of *any chance or event relating to the drawing* of any ticket or tickets in the said lottery, either *as to the time of such ticket or tickets being drawn*, or whether such ticket or tickets should be drawn fortunate or unfortunate."—This was an action upon that statute, against a lottery-office keeper. The declaration contained three counts.—The first stated that the defendant had received £1, 6*s*. from one *Robert Griffin*, in consideration of repaying the value of an undrawn ticket, if the above number should be drawn on the ensuing day.—The second, that he had for the like sum, *and in the like event*, undertaken to deliver an undrawn ticket.—The third only differed from the first, in stating the stipulation to have been to pay a precise sum (of £20) on the like event, and in following more accurately the words of the statute.—The agreement proved at the trial was in the alternative, *viz.* that *Griffin* had paid to the defendant £1, 6*s*. on condition that if the ticket No. 37,733, in the lottery then drawing, should come up, either a blank or prize on the ensuing day, he (the defendant) would *either* deliver to *Griffin an undrawn ticket, or pay him* £20. He had not in fact done the one thing or the other. The cause was tried before Lord MANSFIELD, at *Guildhall*, and, a verdict having been found for the plaintiff, *Dunning* moved for a rule to shew cause why it should not be set aside, and a nonsuit entered:—1. Because the agreement proved, did not correspond with that stated in any one of the three counts in the declaration:—2. Because the agreement as proved would not maintain the action, for that, being optional, it was not within the provisions of the statute.

The rule was granted, and the *Solicitor-General*, and *Lane*, shewed cause.—They said, that the plaintiff, by bringing this action, had made his election [5], and had converted the contract into an absolute agreement for the payment of money.

Dunning, and *Davenport*, on the other side.—They observed that this, being a penal statute, was *stricti juris*, and that the plaintiff, by not stating the contract on the record exactly as the fact was, had deprived the defendant of the means of bringing its legality before another court by a writ of error. [16]

Upon

[5] The plaintiff here was a third person, and not the insured. *Griffin* indeed was the witness who proved the transaction at the trial, but it would have been a violent presumption indeed, to have considered that as a constructive election.

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Upon a question from the court, the *Solicitor General* said, that, by the general practice, the option in such transactions was in the insured.

The court took some days to consider.

Lord MANSFIELD.—We are of opinion that, if the option had been in the insured, and if he had made his election to take the £20, the contract would have been sufficiently stated, because he would thereby have converted the agreement into an absolute contract for the payment of money, and then the other part of the alternative in the original bargain would become surplusage. In an action on the statute of 2 *Geo.* 2. *c.* 24. against bribery, the act of bribery laid, was the corrupting a voter to give his vote for Mr. *Lockyer and the Earl of Egmont*, and the evidence was, that the contract was to vote for Mr. *Lockyer and his friend*. The court held, that, by that part of the transaction by which the voter was corrupted to vote for Mr. *Lockyer*, the offence was compleat, and that the rest was surplusage, and needed not to be proved (*s*). But, though the practice may be, that the insured shall have the option, in point of law, the person who is to perform one of two things in the alternative has the right to elect. This has been established by a variety of cases. The present action, therefore, cannot be supported [6].

Judgment of nonsuit [F 2.]

(*s*) *Coombe* v. *Pitt*, *M.* 5 *Geo.* 3. *B. R.* 3 *Burr.* 1586. But *vide Bristow* v. *Wright*, *infra*, *E.* 21 *Geo.* 3. *p.* 640. [☞] *Churchill* v. *Wilkins*, *B. R. M.* 27 *Geo.* 3. 1 *Term Rep.* 447. On the argument of that case at the bar, the accuracy of this report of *Layton* v. *Pearce* seemed to be questioned; but, besides other proofs I could mention of its correctness, I have had an opportunity of comparing it, with a note taken at the time, by the late Sir *Thomas Davenport*, with which it exactly corresponds. [F 1.]

[6] Part of *Dunning*'s rule was for a new trial, on the ground, that, according to the weight of evidence given at *Nisi Prius*, the office was not kept by the defendant, but another person. But the discussion of that part of the case became unnecessary, by the opinion delivered by the court on the other point.

[F 1] In that case it was held, that proof of a contract to sell tallow at 4*s.* per stone, *or for whatever higher price plaintiff should pay to any other person*, would not support a count on a contract to sell absolutely at 4*s.* and that case was distinguished from this of *Layton* v. *Pearce*, as not being an alternative depending upon option, but upon a contingency. This distinction, however, has since been rendered unnecessary by the cases of *Penny* v. *Porter*, &c. cited below.

[F 2.] The point in judgment before the court in this case seems unquestionable, viz. that the statutable penalty was not incurred, the offence of the defendant being incomplete before the payment of money. But the opinion delivered by Lord Mansfield

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WOOLDRIDGE *against* BOYDELL.

If a ship insured for one voyage, sails upon another, though she be taken before the dividing point of the two voyages, the policy is discharged.

THE ship *Molly* being insured "At and from *Maryland* "to *Cadiz*," was taken in *Chesapeak Bay*, in the way to *Europe*. Upon this, the insured brought this action against the * defendant, one of the underwriters on the policy. The trial came on at *Guildhall*, before Lord MANSFIELD, when a verdict was found for the defendant, and, a new trial being moved for, the material facts of the case appeared to be as follows:—The ship was cleared from *Maryland* to *Falmouth*, and a bond given that all the *enumerated* goods were to be landed in *Britain*; and all the other goods in the *British* dominions. An affidavit of the owner stated that the vessel was bound for *Falmouth*. The bills of lading were "*to Falmouth and a Market*." And there was no evidence whatever that she was destined for *Cadiz*. The place where she was taken, was in the course from *Maryland* both to *Cadiz* and *Falmouth*, before the dividing point. Many circumstances led to a suspicion that she was, in truth, neither designed for *Falmouth* nor *Cadiz*, but for the port of *Boston*, to supply the *American* army; but there was not sufficient direct evidence of that fact.—At the trial, Lord MANSFIELD told the jury, that if they thought the voyage intended was to *Cadiz*, they must find for the plaintiff.—If, on the contrary, they should think there was no design of going to *Cadiz*, they must find for the defendant.

*[17]

The *Solicitor General*, *Dunning*, and *Davenport*, argued for the new trial.—They contended that this was like the cases of an intention to deviate where the capture had taken place before

field, "that where a contract is optional in a party, and he makes his election, the option is thereby determined, and the contract may then be declared on as an absolute contract," was observed by Lord Kenyon, in the case of *Penny* v. *Porter* (*Selw. N. P.* 90.) to be extrajudicial; and appears to be incorrect. In that case the contract was to sell 100 bags of wheat, 40 *or* 50 to be delivered on that market day, the remainder on the following: the defendant did deliver 40; and the plaintiff brought his action against him for non-delivery of the remainder, and laid the agreement in his declaration as an absolute agreement to deliver 40 on that day and 60 on the following: and it was held that the evidence did not support the declaration, which ought to have stated the contract in the alternative, according to its original terms. 2 *East. R.* 2. The cases of *Tate* v. *Wellings*, 3 *T. R.* 531. and *White* v. *Wilson*, *B. & P.* 116, confirm this position, that an alternative agreement cannot be pleaded as an absolute agreement; though the option lay in the party pleading, and has been determined.

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before the deviation was carried into execution; and they cited *Foster* v. *Wilmer* (*t*), *Carter* v. *The Royal Exchange Assurance Company*, cited in *Foster* v. *Wilmer*, and *Rogers* v. *Rogers*, a very late case in this court.—They, besides, urged, that, by "*a Market*" in the bills of lading, and in the instructions to the broker (where that expression was used, but which I believe had not been read at the trial), was meant *Cadiz*.—And that "*to Falmouth and a Market*" might be considered as meaning to the market at *Cadiz*, first touching at *Falmouth*.—(It appeared in evidence at the trial, that the premium to insure a voyage from *Maryland* to *Falmouth*, and from thence to *Cadiz*, would have exceeded greatly what was paid in this case.)

Lee, and *Baldwin*, shewed cause.—They argued, that here there had been no inception of the voyage insured, and therefore the case was very different from those cited by the counsel for the plaintiff.

Lord MANSFIELD,—The policy, on the face of it, is from *Maryland* to *Cadiz*, and therefore purports to be direct a [18] voyage to *Cadiz*. All contracts of insurance must be founded in truth, and the policies framed accordingly. When the insured intends a deviation from the direct voyage, it is always provided for, and the indemnification adapted to it. There never was a man so foolish as to intend a deviation from the voyage described, when the insurance is made, because that would be paying without an indemnification. Deviations from the voyage insured, arise from after-thoughts, after-interest, after-temptation; and the party who actually deviates from the voyage described, means to give up his policy. But a deviation merely intended, but never carried into effect, is as no deviation. In all the cases of that sort, the *terminus a quo*, and *ad quem*, were certain and the same. Here, was the voyage ever intended for *Cadiz*? There is not sufficient evidence of the design to go to *Boston*, for the court to go upon. But some of the papers say to *Falmouth* and a Market, some to *Falmouth* only. None mention *Cadiz*, nor was there any person in the ship, who ever heard of any intention to go to that port. "*A market*" is not synonymous to "*Cadiz*;" that expression might have meant *Leghorn*, *Naples*, *England*, &c. No man, upon the instructions, would have thought of getting the policy filled up to *Cadiz*. In short, that was never the voyage intended, and consequently is not what the underwriters meant to insure.

WILLES, and ASHHURST, *Justices*, of the same opinion.

BULLER, *Justice*,—I am of the same opinion. I believe the law to be according to the authorities mentioned on the part of the plaintiff, but it does not apply here. This is a question of fact. There cannot be a deviation from what never existed

(*t*) *H.* 19 *G.* 2. 2 *Strange* 1249.

existed. The weight of evidence is, that the voyage was never designed for *Cadiz*.

The rule discharged. [F].

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WOOLDRIDGE against BOYDELL.

STUART *against* WILKINS.

THE two first counts in the declaration in this case were as follows:—" *David Stuart* complains of *James Wilkins* being, *&c.* For that whereas the said *James*, on the first day of *February*, in the year of our Lord 1778, at *Hatfield*, in the county of *Hertford*, offered to sell to the said *David*, a certain mare of him the said *James*, and whereupon afterwards, to wit, on the day and year aforesaid, at *Hatfield* aforesaid, in the county aforesaid, in consideration that the said *David*, at the special instance and request of the said *James*, would buy of him the said *James*, the said mare, at and for a certain large price or sum, to wit, the price or sum of £31, 10*s.* of lawful money of *Great Britain*, to be paid by the said *David*, to the said *James*, when he the said *David* should be thereunto afterwards requested; he the said *James undertook, and then and there faithfully promised the said David*

Assumpsit is a proper form of action, where there has been an express warranty.

[19]

[F] This case established a distinction which has been recognized ever since, between a deviation from the voyage insured, and the substitution of another voyage with different *termini*. The former being held not to discharge the underwriter, when the loss happens while the ship is in the track common to the two voyages, the latter to make the insurance void from the beginning. From the short account given of the case of *Carter* v. *The Royal Exchange Company, cited* 2 *Str.* 1249. it would rather appear to have been a case of a substitution of a voyage to Amsterdam for a voyage to London; but since the decision of the principal case, it has never been doubted that such a variance between the voyage insured and the voyage undertaken would discharge the underwriter. The doctrine of this case was expressly recognized by the court in *Way* v. *Modigliani*, 2 *T. R.* 30. which was a case of insurance from a port in Newfoundland to England, and to commence on a certain day. The ship sailed from port to the banks, fished, and sailed again on her voyage for England, before the day on which the risk was to commence: yet the court held that this variation in the voyage, though it was at an end before the commencement of the risk, had the effect of taking it out of the policy. The same distinction was also admitted in *Kewley* v. *Ryan*, 2 *H. Bl.* 343. in *Middlewood* v. *Blakes*, 7 *T. R.* 165; which are cited more fully in the notes to *Thelusson* v. *Fergusson*, infra 361. and in a late case of *Norville* v. *St. Barbe*, 2 *N. R.* 434. In *Murdock* v. *Potts*, *Park's Insur.* 299. on an insurance on freight on a voyage to Virginia; where the goods were in fact to be carried to St. Domingo, and the ship was only to call at Norfolk in Virginia for orders, it was held by Lord Kenyon, a sufficient variation to deprive the assured of their action.

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David, that the said mare was sound, and the said *David* in fact saith, that he, confiding in the said promise and undertaking of the said *James*, so by him made as aforesaid, afterwards, to wit, on the same day and year aforesaid, at *Hatfield* aforesaid, in the county aforesaid, at the special instance and request of the said *James, did* buy of the said *James* the said mare, at and for the said price or sum of £31, 10*s.* and did then and there pay to the said *James* the sum of £25, 5*s.* part of the said sum of £31, 10*s.* and did then and there undertake and faithfully promise the said *James* to pay him the further sum of £6, 5*s.* residue of the said sum of £31, 10*s.* when he the said *David* should be thereunto aftewards requested. Yet the said *James*, not regarding his said promise and undertaking so by him made as aforesaid, but contriving, and fraudulently intending to injure the said *David* in this behalf, did not regard his said promise and undertaking so by him made as aforesaid, but craftily and subtiliy deceived the said *David* in this, that the said mare, at the time of the making the said promise and undertaking of the said *James*, was not sound, but, on the contrary thereof, was unsound, and was afflicted with a certain malady or disease, called the windgalls, to wit, at *Hatfield* aforesaid, in the county aforesaid; whereby the said mare then and there became, and is of no use or value to the said *David*.—And whereas also the said *James*, afterwards, to wit, the same day and year aforesaid, at *Hatfield* aforesaid, in the county aforesaid, in consideration that the said *David*, at the like instance and request of the said *James*, bought of him the said *James*, a certain other mare of him the said *James*, at and for a certain other large price or sum, to wit, the sum of £31, 10*s.* of like lawful money, and had then and there paid to the said *James*, the sum of £25, 5*s.* in part of the said last mentioned sum of £31, 10*s.* and had then and there undertaken and promised to pay to the said *James* the further sum of £6, 5*s.* residue of the said last mentioned sum of £31, 10*s.* when he the said *David* should be thereunto afterwards requested, *he the said James undertook, and then and there faithfully promised him the said David, that the said last mentioned mare was sound.*—Yet the said *James*, not regarding his said last mentioned promise and undertaking so by him made as last aforesaid, but contriving and fraudulently intending to injure the said *David* in this behalf, did not regard his said promise and undertaking so by him made as last aforesaid, but craftily and subtilly deceived the said *David* in this, that the said last mentioned mare, at the time of the making the said last mentioned promise and undertaking of the said *James*, was not sound, but then was unsound, whereby the said last mentioned mare became and is of no use or value to the said *David*."—To these were added a count for money laid out and expended, and another for money

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money had and received.—The cause was tried at the assizes at *Hertford*, before Lord MANSFIELD, and a verdict found for the plaintiff; but the evidence given being of an *express* warranty, and a doubt being raised, whether, in such a case, this was a proper form of action, the verdict was taken subject to the opinion of the court on that question.

Upon the motion for setting aside the verdict, and entering a nonsuit, Lord MANSFIELD said, that it had been suggested, that the form of this declaration arose from a determination of his at the same place about twenty years ago, but that, he said, was a case of a clear fraud, and was declared on as fraud.

Cause was not shewn against making the rule absolute.

Kempe, Serjeant, and *Morgan*, for the defendant, contended, that there are two sorts of warranty, 1. express, 2. implied.—That, in an express warranty, the party is liable without alleging notice; but that it must be laid *warrantizando vendidit*.—That every promise is executory, and refers to something to be done in future, whereas the declaration here charged the defendant with promising a thing past. They cited *Finch*. 180. *Dyer*. 75. *pl*. 23. *Bro. Abr. Tit. Action sur le case, pl*. 8. *Keilway*, 91. 2 Ld. *Raymond*, 1118. *Herne's Pleader* 7, 77, 223. *Rastell*, 9. 1 *Ventr*. 365. *Alleyne* 91. *Salk*. 210. *Fitz N. Br*. 98. *a*.

Lord MANSFIELD,—The declaration struck me as particular, in departing from the old rule of declaring expressly on the warranty. A warranty extends to all faults known and unknown to the seller. Selling for a sound price without warranty may be a ground for an *assumpsit*, but, in such a case, it ought to be laid that the defendant knew of the unsoundness. [F 1]. I left it

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[F 1.] This case was referred to and confirmed by the court in *Parkinson* v. *Lee*, 2 *East*, 314. as a leading authority on this point, viz. that a sound price will not raise an implied assumpsit that the commodity sold is sound or merchantable, and that no action will lie in such case, unless there be in the seller a knowledge of the defect, and a fraud: the authority referred to by *Lawrence*, Justice, in that case from 1 *Roll. Abr*. 90, *p*. and other authorities there found, decide, that an action of *tort* will lie on the warranty in law, where there is a knowledge of the defect: The action of assumpsit not being then in use in cases of warrranty.

Lord Mansfield's position, here reported, seems to require some explanation. It appears that the action of assumpsit, which arises from the seller's knowledge of the defect, cannot be upon an undertaking for the naked fact of soundness, like that which arises on an express warranty of soundness: for how can his knowledge vary his contract with the purchaser in that respect? But every seller makes with the purchaser a certain other implied contract, viz. that he *knows* of no latent defect or unsoundness;

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it to the jury as on a warranty, subject to the opinion of the court, whether a nonsuit should not be entered. I am told by the learned Judges * on my left hand (ASHHURST, and BULLER, *Justices,)* that this sort of declaration, where a warranty is to be proved, has been practised for twenty years, and that it is made use of with a view to let in both proofs, if necessary.

* [21]

ASHHURST, *Justice,*—Whatever may have been the old form, I believe it has been long settled that this form of action is right; and, having been long established, I am of opinion that it ought to be supported. There may be cases where the count for money had and received may be of use to the plaintiff, and the warranty including a promise, may be declared on as such.

BULLER, *Justice,*—This mode has been in use ever since I have known any thing of practice, and my brother ASHHURST remembers it much longer. There is no objection to it, in point of form, which could prevail even on a special demurrer. Promises are not all executory. Do not all our books make a distinction between promises executed and promises executory;—that in one you may traverse the consideration, in the other not? Because another action would lie, it does not follow that this will not. It was determined in *Slade's* case, that there may be different actions for the same injury (*u*).

The rule discharged [F 2.]

(*u*) *T.* 44 *Eliz.* 4 *Co.* 92. *b.*

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unsoundness; and it is for breach of this contract that an action of assumpsit is to be maintained. It is usual to frame counts upon this principle, charging that defendant undertook that he did not know of unsoundness, and laying the breach that the thing sold was unsound, and that defendant knew it; or stating the assumpsit that the commodity was free from latent defects, as was done in a case of *Mellish* v. *Motteux, Peake, N. P. Rep.* 115. in which Lord Kenyon held the plaintiff entitled to recover for a defect in a ship, which was not visible to the purchaser, but which the seller knew of, although in that case the sale was not only without a warranty, but with an express condition to take the ship *with all faults*; which, Lord Kenyon said, must apply only to faults which the purchaser might discover, or which seller was unacquainted with.

[F 2.] This case was also mentioned by the court, as the first in which the mode of declaring in assumpsit was established, in *Williamson* v. *Allanson,* 2 *East.* 446. notwithstanding which, the former practice of declaring in tort, has also been continued: and it is established by that case, that the principle of the law is the same as applied to both forms of action, viz. that express warranty without knowledge, or knowledge without warranty, will make the seller responsible for unsoundness.

KEECH

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KEECH, Lessee of WARNE, *against* HALL and Another.

Monday, 16th Nov.

EJECTMENT tried at *Guildhall*, before BULLER, *Justice*, and verdict for the plaintiff. After a motion for a new trial, or leave to enter up judgment of nonsuit, and cause shewn, the court took time to consider; and, now, Lord MANSFIELD stated the case, and gave the opinion of the court, as follows.

A mortgagee may recover in ejectment (without giving notice to quit) against a tenant who claims under a lease from the mortgagor granted after the mortgage, without the privity of the mortgagee [☞.]

Lord MANSFIELD,—This is an ejectment brought for a warehouse in the city, by a mortgagee, against a lessee under a lease in writing for seven years, made after the date of the mortgage, by the mortgagor, who had continued in possession. The lease was at a rack-rent. The mortgagee had no notice of the lease, nor the lessee any notice of the mortgage. The defendant offered to attorn to the mortgagee before the ejectment was brought. The plaintiff is willing to suffer the defendant to redeem. There was no notice to quit; so that though the written lease should be bad, if the lessee is to be considered as tenant from year to year, the plaintiff must fail in this action. The question, therefore, for the court to decide is, whether, by the agreement understood between mortgagors and mortgagees, which is, that the latter shall receive interest, and the former keep possession, the mortgagee has given an implied authority to the mortgagor to let from year to year, at a rack-rent; or whether he may not treat the defendant as a trespasser, disseisor, and wrongdoer. No case has been cited, where this question has been agitated, much less decided. The only case at all like the present, is one that was tried before me on the home circuit (*Belchier* v. *Collins*); but, there, the mortgagee was privy to the lease, and, afterwards by a knavish trick, wanted to turn the tenant out[f 1]. I do not wonder that such a case has not occurred before. Where the lease is not a beneficial lease, it is for the interest of the mortgagee to continue the tenant; and where it is, the tenant may put himself in the place of the mortgagor,

[22]

[☞] But if there is tenant from year to year, and the landlord mortgages, pending the year, the tenant is entitled to 6 months' notice from the mortgagee. *Birch* v. *Wright*, 1 *T. R.* 378.

[f 1] Semb. that mere knowledge of the defendant's occupation is not sufficient to entitle him to a notice to quit from the mortgagee. *Thunder* v. *Belcher*, 3 *East.* 449.

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mortgagor, and either redeem himself, or get a friend to do it. The idea that the question may be more proper for a court of equity, goes upon a mistake. It emphatically belongs to a court of law, in opposition to a court of equity; for a lessee at a rack-rent, is a purchasor for a valuable consideration, and in every case between purchasors for a valuable consideration, a court of equity must *follow* not *lead* the law. On full consideration, we are all clearly of opinion, that there is no inference of fraud or consent against the mortgagee, to prevent him from considering the lessee as a wrong-doer. It is rightly admitted that if the mortgagee had encouraged the tenant to lay out money, he could not maintain this action [F 2], but here the question turns upon the agreement between the mortgagor and mortgagee: when the mortgagor is left in possession, the true inference to be drawn, is an agreement that he shall possess the premises at will in the strictest sense, and therefore no notice is ever given him to quit, and he is not even entitled to reap the crop, as other tenants at will are, because all is liable to the debt; on payment of which, the mortgagee's title ceases [†9]. The mortgagor has no power, express or implied, to let leases, not subject to every circumstance of the mortgage. If by implication, the mortgagor had such a power, it must go to a great extent;—to leases where a fine is taken on a renewal for lives. The tenant stands exactly in the situation of the mortgagor. The possession of the mortgagor cannot be considered as holding out a false appearance. It does not induce a belief, that there is no mortgage; for it is the nature of the transaction, that the mortgagor shall continue in possession.

[23]

Whoever wants to be secure, when he takes a lease, should inquire after and examine the title deeds. In practice indeed (especially in the case of great estates) that is not often done, because the tenant relies on the honour of his landlord; but whenever one of two innocent persons must be a loser, the rule is, *qui prior est tempore, potior est jure.* If one must suffer, it is he who has not used due diligence in looking into the title. It was said at the bar, that if the plaintiff, in a case like this, can recover, he will also be entitled to the mesne profits from the tenant, in an action of trespass, which would be a manifest hardship and injustice, as the tenant would then pay the rent twice. I give no opinion on that point; but there may be a distinction, for the mortgagor may be

[†9] *Infra, Moss* v. *Gallimore. M.* 20 *Geo.* 3. *p.* 266, 267.

[F 2] In *Weakly* v. *Bucknell. Cowp.* 473. it was expressly decided, that an unstamped agreement to grant a lease, on the faith of which the tenant had built a house, was a defence to an ejectment. This doctrine is now over-ruled, *vide post.*

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be considered as receiving the rents in order to pay the interest, by an implied authority from the mortgagee, till he determine his will [†10]. As to the lessee's right to reap the crop which he may have sown previous to the determination of the will of the mortgagee, that point does not arise in this case, the ejectment being for a warehouse; but, however that may be, it could be no bar to the mortgagee's recovering in ejectment. It would only give the lessee a right of ingress and egress to take the crop; as to which, with regard to tenants at will, the text of *Littleton* is clear. We are all clearly of opinion that the plaintiff is entitled to judgment [7]. The

[†10] It is expressly provided by 4 *Ann. c.* 16. § 10. "That no tenant "shall be prejudiced or damaged by "payment of any rent to a conusor "or grantor of any manors or rents, "or of the reversion or remainder of "any messuages or lands, or by "breach of any condition for non-"payment of rent, before notice "shall be given to him of the grant "by the conusee or grantee."

[7] When the question was argued at the bar, Lord *Mansfield* said, he entirely approved of what had been done by *Nares*, Justice, upon the *Oxford* circuit, and afterwards confirmed by this court, in the case of *White, lessee of Whatley*, v. *Hawkins, viz.* not to suffer a lessee under a lease *prior* to the mortgage to avail himself of such lease on an ejectment by the mortgagee, if he has had notice before the action that the mortgagee did not intend to turn him out of possession [†11]. [F 3].

[†11] *Law of Ni. Pr. Ed.* of 1775, p. 96.

[F 3] The doctrine contained in this case was recognised by Lord Mansfield in *Moss* v. *Gallimore, infra* 279, and confirmed in *Doe* v. *Pegge*, 1. *T. R.* 758. *in not.* but has since been overturned by *Doe* v. *Staple*, 2 *T. R.* 684, in which *Buller*, J. differed from the rest of the court, and by *Doe* v. *Wharton*, 8 *T. R.* 2. and *Doe* v. *Wroot*, 5 *East.* 132. citing *Weakly* v. *Rogers*.

The result of these cases appears to be, that the legal estate must prevail in ejectment, unless under circumstances from which a jury may presume such estate to have been in fact surrendered; as when it arises from a term of years, the trusts of which have been satisfied: and that the action of ejectment is not to be so moulded, as to enable persons entitled to rents and profits to recover possession of them against defendants who can set up a prior legal title, notwithstanding the lessor of the plaintiff foregoes his demand of possession of the land; as was done in this case, and in *Doe* v. *Pegge*. In *Goodtitle* v. *Jones*, 7 *T. R.* 47. it was even held that a satisfied term, if not found by the jury upon a special verdict to have been surrendered, bars a recovery in ejectment. This was repeated by Lord Kenyon, in *Roe* v. *Reade*, 2 *T. R.* 118: And the true limits of the doctrine appear to be laid down by his lordship in *Doe* v. *Sybourn*, 7 *T. R.* 2. where he says, "that in all "cases where trustees ought to con-"vey to the beneficial owner, he "would leave it to the jury to pre-"sume, (where such a presumption "might reasonably be made) that "they had conveyed accordingly." See also, *Roe* v. *Lowe*, 1 *H. Bl.* 446.

The *Solicitor General* for the defendant,—*Dunning*, and *Cowper*, for the plaintiff.

The rule discharged [F 4].

Monday, 16th Nov.

WESTON *against* DOWNES.

Assumpsit for money had and received, will not lie, when the payment has been made on a contract which is still open, and not given up by the defendant.

[*24]

THIS was an action for money had and received by the defendant to the use of the plaintiff. On the trial, before Lord MANSFIELD, the plaintiff proved, that the defendant, in consideration of seventy guineas, had sold him * a pair of coach horses, which he undertook to take back, if the plaintiff should disapprove of them, and return them within a month. The plaintiff did return them within a month, but took another pair from the defendant in their stead, without making any new agreement. These he also returned within a month, and received a third pair on the 23d of *December*, without any fresh bargain. This third pair he disapproved of, because they were restive and would not draw; and offered to return them on the 5th of *January*, but the defendant refused to take them back.

Lord MANSFIELD directed a nonsuit; and, on a rule to shew cause why the nonsuit should not be set aside, and a new trial granted, the question was, whether the action of *assumpsit* for money had and received, would lie in this case.

Dunning and *Davenport*, for the plaintiff, contended, that there was an end of the contract on the return of the first pair of horses, and that then a right accrued to bring this action.

The *Solicitor General*, for the defendant, insisted, that the contract was continued by taking other horses, and that the plaintiff ought to have declared upon the special agreement.

Lord MANSFIELD,—I am a great friend to the action for money had and received; and therefore I am not for stretching, lest I should endanger it [†12]. Where there is a special

[†12] *Infra, Longchamp* v. *Kenny*, *E.* 19 *Geo.* p. 132, 133.

[F 4] The same point was ruled by the court, on the authority of this case, in *Thunder* v. *Belcher*, 3 *East*. 449; where ejectment was maintained by the assignee of a mortgage, against an occupier let into possession as tenant from year to year by the mortgagor, after the date of the mortgage, and before the date of the assignment, although there was no demand of possession; the court holding that the mortgagor was at best a tenant at sufferance himself, and therefore not able to create another tenancy at sufferance.

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a special contract, the defendant ought to have notice, by the declaration, that he is sued upon that contract [☞1]. [F1]

WILLES, *Justice*, of the same opinion.—Here was originally a special contract, and it continued between the parties through all their subsequent dealings.

ASHURST, *Justice*,—If the plaintiff had demanded the seventy guineas, and brought his action, on the return of the first pair of horses, and no second pair had been sent, this action would have lain [☞2]; [F 2] but, here, the contract was continued, and the case resembles one that was tried before me on the Midland Circuit, and afterwards came on in this court; viz. *Power* v. *Wells*, *E.* 18. *Geo.* 3. [8].

BULLER, *Justice*,—This action will not lie, as the defendant has not precluded himself from entering into the nature of the contract, by taking back the last pair of horses.

[25]

Where

[☞1] [F 1] *Vide Fielder* v. *Starkin*, *C. B. T.* 28 *Geo.* 3. *H. Bl.* 17. in which it was held, that an action on the warranty might be maintained without a return; and admitted that an action for money had and received could not.

[☞2] [F 2] *Towers* v. *Barret*, *B. R. H.* 26 *Geo.* 3. 1 *Term Rep.* 133. was exactly the case here put as an instance; and it was decided that the action lay. But in *Payne* v. *Whale*, 7 *East.* 274, where an unsound horse was sold with warranty of soundness, and defendant had promised he would return the money and take back the horse, if he proved unsound: the court held that the buyer could not, after a tender of the horse and demand of the money, maintain an action for money had and received: the best ground for which distinction appears to be, that in the latter case, the conversation about taking back the horse was no part of the original contract. In *Gray* v. *Edwards*, 7 *T. R.* 181, where the seller by his neglect put it out of the power of the buyer to complete a contract of sale, it was held that the buyer might put an end to the contract, and recover money paid in part of the price.

But in *Hulle* v. *Heightmann*. 2 *East.* 145, which was a special contract for seaman's wages for a whole voyage, with an express stipulation, that none should be claimed till the voyage should be completed, it was held that a seaman could not recover *pro ratâ*, in *indebitatus assumpsit*; though his service was put an end to by the wrongful act of the captain sending them ashore. Though it does not appear clearly from the report, whether the court meant to refer the plaintiff for his remedy to an action on the original contract, or to an action of tort against the captain. The case of *Gray* v. *Edwards*, was not cited in this case.

[8] In the case of *Power* v. *Wells*, the plaintiff gave a horse of his own and twenty guineas for a horse of the defendant's, which was warranted sound, but proved to be unsound; upon which the plaintiff, after tendering a return as above mentioned, brought the action for money had and received for the twenty guineas, and also an action of *trover* for his own horse. The court held, that neither would lie. Not the latter action, because the property has been changed [†13].

[†13] Since reported, *Cowp.* 818.

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Where the contract is open, it must be stated specially. In *Power* v. *Wells*, the defendant had warranted a horse to be sound, which proved unsound. The plaintiff tendered a return of the horse, but the defendant refused to receive him; and an action for money had and received being brought, it was held by the court, that it would not lie.

The rule made absolute.

Thursday, 19th Nov.

ROE, Lessee of Roach, Widow, *against* POPHAM and Others.

If a fine is levied by tenant for life, remainder-man in tail, and reversioner in fee, a declaration of uses by the tenant for life and remainder-man in tail, does not bind the reversioner, without his privity.—When no uses are declared, parol evidence may rebut the resulting use to the conusor in favour of the conusee, without any written declaration of the uses in his favour.

BY marriage-articles, bearing date the 28th of *February*, 1734, *Lætitia Harris*, and *Posthuma* her daughter, the one being tenant for life, and the other entitled to a remainder in tail, of a trust estate, in contemplation of a marriage about to be celebrated between *Posthuma Harris* and *William Taylor*, covenanted to levy a fine, and to settle the lands in question on trustees, in strict settlement, with a remainder in fee to *Posthuma*. The legal estate of the whole, and the equitable estate in the reversion in fee, expectant on *Posthuma*'s estate tail, had descended to *Thomas Harris*, eldest son of *Lætitia*'s husband by a former wife. He was not a party to the articles of 1734. But, in 1735, a fine was levied, in which *William Taylor*, *Thomas Harris*, *Lætitia* and *Posthuma*, were conusors, and the trustees in the marriage-settlement conusees. *Thomas Harris* died without issue, in 1736, without having joined in any declaration of the uses of the fine, and was succeeded by his full sister *Elizabeth*, the lessor of the plaintiff, who was his heir at law, and the heir at law of her father as to the reversion. *Posthuma* had two daughters, but she died in 1739; one of her daughters in the same year, and the other in 1740, both without issue; and *Lætitia* died in 1771. This ejectment was now brought by *Elizabeth* against the trustees, on the ground that the declaration of uses in the marriage-articles did not operate against *Thomas Harris*, he not being a party to them; and that where there is no declaration of the uses of a fine (which by the statute of frauds *(v)* must be in writing) they result to conusors. BULLER, *Justice*, before whom the cause was tried, at the last summer assizes for *Somersetshire*, being of

[26]

that opinion, directed a verdict to be found for the plaintiff, but with leave to move for a new trial without payment of costs.

At

(v) 29 *Car.* 2. *c.* 3. § 7.

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ROE against POPHAM.

At the trial, the counsel for the lessor of the plaintiff had objected to the reading of the marriage-articles, because the reversioner, under whom she claimed, was not a party to them, and there was no evidence of his knowing that there were such articles: but the judge over-ruled this objection, as they made a necessary part of the defendant's title, and it was clear that it was no objection against reading a title-deed, that the person against whom it was produced, was not a party to it.

Morris now contended, for the defendant, that the clause in the statute of frauds, requiring that declarations of trusts and confidences (and which is held to include uses,) should be made by some writing signed by the party, extends in the case of fines, to third persons only, and not to the conusors and conusees of the fine. That the resulting use to the conusors may be rebutted in favor of the conusees, by parol evidence, shewing such to have been the intention of the parties. That this doctrine is fully established by the case of Lord *Altham* v. *the Earl of Anglesea (w)*. That it being a mere question of fact and intention, in whom the uses of the fine in the present case vested, that question ought to have been left to the jury, and that there could be no purpose imagined for levying the fine, and making the trustees conusees, except to confirm the marriage-articles.

GOULD for the plaintiff.—He cited *Beckwith's Case (x)*.

Lord MANSFIELD,—The case cited by Mr. *Morris* is good law. There, there was evidence to rebut the resulting use; but here I see no proof of intention on the part of the reversioner in fee. He was not a party to the marriage-articles. If he had been, *that* would have been strong evidence against any resulting use to him. The *form* of a fine is to give a title to the conusee; but, in truth, it is for the convenience of the conusor; and, from the constant usage, the presumption is, that it is levied to his use. This indeed is liable, like all other presumptions, to be encountered by contrary evidence; but here the reversioner in fee has done nothing to rebut the presumption.

The Rule discharged.

(w) *E.* 8 *Ann. Gilb. Rep.* 16. *Pigot on Rec.* S. C.

(x) 2 *Co.* 58. *b.*

1778.

Tuesday, 17th of Nov.

STEVENS *against* CARRINGTON.

On a dissolution of a partnership, by a covenant that the plaintiff shall have the moiety of goods in a warehouse, which is to be the defendant's, the defendant is not bound to deliver the goods.

IN an action of debt, upon a bond, conditioned for the performance of the covenants in a deed to dissolve a partnership between the plaintiff and the defendant as wharfingers, the defendant having prayed oyer of the condition, one of the covenants appeared to be, in effect, "That the "said parties agreed with each other, that the goods and "merchandises which should be lying upon rent, on all, or "any part of the partnership premises at the time of the "dissolution of the partnership, should be divided equally "between them; and that each should bear and pay a "moiety of the charges and expences attending the weighing "and dividing the same; but that the plaintiff should solely bear "and pay the charges and expences attending the conveying "his moiety from a warehouse agreed to be assigned to the "defendant, to another warehouse agreed to be assigned "to the plaintiff."—He then pleaded performance of all the covenants.—The plaintiff replied, that he had performed, or was willing to perform, his part of the above-mentioned covenant, and that although he had required the defendant to *deliver* to him his said moiety of the goods and merchandise, *&c.* yet the defendant did not, nor would deliver or cause to be delivered, to the plaintiff his said moiety, but wholly refused, *&c.*—To this replication the defendant demurred generally.

Baldwin, in support of the demurrer, insisted, that, in actions founded on covenants, the words must be strictly followed; that there was, in this case, no stipulation to deliver the goods. That the defendant did not mean to put himself to the expence of the delivery; that, being a wharfinger, it might not be in his power to deliver them, because some other person or persons might have a control over them.

Runnington, for the plaintiff, admitted, that there was no express covenant to deliver; but contended, that such a covenant arose by necessary implication of law, from the words of the deed. The plaintiff, he said, could not enter the warehouse in which the goods were, without the consent of the defendant; it being assigned to him. He cited *Robinson* v. *Amps* or *Aunts (y)*, and *Hill* v. *Carr (z)*.

Lord MANSFIELD told *Baldwin*, he had no occasion to reply; and said, that the defendant, by this covenant, was

(y) *Sir. Tho. Raym.* 25. 1 *Sid.* 48. (z) *Chancery Cases*, 294.

was not bound to deliver; though if he had obstructed the plaintiff in removing the goods, it would have been a breach of the covenant.

Runnington moved for leave to amend, which was granted.

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STEVENS against CARRINGTON.

The Earl of AILESBURY *against* PATTISON.

Friday, 20th of Nov.

A lord of a hundred, or wapentake, cannot grant a deputation to a game-keeper.

THIS was an action of debt against the defendant, to recover six penalties, on the statute of *Ann.* c. 14. for keeping a gun to destroy game; for using a gun for that purpose; for keeping a setting dog; for using a setting dog; for exposing a grouse to sale; and for exposing a partridge to sale; not being qualified. The cause was tried at the last assizes at *York*, before WILLES, *Justice*, and a verdict found for the plaintiff on one of the counts, subject to the opinion of the court, on the following case, *viz.* "That *William Marwood*, Esq. was lord and chief bailiff of the liberty, wapentake, or hundred, of *Langbaurgh*, in the *North Riding* of the county of *York*. That the said *William Marwood* and his servants, and the servants of those under whom he claimed, had used to kill game on the manor of *Whorleton*, which is within the said wapentake, and also on all the rest of the said wapentake. That the plaintiff was lord of the said manor of *Whorleton*, and had usually appointed a game-keeper within the said manor, for the purpose of preserving the game, and had a game-keeper at the time of the facts committed as laid in the declaration. That the said *William Marwood*, as lord and chief bailiff of the said wapentake, on the 21st day of *July*, 1777, granted a deputation to the defendant (his menial servant), who was killing game at the time in the declaration mentioned, and did kill one grouse within the said manor of *Whorleton* for the said *William Marwood*, by his order, and for his immediate use; which deputation was in the words following, *viz.*—"I *William Marwood*, Esq. lord and chief bailiff of the liberty, wapentake, or hundred of *Langbaurgh*, in the *North Riding* of the county of *York*, do hereby nominate, authorize, and appoint, my servant *Michael Pattison*, to be my game-keeper of and within my said liberty, wapentake, or hundred of *Langbaurgh*, during my pleasure only, with full power, licence, and authority, to kill any hare, pheasant, partridge, or any other game whatsoever, in and upon all and every or any part of my said liberty, wapentake, or hundred of *Langbaurgh*, for my sole and immediate use and benefit, and, also, to take and seize all such guns, bows, greyhounds, setting dogs, lurchers, or other dogs intended for killing of hares,

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hares, ferrets, tramels, lowbells, hays, or other nets, harepipes, snares, or other engines intended for the taking and killing of conies, hares, pheasants, partridges, or other game, as within the precincts of my said liberty, wapentake, or hundred of *Langbaurgh*, shall be used by any person or persons, who, by law, are prohibited to keep or use the same. Given under my hand and seal this 21st day of *July*, 1777.— That the said deputation was duly registered with the clerk of the peace. That the said *William Marwood* had granted no deputation before that given to the defendant."

The question for the opinion of the court, upon the foregoing case, was, "Whether the defendant had any right or authority to kill game upon the manor of *Whorleton?*"

Davenport, for the plaintiff, besides drawing many arguments from the nature of wapentakes and hundreds, and the ancient statutes concerning them, contended, that the statutes authorizing the appointment of game-keepers, do not extend to the lords of a wapentake or hundred. That the words of 22 & 23 *Car.* 2. *c.* 25. are, "That all lords of *manors or other royalties*, not under the degree of an esquire, may, by writing under their hands and seals, authorise one or more game-keeper or game-keepers within their respective manors or *royalties*" *(a)*. That it then gives the game-keepers, so appointed, authority to seize such guns, bows, &c. as, within the precincts of *such respective manors*, shall be used by persons not qualified. That the word "royalty" was not repeated in the last part of the clause, which shewed that it was used as synonimous to manor. That, by the statutes of 5 *Ann. c.* 14. 9 *Ann. c.* 25. and 3 *Geo.* 1. *c.* 11. which use the words "lords and ladies of manors," without any other description, it was manifest that *they* only were meant by the legislature to have the power of granting deputations. That honours, baronies, seigniories, and fees, are words applied, in different parts of *England*, to the same sort of property as manors, one of them generally comprehending several or many manors. But that the lord of a wapentake or hundred was to be considered only as lord of the hundred court or court-leet. That it would not be argued that a sheriff could grant such a deputation for his county; and, if not, how could a lord of a hundred or wapentake, which is
[30] only part of the county, and taken out of it? That if this deputation were sustained, there would be two game-keepers in the same manor; for that Lord *Ailesbury* had appointed one, which he certainly had a right to do; but that, by 9 *Ann. c.* 25. only one game-keeper could be appointed within any one manor. That as to the usage stated in the case, that might

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might be evidence of a prescriptive free warren, so as to excuse a trespass, but it could not enable Mr. *Marwood* to depute another to kill game.

Chambre, for the defendant, argued, that the question depended upon the construction of 22 & 23 *Car.* 2. *c.* 25. and of 5 *Ann. c.* 14. That all wapentakes were originally in the crown, and must be derived from it, and that courts are incident to them, as to manors. 2 *Roll. Abr.* 73. That they therefore are properly royalties, and that, in the statute 14 *Ed.* 3. *c.* 39. the owners of wapentakes are called lords; so that Mr. *Marwood* was rightly styled the lord of this wapentake. That *Davenport* had said, that, "royalty" in the statute of *Car.* 2. was synonimous to "manor," but that the words were "manors, or *other* royalties." That nothing could be inferred from the omission of the word "royalty" in the statute of 5 *Ann.* That acts *in pari materiâ* are to be explained by one another, and that act must be understood to extend to all who are entitled to appoint game-keepers by the statute of *Car.* 2.

Lord MANSFIELD,—All acts in *pari materiâ* are to be taken together, as if they were one law. In the statute of *Car.* 2. the words, "other royalties," are used, but that must mean royalties of the same nature with manors. If royalties of a higher nature had been meant, the statute would have begun with them [F1]. The reason why this word was used in the act of *Car.* 2. was, because such royalties go by different names in different parts of the kingdom; as honours, baronies, fees, &c. But in the act of 5 *Ann. c.* 14. the words are only "lordship or manor" *(b)*, and the acts of 9 *Ann.* and 3 *Geo.* 1. recite the others, and only mention "lords and ladies of manors."

The *postea* to be delivered to the plaintiff.

(b.) § 4.

[F 1]. *Vid. acc. Com. Dig. Parliament R.* 14

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BRADY, Lessee of NORRIS, *against* CUBITT.

An implied revocation of a will by a subsequent marriage, and the birth of a child, may be rebutted by parol evidence.—If a will is revoked by implication, a reference to it, in an instrument attested according to 29 Car. 2. c. 3. amounts to a republication.

IN an action of ejectment, tried on the last *Norfolk* circuit, the jury found a special verdict to the following effect, *viz.* "That *John Norris* was seised in fee, *inter alia*, of the premises in the declaration mentioned.—That, on the 26th of *June* 1770, (being then a widower without children, and his sister *Anne Aufrere*, wife of *Anthony Aufrere*, being his heir at law), he made his will, in writing, duly attested, and thereby devised the said premises to *T. B. Bramston*, *B. D. G. Dillingham*, *T. G. Ewen*, and *T. Brograve*, and their heirs, to the use and intent that the chancellor, master, scholars of the university of *Cambridge*, and their successors, should and might for ever have, receive and take thereout, and every or any part thereof, upon trust as therein after was mentioned, an annuity or yearly rent-charge of 120*l.* clear of all taxes, and other deductions whatever, with powers of entry and distress as between landlord and tenant; and that the testator declared, by his said will, the trusts of the said annuity or rent-charge in the following words, *viz.* "I do hereby declare my will and meaning to be, that the said chancellor, master, and scholars, and their successors, shall from time to time for ever stand and be seised and possessed of the said annuity or yearly rent-charge, and of the said powers and remedies for the recovery thereof, upon special trust and confidence, and to the intent that they shall, from time to time for ever, pay, apply and dispose of the same and every part thereof, to such person or persons, upon such trusts, *&c.* and in every respect in such manner as are expessed, *&c.* in the first twenty pages of a small book covered with marbled paper, wholly of my own hand-writing, and all the interlineations and erasements therein having been made by me; in the twentieth page of which book, there are in my own hand-writing, the words and figures following, *viz.* "All written with my own hand, and bearing date, *Bristol, Sept.* 22, 1768, containing twenty pages.—*John Norris.*"—And also the words and figures following, *viz.* "This is the paper or book to which my will, bearing date the 26th day of *June*, refers.—*John Norris.*"—That subject to, or chargeable with, the said annuity, or yearly rent-charge, and the powers and remedies aforesaid, for the recovery thereof, the testator declared his will to be, that the trustees and their heirs should stand seised of the said premises, in trust for his own right heirs and assigns for ever.—That the testator, by his said will, gave

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gave to the said *T. G. Ewen* 1000*l.* and also gave many other pecuniary and specific legacies to many other persons.—That by the said paper or book, to which the will refers, it is directed, *&c.* (here was set forth an account of the purposes to which the annuity given to the university was to be applied).—That, after making the said will, *viz.* in *May* 1773, the testator married *Charlotte Townshend*; previous to which marriage, and after making the will, he conveyed certain lands of the annual value of 1290*l.* to trustees, for the purpose of securing to the said *Charlotte* a clear yearly sum of 800*l.* in case there should be no son of the marriage, and 600*l.* if there should be a son, by way of jointure, and in bar of dower, with remainder to himself in fee.—That the premises in the declaration mentioned, and so devised as aforesaid by the will, were not comprized in the last mentioned conveyance.—That, on the 13th of *December* 1775, the testator having then had no issue born of the said marriage, and his said sister being then his next heir at law, wrote and subscribed with his name a paper writing (set forth *in hæc verba*, and intituled "memorandum of my intention,") in which, after mentioning, that, by the settlement, his wife (of whom he speaks in the highest terms of approbation) had 800*l.* a year clear money, which his will, "even if it were not prior, could not affect, and which, he said, it had nothing to do with, declared a further intention in her favour as follows, "My will is, (and if I live to express it in legal formality, it shall be a coercive will) that not only all her jewels shall become hers, but that she shall have her choice of half the plate when appraised, and of half my books. That, moreover, she shall have to the amount of 200*l.* (besides the harpsichord which I wholly give her) in furniture, according to her own choice of it, and besides, or over and above the 800*l.* 1000*l.* in cash, to be paid to her within one year from my decease, by my executors under my will.—In case I shall not live to procure this my will and intention to be according to legal prescription, I call upon you my dear sister to fulfil my designs, using too all your endeavours that none shall hinder you.—To the page on the other side, and to the page on this, I have set my name as above dated, *John Norris.*—My friend *T. Ewen* take a copy of this, and if not complied with, publish it."—That, afterwards, on the 25th of *October* 1776, the testator had issue, born of his said wife, *Charlotte Laura Norris*, the lessor of the plaintiff; and that, on the 27th of *December* 1776, being seised as aforesaid of the premises in the declaration mentioned, amongst other real estates, he subscribed his name to another paper writing, in the presence of three wit-

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nesses, who, at his request, subscribed their names thereto in his presence, and in the presence of each other; which paper writing was dictated by him, and reduced into writing by his order, and was in the words and figures following, *viz.* "*Memorandum* of what Mr. *Norris* said in the presence of Mr. *Bromfield*, *T. G. Ewen* and *T. Lunt*, on the evening of the 27th of *December* 1776. That, as his will was made before he married a second time, he had there devised his estate to his heir male, and had given 10,000*l.* to the younger children of the *Hoveton* family; but now, having a female child, it is his meaning that she should inherit the estate as his heir, and of course that the 10,000*l.* should not become due to the *Hoveton* children, unless the said child should die without heirs of her body. Mr. *Norris* also means that the 1000*l.* left to Mr. *T. G. Ewen* should be paid to him, and also all the other legacies mentioned in the will to other people, except the above 10,000*l.*—*J. Norris.*—And he also particularly desires that the college gift may be paid, and disposed, as he has, in the said will, directed.—The parchment book respecting the college gift is to stand.—Mr. *Brograve* had instructions for this, and drew it up."—Witness to the above signing of the said *J. Norris*, *J. Bromfield*, *T. G. Ewen*, *T. Lunt*.—That the said clause in the said paper writing last mentioned, immediately following the name of *John Norris*, *viz.* —"*And he also particularly desires, &c.*" was, by the direction of the said *John Norris*, struck out, by several strokes of a pen drawn through the same, before the testator signed the said last-mentioned paper writing, the testator saying to the person who reduced the said memorandum into writing,—"You may draw your pen through what you have now written, for there is a parchment book with the will in the hands of Mr. *Brograve*, that mentions all about it—That, by the words,—"*children of the Hove-*" *ton family*," and "*Hoveton* children," the testator meant the children of his said sister, who then lived at *Hoveton*—That the will of the 26th of *June* 1770, did not contain any devise of any part of the testator's real estate to his heir male, or to any other person, except only the devise of the premises above-mentioned, part of his real estate, for securing the said rent-charge to the University of *Cambridge*. Nor did the said will contain any gift of 10,000*l.* or any other sum of money to the *Hoveton* children, or any of them; but, in a draught of a will which had been prepared by the direction of the testator in the year 1768, but had never been executed, there was a devise of the principal part of his real estate to his said sister for life, with remainder to her first and other sons in tail-male, charged with the payment of 10,000*l.* to the younger children of his said

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said sister, on certain contingencies therein specified; and the said draft contained also a bequest, of 300*l.* only to the said *T. G. Ewen.*—That the testator died on the 5th of *January* 1777, seised in fee of the premises mentioned in the declaration, leaving the lessor of the plaintiff, his only child and heir at law; and that he also died seised in fee of other real estates of the yearly value of 2,500*l.*—That after his death, and before the time within mentioned in which the trespass, *&c.*—The defendant claimed uunder the devise to the university.

Le Blanc, for the lessor of the plaintiff,—There are two questions upon this special verdict. 1. Whether the will of 1770 was revoked by the subsequent marriage, and birth of a child? 2. Whether, supposing it revoked, any thing appears on the face of the special verdict, which, in law, amounts to a republication, especially with respect to the devise to the universty? 1. Before the statute of frauds, wills of land made under the particular customs of boroughs, or by virtue of the statute of wills (*c*), might be revoked by any express words without writing, the statute of wills giving power to any person seised in fee of lands, to devise such lands by will *in writing*, but being silent as to revocations; *Brooke* v. *Warde* (*d*), *Symson* v. *Kirton* (*e*), *Cranvell* v. *Sanders* (*f*). But, besides these *actual* revocations, there were other acts of a testator which were considered as revocations, because contrary to, or inconsistent with, the will; as a devise in fee, and afterwards a lease for years, to the same person, to commence after the testator's death; *Coke* v. *Bullock* (*g*). And these *constructive* revocations were raised, even where the acts done were void in law; as feoffment without livery; bargain and sale without enrolment; a grant of a reversion without attornment; a devise to the poor of a parish, or to a corporation; *Mountague* v. *Jeoffereys* (*h*), *Rolle's Abr. Title Devise* (*i*). In the case of *Forse* v. *Hembling* (*k*), it was held, that a subsequent marriage revoked a will of land made by a feme sole. Now, in all these instances, the subsequent deed, devise, or marriage, could have no other effect, but to shew an alteration of intention; and, therefore, they prove, that any act indicative of such a change, was construed to be a revocation. The statute of frauds enacts, that all wills of lands shall be executed with certain solemnities (*l*). Then follows a clause prescribing similar solemnities in the case of revocations (*m*). But it is determined that this clause does

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(*c*) 32 *H.* 8. c. 1.
(*d*) *Dyer* 310.
(*e*) *E.* 4 *Jac.* 1. *Cro. Jac.* 115.
(*f*) *M.* 16 *Jac.* 1. *Cro. Jac.* 497.
(*g*) *C. B. M.* 2 *Jac.* 1. *Cro. Jac.* 49.
(*h*) *Moor* 429.
(*i*) p. 614.
(*k*) *C. B. M.* 30 *El.* 4 *Co.* 60. *b.*
(*l*) 29 *Car.* 2. c. 3. § 5.
(*m*) § 6.

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does not extend to implied revocations, or revocations in law; *Speke's Case* (*n*), *The Earl of Lincoln* v. *Rolls & al.* (*o*), *Tickner* v. *Tickner* (*p*), *Eyre* v. *Eyre* (*q*), *Brown* v. *Thompson* (*r*), *Pollen* v. *Huband* (*s*). It is laid down in those cases, that a subsequent marriage and the birth of a child, is one of those changes of situation, that will amount to a revocation in law, of a will of land, as well as personal property. And this doctrine was recognized by your lordship in the case of *Wellington* v. *Wellington* (*t*). The same point came directly before the court of Exchequer, in a case of *Christopher* v. *Christopher*, which was decreed 6th of *July* 1771 (*u*); and it was there determined, by PARKER, *Chief Baron*, and SMYTHE, and ADAMS, *Barons*, against PERROT, *Baron*, that it was a revocation. The same question also occurred two years afterwards, in *Sprague* v. *Stone*, at the *Cockpit* (*v*). The first will in that case was made in *Jamaica*, 6th of *June* 1764, by which the whole estate, real and personal, was devised to the defendant. The testator married in 1765, and had issue in 1766. Afterwards, on the 10th of *October* 1766, he made another will in *England*, which was in his own hand-writing, but not duly attested according to the statute of frauds; by which he devised his estate, real and personal, to his wife, in trust for his son. In *August* 1770, the chancellor of *Jamaica* decreed, that the marriage and birth of a child, and the second will, amounted to a revocation as to the personalty, but not as to the real estate. On the appeal to the privy council, PARKER, *Chief Baron*, DE GREY, *Chief Justice*, and Sir EARDLEY WILMOT, being present, " So much of the decree of the court of chancery in *Jamaica*, as established the will of 1764, with respect to the real estate, was reversed; and it was declared, " that the subsequent marriage and birth of a child were, in point of law, an implied revocation of the will of 1764." Their lordships, in this order of reversal, took no notice of the second will. 2. If the will of 1770, in the present case, was completely revoked by the marriage, and the birth of the daughter on the 25th of *October* 1776, has any thing happened since, that can be construed to be a republication? That cannot be without the solemnities required by the statute of frauds; *Gilbert's Law of Devises* (*w*), *Bunker* v. *Cooke* (*x*). The due execution of a codicil is not sufficient

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(*n*) *Carth.* 81.
(*o*) In *Dom. Proc.* 1695. 1 *Eq. Ca.* 412.
(*p*) Cited in 3 *Atk.* 742.
(*q*) 1 *P. Wms.* 304. Note.
(*r*) *T.* 1702. 1 *Eq. Ca.* 413.
(*s*) *M.* 1712. 1 *Eq. Ca.* 412.
(*t*) *B. R.* 8 *G.* 3. *Hill.* 4 *Burr.* 2165.
(*u*) 4 *Burr.* 2171. Note. 2182. *Addend.*
(*v*) 27 *March* 1773.
(*w*) 87. 95.
(*x*) *Fitz Gibb.* 225. *Gilb. Dev.* 129.

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sufficient to republish a will. It was determined in *Lytton* v. *Lady Falkland*, and in *Penphrase*, v. *Lord Lansdowne*, both cited in *Comyns's* Reports (*y*). So, by cancelling a second will, one of a prior date is not revived; *Burtenshaw* v. *Gilbert* (*z*) [† 14]. The memorandum of the 27th of *December* 1776, is not found by the verdict to relate to the will of 1770. It refers to the devise to the testator's sister's children, which is contained in the former will of 1768, and not in the latter. The part of it, in which it is said to be his intention that the college gift shall stand, was not signed and is scratched out. It may be contended that it is included under the words, "all the other legacies," and it will be said there is parol evidence of what the testator said, when the erasement was made. But the distinction is clear between a legacy and a devise, and no parol evidence should be received to explain the testator's intention contrary to the legal import of the language he has employed; *Strode* v. *Russel* (*a*), *Cole* v. *Rawlinson* (*b*), *Bertie* v. *Falkland* (*c*).

Graham, for the defendant,—I admit that implied revocations subsist as before the statute of frauds. But I am to contend 1. that there has been no revocation of the will of 1770. None of the cases have gone so far as to say that marriage, and the birth of a child, *necessarily* revoke a will. The doctrine is derived from the ecclesiastical courts. In *Lugg* v. *Lugg* (*d*), which was decreed by the delegates, marriage, and the birth of a child was declared to be merely a presumptive revocation. The will there was only of personal property. In the case of *Shepherd* v. *Shepherd* [10], which was sent out of chancery by Lord *Camden* for the

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(*y*) 383, 384.

(*z*) *B. R. E.* 14 *Geo.* 3. [† 14.]

(*a*) 2 *Vern.* 621. 624. S. C. with *Lytton* v. *Lady Falkland.*

(*b*) *B. R. H.* 1 *Ann.* 1. *Salk.* 234.

(*c*) *Canc. H.* 9 *W.* 3 1 *Salk.* 231.

(*d*) *E.* 11 *W.* 3. 1 Ld *Raym.* 441. 2 *Salk.* 592.

[10] The following is the state of the facts in that case. "*Shepherd* the testator having made his will, after some small legacies to his collateral relations, made his wife residuary legatee. After the making of the will, his wife was brought to bed of a daughter in 1763, upon whose birth, the testator added a codicil, whereby he directed that the legacies should be paid, and that an annuity of 300 *l. per ann.* should be secured on the *residuum*, and paid to his daughter. The codicil and will were found together. In 1765, another daughter was born, and in 1768, a son, who was a posthumous child, the testator being dead about six months before his birth."—Sir *George Hay*, in giving his opinion that the will was not revoked, delivered a very solemn and learned argument, in which he stated and examined a number of cases not in print, as well as those contained in the different reporters [F. 1].

[† 14] Since reported, *Cowp.* 49.

[F. 1.] See a full report of this case, 5 *T. R.* 51 *in not.*

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the opinion of Sir *George Hay*, it was determined, that the subsequent birth of children, even in a case of personalty, did not amount to a revocation. *Brown* v. *Thompson*, extended the rule to real property; but that case, as ultimately decided, proves that it does not hold universally, for there the will was established by Lord Keeper *Wright*, because the presumption was rebutted by other circumstances. In *Christopher* v. *Christopher*, there was a disposition of the *whole* estate, and the child, if the will had stood, would have been without any provision. *Spragge* v. *Stone* went entirely on the authority of *Christopher* v. *Christopher*, and, in the decree, it was called an *implied* revocation. Now if this sort of revocation is only presumptive, it may certainly be encountered by evidence. *Searle* v. *Lord Barrington (e)*. Such evidence has always been admitted in the ecclesiastical courts, as appears by Sir *George Hay's* judgment in *Shepherd* v. *Shepherd*. What are the facts in this case? A draught of a will in 1768, by which the testator devised his estate to his sister and her issue in tail, with £10,000 to her younger children. This was never executed. Then, in 1770, the will in favour of the university. And it is to be observed, that the devise to them is only a very small part of the testator's estate—merely a farm. Then an ample settlement on his intended wife. Afterwards the marriage in 1773. Then, in 1775, the testamentary paper set forth in the special verdict. In *October* 1776, a child born; and, in *December* of the same year, the last paper attested by three witnesses. In that paper, the testator does, in some degree, confound the draught of 1768, with the will of 1770, and refers to both. He certainly refers to the latter, because he mentions the legacy of £1000 to *Ewen*. But in the case of presumptions, parol evidence is undoubtedly admissible. And it appears that when he directed the additional clause relative to the college gift to be struck out, he spoke of the instrument of 1770, as his will. This rebuts every presumption that he meant to revoke it.—2. But, if the court were to hold that the marriage, and birth of a child, did revoke the will of 1770, I contend, in the next place, that the paper of the 27th *December* 1776, refers to it with sufficient certainty to amount to a republication. To establish this position, I rely upon *Carleton Lessee of Griffin* v. *Griffin (f)*, *Bond* v. *Seawell (g)*, *Acherley* v. *Vernon (h)*, cited in *Bond* v. *Seawell*, and *Molineux* v. *Molineux (i)*.

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Le Blanc, in reply, insisted on the cases of *Christopher* v. *Christopher*,

(e) *M.* 11 *Geo.* 1. 2 Ld *Raym.* 1370. 8 *Mod.* 278. 2 *Str.* 826.
(f) *E.* 31 *Geo.* 2. 1 *Burr.* 549.
(g) *M.* 6 *Geo.* 3. 3 *Burr.* 1773.
(h) *M.* 10 *Geo.* 1. *Comyns* 381.
(i) *H.* 2 *Jac.* 1. *Cro. Jac.* 144.

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Christopher, and *Spragge* v. *Stone*, as having expressly established that a subsequent marriage, and birth of a child, amount to an absolute revocation. He said that the admission of parol evidence, or of any writing not executed with the solemnities prescribed by the statute of frauds, would be of the most dangerous consequences, and would lead to all the inconveniences of perjury, which that act was calculated to prevent. That, in *Christopher* v. *Christopher*, the judges founded their opinion as to revocations by marriage and the birth of a child, on this, that those circumstances were matter of fact easily ascertained, and of such notoriety as not to occasion any danger of fraud or perjury, and that ADAMS, *Baron*, in that case, expressed a strong disapprobation of taking other extrinsic circumstances into consideration. And he contended, that the paper-writing of *December* 1776, did not refer with sufficient certainty to the will of 1770, for that to operate as a republication, and that a reference by a subsequent instrument, though properly attested, must be clear and unambiguous, in order to re-establish a will which has been revoked.

(*Dunning* mentioned to the court, that he had argued the case of *Spragge* v. *Stone*. That it was agitated at the bar, whether the statute of frauds extends to *Jamaica*; but that the judges thought it unnecessary to decide that question, and that the decree was penned as it is, merely that it might be seen abroad, that the privy council had not decided it [☞].)

Lord MANSFIELD,—I have no doubt upon this case, from the beginning. I have travelled a good deal through the question; I argued most of the cases when I was at the bar, relative to implied revocations of wills of personalty. Sir *George Hay*'s decision is not applicable to the present question, because the point there was, whether the birth of a child alone, operated as a revocation. He held that it did not. And, in that case too, the child was totally unprovided for. A subsequent marriage, and the birth of a child, affords a mere presumption. There may be many circumstances where a revocation may be presumed. The case in *Cicero* is an old and well-known instance of such presumptions (*k*). But, upon my recollection there is no case in which marriage and the birth of a child have been held

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[☞] By Stat. 25 *Geo.* 2. *cap.* 6. § 10. that act is made to extend "to such of the colonies and plantations, where the statute of frauds is by act of assembly made, or *by usage*, received as law." In 2 *P. Will.* 75. it is said to have been decided that the statute of frauds does not bind *Barbadoes*.

(*k*) *Pater credens filium suum esse mortuum, alterum instituit hæredem. Filio domi redeunte, hujus institutionis vis est nulla.* Cic. de Oratore.

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held to raise an implied revocation, where there has not been a disposition of the *whole* estate. It was a total disposition in *Christopher* v. *Christopher*, and in *Spragge* v. *Stone*; and it has always been a total disposition in the cases of personal property, because, by making an executor, the whole is disposed of. In such cases, the inference is excessively strong in favour of the wife and children. But I doubt extremely (I give no opinion,) whether the circumstances in this case are such as would raise the presumption. The testator disposes of a small part of his estate to a charity. Then, in contemplation of his marriage, he settles £800 a year upon his intended wife, with remainder to himself in fee. It is clear, therefore, that he contemplated the change in his situation after the will, and provided for it as to his wife; and, with regard to the children, he may well be supposed to say, I will keep them in my own power. Suppose a man had given several legacies by a will, and had devised all his real estate to the use of his children when he should have any: [F 1.] would a subsequent marriage and the birth of a child have revoked a will of that sort?—But I am clear on the other ground, [F 2] that

[F 1] The case here put happened in *Kenebel* v. *Scrafton*, 2 *East*. 530. where the principal object of the will was to make provision for the future children which the testator might have by a woman with whom he cohabited, and the question was, whether a subsequent marriage with that woman, and the birth of children, revoked the will; and the court decided, principally on the authority of this case, that a specific provision having been made for the children by the will, it was not revoked.

[F 2] In *Kenebel* v. *Scrafton*, the court studiously decline confirming the admissibility of parol evidence; and Lord Kenyon intimates the same disposition in *Doe* v. *Lancashire*, 5 *T. R.* 60. In *Goodtitle* v. *Otway*, 2 *H. Bl.* 516. (in which the court decided against the admissibility, in the case of presumed revocation by conveyance of the estate to new uses) Eyre, Chief Justice, also doubted the doctrine here laid down by Lord Mansfield: but Buller, Justice, maintained it, as distinguishable from the judgment there given in this respect, viz. because in that case there was a solemn act done by the party himself, a deed executed, which must have the construction which the words import, and by a *præsumptio juris & de jure* work a revocation; whereas in this case the revocation was presumed from other facts, to be proved by parol, and therefore to be rebutted by parol.

In *Pole* v. *Lord Somers*, 6 *Ves. jun.* 326. Lord Eldon, Chancellor, entertained the same doubts, and particularly objected to the expression that the evidence was to rebut an equity, which he said should be called answering a presumption. See also in *Gibbons* v. *Caunt*, 4 *Ves. jun.* 840. an opinion of the Master of the Rolls to the same effect, and another of the Chancellor in *Kenebel* v. *Scrafton*, 5 *Ves. jun.* 663.

In *Doe* v. *Staple*, 2 *T. R.* 697. it was ruled that the will of a feme sole was revoked by marriage, though the principal object of the will was to provide for her future husband; and it was doubted by Ashhurst, Justice, whether, if the parties had specifically agreed that the marriage should not revoke the will, such an agreement would have been valid.

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that this presumption, like all others, may be rebutted by every sort of evidence [† 15]. There is a technical phrase for it, in the case of executors; it is called rebutting an equity. *Lugg* v. *Lugg* is strong to this point. *Thompson* v. *Brown* was decided upon a *particular*, against a *general*, presumption; and Sir *George Hay*, appears to have understood this to be the law. Now the intent here is glaring from the writings found by the verdict. Mr. *Le Blanc* admits that there is evidence to rebut the presumption. If that were more doubtful, I think Mr. *Graham* is right, that the instrument of the 27th of *December* 1776, sets up the devise to the university. This instrument was written after the birth of the child. The testator had ordered a draught of a will to be prepared in 1768. Afterwards, in 1770, he makes the will in question. Now what appears on this instrument of *December* 1776? The testator remembers the dispositions, both of 1768 and 1770; but is not correct as to which of them he had executed. But his meaning is, that his estate should go to his daughter.—That the £10,000 should not be paid.—As to the legacy of £1000 to *Ewen*, that was to stand.—"*And also all the other legacies.*"—The word "legacy," in its ordinary signification, is applied to money, but it may signify a devise of land [☞], and may here comprehend the devise to the university, which the testator calls a gift.

[40]

WILLES, *Justice*, of the same opinion.

ASHHURST, *Justice*,—I am of the same opinion. There was a strong case in this court, *E.* 13. *Geo.* 3. on the first point, as to the admission of parol evidence to rebut an equity, or implication. The cause had been tried before me.

BULLER, *Justice*,—I am of the same opinion. I argued the case alluded to by my brother ASHHURST. It was the case of *Rogers* v. *Longfield*; [F 3] and was decided on the authority

[† 15] *Vide Skinn.* 227. *Beckley* v. *Newland*, *Canc. T.* 1723. [☞] S. P. *Per* Lord *Macclesfield*, 2 *P. W.* 182, 186, 187.

[F 3] Mr. East in a note to *Kenebel* v. *Scrafton*, 2 *East.* 534. states from an MS note of Buller, Justice, that the right name of this case was *Goodright and Hodges* v. *Clanfield*: and he adds as part of the judgment given in the principal case by his Lordship, "That if the subsequent written "papers and the parol evidence in "this case were received, which he "thought they must be, it was per-"fectly clear, and so admitted, that "there was no intention in the tes-"tator to revoke his will, and con-"sequently on the whole no ground "for the court to imply it."

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authority of *Lake* v. *Lake* *(k)* before Lord *Hardwicke*. *Burtenshaw* v. *Gilbert*, did not go upon an *implied*, but an *express* revocation, for the first will was in two parts, and the testator had cancelled one of them. In *Goodright, lessee of Glazier* v. *Glazier*, a will revoked by a subsequent will, but not cancelled, was held to be re-established by the cancellation of the subsequent will *(l)*. Implied revocations must depend on the circumstances at the time of the testator's death. [F 4].

Judgment for the defendant [† 16].

(k) In *Canc.* 1751. 1 *Wils.* 313. *Law of Ni. Pr. Ed.* 1775. *p.* 297.

(l) *H.* 10 *Geo.* 3. 4 *Burr.* 2512.

[† 16] *Hide* v. *Mason*, 25 *Nov.* 1734. 8 *Vin.* 140. *pl.* 17. *Harwood* v. *Goodright, lesse of Rolfe*, 3 *Wils.* 447. 2 *Blackst.* 937. and on error in *B. R. T.* 19 *Geo.* 3. *Cowp.* 87. *Sutton* v. *Sutton, B. R. E.* 18 *Geo.* 3. *Cowp.* 812.

[F 4] In *Doe* v. *Lancashire*, 5. *T. R.* 49. (where it was held that marriage and the birth of a *posthumous* child revoked a will) the principle was put on a more correct ground by Lord Kenyon, viz. a tacit condition at *time of making* the will, that it should not subsist in the event of such a change in the state of the family. It is more difficult to reconcile the admissibility of parol evidence with this principle; for if the revocation does not depend on subsequent intention, the declaration of the testator cannot be material.

ACKWORTH *against* KEMPE.

If on a fi. fa. against A. a bailiff takes the goods of B. trespass lies against the sheriff.

[41]

THE goods of one *Wise* had been conveyed to *Ackworth* the plaintiff, by a bill of sale, and had actually been removed from the house of *Wise*. Two writs of *fieri facias*, at the suit of different persons, against *Wise*, were delivered to the sheriff of *Sussex*, (the present defendant,) who granted warrants to his officers to execute them. The officer, in consequence of the warrants took the goods above mentioned in execution, and sold them. Upon this, *Ackworth* brought an action of trespass *vi et armis* against the sheriff, (without joining the officer as a defendant.) The cause was tried before EYRE, *Baron*, at *Horsham* summer assizes, 1778. The defence was, that the bill of sale to the plaintiff was voluntary and fraudulent. Both the writs of *fieri facias* were produced, and a copy of the judgment on which one of them had issued. The copy of the other judgment could not be read, because the witness, who was to have proved it, was

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was interested. On the part of the plaintiff, strong evidence was produced to shew that the bill of sale was fair, and that a valuable consideration had been given for it. The judge directed the jury to find for the plaintiff (at all events, and whatever they might think of the bill of sale) as to the goods taken under the writ, in the case where the judgment on which it issued had not been proved; being of opinion that the writ itself is not sufficient evidence, unless where the action is brought by the person against whom the *fieri facias* had issued. The jury thought that the fairness and consideration of the bill of sale were proved, and they accordingly found a verdict for the plaintiff, with damages to the amount of the sum for which all the goods had been sold under the executions. The plaintiff had produced evidence to shew that the real value was much greater, and equal to what appeared on the bill of sale. The defendant, on the contrary, had insisted, that, if the jury should think the plaintiff intitled to recover, they ought to deduct, from the sum for which the goods had been sold, the sheriff's poundage and the other expences of the executions. (This was on the ground, that the parties at whose suit the goods were taken, were the real defendants; they having indemnified the sheriff.)

A new trial was moved for, on four grounds, *viz.* 1. That the verdict was contrary to evidence, the bill of sale being voluntary and fraudulent. 2. That there had been a misdirection on the point of evidence. 3. That the damages were excessive, the deductions contended for not having been made. 4. That the action would not lie against the sheriff, because his warrants being to take the goods of *Wise*, he had given no authority to his officer to take those of any other person, and therefore, was not answerable, if goods which did not belong to *Wise* had been taken.

Kempe, Serjeant, *Robinson*, and *G. Wilson*, for the plaintiff.— [42]

Dunning, and *Morgan*, for the defendant.

On the day when cause was shewn, the court was clearly against granting a new trial on any of the three first grounds. Lord MANSFIELD said, he had not the least doubt, from the evidence stated in the learned Judge's report, that the bill of sale was fair; which, he said, laid the question on the supposed misdirection out of the case. BULLER, *Justice*, recognized the distinction made by EYRE, *Baron*, on that question, and said, it was founded on the authority of a case in Lord *Raymond (m)*.—With regard

(m) *Lake* v. *Billers*. 1 Ld. *Raym*. 733. *Law of Ni. Pr*. 91. edit. 1775.

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regard to the objection to the action, the court took time to consider; Lord MANSFIELD observing, that, if trespass would not lie, no other action would, and that the point was, therefore, of very extensive consequence.

Some days afterwards Lord MANSFIELD delivered the judgment of the court to the following effect:

Lord MANSFIELD,—The only question now remaining is, whether trespass *vi et armis* can be maintained against a sheriff for goods taken in execution by his bailiff, which turn out not to have been the goods of the person against whom the *fieri facias* issued. On the part of the defendant it has been argued rather on authorities than on principle. The authorities cited were 2 *Rolle's Abr.* 552. *title Trespass, pl.* 9, 10. and *Saunderson* v. *Baker et al'.* in *C. B. T.* 19 *Geo.* 3. *(n)*. The passage in *Rolle's Abridgement* does not warrant the objection. The case there, when rightly understood, will appear to be a particular exception to the general rule; and the true inference from it is, that, where there is no exception, the sheriff is liable. The bailiff of a franchise is not the officer of the sheriff. [☞ 1] He gives no security. It is evident from *pl.* 5. in the same page, that this was *Rolle's* meaning. He there states, that, if a sheriff take one man for another, false imprisonment lies against him; and although he says, "if a *sheriff* take, *&c.*" he means his *bailiff;* for sheriffs never did execute process in person [† 17]. For all civil purposes the act of the sheriff's bailiff is the act of the sheriff. [☞ 2 F] If there could be any doubt, it is cleared up by the very case in the Common Pleas, which has been cited for the defendant. It was said at the bar, that that case was determined on the ground of *recognition* [11] by the sheriff, and that the court was equally divided. The printed

[43]

Vide the same doctrine recognized in *Savage qui tam* v. *Smith, C. B. T.* 16 *Geo.* 3. 2 *Blackst.* 1104. [† 18]

(n) 3 *Wils.* 309. 2 *Blackst.* 832.

[☞ 1] *Boothman* v. *the Earl of Surry, B. R. T.* 28 *Geo.* 3. 2 *Term Rep.* 5.

[† 17] *Vide Backwell* v. *Hunt, Noy* 107.

[☞ 2 F] In *Woodgate* v. *Knatchbull, B. R. M.* 28 *Geo.* 3. 2 *Term Rep.* 148. 150. 154. it was held that a sheriff is liable to an action for treble damages by the party grieved under 29 Eliz. c. 4. for extortion committed by his officer, in taking greater fees than are allowed by the statute.

[11] The recognition in that case was only by the *under-sheriff*. How could that alter the question? It is mentioned as decisive by all the three judges who delivered their opinions on the motion for a new trial. Yet it seems that such a recognition could only make it the act of the under-sheriff. If the act of the bailiff is not the act of the high-sheriff, neither is the act of the under-sheriff.

[† 18] *Vide* also *Martin* v. *Podger, B. R.* 2 *Blackst.* 701. 5 *Burr.* 2631.

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printed account of the case shews the danger of inaccurate reports [12]. I have a very correct report of it from Mr. *Justice* BLACKSTONE's own notes which I will read. (Here his Lordship read the case exactly as it has been since printed *(o)*.) In short, the point appears to be extremely clear; and it was not fair to puzzle us so long with it, as it seems the objection was suggested to Mr. Serjeant *Glynn*, who led for the defendant at the trial, and he would not take it, thinking there was nothing in it.

The rule discharged.

[12] The account of the case, in *Wilson*, agrees pretty nearly with Mr. *Justice* BLACKSTONE's report. It is much fuller; though not quite so accurate in distinguishing what the judges say on the point of the recognition, from what they say on the general question. [☞] The determination is stated to have been on the ground of the recognition, in the argument at the bar, in the case of *Badkin* v. *Powell*, *B. R. M.* 17 *Geo.* 3. *Cowp.* 476, 477.

(o) 2 *Black.* 832.

HURD, *against* FLETCHER and another, Executors of Sir JOHN ASTLEY, Bart.

Tuesday, 24th Nov.

A fine being levied of a feme covert's estate, with a joint power to the husband and wife to declare the uses; and the uses being declared by the husband and wife in remainder to A; If the husband make a lease and covenant for quiet possession against any person claiming under him, and A. evict the tenant, an action on the covenant will lie against the husband's executors.

SIR *John Astley* granted a lease to the plaintiff, in which there was a covenant in the following words: "And the said Sir *John Astley*, for himself, his heirs and assigns, doth covenant and promise, to and with the said *John Hurd*, his executors, administrators, and assigns, by this indenture, that it shall and may be lawful for the said *John Hurd*, his executors, administrators, and assigns, to have, hold, use, occupy, possess and enjoy, all and singular the said demised premises, with the appurtenants, and receive and take the profits thereof, to his and their own use and benefit, without any let, suit, trouble, interruption, or disturbance of the said Sir *John Astley*, his heirs or assigns, *or any person or persons claiming, or to claim by, from, or under him.*" The lessee having been evicted by Lord *Tankerville*, who had succeeded to the estate, this action was brought, upon the covenant, against the executors of Sir *John*. The defendants pleaded, that Lord *Tankerville*, at the time of his entry into the premises, and evicting the plaintiff, "*did not claim, nor was intitled to the premises by, for, or under the said Sir John Astley.*" The cause was tried at the last summer assizes at *Shrewsbury*, when a special verdict was found, which stated, in effect,—That Lady *Astley*, being seised in fee, intermarried with Sir *John Astley*.—That,

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in 1716, after the marriage, by indentures between Sir *John* and Lady *Astley* of the one part, and trustees therein named of the other part, Sir *John* and Lady *Astley* covenanted to levy a fine, the uses of which they thereby declared to Sir *John* for life, remainder to trustees to secure £500 a year to Lady *Astley* for life, remainder over; with a power to Sir *John* to make leases, under the usual restrictions; and with a joint power of revocation to Sir *John* and Lady *Astley*, during their joint lives.—That a fine was accordingly levied.—That, afterwards, by a joint deed executed in 1753, they revoked all those uses declared by the indentures of 1716, which followed the estate for life, and power of leasing given to Sir *John*, and declared new uses to Lady *Astley* for life, with intermediate remainders, remainder to Lord *Tankerville* in tail.—That, in 1771, Sir *John Astley* made the lease to the plaintiff, containing the covenant on which the action was brought, and which lease was not agreeable to the leasing power reserved by the settlement.—That the plaintiff entered.—That Sir *John Astley* died soon after, and all the prior estates being determined, Lord *Tankerville*'s estate vested in possession, and that he had taken advantage of the defect in the lease, and had evicted the plaintiff. The question was, whether Lord *Tankerville* claimed under Sir *John*, or only under Lady *Astley*. If under Sir *John*, the plaintiff was entitled to maintain this action of covenant.

Leycester, for the plaintiff.—*Bower*, for the defendant.

Lord MANSFIELD desired *Bower* to begin.

He argued, 1. That the deed declaring the uses, and the fine, were to be taken together, and considered as making only one conveyance: and that persons taking by virtue of a power, take under the person who creates the power, not under him who executes it. 2. That a husband is only joined in the fine of a wife's estate for conformity, but that the fine is considered as the act of the wife, not of the husband, and the conusee is in by her only, insomuch that, if a wife levy a fine without the husband's concurrence, and he do not enter during the coverture, it will bar her after his death. 3. That, when a revocation of a prior declaration of uses has taken
[45] place, under a power to revoke, and new uses are declared, the new declaration of uses makes part of the fine, and is to be taken as the same conveyance with it, in like manner as the first declaration would have been, if it had not been revoked. And, therefore, if persons claiming under the first, were to be considered as in of the wife's estate only, so must those claiming under the second. He cited 1 *Atk.* 560, *ex parte Caswell*, *Bro. Abr. title Fines (a)*, *Roll. Abr. p.* 346 *(b)*, *Zouch*

(a) Pl. 33. *(b) N. pl.* 1.

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Zouch v. *Bamfield (c)*, *Doe, lessee of Odiarne*, v. *Whitehead (d)*, *Beckwith's Case (e)*, *Charnock* v. *Worsley (f)*, *Holland* v. *Jackson (g)*, *Mary Portington's Case (h)*, *Daniel* v. *Ubley (i)*, *Cromwell's Case (k)*.

Lord MANSFIELD said, the case was so clear, that *Leycester* had no occasion to reply. Justice was strongly with the plaintiff. It was true that a fine, and the deed to lead the uses, were to be considered as one conveyance; but as Sir *John Astley* was a necessary party to the second declaration of uses, by which the estate was limited to Lord *Tankerville*, his Lordship certainly claimed under him, within the meaning of this covenant. Undoubtedly Sir *John* had covenanted against his own acts, and the new limitations were created by one of his acts.

Judgment for the plaintiff [1].

(c) 1 *Leon.* 82.
(d) 2 *Burr.* 704.
(e) 2 *Co.* 56. *b.*
(f) *Cro. Eliz.* 129. 1 *Leon.* 114.
(g) *Bridgman* 75.
(h) 11 *Co.* 43.
(i) Sir *W. Jones*, 138.
(k) 2 *Co.* 78.

[1] *Leycester* meant to have cited *Butler* v. *Swinnerton*. *Palmer* 339.

TRINDER *against* SHIRLEY.

Tuesday, 24th Nov.

Bail is to be discharged, if the defendant succeed to a peerage.

ON *Monday* the 16th of *November*, *Bower* had obtained a rule to shew cause, why an *exoneretur* should not be entered on the bail-piece; the defendant having become a peer, (by succession to his brother the late Earl *Ferrers*.) The ground of the motion was, that it was no longer in the power of the bail to surrender the principal [F].

Baldwin, for the plaintiff, now declared, that he could not shew any cause against the rule. Upon which it was made absolute.

This was said to be the first instance of the kind that had come before the court.

[F] So in *Merrick* v. *Vaucher*, 6 *T. R.* 50. where defendant was sent out of the kingdom under the alien bill; and in *Wood* v. *Mitchell*, ib. 247. where defendant was under sentence of transportation; and in *Langridge* v. *Flood*, 1 *Tidd*. 152. where defendant became member of parliament; but the rule is confined to cases where the render has become impossible by the act or law of our own state, and will not be extended to a detention by a foreign potentate. See also *Robertson* v. *Patterson*, 7 *East*. 407.

The

Saturday, 21st Nov.

The KING *against* the INHABITANTS of LEIGH.

The removal of a feme covert is evidence of the husband's settlement.

TWO justices removed a married woman, and her child, from *Ewell to Leigh*, in the absence of her husband. On an appeal this order was quashed [F 1]. The husband afterwards returning to *Ewell*, he, together with the wife and child, were removed under a new order to *Leigh*; which last order the sessions confirmed; but upon a *certiorari*, and a rule to shew cause why it should not be quashed, the *Solicitor General* now gave it up, as not to be supported since a late determination of the same question, in the case of *Rex* v. *Hinckworth (l)* [13] [F 2].

(l) H. 18 *Geo.* 3.

[13] That case was as follows:—Two justices removed *Sarah*, calling her, in the order, the wife of *Joseph Griffin*, and five of her children, from *Cheshunt* to *Hinckworth*, in the husband's absence, and without having examined him. This order was not appealed from. The husband soon after went to his wife and children at *Hinckworth*, from whence they were all sent back under a new order to *Cheshunt*. The parish of *Cheshunt* appealed against this order, and producing the former one, insisted that it was conclusive as to the husband, as well as the wife and children. The sessions, however, after hearing evidence as to *Griffin*'s settlement, confirmed the new order as to him, and quashed it as to the wife and children. The wife then went back with her children, to her husband at *Cheshunt*. After which, a third order was made, removing the children again to *Cheshunt*. This was likewise appealed against, and confirmed as to all, but two of the children who were under seven years of age, as to whom it was quashed. The case had come on in this court the term before, but the first order not having been stated, on which the whole question turned, it was postponed till that order should be brought before the court. *Bearcroft* and *Stanley* now argued in support of the last order. *Wallace* and *Thornton* on the other side. Lord *Mansfield*—The pauper does not complain. There is nothing in this case. It is admitted, that if they had put into the first order, that it was the husband's settlement, that would have been conclusive, and the omission makes no difference. The general case is, that the husband's settlement is the settlement of the wife [† 19]. There are some special exceptions; as where the husband is beyond sea. But the presumption is in favour of the general rule; and if this had been the case of an exception, it ought to have been stated. —The rule was made absolute to quash all the orders but the first.

[† 19] *Rex* v. *the inhabitants of Ealing, M.* 25 *Geo.* 3.

[F 1] But an order quashed for want of *form* is not conclusive between the parties. *R.* v. *St. Andrew's, Holborn*, 6 *T. R.* 613.

[F 2] It makes no difference that the wife is not described as wife. *R.* v. *Towcester. Cald.* 497. So if she is described as widow, and the husband proves to have been alive. *R.* v. *Rudgely*, 8 *T. R.* 620.

THORNTON

THORNTON *against* DALLAS.

Tuesday, 24th Nov.

ACTION for money had and received. *Pleas.*—1. The general issue.—2. A bankruptcy on the 10th of *February* 1774.—The *replication* to the second plea [F 1] admits the bankruptcy, and that the plaintiff's cause of action accrued before; but the plaintiff further says, that, after the 24th of *June* 1732 *(m)*, and * after the making of the statute of 5 *Geo.* 2. *c.* 30. and before the issuing of the commission of bankruptcy in the plea mentioned, to wit, on the 6th of *November* 1754, the defendant was discharged as a bankrupt, and that on the 2d of *June* 1764, he was again discharged as a bankrupt, under that act of parliament; "and that the estate of him the said defendant, against whom the said commission was awarded, under which he was declared and became a bankrupt, as in the said plea is mentioned, hath not produced, nor will produce, clear after all charges, sufficient to pay every creditor under the said commission, fifteen shillings in the pound for their respective debts; to wit, at *London* aforesaid, in the parish and ward aforesaid; and this the plaintiff is ready to verify. Wherefore he prays judgment, and his damages by him sustained, by reason of the non-performance of the several promises and undertakings in the said declaration mentioned, to be adjudged to him, according to the form of the statute in such case made and provided, *&c.*"—*Rejoinder.*—"That the commission of bankruptcy, under and by virtue of which the said defendant is, in and by the said plea pleaded in reply, supposed to have been first discharged after the issuing thereof, to wit, on the 26th of *April*, in the seventeenth year of the reign of our Lord the now King, at *London* aforesaid, in the parish and ward aforesaid, by a certain writ of our said Lord the King of *supersedeas*, the date whereof is the same day and year last-mentioned, then and there duly issued out of the court of our said Lord the King of his high court of Chancery, the same court then and still being at *Westminster* in the county of *Middlesex*, under the great seal of *Great Britain*, was, in due manner, discharged, and superseded."—The like *supersedeas* to the second commission

Though a prior commission be superseded by consent, a second bankruptcy does not protect future effects, unless fifteen shillings in the pound are paid under the second commission.

* [47]

(m) 5 *Geo* 2 *c.* 30. § 9.

[F 1] Vid. infra 163.

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THORNTON against DALLAS.

mission.—*Sur-rejoinder.*—That the original writ in this action was sued out, on the 1st of *November* 1776; and that the *first* commission in the replication mentioned, was superseded, on the petition of the said defendant, by and with the consent of all the creditors who proved debts under that commission; the *second*, in like manner; and that the same commissions were, and each of them was, superseded, after the suing out the said original writ.—*Demurrer*, and joinder in demurrer.

Cowper, for the defendant,—The question is, whether, under the statute of 5 *Geo.* 2. *c.* 30. § 9. *Dallas* is discharged by the commission of bankruptcy, which he has pleaded; or whether his future effects remain liable? There are two grounds made, why the writs of *supersedeas* should not operate in his favour;—1. That they were after the original writ;—2. Because they were obtained on the petition of the bankrupt, and by the consent of the creditors. As to the *first*, the commissions being now superseded, though the bankrupt did not pay fifteen shillings, they are as if they never had existed; and, as to the *second*, I do not understand what difference it makes. The Chancellor has in fact superseded them; and it does not appear what his ground was. If they are become as nullities, the allegation that fifteen shillings in the pound were not paid, is perfectly nugatory. The defendant cannot have the benefit of the former commissions. He should not, therefore, be prejudiced by them. He certainly could not plead his certificates under them. It may be said the *supersedeas* may be obtained by collusion. But collusion is not to be presumed; it should have been pleaded. The probability is, that the bankrupt conformed in every thing that was necessary, the creditors being satisfied. I can find no case on the subject; from whence I infer that no such claim has ever been attempted, where the former commissions were superseded.

[48]

Davenport for the plaintiff,—It is under the last bankruptcy that the act requires fifteen shillings in the pound to be paid, in order to protect future effects. The defendant pleads his last bankruptcy. The replication is, that he became a bankrupt in 1754, and again in 1764. From the rejoinder it appears, that he rested under the bankruptcies of 1754 and 1764, till 1777. That he finds himself pressed upon, because the statute says, unless you pay fifteen shillings in the pound, your future effects shall be liable. Upon this, at the distance of above twenty years from the first of the two commissions, he gets the consent of his creditors under those commissions, (who have no interest to oppose it,) to their being superseded. He admits that he was *discharged* under the two former commissions. That is sufficient for my purpose; for the words of the statute are express, that when a bankrupt has been *discharged* under a former commission, his

his effects shall remain liable, unless he pay fifteen shillings under the subsequent commission. He admits that he cannot now pay fifteen shillings. The former commissions are not as if they had never existed. Not only sales of goods, but even a bargain and sale of lands, would stand good.

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Lord MANSFIELD,—There is nothing in this case. The only question is, Whether a *supersedeas* can make a thing not to have been done, which, in fact, has been done? The defendant was *discharged* under the former commissions, which is all that need be enquired about. But besides, the act says, that if a bankrupt has *compounded* his debts, he must pay fifteen shillings under a subsequent commission of bankruptcy, in order to protect his future effects. Here, the creditors had *compounded*, [F 2] if the former bankruptcies were to be considered as never having existed, for they accepted of the dividend in lieu of their whole debt.

[49]

WILLES, and ASHHURST, *Justices*, of the same opinion.

BULLER, *Justice*,—The bankrupt laws were made for the benefit of the creditors, not of the bankrupt.

Judgment for the plaintiff.

WHITE *against* SEALY and Others.

Friday, 27th Nov.

THE defendants had entered into a bond, in the penal sum of £600 conditioned, *inter alia*, for the payment of a yearly rent of £570 by another person. The rent being in arrear, the bond was put in suit, and judgment by default obtained against the defendant. Afterwards another action was brought on the same bond, and a second judgment entered up. Then a third action was commenced, in bar of which the defendants pleaded the first judgment, and then obtained a rule to shew cause why the second should not be set aside, with costs; and why, upon payment of the penalty and costs of the first action, the plaintiff should not acknowledge satisfaction, on record. They stated in the affidavit on which the rule was granted, that they had not pleaded the first judgment in bar to the second action by a mistake they had fallen into, in considering the second declaration when delivered as being the same, and in the same action, with the first, and only delivered to cure a mistake in the indorsement on the other. The questions were; 1. Whether the bond, in this

Where there is a bond for payment of rent, the bond is only a security to the amount of the penalty.

[F 2] *Semb.* That this is the better reason for the decision: Since it has been held that a supersedeas of a commission operates *against* a bankrupt to defeat a certificate under it. *Cullen Bankr. Law.* 394.

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this case, was a standing security for all the payments of rent during the term (which was for twenty-one years), or only to the amount of the penal sum? 2. Whether, upon the equity of the case, and the affidavit on the part of the plaintiff, it did not appear, that it was the intention of the parties, that the sureties should be bound for the rent during the whole term, so as to entitle the plaintiff to retain the advantage he had got by the mistake of the defendant?

The *Solicitor General* shewed cause.—*Dunning* and *Bower*, in support of the rule.

[50]

BULLER, *Justice*, at first, was strongly of opinion on the first point, (which had not been made at the bar) that, by the statute of 8 & 9 *W.* 3. *c.* 11. an obligee of such a bond as this, might, from time to time, assign breaches and recover his damages, and have execution for them, though they amounted to more than the penalty in the bond, and that the judgment would still remain as a security for all subsequent breaches.

ASHHURST, *Justice*,—That would be very equitable as against the lessee, but extremely hard on sureties, who only mean to bind themselves to the extent of the penalty.

Lord MANSFIELD,—1. As the bond is conceived, are the defendants liable for more than the whole penalty? I think not, upon the true construction of the statute of *William*, the meaning of which only was that a plaintiff should not, upon every breach, be obliged to go into a court of equity to have issues directed of *quantum damnificatus*. 2. Is there any thing collateral that should make the sureties liable for more? I see nothing in the facts of the transaction, which ought to have that effect. The slip in not pleading the first judgment to the second action, only affects the costs of that action, and not the merits.

BULLER, *Justice*, now declared himself to be of the same opinion concerning the construction of the statute. [† 20]

The

[† 20] S. P. *Brangwin* v. *Perrot*, C. B. E, 18 *Geo.* 3. 2 *Blackst.* 1190. [☞] But, *vide Lord Londsdale* v. *Church*, B. R. E. 28 *Geo.* 3. 2 *Term. Rep.* 388 [F].

[F] In *Lord Lonsdale* v. *Church*, in which it was held that a receiver was liable on his own bond (conditioned to account) beyond the amount of the penalty; Buller, Justice, declared himself to have been dissatisfied with this case: and adds as a reason why it was not moved again, that it was the case of a surety. But in *Wilde* v. *Clarkson*, 6 *T. R.* 303, in which was a case similar to *Brangwin* v. *Perrot*, viz. a bond to indemnify a parish against a bastard child, where the court ordered a satisfaction to be entered on payment of penalty and costs, Lord Kenyon intimated great doubts of the propriety of the decision in *Lord Lonsdale* v. *Church*.

The rule made absolute, but without costs; some circumstances appearing which satisfied the court, that the lessor was misled by the sureties, with respect to the smallness of the penalty.

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WHITE against SEALY.

DOE, Lessee of SIMPSON, *against* BUTCHER.

Tuesday, 24th Nov.

JERVAISE Newton, being seised in fee of the lands in question, devised them to Sir *Michael Newton*, for life, remainder to trustees to preserve contingent remainders, remainder to the first and other sons of Sir *Michael Newton* in tail-male, remainder to the lessor of the plaintiff for life, remainder to his first and other sons in tail-male, with divers remainders over. *Jervaise Newton* died in 1728. Sir *Michael Newton* being seised of the lands in question by virtue of the devise aforesaid, by indenture of lease dated the 2d of *September* 1731, in consideration of £192 demised them to the defendant, for the term of 99 years, if the defendant, *John Shirburne*, and *William Lasbury*, or either of them, should so long live. Sir *Michael Newton* died in 1749, without issue male; and, on his death, the lessor of the plaintiff entered on the premises, and was seised thereof for his life. *John Shirburne* died in 1767. And afterwards the lessor of the plaintiff, by indenture of lease dated the 30th of *June* 1767, for the consideration of £30 demised the lands in question to the defendant, from and after the deaths of the defendant, and *William Lasbury*, for the term of 99 years, if *John Griffin* should so long live. Some time afterwards *William Lasbury* died, and thereupon, the lessor of the plaintiff, by indenture of lease dated the 29th of *November* 1769, in consideration of the sum of £30 demised the lands in question to the defendant, for another term of 99 years, from and after the deaths of the defendant and *John Griffin*, if *William Wright* should so long live. The defendant paid his rent to Sir *Michael Newton* during his life, and after his death to the lessor of the plaintiff until several years after the granting of the last-mentioned lease, and also paid a heriot to the lessor of the plaintiff, on the death of *John Shirburne*, and another heriot on the death of *William Lasbury*. The lessor of the plaintiff from time to time summoned

A lease void against a remainder-man, cannot be set up by his acceptance of rent, and suffering the tenant to make improvements after his interest vests in possession[F].

[51]

[F] In *Doe* v. *Archer*, 1 *B. & P.* 531. the court decided the same point where the remainder-man had received rent, and sold the premises subject to the lease, and the purchaser had mortgaged, subject to the same (the deeds, both of sale and mortgage, referring to the lease as a valid lease,) and the mortgagee also had received rent.

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DOE against BUTCHER.

moned the defendant as his tenant to do suit and service at his manor court. The defendant, after the death of Sir *Michael Newton*, laid out considerable sums of money, in improving the lands. The lessor of the plaintiff never questioned the validity of the lease granted by Sir *Michael Newton*, and the defendant had no notice of the defect of title of Sir *Michael Newton* to grant the lease, not being apprized of any such defect, till about four years before bringing the present ejectment, when, an objection being made by the remainder-man to the power of Sir *Michael Newton*, and of the lessor of the plaintiff, of granting leases for a longer time than their own lives respectively, the lessor of the plaintiff offered the defendant to pay him back the consideration-money of the respective leases granted by him, provided the defendant would account with him for the rents and profits received by the defendant from the time of the death of Sir *Michael Newton*, deducting what he had laid out on improvements; but the defendant refusing to accede to this proposal, the lessor of the plaintiff gave him proper notice to quit the premises before bringing the ejectment. Reversionary leases of the same nature as those above stated, are usually made in the *Western* counties of *England*, to commence not only from the deaths of the persons named in the lease in possession, but also from the end, or other sooner determination, of the lease in possession.

[52]

On a special case from the *Western* circuit, stating the facts as above set forth, the question was, Whether the original lease to the defendant was affirmed by any of the acts of the lessor of the plaintiff, after the death of the tenant for life?

On *Tuesday*, the 24th of *November*, this question came on to be argued by *Gould* for the plaintiff, and *Heath*, Serjeant, for the defendant.

For the plaintiff it was contended, that, the lease having become absolutely void on the death of Sir *Michael Newton*, none of the acts done by the lessor of the plaintiff could re-establish it. That this could not have been done, even by the most formal deed of confirmation, which could only operate on a voidable lease, not on one absolutely void. For this, a late case of *Goodright* v. *Humphrys*, in the *Exchequer*, was relied on, as directly in point [14]. Although the

[14] *Goodright, Lessee of Wynne*, v. *Humphreys*, came on, in the court of *Exchequer*, in the form of a special case, which stated; That *Jane, Lady Bulkeley*, having been tenant for life, with remainders over in tail to her first and other sons and daughters, successively, and with power to her to lease for 21 years in possession, and not in reversion, intermarried with *Edward Williams*, who, without her concurrence, demised to the defendant, to

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the receipts of rent, in the present case, have been for a longer time than in the other, that circumstance can make no difference. The reversionary leases cannot affect the title of the lessor of the plaintiff to recover, because the event on which the first of them is to commence, has not happened, for it is to take effect, not on the determination of the former, but after the death of the defendant; *Rector of Cheddington's Case (q)*, 2 *Fitzh. Abr.* 161. *b.* 1 *Inst.* 308.

For the defendant, it was said, that the distinction in the books between void and voidable was founded on mistaken reasoning. Upon similar reasoning, it was formerly held, that a lease made to commence *from the day of the date* must be a reversionary lease, and therefore void under a power to grant leases only in possession; but, in a late decision of this court, good sense prevailed over authority, and it was determined, that such a lease might be considered as not excluding the day of the date, if such appeared to have been the intention of the parties [15]. In like manner, the old notion, that there could not be cross remainders by implication between more than two, has been exploded, as contrary to sound reasoning [16]. The court always

[53]

to hold from the Feast of the Annunciation then next to come, for 99 years, determinable on three lives.—That the lessor died, and afterwards Lady *Bulkeley* died, leaving *Jane*, her eldest daughter, tenant in tail; who suffered a recovery, and afterwards married the lessor of the plaintiff.—That *Edward Williams* received the rent reserved during his life.—That, after his death, his widow, in like manner, received the rent, and granted receipts.—That the daughter also received the rent till her marriage, and her husband for some time after the marriage, and that a counterpart of the lease was found in his possession.—The court were of opinion, that the lease was void, and gave judgment for the plaintiff.

(q) M. 40 & 41 *Eliz. B. R.* 1 *Co.* 153.

[15] *Pugh* v. *The Duke of Leeds and another, M.* 18 *Geo.* 3. an issue out of Chancery, tried at *Shrewsbury*, and a case reserved, which stated a power to grant leases in possession only, and not in reversion. The lease in question was to commence "from the day of "the date thereof."—Lord *Mansfield*, in a long argument, in which he discussed minutely all the cases on the subject, delivered his opinion, that the words "from the day of the date" might be construed to include that day, and that the lease was good; and *Aston*, *Willes*, and *Ashhurst*, *Justices*, concurred [† 22].

[16] The cases of *Doe, Lessee of Bur-*

[† 22] Since reported, *Coup.* 714. [☞]

[☞] For an instance where "*from*" was held to be exclusive, *vide Rex* v. *Gamlingay*, *B. R. H.* 30 *Geo.* 3. 3 *Term. Rep.* 513. The 4 days allowed in *B. R.* for pleading in abatement, are both inclusive. *Jennings* v. *Webb*, *B. R. T.* 26 *Geo.* 3. 1 *Term Rep.* 277.

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always inclines to support, rather than destroy, grants and leases. The lessor of the plaintiff in this case, will not be suffered to say he was ignorant of the defect in Sir *Michael Newton's* power to grant leases, because, as he took under the will, as well as Sir *Michael*, he must be presumed to have known the limitations contained in it.

Lord MANSFIELD, on the argument, seemed inclined to support the lease. He said, there could be no confirmation of a thing absolutely void [† 21], but that the acts of the lessor of the plaintiff might operate as a new grant [17]. However he desired it might stand over; and now, just before the rising of the court, his lordship delivered the opinion of the court very shortly, in favour of the lessor of the plaintiff. He said, there did not appear to have been any intention, either to confirm the old lease, or to grant a new

[54]

one. Both the lessor of the plaintiff and the defendant had proceeded

Burden v. *Burville*, *E.* 13 *Geo.* 3. *Wright* v. *Lord Cadogan*, *Holford*, *and others*, (being a case out of *Chancery*) *E.* 14 *Geo.* 3. [† 23], *Perry and another* v. *White*, *Lessee of Bertie*, (which was a writ of error from *B. R.* in *Ireland*) *E.* 18 *Geo.* 3. [† 24], and *Phipard* v. *Mansfield*, *E.* 18 *Geo.* 3, [† 25], were all cases in this court, on cross remainders, by implication, between more than two; and the general principle established by them all, is, that, between two, the presumption is in favour of, between more than two, against cross remainders; but that, by necessary implication, they may be raised between more than two, as well as by express words,

[† 21] *Co. Litt.* 295. b.

[17] In the case of *Goodright*, *Lessee of Carter*, v. *Strathan*, which was determined in this court, in *M.* 15 *Geo.* 3. but was not cited on the present occasion, a mortgage, in the form of a lease, was granted, of a feme covert's estate, by the husband and wife. After the husband's death, the deed being in the hands of the mortgagee, the widow had directed the tenants in possession to attorn to the mortgagee, had settled with him for the balance of the rents, stiling him mortgagee, and had not questioned his possession for a considerable number of years. Lord *Mansfield* said, in delivering the judgment of the court, that they were all of opinion, that the conveyance in this case, though in the form of a lease, was, in substance, a mortgage, and, not being within the reason for which leases by a feme covert are held to be only voidable, was absolutely void, on the death of the husband; but that the acts done by the widow, the deed being in possession of the mortgagee, were tantamount to a re-delivery, which, without a re-execution, is equivalent to a new grant. The authorities on which he said the court relied were, *Perkins*, *sect.* 154, and the year-books there cited. *Co. Litt.* 36. *a.* 2 *Roll. Abr.* 26.—The question came before the court, on a motion for a new trial [† 27].

[† 23] Since reported, *Cowp.* 31.
[† 24] Since reported, *Cowp.* 777.
[† 25] Since reported, *Cowp.* 797.
[† 27] Since reported, *Cowp.* 201.

proceeded under a mistake, and had supposed the original lease to be good. 1778.

The *postea* to be delivered to the plaintiff [† 26]. Doe against Butcher.

[† 26] *Jenkins, Lessee of Yate*, v. *Church, B. R. M.* 17 *Geo.* 3. *Cowp.* 482. *S. P.* But *Qu.* whether the defendant, in the present case, might not have been relieved in equity? *Vide Stiles* v. *Cowper. Canc.* 8 *March* 1748. 3 *Atk.* 692.

The End of Michaelmas *Term* 19 George III.

CASES

CASES

ARGUED AND DETERMINED

IN THE

COURT OF KING's BENCH,

IN

HILARY TERM,

IN THE NINETEENTH YEAR OF THE REIGN OF GEORGE III.

1779

Tuesday, 26th Jan.

MILFORD *against* MAYOR.

If a bill of exchange is not accepted an action will lie upon it against the drawer, before the time when it is made payable [F 1].

ON a rule to shew cause why the defendant should not be discharged. The ground was, that by the affidavit on which he was held to bail, it was sworn "that "he was indebted to the plaintiff as indorsee of a bill of "exchange," but that the bill in fact was not yet due. The defendant was the drawer of the bill, and the drawee had refused to accept it.

BULLER,

[F 1] *Acc. Bishop* v *Young*, 2 *B. & P.* 83.

Adm. Campbell v. *French*, 6 *T. R.* 200.

Dutton v. *Solomonson*, 3 *B. & P.* 582. *Potter* v. *Brown*, 5 *East*, 124.

In *Ballingalls* v. *Gloster*, it was decided that under the same circumstances an action lies by the indorsee against the indorser on the authority of this case and the several cases there referred to, which consider each indorser as a new drawer. 3 *East.* 481.

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MILFORD against MAYOR.

BULLER, *Justice*,—It is settled, that, if a bill of exchange is not accepted, an action on the bill will lie immediately against the drawer, although the time of payment is not come. This I remember to have been determined in the year 1765, in a cause in which Sir *Fletcher Norton* was counsel for the defendant *(a)*. The reason is this, as Lord MANSFIELD said in that case, that what the drawer had undertaken has not been performed, the drawee not having given him the credit which was the ground of the contract. There have been a great many actions of the same sort, since that time.

WILLES, and ASHHURST, *Justices*, of the same opinion [† 28].

Lord MANSFIELD absent.

The rule discharged.

(a) Bright v. *Purrier*, *Law of Ni. Pri.* 269. Ed. 1775.

[† 28] In *Macarty* v. *Barrow*, *B. R. E.* 6 *Geo.* 2. 2 *Str.* 949, the defendant having drawn bills on *Spain*, which were afterwards protested for non-acceptance, became a bankrupt before they were returned, and, being arrested, he was discharged upon motion, on the ground that it was a debt contracted before the bankruptcy, and at the very instant when the bills were drawn; 2 *Str.* 949; and, more fully and accurately, from a note supplied by *Wilmot*, *Chief Justice*, in 3 *Wils.* 17 [F 2].

KINNERSLEY *against* ORPE and Others.

Tuesday, 26th Jan.

On a proviso in a Duchy-lease,—that it shall be enrolled with the auditor,—the certificate of the auditor on the margin is sufficient evidence of the enrollment—Under leases are not within provisoes concerning assignments.

IN an action of trespass, for fishing in the plaintiff's fishery, in part of the river *Dove*, which was tried, at the last assizes, at *Stafford*, before SKYNNER, *Chief Baron*, a verdict was found for the plaintiff, upon which a rule was obtained to shew cause why there should not be a new trial. The plaintiff had declared upon a several fishery, but was not owner of the soil, and the defendants having pleaded the general issue, and also several justifications, as servants to *William Cotton*, the first plea in which *Cotton* was mentioned had called him *the said William Cotton*, although his name had not before appeared on the record. At the trial, the plaintiff's counsel were unwilling to risk the

[F 2] The same point was ruled in *Starey* v. *Barns*, 7 *East.* 435; in a case where the bill *had been accepted*, and was not refused payment by the acceptor till after the bankruptcy, on the express words of 7 *G.* 1. *c.* 31.: Lord Ellenborough expressing doubts of the principle that drawing the bill creates the debt, on which *Macarty* v. *Barrow*, was decided. Another report of *Macarty* v. *Barrow* is given by Mr. East in a note.

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KINNERSLEY against ORPE.

the case on the point, which seems still not quite settled, whether a person who has an exclusive right of fishery, but without the soil, can declare on a several fishery. The defendants, on the other hand, could not have availed themselves of their special pleas, on account of the mistake just mentioned. It was, therefore, agreed that the cause should be tried, as if there had been a count on a free fishery, and as if the pleas had been amended; and that, next term, the pleadings should be so amended by consent. The plaintiff derived his title, under a lease dated in 1753, from the Duchy of *Lancaster*, in which there was a proviso, that the lease, and all assignments thereof, should be enrolled within three months from the date, with the auditor of the Duchy, or otherwise should become void. The original lessee made a lease, in 1777, to the plaintiff, for a term somewhat less than what remained unexpired of the original term. To prove the enrollment of the lease of 1753, a memorandum, or certificate, on the margin of the lease, was read, signed "*Peregrine Fury*, Auditor." No evidence of the enrollment of the second lease of 1777 was offered. The plaintiff had paid the rent to the Duchy, up to the time of the trial.

Counsel for the plaintiff *Adair*, Serjeant, *Howorth*, and *Cowper*, (and, at the trial, *Kenyon*.)—For the defendants, *Bearcroft*, *Dunning*, and *Bower*.

The application for a new trial was made on four grounds, *viz.* 1. Because the verdict was against the weight of evidence produced at the trial. 2. Because the defendants had been surprised by evidence, which they now offered affidavits to contradict. 3. Because there was not legal evidence of the enrollment of the first lease, or that an office-copy of the enrollment ought to have been produced. 4. Because the second lease was an assignment, and not having been enrolled was void.

[57]

Lord MANSFIELD absent.

The court immediately disposed of the two first grounds. They said it did not appear from the report, that the verdict was against the weight of evidence. No surprise was stated by the judge, and the evidence now offered to be laid before the court by affidavit, might have been produced at the trial. On the third and fourth points, the three judges present delivered their opinions to the following effect.

WILLES, *Justice*,—The memorandum on the margin is the certificate of the proper officer, not of a private person, as has been contended at the bar. I cannot distinguish between this case and that of a bargain and sale, where the indorsement on the back of the deed by the proper officer is always received as evidence of the enrollment. This case too is fortified by the circumstance of long possession under the

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KINNERSLEY. against ORPE.

the lease. At any rate, third persons cannot avail themselves of a forfeiture of this sort; but I think the enrollment is sufficiently proved if it were against the grantor. Besides, the lease is admitted, for it is stated in the pleadings and not traversed [1]. The case of *Crusoe, Lessee of Blencoe* v. *Bugby (b)*, which has been cited at the bar, is conclusive to prove that the second lease, being for a shorter time than what remained of the first term, is not an assignment, but an under-lease.

ASHHURST, *Justice*,—I am of the same opinion. The case in the *Common Pleas* is decisive of the point as to the assignment [☞]. And I think the memorandum is sufficient evidence of the enrollment. For what other purpose was it made? But, on the other ground, I do not think it competent to a third person, a wrong-doer, to take advantage of a defect which the grantor has waved; for the rent has been received up to this time [† 29].

[58]

BULLER, *Justice*, I think the lease, with the certificate under the hand of its own officer, would bind the crown itself. The *proviso* is—"That it shall be enrolled with the "auditor." I cannot distinguish this case from that of a bargain and sale. The act of parliament *(b)* in that case, does not

[1] *Infra* 58. Note [1].

(b) T. C. B. 11 *Geo.* 3. 3 *Wils.* 234. since reported in 2 *Blackst.* 766.

[☞] In that case the words were, that the lessee, "his executors or administrators, shall not, at any time or times during this demise, *assign, transfer, or set over* or otherwise do or put away this present indenture of demise, or the premises hereby demised, or any part thereof." But where the words of a proviso were, that the lease should become void, in case the lessee, his executors or administrators, shall, at and during the said term, set, let, or assign over, the said hereby-demised messuage or dwelling-house, or any part thereof, a demise by the lessee's administratrix, for a term which fell a day short of the expiration of the original lease, was held to be within the meaning of the proviso. *Roe, Lessee of Gregson*, v. *Harrison, B. R. E.* 28 *Geo.* 3. 2 *Term Rep.* 425.

[† 29] It should seem that the acceptance of the rent by the grantor, would not have been a waver of the forfeiture in this case, as between him and the grantee.—"It is to be ob-"served, where the estate or lease is, "*ipso facto, void*, by the condition or "limitation, no acceptance of rent "afterwards can make it to have a "continuance; otherwise it is of an "estate or lease *voidable* by entry;"—*Co. Littl.* 215. *a.* & cites *Browning* v. *Beston, B. R.* 2 & 3 *Ph.* & *M. Plowd.* 131, where it was so laid down, in argument, by *Ramsey, ibid.* 136. But it was so resolved in *Pennant's Case, B. R. T.* 38 *El.* 3 *Co.* 64. *b.* & in *Finch* v. *Throgmorton, Scacc.* 33 *Eliz. Cro. El.* 220 [F 1].

(b) 27 *H.* 8. *c.* 16.

[F 1] *Vid. Doe* v. *Butcher, ante* 50.

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not provide that the indorsement by the officer, shall be evidence of the enrollment, and yet it is constantly admitted. Besides, the lease is stated in the replication, and, therefore, although there is a *protestando* against it by the defendants, it is admitted as to this cause [1]. On the other point, the case in the Common Pleas is a direct authority *(c)*.

The rule discharged.

[1] *Qu.* As there was a plea of not guilty, which put the plaintiff on proving all his title [F 2].

(c) Vide Holford v. *Hatch*, *E.* 19 *Geo.* 3. *Infra*, 174.

Friday, 29th Jan.

CHANDLER *against* ROBERTS and Another, Bail of WHITE.

To a plea to a sci. fa. against bail, that the principal died before the return of any ca. sa. a replication stating a particular ca. sa. and that the principal was alive at the return of that ca. sa. ought to conclude to the court.

A *Scire facias* on a recognizance of bail.—The defendants *plead*, that the principal, before the issuing of the said writ of *scire facias*, and before the return of any *capias ad satisfaciendum*, to wit, on the first day of *May* 1778, at *Westminster* aforesaid, died. *Replication.*—That the several promises and undertakings mentioned in the said declaration whereon the judgment aforesaid was recovered, were, in the said declaration, alleged to be made in *Middlesex*, and that, after the recovery of the said judgment in the said writ of *scire facias* mentioned, against the said *John White*, and before the suing forth the said writ of *scire facias*, to wit, on the 6th day of *May*, in the eighteenth year of the reign of our Lord the now King, the plaintiff sued and prosecuted out of the court of our Lord the now King, before the King himself, the said court then and still being held at *Westminster* in the county of *Middlesex*, a certain writ of our said Lord the now King, of *capias ad satisfaciendum*, of and upon the said judgment, directed to the then sheriff of *Middlesex*, by which said writ, our said Lord the King commanded the said then sheriff of *Middlesex*, that he should take the said *John*, if he should be found in his bailiwick, and him safely keep, so that he might have his body before our said Lord the King at *Westminster*, on *Wednesday* next, after one month from the day of

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[F 2] The Judges must have considered that on the general issue possession would have been sufficient.

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of *Easter*, then next coming, to satisfy the said plaintiff, the said £30 the damages, costs, and charges aforesaid, in form aforesaid recovered, and that the said then sheriff should have there then that writ, which said writ, afterwards, and before the return thereof, to wit, on the 10th day of *May*, in the eighteenth year aforesaid, at *Westminster* aforesaid, was delivered to *Robert Peckham* and *Richard Clarke*, so being sheriff of *Middlesex* aforesaid, to be executed in due form of law, at which day, before the said Lord the King at *Westminster*, came the said plaintiff, in his proper person, and the aforesaid then sheriff of *Middlesex*, to wit, the said *Robert Peckham* and *Richard Clarke*, returned on the said writ, to our Lord the King at *Westminster* aforesaid, that, the said *John* was not found in his bailiwick, *as by the said writ, and the return thereof, duly filed and remaining of record* in the said court of our said Lord the now King, before the King himself at *Westminster* aforesaid, *more fully appears*; and the said plaintiff further says, that the said *John*, at the respective times of the suing out of the said writ of *capias ad satisfaciendum*, and of the return, and of filing the same, *was and still is living*, and in full life, to wit, at *Westminster* aforesaid, *and this he is ready to verify*, wherefore he prays judgment, &c. To this replication, the defendants *demur* specially, "because "the said replication concludes *with a verification*, and not "*to the country*."

Morgan, for the defendant, admitted, that this had been the usual form, till 1771, but he relied on the case of *Mather* v. *Cormick*, *Bail* of *Collins*, *T.* 11 *Geo.* 3. and *Brian* v. *Thorn*, *Bail* of *Boss*, *M.* 14 *Geo.* 3. both in this court, and in both of which the replication having concluded with a verification, and having been demurred to, the court recommended to the plaintiff's counsel to move for leave to amend. He also cited *Hanna* v. *Bristow*, *Bail of Reilly*, *H.* 17 *Geo.* 3. in this court, where the replication having concluded to the country, upon a demurrer there was judgment for the plaintiff (without argument), and a writ of error brought, but not proceeded on. He said, he supposed there would be three points made in support of the verification in the replication,—1. That new matter had been introduced, which the defendant ought to have an opportunity of answering.—2. That matter of record, *viz.* the writ, was stated, which could not be tried by a jury, and yet a conclusion to the country would have put that in issue.—3. That it contained several distinct facts. As to the first, he contended that the new matter was only inducement, which could not be traversed. That the replication denied the whole plea, and, therefore, ought to conclude to the country. That, if it did not, it was bad in substance; 5 *Com. Dig.* 96. 2. *Leo.* 81. 8 *Co.* 67. *Latch.*

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111. *Hardr.* 69. 70. *Cro. Jac.* 588. As to the second, he said that the reasons on which records were not to be tried by the country, did not apply to this case; for that this was not like the case of a solemn judgment pleaded. That the question here was merely matter of fact relative to a particular period of time. That, if the defendant had denied the writ, it would have been a departure; 5 *Com. Digest.* 89. *Cro. Jac.* 588. *Raym.* 94. 1 *Sid.* 180. 2 *Roll.* 692. 2 *Saunders* 84. *Vincent* v. *Attwood,* 10 *Mod.* 256. On the third point he cited *Robinson* v. *Raley,* 1 *Burr.* 316.

Wood, for the plaintiff, insisted, that the replication was in the usual form, and agreeable to the rules of pleading, and that, in the three instances of similar cases which *Morgan* had cited, there had been no decision of the court.

Lord MANSFIELD recommended to *Morgan* to move for leave to withdraw his demurrer; which was granted without costs.

ASHHURST, *Justice,*—It is proper that it should be known, to avoid future inconvenience, that the ground upon which the court determines is, the introduction of new matter, in which case, the conclusion should always be an averment, in order that the party may have an opportunity of answering it.

BULLER, *Justice,*—It is admitted that, till 1771, this was thought the proper form, and there has yet been no decision to the contrary. In pleading, *via trita via tuta.* It always was the rule, that two affirmatives cannot make an issue; 1 *Leo.* 78. 39 *H.* 6. 49. 32 *H.* 6. 23. In *Mathers* v. *Cormick, Brian* v. *Thorn,* and *Hanna* v. *Bristow,* the replication was in the negative—"That the defendant "did not die," *&c.*—; and those cases were attempts to alter the established form. It is also an established rule, that, whenever new matter is introduced, the pleading must conclude with an averment; *Carth* 337. *Moore* 286. 3 *Leo.* 165. 1 *Lutwyche* 101. 1 *Saund.* 103. The case of *Filewood* v. *Poplewell,* 2 *Wils.* 65. is exactly in point, and *Carth.* 4. shews that the *particular* writ must be stated in the replication. The defendants here might have had either of two defences; *nul tiel record;* or, that the principal
[61] died before the return of the *capias ad satisfaciendum* set forth in the replication. If the plaintiff had concluded to the country, and the defendants had only meant to make use of the first of those defences, an issue would have been sent down, without any fact for a jury to try. In the case in 10 *Modern* the writ was *admitted.* The account of that case, is but a loose note; the book is of little authority; it is not in any other reporter, and is *there* stated only as the argument of counsel. If the cases referred to in it applied, then that case was not applicable to the present. If they did not, it was decided without reason or authority.

This

This is the ancient form of replications, and while it is adhered to, no difficulties will arise [☞].

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[☞] *S. P. Henderson* v. *Witley & al'*, Bail of *O'Bryen, B. R. T.* 28 *Geo.* 3. 2 *Term Rep.* 576 [F].

WARD *against* HONEYWOOD.

Friday, 29th Jan.

UPON a writ of error from the *Marshalsea* court, the case was this: An action had been brought upon a promissory note, which was made payable on the 28th of *April*, and, if three days of grace were to be allowed, it did not become due till the first of *May*. The plaint was intituled of the 24th of *April*, and a verdict having been found, and judgment given for the plaintiff, it was assigned for error on the first count, that it appeared upon the record, that there was no cause of action at the time of the commencement of the suit.

In the Marshalsea court, the plaint is the commencement of the action. It is not settled whether days of grace must be allowed on promissory notes.

Baldwin, for the plaintiff in error, contended, that this was a defect not curable by verdict, and cited *Stafford* v. *Moore (d)*.

Bolton, in support of the judgment, said, that the objection might have been taken advantage of below, for, though the plaint did not appear in the declaration, the defendant might have pleaded it in abatement, or craved oyer of it, and demurred; but that the defect was now cured by some of the statutes of *jeofail*, either 27 *El.* c. 5. 16 & 17 *Car.* 2. c. 8. or 5 *Geo.* 1. c. 13. He relied on *Hob.* 54. 5 *Mod.* 286. and 1 *Leon.* 302. and, particularly on the case of *Acton* v. *Eels (e)*, where, in an action of assault, on a motion in arrest of judgment, because the time laid in the declaration was not yet come, the court said that the jury must be supposed to have given the damages for another trespass, and that it was the same as if no time had been alleged. So here the court, he said, ought to intend that the date of the note was a mistake, as stated in the record, and that

(d) B. R. E. 1 *Geo.* 1. 10 *Mod.* 311.

(e) B. R. M. 8 *W.* 3. 2 *Salk.* 662.

[F] See a learned note of Mr. Serjeant Williams, in his edition of Saunder's Reports, to the case of *Hayman* v. *Gerrard*, *p.* 103; and see *Boyce* v. *Whitaker*, *infra* 94.

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that another note, due at a time consistent with the commencement of the action, had been given in evidence to the jury. He also insisted that the date of the plaint was a mere legal fiction. That the *capias* supposes a previous plaint, but which in fact never exists, and that the day of the teste of the *capias* was really the time when the action had been commenced. That the practice of the court below warranted the judgment.

*[62]

Baldwin, in reply, observed, that, if the *capias* were to be considered as the commencement of the action, still, as the note had no run, (including the three days of grace,) till the first of *May* inclusive, the *capias* ought not to have been sued out till the 2d of *May*.

Lord MANSFIELD absent.

WILLES, *Justice*,—This case is certainly not within any of the statutes of *jeofail*. Supposing the *capias* did issue the first of *May*, and that it was the commencement of the action, the debt was not then due, for the defendant had the whole day to pay it.

ASHHURST, *Justice*,—If the plaint were like a *latitat*, it might be taken out before the cause of action accrues. This has been determined with regard to *latitats* [† 30]. But it appears, by the case of *Savage* v. *Knight* (*f*), (that case had been mentioned by *Bolton*,) that the plaint, in an inferior

[† 30] In *Foster* v. *Bonner*, *B. R. E.* 16 *Geo.* 3. *Cowp.* 454. this was resolved upon solemn argument.

The rule to consider the bill, not the *latitat*, as the commencement of the suit, is subject to several exceptions. For instance; where the defendant has pleaded, that one of the statutes of limitations, had attached *ante exhibitionem billæ*, the plaintiff may reply a *latitat*, sued out of the preceding term, and the defendant may rejoin, that the *latitat* was not in fact sued out till the vacation after such preceding term, and after the expiration of the time limited for bringing the action; *Johnson* v. *Smith*, *B. R. E.* 33 *Geo.* 2. 2 *Burr.* 950. So, if the defendant has pleaded a tender before the exhibiting of the bill, the plaintiff may reply a *latitat* previous to the tender, and the defendant may rejoin, that there was no cause of action at the time when the *latitat* issued; *Wood* v. *Newton*, *B. R. M.* 20 *Geo.* 2. 1 *Wils.* 141. In like manner, when there is no special memorandum, in which case the bill by fiction, is, in general, held to be of the first day of the term, if the cause of action arose before the first day of the term, it will be sufficient for the plaintiff to shew in evidence, a *latitat* sued out after the cause of action arose; *Morris* v. *Pugh*, *B. R. M.* 2 *Geo.* 3. 3 *Burr.* 1241. *Pugh* v. *Martin*, *B. R. H.* 24 *Geo.* 3. In *Prodger's Case*, *B. R. M.* 21 *Car.* 2. 1 *Sid.* 432. it had been held, where the demise in ejectment was laid of a date subsequent to the first day of the term, and the declaration was generally of the term, that the plaintiff might shew in evidence, that the *bill* was, in fact, filed after the first day of the term.

(*f*) *B. R. M.* 29 & 30 *El.* 1 *Leo.* 302.

inferior court, is considered as the original [† 31] [r 1]. We must take the note to have been proved as laid, and *that* makes the difference between this, and the case of a trespass, where the day is immaterial.

* BULLER, *Justice*, said, he doubted, whether, by law, three days of grace were to be allowed on promissory notes, though, in practice, it was usually done [2]; but that here it appeared on the record, that there was no cause of action, for it had always been held that the plaint, in the inferior court, is the original, and commencement of the action. That no substance is within any of the statutes of *jeofail*.

* [63]

The judgment reversed.

[† 31] In *Leader* v. *Moxon*, *C. B. M.* 14 *Geo.* 3. 2 *Blackst.* 924, 925. it was resolved, that, under the limitation of time for bringing actions against commissioners for executing a paving act, (and in the case of all other statutes of limitations,) it is enough to shew a *capias*, which every body understands to be now the commencement of a suit in *C. B.* and that, though the plaintiff state in his declaration the suing out of an original, the *capias* is sufficient evidence thereof.

[2] In *Dexlaux* v. *Hood* (at *Guildhall* 1752, *Law of Ni. Pri.* 274. *Ed.* 1775.) *Dennison*, Justice, ruled, that by law there are not three days of grace on promissory notes; but the case is mentioned with a *Quære*. The point, I believe, has never been settled by a solemn decision. It occurred in a cause of *Lloyd* v. *Skutt*, which was tried at the sittings for *Middlesex* after *M.* 20 *Geo.* 3. 30th *Nov.* before Lord *Mansfield*. That was an an action on the statute of usury. The plaintiff declared on a contract to forbear for four calendar months and three days. The evidence was a promissory note payable at four months from the date, and it was objected by the *Solicitor General* for the defendant, that this was a variance. But Lord *Mansfield* observing that in a computation of interest made by the defendant himself, and which was in evidence, the three days of grace were allowed, he thought this decisive against him, without determining the general question. The case came on afterwards in court *(Vide infra E.* 20 *Geo.* 3. p. 336.), but on another point [r 2].

[r 1] See the law of the commencement of actions fully expounded in Serjeant Williams's note to *Mellor* v. *Walker*, 2 *Saund.* 1.

[r 2] The point in *Dexlaux* v. *Hood*, had been ruled the same way in *May* v. *Cooper*, *Fortesc.* 376.: but these decisions have since been fully reconsidered and over-ruled in *Brown* v. *Harraden*, 4 *T. R.* 148.: in which it was determined that by operation of 3 and 4 *Ann. c.* 9. promissory notes are put on the same footing with bills of exchange as to days of grace.

1779.

Wednesday, 3d Feb.

BRADFORD *against* FOLEY and Others.

Under a devise, —to the testator's son for life, remainders in tail to his first and other sons, &c. by any future wife, but, if he married any person related to his present wife, in such case to go over to the children of the testator's brother,—the event of the son's marrying a second wife related to his first is not a condition precedent; and, on his death without marrying again, the estate vests in the children of the testator's brother, and does not descend to the testator's heir at law [F].

THIS was a case sent from the court of *Chancery*, for the opinion of the Judges of this court, which stated, that *Tempest Hey*, being seised of a considerable real and personal estate, on the 26th of *March* 1762, made his will, the material part of which was in the following words,—" I give and devise all and singular my real estates whatsoever and wheresoever, to *Richard Wright* and *Michael Tovey*, and their heirs, in trust, in the first place, to protect and preserve the contingent remainders, herein and hereby created and limited, from being defeated and destroyed, and then to and for the several uses herein after-mentioned, that is to say, to the use of my son *Thomas Hey* (who now spells his name *Hay*) for and during the term of his natural life, and from and after his decease, to the first and every other son, which he shall have by any *future* wife, with whom he shall afterwards intermarry, in tail male, and for default of such issue male, to the use of all and every the daughter and daughters of such future marriage, to have and to hold the same, in case there shall happen to be more than one daughter, to them and their heirs, as tenants in common, and not as joint-tenants. Provided always, and it is my full and express intent and meaning, that if my said son shall hereafter intermarry with any woman who is any ways related in blood to *Muriel Ayshecombe*, his now wife, that all and every the above limited uses, as far as the same shall relate to the issue of such future marriage, shall utterly cease, determine, and be void, to all intents and purposes, it being my stedfast resolution, as far as the law enables me, to hinder that no person any ways of kin to her in blood, or born or descended from any such person, shall inherit any part of my said estate, and, *in such case*, notwithstanding there shall be lawful issue of my said son by such future marriage living at the time of his decease, my will and mind is, that they nor either of them shall take any thing by and under this my

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[F] See a similar decision upon a will, *Horton v. Whitaker*, 1 *T. R.* 346. and see *Fearne Cont. Rem.* 355. where the distinction between this case and that of *Doe* v. *Shipphard*, *post* 75. is stated to be, that here there is an *apparent* intention not to extend the contingency further than the first estate; without which apparent distinction in the testator's view, in that respect, between such estate and those which follow it, the contingency will equally affect the whole ulterior train of limitations.

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BRADFORD against FOLBY.

my will, but that the said trustees shall stand seised of all and singular the said premises, to the use of all and every the child and children of my late brother *John Hey* deceased, which shall be living at the time of my decease, to have and to hold the same, if more than one child, to them and their heirs, share and share alike, as tenants in common, and not as joint tenants, such parts or shares thereof as shall respectively belong to the daughters of my said brother, to be to their sole and separate use, independent and exclusive of any present or future husband that they respectively have or may hereafter have, and not subject to the debts or controul of any or either of them; and, in case *all* and every of the said children of my said brother shall happen to die in my life-time, or after my death, without issue, then I hereby give and devise *all* and singular my said real estate to my right heirs; I mean such heirs only, as shall be no ways related in blood, or claim any descent from any person related in blood to the said *Muriel Ayshecombe*, my said son's now wife; all and every of whom I hereby utterly exclude from any right, title, or benefit from my real or personal estate, in any shape whatsoever."—The testator died in *December* 1763, and left *Thomas Hay*, his only son, and heir at law. The trustees (who were also made executors) proved the will, and, by virtue thereof, entered upon and possessed themselves of the real and personal estates of the testator. There were five children of *John Hey*, brother of the testator, living at the time of the testator's death, *viz. Alice* the wife of *Benjamin Pilkington*, *Mary* the wife of *James Fletcher*, *Jennet* the wife of *Thomas Crompton*, *Tempest Hey* and *John Hey*. In *December* 1768, a commission of bankruptcy was taken out against *Thomas Hay* the son of the testator, and an assignment executed of all his estate and effects, to assignees, [65] in trust for themselves, and the rest of his creditors who should come in and prove their debts under the commission. *Tempest Hey*, the son of *John Hey* the testator's brother, died a batchelor. *John Hey*, the other son of the testator's brother, died some time after his brother *Tempest*, leaving one only child, *Thomas Hey*, an infant. *Mary* the wife of *James Fletcher* died without issue. *Jennet* the wife of *Thomas Crompton*, died, leaving issue *Thomas Crompton* the younger. *Muriel Ayshecombe*, the wife of *Thomas Hay* the testator's son, died in the life-time of her husband. Soon after her death, *Thomas Hay*, the son of the testator, also died without issue, *and without having married again*, leaving *Thomas Farren Hey* his heir at law. On the 3d of *October* 1771, the said *Thomas Hay* (son of the testator) made his will, and, as to what might become due to him in expectancy or reversion, gave the same to his executors therein after-

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BRADFORD against FOLEY.

after-named, for the uses following, " First to pay his funeral expences, then his just debts that he had contracted, since the first day of *March* 1769, as far as his effects might amount; but if all his creditors were paid twenty shillings in the pound, and there should be an overplus, after all the expences were discharged, then he gave the same to his niece *Amelia Heydon* for her own proper use," &c. The plaintiff claimed under *Thomas*, the son and heir at law of the testator; the defendants, under the children of the testator's brother, *John Hey*. The question for the opinion of the court was, " Whether the children of *John Hey* the brother of the testator had taken any, and what estate in the case that had happened?"

The case was argued on *Friday* the 29th of *January*, and this day by *Hood*, for the defendants, and *Morris*, for the plaintiff. The court directed *Hood* to begin.

He contended, that the children of the testator's brother had taken estates-tail, with cross remainders, although the previous event, on which the devise to them was limited, had never happened. 1. To shew that words like those in the present case were not to be construed as constituting a condition precedent, but as words of limitation, he cited *Jones* v. *Westcomb (g)*, *Gulliver* v. *Wicket (h)*, *Page* v. *Heyward*, cited in that case *(i)*, and 1 *Roll. Abr.* 835. 2. He said the intention of the testator was certainly to exclude the children that his son might have by his then wife, and

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yet, according to the argument which would be made use of for the plaintiffs, such children, if there had been any, must have taken in the event that had happened.

For the plaintiff, *Morris* insisted, that, if there was such a thing now in the law as a condition precedent, this was clearly one. That the cases cited by *Hood*, as well as others of the same sort, *viz.* *Avelyn* v. *Ward (k)*, *Andrews* v. *Fulham* [3], and *Statham* v. *Bell* [4], all went upon the idea

(g) *M.* 1711. *Prec. in Chan.* 316. 1 *Eq. Ca.* 245.

(h) *B. R. M.* 19 *Geo.* 2. 1 *Wils.* 105.

(i) *B. R. T.* 3 *Ann.* 2 *Salk.* 570. *Piggot* 176.

(k) *Canc.* 19th of *March* 1749. 1 *Vez.* 420.

[3] *B. R.* Cited 1 *Vez.* 421. *Jones* v. *Westcomb*, *Andrews* v. *Fulham*, and *Gulliver* v. *Wickett*, were all cases on the same will.

[4] *Statham* v. *Bell and others* [† 32] was a case from the Court of Chancery, argued in this court, *E.* 14 *Geo.* 3. 26th *April*, by *Kenyon* for the plaintiff, and *Davenport* for the defendants. The facts were as follows.—*Statham* having an only child, a daughter, made his will, whereby,

[† 32] Since reported, *Cowp.* 40.

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idea of a double contingency, and that the only thing to prevent the subsequent limitation from taking effect in possession was the intervention of the estate limited first. That those authorities were not now to be shaken, but that they did not apply to this case. That, in every view, the old reversion here must have remained. In the other cases, the contingency was annexed to the precedent, here to the subsequent estate. He cited *Arton* v. *Hare (l)*, and contended, as to intention, that it did not appear that the testator had taken into consideration the event of his son's having children by his then wife, and not marrying again.

Lord MANSFIELD,—Nothing can be clearer than that the testator meant that no child of *Muriel Ayshecombe* should take in any event, and yet, according to Mr. *Morris*'s argument, such child (if there had been one) must have taken. We will take time to consider of our certificate.

The case was not afterwards mentioned in court. The certificate was in the following words:

"We are of opinion that the children of *John Hey*, the "brother of the testator *Tempest Hey*, took estates tail, "with cross remainders.

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1th *February* 1779.

whereby, reciting that whereas his wife *Mary Statham* was then pregnant, he devised his estate to his son, if his wife should be delivered of a son, when he should attain the age of 21. If she should have a daughter, then he devised one moiety of the estate to his wife and the other moiety to his daughters, when they should attain their ages of 21 years. And if either of them should die before that time, then her share to the survivor, and if both should die under 21, then the other moiety to go to the wife. The testator died without having any child after the making of the will, his wife not having been ensient, and the daughter died before she was 21. The question was, whether the plaintiff, the testator's heir at law, or the widow, who married *Bell* the defendant, should have the estate, in the event which had happened. The certificate was in the following words: "Having heard "counsel and taken the case into "consideration, we think it was the "plain intention of the testator, that, "in case no son should be born, and "he should have no daughter who "should live to attain the age of 21 "years, his wife should have the "whole estate; therefore, in the event "which has happened, we think "*Mary Bell* took an estate in fee-"simple in the whole of the pre-"mises is question.

[67]

Mansfield.
May 16th, *R. Aston.*
1774. *E. Willes.*
W. H. Ashhurst."

(l) T. 37 *El. Poph.* 97.

1779.

Wednesday, 3d Feb.

OXLEY *against* BRIDGE.

On a rule to plead by a particular day, that day is construed to continue till the office open next morning.

THE first day of this term, the paper-book in this cause had been delivered to the defendant, containing the common replication to a sham plea of a judgment recovered; with a rule to return it on the *Wednesday* following, 27th of *January*. He returned it on the *Thursday* before 9 o'clock, having struck out the special pleading, and substituted the general issue in its place. The plaintiff refused to receive it, unless the defendant would agree to deliver it as of *Wednesday*, which he not consenting to, the plaintiff signed judgment.

On a rule to shew cause why this judgment should not be set aside for irregularity, it was contended for the defendant, that by the practice of the court, when a day is fixed for pleading, &c. that day is considered as continuing till the office opens next morning, and that you are regular if you comply with the rule before that time. And the court being of that opinion *(m)*, the rule was made absolute [5].

Wood, for the plaintiff.—*Douglas*, for the defendant.

(m) But *vide T.* 19 *G.* 3. *Haselar* v. *Ansell. infra.* 197 [F].

[5] This suit was by original. By not returning the paper-book till the *Thursday*, the defendant prevented the plaintiff from having judgment of this term. Eight days notice of trial (exclusive) is required by the rules of the court. If the paper-book with the general issue had been returned on the *Wednesday* (27th *January*) notice of trial might have been given for the *Thursday* se'nnight following (4th *February*), for which day the second sitting in term at *Guildhall* was appointed. This was before the last return day, (11th *February*) when the *distringas* would have been returnable. Being not returned till *Thursday*, the eight days went beyond the fourth of *February*, and there was no sitting after that till the last day of term (12th *February*), which was after the last return. If the plaintiff had sued by bill, this advantage could not have been taken; because the return may be on any day in the term. But then the defendant might have hung up the cause for twelve months by a writ of error in the *Exchequer Chamber*.

[F] In which this case was overruled. Both cases were reconsidered in *Thomson* v. *Ryall*, 4 *T. R.* 195. and *Haselar* v. *Ansell* was confirmed.

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LENCH *against* PARGITER.

Thursday. 4th Feb.

The groats under the Lord's act must be paid every Monday [r 1].—A judge's order for a prisoner's discharge under that act, made out of term, is final.

THE defendant had been brought up on a *Wednesday*, to be discharged under the Lord's Act *(o)*, but was remanded on the plaintiff's paying him two shillings and four-pence, and giving him a note for the payment of the like sum, on *Wednesday*, in every subsequent week. In the last vacation, the defendant applied to WILLES, *Justice*, to be discharged, on the ground, that the two shillings and four-pence had not been paid, nor the note made agreeable to the directions of the statute, which are, that the payment of the groats shall be made on *Monday* in every week, and the note framed accordingly. It was admitted that the payments had been regularly made the first and every *Wednesday* till the defendant's application to be discharged. WILLES, *Justice*, was of opinion, that the defendant was entitled to his discharge, and on the first day of this term, made an order for that purpose. On *Thursday*, the 28th of *January*, *Baldwin* moved for a rule to shew cause why that order should not be set aside, and the plaintiff be at liberty to retake the party, and stated, that the constant practice in this court had been to pay the groats on that day week on which the party was brought up, and so successively, and to make the note for payment on those days. In this he was confirmed by the officers of the court. He cited also *Shaw* v. *Gimbert*, in *Barnes (p)*, where, in the *Common Pleas*, the money was made payable on a *Tuesday* [6]. He urged

(o) 32 *G.* 2. *c.* 28. § 13.

(p) *M.* 7 *G.* 2. *Barnes quarto edit.* 369.

[6] This case, and *Beech* v. *Paxton*, must have been upon some temporary statute. They happened more than twenty years before the Lord's act passed [† 33].

[† 33] Probably on 2 *Geo.* 2. *cap.* 22; and there is a remarkable difference between the words of that act, and those of the perpetual Lords' act. In that of 2 *Geo.* 2. the words are, "unless the creditor do agree, by writing

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[r 1] In *Constantine* v. *Pugh*, 3 *B.* & *P.* 184. it was ruled on the authority of this case, that it must be expressed in the note, that the money is payable on Monday; and that such defect cannot be supplied by proof of delivery of the note on a Monday; nor (as it seems) by the date of the note.

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*[69]

urged, that the spirit of the act had been complied with, as the prisoner had been paid weekly. That, in another case in the same book, where the money was made payable on *Monday*, the plaintiff having slipt that day, but having tendered it on the *Tuesday*, the Court of * *Common Pleas* refused to discharge the prisoner; *Beech* v. *Paxton, widow (q)*.

Morgan now shewed cause, and insisted on the words of the statute, and that there was a good reason why all payments should be made on the same day, especially in the great prisons in *London*, because the servants belonging to the prisons knew, thereby, when they must attend. He said the defendant could not wave his right, by accepting of the note and payments. That the note at first was not such an engagement as warranted the court in remanding him, and as to his subsequent discharge, a discretion was, by the act, vested in a single Judge in vacation, which, having been exercised by WILLES, *Justice*, in this case, ought to be final.

Lord MANSFIELD,—This case must be considered with a reference to the application, which was made in the vacation; and a single Judge having then a complete authority, I do not see how the court now can controul the order. Mr. *Justice* WILLES consulted the other Judges at Serjeant's Inn before he signed it, and they thought it right. They afterwards sent him word that they doubted, and he sent to recall his order, but it was too late. As to the general point, enquiry has been made, and the practice in this court has been as stated by Mr. *Baldwin*, and the officers, for above thirty years. In the *Common Pleas*, it has always been otherwise. There, the plaintiff pays the fraction from the day of the application to the next *Monday*, and then gives a note for, and makes his payments on, every *Monday* afterwards. The Judges of the *Common Pleas*, say there never was a note in that court made payable on *Tuesday*; so that *Barnes* must have mistaken [†34]. In the present instance, although we think the man has no right to the advantage of the mistake after

(q) E. 6 G. 2. Barnes quarto edit. 367.

[† 34] *Vide* the foregoing page, Note [† 33].

" ing under his hand, to pay and allow weekly, a sum not exceeding 2*s.* 6*d.* per week, unto the said prisoner, *to be paid the first day of every week*;" § 9. But in 32 *Geo.* 2. *c.* 28. the words are, " shall agree by writing, &c. to pay and allow weekly a sum, &c. unto, &c. *to be paid every* Monday *in every week*;" § 13. This difference reconciles the cases in *Barnes* to the practice of C. B. under 32 *Geo.* 2.

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after having received the money [f 2], the order is final. In future, as it is proper that the practice of all the courts should be uniform, and that of the *Common Pleas* is most consonant to the words of the act, let all notes be made payable on the *Monday*. It is much more convenient that there should be one common day, that the turnkey may know when to attend. But it is to be understood that no other prisoner, already remanded, will be discharged, because the payment is not on a *Monday*, unless the *Monday* happens to be the day when he was remanded.

* The KING *against* the INHABITANTS of STOCKLAND.

Saturday, 6th Feb.

*[70]

If the master of an apprentice die, and the executor, at the pauper's request, agree that he shall go to live with another person, a service of forty days with such person, before the term of the apprenticeship expires, gains a settlement under the apprenticeship. [F]

A PAUPER was removed to the parish of *Stockland*, and the sessions confirmed the order, stating as follows. —That the pauper was bound an apprentice in husbandry, by the parish of *Stockland*, to *John Davies* of that parish, till he should be twenty-four years of age. That he lived there four years, under that indenture, when the master died. That he continued with his master's son, who was his executor, and had proved his will, for about seven years, in the same parish; when, being desirous of living with his uncle, in the parish of *Otterton*, to learn the trade of a miller, his uncle and he applied to the executor for his consent, who gave his consent accordingly, saying he would do any thing for the benefit of the pauper, and that then the pauper made an agreement with his uncle for 1*s*. 6*d*. *per* week, and continued with him in the whole, two years and an half; at the end of the first four months of which time the pauper attained his age of twenty-four years.

The *Solicitor General* now argued in support of the order. He contended that the contract between a master and his apprentice is merely personal, and dies with the master. This has been decided in the case of *Baxter* v. *Burfield* (*r*). By

(*r*) *B. R. E.* 20 *Geo.* 2. 2 *Str.* 1266.

[f 2] In the *King* v. *Wilkinson*, 7 *T. R.* 156. this point in the case was overruled, and a defendant discharged after the receipt of several payments under an informal note.

[F] S. P. admitted, *R.* v. *St. Paul's, Bedford*, 6 *T. R.* 452.

S. P. in case of a settlement by hiring and service, under a service with the executor of the master. *R.* v. *Ladock*, *Burr. S. C.* 179.

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By law there can be no valid assignment of an apprentice. An assignment is indeed evidence of the original master's consent to the apprentice's residence with the new master; but here that presumption fails, because the original master did not exist when the pauper was assigned.—He endeavoured to distinguish this case from the *King* v. *Bridgeford (s)*.

Dunning and *Fanshaw* on the other side.—They said, if an apprentice resides in a parish, by the consent, either of his master, or the executor or administrator of the master, he gains a settlement; and for this, they cited the *King* v. *Bridgeford*. Here, there has been no dissolution of the apprenticeship by the act of the parties, and no case has gone so far as to decide, that an apprenticeship is of course dissolved by the death of the master. It has only been decided, that an apprentice cannot be compelled to serve the master's representative. The case of *Baxter* v. *Burfield* was founded on the contract having been made for the
[71] purpose of teaching the apprentice a trade, which an executor might not be able to teach. There never has been such a decision as to parish apprentices, and the reason does not apply to their case.—They cited the *King* v. *Clapham (t)*, and the *King* v. *Tavistock (u)*, to shew, that, after an apprentice has been once transferred, the consent of the original master is not necessary to a subsequent transfer of him. But they chiefly relied on the *King* v. *Bridgeford*, as having gone much farther than this present case would do; because, there, the assignment was by a person who had only the right to the administration, but had not administered.

Lord MANSFIELD,—Though an apprentice is not strictly assignable, nor transmissible, yet if he continue, with the consent of all parties and his own, it is a continuation of the apprenticeship. The case of *Bridgeford* is much stronger than this.

Both orders quashed.

(s) T. 12 *G.* 2. 2 *Str.* 1115. S. C. *Cases, No.* 91. *Burr. Settl. Cases, No.* 43.

(t) E. 20 *Geo.* 2. *Burr. Settl. Cases, No.* 186.

(u) T. 7 *G.* 3. *Burr. Settl. Cases, No.* 186.

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HAYLEY *against* RILEY.

Saturday, 6th Feb.

If a defendant suspend a cause by an injunction for a year, and afterwards the plaintiff proceed to trial without a term's notice, and obtain a verdict, the court will not set aside the verdict.

ACTION of debt, on a replevin bond, and a verdict for the plaintiff. The defendant obtained a rule to shew cause why the verdict should not be set aside, *the cause having been suspended* [F], *after issue joined, for above a year*, and then brought to trial, without giving *a term's notice* [6].

Baldwin now shewed for cause, that the trial had been stopped by the defendant himself, under an injunction from the court of *Exchequer*, and said, that the court would never suffer a party to avail himself of a privilege arising from a delay which he himself had occasioned.

The *Solicitor General*, on the other side, insisted, that the trial without notice for a term was irregular, and that the verdict must be set aside; for which he cited *Peyton* v. *Burdus (w)*. He contended, that, on a proper application to the court of *Exchequer*, the plaintiff might have had leave, before answer, to proceed to trial, and that it was universally understood, in practice, that an injunction is no excuse for not complying with the established rule.

Lord MANSFIELD expressed his indignation at the defendant's endeavouring to take advantage of a delay occasioned by himself, to protect himself against a deed under his own hand and seal, and seemed surprised when he was informed, that the injunction had issued without any affidavit by the defendant, (the plaintiff in equity), of any fact which entitled him to a stay of proceedings. [72]

BULLER, *Justice*, said, the practice was as it had been stated by the *Solicitor General;* that it was grounded on the principle, that the injunction was no proceeding in the cause depending in this court; but that he thought this a case

[6] Rules of *C. B. M.* 1654, § 21. I do not find when this rule was adopted by the Court of King's Bench. It makes no part of the body of rules made by *that* court in the same term; *M.* 1654. [☞] It was introduced in *B. R. T.* 5 & 6 *Geo.* 2.

(*w*) *B. R. M.* 12 *G.* 2. 2 *Str.* 1110. —*Vide* also *Bogg* v. *Rose*, *E.* 15 *G.* 2. 2 *Str.* 1164.

[F] But if notice that the plaintiff will proceed be given within the year, the common notice of trial is sufficient. *Richards* v. *Harris*, 3 *East.* 1.

1779. case where the court might very well alter the practice (7) [†35]

The rule discharged.

[7] In *Bosworth* v. *Phillips*, *T.* 11 *Geo.* 3. which was a case parallel to this, the Court of Common Pleas held, that the rule only extends to voluntary delays by the plaintiff, and that a delay by an injunction is, from the nature of the thing an exception to the rule. 2 *Blackst.* 784. *Vide Walter* v. *Stuart*, *C. B. T.* 13 *Geo.* 3. 2 *Blackst.* 918.

[† 35] *Vide Worral* v. *Stewart*, *B. R. M.* 23 *Geo.* 3.

Saturday, 6th Feb.

LILLY and Others *against* EWER.

In a policy of insurance, "sailing with convoy," means "sailing with convoy for the voyage."

THIS was an action for money had and received, brought against an underwriter, for a return of premium. The policy was on the ship the *Parker* galley; "at and from "*Venice* to the *Currant Islands*, and at and from thence "to *London*," *at a premium of five guineas* per cent.; "*to return £2 per cent. if the ship sailed with convoy from* "Gibraltar, *and arrived.*" The ship touched at *Gibraltar* on her way home, and sailed from thence under convoy of the *Zephyr* sloop of war, but the convoy was destined only to go to a certain latitude, about as far as Cape *Finisterre*, being ordered on the *Lisbon* station; and, accordingly, the ship and convoy separated, and the ship arrived safe at *London*. The only question in the cause was, Whether, by the terms of the policy, the condition for the return of premium was, a departure from *Gibraltar* with such convoy as could be met with, for whatever part of the voyage that might happen to be, or, a departure with convoy for the voyage? The trial came on at *Guildhall*, before Lord MANSFIELD, and a common jury, at the last sittings, when a verdict was found for the plaintiff.

On the second day of this term, a rule was obtained to shew cause, why there should not be a new trial, and the case came on to be argued this day; when, upon Lord [73] MANSFIELD's report of the evidence, it appeared, that the plaintiffs had called witnesses, (one of whom was Mr. *Gorman*, an eminent merchant), who swore, that, for some few years past, when convoy *for the voyage, or the whole voyage*, was intended, those explanatory words had been added, and that, by this usage, the expressions of "*sailing* "*with convoy*," and "*sailing with convoy for the voyage*," had received distinct technical meanings; "with convoy," signifying whatever convoy the ship should depart with, whether for a greater or less part of the voyage. Several policies

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policies were also produced, which had been filled up at the office of the same broker, who had prepared that which had given occasion to this cause, in which the words, "*for the voyage*," or "*for England*," were added. The captain proved, that, at the time when he left *Gibraltar*, no other convoy was to be had.—The witnesses for the defendant swore, that they understood the words "*with convoy*" to mean *convoy for the voyage*; and the broker said, that, at the time when this policy was signed, he understood, and apprehended it was so understood by all the parties, that the convoy was to be for the voyage, and that the return was such as was usual when convoy for the voyage was meant. His Lordship, after stating the evidence, said, that when the case was opened, he thought, on the face of the policy, that the words must mean for the voyage. He had not admitted the evidence, to ask the opinion of the witnesses on the construction, but to learn whether there was any usage in this case which would give a fixed technical sense to the words. This was a question of fact to be ascertained by evidence, and proper for the consideration of a jury.

Dunning and *Davenport*, for the plaintiffs.—*Bearcroft* and *Baldwin*, for the defendant.

For the plaintiffs it was insisted, that the question had been fairly and completely tried. The sense in which the words were to be understood, depended on the usage. His Lordship had stated to the jury, the interpretation they must receive, independent of usage, and told them, if they were not satisfied with the evidence for the plaintiffs on the head of usage, they must find for the defendant. The verdict must, therefore, be considered as having been found upon full consideration of the proof as to the usage.

For the defendant, it was argued, that the obvious and natural import of the words, and also the weight of the evidence, were in his favour. Even if the words were doubtful, according to a known and established rule of law, they ought to be construed most strongly against the person who used them. Here, they were the words of the insured, and in the nature of a warranty on his part. It was also said that when partial convoy was meant, it had of late been a frequent practice, especially in policies on this *Levant* voyage, to specify how far the convoy was to come; as "*convoy to the Cape*," "*convoy to Lisbon*," &c.

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Lord MANSFIELD,—On the words, I was strongly of opinion, that the policy meant a departure with convoy intended for the voyage. The parties could not mean a departure with convoy which might be designed to separate from the ship in a minute or two; though, when convoy for the whole of a voyage is clearly intended, an unforseen sepa-

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ration is an accident to which the underwriter is liable; for the meaning of such a warranty is not that the ship and convoy must continue and arrive together. But I still think that the evidence was properly admitted at the trial of this cause, because the sense contended for by the plaintiffs was not inconsistent with the words of the policy; and, therefore, it was material to see what the usage was. I laid great stress on Mr. *Gorman*'s testimony. I did not consider him as a common witness. However, it seems, from what I have heard since, that people in the city are dissatisfied with the verdict, and think the evidence of the plaintiffs' witnesses was founded on a mistake. Certainly critical niceties ought not to be encouraged in commercial concerns; and wherever you render additional words necessary [F], and multiply them, you also multiply doubts and criticisms. It may be hard, because words have been added in some instances, to force a construction in this case, from the omission of them. The question is of great importance.

The rule made absolute [7].

[7] The new trial came on before Lord *Mansfield*, at the sittings after *Trinity Term*, 19 *Geo.* 3. when a verdict was found for the defendant. *Vide* the case of *Jeffery* v. *Legender*, 3 *Lev.* 320. *B. R. M.* 3 *W. & M.* or *Jefferys* v. *Legendra*, as it is called in other books; 2 *Salk.* 443. 1 *Show.* 320. 4 *Mod.* 58. *Holt.* 465. where, according to *Levinz*, upon a special verdict, finding a warranty in these words, "*warranted to depart with convoy*," *Holt*, Chief Justice, and the greater part of the court, held, that those words mean sailing with convoy for the whole voyage [† 36].

[† 36] *Vide Gordon* v. *Morley*, and *Campbell* v. *Bordell*, *Guildhall*, *H.* 20 *Geo.* 2. 2 *Str.* 1263.

[F] *(Quotation)* "It is now too late to say that warranty is not to be expounded with due regard to the usage of trade. Perhaps it is to be lamented, that in policies of insurance, parties should not be left to express their own meaning by the terms of the instrument. This seems to have been the opinion of that great Judge Lord Holt (*Lethieullier's* case. 2 *Salk.* 443). It is true, indeed, that Lord Mansfield, who may be considered the establisher, if not the author, of great part of this law, expressed himself thus, *(quoting this passage)* Whether, however, it be not true, that as much subtlety is raised by the application of usage to the construction of a contract, as by the introduction of additional words might, if the matter were *res integra*, be reasonably questioned." *Quotation* per Lord Eldon, C. J. in *Anderson* v. *Pitcher*. 2 *B & P.* 168.

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DOE, Lessee of WATSON and Others, *against* SHIPPHARD.

Monday, 8th Feb.

Under a devise of land;—to trustees to pay 20*l.* of the rents and profits to the testator's daughter, and the rest to her husband, and the whole rents and profits to the husband after the daughter's death; and, in case the daughter should survive her husband, then (the land) to the use of the daughter for life; and, after her death, to the use of her son in tail, then to the heirs of the body of the husband, by the daughter, then to the heirs of her body, then to the heirs of the husband;—the daughter dying before her husband, the limitations over shall not take effect, the contingency not being confined to her life-estate, but affecting all the other limitations, and operating as a condition precedent.

IN an action of ejectment, a special verdict was found, which stated;—that *John Hewitt*, being seised in fee of several messuages, tenements, and lands, in the counties of *Essex* and *Lancaster*, by his will, bearing date the 2d of *July*, 1727, devised as follows: *viz.* all his messuages, tenements, lands, and hereditaments, in *Essex*, to four trustees and their heirs, (one of whom, named *Charles Shipphard*, was the defendant,) upon special trust and confidence, that they should, out of the rents and profits thereof, levy and raise the sum of £20, and pay the same to *Rachel Shipphard* his daughter, and then wife of *Thomas Shipphard*, annually, during her natural life, by four quarterly payments, to her separate use; and, upon the farther trust and confidence, that they should pay and dispose of all the residue of the rents and profits, as also of the whole rents and profits thereof after the decease of his said daughter, to the use of the said *Thomas Shipphard* for the term of his natural life; "*and, in case my said daughter Rachel should happen to survive the said Thomas Shipphard her husband*, then, upon trust and confidence, that they the said trustees shall stand and be seised, of all and every my said messuages, lands, tenements, and hereditaments, to the several uses, intents, purposes, and upon the several trusts, herein-after mentioned, *viz.* to the use and behoof of my said daughter *Rachel*, for and during her natural life; and, from and after the decease of my said daughter, then, to the use and behoof of my grandson *Hewitt Shipphard*, son of the said *Thomas* and *Rachel Shipphard*, and the heirs of his body, and for default of such issue, then, to the use and behoof of the heirs of the body of the said *Thomas Shipphard*, begotten or to be begotten on the body of the said *Rachel* his wife, and, for default of such issue, then to the use and behoof of the heirs of the body of the said *Rachel* my daughter, by any other husband, and in default of such issue, then to the use and behoof of the said *Thomas Shipphard*, and his heirs for ever. *Item*, I do give, devise, and bequeath, all my messuages, lands, tenements, and hereditaments, in the several parishes of *Eccles* and *Dean*, in the county of *Lancaster*, to the said (trustees), upon the several trusts, and to and for the several uses, intents, and purposes herein-after mentioned, *viz.* to the use and behoof of the said *Thomas Shippard* and *Rachel* his wife, and the survivor of them, until such time as the said *Hewitt*

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Shipphard my grandson attain the age of twenty-five; and from and after the decease of the said *Thomas Shipphard* and *Rachel* his wife, and the survivor of them, and, after my said grandson's attaining the age of twenty-five years, which first shall happen, then to the use and behoof of the said *Hewitt Shipphard* my grandson and the heirs of his body; and, for default of such issue, or his dying under the said age, then to the use and behoof of the heirs of the body of the said *Thomas Shipphard* begotten, or to be begotten, on the body of the said *Rachel* his wife; and, in default of such issue, then to the use and behoof of the heirs of the body of the said *Rachel* my daughter, by any other husband; and, in default of such issue, then to the use and behoof of the said *Thomas Shipphard*, his heirs and assigns for ever."—That, on the testator's death, *Thomas Shipphard* his son-in law entered upon all the devised premises, and held them till the time of his death. That *Rachel* died in the life-time of her husband. That the husband died in *July* 1771, leaving *Hewitt Shipphard*, his only son and heir at law, who, on his father's death, entered upon all the devised premises, and enjoyed them till his death. That *Thomas Shipphard* never had any other issue by his wife *Rachel*, but *Hewitt Shipphard*, who died in *December* 1775 intestate and without issue. That three of the trustees were dead; and that *Charles Shipphard*, the defendant and surviving trustee, was the eldest brother and heir at law of *Thomas Shipphard*, and also the eldest uncle and heir at law, on the part of the father, of *Hewitt Shipphard*. That *John Watson*, and *Mary* the wife of *John Powell*, two of the lessors of the plaintiff, were nephew and niece, and heirs at law of the testator, and also heirs at law, on the part of the mother, of *Hewitt Shipphard*.—The ejectment was brought for the estate in *Essex*. The case was argued on *Friday* the 5th of *February*.

Balguy, for the lessors of the plaintiff, stated the question to be, Whether the limitation in fee of the *Essex* estate to *Thomas Shipphard*, had taken effect? That the whole depended on the clause beginning, "and in case my said "daughter," &c. and on the fact that the daughter had not survived her husband. He said, that if, in the event which had happened, there was no devise over, the lessors of the plaintiff were entitled to recover. That, upon the face of the will, the testator appeared to have provided for two events. 1st, *That* of the husband's surviving his wife. That, in contemplation of that event he had given him a life-estate after his wife's death; and that after his death he might naturally mean that the estate should *descend* to his grandson, who appeared to have been a favourite. 2d, *That* of the wife being the survivor. That the limitations over after her death

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death were only made *in case* she should happen to survive her husband. That if the contingency of her surviving were to be considered as annexed only to her life-estate, and not as a condition precedent before any of the uses limited over could arise; then, in the event which had happened, *Thomas Shipphard*, the husband became tenant for life, with remainder in tail to his son *Hewitt* then in *esse*, remainder in tail to himself. That if so, he had it in his power to have barred all the issue of his wife, except *Hewitt* the son. That this could never be the testator's intention, because it was clear that he meant particularly to provide for ALL children of his daughter. That if he had foreseen what had happened, the death of his daughter and her only child without issue, he never could have meant that, in such event, strangers should be preferred to his own blood. That a material argument arose from the diversity between this and the devise of the *Lancashire* estate; for that, there, as the testator meant no condition precedent, he had annexed no conditional words to the subsequent estates, but had limited them over in direct terms. That, if the intention were not so clear as it appeared to him to be, yet, as the words were clear, the court would not explain them away, in order to adapt them to a doubtful intention. That it was rare that cases cited on the construction of wills were very apposite, and he should only mention *Davies* v. *Norton* (*x*), being, as he said, a stronger case than the present, and where there could have been very little doubt about the intention.

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Howorth, for the defendant, contended, that no man who was not a lawyer, upon reading the will, could entertain any doubt of the testator's intention to vest the fee of the *Essex* estate in his son-in-law, *Thomas Shipphard*. That the disposition of the *Lancashire* estate corroborated the argument, because it was manifest from thence, that he was a great object of his favour and bounty, the remainder in fee of that estate being undoubtedly given to him in all events. That if the construction contended for on the part of the lessors of the plaintiff were to prevail, this absurdity would follow, that the son-in-law himself could derive no benefit from the devise in his favour, because he must be dead, before the contingency could happen by which the remainder in fee was to vest in him. That the testator did not mean any contingency by the words "*and in case, &c.*;" for to give them that operation would be to suppose he intended a partial intestacy. That if they should be construed to express a contingency, yet that contingency only extended, and was annexed to the life-estate to *Rachel*, and

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(*x*) *M.* 1726. 2 *Peere Wms.* 390.

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and did not affect the subsequent limitations, which were all meant to be vested remainders. That the case of *Napper* v. *Sanders (y)*, which was cited and relied on by Lord HARDWICKE, in *Tracy v. Lethieullier (z)*, was in point, in favour of this construction. That the determination in *Davies* v. *Norton* was inexplicable, the intention being manifest the other way [8]. That here the collateral heirs of the testator were not once mentioned in the will.

Balguy, in reply, insisted, that his construction was most consonant to the intention of the testator. That there was nothing absurd in supposing that, in the event of his daughter's dying before her husband, he meant a partial intestacy, for then the estate would by course of law descend to his favourite grandson. That as to the contingency being only annexed to the daughter's estate, such a construction was so plainly against the words of the will, that nothing but a direct authority could support it. But that the case relied on was very distinguishable from this. That, in that case, there was no contingency previous to the estate to the feoffees, but the contingency immediately preceded and was annexed to the particular estate of *Elizabeth Sanders*, and therefore the subsequent limitations being (as Lord HARDWICKE said in *Tracy* v. *Lethieullier)* substantive limitations, and independent of the former, they arose out of the seisin of the feoffees, although the estate to *Elizabeth* could not, as the contingency, on which her estate was to depend, had not happened. That here, on the contrary, the trustees were to stand seised only on the contingency of the wife's surviving her husband, and that all the limitations were connected with that event, and dependent upon it.

The court took some days to consider; and now, Lord MANSFIELD, after stating the case, delivered their opinion to the following effect:

[79] Lord MANSFIELD,—The question is, whether the limitations over are to take effect in the event which has happened, of *Thomas Shipphard*, the husband, having survived his wife, the testator's daughter? Now there are no express words limiting the estate over on that event, and yet it is plain that it was foreseen by the testator, for he gives the rents and profits to the husband after the death of the wife. The testator then proceeds to say, "*and in case* my said daughter *Rachel* should happen to survive the said *Thomas Shipphard* her husband, *then* upon trust," *&c.* The court may

(y) *Hutt.* 118.

(z) *Can.* 1754. 3 *Atk.* 774. ☞ *Ambl.* 204.

[8] It was but the single decision of *Reynolds*, Justice, who tried the cause, and for whose opinion a case was reserved.

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may supply the omission of express words, if they find a *plain intent*, but unless that is the case, they cannot do it; and upon full consideration of the whole of this will, we do not find there is sufficient for us to gather such intent, so as to warrant us in supplying the omitted words. Guesses may be formed, but that is not enough. Perhaps, *quod voluit non dixit*. We cannot make a will for the testator. Conjectures may be made both ways. The argument, which was drawn by Mr. *Howorth* from the devise of the *Lancashire* estate, turns the other way. There may be a reason why the testator might not intend the limitations over to take place, except in the event of the daughter's surviving her husband, *viz.* to secure the estate in tail to his grandson, *Hewitt Shipphard*, against any preference his daughter might shew to her issue by any subsequent husband. If she did not survive him, there could be no danger of that sort, as the estate would descend to *Hewitt Shipphard*. This bears no resemblance to the famous case of *Jones* v. *Westcomb (a)*, for, there, the intention was clear that, failing the child, the estate should go over to the devisees in all events.

Judgment for the plaintiff [☞] [F].

(a) *M.* 1711. *Prec. in Chanc.* 316. *Wilkinson, B. R. H.* 28 *Geo.* 3. 2 *Term Rep.* 209. 1 *Eq. Ca.* 245.

[☞] *Vide Doe, Lesse* of *Vessey*, v.

The KING *against* the MAYOR and BURGESSES of LYME REGIS, on the prosecution of DAVID ROBERT MITCHELL.

Monday, 8th Feb.

A return to a mandamus to restore, stating, that the prosecutor—"was not DULY ELECTED, admitted, and sworn"—is bad.

*[80]

MANDAMUS to restore *David Robert Mitchell* to the office of a capital burgess of *Lyme Regis*. The writ—after reciting that *Mitchell* was duly elected, admitted, and sworn, a capital burgess of the said borough, and as such capital burgess had always behaved and governed himself well, yet that they* the said mayor, *&c.* without any just or reasonable cause, had unjustly removed the said *Mitchell* from his office of a capital burgess—commanded them to restore him, or cause him to be restored, to his office, or to signify cause to the contrary.—To this, the defendants

[F]. *Vide Bradford* v. *Tolcy, suprà*, 63.

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fendants returned, "that *Mitchell* was not *duly elected*, "*admitted, and sworn*, a capital burgess of the said borough, "and therefore they could not restore him, or cause him "to be restored."

On *Saturday*, the 6th of *February*, the sufficiency of this return was argued, by *Rooke* for the prosecutor, and *Lawrence* for the defendants.

Rooke,—The return does not deny that *Mitchell* had been, *de facto*, in possession of the office of a capital burgess; therefore, the conclusion, that they cannot restore him, does not follow from the premises. The complaint is, that he has been removed from an office, from which they had no right to remove him. They may restore him, whether he was *duly* elected, sworn, and admitted, or not. The *mandamus* states, that he was duly elected, *&c.* only by way of inducement, and the defendants ought to have set forth the reasons for which they turned him out. The restoring him upon this *mandamus* could not decide the right. After he has been restored, *that* may be tried in a regular way by a *quo warranto*. The question is, Whether a corporation, having once admitted a member, can afterwards disfranchise him for want of an original qualification? Now it is so plain that they have no such authority, that there is not a hint of it in any case I have ever met with. The causes of a a motion are enumerated in *Bagg*'s Case, 11 *Co. (b)*, in *Carth.* 176. *(c)*, and in 1 *Burr.* 538. *(d)*, but this is no where stated as one of them.—(Lord MANSFIELD—"Are you not hampered by the writ?")—The writ is in the usual form. The word "*duly*" is in all the precedents in *Tremayne*, and the other books. It is merely a word of inducement. The gist of the complaint is the removal. All the general books, and many of the reports, confound the *mandamus* to admit, with the *mandamus* to restore. *Non fuit debitè electus* is a good return to the first, but not to the other, and this clue leads to the explanation of all the contradictory *dicta* on the subject. Upon principle, it is clear that a corporation ought not to have the power to remove a
[81] corporator *de facto*, on a defect of title. The franchise is the corporator's freehold. Entry by the feoffer cannot divest the estate of a man duly enfeoffed. After a descent cast the disseissee cannot recover the land by entry. So, a clerk who has been presented under a bad title, and has been instituted and inducted, acquires a possessory right, which cannot be divested but by *quare impedit*. The analogy between corporate

(b) *T.* 13 *Jac.* 1. 11 *Co.* 93. *b.*
(c) 2 *&* 3 *W. & M.* Sir *Thomas Earle's Case.*
(d) *E.* 31 *G.* 2. *Rex* v. *Richardson.* He cited also *Rex* v. *Mayor of Derby. T.* 8 *Geo.* 2. *Cases Temp. Lord Hardwicke* 153. and *Hereford's Case, T.* 16 *Car.* 2. *Sid.* 209.

porate and other rights would be overturned, if a man could lose his franchise for defect of title, by the mere vote of the corporation who admitted him. Great inconvenience would arise, if a power to disfranchise, on a defect of title, were vested in corporations. Many would be totally overturned by it. In this borough, the capital burgesses are elected only by the capital burgesses, but the disfranchisement is by the corporation at large. If they could disfranchise on a supposed want of title, the right to elect would be a nugatory privilege, in the select part, because it might be frustrated by an immediate removal by the whole body. It is easy to see, to what extent this power might be abused. After disfranchisement, and a *mandamus* to restore, the corporation might put the party to a traverse, or action on the return, and, if he succeeded, and obtained a peremptory *mandamus*, they might again dispute his title by *quo warranto*. Besides, this sort of removal may be put in practice at any distance of time,—after possession for 30, 40, 50, years,—although this court will not trust themselves with the authority of removal, in the regular way, after possession for twenty years [9.] The rule would be nugatory, if, by another mode, the limitation could be evaded. Certainly, when the court established the rule, it was intended to prevent any impeachment of a corporator's title after 20 years, by any private persons. This power, too, might be partially exercised, at very critical periods. For instance, a mayor elect might be amoved before he is sworn; and this is not ideal, for it happened in this very case. *Mitchell*, being mayor elect, was disfranchised as a capital burgess, by which means he could not be sworn into his office of mayor, without a *mandamus* to restore him; and, in the mean time, the old mayor now holds over. By the same sort of management, with a majority in the corporation, the same mayor might be continued for life. These are some of the inconveniencies which would follow from such

[9] This rule was established in the *Winchelsea* causes, *M.* 7 *Geo.* 3. 4. *Burr.* 1692. and explained in *Rex* v. *William Rogers*, *H.* 10 *Geo.* 3. 4 *Burr.* 2522 [F].

[F] In *the King* v. *Dickin*, 4 *T. R.* 282. It was decided that this period of twenty years was much too long to be allowed. Several decisions previous to the Winchelsea cases were referred to, in which a much shorter limitation had been adopted; and a general rule of court was made, limiting their own discretion in granting *quo warrantos* to six years, beyond which no person in possession of his franchise was to be disturbed. In conformity to this rule, the statute of 32 *G.* 3. *c.* 58. made possession for six years a good plea to a *quo warranto*, and a sufficient title to support the franchise of any person elected by a corporator who had exercised his right for that period.

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such a right vested in the corporation, and there can be none from their not possessing it.

*[82] *Lawrence,*—The question is, Whether the suggestion in the writ is sufficiently denied? In all cases, the party who applies for the *mandamus* is supposed to know his own title best, and if the right, as he states it, is denied by the return, that is enough. Unless the right is that which the party says it is, in the writ, the court cannot know that he has any right, and the motives which influenced them in granting the writ would no longer exist. Here, the suggestion is, that *Mitchell* had been *duly elected, admitted, and sworn*, and that he has been unjustly removed. If he was not *duly elected, admitted, and sworn*, the reason for restoring him ceases. Had the writ suggested only *that he was elected*, it would have been a bad return, in such case, to have said, that he was not duly elected, for that would then have been a negative pregnant. In the present return, every thing on which *Mitchell* founds his title is denied. Is it meant to be contended, that nothing but the fact of the removal can be questioned on a *mandamus* to restore? If so, it would not be competent even to deny that the party had ever been admitted. But I insist, that it is sufficient to deny any part of the title suggested, either the dueness of the election, or the dueness of the admission. In the case of *The King* v. *The Mayor of Lynne*, of which Sir *James Burrows* has furnished me with a note, and which is also reported in *Andrews (e)*, *Lord Chief Justice* LEE said, that it was enough if any part of the suggestion was denied. (BULLER, *Justice*,—" According to the note I have of it," he said, " if any *material part* was denied)." In the case of *The King* v. *Sir Henry Penrice*, reported in *Strange (f)*, it was held that if an immaterial circumstance is alledged, it is a good return to deny it, even though the answer amount to a negative pregnant. (WILLES, *Justice*,—" That was the case of a *mandamus* to *admit*." As to *Hereford's Case*, it does not appear there, nor in any of the other cases mentioned there, that the writ suggested that the party had been *debito modo admissus*, or *electus*. In the case of *The Queen* v. *Twitty (g)*, the suggestion being *debito modo electus*, and the return *non debito modo electus*, Lord *Holt* said, *that* was a good return, for it was an answer to the writ. That, indeed, was a *mandamus* to admit, but the reason given will apply in the case of a *mandamus* to restore. In *The King* v. *Lambert (h)*, which is reported in 12 *Modern (i)*,

[83] the writ, which was a *mandamus* to restore, was *debitè electus*, the return *nunquam debitè electus*, and it was held good

(e) *H.* 11 *Geo.* 2. *Andrews* 105.
(f) *T.* 18 *Geo.* 2. *Str.* 1235.
(g) *M.* 1 *Anne.* 2 *Salk.* 433.
(h) *M.* 2 *W. & M.*
(i) 12 *Mod.* 2.

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good, " because it was a direct answer." If *Lambert's case*, which is reported in *Carthew (k)*, is the same, it is there, by mistake, called a *mandamus* to admit. (BULLER, *Justice*, —" 12 *Mod.* is not a book of any authority)." In the case of *The King* v. *Hill* in *Shower (l)*, it appears, from Lord *Holt*'s argument, that the *mandamus* was to restore, and there, likewise, *non debito modo electus* was determined to be a good return, and for the same reason, " because it followed the writ." *Stevenson* v. *Nevenson*, as reported by Lord *Raymond (m)*, was a *mandamus* to restore, and it appears that, on the trial of the issues in that case, Mr. Serjeant *Pengelly* called witnesses to prove the *due* election. In *Crawford* v. *Powell*, the writ suggested a due election, and the return was, not duly elected, and was not objected to *(n)*. All those cases prove that the return may deny the suggestion in the very words of the writ. In *Hilary*, 16 *Geo.* 3. *The King* v. *The Churchwardens of Taunton St. James* [†37], was the case of a *mandamus* to restore *L. C.* to the office of sexton, suggesting that he was duly elected. The return was, " Not duly elected," and it was held to be good. (BULLER, *Justice*,—I argued that " case, and this point was not made a question. The return " also stated, that the sexton was also removeable at will, " and the argument went upon the question whether those " two matters could be joined in the return.") The precedents in *Tremayne* and other books afford no argument, for there is no settled form for this writ in the Register, and it is always adapted to the circumstances of the case. Either it is necessary to suggest the dueness of the election, or it is not; if it is, it is proper to deny it; if it is not, they ought not to have suggested it. As to the supposed negative pregnant in the return, *viz.* that it admits that *Mitchell* had been in possession, that is not so; it admits no part of the suggestion; neither his former admission, nor the removal. The sort of certainty required in returns, is ascertained by Lord *Holt* in the case of *The King* v. *The Mayor of Abingdon (o)*, and it appears there, that when a thing follows by necessary inference that will be sufficient. The court cannot intend from this return, that *Mitchell* had been in possession *de facto*, because the only allegation of the writ is, that he was duly in possession, and that is fully denied; yet, all the arguments of inconvenience proceed upon the supposition, that the return admits a *de facto* possession. On the other

[84]

(k) 170.
(l) *M.* 2 *W. & M.* 1 *Sh.* 253.
(m) *E.* 10 *Geo.* 3. 2 *Ld. Raym.* 1353. 1 *Str.* 583.
(n) *T.* 33 & 34 *Geo.* 2. 2 *Burr.* 1013.
[† 37] Since reported, *Cowp.* 413.
(o) *E.* 12 *W.* 3. 1 *Ld. Raym.* 559, 560.

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other side they have admitted, (by arguing the sufficiency of the return, and not traversing it,) that *Mitchell* was *not* duly elected. It appears, therefore, clearly, that he is without title, and, in such a case, although the return should be insufficient, the court will not award a peremptory *mandamus*; *Rex* v. *Tidderley* (*p*), *Basset* v. *The Mayor of Barnstaple* (*q*).

Rooke, in reply,—It seems to be agreed, that a corporation has no right to disfranchise its own members for want of title, and the only dispute now is, whether *Mitchell* was in possession. It is said that the writ suggests a due election, which the return denies, and therefore nothing is admitted by the defendants; but if, knowing our own case, we have stated it right, we ought not to be in a worse condition, than if we had only said that he had a bad title. They should have denied either the fact of admission, or the fact of removal; for the right is immaterial. In the case of *The King* v. *The City of Chester* (*r*) the court expressly makes the distinction between a *mandamus* to restore, and a *mandamus* to admit; and, wherever a case of *mandamus* has been decided with that distinction in view, and upon solemn argument, I will venture to assert that *non debito modo electus, admissus, et juratus*, has not been held to be a good return to a *mandamus* to restore. All the cases cited on the other side, which relate to offices not corporate, are beside the present question. The rights of churchwardens, sextons, and coroners, cannot be tried by *quo warranto*; therefore, where there are different claimants, the court will grant a *mandamus* to each, and let them litigate the right in that manner. If we were to take issue on this return, and go to trial, and obtain a verdict, the court could then only grant the peremptory *mandamus* on the ground of prior possession, for the right could not be questioned at the trial. The corporation cannot contest it at all; the King only by *quo warranto*. The conclusion of the return is, that they cannot restore. Why? Because *Mitchell* was not duly elected. That inference is not true, for they must restore, if there has been a *de facto* election. The return at most denies the actual possession only by argument, which is insufficient; for Lord *Holt* says, that the certainty in returns should be as great as in indictments.

[85] Lord MANSFIELD.—I have often said, that I was particularly anxious that every part of corporation-law should be settled on clear and certain principles, and not on nice subtleties and verbal distinctions. We will therefore consider of this question. At present, it strikes me to be sufficient if the suggestion

(*p*) *M.* 12 *Car.* 2. 1 *Sid.* 14.
(*q*) *E.* 18 *Car.* 2. 1 *Sid.* 286.
(*r*) *M.* 6 *W. & M.* 5 *Mod.* 10.

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suggestion of the writ is fully denied, whatever that is. I am not thoroughly aware of the sense and meaning of the distinction between elected and duly elected; because it seems to be a contradiction to say, that a man has been elected, and at the same time to say, he has not been duly elected; they seem to me the same. On an issue to try if a man has been elected, he must prove a due election. In general, where a person takes upon him to suggest what he was not bound to do, that may be denied. But another thing strikes me at present; the return should be such as, if true, would shew that the party has no *right* to be restored, and therefore it ought to deny the material part. In the case of *Lynne*, (a very full note of which Mr. *Justice* BULLER has shewn me,) they go very nicely into the arguments upon this head. There, it was denied that there was any admission. Here, they deny that *Mitchell* was duly elected, admitted, *and* sworn, in the conjunctive. Upon such an issue, he must prove all the three allegations; yet the dueness of his election is immaterial, for the corporation could not judge of the title. I give no opinion.

This day, his Lordship, after stating the writ and return, delivered the opinion of the court, as follows.

Lord MANSFIELD,—The question is, whether this is a sufficient return. The grievance complained of, by the person applying for the writ, is, that, having been duly elected, admitted, and sworn, he has been removed by the corporation; and *they* are to shew a just cause of removal. It is admitted, that they could not remove for want of an original title; but it is contended, that they have sufficiently answered the suggestions of the writ, and that issue may be taken, or an action brought, on the return. Upon full consideration, we are all of opinion, that the return must answer, not the words, but the materiality of the writ, and nothing shews this more than the nicety in the cases as to *elected* and *duly elected*. In the case of *Lynne*, the whole turned upon the question, Whether it was a return to the material part? A return which seems to be guarded, and not to deny the substance, is bad, although I rather think nothing is an election but a *due* election. Here the material suggestion is the removal. They were not to judge of the title. The return is in the conjunctive,—not duly elected, admitted, *and* sworn,—and, therefore, fallacious. If the truth would have warranted it, and they had returned not duly elected, *or* admitted, *or* sworn, it might have been good. We are all of opinion, that the return is insufficient, and therefore a peremptory *mandamus* must issue.

[86]

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Monday, 8th Feb.

DEVON and Another, Assignees of GASCOYNE, a Bankrupt, *against* WATTS.

An assignment of a lease, part of a bankrupt's estate, made, in contemplation of a bankruptcy, to some of the creditors, is an act of bankruptcy.

IN an action of *trover*, by the assignees of a bankrupt, a verdict having been found for the plaintiffs, and a rule obtained to shew cause why there should not be a new trial, the case came on to be argued this day, when the question was, Whether, under the particular circumstances, an assignment of a lease which had been made by the bankrupt, was an act of bankruptcy?

Upon the report of the evidence, the facts appear to be, That on the 30th of *November*, *Gascoyne*, the bankrupt, sent for one *Hall*, his attorney, to advise with him about his affairs, when he shewed *Hall* a decree of the court of *Chancery* against him, and told him, he had been served with a *subpœna*, and was threatened with an attachment, but was not able to pay the money. He asked *Hall*, whether his creditors could be forced to take a composition, who told him they could not, and that, if the attachment should issue, he must pay the money. He then told *Hall*, that some of his creditors had looked into his affairs, and they thought he could not pay above eight shillings in the pound. *Hall*, upon this, advised him to become a bankrupt. He sent again for *Hall*, on the 2d of *December*, and then named to him some creditors who had been long great friends to him, and had indorsed bills for him which were not yet due, which would distress them, and said, that as he could not pay the bills, the only method by which he could secure them, would be, by an assignment of the lease in question. On the 3d of *December*, *Hall* went to him again; and was told by him, that *Cox*, one of his creditors, had been with him, and had said that *Blake*, attorney for *Cox*, thought matters might be settled without a bankruptcy. At four or five o'clock in the afternoon of the 3d of *December*, the assignment of the lease was executed to three of his creditors—*Watts*, *Giles*, and *Hall*.

[87]

After the execution of the assignment, *Hall* went to *Blake*, when, upon his stating to him the situation of *Gascoyne*'s affairs, *Blake* agreed it was proper a commission should be sued out. Some of the creditors were present at this meeting, and mentioned the lease as a part of *Gascoyne*'s estate; on which *Hall* told them of the assignment, but did not mention when it was made. The lease was worth about £400, and was only assigned to secure about £250, and was then to be held in trust for the bankrupt, his executors, administrators, and assigns. The assignment recited that *Giles* had become security

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rity for the bankrupt. *Hall* had lent him money, and several bills and notes had been indorsed for the bankrupt, by *Watts*, *Giles*, and *Hall*, which remained unpaid, and he had agreed to assign the lease, in order to secure the payment of those debts.

Dunning and *Peckham*, for the plaintiffs.—The *Solicitor General*, for the defendant.

For the plaintiffs, it was argued, that this was a fraudulent conveyance within the statute of 13 *Eliz. c.* 5.; and that, by 1 *Jac.* 1. *c.* 15. fraudulent conveyances are made acts of bankruptcy. Three facts are clear: 1. *Gascoyne* was insolvent at the time of the assignment, for, by his own account, he could only pay eight shillings in the pound. 2. He intended to prefer the assignees of the lease, to his other creditors. 3. When he made the assignment, he intended an act of bankruptcy. In *Worsley* v. *Demattos* (*s*), an assignment, by deed, of *all* a trader's stock, though by way of security, and for a valuable consideration, was held to be an act of bankruptcy. In *Linton* v. *Bartlett* (*t*), an assignment, by deed, of only *one third* of the bankrupt's effects, by way of security, was determined to be an act of bankruptcy. In the case of *Rust and Another, Assignees of Papps* v. *Cooper*, which was determined in this court *T.* 17 *Geo.* 3. a parol assignment of *part* [F 1], as a security to a creditor, and under very favourable circumstances, but in contemplation of an act of bankruptcy, was held to be a fraud against the bankrupt-laws, and therefore void [† 38]. It was not an act of bankruptcy, because it was not by deed, but such an assignment by deed is in itself an act of bankruptcy.

For the defendant, it was said, that the assignment was of real property, and there was a *bonâ fide* consideration for it. The circumstances of the overplus, after paying the creditors to whom the assignment was made, being limited to the bankrupt, (which was insisted upon on the other side as evidence of an intention to defraud the other creditors,) is a proof of the fairness of the transaction. It is like the case of a mortgage,

[88]

(*s*) *B. R. H.* 31 *G.* 2. 1 *Burr.* 467.
(*t*) *C. B. H.* 10 *G.* 3. 3 *Wils.* 47.

[† 38] Since reported, *Cowp.* 629.

[F 1] A reported direction of Lord Mansfield at Nisi Prius, in *Hooper* v. *Smith*, 1 *Bl. Rep.* 442. must be incorrect. The distinction is laid down in *Newton* v. *Chantler*. 7 *East*. 138. that conveyance of the whole must necessarily be presumed an act of bankruptcy, whereas a conveyance of part depends upon the circumstances of the case, *vid. Butcher* v. *Easto*, *infrà* 295.

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gage, where the mortgagee must account for the overplus to the mortgagor, or those who stand in his place. If the surplus had been limited to the other creditors, or the assignees, *that* would have plainly shown that an act of bankruptcy was in contemplation. *Worsley* v. *Demattos* went on the particular circumstances of the case, which were very strong, but it was not there laid down, as a general rule, that a *bonâ fide* assignment to a fair creditor, even though in contemplation of an act of bankruptcy, is void. *Rust* v. *Cooper* differed from this case, for, there, it was clear the bankrupt could not stand longer than the *Saturday*, and the order was sent, by express, to deliver the goods before that time. The creditors, here, were informed of the assignment, and did not object to it. It was said, this assignment was a fraud, in particular, upon the creditor under the decree and attachment, but *he* could not have taken the lease, if there had been no assignment, the attachment being only an execution against the person.

Lord MANSFIELD said, he continued of the same opinion which he had entertained at the trial, *viz.* that this was a fraudulent deed, and an act of bankruptcy. He thought it was fraudulent on two grounds: 1. It was fraudulent against the creditor under the decree. The court of *Chancery* would have relieved him against the defendant, and given him the benefit of the lease, notwithstanding the assignment was for a valuable consideration; for if any man, knowing of a judgment, or a decree, purchases, though for a full value, the purchase is fraudulent and void. This was established in *Twyne's Case (u)*. The creditor in equity might have had a sequestration of the lease. 2. In the other view, the assignment was a clear fraud against the general creditors under the bankrupt-laws. The bankrupt was advised, and agreed, to have a commission sued out; and, after that, made the assignment. It was said, the creditors were told of the assignment. The manner in which they were told of it was the worst part of the case; for the bankrupt concealed from them, when or how it was made, and they had no reason to suppose that it was not made long before. All amicable commissions are agreed to by the creditors, on the idea that there is to be no preference.

[89] BULLER, *Justice*, observed, that the preference given to the defendant, and the two other assignees of the lease, was voluntary, for they had not applied to the bankrupt for payment of their debt. The motive perhaps was not culpable, but the transaction was contrary to the general policy of the law.

The rule discharged [† 39].

(u) M. 44 Eliz. 3 Co. 80. b.

[† 39] Since the former edition of these

these Reports was published, the following important case has been determined in the court of *King's Bench*.

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HASSELLS and Another, Assignees of JACKSON, a Bankrupt, *v.* SIMPSON.

This cause came on in *M.* 21 *Geo.* 3. before his honour the late Master of the Rolls, (Sir *Thomas Sewell,*) who directed an issue to try the following question; *viz.* "Whether *Jackson* was a bankrupt, within the true intent and meaning of the several statutes made relating to bankrupts, at the time of the execution of a certain indenture, dated the 14th of *August* 1773, and made between the said *Jackson*, (therein described to be a mercer and grocer,) of the one part, and the defendant on the other part, witnessing, among other things, that the said *Jackson* had sold and delivered to the said defendant, all the household-furniture, goods, chattels, and personal estate, of the said *Jackson*, (except as therein excepted,) subject to the proviso therein mentioned?"

The trial of this issue came on, at the spring assizes for the county of *Stafford*, 21 *Geo.* 3. before *Nares*, Justice, when a verdict was found for the plaintiffs.

In Easter Term following, *Howorth* obtained an order, in the court of Chancery, to shew cause, why there should not be a new trial; which was afterwards argued, on the 21st of *June*, 21 *Geo.* 3. but the Lord *Chancellor* did not deliver his opinion till *April*, 23 *Geo.* 3. when the order was made absolute.

The second trial came on before the same Judge, and a special jury, at the summer assizes for *Staffordshire*; and, upon that occasion, a case was reserved for the opinion of the court, the purport whereof was as follows:

Ralph Jackson, of *H.* in the county of *Stafford*, grocer, was, on the 28th of *November* 1777, being the day on which the commission of bankrupt issued, a trader, within the true intent and meaning of the several statutes made, and now in force, concerning bankrupts. He became indebted to the petitioning creditor, in £100 by bond, bearing date the 13th of *August* 1770, and payable on the 13th of *February* 1771. Some days previous to the 14th of *August* 1773, he applied to one *Child*, an attorney and conveyancer, to propose an indemnity to *Simpson*, the defendant, against a bond in which *Simpson* had joined with him, to a Mrs. *Bartlom*. At the time of this application, *Child*, to whom he was quite a stranger, asked him what property he had; and he answered, that he had the newly built house, mentioned in the indenture of the 14th of *August* 1773, besides his household goods and stock in trade. He had no writings with him. *Child* then asked, Whether he had any objection to include the household goods and stock in trade, in the indemnity? He said, he had not; and that he had drawn rather too much money out of trade, towards building the house; and that the money borrowed of Mrs. *Bartlom*, and for which *Simpson* had become bound, was to replace the money so taken out of trade; and that he wished to indemnify *Simpson*, in such manner as *Child* should think reasonable and right. Thereupon, *Child* prepared the indenture in question.

It recited, That the defendant, at the instance and request of *Jackson*, and for his proper debt, together with *Jackson*, was, by a bond of the same date, bound to Mrs. *Bartlom*, in the penal sum of £400, conditioned for the payment of £200 with interest, on the 14th of the ensuing *February*; that it was agreed between *Jackson* and the defendant, before the execution of the said bond, that the defendant, his heirs, executors, and administrators, should be sufficiently indemnified

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demnified therefrom, out of the copyhold and personal estate of *Jackson* therein mentioned; and that he should surrender, grant, and assign, the same to the defendant, his executors, administrators, or assigns, in such manner as he or they should direct, for the purpose aforesaid. It then witnessed, that, in pursuance, and in part of the performance of the said agreement, and in order to indemnify the defendant, his heirs, executors, and administrators, from and against the said bond, and the principal and interest thereby secured, and all costs, charges, and trouble, any ways concerning the same, the said *Jackson*, for himself, his heirs, executors, administrators, and assigns, did covenant with the defendant, his heirs, executors, and administrators, and every of them, that the said *Jackson* and his heirs, and all other persons having any estate or interest in the copyhold premises therein after-mentioned, should, at his and their costs and charges, within three months after the date of the said indenture, at some court baron, to be held for the manor of *Newcastle under Lyne*, surrender into the hands of the lord of the said manor, or of his steward, according to the custom of the said manor, free from all incumbrances, all that new erected copyhold messuage, situate in *S.* within the said manor, then in the occupation of *Jackson*, or his under-tenants or assigns, together with all barns, stables, &c. thereto belonging, to the use of the defendant, his executors, administrators, and assigns, for the term of 500 years, to be computed from the date of the surrender; provided, that if *Jackson*, his heirs, executors, or administrators, should, on or before the 14th of *February* next ensuing, pay the said £200 and interest to Mrs. *Bartlom*, and, in the mean time, and until payment thereof, should

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save harmless, and keep indemnified, the said defendant, his heirs, executors, and administrators, and his and their goods, chattels, lands, and tenements, from and against the said bond, and the principal and interest thereby secured, and all costs, charges, &c. concerning the same, then the said indenture, and the surrender so to be made, should from thenceforth cease, determine, and become void. Then there was a covenant by *Jackson* to pay the £200 and interest according to the said proviso, and that he had done nothing to charge or impeach the title to the said messuage. The indenture then further witnessed, that, for the same considerations, and in further part performance of the said agreement, *Jackson* did bargain, sell, and deliver to the defendant, his executors, administrators, and assigns, all the household-furniture, goods, chattels, and personal estate, of the said *Jackson* therein mentioned; that is to say, &c. (here followed an inventory of furniture in *Jackson*'s house), and all other the goods, chattels, stock in trade, and personal estate, whatsoever, of him the said *Jackson*, situate at *S.* aforesaid, or elsewhere in the kingdom of *England*, (wearing-apparel excepted,) to hold the same, to the defendant, his executors, administrators, and assigns, for ever, subject, nevertheless, to the proviso aforesaid; and the said *Jackson* did thereby grant to the defendant, his executors, administrators, and assigns, in default of the payment of £200. and interest, on the day mentioned in the proviso, full power, at any time or times, to enter into the premises of the said *Jackson*, and to take, carry away, and sell, any of the said goods and chattels. Then *Jackson*, by the said indenture, for himself, his heirs, executors, and administrators, covenanted with the defendant, his executors, administrators, and assigns, that they would warrant and defend the goods and chattels so bargained and sold to the defendant, his executors, administrators, and assigns,

signs, subject to the said proviso, against him the said *Jackson*, his executors and administrators, and every other person and persons whatsoever; of all which goods and chattels the indenture stated, that the said *Jackson* had put the defendant in full possession, by delivering to him a silver teaspoon, in the name of all the said goods and chattels, at the sealing and delivery of the said indenture.

This indenture was duly executed by *Jackson*. A commission of bankrupt, bearing date the 28th of *November*, 17 *Geo.* 3. issued against him; and his estate and effects were assigned by the commissioners to the plaintiffs, on the 31st of *December*, 17 *Geo.* 3. *Jackson*, at the time of the execution of the indenture, was in full credit. The house therein mentioned was then worth £400, and his personal estate worth £800 more. He continued in trade, and in credit, until the month of *October* 1776.

The question stated for the opinion of the court was the same with that contained in the terms of the issue.

The case came on to be argued, *M.* 24 *Geo.* 3. on *Tuesday* the 25th of *November*, by *Nares* for the plain-
[91] tiffs, and *Bower* for the defendant; but, it being alleged, on the part of the defendant, that *Jackson* was worth a great deal more than the money borrowed of Mrs. *Bartlom*, at the time of the execution of the indenture, and that it did not appear, on the case, that he owed any thing at that time, but that debt, and that due to the petitioning creditor; the court directed the argument to stand over till the next term; and that, in the mean time, the parties should enquire, whether *Jackson* owed any other debts at that time, and, if it should appear that he did, that an addition, stating such other debts, should be made to the case.

No such addition, however, was made, and the case came on again for argument, in *H.* 24 *Geo.* 3. on *Tuesday*, the 3d of *February*.

Lord *Mansfield* directed *Bower* to begin.

He informed the court, that, in consequence of what had passed last term, there had been an attendance at *Buller*, Justice's chambers; and that the defendant had there offered to admit any debt, previous to the execution of the indenture, which the plaintiffs should verify by affidavit, and that they had not attempted to prove any in that manner. The defendant, he said, cannot prove a negative; and, therefore, the court will presume that *Jackson* was no otherwise indebted than as is stated in the case.—(Lord *Mansfield*.—"The court will not presume one way or the other; the case only says, *Jackson* was in good credit; a man may be in very good credit, and yet owe a great deal.")—This case has been twice before the Chancellor on the same state of facts that appears now before this court; and his Lordship strongly inclined to think there was not enough to establish an act of bankruptcy. The question is, Whether the assignment and conveyance, contained in the indenture in question, being expressly made as an indemnity to the surety, is such a conveyance as constitutes an act of bankruptcy, within the meaning of the statute of 1 *Jac.* 1. *c.* 15. § 2. the words of which are, "or make, or cause to be made, any "*fraudulent* grant, or conveyance, of "his, her, or their, lands, tenements, "goods, or chattels, to the intent, or "whereby, his, her, or their, creditors shall or may be defeated or "delayed, for the recovery of their "just and true debts?" As to actual fraud, or undue preference, no such thing was pretended, or attempted to be proved. *Jackson* does not appear to have owed more than £300 to all the world at the time; and this case differs materially from all the others which have arisen on this clause of the act of Parliament, in this circumstance, that the party, to whom the conveyance was made, was not a

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creditor at all at the time, nor then likely ever to become a creditor. It is not stated that he ever did, and, in fact, he did not, become a creditor till after the commission of bankruptcy issued. It may be proper to mention the leading cases, to shew how much they are distinguishable from the present. In *Worsley* v. *Demattos (a)*, the conveyance was, it is true, an indemnity; but it was made at a time when the bankrupt was so much indebted, as to be unable to carry on his trade, without the assistance of *Demattos*; and it was made for the purpose of being a floating security to him, for contingent acceptances of bills to be drawn upon him by the bankrupt. There were, besides, many circumstances of fraud in that case. In *Linton* v. *Bartlet (b)*, the assignment was to an actual creditor at the time, and was made when the party was insolvent, and on the very eve of absconding to avoid his creditors. In *Wilson* v. *Day (c)*, the party was insolvent at the time of the assignment; it was executed under very fraudulent circumstances, to protect, and prefer, a favourite creditor; and only a few days before the bankrupt absconded. In *Compton* v. *Bedford (d)*, the bill of sale was, in like manner, executed under the impression of an immediate insolvency, to give a preference to favourite creditors, and the very day before the party absconded. These are all the material cases, except that of *Law* v. *Skinner*, which shall be mentioned afterwards. In the present case, the defendant could not have taken possession of the estate, or goods, under the indenture, at any one time, prior to the commission. If he had, the estate might have been recovered from him by *Jackson*, in ejectment, [F 2] and the goods in trover; for the court will not permit a trustee to keep possession against his [92] *cestui que trust (e)*. It may be said, that the leaving *Jackson* in possession gave him a false credit. But will it be contended, that his credit would have been worse, if the transaction had been publicly known? If Mr. *Hoare*, the banker, were to make an assignment of all his property to secure the payment of £20, would such an act, when known, hurt his credit, or make him a bankrupt? The circumstance of the amount of the debt in proportion to the property is what affects credit, not the amount of the security. As to the case of *Law* v. *Skinner (f)*, it was decided on a principle which certainly is not law; for the Chief Justice is there made to say, that the question turned upon this, "Whether the deed did not, *ipso facto*, create an *insolvency* in the trader? that, if so, it was clearly an act of bankruptcy (*g*)."—(Lord *Mansfield*—"You are

(*a*) *B. R. H.* 31 *Geo.* 2. 1 *Burr.* 467.

(*b*) *C. B. H.* 10 *Geo.* 3. 3 *Wils.* 47.

(*c*) *B. R. T.* 32 & 33 *Geo.* 2. 2 *Burr.* 827.

(*d*) *Guildhall*, after *H.* 2 *Geo.* 3. *coram* Lord *Mansfield*, 1 *Blackst.* 362.

(*e*) *Infra*, p. 695.

(*f*) *C. B. E.* 15 *Geo.* 3. 2 *Blackst.* 996.

(*g*) 2 *Blackst. l. c.* 997.

[F 2] Vide note to *White* v. *Hawkins*, *suprà* p. 23.

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are right; a man may be insolvent, without being a bankrupt; and a man may become a bankrupt, and yet be able to pay 25*s.* in the pound. The reason why a man becomes a bankrupt, who conveys away all his property, is, that he thereby becomes totally incapable of trading.")—Here, the proviso would have prevented the defendant from entering or taking possession at the time of the execution of the indenture; therefore the defendant could not have stopped *Jackson*'s trading. To hold him to have become a bankrupt by the assignment, the court must decide, that the defendant could have taken possession under it. But he could not. If he had, it would have been a tortious act, and he would have been liable to be sued for it, as such, by *Jackson*.

Nares, for the plaintiffs,—The Master of the Rolls declared a pretty strong opinion, that the assignment, in this case, was an act of bankruptcy, and the Chancellor gave no opinion to the contrary: he only expressed doubts on the subject. *Jackson*, at least, owed £100 to the petitioning creditor at the time of the assignment, and that conveyance certainly tended to delay *him* in the recovery of his just debt. The instant *Jackson* failed in the payment of the bond-debt to Mrs. *Bartlom*, the defendant had a right to take possession under the assignment, *Law* v. *Skinner* was the solemn and unanimous decision of the court; and this is to the full as strong a case as that was. There, the bankrupt continued in credit near two years after the assignment. A conveyance of *part* of a trader's property *may* be fair; a conveyance of the *whole must* be against the statute.

Bower, in reply, contended, that the execution of the assignment must have been an act of bankruptcy, at the time when it took place, or could not become so afterwards.

Lord *Mansfield*,—I have endeavoured to find out where there can be a doubt in this case. A fraudulent disposition of a trader's property is void against his creditors; and, if it is done by deed, it is by force of the statute of *James* an act of bankruptcy. In the present case, the assignment is by deed; and what has the trader done by that deed? Why, to secure the defendant against the consequences of being surety for him, he conveys a copyhold estate, and also all his goods, furniture, stock, &c. to the defendant. He enumerates the goods specifically, and in detail, and gives a sham possession, by delivering a spoon. It has been settled, over and over, that, if a trader makes a conveyance of all his property, *that* is, instantly, an act of bankruptcy. It is fraudulent: it destroys the capacity of trading. In this case, *Jackson* could not fairly sell an ounce of merchandize after the assignment. The whole belonged to another man. It was a fraud in *Jackson* to deal with any body as a trader. There is another ground. By the assignment *Jackson* defeated every other creditor. The petitioning creditor was deprived of the benefit of an action. There was nothing left for him to take in execution, if the deed was valid. But it may be said to have been void against creditors, and that the goods might still have been taken in execution, under the statute of Queen *Elizabeth* (*h*). If so, it was fraudulent, and therefore an act of bankruptcy, under the statute of *James*. It makes no difference that *Simpson* was not a creditor at the time. It was a preference to him, when he should become a creditor. Another thing: It does not appear that *Simpson* applied for, or knew of, the assignment. *Jackson* sent

(*h*) 13 *Eliz. c.* 5.

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sent for the attorney, who, I think, blundered. If he had only made a conveyance of copyhold estate, it might have made a difference; though I give no opinion on that head [r 3]. After the number of cases that have been decided, I can have no doubt. We must not always rely on the words of reports, though under great names: Mr. Justice *Blackstone*'s reports are not very accurate.

Willes, *Ashhurst*, and *Buller*, Justices, concurred in opinion with his Lordship.

The *postea* to be delivered to the plaintiffs.

The cause, I believe, has never since come on in the court of Chancery, for farther directions.

Vide also *Butcher* v. *Easto*, *M.* 20 *Geo.* 3. *infra*, *p.* 282.

(h) 13 *Eliz. c.* 5.

Monday, 8th Feb.

COGHLAN *against* WILLIAMSON.

In an action on a bond, if the defendant's admission of the debt is proved, and that the subscribing witness cannot be got, it will be sufficient to prove the defendant's hand-writing [F].

IN an action of debt upon a bond, tried before Lord MANSFIELD, on a plea of *non est factum*, it appeared, by the bond, that the subscribing witness was one *Steele*. He was not produced, but the plaintiff proved that one *Steele* had gone to the *East Indies* about five years ago as a *cadet*, in a ship in which the defendant was purser. Enquiries had been made after him, and it did not appear that he had ever returned.

[r 3] In *ex parte Cockshott*, 3 *Br. Ch. C.* 502. it was held by the Lord Chancellor, that a surrender of a copyhold could not be an act of bankruptcy; because copyhold is not subject to *fieri facias* or *elegit*.

[F] In *Barnes* v. *Trompousky*, 7 *T. R.* 265. This case was admitted and approved by the court, and said to be the first deviation from the ancient general rule; but it was ruled that if the subscribing witness is a *known* person residing abroad, proof of the hand-writing of the party will not be sufficient, without proof of the hand-writing of the subscribing witness. In *Wallis* v. *Delancey*, *ibid in not.* where there were two witnesses to a bond executed abroad, it was held that proof of the hand-writing of one, *and that of the party*, coupled with very slight evidence that the other witness was abroad, was sufficient to go to the jury. In *Adams* v. *Kerr*, 1 *B. & P.* 360. it was held that this evidence was sufficient, *without proof of the hand-writing of the party*. S. P. Adm. *Cunliffe* v. *Sefton*, 2 *East.* 183. and *Prince* v. *Blackburn*, *ibid.* 250. in which it was also held to make no difference whether a witness is domiciled abroad, or only absent for a temporary purpose.

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returned. *Webb*, a captain in the *East India* Company's service, said he was in the trading way in *India*. The plaintiff had applied to the defendant to settle the bond, when the defendant offered to pay £80 immediately, and to settle the rest of the debt, with interest, at the end of the year. The plaintiff refused to agree to this proposal, upon which the defendant said, that he could not recover, for the bond was executed on shipboard, and that he could not get the witness. The defendant's hand-writing was proved, and also a receipt, and subscription to a bond to the *East-India* Company, by *Steele*.—Upon this evidence, Lord *Mansfield* directed the jury to find a verdict for the plaintiff; and, now, upon shewing cause against a rule for entering a nonsuit, the question, Whether, under the above circumstances, the evidence of the defendant's hand-writing was admissible? came on to be argued by the *Solicitor General* and *Davenport*, for the plaintiff, and *Dunning* and *Morgan*, for the defendant. But the counsel for the defendant thought it was impossible for them, after the admission by the defendant, as above stated, to support the rule.

The rule discharged, with costs [☞].

[☞] Vide *Lord Ferrers* v. *Shirley*, *B. R. H.* 4 *Geo.* 2. *Fitzg.* 195, 196. *Gould* v. *Jones*, *Tr.* 2 *Geo.* 3. Law of *N. Pr.* 236. By 26 *Geo.* 3. *cap.* 57. § 38. bonds and deeds executed in the *East Indies*, when the subscribing witnesses reside there, are made evidence in *Great Britain*, on proofs of the hand-writing of the parties and of the witnesses.

* BOYCE *against* WHITAKER.

Tuesday, 9th Feb.

If the defendant undertake to set forth the statute of 23 H. 6. c. 9. in a plea to an action on a sheriff's bond, a misrecital is fatal.—If the replication conclude with a verification, it will be bad, upon special demurrer.

THIS was an action of debt on a bail-bond, brought by the plaintiff, as assignee of the sheriff of *Kent*. The defendant prayed oyer of the bond and condition, and set forth the condition, which was in the usual form, and then *pleaded*, "That, before the making of the writing obligatory afore-"said, to wit, by a certain act made in a parliament of the "said *Henry* the 6th, held at *Westminster*, in the county of "*Middlesex*, on the 25th day of *February*, in the 23d year "of

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See *Abbot* v. *Plumb*, *infrà* 216.

In *Swire* v. *Bell*, 5 *T. R.* 371. where the subscribing witness was interested at the time of the execution, as well as at the trial, it was held that proof of his hand-writing would be sufficient, coupled with that of the party; though it would not be admissible by itself, in that case, as it would where the witness became interested since the execution.

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" of his reign, it was, among other things, enacted, by the " authority of the same parliament, that no sheriff, under- " sheriff, sheriff's clerk, steward, or bailiff of franchise, ser- " vant of bailiff, or coroner, should take any thing by colour " of his office, by him, nor by any other person, to the use of " any person, for the making of any return, or panel, and " for the copy of any panel, but fourpence. And that the " said sheriffs, and all other officers and ministers aforesaid, " should let out of prison all manner of persons, by them, " or any of them, arrested or being in their custody, by force " of any writ, bill, or warrant, in any action personal, or by " reason of indictment *by* trespass, upon reasonable sureties " of sufficient persons having sufficient within the counties " where such persons be let to bail, or mainprize, to keep their " days in such place as the said writ, bills, or warrants, " should require; such person or persons which were or " should be in their ward by condemnation, execution, *capias* " *utlegatum*, or *excommunicatum*, surety of the peace, and " all such persons which were or should be committed to " ward by special commandment of any justices, and vaga- " bonds refusing to serve according to the form of the statute " of labourers, only excepted. And that no sheriff, nor " any of the officers or ministers aforesaid, should take, or " cause to be taken, or make any obligation, for any cause " aforesaid, or by colour of their office, but only to them- " selves, of any person which should be in their ward by the " course of the law, but by the name of their offices, and " upon condition written, that the said prisoners should ap- " pear at the day contained in the said writ, bill, or warrant, " and in such places as the said writs, bills, or warrants, " should require. And if any of the said sheriffs, or other " officers or ministers abovesaid, take any obligation in other " form, by colour of their office, that it should be void, as [95] " by the same act, among other things, more fully appeared." That the defendant was arrested at the said time of making the said writing obligatory, (6th *July* 1778,) by the sheriff of *Kent*, on a *pluries latitat* returnable on *Wednesday* next after three weeks of the *Holy Trinity* (1778), and that the sheriff, upon that arrest, took bail, the writing obligatory aforesaid, with the condition aforesaid, for *ease and favour* to the said defendant of his imprisonment by the said sheriff shewn, and to have and obtain his deliverance therefrom; which said writing obligatory the said sheriff took by *colour of his office*, against the form of the statute *aforesaid*.—The plaintiff *replied*, that the defendant, *before* the return of the writ in the declaration mentioned, to wit, on the day of the date of the bond, *viz.* 4th *July* 1778, as bail for his appearance at the return of the writ sealed, and, as his act and deed, delivered, the bond, in the manner in the declaration mentioned,

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tioned, *without this*, that the said sheriff, upon the arrest of the defendant in the plea mentioned, took bail, the writing obligatory aforesaid, with the condition aforesaid, for *ease and favour* to the defendant of his imprisonment by the said sheriff shewn, in manner and form, &c. and "*this the said defendant is ready to verify*."—To this replication the defendant *demurred*; and shewed for cause, "That the replication, denying the whole substance of the plea, concluded with a verification, and to the court; whereas it ought to have concluded to the country."

Baldwin, for the defendant, and contended, that this case was within the reasoning and general principle laid down in *Trapaud* v. *Mercer* (*v*), *viz.* "that, wherever there is an affirmative and a negative, the conclusion ought to be to the country." He said, that the plea and replication here were analogous to the pleas and replications in actions on the statutes against gaming and usury; and that, in those cases, the replication always concludes to the country. He also cited, as in point, a case of *Ash* v. *Walker*, which had been determined in this court last term.

Morgan, for the plaintiff, insisted, 1. That the conclusion of the replication was right. 2. That the plea was bad, and therefore at all events the plaintiff would be entitled to judgment. 1. As to the first point, he cited *Foden* v. *Haines* in *Carthew* (*w*), where, although there was a demurrer to a replication like the present, and which concluded with a verification [10], no objection was made on that ground; and he observed, that, by the report of the same case in *Comberbatch* (*x*), the court is stated to have said, that the plaintiff should have alleged, that the bond was *pro bono et vero debito*, and then *traversed* the ease and favour. He also cited *Lenthal* v. *Coke*

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(*v*) *T.* 33 & 34 *G.* 2. 2 *Burr.* 1022.

(*w*) *B. R. E.* 6 *W.* & *M. Carth.* 300.

[10] It is not stated, either in *Carthew* or *Comberbatch*, that the replication, in that case, concluded with a verification. *Morgan* inferred that it did, probably because of the traverse; but although it is a general rule that a traverse must conclude with a verification, yet it may, and, when it comprises the whole substance of the plea, it ought to conclude to the country [† 40]; *Haywood* v. *Davies*, 1 *Salk.* 4. *pl.* 10. *Robinson* v. *Railey*, 1 *Burr.* 316.

(*x*) *Comb.* 245.

[† 40] In *Mullinor* v. *Wilkes*, *B. R. E.* 23 *Geo.* 2. cited *infra*, *p.* 414. *Buller*, Justice, said, there is no case where it has been held, that a traverse with an inducement should not conclude to the court; and that, therefore, that was the safest way. [☞] Vide *Hedges* v. *Sandon*, *B. R. E.* 28 *Geo.* 3. 2 *Term. Rep.* 439.

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Coke, in *Saunders* and *Siderfin (y)*, where the replication was exactly similar to this, concluding with a traverse of the ease and favour, and a verification; and yet, on a special demurrer, the present objection was not made. He mentioned also a precedent of the same sort in *Ashton's Entries, title Debt (z)*. 2. He argued that the plea was bad on two accounts. In the first place, because the statute of *Hen. 6.* was misrecited, there being two variances, *viz.* "indictments "*by* trespass," instead of "indictments *of* trespass" and "*capias utlegatum*" instead of "*capias utlagatum*." In the second place, he said, the plea was bad, because it averred matter *dehors* the deed, contradictory to the condition; for the condition stated the bond to have been taken for the defendant's appearance, and the plea averred it to have been for ease and favour; that, if the condition had been for the payment of money, ease and favour might have been averred, because that might not have been inconsistent. He cited, on this head, 5 *Com. Dig.* 224. *Cock* v. *Ratcliffe, Cases temp. Hardwicke*, 287. and *Collins* v. *Blantern (a)*, [11].

Baldwin, in reply, observed, as to the conclusion of the replication, that, in none of the cases cited by *Morgan*, the concluding with an averment had been assigned as a cause of demurrer. With regard to the mis-recitals of the statute, he

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said, that, if it is a public act, the court would not take notice of them, and, if a private act, the plaintiff ought to have replied "*nul tiel record*" [†41].

Lord

(y) M. 20 *Car.* 2. 1 *Saund.* 156. 1 *Sid.* 383.

(z) Ashton, 266, 267.

(a) C. B. E. 7 *G.* 3. 2 *Wils.* 352.

[11] That case was an action on a bond, conditioned for the payment of a sum of money. The defendants pleaded, after setting forth the condition, that it was entered into as an indemnification to the plaintiff for a note which he had given to a person to bribe him not to appear as a witness on an indictment. The plaintiff demurred generally; and it was argued, that this was an averrment of matter *in pais dehors* the deed, and therefore bad; but the court over-ruled the demurrer, on the ground that the deed was void *ab initio*. *Morgan* must have cited this case therefore by way of anticipation, and to distinguish it from that before the court.

[† 41] In the case of *Rex* v. *Wilde*, *B. R. M.* 21 *Car.* 2. 1 *Lev.* 396. which was an information under a *private* act of parliament, after verdict for the prosecutor, on the plea of "not guilty," a motion was made in arrest of judgment, because there was a mistake in setting forth the commencement of the parliament. The answer given was, that, being a private act, the court could not take notice of the mistake, on that motion, as it did not appear on the record, and that the defendant ought to have pleaded *nul tiel record*; but the court held that they were bound to take notice of the commencement, prorogations, and sessions of parliament. It seems to follow from that case, that misrecitals of private acts in other respects can only be taken notice of by the court, when there is a plea of *nul tiel record*. *Vide*, to that effect, *Platt* v. *Hill*, *B. R. M.* 10 *W.* 3. 1 *Ld. Raym.* 381. 1 *Salk.* 330.

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Lord MANSFIELD said, that, if the defendant had unnecessarily set out [F 1] the act of parliament, which it seemed to him he had, he would hold him to half a letter [12]; [☞] and that, as to the other objection to the plea, a bond taken for the defendant's appearance at the return of the writ, could not be for ease and favour, and, therefore, the condition an averment in the plea were inconsistent.

BULLER, *Justice*, thought there was no doubt but the conclusion to the replication was bad [F 2], as the whole substance of the plea was denied; but that it was unnecessary to look beyond the plea, which was clearly bad. He said, there were many cases where the word "*aforesaid*" had been held to tie the party up to an exact recital, and the plea here concluded that the bond was taken "against the form "of the statute *aforesaid*."

Judgment for the plaintiff.

[12] Lord *Mansfield* asked if there was any doubt whether the statute was a public act, and *Davenport*, as *amicus curiæ*, said it had been doubted, and was therefore always set out.—It is recited in the case of *Lenthal* v. *Coke*, and also in *Dive* v. *Manningham*, *Plowd.* 60. ☞ But in *Samuel* v. *Evans*, *B. R. T.* 28 *Geo.* 3. 2 *Term Rep.* 569. the court held clearly, that it is a public act, and therefore said, that they would take notice of it though not pleaded. Qu. Whether the same act may not be public as to some clauses, and private as to others? *Vide Rex* v. *London*, *T.* 3. *W. & M. Skinn.* 293, 294.

[☞] *Vide S. P.* ruled as to the statute of *Scandalum Magnatum*, 2 *Ric.* 2. *cap.* 5. in Lord *Cromwell's* Case, *B. R. T.* 20 *Eliz.* 4 *Co.* 12 *b.* and *Viscount Say and Seale* v. *Stephens*, *B. R. M.* 4 *Car.* 1 *Cro. Car.* 135. and, as to this very statute of 23 *Hen.* 6. in *Trussel* v. *Aston*, *B. R. M.* 30 *El. Cro. El.* 108. *Vide* also *Holby* v. *Bray*, *B. R. H.* 19 & 20 *Car.* 2. 1. *Sed.* 356.

[F 1] In *King* v. *Marsack*, 6 *T. R.* 771. Lord Kenyon referring to these words of Lord Mansfield, adds, "it "is not necessary here to overset the "authority of that case, or to inquire "whether or not that doctrine is "carried too far; it is sufficient for "the determination of this case to "say that there is a *material* difference "between the declaration and the "words of the act of parliament." The variance there was the word *and* substituted for the *disjunctive or:* and Lord Kenyon had before laid it down on the authority of 2 *Ventr.* 215. that if the recital in the declaration answered the sense of the statute it would be sufficient.

[F 2] See *Chandler* v. *Roberts*, *ante* 58; and see note to *Hayman* v. *Gerrard*, 1 *Wms. Saund.* 103. where this case is cited with many others; and the rule drawn from them by the learned editor is this, "that where a "defendant cannot take any new or "other issue in his rejoinder, than "the matter he had pleaded before, "without a departure from his plea; "or where the issue on the rejoinder "would be the same in substance as "on the plea, that the plaintiff ought "to conclude to the country:" and many instances are adduced in which that is done, where the replication selects and denies a particular fact.

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BOYCE against WHITAKER.

Coke, in *Saunders* and *Siderfin (y)*, where the was exactly similar to this, concluding with a ease and favour, and a verification; and ye murrer, the present objection was not ir also a precedent of the same sort ir *Debt (z)*. 2. He argued that th counts. In the first place, be was misrecited, there being " *by* trespass," instead " *capias utlegatum*" i the second place, he averred matter *dehe* tion; for the cor for the defer to have beer been for t been av He *cliff* (

HOOKE.

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declared, That, in by him to the defendant, bearing date the 7th of *July* he would pay the plaintiff an £40 a year, at four quarterly pay- annuity became in arrear on the The defendant prayed *oyer* of the deed set forth, and by which, after re- *better* securing * the annuity, the de- executed a bond to the plaintiff, bearing even in the penal sum of £400 he assigned for his *farther* security, a salary of £50 one of the clerks to the auditor of im- *to pay the annuity by quarterly pay-* He then prayed *oyer* of the bond, which was set and also of the condition, which was also set forth, That, if the defendant should pay the annuity at regular quarterly payments, and should perform all the in the indenture *bearing even date with the bond*, the bond should be void. He then *pleaded*, 1. That plaintiff ought not to have any execution against the defendant, *other than against his real estate, his money in the funds, or his money lent upon real security only*, because indenture of covenant which he had set forth, and *that* mentioned in the condition of the bond, were one and the same; that the bond and deed of covenant were both given to secure one and the same annuity; that, after the execution of the deed of covenant, and the bond, and before the 22d of *January* 1777, mentioned in an act, *&c.* (the insolvent debtors' act of 16 *Geo.* 3.) (*b*). *viz. on the 7th of January* 1776, £20 for two quarters of the annuity became due, and was not paid according to the tenor and effect of the said bond, whereby *the said bond became forfeited*, and the penal sum became due and owing to the plaintiff, and that, before the first day of *January* 1776, the defendant

(*b*) c. 38.

[* 1] Precisely the same point under the insolvent act, 34 *G.* 3. c. 69. (which is similarly penned to 16 *Geo.* 3. in this respect) was ruled in *Marks* v. *Upton*, 7 *T. R.* 305. on the authority of this case. See also *Billett* v. *M'Arthy*, 2 *East.* 148.

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COTTEREL against HOOKE.

ested, and in actual custody of an officer of the iddlesex, and held to bail by virtue of a bill of d that he surrendered himself in discharge of as, thereupon, committed to the prison of before the 26th of *June* 1776, in the , *viz.* on the 17th of *May* 1776, and the time of his discharge, and that, at er sessions for *Surrey*, held, by adjourn- 29th day of *July* 1776, he was discharged, o the form and effect of the said act; and con- with a verification, and prayed judgment if the ntiff ought to have any execution against him, *other than against his real estate, &c.* 2. That, before the 22d of *January* 1776, *viz.* on the 8th of *December* 1775, he was arrested, *&c.* (stating the arrest, surrender, and discharge, as in the former plea), *That the indenture on which the plaintiff had brought his action was dated and made, and all debts thereupon owing, and accruing, from the defendant to the plaintiff, were contracted, and occasioned, before the 22d of January* 1776, to wit, on the 7th day of *July* 1767, and this, *&c.* wherefore he prayed judgment whether the plaintiff ought to have any execution, *other than against his real estate, &c.* The plaintiff *demurred* generally to each of the pleas; and the case came on to be argued this day, by *Wood* for the plaintiff, and *Bolton* for the defendant.

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(By the statute of 16 *Geo.* 3. *c.* 38. § 41. it was enacted, "That the future real estates, as well freehold and copyhold, as customary copyhold, or money in the funds, or lent upon real security of persons discharged under the act, should remain liable to their respective creditors, and that execution might be sued out against such real estate, or money in the funds, *but not against their person, or other personal estate*").

Wood, for the plaintiff, contended, that, supposing the bond to have been forfeited before the discharge, and *that* security gone, yet that did not destroy the other security by the deed of covenant, and that the plaintiff had his election to proceed on either, as he pleased. He said, the only question was, Whether the insolvent debtors' act discharged the payments of annuities, which became due after the discharge? The words of the statute are, "That "no person to be discharged by this act, shall be impri- "soned by reason of any judgment or decree obtained for "payment of money only, or for any debt, damages, con- "tempts, costs, sum or sums of money contracted, in- "curred, *occasioned, owing, or growing due,* before the "said 22d day of *January* 1776" (*c*). But the word "*occasioned*"

(*c*) *sect.* 33.

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"*casioned*" must be considered as applied only to "*con-*
"*tempts,*" otherwise the insolvent would be discharged from contingent debts, which is not the case even of a bankrupt who has obtained a certificate. "*Owing and growing due*" mean, in the above clause, the same as "*grown due,*" which is manifest from a subsequent section *(d)*, where the persons discharged are authorised to plead, to any action brought "for any debt, sum, or sums of money *due* be-
"fore the 22d of *January* 1776," that such debt or sum
"of money, was *contracted or due,* before the said 26th of
"*January.*" At any rate, the words "*growing due*" can only extend to the quarter's payment, which was accruing on the 26th of *January,* for by § 34. it is expressly provided, that no person shall, by the act, be discharged of debts
[100] subsequent to that date. Where an annuity is secured, (as in this case), by a deed of covenant, a bankruptcy does not discharge future payments; although, if the only security is a bond, which has been forfeited before the bankruptcy, a court of equity, in favour of the creditor, will allow him to consider the penalty as a debt, and to prove the value of the annuity. He cited, to prove that the remedy under a deed of covenant is not taken away by a bankruptcy, *Fletcher* v. *Bathurst, Viner, title Creditor and Bankrupt (e)* [F 2]. He also mentioned *Webster* v. *Bannister,* which was a case in this court, last term *(f)*. Such an annuity as this, was, he said, clearly a contingent debt, because, unless the party live, it never can become due; that the last insolvent act of 18 *Geo.* 3. *c.* 52. was decisive on the question, for that a new clause was introduced into that act, (§ 30.) to relieve the grantors of annuities (who have been fugitive beyond seas) when discharged under it, from the accruing payments of such annuities; that this clause was a legislative exposition of the former acts, for it recited, that without such express provision, such persons could not have the benefit of the act, (which in its other provisions resembled the former ones,) in respect of the accruing payments of annuities.

Bolton, for the defendant, said, that all *Wood's* argument applied only to the second plea, but that *his* objection to the action was, that both the bond and covenant were entered into to secure the same annuity, and that the bond having

(d) sect. 36.
(e) T. 9 *G.* 1. *Viner,* vol. 7. p. 71. *pl.* 4.
(f) Vide infra, E. 20 *G.* 3. p. 393.

[F 2] This point has since been fully argued, and decided as here stated, in *Mills* v. *Auriol,* 1 *H. Bl.* 433. (where this case was relied on as an authority in point) which was affirmed on a writ of error in *Auriol* v. *Mills,* 4 *T. R.* 94.

having been forfeited, the penalty had become a present debt, under which the plaintiff might have received a dividend; that he admitted this case was not within the statute of the 7th of *Geo.* 1. *c.* 31. relative to bills, bonds, notes, and other securities to be paid at a future day, but that on the forfeiture, the penalty having become a present debt, the discharge under the act had relieved the defendant against the payment of the annuity; that, as to the case of a bankrupt, there was no doubt; that the point had been solemnly decided by the court of *Common Pleas*, in *Perkins* v. *Kempland (g)*, which case he read from a note lent him by GOULD, *Justice*; that, if there was a difference, the case of an insolvent debtor was more favourable, because a bankrupt is considered as a criminal; that the same facts were now before the court as if an action had been brought on the bond, for that the deed purported to be given for [101] the *farther* securing the same annuity for which the bond was given. He also cited a case of *Raincock* v. *Freemantle* in this court about six years ago, where an insolvent debtor who had been discharged, gave a note for a debt which had accrued before his discharge, and it was held to be void [† 42].

Lord MANSFIELD stopped *Wood* from replying.

His Lordship said, the question was, Whether, when there was a bond with a penalty, and also a deed of covenant, and the plaintiff made no use of the penalty, he should be barred of his remedy under the deed of covenant? That he took the case of a bankrupt and insolvent debtor (as to this point) to be the same. That when a man has two remedies, he may elect [F 3]. That if the plaintiff had made

(g) C. B. T. 16 *Geo.* 3. Since reported, 2 *Blackst* 1106.

[† 42] I have not been able to find that case, and, in the case of *Best* v. *Barber*, *B. R. M.* 23 *Geo.* 3. which arose on the insolvent act of 1781, the contrary was expressly determined. ☞ As it had been in the case of a bankrupt, in *Trueman* v. *Fenton*, *B. R. H.* 17 *G.* 3. *Cowp.* 544. See also the same doctrine confirmed in *Cockshot* v. *Bennett*, *B. R. M.* 29 *Geo.* 3. by Lord *Kenyon*, 2 *Term Rep.* 763. 765. *Vide Ex parte Burton*, *Canc.* 1744. 2 *Atk.* 255.

[F 3] But where a party takes one security, the law will not raise a promise in order to create another for him: and therefore when a surety took a bond from his principal for payment of money for which he had made himself liable, and the surety obtained a judgment on the bond, and took out execution, and afterwards the principal became a bankrupt; the court held that the surety could not maintain an action for money paid to the use of the principal, to recover sums paid by him after the bankruptcy to the persons to whom he had made himself liable as surety. *Toussaint* v. *Martinnant*, 2 *T. R.* 100.

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made use of the penalty, the case would have been different; but that, as he had not, he might proceed as often as he pleased for breaches of the covenant.

BULLER, *Justice*, said, that there were two pleas, one of which (the second) was upon the deed of covenant. That, if the covenant had been the only security, nothing had happened to bar it. That the other plea stated the bond, conditioned for the regular payment of the annuity. That the court could not, because such a bond appeared to have been given, determine the other security to be void.

Judgment for the plaintiff [†43].

[† 43] *Vide Wyllie* v. *Wilkes*, *M.* 21 *Geo.* 3. *infra*, p. 519.

Thursday, 11th Feb.

WILKINS and Others, Assignees of BROOKE, a Bankrupt, *against* CARMICHAEL.

A captain of a ship has no lien upon the ship for wages, stores, or repairs done in England.

THIS was an action of *trover*, brought by the assignees of a bankrupt, for a ship, of which the bankrupt was owner, against the captain. The cause was tried before Lord MANSFIELD, at *Guildhall*, at the Sittings after *M.* 19 G. 3. *(h)*. The defence set up was, that the captain had a lien on the ship for his wages, and for stores, provisions, and repairs. A verdict was found for the plaintiffs with £605 damages, subject to the opinion of the court, on a case, which stated as follows:—"That the defendant being the captain of the ship *Africa*, mentioned in the declaration, bespoke and directed repairs to be done to the ship, before she set out upon

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her last voyage, and likewise directed her to be supplied with stores and provisions, for which repairs, stores, and provisions, the defendant was liable as well as the owner. That the defendant likewise had wages due to him. That *Brooke*, the owner of the ship, became a bankrupt, and, *after the bankruptcy* and *the demand* (of the ship) *therein after mentioned*, the defendant paid the creditors their bills for stores and repairs. That the plaintiffs (the assignees) demanded of the defendant to deliver the ship to them, which he refused, without having an allowance in his account for his wages, and the money he was *liable* to pay for the bills before mentioned."—The question, on the above facts, as stated for the opinion of the court, was, "Whether in this action, the defendant could be allowed to retain, and have deducted out of the damages which ought to be given for the value of the ship, the several sums mentioned in the case, or any of them; or whether any

(h) Thursday, 10 *December* 1778.

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any of the above articles were so far a lien on the ship as to justify his refusal to deliver the ship to the plaintiffs without being paid? If the court should be of opinion that the defendant had a lien on the ship for any of his demands, a nonsuit to be entered. But, if they should think that any of his demands ought to be deducted out of the damages for the value of the ship, then such money to be deducted out of the money recovered by the verdict, and the *postea* to be indorsed accordingly."

The case was argued, on *Friday*, the 5th of *February*, by *Davenport*, for the plaintiffs, and *Baldwin*, for the defendant.

Davenport argued, 1. That, as to the captain's wages, it is settled that they are no lien upon the ship. This is clear from the case of *Clay* v. *Sudgrave (i)*, in *Salkeld* [1], and confirmed by *Bayley* v. *Grant (k)*, in the same book. But if he has no lien for his wages he can much less claim any lien for any other demand, as repairs or stores; the wages being more closely connected with the ship, than any other [103] demand, as they are the consideration for the work which is done in the ship, and is absolutely necessary to her earnings. The different tradesmen, as the ship-wright, biscuit-baker, butcher, &c. could not have justified the detention of the ship, if she got into their possession, and the derivative creditor for their demands cannot have a better right than them. As to repairs done in *England*, it was expressly determined in the case of *Watkinson* v. *Barnardiston (l)*, that they are no charge upon the ship. 2. If the captain cannot justify the detention, neither can he be entitled to any allowance out of the damages. A mutual account cannot be settled by a sort of equitable set-off in an action of *trover*. To permit it would be a dangerous

(i) B. R. T. 12 *W.* 3. 1 *Salk.* 33. *S. C.* by the name of *Clay* v. *Snelgrave*, 1 *Ld. Raym.* 576.

[1] By the statute of 15 *Ric.* 2. *c.* 3. it is enacted, that the Admiralty court shall have no jurisdiction of contracts arising by land, yet it is permitted to mariners to sue for their wages in the courts of Admiralty. In the case of *Clay* v. *Sudgrave*, as reported by *Salkeld*, Lord *Holt* is made to say that this is *expressly against the statute*, but that *communis error facit jus*. Surely it is not consonant to legal principle to hold that any usage or common error can abrogate a statute to any purpose, or give legality to what an act of parliament expressly prohibits. After the case of *Clay* v. *Sudgrave*, the statute of 4 *Ann. c.* 16. § 17. puts suits in the Admiralty court for seamen's wages very clearly, though by implication, upon a legal footing, for the words of that section are, "That all suits and "actions in the court of Admiralty "for seamen's wages, shall be commenced and sued within six years "next after the cause of such suits or "actions shall accrue."

(k) B. R. T. 12 *W.* 3. 1 *Salk.* 33. *S. C.* 1 *Ld. Raym.* 632. 12 *Mod.* 440.

(l) Canc. T. 1726. 1 *P. Will.* 367.

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gerous innovation in the law. Here, indeed, the defendant's demand is such as could not have been set off in an action which admits of setting off mutual debts, because he was only *liable* to pay, at the time of the demand and refusal, but had not actually paid. If he were to be allowed for what he was only liable to pay, it may prove a great detriment to the bankrupt's estate, because the captain may afterwards refuse, or be unable, to pay, and then the tradesmen will come upon the estate of the bankrupt.

Baldwin insisted, that the workman who repairs a ship has a lien upon it. This appears from a case *Ex parte Shanks and others*, in *Atkyns (m)*, which was determined against the ship-wright, on the particular ground of his having delivered up the possession of the vessel. Probably, in the case of *Watkins* v. *Barnardiston*, the possession had been, in like manner, relinquished. If the workman has a lien, it seems to be just, that he should be able to transfer such lien, with the possession, to the captain, who is liable to pay him. An action could be maintained by the workman against the captain, although he had not given the orders. This must be on the ground, that the workman has parted with the possession of the ship, which he might have detained as his security, to the captain. It would therefore be highly unreasonable, if he could not secure himself by retaining the ship.—On a question from the court, he said, *he did not know of any case* where it had been determined that a captain is liable for repairs, if he has not ordered them. As to the general doctrine concerning liens, he cited a case *Ex parte Deeze (n)*, and *Greene* v. *Farmer (o)*, and said there could be no reasonable distinction in respect to liens between one sort of tradesmen and another, between carriers, taylors, *&c.* and ship-carpenters. If a coachman is sent to the country on a job, with his master's coach and horses, and he lays out money in repairing the carriage and feeding the horses, he may detain them till he shall be paid. A captain can certainly detain the cargo till the *freight* is paid, and it would be inconsistent that he should be bound to part with the ship, when he is not bound to part with the goods. This case is not different from what it would have been, if the owner had continued solvent, because assignees take, subject to all equitable liens and demands against the bankrupt. For this, he cited *Brown, Assignee of Williams*, v. *Heathcote & al. (p)*.

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Davenport, in reply, contended, that the possession of the captain is merely that of a servant, to whose skill and fidelity the owner entrusts his ship, and that the captain does not, thereby, acquire any qualified property. The owner may pledge

(m) 1754. 1 *Atk.* 234.
(n) 8 *June* 1748. 1 *Atk.* 228.
(o) *E.* 8 *Geo.* 3. 4 *Burr.* 2214.
(p) 22 *Oct.* 1746. 1 *Atk.* 160.

pledge the ship, although the captain is in possession of her, but the captain cannot, at least, he can only hypothecate her abroad, and *that* from the necessity of the case, because no personal security can be given. It would be absurb, if the owner were to change the captain, to suppose that the former captain could retain the ship, and prevent the voyage, till his account should be settled. He denied that a captain is liable for repairs, which he has not ordered.—Lord MANSFIELD having asked, whether if a ship is sent to dock, the shipwright may detain her, till he is paid? He answered, that it is the practice not to receive a ship into dock, unless they are satisfied that the owner is a good paymaster, which seemed to shew that they do not look to the ship as a security.

Baldwin had instanced the case of attorneys, who cannot be compelled to deliver up the deeds and papers of their clients, till they are paid; upon which Lord MANSFIELD said that the practice, in that respect, was not very ancient, but that it was established on general principles of justice, and that courts both of law and equity have now carried it so far, that an attorney or solicitor may obtain an order to stop his client from receiving money recovered in a suit in which he has been employed for him, till his bill is paid [13]. Sir *James Burrow* mentioned to the court, that the first instance of such an order in this court, was in the case of one *Taylor* of *Evesham*, about the time of a contested election for that [105] borough; and Lord MANSFIELD said, he himself had argued the question in the court of *Chancery*.

The court took time to consider.

Lord MANSFIELD, now, (after stating the case), delivered the opinion of the court, as follows.

Lord MANSFIELD,—Notwithstanding the strongest inclination that the defendant should have satisfaction, before the value of the ship is paid over by him, we are not able to find a ground upon which we can give judgment in his favour. 1. He has set up a lien upon two sorts of claim, *viz.* wages; and stores and repairs. As to wages, there was no particular contract, that the ship should be a pledge; there is no usage in trade to that purpose; nor any implication from the nature of the dealing. On the contrary, the law has always considered the captain as contracting personally with the owner: on this ground, prohibitions have been granted; and the case of the captain has, in that respect, been distinguished from that of all other persons belonging to the ship. This rule of law may have its foundation in policy, and the benefit of

[13] *Vide Rex* v. *May*, *infra*, *E.* 19. *Geo.* 3, p. 193, 194. *Note* [26] And, *Welsh* v. *Hole*, *M.* 20 *Geo.* 3. p. 238.

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of navigation; for, as ships may be making profit and earning every day, it might be attended with great inconvenience, if, on the change of a captain, for misbehaviour, or any other reason, he should be entitled to keep the ship till he is paid. As to stores and repairs, it is a strong answer to that claim, that when the demand was made by the assignees, the captain had not paid. But, if there was any lien originally, it was in the carpenter. The captain could not, by paying him, be in a better situation than his, and *he* had parted with the possession, so that he had given up his lien, if he ever had one. The other creditors had none. If the defendant is liable to the tradesmen, it is by his own act. Work done for a ship in England, is supposed to be on the personal credit of the employer. In foreign parts, the captain may hypothecate the ship. The defendant might have told the tradesmen that he only acted as an agent, and that they must look to the owner for payment [F]. 2. If there is no lien, can there be a set-off? This was no *item* of any sort in account between the bankrupt and the defendant. The ship remained in *specie* till after the bankruptcy; and the conversion arises from an act done on the specific property of the assignees, not of the bankrupt.

The *postea* to be delivered to the plaintiffs [†44].

[†44] *Vide Rich* v. *Coe*, *B. R. T.* 17 *Geo.* 3. *Cowp.* 636.

Friday, 10th Feb.

*[106]

* SULLIVAN *against* MONTAGUE.

A certificate under 19 Geo. 2. c. 34. or 4 Geo. 3. c. 15. may be granted at a period subsequent to the trial, and out of court.—Matter of defence arising after the action brought, may be given in evidence if it happen before plea pleaded, in cases where the special matter may be given in evidence under the general issue.—The time of plea pleaded is to be reckoned from the entry of the plea on the record, not from the time of its being delivered to the plaintiff.

THE defendant, being captain of a man of war, on the *Quebec* station, had seized a trading vessel, of which *Sullivan* was the master and owner, as a smuggler. Upon an information brought in the *Vice-Admiralty* Court at *Quebec*, sentence was pronounced against *Sullivan*; whereupon he appealed to the superior court of *Admiralty* at *Halifax*, where the sentence was reversed. On the defendant's return to *England*, *Sullivan* brought the present action of trespass in this court; and the trial coming on before Lord MANSFIELD,

[F] A mortgagee of a ship is not liable for necessaries, *Jackson* v. *Vernon*, 1 *H. Bl.* 114; nor entitled to freight, *Chinnery* v. *Blackburn*, *ibid.* 117. *in not.*

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MANSFIELD, at *Guildhall*, at the Sittings after last *Trinity Term*, and the fact of the trespass being proved, the defendant produced the record *(a)* of the proceedings on the appeal in the court at *Halifax*, on which was indorsed a *certificate* of the judge of that court, *that there was a probable cause of seizure*. The sentence of the court at *Halifax* bore date in *May* 1776. The certificate indorsed upon it was dated thirteen months later, *viz.* 21 *June* 1777, which was posterior to the commencement of the present action.

The counsel for the defendant insisted, that this certificate was a bar to the action, and that the plaintiff must be nonsuited.

For the plaintiff it was answered, that the certificate ought to have been made at the time when the sentence was pronounced.

The jury found a verdict for the plaintiff, with £1800 damages, but subject to the opinion of the court as to the effect of the certificate.

The trial had once been put off upon an affidavit on the part of the defendant, that an application had been made to the judge at *Halifax*, to certify, at the time of the reversal of the original sentence, and that the judge then said he would certify whenever he should be required. Between the time when that affidavit was made, and the actual trial of the cause, the certificate had been obtained.

In the last term, the *Solicitor General* having obtained a rule to shew cause why a nonsuit should not be entered, two questions were made: 1. Whether the certificate could have been granted even at the time when the sentence, on the appeal, was pronounced? 2. Whether it could be granted so long after the sentence?

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It was supposed, at the trial, and when the argument came on upon the rule to shew cause, by the counsel on both sides, that the certificate had been granted under the 16th section of the statute of the 19th of *Geo.* 2. *c.* 34. which consists of two branches. "1. In case any information shall be commenced and "*brought to trial*, on account of the seizure of any ship as "forfeited for illegally carrying goods, or of any wool, goods, "wares or merchandizes, as prohibited or uncustomed, or "illegally carried or exported, or intended or attempted to be "exported, or as illegally relanded after having been shipt or "exported upon debenture or certificate, wherein a *verdict* "shall be found for the claimer thereof, and it shall appear "to the judge or court before whom the same shall be tried, "*that there was a probable cause of seizure*, the judge or court "before whom the said information shall be tried, *shall certify* "*on the record*, that there was a probable cause for the prosecutor's

(a) i. e. a *copy*, by consent of the plaintiff.

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" prosecutor's seizing the said ship or goods; and in such " case, the defendant shall not be entitled to any costs of " suit whatsoever, nor shall the persons who seized " the said ship or goods; be liable to any action, in- " dictment, or other suit, or prosecution, on account of " such seizure. 2. And in case any action, indictment, or " other prosecution, shall be commenced and brought to " trial against any person or persons whatsoever, on account " of the seizure of any such ship; or of any wool, goods, " wares, or merchandizes, as prohibited or uncustomed, or " as illegally carried or exported, or intended or attempted " to be exported, or illegally relanded as aforesaid wherein " a verdict shall be given against the defendant or defendants, " if the court or judge before whom such action or pro- " secution shall be tried, shall certify on the said record, " that there was a probable cause for such seizure, then the " plaintiff, besides his ship or goods so seized, or the value " thereof, shall not be entitled to above two-pence damages, " nor to any costs of suit, nor shall the defendant in such " prosecution be fined above one shilling."

DUNNING, and *Lee*, shewed cause; and it being urged, that the above clause in the statute of *Geo.* 2. was confined to *Great Britain*, and the court being of that opinion, and thinking, also, that it applied only to cases where there had been a trial before a jury and *a verdict*, the case stood over, in order to see whether any subsequent act had extended this provision for granting certificates to the *Admiralty* courts in *America*.

[108] At the trial, the *Solicitor General* had applied to Lord MANSFIELD to certify under the second branch of the clause, but his Lordship refused, being of opinion that the case was not within it, for that it only related to cases where there had never been a condemnation [†45].

When the argument came on again, (which it did in the same term, *viz. M.* 19 *G.* 3.) it appeared, that by a clause in the statute of 4 *Geo.* 3. *c.* 15. the 16th section of 19th *Geo.* 2. is expressly extended to *America*, and to cases where there has either been a verdict, *or sentence (a)*.

Dunning, for the plaintiff, still insisted, 1. That the certificate could not be granted *upon an appeal*; and, 2. That it could only have been granted *at the time when the sentence was pronounced*.

The

[†45] *Vide Renalls* v. *Cooper*, *B. R. E.* 22 *Geo.* 3. where it was held that a judge may certify, under that second branch of the clause, though there has been no information brought in the *Exchequer*, for the condemnation of the ship.

(a) 4 *Geo.* 3. *c.* 15. § 46.

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The *Solicitor General*, on the other side, said, as to the first point, that there were no words in the clause of the statute of 4 *Geo.* 3. to exclude the judge in an *appellate* jurisdiction from granting certificates; and that it would be extraordinary indeed, if a person who had taken a ship which had never been condemned, might be protected by a certificate, and yet that another, who had such good ground for seizure as to obtain a sentence in his favour, should have no such protection, if that sentence was, afterwards, reversed. As to the second point, he observed, that there were no words in the statute requiring the certificate to be made in open court; that, by the statute of 4 *Ann.* *c.* 16. § 5. the judge is authorized, where there have been several matters pleaded, to certify whether there was probable cause; but there being no express words requiring this to be done in court at the trial, the court of *Common Pleas* had determined, that it might be done after an application had been made for taxing the costs; *Cremer* v. *Dent* *(b)*; that, where the legislature meant the certificate to be made at the time of the trial, it is so expressed, as in the case of special juries *(c)*.

Lord MANSFIELD delivered the opinion of the court; 1. That the judge in the appellate jurisdiction had a power to certify, so that the words and meaning of the statute of *Geo.* 3. were, that, wherever a sentence was pronounced, the judge might certify. That a contrary construction would be attended with the absurdity stated by the *Solicitor General*. There could be no certificate in the original court, because the sentence was in favour of the defendant, and it would be strange indeed if he were to be in a worse situation than if that sentence had been against him. 2. That the certificate might be granted after the trial. That there were no words confining it to the time of the trial, and the case on the statute of 4 *Ann.* was a strong authority on this point. That the case of a sentence by a court of *Admiralty* was stronger than that of a verdict at law, because the verdict is entered, and completed, [109]

(b) *E.* 24 *G.* 2. *Barnes* 141. 4*to* *ed.* 1772.

(c) 24 *G.* 2. *c.* 18. § 1. "Unless "the judge before whom the cause is "tried, *shall immediately after the* "*trial certify in open court, under his* "*hand, upon the back of the record,* "&c." [† 46].

[† 46] A certificate under 8 & 9 *Will.* 3. *c.* 11. § 4. that a trespass was wilful and malicious, made *out of court*, has been determined to be void (*Ford* v. *Parr*, *C. B. E.* 28 *Geo.* 2. 2 *Wils.* 21.) though the words of that statute are not so strong as those of 24 *Geo.* 2. *c.* 18. nor indeed so strong as the report in 2 *Wils.* makes the court state them to be.

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pleted, immediately, but the sentences in the *Admiralty* court are often not drawn up for months after they are pronounced.

His Lordship said, the rule for entering a nonsuit must be made absolute.

But *Dunning* having raised a new objection, *viz.* that, as the certificate did not exist at the time of the commencement of the action, it could not be taken advantage of on the general issue, but ought to have been pleaded, this question stood over, till *Saturday* the 28th of *November*, the last day of *Michaelmas Term*, when it was argued, by *Dunning*, for the plaintiff, and the *Solicitor General*, for the defendant.

As the argument, on this point, turned upon the times, and dates of the proceedings, it will be proper to state them. The action was commenced in *February* 1777. The declaration was of *Easter Term* 1777. The plea was delivered on the 10th of *June* 1777, but was not entered of record till *Hilary* 1778. The certificate, as has been already mentioned, bore date the 21st of *June* 1777.

For the defendant, it was said, by the *Solicitor General*, that the present question came before the court in a very unfavourable light, for that it amounted to this, whether there had been, by the fault of those concerned for the defendant, such an omission in pleading, as should, in the present state of the cause, render him liable to the amount of £1800, which in reality he was not bound to pay? But that, even at the trial, if the objection had been made, it could not have prevailed; or, if it could then, it now came too late. That
[110] it was a general rule, that, whatever takes away the right of action, although it arise after the commencement of the suit, provided it happen *previous to plea pleaded*, may, in cases where special pleading is necessary, be *pleaded in bar*, without saying in the plea, *that* it happened after the bringing of the action; and, in cases where the special matter may be given in evidence, may be taken advantage of on the general issue; *Bird* v. *Randal (a)*. That, by the statute of 4 *Geo.* 3. *(b)*, the defendant, here, was entitled to give the special matter in evidence. That it would have been impossible to plead the certificate at the trial, in this case, *puis darrein continuance*, because, on looking to the record of the plea, and comparing it with the date of the certificate, it would have appeared, that the matter of defence had arisen before the plea, which was the last continuance on record. That the plea had indeed been *delivered* before the date of the certificate, and that it was in the plaintiff's power, who made up the record, to have entered it, either of the term preceding, or

(a) *M.* 3 *Geo.* 3. *B. R.* 3 *Burr.* 1344. *(b)* § 47.

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or the term subsequent to, the delivery; but that, having entered it of the term subsequent, and the certificate having been granted in the interval, he could not now be permitted to say the certificate was posterior to the date of the plea, as appearing on the record, and as he himself had put it there. That, in actions against executors, if judgments are confessed, after the declaration, and before the plea, the practice is, to plead them in bar, not *puis darrein continuance*. That there had been a case very lately before HOTHAM, *Baron*, in *Kent*, where a certificate, granted after issue joined, was permitted to be given in evidence. That, if it were true that the certificate ought, in strictness, to have been pleaded, yet, as no objection had been made on that ground at the trial, and the certificate, which was then, *in fact*, given in evidence, proved that the plaintiff had no right to recover, the court would not suffer him now to profit by a mere slip in point of form.

Dunning, on the other side, insisted, that Lord MANSFIELD had given the defendant leave, *generally*, to move for a nonsuit, without saving any particular point; and therefore, every objection was now as open to both parties as they would have been at the trial. That, at that time, all concerned thought the only act on the subject was the statute of 19 *Geo.* 2. That, as to the argument that this could not be pleaded *puis darrein continuance, that* depended on the fact, whether the matter arose previous to, or since the last continuance. But that his ground was, that, in all events, it ought to have been *pleaded*; if before the last continuance, in bar; [111] if after it, then *puis darrein continuance*. He appealed to the court, and the bar, whether it was not a general rule, that a fact, which if it had happened before the commencement of the action might have been given in evidence, must be pleaded if it arise after the action is brought; and said it was every day's practice, in actions of *assumpsit*, to *plead* a release, when obtained *after* the commencement of the suit, although it is to be given in evidence, when *prior*. That the reason was plain, because, by the general issue, a defendant asserts, that, at *the time of commencing the suit*, some reason existed which should have prevented the plaintiff from bringing the action. That, if the defendant should now prevail, the plaintiff would be charged with costs, for a reason which had no existence when he brought his action. That, by pleading the certificate, the defendant would have given the plaintiff an opportunity of taking the opinion of the court, on the point disposed of on the former argument, without the expence of a trial.

The court seemed all to agree, that matter happening after the beginning of the suit, but before plea pleaded, might be given in evidence; but WILLES, *Justice*, expressed

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pressed with great earnestness his doubts, whether the time of plea pleaded ought not to be reckoned from the time when the plea was actually delivered, the date on the record being a mere fiction. Lord MANSFIELD observed, that supposing the rule to be as WILLES, *Justice*, conceived it, both parties had been guilty of a slip; the plaintiff in not objecting to the evidence at the trial; the defendant in not pleading; and can the court (he said) decide that the plaintiff shall be relieved against the one, and the defendant caught by the other?

The case stood over.

And now, his Lordship, (after stating the facts and dates,) delivered the unanimous opinion of the court, to the following effect:

Lord MANSFIELD,—The question made at the trial was, Whether the Judge of the court of *Halifax* could certify, *after the cause was over?* That was the point saved. If the court should be of opinion that the certificate was a bar, a nonsuit was to be entered. The question was fully argued last term, and we were all of opinion, that the certificate was a bar to the action. After that opinion was delivered, a motion was made to support the verdict, and on

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grounds entirely new. For it has been objected that the certificate ought not to have been read at the trial; 1. Because it did not exist when the action was brought; 2. Because it did not exist at the time of plea pleaded. This was no part of the question meant to be submitted to the court, yet the plaintiff was fully apprized of the certificate before the trial, and a copy of it was read by consent. The only way in which we could let the plaintiff have the advantage of the present objection, would be to grant a new trial; but, in that case, the defendant must be let in to plead the certificate. This alone is decisive. But, to go farther. If the objection had been made at the trial, we think it could not have prevailed. *Actio non* goes, in every case, to *the time of pleading*, not to the commencement of the action [† 47]. In the present instance, the general

[† 47] *Vide Reynolds* v. *Beerling*, *B. R. M.* 25 *Geo.* 3. where it was determined on a demurrer, that a judgment obtained by the defendant, against the plaintiff, after the declaration was delivered, and before plea pleaded, may be pleaded as a set-off, and *that*, although it do not appear that the cause of action on which the defendant's judgment was obtained, was prior to the commencement of the plaintiff's action. ☞ But, in *Evans* v. *Prosser*, *B. R. E.* 29 *Geo.* 3. 3 *Term Rep.* 186. it was determined, that a plea of set-off, that the plaintiff was indebted to the defendant at the time of the plea pleaded, is bad; and that it should state that he was indebted at the commencement of the action; and *Buller*, Justice, said, that on looking into the case of *Reynolds* v. *Beerling*, he

general issue is given by statute, and that leaves every defence open which the defendant might otherwise have by special pleading. The certificate is dated the 21st of *June* 1777, and the plea was actually delivered on the 10th of that month, but the plaintiff made up the record, and entered the plea of *Hilary* 1778. We think he could not have been let in at the trial to contradict the record. Legal fictions, and relations, can never be contradicted, to *prevent* justice, and let in mere objections of form and regularity [† 48]. If a writ is *teste'd* the last day of a term, you cannot say it issued in the vacation, for the purpose of making it void, though you may shew when it really issued, *if the justice of the case required it* [13]. But, here, the plaintiff himself made up the record. Shall he be admitted to aver against his own act, by which he has misled the defendant? By so doing he said to the defendant, "Instead of pleading this matter, you may give it in evidence." One case was mentioned at the bar, in which a certificate granted after issue joined, was admitted in evidence; but it is said that no objection was made. There is great reason for considering the certificate, in cases like this, as granted *nunc pro tunc;* but, without giving any opinion, now, on that point, as the objection was not made at the trial, as it would not have availed if it had been made, and as the defendant, if it were to prevail now, must be let in to plead; we are all of opinion that the rule for a nonsuit ought to stand.

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The rule made absolute. [F 2].

he found, that on the point here stated, it could not be supported. [F 1].

[† 48] *Vide Mostyn* v. *Fabrigas*, *B. R. M.* 15 *Geo.* 3. *Cowp.* 161. 177.

[13] *Vide*, to this purpose, *Rex* v. *Mann*, *Scacc*, 13 *Geo.* 1. 2 *Str.* 749. *Johnson* v. *Smith*, *B. R. E.* 33 *Geo.* 2. 2. *Burr.* 950. *cited supra*, p. 62. Note [† 30]. *Morrice* v. *Pugh*, *B. R. M.* 2 *Geo.* 3. 3 *Burr.* 1241. cited, *supra*, *ibid.*

[F 1] In *Le Bret* v. *Papillon*, 4 *East.* 502. it was said by Lord Ellenborough that this position, that *actio non* goes to the *time of pleading*, had never been cited as law since *Evans* v. *Prosser*: and in the judgement of the court afterwards given, the following is laid down as the settled rule of pleading, "that no matter of "defence arising after action brought "can properly be pleaded in bar of "the action generally."

[F 2] In *Harris* v. *James*, 9 *East.* 82. it was decided that a bankrupt's certificate dated and allowed after the filing the plaintiff's bill, *and before plea pleaded*, is evidence to support the general plea of bankruptcy of defendant under 5 *G.* 2. *c.* 30. *s* 7. *viz.* that before the exhibiting plaintiff's bill the defendant became a bankrupt, and that the cause of action accrued before he became a bankrupt.

The End of HILARY *Term* 19 GEORGE III.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF KING's BENCH,

IN

EASTER TERM,

IN THE NINETEENTH YEAR OF THE REIGN OF GEORGE III.

1779.

Wednesday, 21st April.

Ex parte COLE.

If an attorney is struck off the roll on his own application, and afterwards called to the bar, the court will not give him leave to be again put upon the roll of attorneys.

COWPER moved, on the part of *Cole*, who had formerly been an attorney of this court, and had, at his own desire, been struck off the roll, and was then called to the bar, that he might be again put on the roll of attorneys. The court refused to comply with the application, there being no instance of a barrister being admitted an attorney. They *said*, he ought first to have applied to his society to be disbarred [†49].

[†49] *Vide Moody's Case, C. B. T.* 16 *Geo.* 2. *Barnes, quarto* ed. p. 42. where an attorney, having, at his own instance, been struck off the roll, and having been put into the commission of the peace, and made a commissioner of the land tax, and having moved to be restored, on an affidavit, setting forth his reasons, the motion was granted, he consenting to take no advantage of any action pending, if there should be any.

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RICHARDS *(qui tam,* &c.) *against* BROWN.

A variance between the names of the attorney in the warrant and in the declaration, may be amended by altering the name in the warrant to that in the declaration, in a penal action, after error brought and the variance assigned for error.

THE plaintiff having sued the defendant in an action for usury, and having obtained a verdict, and judgment, in this court, the defendant brought a writ of error, in the House of Lords, and assigned for error, that the attorney who had appeared on record for the plaintiff had no warrant from him. In the last term, pending the writ of error, the plaintiff obtained a rule to shew cause why the judgment roll should not be amended, by striking out the name of "*Robert Mayes,*" in the plaintiff's warrant, and inserting that of "*John Stapleford.*"

Davenport now shewed cause, and contended, that there is no instance of such an amendment being made after error brought, especially in a penal action, unless where the plaintiff in error has been guilty of *laches (a)*. Even the omission of the Christian name of the attorney, in the warrant, has been held to be bad, and to make it no warrant *(b)*. A warrant of attorney must be entered, which cannot be done after error brought; as was decided in a case in *Dyer, T. 6 Eliz. (c)*. To alter both the Christian name and sirname of the attorney in this case would be making a new warrant.

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The *Solicitor General*, for the rule, contended, that the distinction where there has been *laches* on the part of the plaintiff in error, has no foundation in reason, and that the cases cited by *Davenport* were decided on grounds which go to the *discretion*, not the *power* of the court. In a case in *Moore (d)*, an amendment was allowed in the name of the attorney, after error brought; and in the case of *Henriques* v. *The Dutch West India Company (e)*, it was determined that a warrant of attorney may be entered at any time, *pendente lite*. As to this being a penal action, since the mistake was merely in form—the blunder of a clerk—he did not conceive *hat* could make any difference [☞]. In *Sedgwick*

(a) Dyer 180. *pl.* 48.
(b) 1 *Roll. Abr.* 289. (H). *pl.* 3.
(c) Dyer 230. *b. pl.* 58.
(d) Heley v. *Rigs, Moore* 711.
(e) B. R. T. 2 *G.* 2. 2 *Stran.* 807. 2 *Ld. Raym.* 1532.

[☞] In *Goff (qui tam,* &c.) v. *Popplewell, B. R. M.* 29 *Geo.* 3. 2 *Term Rep.* 707. the court said, there was no difference between civil and penal actions as to amendments at common law. But as the action (for usury) had been depending four years, they would not permit the sums and dates in the declarations to be amended, as it would, in effect, amount to leave to bring another action, after the time limited by law was expired.

1779.

RICHARDS against BROWN.

wick v. *Richardson (f)*, it was held, that penal actions are within the statute of 32 *Hen.* 8. *c.* 30. and that a discontinuance in such an action is, by force of that statute, cured after verdict; and in *Philips* v. *Smith (g)*, which was a penal action, a mistake, in the addition of the defendant, in the warrant of attorney, was amended after error brought. *John Stapleford* is the name *in the memorandum of the declaration*, according to which the amendment may be made [1].

The Rule made absolute.

(f) C. B. T. 5 *W & M.* 3 *Lev.* 374.

(g) B. R. M. 5 *G.* 1. 1 *Stra.* 136.

(1) In the case in *Moore*, the attorney was called, in the warrant, *John Keeling*, and, in the declaration, *William Keeling*, and the amendment made was to alter *Willium* to *John*. The court allowed the amendment, on the ground, that by intendment, the warrant of attorney is antecedent to the declaration. The present case was just the reverse; and, if there is any weight in *that* reason, it rather made against the amendment in this case.

In *Short* v. *Coffin, Exr. B.* [116] *R. E.* 11 *G.* 3. (*h*), the court amended a judgment by changing it from, "*de bonis propriis*," to "*de bonis testatoris si, &c.*" after error brought, and an argument in the Exchequer Chamber [☞]. In *Tully* v. *Sparkes (i)*, on a writ of error in the Exchequer Chamber, it was assigned for error, on a judgment, on a demurrer to the plea, that the damages *occasione detentionis debiti* were not said to be awarded *ex assensu suo*; and *Pengelley*, Chief Baron, having some doubts whether the case was within 16 & 17 *Car.* 2. *c.* 8. § 1. the court of *B. R.* was moved, and amended the judgment in the original record, and, the transcript being afterwards amended, the court of Exchequer Chamber affirmed the judgment. *Vide infra*, *Rex* v. *Lyme Regis*, on the prosecution of the Hon. *Henry Fane*, p. 135.

(h) 5 *Burr.* 2730.

[☞] And even after the record has been sent back from the Exchequer Chamber. *Green* v. *Bennett*, *B. R. E.* 27 *Geo.* 3. 1 *Term Rep.* 782, 3.

(i) 2 *Str.* 867. 869. 2 *Ld. Raym.* 1570, 1571.

Saturday, 24th April.

The KING *against* WAVELL and Others.

A rate cannot be made to repay money borrowed to repair and rebuild a workhouse.

THIS was a rule to shew cause, why a rate for the relief of the poor of the parish of *Effingham*, in the county of *Surry*, and an order of sessions confirming the rate, should not be quashed, on the ground, that the parties applying for the rule were *over-rated* and *over-charged*. The court of quarter sessions had refused to state a special case, but the counsel for the appellants being of opinion that the rate would

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would appear to be bad from the *title*, they removed it, by *certiorari*, into this court, and obtained the present rule. The title of the rate was as follows:

"*Surry*, to wit. An assessment on all and every the occupiers of lands and houses, in the parish of *Effingham*, for the necessary relief of the poor, *and towards payment of money borrowed for repairing and rebuilding the workhouse.*"

The objection being stated to be, that, upon this title, the rate appeared to be made for a purpose not within the statute of 43 *El. c.* 2. viz. *towards payment of money borrowed*, &c. WILLES, *Justice*, observed, that the ground, in the rule, was only, that the parties were *over-rated* and *over-charged*, and seemed to doubt whether, upon a rule so worded, the court could go into the jurisdiction, or right to rate; but the *Solicitor General* answering, that they were *over-rated*, and *over-charged*, to the amount of that part of the sum assessed which was to be applied to the repayment of the money borrowed, the counsel in support of the rate proceeded to shew cause against the rule.

Dunning, *Lade*, and *Rous*, for the rate—The *Solicitor General*, and *Mingay*, on the other side.

In support of the rate, it was contended, that it was unnecessary to have said more in the title, than "*A rate for the relief of the poor*," and that the acts and orders of magistrates, (except convictions,) are entitled to every intendment [117] from the court that can support them, and, therefore, the court would intend the whole money to have been assessed for the first purpose expressed in the title, if it should be thought that the other was not within the statute, and would reject the additional words, as surplusage. If the present objection was founded in law, the proper method of getting at it would have been by an appeal from the allowance of the overseers' accounts. However, this purpose, of building or repairing a workhouse, was manifestly within the spirit of the statute of *Elizabeth*, since it would be in vain to provide for the sustenance of the poor, without being able to furnish them with a lodging. It did not appear, on the face of the rate, but that the money might have been borrowed *within the year*, and, therefore, it was incumbent on the persons complaining to shew that a rate cannot be made for the repayment of money borrowed for building a workhouse within the year. There is a clause in the act (*g*), authorizing the parish-officers to build houses on the waste for lodging the poor, and directing the money for that purpose to be levied in the same manner as what is before (*h*) directed to be raised for the relief of the poor; and such power in the parish-officers

(*g*) § 5. (*h*) § 1.

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cers is clearly recognized and confirmed by subsequent statutes *(i)*.

On the other side it was said to be a general rule without exception, that parish-officers cannot *borrow* money for any purpose whatever. The inconvenience of vesting such an authority in them was manifest; for new inhabitants might be called upon to pay money borrowed before they become parishioners, and for purposes from which they could derive no benefit; in order, for instance, to repay money employed in building a workhouse, which may be fallen to ruin at the time of making the rate. It was determined in *Tawney's Case (k)*, that there is no power to re-imburse an overseer for money he may have advanced on account of the parish; that he can only do it himself by a rate made within his year *for the relief* of the poor. It was impossible that the court should intend that the rate was not made for the very purposes expressed on the face of it, by the persons who made it. The court could not suppose, that no part of this rate was for the money borrowed, or consider *that* part of the
[118] title as surplusage. In the case of *Rex* v. *Rebow (l)*, the rate was both for the house and the tolls, and the counsel, in support of the rate, contended, that, as the house was clearly rateable, the court, if they should be of opinion that the tolls were not, would intend that the whole was assessed for the house, rather than quash the rate; but the court would not listen to this argument [2]. The present objection would not have been competent, on an appeal from the allowance of the overseers' accounts; for in such case, nothing can be objected, but that the money has not been applied to the purposes for which the rate was made.

Lord MANSFIELD absent.

WILLES, *Justice*,—Can we reject as surplusage what is a material part of the title of the rate? If we cannot, is a rate, to repay money borrowed, good? *Tawney's Case* is in point to this, that a rate cannot be made for the express purpose of re-imbursing an overseer for money advanced by him

(*i*) 9 *Geo.* 1. c. 7. § 4.

(*k*) *H.* 2 *Ann.* 2 *Ld. Raym.* 1009. 2 *Salk.* 531. 6 *Mod.* 97. *S. P. Rex* v. *Churchwardens of Rotherhithe*, *M.* 11. *G.* 1. 8 *Mod.* 339.

(*l*) *M.* 13 *Geo.* 3. *Bott. Append.* 384.

[2] By the report of the case in *Bott. (loc. cit.* p. 386.) Lord *Mansfield* is made to say, "*They have not rated the house, they have rated the tolls*;" and it is expressly stated in a manuscript note which I have, that the court observed, that it was not set forth in the case, that *Rebow* was rated *for the house*, but only for the tolls. There is probably, therefore, some inaccuracy in the account here given of the argument in that case.

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him, even within his year [F 1]. As to an appeal against the overseers' accounts, is a parishioner to be obliged to pay money, and to be turned round, in that manner, to get it back, if levied without authority? The rate cannot be supported [F 2].

ASHHURST, *Justice*, of the same opinion.

BULLER, *Justice*,—This rate imports to be made for two purposes, and we are desired to consider it as only made for one. I conceive, that a rate cannot be made for money [F 1] borrowed, even though within the year, *Twwney's Case* goes that length; for it is not confined to the *mandamus*. If it were otherwise, the inconvenience might be very great. [F 3].

The rule made absolute.

COCKSEDGE *against* FANSHAW.*

Tuesday, 27th April.

On a demurrer to evidence, every fact which the jury could infer, in favour of the party offering it, from the evidence demurred to, is to be considered as admitted.—A corporation having a customary duty on corn imported, it is a good custom, that factors free of the corporation shall receive to their own use, that part of the duty which arises from corn consigned to them as factors.

"FROM time immemorial, there hath been paid to the "corporation of *London*, for their use, a toll or duty of "one farthing on the quarter of corn, by all persons, not "being free of the city, importing corn into *London*, or "the liberties thereof, coastwise, eastward of *London* Bridge, "except from the *Cinque-ports*, or the county of *Kent*." Freemen are exempt from this toll; and such freemen as are corn-factors claim a right to have the duty collected on all corn consigned to them in *London*, to be sold on account of their correspondents, although such correspondents be not freemen, returned to them. The corporation insist, that *they* are entitled to retain the duty paid for such corn, the property of strangers, though consigned to freemen-factors. To try this question, the present plaintiff, being a freeman-factor, brought an action for money had and received to his use against the defendant, who was the city officer who had collected the duty on a quantity of corn consigned to the plaintiff, but which was the property

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[F 1] It seems clear that overseers may make a rate to reimburse expences incurred *within the year*. *R.* v. *Goodcheap*, 6 *T. R.* 159. *R.* v. *Micklefield*, 1 *Bott.* 92.

[F 2] But if the title of a rate is good upon the face, the Court of King's Bench will not quash it because the sessions, in a case stated, represent that part of the money mentioned therein was raised for an illegal purpose; but will leave the party to his remedy for the future misapplication by appeal to the overseers' accounts. *R.* v. *Mayor, &c. of Gloucester*, 5 *T. R.* 346.

[F 3] By 41 *G.* 3. *c.* 23. *s.* 9. overseers may make rates to reimburse preceding overseers' money advanced during a time when no rate was made, or *pending an appeal affecting the whole rate*, or under which it might be quashed.

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property of a non-freeman. The cause was tried, at *Guildhall*, before Lord MANSFIELD, at the Sittings after *Trinity Term*, 16 *Geo.* 3, when a verdict was found for the plaintiff. In *Michaelmas* Term following, the defendant obtained a rule for a new trial, and, on the day for shewing cause, Lord MANSFIELD reported the evidence, in effect, as follows:

The counsel for the plaintiff called,

Benjamin Green, who said he had been an officer of the customs 46 years: he had particularly known the toll of the farthings, from the year 1729, to the year 1751. During that time, they were always returned, when the corn belonged, or was consigned to, freemen. He remembered they were always returned to Sir *John Thompson*, and to Alderman *Nelson*.

Joseph Fisher, aged 75, said, he had been in the corn-trade for 50 years. The farthings had always been returned to him as a factor. He had been clerk to Sir *John Thompson*, and always understood the exemption to extend to freemen as factors.—On his cross examination, he said they always charged the farthings to their correspondents.

[120] *William Anderson*'s evidence was to the same purpose. He said, he had been a clerk to Alderman *Nelson*, who never dealt on his own account, but solely as a factor. That *Nelson*'s dealings were to a great amount, for that he sometimes sold 5000 quarters in a day, and he always had the farthings returned.

William Read, clerk to the defendant, said, at first, that the farthings were never allowed to factors, and that he would not have allowed them if the persons claiming had declared that the corn was consigned on commission. But, on being pressed, he acknowledged that he never knew the question asked, whether the person claiming the farthings was, or was not, a factor. He knew *Nelson* to be a factor, and had returned the farthings to him, to the amount of £100 in a year. When the demand of a return of the farthings was made, the freeman making the demand used to write thus (in what is called a certificate), "*for your humble servant*," or, "*on account of your humble servant*." He knew that nineteen out of twenty parts of the corn sold in *London*, was sold by commission, and he knew of no instance where freemen had paid the duty. He had known the duty amount to £1100 in a year, but it was now reduced to £200.

Richard Reed said he was clerk to Messrs. *Wear* and *Taylor*, corn-factors. They had always paid the duty, before they took up their freedom, and never since. On proof of their being freemen, the farthings had always been returned, without further enquiry.—On his cross examination, he said, they always charged the farthings to their correspondents, in this

this manner; "*for the farthing*," and not "*paid for the farthing*."

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There was no evidence produced on the part of the defendant.

His Lordship said, he had told the jury, that the whole depended on the usage: that the factors charging their correspondents the farthings did not amount to a decisive acknowledgment, that the city was entitled to them. It might raise a question between them and their employers. The practice of selling by commission, may have been as ancient as this duty; and, if in the original grant of the duty, there was an exemption as to all corn consigned to freemen, such exemption would be good.

Wallace, *Bolton*, and *Buller*, shewed cause against the new trial.—They contended, that the evidence was irresistible. The reason of the exemption, at first, might have been to encourage freemen to become importers of corn, or to induce men to purchase the freedom of the city. It was not true, as had been urged, at the trial, that such an exemption was as broad as the grant; for *non-freemen* might import corn, either on [121] their own account, or as factors; and they, in either case, must pay the duty.

Glynn, Serjeant, *Dunning*, and *Davenport*, in support of the rule for a new trial, observed, that, if the plaintiff's claim were to succeed, the duty, which, according to *Read*'s evidence, had already sunk from £1100 a year to £200, would very soon be reduced to nothing. Some of the certificates read at the trial stated, in explicit words, that the freeman had the property of the corn in him, for the expression made use of was, "*being mine*," or, "*being my property*." It was clear the collector had understood them all in that sense. The exemption claimed would amount to a breach of the oath taken by all freemen of *London*, *viz.* "Ye shall "*colour* no *foreign* goods under, or in your name, whereby "the king, or this city, might or may lose their customs or "advantages." By "*foreign goods*," in the oath, were meant the goods of non-freemen, and the attempt of the plaintiff was to *colour* such goods, whereby the city would lose its customs. At all events, the plaintiff could not maintain this action, for the money paid for the farthings by the captain of the vessel in which the corn had been imported, if to be returned at all, must belong to the consignor, and was had and received to his use, not to the use of the consignee.

Lord MANSFIELD,—This is a matter of value, and the question is of importance; therefore the court will take time to consider of it. Independent of the oath, there is no doubt but that *colouring* goods would be a fraud. But the argument founded upon the oath turns in a circle. If the

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custom extends to factors, as well as to owners, then a person cannot be said to colour goods, unless he covers with his own name corn, which he is neither owner of, nor employed to sell as a factor. The words "*foreign goods*," in the oath, certainly mean the goods of non-freemen. If a new trial is granted, it can only be, either on the ground of apparent fraud, or because such an exemption as is claimed by the plaintiff cannot be supported by any usage. To say this, would be to decide the cause completely against the plaintiff; whereas, if we should not grant a new trial, the city of *London* will not be concluded by the present verdict. They will only have the disadvantage of a recent verdict against them, in case they should try the question again in another action.

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ASTON, *Justice*,—By the statute of 1 *Hen.* 8. *c.* 5. *(m)* it is enacted, "That no citizen of *London*, or other the king's "subjects inhabiting the *Cinque-ports*, or any other being "free of prisage or butlarage of wines, by grant, custom, "or otherwise, custom no wines of any person or persons, "not being free of any prisage or butlarage." By a charter of 1 *Ed.* 3. the king had granted to the city of *London*, "*Quod de vinis civium nulla prisa fiat, sed perpetuè inde* "*essent quieti.*" The object of the statute of *Hen.* 8. clearly was to prevent the abuse of that privilege. Now the words in the oath taken by freemen, have nearly the same import as to *all* goods, as those of the statute have as to wines; and when we compare the words of the charter and of the statute together, it seems that none but freemen, for their *own* wines, are exempted from prisage. In the case of *The King & Waller* v. *Hanger*, reported in *Bulstrode (n)*, the question was, Whether the defendant, as executrix of a citizen of *London*, was exempted from prisage of wine which had belonged to the testator, and was shipped in his life-time, but not unloaded till after his death? There was no decision, the court being equally divided; but it is laid down by *Dodderidge*, Justice, (although he was of opinion with the defendant,) that, to be entitled to the exemption, the party must have the *whole* property *(o)*. In the present case, therefore, if it stood clear of uninterrupted usage, I should think there would be great deal in the objection. It is observable, that there are none of the notes or certificates which expressly and confessedly state the goods to have come to the parties as factors. The parol-evidence is, that the exemption *does* extend to freemen-factors. The point to be determined is, To what extent the constant usage has been carried? If there should be a new trial on that ground, the opinion of the court in granting it will not occasion any bias in the second jury.

Lord

(*m*) § 6. (*n*) *B. R. H.* 12 *Jac.* 1. 3 *Bulst.* 1.
(*o*) *Loc. cit.* p. 17.

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Lord MANSFIELD, on the day following, declared the opinion of the court as follows:

I left this question to the jury, on the foundation, that originally, the exemption *might* have been as to *all* corn consigned to freemen, either on their own account, or as factors. As there were no traces on the subject, in writing, the question for them to try was, Whether the usage had been such, as to warrant both the claims? The evidence of usage was extremely strong. It appeared, that, for fifty years, the privilege had been considered as extending, *bonâ fide*, to both cases; and we cannot suppose, that, during that time, one [123] half of the city were fools, and the other knaves. Witnesses swore that they always understood the exemption to extend to both cases. Several things which have been urged do not weigh with me against the usage; for instance, the argument drawn from the exemption relative to prisage, for the words creating that exemption expressly confine it to the wines of *citizens*—"*De vinis civium.*" The oath proves nothing; because it still leaves the question to be, Whether this is *colouring* foreign goods, or not? The gradual diminution of the income from this duty is equally inconclusive. There has, of late, been a scarcity of corn in *England*, and a great deal has been imported from abroad, which is a thing formerly not known. Yesterday, after the argument, I revolved the question in my mind, on the nature of the claim, and the presumption upon which it must be supported; *viz.* that the exemption might have commenced with the grant; and it seemed to me next to impossible from the nature of the thing. It is an exemption in favour of citizens, from a duty granted to the city of *London*. Such an exemption must relate to something which a citizen must otherwise have paid. But that is not the case; for the citizen-factor would not have paid any thing. If the citizen-factor were to take the benefit to himself, then the exemption would in truth operate as a grant, for the owner would have the duty to pay, and the factor would receive it, instead of the corporation. Either the freeman must allow the farthings to his employers, and then this would be an exemption in favour of owners, not freemen, and inconsistent with the grant to the city, or else he is entitled to receive it for his own benefit, and then it is a grant to him. Therefore it strikes me as a thing which cannot be supported by way of exemption. This however is not an objection in point of law. It is matter to be left to a jury; for, if they find the exemption to have constantly existed in point of fact, it must operate as evidence of a grant. But this distinction not having been particularly pointed out to the jury on the last trial, it is proper that the cause should be reconsidered. Therefore we are all of opinion, that there should be a new trial.

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The new trial came on at the Sittings after *Michaelmas* Term, 17 *Geo.* 3. when a verdict was again found for the plaintiff; and in *Hilary* Term, 17 *Geo.* 3. a rule was obtained to shew cause, why the last verdict should not be * set aside, and a third trial granted, which came on to be argued on the 6th *February*, 1777.

Lord MANSFIELD stated the evidence on the second trial as follows:

Benjamin Green said, that the daty was always repaid to freemen; and no questions were asked, whether the corn was their own, or only consigned to them as factors. He had known *Wormley*, who was receiver of the duty for a lessee of the corporation, from the year 1700, and *he* had told him that the practice was always to return the farthings. *Alderman Thompson* and *Sir Crispe Gascoigne* were known to be factors, and they had £ returned. The method was, that the factor came and said, "I am a "corn-factor, there is the copy of my freedom, you will "accept my bills, and return the farthings." The understanding of the officer was, that the factors, as such, were entitled to the return. He never knew of any suspicion of fraud or abuse.

Joseph Fisher had known the trade 60 years; and, in addition to his evidence on the former occasion, said, that he had heard many old people talk of the privilege belonging to *free-factors*.

William Anderson and *Richard Reed* gave the same testimony as on the former trial.

All the plaintiff's witnesses said, that many factors had taken up their freedom for the sake of this privilege, and had paid the city £30 for it.

On the part of the defendant, the freeman's oath was read.

William Read, who was now produced on the part of the defendant, said, that since the matter had become a subject of dispute, they had understood the claim of exemption to relate only to corn which was the property of the freeman himself. However, nineteen out of twenty of the dealers in corn were factors, and so understood to be. There had been no dispnte till the present. *He* had conceived the repayment of the farthings to factors, as such, to be wrong, and had mentioned his sentiments to the defendant, and he to the corporation, which was the occasion of the present litigation.

One *Gimbert* said, he had been a factor 20 years, and a freeman part of the time. That he had been told, that if he were a freeman, he would be entitled to have the farthings returned, and yet to charge his employer for them. If he had not thought so, he would not have paid what he did, *viz.* £30

£30 10s. for his freedom. *Wear (p)* had told him, that he thought they were all forsworn;* but, two or three years afterwards, *Wear* became a freeman, and then he looked upon the exemption as his right. The witness could not say he was satisfied; and, after some time, he used to write in his certificates, "Receive such and such corn, from such a "ship," without saying, "mine," or "my corn." He mentioned the truth to the corporation, but they made no difference, whether the certificates were in one form or another. 1779. COCKSEDGE against FANSHAW. [*125]

Many notes or certificates were produced, in which the words concerning the corn were, "*is mine*," "*belongs "to me*," "*on my account*," "*for your humble servant*," and there were none which specified that the corn was consigned.

After having reported the evidence, his Lordship said:

For the plaintiff it was contended, that the usage was evidence of an original grant from the crown or parliament. That, in the original grant to the corporation, there might have been a proviso, that, whenever corn subject to the duty should be consigned to free-factors, they should be entitled to receive the farthings to their own use. That, if there was any doubt whether that could be the origin of the exemption, it might have arisen from a subsequent grant by the city to the free-factors, or an agreement between the city and them. I told the jury that the ground on which we had granted a new trial was, an intrinsic objection to the exemption; that the practice might have commenced in fraud, and yet have been carried on fairly afterwards; that it must have been an exemption as to factors, in the original grant to the city, or an original grant to the factors; that there could be no exemption, unless in favour of persons otherwise liable; but here the factor would not have been liable, but the owner, and *he* was not exempted. As to its being a grant, I told them, I had never heard or read of such an instance as a grant to factors; but that this was matter of evidence; I did not know of any law against such a grant; and, upon the whole, I left it to them to consider, whether they thought the usage coeval with the right of the city to the duty. Mr. *Wallace* suggested to me, that I had omitted the other ground, that the exemption might have originated in a subsequent grant from the city, or an agreement with them; but, thinking this origin less probable than the other, I said no more to the jury.

Wallace, *Bolton*, and *Buller*, again shewed cause.—*Dunning* and *Davenport* on the other side.

For the plaintiff it was urged, that no usage was ever so clearly established. There was no deception or fraud on the part [126]

(p) Mentioned *supra*, p. 120.

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part of the factors, nor ignorance on the part of the city. The only ground left for the defendant was, the supposed impossibility that this usage could have a legal origin. But it might be considered as beneficial to the city, being an encouragement to the importation of corn, and there was nothing to hinder the crown from granting part of a duty to a corporation, and the rest to particular members of that corporation; nor was it impossible that the city, subsequent to the grant of the duty, might have agreed with the freemen-factors, that they should have the duty on corn consigned to them. The temptation, which this would hold out to purchase the freedom of the city, was a reasonable inducement to such an agreement. In the case of *The Mayor and Commonalty of Linn Regis* v. *Taylor*, it was held to be a good custom, that freemen, being proprietors of ships, though not separately incorporated, might dig gravel in a manor which had been granted to the corporation (*q*); and, in a similar case, a few years ago, it was ruled at *Nisi Prius*, that the resident freemen of *Newcastle* might claim an exclusive right in the town moor, against the members of the corporation at large. The objection, in the present case, arose, from confounding prescriptions and customs, the former of which must have a legal origin; but customs needs not; *Gateward's Case* (*r*), *Viner*, *title Custom*, *Archer* v. *Bothenham* (*s*), *Day* v. *Savage* (*t*), *Potter* v. *North* (*u*). All customs vary from the common law, and the very idea of a custom is, that its origin cannot be traced. As to the supposition of fraud, the *onus* of proving lay upon the defendant, but there was as much reason to presume fraud against the duty, as against the exemption.

For the defendant, it was insisted, that the practice of the factors was nothing else but *colouring* the goods of non-freemen. All the notes held the corn out as the property of the factor. If the city did formerly know of the abuse, without correcting it, that was no reason why it should not now be corrected. While the frauds of the factors were kept within bounds, they were not inquired into, but

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as they had increased so much to the detriment of the city, it had become necessary to check them. No questions were asked of the factors, because the notes were contrived to answer the questions which might have been asked. The idea of an exemption, which was the only ground on the first trial,

(*q*) *C. B. M.* 35 *Car.* 2. 3 *Lev.* 160. There must be some mistake in the report of this case; for, though it states the whole court to have held the custom good, it concludes that judgment was given for the plaintiffs.

(*r*) *C. B. H.* 4 *Jac.* 1. 6 *Cro.* 59. *b.*

(*s*) *C. B. H.* 6 *Ann.* 11 *Mod.* 148. 161.

(*t*) *Hob.* 86.

(*u*) 1 *Ventr.* 383. 386.

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trial, was abandoned on the second, as not capable of being maintained; but the supposition of the privilege claimed, being part of the original grant, was equally untenable, because the importation of corn into the city must have been of a much earlier date than the existence of factors. It was the interest of the corporation, that freemen should have an exemption for themselves, because this rendered it a desirable thing to purchase the freedom of the city; but it was not their interest, that the free-factors should be entitled to receive a duty on corn from other freemen, which would be, in substance, the case, if the plaintiff prevailed; because the owner would charge the farthing duty, which he must pay to his factor, in the price of the corn sold to other freemen, for their consumption. It was said, that, though factors might not be able to take by a direct grant, the city might, in trust for them; but the objection was, that no possible reason could be imagined for such a grant in their favour. Though a custom need not have a legal origin, it must not be unreasonable, which this was. The cases cited were not similar to the present. The *Newcastle* case had been compromised, but there was nothing unreasonable in a custom for resident freemen to have an exclusive privilege, in what *they* only could use. In that case, the resident freemen did not claim a right of putting on the cattle of *strangers*, nor did the freemen ship-owners, in the case in *Levinz*, set up a right to take ballast, in order to sell to other persons. The corn-factors are not admitted to their freedom under that description, but belong to any company in which they choose to be admitted,—(the plaintiff belonged to the Stationers' company.)—The main argument for the defendant was, that all the proof which had been, or could be, produced, could not out-weigh the internal evidence against the claim: and it could not, it was said, be fairly urged against the present application, that there had already been two concurrent verdicts; for they had been given on different grounds.

Lord MANSFIELD,—The question, in this case, is, Whether the freemen of *London* have a right to be exempted from the duty on all corn, whether consigned to them as factors, or their own property? If there is no distinction, the plaintiff is entitled to recover, otherwise not. On the [128] first trial, I thought the evidence of the usage was very strong; and, as far as the memory of people living went, it was impossible to suppose there had been any fraud. The internal objection, (though it had been mentioned by the counsel on the first trial,) not having been particularly pointed out, by me, to the attention of the jury, it was thought proper that the cause should be re-considered. On the second trial, the usage has been proved more strongly than before; and

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and there was no evidence that the city had ever received, to their own use, the duty on corn consigned to freemen as factors. It appeared, on the first trial, that the duty had diminished in its produce. There was no evidence of this on the last. The oath cannot avail the defendant, because the claim, whether well or ill-founded, is between the factor and his correspondent. He does not *colour* the goods. He takes the money to himself, and does not make a deduction in his account with his employer. As to the notes, whether they were fraudulent or not, must depend on the fact, whether the claim was or was not known. Now it was as notorious that the corn did not belong to the factors, as if the notes had expressly said so. Till this dispute, no questions were ever asked. The farthings were always returned to *Nelson*, who dealt so largely, and never but as a factor. Persons, who only dealt as factors, have paid £30 for their freedom, in order to acquire this privilege. But the internal objection is, that the usage must have commenced in fraud some hundred years ago. This objection I cannot answer, and I left it to the jury in the strongest terms; but they have again found for the plaintiff. If I did wrong in leaving it to the jury, that would be a ground for a new trial. But I think I did right, and that this was not a subject for a special verdict, being merely a matter of evidence. If the jury thought there was evidence of a grant to the city, but that freemen should be exempted, and should receive a farthing a quarter on corn consigned to them as factors, I see no objection to it, in point of law. If we were to grant a third trial, we might as well grant a fourth and fifth. There would be no end. The city will not be concluded by the verdict.

ASTON, *Justice*,—This is a point of an uncommon nature, but the usage is very strong. The expressions in the notes may be reconciled to the truth. The only question now is, Whether the matter was fit to be left to the jury? If it was not, the last new trial ought not to have been granted. The court should have determined the cause. But I think the matter was proper for the decision of a jury, and that the evidence was sufficient in this cause—between a factor and the city-collector.

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WILLES, and ASHHURST, *Justices*, of the same opinion.

The rule was accordingly discharged; but, the city not being satisfied, they still refused to return the farthings, and the plaintiff was obliged to bring another action. This second action coming on to be tried, at the Sittings after last *Michaelmas* Term, the evidence for the plaintiff was of the same sort and import, with what has been already stated, but more correct, explicit, and circumstantial. The defendant now demurred to the evidence; and, this day, the demurrer

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demurrer was argued, by *Davenport*, for the defendant, and *Wood*, for the plaintiff.

Davenport divided his argument into five points, or heads: 1. He contended, that, from the nature of a demurrer to evidence, and upon the evidence put on the record, the court might, and ought to, disbelieve that the usage had been immemorial; 2. He then endeavoured to shew, that the claim, whether as founded on an exception or proviso in the original grant, or as a trust, or otherwise, could not have had a legal origin in respect of the persons of the claimants; 3. In respect of those who receive the duty; 4. In respect of those who pay it; Nor, 5. in respect of the nature of the duty itself.—1. As to the nature and effect of a demurrer to evidence, he said, he knew no difference between *that*, and a demurrer to pleadings, except that in the case of the latter, you admit, at first, the truth of the facts pleaded; and, in the former, you first put the party on the proof of the facts. That, when the facts are proved, you deny, on a demurrer to evidence as you do on a demurrer to pleadings, that the inference contended for, follows from the facts alleged. But he insisted, that although a demurrer to evidence admits the truth of all the particular facts, it does not admit the conclusions in point of *fact*, more than those in point of *law*, which the party offering the evidence contends for; so that, (as he conceived,) a demurrer to evidence may be maintained, even where there is some part of the evidence which might be left to a jury. This, he said, appears from the form of the words used, which are, "that the evidence is not *sufficient* in law, to "maintain the issue:" not, "that there is *no* evidence pro-"duced in support of the issue." That, in this respect, the effect of such a demurrer differs from a special verdict, and that it may be used where the party demurring is unwilling to trust the jury with the inference in point of fact. As authorities in support of this doctrine, he relied on what is said in the First *Institute* (*v*), in *Baker's Case* (*w*), in *Reniger* v. *Fogossa* (*x*), and on the precedents in *Rastall's* Entries, *title Evidence* (*y*); and he contended, that, according to the definition he had given, he was entitled to argue, that the particular facts sworn to, did not establish the general fact of an immemorial and uninterrupted allowance of the farthings to freemen-factors upon corn consigned to them, and not their own property. He urged, on this head, the appearances of fraud, in the various and ambiguous phrases and expressions which were used in the notes or certificates.—2. He said the usage, if in point of fact

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(*v*) *Co. Littl.* 72. *a.*
(*w*) *B. R. T.* 42 *El.* 5 *Co. a.*
(*x*) *M.* 2 *Edw.* 6. *Plowd.* 1.
(*y*) *P.* 317. *b. to* 319. *b.*

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fact it had been immemorial, could never have had a commencement such as to establish a right in point of law, in respect of the persons claiming. It was now agreed, that the foundation of the claim must be considered as a grant; but freemen-factors were not persons capable of a grant. There was no such class of men existed till after the time of *Richard* I. There was no evidence of their existence at that period, nor was it possible; for the commerce of corn must itself have originated in later times. Corn-factors, even now, have no permanent character, and are not created by the city, by the crown, nor by any other legal authority, being the mere temporary creatures of their employers, who may destroy their existence when they please.—3. As to the persons receiving the duty, it was impossible, he said, to believe that there could ever be a legal commencement of an usage, by which the corporation of *London* were to become the trustees, or agents and collectors, for such a fluctuating and uncertain class of individuals. The city appoints, and pays the collector, and the factors do not at all contribute to the charges of the collection.—4. As to the employers, who were to pay this duty, the same absurdity arose when *they* were considered, because it could not have been supposed that they would employ factors who were entitled, over and above the allowance paid them as such, to levy a duty upon the goods consigned to them. There was no consideration moving from the factors, to the owners, to entitle them to such a duty.—5. As to the nature of the duty, being a port-duty, and paid on account of the maintenance of the quays and harbour, he thought *that* was equally inconsistent with the idea of a grant to the free-factors, for there is nothing done by them to support, or benefit, the harbour. Upon the whole, he concluded, that the claim could never have had a legal commencement, but must have originated, either in fraud, or, at best, in mistake, by confounding the corn belonging to freemen who happened to act as factors, and that consigned to them on account of other persons.

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Wood, for the plaintiff,—1. Denied *Davenport*'s definition of a demurrer to evidence, and insisted, that it admits all matters of fact which a jury *might* find, and only brings the decision, upon the inference in point of law from those facts, before the court. If it were otherwise, he said, a party might, in every case, take away the trial of the cause from the jury, and vest it in the court. The evidence of the usage was not only such as was to be left to a jury, as the court indeed had decided on the motions in the former action, and which was, on the present occasion, sufficient for the plaintiff, but was extremely strong and satisfactory. To say, whether the allowance constantly made to factors, was obtained

tained by fraud, was directly and exclusively the province of the jury, but there was no pretext for supposing fraud.—2. He insisted, that the actual existence of the usage or custom being admitted by the demurrer, it was certainly such as might have a legal origin in various ways. If the crown, in the original grant of the duty to the city, had inserted a proviso to this effect, "but we will and ordain, that the free-"men of the city of *London* shall receive to their own use, "that part of the duty which shall arise upon corn con-"signed to them," there was no doubt but that such a proviso would have been good, in law, to entitle them to such part of the duty. The king might have granted it, as an encouragement to them to import corn for the supply of the city. It is not at all an unusual thing for a particular part of a corporation to be entitled to rights or privileges to the exclusion of the rest, and to prescribe for them through the intervention of the whole body. This appears from the case of *Mellor* v. *Spateman* in *Saunders (z)*, where a burgess of *Derby* prescribed in a right of common, through the medium of the corporation; and from *Brooke, title Prescription (a)*. The custom might also have arisen, by a subsequent agreement between the city and the free factors. It was not necessary for the plaintiff to shew the exact origin; it being sufficient for him if there was any possible legal commencement of such a privilege.

Lord MANSFIELD,—The foundation, upon which the plaintiff rests his title, is this; that, by immemorial usage, to which there has been no interruption since the time of *Richard* I. freemen-factors have a right to take, to their own use, that part of the farthing duty which is paid for corn consigned to them. The defendant denies the fact, and says, there is no such usage or custom. I speak to the fact now; the legal objection I will consider by and by. But this is the fact upon which the parties are at issue; and this is to be tried by the jury. Nobody else can try it; because it is a conclusion of fact from the evidence. Almost all the objections that have been made, are such as were very proper to be stated to a jury, to induce them to doubt of the fact of such immemorial usage; to induce them to conclude that it began in fraud, or mistake; that it could not begin in the way in which it is claimed; that such an usage could not possibly be immemorial: and, on the second trial, all this was strongly put to the jury. But, what is now brought before the court on this demurrer? Not a question, whether the evidence was sufficient to

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(z) *B. R. M.* 21 *Car.* 2. 1 *Saund.* 339. 343

(a) *pl.* 28.

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to satisfy the jury of the fact of the custom, for, by the demurrer, the defendant admits every fact which the jury *could* have found upon the evidence. The only question before the court, is, Whether, supposing the fact to be as the plaintiff contends, and that, immemorially, without any exception since the time of *Richard* I. the usage has been for the freemen-factors to receive the farthings, such usage could, by any possibility, have a legal commencement? The plaintiff was not bound to find out what the actual commencement was, because it has existed from time immemorial. The city itself has no writing, or grant, to shew. They only say, the duty has been paid to them as a right, time out of mind, by all but freemen for their own corn. The plaintiff says, there is another qualification: "It has not been paid by "freemen-factors for corn consigned to them; they have al- "ways enjoyed that privilege." If, by no possibility, such a privilege could have a legal commencement, then, to be sure, the fact of its existence does not decide the question; because in point of law, that does not establish the right; but the rule of law is, that wherever there is an immemorial usage, the court must presume every thing *possible*, which could give it a legal origin. Whether *probable* or not, is for a jury to decide. Now, why is it not possible that, in the original grant, the crown may have said, for the purpose of encouraging persons to take up their freedom, that no freeman should pay the duty to the city, either for his own corn, or for corn consigned to him as a factor? Would such a grant be void? Certainly there may have been such a grant. But, further, in cases of this sort, an act of parliament may be presumed. Many, if not all the usages and customs of the city of *London*, are confirmed by act of parliament. Or, the privilege may be founded on a bye-law, made before time of memory. Suppose, after the grant to the city, there had been a bye-law made, by which, for the purpose of encouraging factors to become free, and by that means, introducing the corn trade, the corporation gave them, when freemen, all the farthings arising on corn consigned to them; surely there is nothing impossible in this; and there is a colour for supposing *that* to be the ground, from the evidence; because it is in proof, that the factors purchase the freedom on purpose to acquire the privilege. The only point now before the court was very fully considered, upon the second motion for a new trial, and we were all of opinion, that, if supported by immemorial usage, it was impossible for the court to say, that the privilege could not have a legal commencement.

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WILLES, *Justice*,—I am of the same opinion, for the reasons which my Lord has given. As to one thing urged by Mr. *Davenport*, *viz.* that there could be no corn-factors in

in the time of *Richard* I. though, perhaps, they did not then exist by that name, yet, as *London* was a flourishing city long before that period, it must have been supplied with corn in great quantities; and it would be absurd to suppose that the growers themselves brought their own corn from all parts of the kingdom to the *London* market. When they did not come themselves, they must have employed factors, agents, or consignees, to sell it for them. 1779. COCKSEDGE against FANSHAW.

ASHHURST, *Justice*,—I am of the same opinion. The question now before us, is precisely what was decided on the last motion for a new trial. The opinion of the court then was, that the custom might have a legal commencement. As to the evidence, there is certainly enough to have warranted the jury in inferring, that the usage had existed as far back as the time of memory. There was sufficient to be left to a jury, and that is all that is requisite.

BULLER, *Justice*,—Though Mr. *Davenport* divided his argument into five parts, it seems to me, that there are but two questions in the cause. The first, What is the nature of a demurrer to evidence? the second, Whether the custom set forth in this demurrer-book, as stated by the plaintiff's counsel, be, or be not, good in law? With respect to the first, [134] I think Mr. *Davenport* has gone a great way too far. It is the province of a jury, alone, to judge of the truth of facts, and the credibility of witnesses; and the party cannot, by a demurrer to evidence, or any other means, take that province from them, and draw such questions *ad aliud examen*. I think the plain and certain rule is this: The demurrer admits the truth of all facts, which, upon the evidence stated, *might* be found by the jury in favour of the party offering the evidence. Mr. *Davenport* puts the case of a special verdict, and says, the reason for a demurrer to evidence is, that the party demurring does not chuse to trust the jury. In a certain degree that is true; but the reason of not trusting the jury is, because they may, if they please, refuse to find a a special verdict, and then the facts never appear on the record. But whether the case comes before the court on a demurrer to evidence, or on a special verdict, the law is the same. Now, if this cause had been put into the shape of a special verdict, what must have been stated on the record? The jury could not find all the evidence set forth in the demurrer, but must have pronounced upon the fact, whether or not such an immemorial custom had existed, and then it would have been for the court to decide, whether such a custom was good in law. I agree with Mr. *Wood* in his definition of a demurrer to evidence; and I am clear that there was sufficient to be left to a jury, and, therefore, on the first question, there seems to me to be no doubt at all. As to the second, though I have no doubt in my own mind,

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Judgment for the plaintiff [5].

[5] Upon this judgment, the defendant brought a writ of error in the Exchequer Chamber, where the cause has been twice argued, *viz. M.* 21 *Geo.* 3. by *Adair*, Serjeant, for the plaintiff in error, and *Wood* for the defendant; and *T.* 21 *G.* 3. by *Davenport* for the plaintiff in error, and *Chambre* for the defendant. It now stands for judgment. (*Vacation* after *T.* 21 *Geo.* 3.) [†50].

[† 50] In E. 22 *Geo.* 3. the Judges of the Common Pleas, and the Barons of the Exchequer, delivered their opinions and reasons, *seriatim*; when they were all of opinion with the Court of King's Bench, except *Eyre*, Baron; and, accordingly, the judgment was affirmed. Afterwards, a writ of error was brought in the House of Lords, where, after the case had been argued at the bar, the following questions were put to the Judges; viz. 1. Whether the evidence and facts admitted, upon which this demurrer has been joined, are sufficient, in law, to maintain the issue for the defendant in error? 2. Whether, if the evidence be insufficient, or uncertain, a new *venire* ought to have been awarded?

Gould, Justice, (in the absence of *Skynner*, Chief Baron, who was confined by indisposition,) delivered the unanimous opinion of the Judges present, (*Eyre*, Baron, being one,) upon the first question, in the affirmative; and submitted to the House, that, the first question being so answered, any answer to the second was unnecessary. Upon this, the judgments of the Court of *B. R.* and *Cam. Scacc.* were (5 June, 1783;) unanimously affirmed.

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Wednesday, 28th April.

The KING *against* the MAYOR and BURGESSES of LYME REGIS, on the prosecution of the Honourable HENRY FANE.

A clerical mistake may be amended in the return to a *mandamus*, after the return has been filed [F].

A *Mandamus* having issued to restore the *Honourable Henry Fane*, to the office of a capital burgess of the borough

[F] It seems this doctrine is to be extended beyond clerical errors, but it is a subject for the discretion of the Court. There is no certain rule, but the principle is, "that an amendment shall or shall not be permitted "to be made as it will best tend to "*the furtherance of justice*," per Lord Kenyon in *The King v. The Mayor, &c. of Grampound*, 7 *T. R.* 699; in which the court refused to permit the defendants after verdict on a traverse to a return to a *mandamus* to make amendments verifying the description of the condition of the borough.

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borough of *Lyme Regis*, the corporation returned, That one *Coade*, one of the capital burgesses, had exhibited "*certain* "*articles of complaint*" against *Fane*: that, *by* "*the said* "*articles of complaint*," he had charged him with having been duly summoned, and having neglected to attend the corporate meeting, for the election of a capital burgess; and that, *by* "*the said articles* of complaint," he had also charged him with non-residence, and neglect of his duty as a capital burgess: that it was ordered, that a copy *of the said articles* should be given to *Fane*, and that he should have notice to appear, at the next meeting of the mayor and burgesses, to answer the several articles against him, in the said complaint contained, and to shew cause, why he should not be removed and displaced from his office: that the copy and notice were served: that a meeting was had, where he appeared, and was charged with, and accused of, the non-residence, absences, contempts, neglects, breaches of duty, and misbehaviour, specified and contained in *the said several articles* of complaint so exhibited against him. That the meeting heard evidence in support of the "*said several ar-* "*ticles*" mentioned and contained in the said complaint, and in *Fane*'s defence, and, also, what was alleged by him and his counsel why he should not be removed from his office of capital burgess, "for the several matters in the *said* "*articles* of complaint mentioned;" and, thereupon, it was adjudged, that he was "guilty of the non-residence, ab- "sences, contempts, neglects, breaches of duty and misbe- "haviour, and other matters objected and charged against "him, *in and by the second and fourth articles of the said* "*complaint*;" and that, thereupon, they had resolved to remove him from his office; and had removed him; and that he had not been elected since; so that they could not restore him.

This return had been filed last term. The defendants, afterwards, discovered that they had, in that part of it which stated the conviction, set forth, that the prosecutor had been found guilty of the charges in *the third and fourth articles*, [136] without having stated, in the preceding part, that the complaint consisted of four articles; that, on the contrary, by the recital of the complaint in the return, it seemed rather to be stated as containing only two; and that it did not therefore certainly appear, that the articles on which *Fane* was convicted, were the same which were set forth as containing the accusations against him. A motion was, therefore, made this term, (on *Monday* the 26th of *April*,) and a rule granted, to shew cause why the defendants should not be at liberty to amend, by inserting the words, "*second of the*," and "*fourth of the*," in that part of the return which "recited the articles on which he was accused, so as to make "it run thus, "*and, by the second of the said articles* of "complaint,

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" complaint, charged and accused the said *Honourable Henry Fane,*" &c. and again, " and *by the fourth* of the said articles of complaint," &c.

The *Solicitor General, Dunning* and *Rooke,* now shewed cause.—They said, enquiry had been made at the office, and that no instance could be found, where the court had permitted a return to be amended after it had been filed, and, thereby, made a record of the court. That the case of the amendment of a return in *Shower (b)* (which had been cited when the rule was obtained), was upon a motion which did not appear to have been opposed, and it did not appear that the return, in that case, had been filed. That, in the case of *Lepara* v. *Germain (c),* after a plea in abatement on the ground of an erroneous addition, *viz.* that the defendant had been stated as *Knight,* instead of *Knight and Baronet,* the court refused to permit an amendment, by inserting the words " *and Baronet,*" although the proceedings were all in paper.

Bearcroft, in support of the rule, relied upon an affidavit, which stated, that the omission of the words, now prayed to be inserted, had arisen from a mere mistake of the gentleman who settled the draught of the return, and who had struck his pen through those words.

Lord MANSFIELD,—It is very essential to the administration of justice, that slips, or mistakes of the pen, should not be fatal. I am satisfied this is a mere blunder, and not a trick; and the amendment suggests itself upon inspection. [137] As the return stands at present, it is nonsense. There is no case cited, where the court has refused to amend such a mistake, although the return has been filed. The case in *Shower* seems to be an authority to the contrary.

The rule made absolute; the defendants undertaking, if an action for a false return should be brought, to take short notice of trial, and not to bring a writ of error, if there should be judgment against them [4].

(b) Rex v. *Mayor* of *Chichester, T. W. & M.* 1 *Sh.* 273.

(c) E. 2 *Ann. B. R.* 1 *Salk.* 50.

[4] There were four other returns, to different writs of *mandamus,* in which similar amendments were moved for, and granted at the same time with this. The returns were the same, (*mutatis mutandis,*) and the mistake in the draught had been copied in all of them.—*Vide supra, Richards* v. *Brown,* p. 114 to 116.

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LONGCHAMP *against* KENNY.

Thursday, 29th April.

If one person obtains possession of goods entrusted to another to be sold at a fixed price, and, at the time when the goods are to be re-delivered, or the price accounted for, he refuses to do either, and the person to whom they were entrusted, being threatened with an action, pays the fixed price to the owner, such person may recover the sum against him who took possession of them, in an action for *money had and received* —Perhaps in one for *money paid*.

THE plaintiff was a waiter at one of the great subscription-houses, or clubs, in *St. James's Street*, of which the defendant was the master. Each of them had received, from Mrs. *Cornelys*, a number of masquerade tickets, to dispose of, for which they were to account, after the masquerade, by paying the value, or returning the tickets. *Kenny* had got possession of one of the tickets which had been delivered to *Longchamp*, and, when Mrs. *Cornelys*'s agent came to demand an account of *Longchamp*'s tickets, he was told, by *Longchamp*, that *Kenny* had had one of them, and he must pay for it. Upon this, the agent went and made a demand on *Kenny*, who said, "Well, if I had "it, what then? Go to the person who received it of you, "and let him pay you." *Longchamp* was then threatened with an arrest, on which he paid five guineas, (the value of the ticket,) to Mrs. *Cornelys*, and then brought this action against *Kenny*. The declaration contained a count for *money had and received*, one *for money paid, laid out, and expended*, and one for money lent. The cause was tried at *Westminster*, on *Thursday* the 18th of *February* 1779, before Lord MANSFIELD. The plaintiff, besides the above facts with regard to the ticket, endeavoured to prove a sum of money due for wages, but, there being no count for wages, nor for work and labour, it seemed clear that he could not recover on that ground; and, the jury having found a verdict for him, with five guineas damages, they mentioned that they found this sum expressly for the ticket. It appeared, that the defendant was apprised, that the plaintiff meant to sue him for the value of the ticket, and that he came prepared to resist [138] that demand. Lord MANSFIELD, at the trial, expressed great doubt, whether the action could be maintained, either on the count for *money paid*, (on which the plaintiff's counsel relied,) or on that for *money had and received*. He said, he would reserve the question, for the opinion of the court, on a motion for a non-suit—(It was clear that none of the evidence applied to the count for money lent.)

Dunning, and *Cowper*, now shewed cause against setting aside the verdict.—*Bearcroft*, and *Mingay*, on the other side.

For the defendant, it was contended, that *trover* was the proper form of action. In a count for money paid, the words, "*at the defendant's special instance and request*," are not mere words of course. There must be a privity in

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the transaction, between the parties, in order to support such a count; and, as to the count for money had and received, though such privity is not necessary to support that, yet it must appear, that money, which ought to have been paid to the plaintiff, had, in fact, been received by the defendant. In this case, there was no proof that the ticket had been sold, or any money received for it, by *Kenny*.

Lord MANSFIELD,—It is certain, that, where the demand is for a specific thing, an action cannot be maintained in this form. Great benefit arises from a liberal extension of the action for money had and received; because the charge and defence in this kind of action, are both governed by the true equity and conscience of the case. But it must not be carried beyond its proper limits *(b)*. The plaintiff must never be permitted to turn the generality of the count into a surprize upon the defendant, by deserting the ground which the defendant was led to think the only matter to be tried, and resorting to another, of which he could not have the least suspicion. If the present action had been brought without notice of the nature of the demand, I should have thought it could not have been supported. But, here, the defendant came prepared. If he sold the ticket, and received the value of it, it was for the plaintiff's use, because the ticket was his. Now, as the defendant has not produced the ticket, it is a fair presumption that he has sold it. [F 1].

ASHHURST, and BULLER, *Justices*, were inclined to think, that the evidence would have supported the count for money paid. ASHHURST, *Justice*, compared this case to that of a surety, who, by paying the debt for the principal, saves him from being sued, and who can maintain an action against him for money paid. In like manner, he said, the plaintiff here had paid the five guineas under a compulsion brought

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(b) Vide supra, Weston v. *Downes, M.* 19 *G.* 3. p. 23, 24.

[F 1] In *Leery* v. *Goodson*, 4 *T. R.* 688. where goods distrained by plaintiff upon his tenant for rent were returned by him to defendant on his promising to pay the rent, it was held, that a count for money had and received could not be supported; and this case being cited, the court distinguished by observing, that here the ticket was delivered for the purpose of being sold, whereas the pictures in that case were taken by defendant to *prevent* a sale. In *Whitwell* v. *Bennett*, 3 *B. & P.* 559. the court observed, that here there was abundant evidence out of defendant's own mouth, that he *had received* the price. This seems the true ground on which the case is to be supported. See the opinion of Wilson, Justice, in *Israel* v. *Douglas*, 1 *H. Bl.* 239. where he holds it necessary that money must be actually received, to make a defendant liable in this form of action.

brought upon him by the defendant [F 2], and had thereby saved *him* from an action. But they gave no decisive opinion on that point; being clear, that the count for money had and received was maintainable.

The rule discharged.

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LONGCHAMP against KENNY.

GOODTITLE, Lessee of FOWLER, and Another, *against* WELFORD.

Thursday, 30th April.

An executor who takes no beneficial interest, is a competent witness to prove the sanity of the testator.—If a person who is interested execute a surrender or release of his interest, he may be examined as a witness, although the surrenderee, &c. refuse to accept the surrender or release.

THIS was an ejectment, in which the lessors of the plaintiff claimed under the will of one *Elizabeth Bezley*. The action was tried before Lord MANSFIELD, at *Westminster*, at the Sittings after last *Hilary Term*, and one *Hearle*, who was named executor in the will, and was also devisee of a reversionary interest, expectant on an estate for life, in some copyhold lands part of the estate devised, was called, on the part of the plaintiff, to prove the sanity of the testatrix, which was impeached by the defendant. To obviate the objection of interest, he had surrendered his estate in the copyhold lands to the use of the heir at law, but *he* had refused to accept the surrender.

The counsel for the defendant insisted, that *Hearle* was an incompetent witness; 1. Because the surrender was ineffectual, and did not extinguish his interest, not having been accepted; 2. Because he had acted in the executorship, having paid different legacies, and, therefore, had rendered himself liable to be sued, if the will should be set aside.

Lord MANSFIELD over-ruled both objections, and, the witness being examined, the jury were satisfied of the sanity of the testatrix, and found a verdict for the plaintiff.

On a rule to shew cause why there should not be a new trial, which came on to be argued this day, *Bearcroft*, *Dunning*, and *Bolton*, were of counsel for the defendant. The *Solicitor-General*, and *Lane*, for the plaintiff.

For the defendant, besides the two objections to *Hearle*'s evidence which had been made at the trial, it was now contended, that, as executor, he was entitled to the residue of the personal estate not disposed of by the will, and was, therefore, interested, on that account, to support it. One clause

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[F 2] S. P. *Exall* v. *Partridge*, 8 *T. R.* 308. But query if the principle applies to the present case. Here is no privity between the plaintiff and defendant to support an implied authority. Could the count for money paid have been supported on an *express* authority from the answer made by defendant to the agent?

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clause in the will was in the following words, "I devise and "bequeath to *E. Lawrence* all the rest of my *goods, plate,* "*and cloaths;*" and it was contended, that, although the words "*goods,*" had it been used alone, would perhaps have comprehended the whole personal estate, yet it appeared by the subsequent words, that it was only used to express a specific legacy, and therefore the rest of the personal estate would vest in the executor, who had no legacy given him, which could raise a resulting trust in favour of the next of kin.—To shew, that nothing passes by a release or surrender, unless accepted by the person in whose favour it is made, they cited *Perkins, title Surrender (c),* and *Shephard,* same *title (d).*

For the plaintiff, in answer to the objection that *Hearle* might be liable to be sued for what he had done in the character of executor, if the will were set aside, the case of *Lowe* v. *Jolliffe (e)* was relied upon, where one *Dovey,* an executor who had released a legacy given him by the will, and, therefore, took no beneficial interest, was admitted, on a trial at bar, to prove the testator's sanity, although he was objected to, on the general ground of his being liable to be sued for his acts as executor, if the will should be set aside, and, also, because he had actually sold a set of chambers which had belonged to the testator, and was, therefore, answerable to the purchasor for the title.

The counsel for the defendant said, that, in the case of *Lowe* v. *Jolliffe,* the purchaser of the chambers was in court at the trial, and, upon the objection being made, offered to release to *Dovey,* and that *Dovey* was only admitted as a witness in consequence of that offer [1].

Lord MANSFIELD,—This will has been tried three or four times; and there have been contradictory verdicts. On the trial, in the present instance, the jury were satisfied. But a motion has been made for a new trial, not on the merits, but on the incompetency of a witness. When the witness was produced, the counsel for the plaintiff read his surrender of the copyhold estate left to him by the will, but it was objected, that this surrender had not been accepted.—The witness, on being questioned, said, he had acted as executor, and that the legatees had received their legacies under the

[141] will. On this ground also, it was contended, that he was interested, because, if the will should be set aside, he would be answerable for having acted *de son tort.* But he was not objected to, at the trial, as being entitled to the residue of the personal estate. Now, on such a motion as the present, no

(c) § 608.
(d) *Sheph. Touchst.* p. 307.
(e) *B. R. E.* 2 *G.* 3. Since reported, 1 *Blackst.* 365.

[1] *Qu.* For, according to the report of the case in 1 *Blackst.* the court thought there was no occasion for the release; *loc. cit.* p. 366.

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no objection to a witness should be received which was not made at the trial. If this new objection had been made *then*, it might perhaps have been shewn, that there was no residue, or a release might have been given, *&c.*—As to the other objections, 1. The bequest to the witness would certainly have gone to his competency, if he had not parted with his interest; but, as he has parted with it, as far as depends upon him, third persons have a right to his testimony, and the surrenderee shall not deprive them of it, by refusing to accept the surrender [☞ 1]. 2. It is contended, that, in an action concerning land, an executor is not a competent witness, because he may be sued for his administration of the personalty. But he certainly has no immediate interest in the action; and I remember its being determined by Lord *Hardwicke*, on a petition for a commission of review, and afterwards by the Delegates, that it is no objection to an executor's testimony, that he may be liable to actions as executor *de son tort* [☞ 2].

WILLES, *Justice*,—It is clear that an executor in trust may be a witness [† 51]. If the testator had stopped at the word

[☞ 1] *Bent.* v. *Baker*, *B. R. H.* 29 *Geo.* 3. 3 *Term Rep.* 27. 35. [F 1].

[☞ 2] *Vide Bailie* v. *Wilson*, 15 *Jan.* 1744, cited 4 *Burr.* 2254, 2255.

[† 51] In *Goss* v. *Tracey*, *Canc. M.* 1715, Lord *Cowper* determined, "that "a grantee, when he appears to be a "bare trustee, is a good evidence, to "prove the execution of the deed to "himself." 1 *P. Will.* 287. 290. ☞ And, in *Fountain* v. *Coke*, *B. R. E.* 26 *Car.* 2. 1 *Mod.* 107. it is said by Lord *Hale*, "an executor may be a "witness in a cause concerning the "estate, if he have not the surplusage "given him by the will; and so I "have known it adjudged." [F 2]

[F 1] In which it was held that, if the interest of a witness arises from liability to costs of a bill in equity, in which he is a plaintiff, and the other party in the cause a defendant, that interest is removed, and the competency of the witness restored, by an offer on his part that the bill shall be dismissed as to himself at his own costs; although that offer be refused by the other party. By 25 *G.* 2. *c.* 6. *s.* 3. refusal of a legacy tendered renders a person who is an attesting witness, and also a legatee under a will, competent to prove the execution, as well as payment accepted or released: the only difference is, that (by *s.* 4.) such refusal annuls his title to the legacy.

[F 2] So, *sect.* 1. of 25 *G.* 2. *c.* 6. which avoids devises to attesting witnesses, and makes them competent to prove the execution of the will, is confined to *beneficial* interests. But if trustees are *parties* to a suit and liable to costs in *the first instance*, they are disqualified; though they may have power to reimburse themselves out of a general fund, as contributors to which they are restored to competence by act of parliament. R. in *R.* v. *Bermondsey*, 3 *East.* 7, where doubt is thrown on *R.* v. *Woodland*, *ib. cit.* which decided that an indemnification against poor's rate by the landlord took away the objection of interest from the occupier.

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word "*goods*," the legatee would have taken all the residue; but the addition of the words "*plate and cloaths*" may restrain the meaning. But the objection on this ground was not made at the trial, which is a reason for not setting the verdict aside. Besides, on a new trial, the witness may establish his competency, by releasing any interest he may have in the residue. As to the surrender, I think it operates without the assent of the surrenderee, and if, on three proclamations, the surrenderee would not come in to be admitted, I think the lord might take advantage of it, as a forfeiture.

ASHHURST, *Justice*,—Every objection of interest proceeds on the presumption that it may bias the mind of the witness; but this presumption is taken away, by proof of his having done all in his power to ged rid of the interest.

The rule discharged.

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Friday, 30th April.

MARTYN *against* HIND.

If a rector give a person a *title* to the bishop by which he appoints him curate of his church, and undertakes to continue him and pay him a salary, *till he shall be otherwise provided of some ecclesiastical preferment, or for fault by him committed, lawfully removed*, he cannot remove him, without cause, while he continues rector of that parish, and during that time the curate may recover the salary in an action upon the *title*.—But if the rector is *bonâ fide* preferred to another living, the obligation ceases.—A readership is not ecclesiastical preferment within the meaning of such a title.

THIS was a case reserved for the opinion of the court. The cause had been tried at the Sittings in *London (a)*, after last *Hilary Term*.—The *declaration* stated, that the defendant, on the 13th of *February*, 1769, by an instrument in writing, undertook and promised to retain and continue the plaintiff to officiate as curate in the parish church of *St. Ann, Westminster*, until otherwise provided of some ecclesiastical benefice, unless, by fault by him committed, he should be lawfully removed; and to pay him 50 guineas a year during that time; that the plaintiff had not been provided of any other ecclesiastical preferment, nor lawfully removed, and that the defendant had not, from the said 13th of *February*, 1769, retained and continued him curate of the said church, and permitted him to officiate therein, and had not paid the 50 guineas a year, *&c.*—*Plea*,—*Non assumpsit*.—The case stated the instrument on which the action was brought, and which is called a *Title*, which was in these words:—

"To the Right Reverend Father in God *Richard* Lord "Bishop of *London*. These are to certify your Lordship, "that I *Richard Hind*, rector of *St. Ann, Westminster*, in "the county of *Middlesex*, and your Lordship's diocese of "*London*, do hereby nominate and appoint the Reverend "*Thomas Martyn*, to perform the office of a curate, in my "church of *St. Ann* aforesaid, and do promise to allow "him the yearly sum of 50 guineas, for his maintenance in "the

(a) By *consent*; for the *venue* was laid in *Middlesex*.

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" the same, and to continue him to officiate in my said " church, until he shall be otherwise provided with some " ecclesiastical preferment, unless, by fault by him committed, " he shall be lawfully removed from the same; and I hereby " solemnly declare, that I do not fraudulently give this cer- " tificate, to entitle the said *Thomas Martyn* to receive holy " orders, but with a real intention to employ him in my said " church, according to what is before expressed. Witness " my hand, this 13th day of *February*, 1769, *R. Hind*."

The case then stated, that on the 6th of *July*, 1778, the church of *St. Ann* had become vacant, on the defendant's having taken other preferment, *(viz.* the living of *Rochdale)*, and that he had paid the plaintiff his salary, as curate, up to that time.

About the year 1776, upon a disagreement between *Hind* and *Martyn*, *Hind*, after giving him six months' notice to quit the curacy, had refused to permit *Martyn* to officiate, and had discontinued the payment of his salary, upon which *Martyn* brought an action, in this court, similar to the present, on the written instrument above set forth, and obtained a verdict for the arrears then due; but the question, whether he could maintain the action, being brought before the court in *Easter Term*, 16 *Geo.* 3. on a motion for a new trial, it was looked upon as a matter of importance, and entirely new; and, after it had been fully argued at the bar, the court took time to consider. [143]

The objections made to the action, on that occasion, were three. 1. It was contended, that the instrument did not contain any contract between the rector and curate, nor any promise from the latter to the former. That it was merely an engagement and indemnity, by the rector to the bishop, founded on the statute of 12 *Ann. st.* 2. *c.* 12. and on the canons, by which the bishop, if he ordain a person who has no curacy or preferment, is himself liable to maintain him. That, if any person was entitled to sue the defendant, it was the bishop. That *Martyn* was not a party to the instrument, and that the undertaking contained in it, was, as to him, without consideration: that there was no reciprocity of obligation between *Hind* and him, for that he might cease to act as curate whenever he pleased. 2. It was said, that *Martyn* had never obtained a regular licence, (which ought to be under seal,) to officiate as a curate, which it was incumbent on him to have done, in order to entitle himself to the benefit of *Hind*'s undertaking, supposing it could be considered as an engagement to him. That a licence was in the nature of an investiture to a curate; and that, not being licenced, he was certainly removeable at the pleasure of the rector, and could not maintain this action as curate. Cases were also cited with a view to shew, that all curates are removeable

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removeable at the pleasure of the rector, *viz. Price* v. *Pratt (a)*, *Bott* v. *Brabalon (b)*, *The Attorney-General* v. *Brereton (c)*, *Birch* v. *Wood (d)*. 3. *Martyn*, since his nomination to the curacy, had been chosen to the *readership* of the same parish, with a salary of £30, and it was contended, that this was *ecclesiastical preferment*, within the meaning of the instrument, or title. That although many readerships were such as could be exercised by laymen, (according to the account of their duty in *Burn (f)*, and other writers on the ecclesiastical law,) this particular readership had functions belonging to it which could only be performed by a clergyman; such as assisting in the administration of the sacrament.

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In answer, 1. to the *first* objection, it was argued, that the title was, in substance and effect, an engagement with the plaintiff. That the words were, "*I do promise to allow* "*him*," not, "*I do promise to indemnify you*, &c." That, if the instrument had been a deed under seal, none but persons strictly parties to the deed could have maintained an action upon it; but the case was different with regard to a common undertaking in writing, like the present. That it had been determined, in the case of *Dutton* v. *Poole*, that, on a promise made to one person, for the benefit of another, an action may be maintained by the person for whose benefit the promise was made *(g)*. That the sum of fifty guineas was more than was required by any canon, or act of parliament, and, therefore, if an allowance to the extent required by law should be considered as an indemnity to the bishop, yet a salary exceeding that allowance could only arise from a contract between the rector and curate. That the consideration for the salary was the performance of the duty. 2. To the *second* objection, it was answered, that no part of the canon law makes a licence necessary. That the act of uniformity requires it for lecturers and preachers, but for no other persons *(h)*; and, as to the cases mentioned, to shew that all curates are removeable at pleasure, none of them had established that doctrine. That *Birch* v. *Wood* had not gone further than a rule to shew cause. That the case in *Bunbury* had only *decided*, that a curate has not such an interest as to be enabled to sue for tithes; and that, in the case in *Vezey*, Lord *Hardwicke* had used the expression of "*common* curates," and applied what he said to *them*, in contradistinction to those who have a permanent interest in their office. That the general meaning and object of a licence

(a) *Bunbury*, 237.
(b) *Noy*, 15.
(c) 2 *Vez.* 425. 429.
(d) 2 *Salk.* 506.
(f) *Burn Eccl. Law, title Reader.*
(g) *B. R. M.* 29 & *M.* 30 *Car.* 2. 1 *Ventr.* 318. 332.
(h) 13 & 14 *Car.* 2. c. 4. § 19.

cence is to attest the good morals of a clergyman, when he goes into a new parish, but that such attestation was unnecessary here, as the bishop of the diocese had attested the same thing, in as strong a manner, by ordaining the plaintiff. 3. As to the readership being an ecclesiastical preferment, the account given of the office in the writers on the ecclesiastical law was relied on; and, as it appeared, that, although in some former appointments in this parish, part of the duty which the reader undertook was to assist in administering the sacrament, nothing of that sort was stipulated for in *Martyn's* appointment; it was insisted, that his office as reader was such as a layman might hold and execute as well as a clergyman.

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Afterwards, in the same term, Lord MANSFIELD delivered the opinion of the court, to the following effect:

Lord MANSFIELD,—At the trial, the defendant attempted to shew, that the plaintiff was lawfully removed *for fault by him committed*, and offered evidence to prove the irregularity of the plaintiff's life and behaviour; but I would not suffer this evidence to be given, being of opinion, either that the rector ought to have represented his conduct to the bishop, and applied to him to remove him, or, if he himself could remove him on that account, that he ought to have notified to him that the cause of his removal was his immoral behaviour, which he had not done. I am still of the same opinion, as to that part of the case, as at the trial, and no objection has been made to it, on the argument. But I desire it to be understood, that this does not imply an opinion, that the bishop may not remove a curate, nor even that the rector may not, for just cause, properly notified to the curate. Those points still remain open. As to the *first* of the three objections made on the part of the defendant, it will be necessary to consider the nature of *titles* to the bishop. The 33d canon of 1603, is in the following words: "It "hath been long since provided, by many decrees of the "ancient fathers, that none shall be admitted, either deacon, "or priest, who had not first some certain place where he "might use his function: according to which examples, we "do ordain, that, henceforth, no person shall be admitted "into holy orders, except he shall, at that time, exhibit, to "the bishop of whom he desireth imposition of hands, a "presentation of himself, to some ecclesiastical preferment, "then void in the diocese; or shall bring, to the said bishop, "a true and undoubted certificate, that, either he is provided "of some church within the said diocese, where he may "attend the cure of souls, or of some minister's place va-"cant, either in the cathedral church of that diocese, or in "some other collegiate church therein also situate, where he "may execute his ministry; or that he is a fellow, or in right

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"as a fellow; or to be a conduct, or chaplain, in some col-
"lege, in *Cambridge*, or *Oxford;* or except he be a master
"of arts of five years standing, that liveth of his own charge,
"in either of the universities; or except, by the bishop
"himself that doth ordain him minister, he be* shortly after
*[146] "to be admitted, either to some benefice, or curateship, then
"void. And, if any bishop shall admit any person into the
"ministry, that hath *none* of these titles, as is aforesaid, then
"he shall keep and maintain him with all things necessary,
"till he do prefer him to some ecclesiastical living; and, if
"the said bishop shall refuse so to do, he shall be sus-
"pended by the archbishop, being assisted with another
"bishop, from giving of orders, by the space of a year *(i)*."
It appears from this canon, and from *Gibson*'s commentary upon it, that a pecuniary provision is not the only object of a title, (for a title by *patrimony* or *pension* is thereby *constructively* taken away *(k)*,) but that one purpose of it is, to assure the bishop that the person to be ordained has some church where he may exercise his function. And if, after being certified of that fact, the bishop ordains him, and he is afterwards removed, the bishop is not liable to maintain him. And, therefore, the bishop, in this case, can have no claim of indemnity against the defendant. The title is only a certificate to the bishop, of the fact, that the rector has undertaken to employ him, to pay him, and to continue him in the curacy, till provided in some other ecclesiastical preferment. It is difficult to conceive how any question could be made on this point, or how a doubt could have been entertained in the case of *Dutton* v. *Poole*, which, however, was not near so strong as the present. As to the *second* objection, the bishop having ordained the plaintiff on this very title, there surely cannot be a stronger licence. Whether it is such as would satisfy some penal statutes, may be a critical question; but we are of opinion, that it does not lie in the defendant's mouth to say, that *Martyn* has no licence, when he himself has admitted him to act as his curate, and has never before objected to him on this account, or given him notice, and an opportunity of obtaining one in form. With regard to the *third* point, after the fullest consideration, we find it impossible to say, that this readership is an ecclesiastical preferment. A reader, in the canon law, is always put in opposition to a clergyman. It means a person who reads prayers in the morning, and afternoon, on week days. It is an order in the *Romish* Church, inferior to a deacon. So it is called by *Burn (l)*, and, I am informed, that, in the *Welsh* and *Chester* dioceses, there are laymen who officiate as readers at

(i) Burn's Eccl. Law, title Ordination, Gibs. vol. I. *Tit.* 6, *c.* 3.

(k) Loc. cit. Note (f).

(l) Eccl. Law, title Ordination.

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at this day. The institution of the office in this parish has been looked into, and it seems that it existed before 1706. There are some entries in the parish books which require particular duties to be performed by the reader, as assisting in administering the sacrament, assisting the clerk, &c. When a certain appropriated fund ceased, from which the salary was payable, the vestry ordered £30 a year to be paid out of what they call *commission money*, and afterwards to be charged by the churchwardens in their accounts. Now, what stability is there in this? The rector may refuse the reader the use of the church to read in. The parish may no longer choose to have prayers read on week days, and may discontinue the salary. We are, therefore, of opinion, that this is not an *ecclesiastical preferment*, within the meaning of the undertaking given to the bishop.

The rule for a new trial was accordingly discharged, and judgment entered up for the plaintiff [† 52].

The question now, upon the case reserved in the present action, was, Whether the plaintiff could recover the arrears of his salary of fifty guineas, from the time of the defendant's quitting the rectory of *St. Ann*?

Cowper argued for the plaintiff.—*Davenport* for the defendant.

For the plaintiff, it was contended, that the undertaking by *Hind* did not determine by his ceasing to be rector of *St. Ann*. It was a permanent agreement to provide for the plaintiff till he should obtain some other church preferment. It could not be avoided by the voluntary act of the defendant, but, if he had put it out of his own power to continue *Martyn* in the exercise of the functions of curate of *St. Ann*, he was still bound to pay him the salary. The nature of a title to the bishop is not a precarious provision, dependent on the will of the person who gives it, but certain, and only determinable by the misconduct, or preferment, of the person to whom it is given. To prove this, several cases were referred to in the register of archbishop *Winchelsea*, which are mentioned in *Gibson's Codex*, in the commentary on the 33d canon of 1603 *(m)*, and particularly,—the following entry in that register; "An order from the archbishop "to the bishop of *St. Asaph* to compel *John* rector of "*Goldfield* to pay the annual sum of five merks sterling "to *Amianus de Goldfield*, to whom the said *John* had "given a title for that sum, until he should be provided for. "Given at *Stepney*, *Kal. Apr.* 1303."—And two orders from the archbishop: one, to a bishop, to provide for a clergyman whom he had ordained without a title; and another,

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[† 52] That part of this case has been reported since, *Cowp.* 437.

(m) Gibs. vol. I. *Tit.* 6. *c.* 3.

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another, of the like purport, to a bishop's executors, to oblige them to provide for one who had been ordained without a title.

For the defendant, it was insisted, that every sentence in the instrument confined the undertaking to the time of *Hind*'s continuance in the rectory of *St. Ann*. It could not bind his successor, and certainly did not bind him to continue all his lifetime rector of that parish. The consideration for which the 50 guineas were to be paid was the performance of the duty of curate. The contract would want mutuality if it extended beyond *Hind*'s continuance in the rectory of *St. Ann*, for he could not compel the plaintiff to officiate as his curate at *Rochdale*, his present living. An engagement to pay 50 guineas, independent of any clerical functions, would not have been a title upon which the bishop could have ordained the plaintiff.

Cowper, in reply, observed, that the plaintiff was prevented from performing his part of the contract, by the act of the defendant.

Lord MANSFIELD,—There does not seem to me to be any colour whatever for the present demand. The question is, what *Hind* has undertaken to do. He could not turn the plaintiff out at pleasure, but there is no pretence to say that he has undertaken for himself, or his executors, to maintain him for life, or to continue all his own life-time rector of *St. Ann*. The question here is not, whether this is a good title or not; although it should seem that it is good. They commonly run in this form, and the curate takes the risque of the rector's quitting the living. A man may give a more permanent title, but the words of this instrument clearly confine the undertaking to the time of *Hind*'s continuing rector of *St. Ann*. "I nominate, "*&c.*" "to the office of a curate of *my parish* of *St.* "*Ann, &c.*"

The *Postea* to be delivered to the defendant.

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The KING *against* the MAYOR and BURGESSES of LYME REGIS, on the prosecution of FRANCIS FANE;—and the SAME *against* the SAME, on the prosecution of JOHN LUTHER.

Saturday, 1st May.

THE writs in these cases, were exactly the same as in that of *Mitchell (n)*.

The return, in the case of *Francis Fane*, set forth; That *Lyme Regis* was a borough by prescription. That the Mayor and Burgesses, (the corporate name,) had been immemorially accustomed to have a guild-house, called the *Moot-hall, or Guild-hall*. That, from time whereof, &c. till the granting the letters patent therein after mentioned, and also ever since, there had been, and still was, a council of the mayor and burgesses, consisting of the mayor and certain other persons, who, immemorially, until the granting the letters patent, were called *counsellors*, and, from the granting the letters patent, *capital burgesses*, and that immemorially, till the letters patent, the council consisted of *eleven* burgesses, inhabiting and residing within the borough or the liberties thereof, of whom the mayor was one. That, till the letters patent, every counsellor, on his admission into that office, took an oath for the due execution thereof; and, from the time of the granting the letters patent, hitherto, every capital burgess, upon his admission into that office, had taken an oath for the due execution thereof; which oath, so respectively taken, was stated *in hæc verba* in the return, the material part being as follows: "You shall swear, that you shall be "obedient to the mayor and his successors, when, and as often, as the mayor shall have occasion to send for you, either "for the affairs of the town, or else for to be aiding and assisting of him in the court, upon the pleading or hearing "of any matter or cause depending before him, or for or "concerning any other cause for the which the said mayor "shall, or may, in respect of the office of the mayoralty, "have occasion to hear, or use your opinion or counsel. "His counsel and his brethrens' you shall observe and keep, "of and concerning all matters that shall be communed of "*in the council-house*, or elsewhere, for the affairs of the "common-wealth of this town, and shall not disclose, discover,

In a return to a *mandamus* to restore, if it is stated that the party was removed *by the corporate body at large*,—it is unnecessary to *aver* that the power of removal is vested in them, because it is *incidental* to them, unless given by charter, bye law, &c. to a select part.—An action will lie for a *suppressio veri* in a return, as well as for an *allegatio falsi*.—When non-residence is a ground for removing a corporator, it is unnecessary to summon him previously to come and reside.

(n) *Supra, H.* 19 *G.* 3. p. 79.

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"cover, or report abroad, what shall be treated of in "the said council-house, or any particular man's opinion "there delivered, touching any thing that shall there be "treated, or communed of, touching any the affairs of the "said town." That, till the letters patent, every counsellor, and since, every capital burgess, was accustomed to reside and inhabit, and of right ought to have resided and inhabited, within the borough, or the liberties thereof, to advise and assist the mayor, touching the state, good rule, and government of the borough, and the administration of justice within the same. That Queen *Elizabeth*, by letters patent of the 26th of *June*, in the 33d year of her reign, did, *(inter alia* stated in the return,) grant [7], That there should be for ever in the borough, a mayor, and eleven other burgesses in number only, out of the burgesses of the borough or town aforesaid, to be chosen and constituted according to the form in the said letters patent thereunder specified, who should be called capital burgesses; (then nominating as usual in charters, the first mayor and eleven capital burgesses.) The capital burgesses to continue for life, unless, in the mean time, for their own bad government in that behalf they should be removed. That the said mayor, and eleven burgesses thereby appointed by name, or the greater part of them, the mayor for the time being one, whenever to them, or the greater part of them, it should seem fit, in their sound prudence and discretions, should choose, not exceeding the number of four other persons of the inhabitants of the borough or town, to be other capital burgesses, so that the other capital burgesses, so to be chosen, together with the mayor, and the other eleven capital burgesses, should not exceed the number of *sixteen*, to be continued in the office for their lives, unless, *&c.* That, as often as the capital burgesses, so nominated, or thereafter to be chosen, (*i. e.* the eleven and four,) or any of them, should die, or be removed for, *&c.* then it should be lawful *to the other capital burgesses, being the common council*, or the greater part of them, to choose one or more of the other burgesses, in the place or places of such capital burgess or burgesses so happening to die, or to be removed; and that he or they so chosen should be a capital burgess, or capital burgesses, in like manner as the capital burgesses, by the letters patent before constituted, were and should be. That, whenever a
[151] a vacancy or vacancies should happen, by the death or removal of any of the said capital burgesses, another or others of the burgesses should be elected a capital burgess, or capital burgesses, *by the rest of the council*, or the greater part of them, in the place of such capital burgesses so happening to die or to be removed. That the capital burgesses, so from time to time to be chosen, should take their oaths before the mayor and the rest of the capital burgesses, or the greater part of them, well

[7] Vide the following page, Note [7]

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well and faithfully to execute their office. That by the said letters patent, the queen granted to the mayor and capital burgesses, and their successors, that it should be lawful for them to keep or appoint a guild or council house, within the borough or town, commonly called the *Moot-hall*, and *that the said mayor and capital burgesses, the common council of the borough or town aforesaid*, or the greater part of them for the time being, as often as to them it should seem necessary, should and might convoke, and hold, in the said house, a certain convocation of the same mayor and capital burgesses, or the greater part of them, and in the same convocation, should and might treat, *&c.* of the statutes, acts, articles, and ordinances, touching the borough or town, and the good rule, state and government thereof, according to the tenor of the said letters patent, as by the said letters patent, remaining on record, might more fully appear [7].) That the mayor and burgesses accepted the letters patent, in the several matters in the return specified, and from that time, had acted under, and conformed thereto*, *and that, ever since, the council had consisted, and of right ought to consist, of the mayor and the capital burgesses of the borough for the time being**. That *Fane*, on the 29th of *August*, 1774, was elected a capital burgess, and afterwards, on the same day, took the oath above specified. *That he had not, at any time since his election, inhabited or resided within the borough, or the liberties thereof, but, on the contrary, had, ever since, inhabited and resided with his family, in places out of, and at a great distance from the said borough, and the liberties thereof*, and had, during all that time, *voluntarily, without good occasion*, absented himself from the borough, and from the duty of the office of a capital burgess; and that by his non-residence, and his voluntary absence from the borough, and the duty of his office, he did, during all the time of his being a capital burgess, wilfully neglect and omit the duty and execution of [152] his office, and deprive the mayor and burgesses of that counsel, and assistance, and advice, which by the duty of his office, and according to the said oath, he ought to have given. That, at a meeting or convocation of the mayor and burgesses, *held, according to the immemorial custom and usage of the borough* at the *Moot-hall*, or *Guild-hall*, on the 31st of *August*, 1778, *John Coade*, one of the capital burgesses, exhibited certain articles of complaint, *&c.* against *Fane*. (In the same form, and with the same omission, but which was now taken as amended, as in the return to the *mandamus* of the

[7] There was the same recital with that included in this parenthesis in the return to the *mandamus* to restore *Arthur Raymond*, *infra*, 177.

* This sentence, (printed between two asterisks,) was not in the return in the case of *Arthur Raymond*.

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the *Hon. Henry Fane (a)*, except that here the only charge was *non-residence and consequent neglect of duty*, and the conviction was stated to be only on the *fourth* article of the complaint.) That a copy of the articles, and a summons to appear at the next meeting or convocation of the mayor and burgesses, then appointed to be held at the *Guild-hall*, on the 14th of *September* next, and answer the said articles, and shew cause why he should not be removed and displaced, were ordered to be, and afterwards on the 31st of *August*, 1778, were served on *Fane*. That, in pursuance of an order made at the said meeting or convocation, held on the 31st of *August*, 1778, all the burgesses of the borough, within the reach of summons, were, afterwards, and before the holding of the next meeting, duly summoned, to appear at the said next meeting or convocation, to treat, advise, consult, and determine, touching the removal and discharging of *Fane* from the office of a capital burgess, for the causes and misdemeanors mentioned and contained in the said articles. That, on the 14th of *September*, a meeting of the mayor and burgesses was, according to the said last-mentioned summons and notice, held, at the *Guild-hall* aforesaid, for the purpose aforesaid, amongst other business, and that *Fane* appeared. That, by his consent, the meeting was adjourned to the next day. That, on the next day, a meeting or convocation of the mayor and burgesses aforesaid was, according to and in pursuance of the said adjournment, held at the *Guild-hall*. That *Fane* also appeared at the adjourned meeting, and it was there adjudged, that he was guilty of the non-residence, absences, contempts, neglects, breaches of duty, misbehaviour, and other misdemeanors, and things, objected and charged against him, in and by the *fourth* of the said articles of complaint. That he had not shewn any just cause why he should not be removed from his office. That the mayor and the rest of the burgesses holding the meeting, had resolved, that, for the *non-residence*, absences, *&c.* whereof he had been adjudged guilty, he ought to be removed, and did then and there remove him. That he had not afterwards been elected, admitted, sworn in, or restored; and that, for these reasons, they could not restore him, or cause him to be restored.

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In the case of *Luther*, the return was, in every material part, exactly like that in the case of *Fane*. The validity of the return in the case of *Luther*, was argued before that in the case of *Fane*, (Lord MANSFIELD being, I believe, absent,) by *Rooke* and *Lawrence (o)*; but I was not in court. Afterwards the case of *Fane* was argued by the same gentlemen, on this day.

ROOKE, against the sufficiency of the return,—I shall make three objections to this return. 1. Because it does not state

(a) *Supra*, p. 155.

(o) *On Saturday, 24th April.*

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state that the meeting which disfranchised *Fane* was held by any right or custom. 2. It does not aver that the corporation at large had an authority to disfranchise. 3. It does not state that they had a right to disfranchise for the reasons for which they have removed the prosecutor.—1. It is not stated that the meeting, when the disfranchisement was pronounced, was held by custom or charter; and one, or the other, is necessary to warrant a mayor in calling a corporate assembly. In the case of the *King* v. *Richardson (p)*, a custom to hold the meeting was alledged in the plea to the *quo warranto*, although pleas do not require so great certainty as returns. Unless it can be stated as general law, that a mayor can call corporate assemblies at his pleasure, this meeting was not legal.—2. The right in the corporation at large to disfranchise their members, is not averred. The return may be all true, and yet the prosecutor may have been unjustly removed. This deprives him of any remedy, by traverse or action. The same strictness is required, and the same principles govern in returns to writs of *mandamus*, as in indictments, or returns to writs of *habeas corpus*; *Rex* v. *Hutchinson Mayor of Carlisle (q)*, where it is said on the margin *(r)*, that returns to *mandamuses* require even greater certainty than indictments, because they cannot be traversed, (that is, at common law.) Now, in the case of indictments, *they* are bad wherever all the facts stated may be true, and yet the party innocent; 2 *Hawk. Pl. Cr. c.* 25. § 57. & § 119. 123. 126. where it is laid down, that the caption of an indictment must shew, that the indictment was taken before competent jurisdiction, and that the jurors had authority to find it. In returns to writs of *habeas corpus*, an express and certain cause of commitment must be set forth, for the court will intend every thing against the person making the return; *Deyton's Case (r)*, and 1 *Salk.* 350. 5 *Mod.* 83. But it will be said, that a power of amotion is incident to every corporation, and therefore it need not be stated. What is meant by incident? If it means, that it *necessarily* belongs to the corporation at large, I deny it. In Lord *Coke*'s time, it was held, that a corporation had not the power of amotion, unless by custom or charter. However, that doctrine has been over-ruled since, in *Lord Bruce's Case (s)*, and in the *King* v. *Richardson (t)*, and I admit that corporations have a power to disfranchise. But custom, charters, or bye-laws may restrain that power to a *part*. If *they* are silent, it is vested in the *whole* body. The question, therefore, comes to be, how far it is necessary to

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(*p*) *E.* 31 *G.* 2. 1 *Burr.* 517.
(*q*) *M.* 9 *Geo.* 1. 8 *Mod.* 99.
(*r*) *Ibid.* 101.
(*r*) *Moore* 840.
(*s*) *M.* 2 *Geo.* 2 2 *Str.* 819.
(*t*) 1 *Burr.* 539.

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to state legal presumptions. They only stand, till the contrary is proved. If it is competent to encounter such legal presumptions, a return ought to state something which will enable the opposite party to contradict what the general presumption would establish. But, on this record, it is impossible for us to deny the right in the body at large. It ought to have been expressly alledged. In indictments for not repairing highways or bridges, although the inhabitants at large are bound, at common law, to repair, yet it is always charged that they are liable, to let in a plea that they are not, but that particular persons are.—(BULLER, *Justice*,—"You cannot traverse "that averment in the indictment.")—This case must be considered as independent of the statute of Queen *Anne* (*u*), for that act was intended solely for the benefit of persons suing out writs of *mandamus*, and not to take away the strictness which the common law required in returns; *Rex* v. *Mayor of Lynn* (*v*), and 2 *Burr.* 733. 741; and the certainty necessary at common law is established by *Bagg's Case* (*w*), in *Rex* v. *Clapham*, (*y*), and in *Rex* v. *Mayor of Abingdon* (*z*). As to precedents, there is not one which does not aver a right to disfranchise, except *that* in *Bagg's Case*, and it has never been said that the return in that case could be supported. No inconvenience can arise from obliging the party to put this right on the record, whereas there will be great inconvenience the other way, as it will enable a mayor to throw the whole corporation into confusion, without any danger to himself.—3. Supposing the power of amotion to be in the corporation at large, they have not shewn a right to disfranchise for the cause for which this prosecutor has been removed. They do not state that they ever gave him notice to come in and reside. They only say, that he was non-resident, at and since the time of his election, but no instance of any particular absence is specified. On this point, I must rely on the principles laid down by your Lordship, in the cases of *Rex* v. *Richardson* (*a*), and *Rex* v. *The Mayor of Liverpool* (*b*). It is charged, generally, that *Fane wilfully* absented himself, but no particular instance of disobedience to any summons to attend is set out, which ought to have been done, according to the doctrine in *Rex* v. *The Mayor of Doncaster* (*c*), and in *The City of Exeter* v. *Glyde* (*d*).

[55]

Lawrence, for the defendants,—1. If the corporation had a power

(*u*) 9 *Ann. c.* 20.
(*v*) *H.* 11 *G.* 2. *Andr.* 105.
(*w*) *T.* 13. *Jac.* 1. 11 *Co.* 93. *b.*
(*y*) *H.* 22 & 23 *Car.* 2. 1 *Ventr.* 111.
(*z*) *E.* 12. *W.* 3. 2 *Salk.* 432.
(*a*) 1 *Burr.* 540.
(*b*) *H.* 32 *Geo.* 2. 2 *Burr.* 731.
(*c*) *M.* 3. *Geo.* 2. 2 *Ld. Raym.* 1564.
(*d*) *T.* 3 *W.* & *M.* 4 *Mod.* 33.

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power to amove, and yet could not assemble for that purpose, that power would be nugatory. In the case of *The King* v. *Richardson*, the ground of amotion was non-attendance at corporate meetings, and, therefore, it was necessary to state the right to hold those meetings.—2. In all the former cases, they have founded the right on charter or custom. This is the first in which the power to remove as incident to the corporation at large has been relied upon, and, therefore, it is not to be judged of strictly by former precedents. But that such a power is, at common law, incidental to every corporation, is clearly established by *Lord Bruce's Case*, and by that of the *King* v. *Richardson*. Every common-law right will be taken notice of by the court. The business of pleading is to set forth the facts, not to draw inferences of law. Certainty to a common intent is all that is required in returns, and *that* not as has been argued, to enable the other party to bring an action for a false return, but for the information of the court, as was held in *Rex* v. *The Mayor of Abingdon (e)*. This is resembled to cases of indictments and returns to writs of *habeas corpus*. But, as to indictments, the record must shew, before whom they were found, and by what jury tried, because those are facts; but it is never set forth, that the grand jury had power to find the indictment, or that the judge had authority to try it, because those conclusions in law are made by the court. So, in returns to writs of *habeas* [156] *corpus*, if the power of commitment is at common law, it is never stated in the return. Thus, in the case of *Crosby Lord Mayor of London (f)*, the power of the Speaker of the House of Commons was not alledged. In an indictment against a gaoler, for an escape, there is no occasion to aver, that he was bound by the duty of his office not to suffer his prisoner to his escape. So, in an indictment for not performing statute-labour on the high-ways, the authority of the overseers to appoint the work need not be alledged; *Rex* v. *Boyall (f)*. The reason why, in an indictment for not repairing a road, it is stated, that the inhabitants ought to repair, is to give an opportunity of introducing the name or description of the defendants, for the purpose of shewing who are the offenders; but, if that were done in any other way, it would be sufficient. It is not necessary to follow the common form of words. Indictments for perjury are the only instances in which a legal authority is usually set forth. But that has only been the practice since the statute of 23 *Geo.* 2. (*g*). The precedents before that period, do not contain such an averment; *Co. Ent.* 363. 368. *Tremayne* 136. 144.

(*e*) 1 *Ld. Raym.* 559. 560.
(*f*) *T.* 32 & 33 *Geo.* 2. 2 *Burr.* 832.
(*f*) *C. B. E.* 11 *Geo.* 3. 3 *Wils.* 188. Since reported, 2 *Black.* 754.
(*g*) *Cap.* 11. § 1. *infra.* 194.

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144. 147. 157. It is said, that whatever was necessary to be stated before the statute of Queen *Anne*, is still necessary. This I admit. But then all the precedents of returns before that statute, were also prior to *Lord Bruce's Case*, when the general power of corporations at large was first settled, and till then, it was thought necessary to state the power, it not being considered as incidental. It is said, the facts here alledged may be all true, and yet the party unjustly removed, and that he will have no remedy. But, if the corporation have not the power of amotion, he still remains a capital burgess. If the right were not in the corporation at large, he might have suggested in his writ, that it was in a select part, and that he had been amoved by the whole body, and then the return must have denied the right to be in the select part. As the suggeston of false facts is a ground for an action, so is the suppression of true facts. Thus, suppose there were two charters, one giving, (with other privileges,) a power of amotion to a select part of a corporation, another of a later date, confirming the other as to every thing else, but restoring the right of amotion to the body at large. If
[157] a *mandamus*, in such a case, were to state a removal by the select part, and the return were to set forth the old charter only, all the facts in that return would be true, yet certainly an action on the case might be maintained for the deceit.—3. A stronger case of wilful absence cannot be stated, for the prosecutor is alledged never to have resided since his election. In *Richardson's* case, the offence was the non-attendance at particular courts, of which he might not have had notice; and, therefore, it was necessary to set forth that due notice had been given But I conceive that, by law, a capital burgess is obliged to reside, and that in such case, non-residence, without any summons to attend, is a forfeiture. In *Lord Shrewsbury's Case* (*h*), it is held, that, where an office concerns the administration of justice, the officer is liable to forfeiture for non-attendance, or non-user, and that he is bound to attend without any demand or request. In *Glyde's Case* (*i*), non-residence is stated to be a forfeiture of the office of alderman. In *Vaughan* v. *Lewis* (*k*), Lord *Holt* says, that a clause in a particular charter, making non-residence a forfeiture, was only declaratory of the common law, for that non-residence was, by law, good cause to remove a member of a corporation (*l*) [☞ 1]. In the case of the *The*

(*h*) *T.* 8 *Jac.* 1. 9 *Co.* 50.
(*i*) 4 *Mod* 36.
(*k*) *E.* 4 *W. & M. Carth.* 227.
(*l*) *Ibid.* 229.

[☞ 1] But non-residence, though a good cause of removal, does not *ipso facto*, determine the office, but there must be a judgment of amotion pronounced by the corporation, before an information in the nature of *quo warranto* will lie. *Vaughan* v. *Lewis*, and *Rex* v. *Heaven*. *M.* 29 *Geo.* 3. 2 *Term Rep.* 772.

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The King v. *The Corporation of Wells (m)*, a determined neglect, or wilful refusal, is held to be a ground of forfeiture, and non-residence is the most glaring neglect of any; and, in the case of *The Queen* v. *Truebody (n)*, it was expressly decided, that, if a capital burgess quite leaves the borough, and goes and resides in another place, it is a sufficient ground for turning him out, and that there is no need of summoning him before he is removed, because he has abdicated the borough [☞ 2]. But, if this return were bad, the court would not grant a peremptory *mandamus*, when it appears that the prosecutor has deserted the corporation; *Rex* v. *The Mayor of Newcastle*, cited in *Rex* v. *Richardson (o)*.

Lord MANSFIELD,—The only question is, Whether, taking the law as clearly established, that the power of a motion is incident to a corporation, this would have been a sufficient return before the statute of Queen *Anne*; for I take it to be settled, that the same certainty is required now, as before that statute, though I think at first it might have been otherwise determined, because the reason was not the same. The great objection made to this return is, that the defendants have not set out, that the body at large has the power. They [158] have set out the charter, and we must take it to be as stated, and there is no special power thereby given either to the whole body, or any select part. In such a case, the charter making them a corporation, the law implies the right to remove to be in the whole body [F 1]. The charter leaves it to the rule of law. It is said, there may be some other charter or bye-law to the contrary. But is it necessary to state every possible negative,—as, that there is no other charter,—no bye-law, &c.? I think it is not. If there were another charter or bye-law restraining the power, and that were not set out, can there be a doubt but an action would lie? *That* would be misleading the court. Wherever there is a suppression of truth, and the party is thereby injured, he may maintain an action. As to the cause of removal, it is set out in express words, *viz.* a general non-residence. But, if the corporation has the power to remove, they must have power to hold a meeting for that purpose, and *that*, being incident to the

(*m*) *H.* 7 *Geo.* 3. 4 *Burr.* 1999.
(*n*) *E.* 5 *Ann.* 2 *Ld. Raym.* 1275.
[☞ 2] *Rex* v. *Mayor of Shrewsbury*, T. 8 *Geo.* 2. *Cases Temp. Lord Hardw.* 147. 151.
(*o*) 1 *Burr.* 530. 534.

[F 1] So in an action upon a bye-law made by the whole body, it is not necessary to state their power of making bye-laws:—"It is incident to every corporation, either by the body "at large, or by a select part; and "it is in the latter case only, that the "power need be shewn." *Company of Feltmakers* v. *Davis*, 1 *B & P.* 98.

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the other, need not be set out. It is not true that you are to presume every thing against a return. You are not to presume for or against it.

WILLES, and ASHHURST, *Justices*, of the same opinion.

BULLER, *Justice*,—I will take the first and third objections together; and, with regard to them, I think that a general non-residence being expressly stated as the ground of amotion, it was not necessary to give notice to come and reside; for, if a member of a corporation ought, by his office, to reside, he is bound to know the law; and, where there is a right to remove, there must be a right to assemble for that purpose. As to the great question, Whether it was necessary to state that the power of amotion was in the body at large? it has been admitted, that it is, by law, incident to the whole body, if not restrained, by an express grant, to a select part. It is also admitted, that, if it had been stated, it would not have been necessary to prove it. But it is insisted, that this return may be true in every thing, and yet the party be entitled to be restored, and that he has no opportunity of traversing the right, or bringing an action for a false return. I agree that, in these returns, the same certainty is required as in indictments, or returns to writs of *habeas corpus*. Lord *Coke* has distinguished certainty in pleading into three sorts [☞] [† 53]; 1. Certainty to a common intent, which is sufficient in a plea in bar; 2. Certainty to a certain intent in general, as in counts, replications, *&c.* and so in indictments; 3. To a certain intent in every particular, which is necessary in estoppels. The second of those sorts is all that is requisite here, and I take it to mean, what, upon a fair and reasonable construction, may be called certain, without recurring to *possible* facts, which do not appear. Before the cases of *Lord Bruce* and *Richardson*, it was thought necessary, to state the power to be in the corporation at large, because it was not then considered as incident to them. It is one of the first principles of pleading, that you have only occasion to state facts; which must be done, for the purpose of informing the court, whose duty it is to declare the law arising upon those facts, and to apprize the opposite party of what is meant to be proved, in order to give him an opportunity to answer or traverse it. It is now settled to be matter of law, that, *primâ facie*, the power of amotion is in the body at large. Being matter

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[☞] *Co. Littl.* 303. *a.*

[† 53] For an explanation of the different sorts of certainty, *vide* the judgment delivered by *De Grey*, Chief Justice, in the case of *Rex v. Horne* in *Dom. Proc.* 11 *May*, 18 *Geo.* 3. *Cowp.* 672. 682.

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matter of law, it is not traversable [F 2]. But the present prosecutor may now *reply*, that the power is not according to the general law in this case, but in a select body, which may then be tried by a jury. If the return be certain on the face of it, *that* is sufficient, and the court cannot intend facts inconsistent with it, for the purpose of making it bad. We must consider the charter as truly stated, because nothing appears to contradict it; and, if so, the law says, that, by such a charter, the corporation at large have the power of amotion. If presumptions were to be allowed, certainty in every particular would be necessary, and no man could draw a valid and sufficient return. If the power of amotion is, in this place, in a select part, and the present return is bad on that account, I am clear that an action will lie. I say, if it is bad on that account, because it does not necessarily follow that it is bad. The contrary was held in *Braithwaite's Case (p)*, which was recognized to be law by this court not many years ago, in a case from the borough of *Leicester*. *Braithwaite's Case* also proves, 1. That, although a return be true in words, yet, if it is false in substance, an action will lie, and, 2. That presumption and intendment, as far as they go, must be in favour of returns, not against them. If, in this borough, the power is given to a select part, by the charter or otherwise, the court is imposed upon, and the prosecutor injured; and it would be a very proper subject for an action.

The court pronounced judgment in favour of the return, both in the case of *Francis Fane*, and in that of *Luther*; but, upon the suggestion of the *Solicitor General*, that another objection, which was afterwards argued in the case of *Arthur Raymond*, applied also to these two, (as well as to several others,) they were all left open to the opinion of the court upon that objection *(q)*. [160]

(p) E. 21 *Car.* 2. 1 *Ventr.* 19. *(q) Infra*, p. 182. *Note* 19.

[F] 2 For this reason, where the writ states facts, and draws the conclusion that *A.* was duly elected, the return should traverse some of the facts; and if it states only that "*A* "was not duly elected," it is argumentative and bad. *R.* v. *Mayor, &c. of York*, 5. *T. R.* 70.

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Saturday, 1st May.

ALSOP and another *against* PRICE.

On a general plea of bankruptcy under 5 *Geo.* 2. *c.* 30. the *plaintiff* may give the condition of the bond on which the action is brought *in evidence* to shew that he is not barred by the certificate.—If a bond by a principal and surety has not been forfeited before the bankruptcy of the surety, the debt cannot be proved under *his* commission, and he may be sued upon it, after he has obtained his certificate.

THIS was a special case reserved for the opinion of the court.—The action, which was debt upon a bond, was tried before BULLER, *Justice*, at *Guildhall*, at the Sittings after *Hilary Term*, 19 *Geo.* 3.

The *declaration* stated, That the defendant, on the 17th of *June* 1772, by his writing obligatory, acknowledged himself to be bound unto *William Nash*, in his lifetime, by the description of the Lord Mayor of the City of *London*, Sir *Robert Ladbroke*, in his lifetime, and *Robert Alsop*, Esq. (one of the plaintiffs,) by the description of the two senior Aldermen of the said city, Sir *James Eyre*, Knight, the other plaintiff, by the description of the Recorder of the said city, Sir *Stephen Theodore Janssen*, Bart. in his lifetime, by the description of the Chamberlain of the said city, in £200, to be paid to the said obligees, when the defendant should be thereunto requested, and that, though often requested, he had not paid the same, or any part thereof, to the said obligees, or any of them, in the lifetime of *Nash*, *Ladbroke*, and *Janssen*, nor to the plaintiffs, or either of them, since the death of the said *Nash*, *Ladbroke*, and *Janssen*.—To this declaration the defendant *pleaded*, generally, that, after making the bond, and before the action brought, he became a bankrupt, within the meaning of the statutes made against bankrupts, or one of them, and that the cause of action acrued before the time when he so became a bankrupt; and concluded to the country.

The case stated, that a commission of bankruptcy issued against the defendant on the 5th of *September* 1776, and that he afterwards obtained his certificate, which was allowed by the Chancellor on the 1st of *May* 1777. It then set forth the bond on which the action was brought, and the *condition*.

[161] The bond appeared to be a joint and several bond by *James Sage Thomas Lawrence*, the defendant *Price*, and *Benjamin Ivory*. The condition recited, 1. That *Samuel Wilson*, late of *Hatton Garden*, in the county of *Middlesex*, Esq. deceased, by his last will and testament, bearing date the 27th of *October* 1776, directed that his executors should pay the sum of £20,000, if the residue of his estate should amount to that sum, or, if not, the amount of such residue, to the Chamberlain of *London*, for the time being, to whom, together with the Lord Mayor, the two senior Aldermen, and the Recorder, for the time being, he committed the management thereof, for the use and intent, that the said £20,000, or the amount

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amount of such residue, should be a perpetual fund, to be lent to young men who have set up one year, or not more than two, in some trade or manufacture, in the city of *London*, or within three miles thereof, and who could give satisfactory security for the repayment of the money so to be lent to them; and his will was, that no more than £300, nor less than £100, should be lent to any person or persons in copartnership, nor for any longer term than five years, and that every person, to whom any of the said money should be so lent, should, for the first year, pay 1 *per cent.* and, for the remainder of the time while he should keep the principal, 2 *per cent. per annum;* and that the borrower should pay the interest half-yearly to the said Chamberlain of *London*, under certain limitations and restrictions therein particularly mentioned. 2. That *Brass Crosby*, Esq the late Lord Mayor, Sir *Robert Ladbroke*, Knight, and *Robert Alsop*, Esq. the late and then two senior Aldermen, *James Eyre*, Esq. the late and then Recorder, and Sir *Stephen Theodore Janssen*, Bart. the late and then Chamberlain, having accepted of the trusts so reposed in them, the executors had, some time before, paid to the said Sir *Stephen Theodore Janssen*, out of the assets of the testator, then come to their hands, £10,000, in part of the £20,000, which sum of £10,000 had since been applied and disposed of according to the uses and directions in the said will. 3. That the executors had paid, out of assets of the testator, since come to their hands, the further sum of £10,000. 4. That the said *James Sage Thomas Lawrence*, (the borrower, and first obligee in the bond,) who had been set up fifteen months in the trade of a watch-case maker, in the parish of *St. John Clerkenwell*, in the county of *Middlesex*, had applied to the trustees, for the loan of £100, part of the remainder of the said trust-money, for the time, and upon the terms, in the said will mentioned. 5. That the trustees, [162] being satisfied, from the best information they could obtain, that the said *James Sage Thomas Lawrence* was, according to the directions and meaning of the will, a proper and deserving person to have the benefit of part of the said trust-money, had, that day, advanced and lent him £100, part thereof, for the term of five years, if he should so long live, on the terms and conditions in the said will recited, and therein after limited and appointed. The condition then declared, that the bond should be void, if, 1. the said *James Sage Thomas Lawrence*, his executors and administrators, should pay the interest, (in the manner above mentioned;) and if, 2. the said *James Sage Thomas Lawrence*, his executors or administrators, should, within twenty days after the expiration of five years, in case he should so long live and enjoy the benefit of the loan, repay, or cause to be repaid, to the Chamberlain of the city for the time being, on account of

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of the trust, the said principal sum of £100; and if, 3. (in case the said *James Sage Thomas Lawrence* should die before the expiration of the five years,) his executors or administrators should, within three months after his death, repay the principal in like manner, together with all interest that should be then due; and if, 4. (in case the said *James Sage Thomas Lawrence*, or both or either of his sureties, within the five years, or before the principal should be repaid, should remove from their then present or future place of abode, or in case the said the said *Thomas Price* (the defendant) or *Benjamin Ivory*, or either of them, should, within the time aforesaid, die, or become bankrupt, or insolvent, or compound with their creditors,) the said *James Sage Thomas Lawrence* should, within a month after such, or any, or either of such removals, deaths, insolvencies, or compositions, give notice thereof, in writing, to the clerk of the trust for the time being, and also, if required so to do, within one month after notice should be given to him for that purpose, by the said clerk for the time being, nominate one or two other good and sufficient surety or sureties, to be approved of by the trustees for the time being, in the room of him or them so removing, dying, becoming bankrupt, or insolvent, or compounding his or their debts, and should also, with such new surety or sureties, enter into a new bond to the trustees for the time being, and so *toties quoties*.

This was all that was stated in the case; but it was admitted, at the trial, on the argument, that the bond had not [163] been forfeited by the breach of any of the stipulations in the condition, till after the bankruptcy, *viz.* not till the 7th of *July* 1777.

Davenport, for the plaintiffs.—*Morgan* for the defendant.—The case was argued on *Friday* the 30th of *April*.

Two questions were made. 1. Whether the plaintiffs could avail themselves of the condition, as they had not put it upon the record? 2. Whether, if they could, this was not such a debt before the forfeiture, as might have been proved under the commission? *Cowper*, who was of counsel for the defendant at the trial, had objected to the reading of the bond and condition by the plaintiffs, and to their being inserted in the case, because the bond, as stated in the declaration, was admitted by the plea, and not put in issue. BULLER, *Justice*, on the argument, said, that he had thought *Cowper* was right in his objection, but that he had permitted them to be stated in the case, from deference to the gentlemen, (the *Solicitor General*, *Dunning*, and *Davenport*,) who were of counsel for the plaintiffs.

Davenport, on the part of the plaintiffs, argued as follows: 1. Wherever, by an act of parliament, a defendant is permitted to plead generally, and give the special matter of his

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his defence in evidence, the privilege is reciprocal, and the plaintiff may also give all special matters in evidence, which tend to support his demand. Pleas of bankruptcy, (such as the present,) under the statute of 5 *Geo.* 2. (*r*), always conclude to the country. This is the settled form, which has been used ever since the passing of the act; and there is no example of such a plea being demurred to for not concluding with a verification. This being the proper conclusion of the plea, it was impossible for the plaintiffs to *reply*, and so put the condition on the record, and therefore the only method in which they could shew the nature of the debt, and that the bond was not absolute, was by producing it in evidence. In the case of *Thornton* v. *Dallas (s)* indeed he said that he had, to a plea of bankruptcy which concluded to the country, replied the special matter, in order to put the question in the cause upon the record; but that, if the replication had been demurred to, he must have withdrawn it, and given the special matter in evidence. Before the statute of 5 *Geo.* 2. the case was otherwise. The defendant then was obliged to set forth, in his plea, the trading, the act of bankruptcy, the petitioning creditors debt, &c. as was determined in the case of *Tully* v. *Sparkes (t)*, and, to such a special plea, it was in the plaintiff's power to reply the special matter. Besides, in the cases of bankruptcy, before the statute, the defendant, in an action on a bond, could not, (as he cannot still in any other instance,) plead any matter whatever in discharge of the bond, without setting forth the condition. By this means, an opportunity was given to the plaintiff to avail himself of the condition, and it can never have been the intention of the statute to deprive him of that advantage, which would be the case now, if he could not give it in evidence. 2. As to the merits, this is not, as against the sureties, *debitum in præsenti, solvendum in futuro*. It was not certain, at the time of the bankruptcy, that ever the defendant would be liable to the debt. It is not, therefore, a debt within the statute of 7 *Geo.* 1. *cap.* 31. which only applies to cases where the money is due at the time of the bankruptcy, although not payable till a future day. That statute directs a rebate of the interest for the interval between the actual payment of the dividend, and the time when the payment of the debt should have been made; but what rebate of interest could have been made to the plaintiffs in the present case [8]?

[164]

Morgan,

(*r*) c. 30. § 7.
(*s*) *Supra, M.* 19 *Geo.* 3. p. 46.
(*t*) *B. R. M.* 2 *Geo.* 2. 2 *Ld. Raym.* 1546. 1548. 2 *Str.* 867.

[8] *Tully* v. *Sparkes* is also in point for the plaintiffs on this second head.

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Morgan, for the defendant, insisted, 1. That the plaintiffs had undertaken to state their whole case in their declaration, and, if they had thought fit, they might there have set forth the condition of the bond, but as they had not done so, it ought to be considered as an absolute bond, for such it appeared to be from the declaration. The plea admitted the bond to be such as the plaintiffs, who ought to know their own title, had set forth, and only asserted, that the defendant had become a bankrupt subsequent to the time when the cause of action accrued. Nothing but that fact was in issue, and therefore the condition ought not to have been read; for it appeared, upon the plaintiffs' own shewing, that the debt was due immediately on the execution of the bond, long before the time when the defendant had proved that he had become a bankrupt. 2. That this was a debt which *certainly* would become due at a future day, and, therefore, within the spirit of the statute of 7 *Geo.* 1. That, in truth, the debt was contracted, and completed, at the time when the money was advanced. For this he cited *Macarty* v. *Barrow (u)* [☞].

[165] He also cited *Ex parte Caswell*, before Lord *King (v)*, *Ex parte Greenway (w)*, *Ex parte Groome (x)*, and *Ex parte Michell (y)*, before Lord *Hardwicke*, and *Swaine* v. *De Mattos (z)*, [9].

Davenport, in reply, insisted, That it was not incumbent on the plaintiffs to state the condition in the declaration; they might not know that the defendant had been a bankrupt, nor, if they did, that he would avail himself of that defence. It would be a singular hardship if it were required of them to

(u) *B. R. E.* 6 *Geo.* 2. 2 *Str.* 949. 3 *Wil.* 16. *Supra*, p. 55. Note [† 28].

[☞] *Vide Brookes* v. *Lloyd. B. R. M.* 26 *Geo.* 3. 1 *Term. Rep.* 17 [F 1].

(v) *M.* 1728. 2 *P. W.* 497.

(w) 1740. 1 *Atk.* 113.

(x) 1744, *ibid.* 115.

(y) 1751, 1752, *ibid.* 120, 121.

(z) *T.* 17 *Geo.* 2. at *Guildhall*, before *Lee*, Ch. Justice.

[9] The point ruled in the case of *Swaine* v. *De Mattos*, was only, that bonds, payable at a future day, are within the statute of 7 *Geo.* 1. though not given for goods sold by traders. The four cases in *Chancery* cited by *Morgan*, all go to establish the point insisted on by the plaintiffs in this present case, *viz.* that a debt which may perhaps never become due from the bankrupt, cannot be proved under his commission, and, of course, is not discharged by his certificate.

[F 1] The case of *Brookes* v. *Lloyd* appears inconsistent with the present case. There the two defendants were principal and surety in a bond, conditioned to pay money by instalments, and the court held that the bond might have been proved under a bankrupt commission of the surety, issued before the first default in payment.

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to foresee, and answer by anticipation, every possible defence that might be set up [10].

BULLER, *Justice*, having asked, whether there was any instance, which had come before the court, where the plaintiff had been permitted to set forth the condition of a bond in his replication, *Davenport* said, it was done in the case of *Webster* v. *Bannister (a)*, [11].

The *Solicitor-General* mentioned a case of *Pattison* v. *Banks* [12], at the Assizes at *Carlisle*, before ASHHURST, *Justice*, in which, he said, the pleadings were similar to those in the present case; that, the certificate having been produced, and the bankruptcy appearing to have been long subsequent to the date of the bond, he offered the *condition* in evidence; that this was objected to; but that, after some argument, the Judge admitted it; and that a case was afterwards stated for the opinion of this court, which was argued in *H.* 17 *Geo.* 3. but that this point was not reserved [† 54].

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The court took time to consider; and, this day, Lord MANSFIELD delivered their opinion, as follows:

Lord MANSFIELD,—We are all of opinion, that the plea given by the statute opens the whole merits of the question in evidence on both sides; and, on the merits, we think that this was not a debt which could have been proved under the commission; for the defendant was not originally the debtor. It was not a debt to be paid by him *in futuro*, at all events, but depended on the acts of the principal, *viz.* whether he did

[10] In *Tully* v. *Sparkes* the condition was set forth in the declaration, and, in the case *Ex parte Caswell*, Lord *King* is stated to have said, "The certificate will not bar, if the "obligee is careful in declaring upon "his bond; indeed if the party de- "clared upon the bond only he shall "be barred: *Secus* if he sets forth as "well the condition, as the bond in "the declaration, for then it must "appear that the cause of action did "not accrue at the time of the "obligor's becoming a bankrupt." 2 *P. W.* 499. However this was only an *obiter* opinion.

(a) Infra, *E.* 20 *Geo.* 3. 5th *May*, 1780, p. 393.

[11] That case came on in court in *M.* 19 *Geo.* 3. but I have postponed the report of it to *E.* 20 *Geo.* 3. because the last proceedings in court were in that term. The plea was a discharge under the insolvent debtors' act, and it concluded with a *verification*.

[12] The principal question made in that case was, whether bonds not granted for the price of goods, are within the statute of 7 *Geo.* 1. *c.* 31.; when the court decided that they are. *Swaine* v. *De Mattos* was cited, *ante*, n. 9. and, being said by *Chambre*, (for the plaintiff,) to be only a *Nisi Prius* case, *Wood*, (for the defendant,) answered, that it had been recognized to be law, by the court of *C. B.* in *Goddard* v. *Vanderheyden*, *M.* 12. *G.* 3. 3 *Wils.* 262. 271. *Wood* endeavoured to argue the same point, which was the first in the present case, in arguing *Pattison* v. *Banks*, but the court would not permit him, as it had not been reserved.

[† 54] *Pattison* v. *Banks* has been since reported, *Cowp.* 540.

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The *postea* to be delivered to the plaintiffs [† 55].

[☞] *Vide Paul* v. *Jones*, *B. R. H.* 27 *Geo.* 3. 1 *Term Rep.* 599. *S. P.*

[† 55] The following cases have been since determined:

HESKUYSON *v.* WOODBRIDGE and another. *B. R. M.* 24 *Geo.* 3.

The facts of this case came before the court in a special verdict, and were these: On the 13th of *June* 1782, the defendants applied to the plaintiff, to accept a bill for £300, which they would draw upon him, and which he did, not having any effects of theirs in his hands. The bill being indorsed over by the defendants, and becoming due on the 16th of *August*, the plaintiff then paid it. At the time when it was drawn, the defendants gave the plaintiff a paper in the following words: "Received, the '13th of *June* 1782, of Mr. *R. D.* "*Heskuyson*, his acceptance for £300 "due 16th of *August*, which we pro- "mise to pay when due, *John Wood-* "*bridge* and Co." On the 22d of *July*, the defendants became bankrupts, and afterwards, obtained their certificate.

Bower, for the plaintiff, argued, that the note given by the defendants was a mere indemnity, and that the plaintiff's demand did not accrue till the bill was paid, and therefore not till after the bankruptcy. He relied on *Chilton* v. *Whiffin*, *C. B. T.* 8 *Geo.* 3. 3 *Wils.* 13.

Chambre, for the defendants, insisted, that the note was an absolute engagement, and constituted a debt within the meaning of the statute of 7 *Geo.* 1. *c.* 31. He agreed, that the meaning was to give an indemnity, but said, the question whether the case was within the statute depended on the thing done, not the intention: that, in *Chilton* v. *Whiffin*, the promise was in the alternative, and conditional, not positive, as in this case. He cited *Macarty* v. *Barrow*, and *Ex parte Michell*, *Canc.* 23 *Dec.* 1751. 1 *Atk.* 120.

Lord *Mansfield*,——The note was clearly nothing but an indemnity to the plaintiff, against the consequences of his acceptance.

Buller, Justice,—This case is not distinguishable from *Chilton* v. *Whiffin*. The money was not payable at all events, in the present case, to the plaintiff. The defendants might have taken up the bill, and then the plaintiff would have had no demand against them.

Judgment for the plaintiff [☞].

COX *v.* LIOTARD, *B. R. H.* 24 *Geo.* 3.

This was an action on a policy of insurance, on the life of *J. H. Byde*, lately gone to the *East Indies*, on the event of his dying between the 5th of *April* 1780, and the 5th of *April* 1783. The defendant pleaded; 1. bankruptcy generally, and that the cause

[☞] *Vide Hockrell* (or *Hockley*) v. *Merry*, *B. R. E.* 9 *Geo.* 2. 2 *Str.* 1043. *Ca. Temp.* Ld. *Hardw.* 262. *Young* v. *Hockley*, *C. B. M.* 13 *Geo.* 3. 2 *Blackst.* 839. *Mason* v. *Vere*, *C. B. T.* 18 *Geo.* 3. 2 *Blackst.* 1217 [F 2].

[F 2] And see *Cowley* v. *Dunlop*, 7 *T. R.* 565, and *Houle* v. *Baxter*, 3 *East*. 177.

cause of action accrued before the bankruptcy; 2. that the policy was made prior to the time of [167] his becoming a bankrupt, then the trading, act of bankruptcy, petitioning creditor's debt, commission, proceedings, and certificate, specially, and that he was thereby discharged from the said policy, and all debts due at the time of the bankruptcy, without saying that the cause of action accrued before the bankruptcy. To this last plea, there was a general demurrer.

Chambre, for the plaintiff, insisted, that this was a contingent debt, and not discharged by the bankruptcy and certificate, not being within the act of 19 *Geo.* 2. *cap.* 32. § 2. for that, though the enacting words are general, *viz.* "the assured in *any* policy "of insurance," yet, as the preamble only mentions the cases of insurance "on ships or vessels, and the goods "and merchandizes loaded thereon," the construction ought to confine the operation of the enacting part to such cases; that *Pattison* v. *Banks* might be cited for the defendant, where it was held, that the general enacting words were not restrained by those in the preamble, but that there was a difference between the subject matter of that, and that of the statute of 19 *Geo.* 2.; for that, if the construction of the last-mentioned statute, instead of being confined to voyages, which terminate in a given limited time, and are clearly what was in the immediate contemplation of the legislature, should be extended to policies on lives, where the risk may remain unsettled for a very long and indefinite number of years, great inconveniences would follow. If the holders of such policies could claim under the commission, the assignees might either be obliged to impound effects for half a century; or, if they should, after a certain period, consider the debt as claimed and not proved, the policy creditor would be excluded from his share of the bankrupt's estate, in case the death should afterwards happen within the time insured, and would yet be barred from any remedy against the bankrupt.

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Lord *Mansfield* (stopping *Wood*, who was for the defendant,)—Though the preamble does not mention insurances of this sort, yet they are within the same mischief, and the enacting words are sufficient to comprehend them. The statute of 7 *Geo.* 1. is similar to this, and the case of *Pattison* v. *Banks* is in point.

Buller, Justice,—In *Mace* v. *Cadell*, *B. R. M.* 15 *Geo.* 3. *Cowp.* 232, it was determined, that the general enacting words of 21 *Jac.* 1. *c.* 19. § 11. are not restrained by the particular words of the preamble.

Judgment for the defendant.

JOHNSON *v.* SPILLER, *B. R. H.* 24 *Geo.* 3.

This was an action for money had and received, money paid, money lent, and on an account stated. The defendant pleaded his bankruptcy and certificate, and that the cause of action accrued before the bankruptcy. The trial came on at *Guildhall*, before *Buller*, Justice, at the Sittings after *Michaelmas* term, 1783, when a verdict was found for the plaintiff, with £378 15*s.* 2*d.* damages, subject to the opinion of the court on a case reserved, which stated: That, on the 7th of *October* 1782, the plaintiff, being in want of £1800, applied to the defendant to indorse his (the plaintiff's) promissory note for that sum, for the purpose of discounting it at the Bank; and as a security, or indemnity, the plaintiff deposited, in the defendant's hands, three Ordnance debentures, with the usual assignments thereon, executed by the plaintiff, so as to render them negotiable, for which the following memorandum was signed,

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viz. "Received, 4th of *September* 1782, of Mr. *James Johnson*, three Ordnance debentures, *viz.* &c. (specifying them) amounting to £2077 4*s.* 10*d.* which I hold as a collateral security for his note of hand to me, dated 5th *August*, at three months, for £1800 due the 8th of *November* next, *J. Spiller*, *J. Johnson*." The note for £1800 was afterwards renewed, for the accommodation of *Johnson*, by another, dated the 7th of *October* 1782, payable in three months. On the 12th of *November* 1782, the defendant pledged one of the debentures for £779 5*s.* 2*d.* with Messrs, *Tibbitts*, as a security for £500, for which he also gave his note of hand, payable two months after date. On the 10th of *January* 1783, the plaintiff paid his renewed note of hand for £1800 to the Bank, to whom the defendant had indorsed it. On the 18th of *January* 1783, the defendant became a bankrupt, and, on the 29th of *March* following, obtained his certificate. On the 31st of *October* 1783, the plaintiff redeemed the debenture for £779 5*s.* 2*d.* from Messrs. *Tibbitts*, by paying £378 15*s.* 2*d.* the remainder of the £500 having been received by them as a dividend under the defendant's commission.

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Wilson, for the plaintiff.—*Baldwin*, for the defendant.

Wilson contended, that this debt could not have been proved under the commission, and, therefore, was not discharged by the certificate. The first statute which made bankruptcy and a certificate an absolute discharge, from any debts, was 4 & 5 *Ann.* c. 17. The words were, "Shall be discharged from all debts by him, her, or "them, due, or owing, *at the time* "that he, she, or they, did become "bankrupt;" and those words have been continued in 5 *Geo.* 2. c. 30. § 7. There are only two other acts, *viz.* 7 *Geo.* 1. c. 31. and 19 *Geo.* 2. c. 32. which respect the discharge from debts, by bankruptcy. The former extending the operation of the bankruptcy in that respect, to debts, which at the time of such bankruptcy are *debita in presenti*, but *solvenda in futuro*, the other to certain contingent debts therein specified. The present case falls within neither of those acts. The debt was not at all due from the defendant to the plaintiff, till the plaintiff had paid the money to Messrs. *Tibbitts*. It was not, therefore, *debitum in presenti*, at the time of the bankruptcy, and it was clearly not a contingent debt within 19 *Geo.* 2. It was *Spiller* who borrowed the £500 of Messrs. *Tibbitts*. He gave his own promissory note for it, and also pledged one of the debentures, with *Johnson*'s consent; for *Johnson*'s consent was implied from his having made the debentures negotiable. *Johnson*, therefore, was only liable to Messrs. *Tibbitts* as a collateral surety for *Spiller*, and was not damnified till *October*, when he redeemed the debenture, and that was after the bankruptcy. This resembles many former cases of sureties, and, particularly, that of *Taylor* v. *Mills*, *B. R. H.* 17 *Geo.* 3. *Coup.* 525, where it was determined, that a surety in a bond, who paid the debt after the bankruptcy of the principal, was not barred by the certificate of the principal, from recovering over against him, although the bond was forfeited before the bankruptcy. There is no substantial difference whether the surety gives a bond or not, or pledges part of his property. The only distinction between this case and *Taylor* v. *Mills* is, that, here, *Johnson* might have brought an action against *Spiller* before his bankruptcy, *viz.* as soon as he pledged the debenture. But that action must have been trover, the right to which certainly still remains; for bankruptcy is no plea to an action for a tort *(a)*; and the circumstance of the plaintiff's having got back the debenture,

(a) Vide Goodtitle v. *North*, *B. R. H.* 21 *Geo.* 3. *Infra*, 584.

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debenture, would only go in mitigation of damages. The only objection, therefore, here, must be to the form of the action; but, if the plaintiff has been obliged to pay the money in order to recover the debenture, why should he not recover that money upon an implied *assumpsit*? He may wave his remedy for the tort, and affirm the transaction of the pledge, and then the case is the same as if he had gone at first with the defendant to Messrs. *Tibbitts*, and had then pledged the debenture as a collateral security.

Lord *Mansfield*, (stopping *Baldwin*,) —This is a very plain case. *Johnson* wanting money, prevails on *Spiller* to lend him his name, by indorsing his note to be discounted at the Bank, giving him, as a security, this debenture, (among others,) and making it negotiable. This put it in the defendant's power to dispose of it, and he pledged it with Messrs. *Tibbitts*. Afterwards, on the 10th of *January* 1783, *Johnson*'s note was paid at the Bank. From that time *Spiller* became his debtor for money had and received, and was immediately liable in an action of *assumpsit* [F 3]. This was before the bankruptcy; it was a debt which might have been proved under the commission; and, therefore it is discharged by the certificate.

Buller, Justice,—It is not to be taken for granted that a demand in trover cannot be proved under a commission of bankruptcy; where the demand can be liquidated, it may [F 4]. It is only personal damage, as for an assault, &c. that cannot be proved. But, here, the plaintiff might have had a special action of *assumpsit*, as soon as the debenture was pledged. We are not to presume the consent of *Johnson*. It was only deposited with

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[F 3] The cause of action must be complete before the bankruptcy; and therefore where *A.* had lent *B.* stock, to be replaced at an indefinite time, and *B.* became bankrupt without having replaced it, the court, on re-consideration, held that *A.* could not be admitted as a creditor under the commission for any sum, 4 *T. R.* 570. Though they had formerly held that he might be admitted to the amount of the price of stock at the time of the bankruptcy, *Utterson* v. *Vernon*, 3 *T. R.* 539. And where the *damages* have not accrued before the bankruptcy, they may be recovered in an action, notwithstanding a certificate; although a cause of action for nominal damages may have accrued before, *R.* in *Hammond* v. *Toulmin*, 7 *T. R.* 612. which was an action brought on a covenant for a good title to a ship, where plaintiff, after the bankruptcy of defendant, had been compelled to pay the value of the ship to persons having a better title to it than defendant.

[F 4] The meaning of this dictum is, not that a person who has a cause of action which may either be in tort, or (by waiving the tort) be changed into an action of *assumpsit*, is *bound* to prove his debt under the commission; but that he has his election, and shall not be prevented from proving under the commission, because he might bring trover; and if he chooses to consider it as a contract, and to bring an action of *assumpsit*, the certificate will be a bar, per Lord Kenyon and Lawrence, J. in *Parker* v. *Norton*, 6 *T. R.* 695, where it was decided that bankruptcy was no plea to an action of trover for a bill of exchange.

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with the defendant, to be kept as a security. As to the uncertainty of the demand in such an action, would it have been more uncertain than the demand in a common action of *assumpsit* on a *quantum meruit*, for goods sold?

The *postea* to be delivered to the defendant [☞].

[☞] A principal and surety give a bond for payment of money by instalments, and the principal gives the surety, by way of counter-security, a bond conditioned for the payment of the amount of the instalment, on a day previous to that on which the first instalment is to be payable. Subsequent to the day, in the condition of the last-mentioned bond, but previous to that on which the first instalment is payable, the principal becomes a bankrupt, and afterwards obtains his certificate. After this, the surety pays the instalments, and then brings *assumpsit* against the principal. The court was of opinion, that the surety might have proved the sum in the condition of the bond to him, under the commission, and therefore they held, that the action was not maintainable. *Toussaint* v. *Martinnant*, *B. R. M.* 28 *Geo.* 3. 2 *Term Rep.* 100. And, in a subsequent case, it was determined, that if a counter-bond is given by the principal to the surety, conditioned for the payment of the sum for which he is bound, on the day previous to that on which the principal sum is made payable; this is a debt which the surety may prove under the commission of the principal, though he become a bankrupt, before the day of payment in the bond to the surety, and before he has been called upon to pay any thing for the principal. Consequently, the principal, after he has obtained his certificate, cannot be sued by the surety. *Martin* v. *Court*, *B. R. T.* 28 *Geo.* 3. 2 *Term Rep.* 640. Vide also, of another class of debts, *Ex parte Maydwell*, *Canc.* 1785. 1 *Co. Bankr.* 204. *Ex parte Beaufoy*, *Canc.* 1787. *Ib.* 205. *Ex parte Lord Clanricarde*, *Canc.* 1787. *Ib.* 209. and *Ex parte Brymer*, *Canc.* 1788. *Ib.* 211.

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Monday, 3d May.

POWELL *against* WHITE and Others.

In a joint action against several, the plaintiff cannot be non-prossed unless by all the defendants.

ON a rule to shew cause, why the judgment of *non-pros* in this case should not be set aside, for irregularity, the circumstances were, that the plaintiff had sued out a bailable writ against three, that one was arrested, and put in bail, and the plaintiff not having declared against him within two terms, he signed judgment, the other two defendants not having appeared to the writ.

Cause was this day shewn; but the court was clearly of opinion, that in a joint action, the plaintiff could not be *non-prossed* by one, or some of the defendants, without the others.

Bearcroft,

Bearcroft, for the plaintiff.—The *Solicitor General*, for the defendants [† 56]. 1779.

The rule made absolute.

[† 56] But, where two defendants, in *assumpsit*, severed in pleading, and the one pleaded a bankruptcy, which, on issue joined was found for him, it was held, that the plaintiff might enter a *nolle prosequi*, as to him, and still proceed to final judgment and execution, against the other; *Noke* v. *Ingham*, *B. R. E.* 18 *Geo.* 2. 1 *Wils.* 89. *Vide* also *Weller* v. *Goyton*, *B. R. T.* 30 & 31 *Geo.* 2. 1 *Burr.* 358. where it was held, that, when there is judgment by default against one defendant, in a joint action, the other cannot *non-suit* the plaintiff, at the trial on issue joined by him, nor, if the plaintiff neglect to proceed to trial, can he obtain judgment as in case of a non-suit under 14 *Geo.* 2. *c.* 17. § 1.

Philpot v. *Muller*, *B. R. T.* 23 *Geo.* 3. was an action of trespass against two, who severed in pleading, and one of them signed judgment of *non pros*, and sued out execution thereon. The execution was a *ca. sa.* in trespass on the case, instead of trespass. The judgment was of *E.* 23 *Geo.* 3. On a rule to shew cause, why the judgment and execution should not be set aside, for irregularity, *Buller*, Justice, said, there was a great difference between a *nolle prosequi*, (as in *Noke* v. *Ingham*,) and judgment of *non-pros*, for that, by the latter, the plaintiff is put out of court as to all the defendants. He cited *Parker* v. *Lawrence*, *Cam. Scacc. H.* 11. *Jac.* 1. *Hob.* 70. *Slowley* v. *Eveley*, *Cam. Scacc. T.* 12 *Jac.* 1. *Hob.* 180. *Walsh* v. *Bishop*, *B. R. H.* 7 *Car.* 1. *Cro. Car.* 239. 243. and *Weller* v. *Goyton* [☞]. However, he said, as the judgment was of a former term, it could not be set aside upon motion, but must be reversed by writ of error. But, as to the execution, the court ought to interfere, because it could not be got at by writ of error, and the party had no other remedy. The rule was made absolute, for setting aside the execution, the plaintiff undertaking not to bring an action.

[☞] *B. R. T.* 30 & 31 *Geo.* 2. 1 *Burr.* 358.

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Monday, 3d May.

LE CHEVALIER, Assignee of DORMER, a Bankrupt, *against* LYNCH and Another.

Money owing out of England to a bankrupt may be attached by the law of the place after, for a debt due before, the bankruptcy [F].

A CREDITOR of *Dormer's*, to whom he was indebted before he became a bankrupt, attached, in the Island of St. *Christopher's*, after the bankruptcy, a sum of money owing by *Lynch* to *Dormer*. Afterwards, *Lynch* coming to *England*, the plaintiff brought an action against him, to recover the debt owing by him to the bankrupt; and *Lynch* applied to the court for a rule to shew cause, why the trial should not be put off, till he should be able to procure from St. *Christopher's* evidence of the debt having been attached in his hands, in the manner just stated.

On shewing cause, this day, it was contended, that, as the debt for which the money was attached was due before the bankruptcy, the creditor was only entitled to his share of the dividend under the commission, and could not attach the money in the hands of *Lynch*, because the right to the money owing by *Lynch* was, by the assignment, vested in the plaintiff, for the benefit of all the creditors.

Lord MANSFIELD,—If a bankrupt has money owing to him, out of *England*, as in St. *Christopher's*, *Gibraltar*, &c. the assignment under the bankrupt laws so far vests the right to the money in the assignees, that the debtor shall be answerable to them, and shall not turn them round by saying he is only accountable to the bankrupt. In *Scotland* they permit assignees of a bankrupt in *England* to sue for money owing to the bankrupt in *Scotland*; and it has been determined, at the *Cockpit*, upon solemn consideration, that bills by *English* assignees may be maintained in the Plantations, upon demands due to the bankrupt's estate. In the case of *Wilson*

[F] That is, where a debtor has paid money under due process of local law, he shall not be compelled to pay it over again; but where a creditor domiciled in England has received money due to a bankrupt, by attachment in a foreign court, commenced after the assignment of a bankrupt's estate, and with a knowledge of the fact, the assignees may recover against the creditor in an action for money had and received. *Hunter* v. *Potts*, 4 *T. R.* 182. *S. P. Philips* v. *Hunter*, *in error*, 2 *H. Bl.* 402. *Dissentiente Eyre*, *Ch. J.*

Wilson the agent (*b*), Lord *Hardwicke* went so far as to refuse to permit the *Scotch* creditors to come in under the commission, on the same footing with those in this country, unless they would abandon the priorities which they had obtained by the law of *Scotland*, as to the effects there [13]. But if, in the mean time, after the bankruptcy, and before payment to the assignees, money owing to the bankrupt out of *England* is attached, *bonâ fide*, by regular process, according to the law of the place, the assignees, in such case, cannot recover the debt.

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LE CHEVALIER against LYNCH.

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The rule made absolute.

(b) Reported 1 *Atk.* 128. by the name of *Richardson al.* assignees of *Wilson* v. *Bradshaw*, 25th *February* 1752. But this point is not mentioned.

[13] *Vide* the case of *Bradshaw* and *Ross*, assigness of *Wilson*, v. *Fairholme* and another, in the collection of Decisions of the Court of Session from 1752 to 1756, *p.* 198.

BIRT *against* BARLOW.

Monday, 3d May.

THIS was an action of trespass and assault, for criminal conversation with the plaintiff's wife. It was tried before BLACKSTONE, *Justice*, at the last Assizes for *Kent*, when, by the direction of the Judge, the plaintiff was non-suited.

The Court, under particular circumstances, will permit a new trial to be moved for after the four days are expired.—In an action for crim. con. an actual marriage may be proved by a copy of the register, and the minister, clerk, or subscribing witnesses to the register, are not the only competent witnesses to prove the identity of the persons married.

On *Monday*, the 26th of *April*, *Rous* moved for a rule to shew cause, why the nonsuit should not be set aside, and a new trial granted.

Wednesday, the 21st of *April*, was the first day of the term, and, by the practice of this court, all new trials, (in causes tried in vacation,) must be moved for within four days of the beginning of the term, including the first; so that *Saturday*, the 24th of *April*, was the last day for moving. However, *Rous* having stated that he had understood that the four days were reckoned *exclusive* of the first, and BLACKSTONE, *Justice*, having desired at the trial, that the opinion of the court should be taken, the court entertained the motion, which was founded on the ground of a misdirection in point of evidence; and the rule was granted (*c*).

This day BULLER, *Justice*, read the Judge's report, which was as follows:

The first witness called by the plaintiff was *Thomas Sharpe*, who proved a copy of the register of the parish of St.

(c) Vide infra, *Rex.* v. *Gough*, *T.* 21 *G.* 3. *p.* 791.

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St. *Alfred, Canterbury,* in *hæc verba*—" 1767, No. 106. " *John Birt*, Esq; of the parish of St. *Margaret, Rochester,* " Co. *Kent*, and *Harriot Champneys* of this parish, married " by banns 15 *December* 1767, by *John Lynch*, minister. " Witnesses, *Robert Lynch, Francis Champneys, Anne Lynch,* " *Elizabeth Lynch* [14]."—Another witness, (*Susanna*——) was next called, to prove the fact of adultery.—I was of opinion, that this was not sufficient evidence of the marriage, but that the identity of the parties must be proved, else it might possibly be a register of the marriage, not of the plaintiff and his supposed wife, but of some other persons of the same name.—The counsel for the plaintiff then said, that, in the course of their examination to prove the adulterous intercourse, it would come out from the mouths of the witnesses, that the plaintiff's reputed wife was of the name and family of *Champneys*, and that they have long cohabited together, and were esteemed to be man and wife by all their friends and relations.—I still thought that the evidence, so opened, would be insufficient, holding, in conformity to the case of *Morris* v. *Miller*, reported in 4 *Bur.* 3057 (*d*), (and of which I also had a manuscript note of my own,) that this was the only *civil* case in which proof of an actual marriage was requisite, as contradistinguished from acknowledgment by the parties, cohabitation, reputation, &c. That the *best* proof that could be given of an actual marriage, was by some person personally present at the solemnity, which, in my small experience, I had never seen an instance of not producing. If it did not appear that there were any persons present besides the minister [15], and he was dead, perhaps other collateral proof might be admitted, which might render probable the identity of the plaintiff and his wife, and the persons whose marriage was so registered. But that, in the present case, there appeared to have been no less than *five witnesses present* at the marriage thus registered, which was only eleven years ago. That the marriage act had directed the witnesses to subscribe their names to the register (*e*), in order to facilitate the investigation of the legal evidence of marriages.—And that till these five witnesses and the minister were accounted for, as by shewing them all dead, or the like, I could not admit less proof than that of some person present to demonstrate the identity of the parties.—I accordingly nonsuited the plaintiff. After which a proctor from the ecclesiastical court, then

[14] I presume the names of the husband and wife were also subscribed, although that was not stated in the report. It is expressly required by the marriage act, 26 *G.* 2. *c.* 33. § 15.

(*d*) *B. R. E.* 7 *G.* 3. Since reported, 1 *Blackst.* 632.

[15] Two witnesses at least, besides the minister, are expressly required by the marriage act. § 15.

(*e*) 26 *G.* 2. *c.* 36. § 15.

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then present, declared openly that he had been subpœnaed by the plaintiff to prove, and could prove the taking out of a *licence* for the marriage of the plaintiff and his reputed wife. I mention this circumstance, though it could be no ground of my determination, as it shews *something more than a bare possibility* that the plaintiff and his wife were not the identical persons so registered as marrying by bans.

Kempe, Serjeant, and *Peckham*, shewed cause.—They argued, that the marriage act meant to introduce some more accurate proof of marriages than what was in use before the passing of that act. This purpose was expressed in the preamble to the 15th section. It had accordingly been enacted by that section, that witnesses should be present, who should subscribe their names to the register; and the purpose of such subscription must have been to point them out, that they might be produced when it should become necessary to prove the marriage. There is no case in the law where subscribing witnesses are necessary, and yet it is not necessary to produce them, or, if they are shewn to be dead, to prove their hand-writing. The register proved the marriage of two persons of the same name with the plaintiff and his wife, but could not shew that *they* were those identical persons.

Dunning, and *Rous*, in support of the rule, observed, that the preamble to the section of the marriage act relied on, professed an intention to render the proof of marriages *more easy*, and it would be a strange solecism to construe it so as to render them more difficult. It was admitted, that the proof of a marriage was complete, and no case could be shewn which had determined, that there could be no other evidence of the identity of the parties, but the testimony of persons present. Proof of the parties having been seen going to church the morning of the day mentioned in the register, or sleeping together that night, would surely be evidence of the identity, and so would proof of their having cohabited together from the time of the marriage downwards. In an action for goods furnished to a wife, evidence of cohabitation and reputation is sufficient. In a case of criminal conversation, something more, *viz.* an *actual* marriage must be shewn. This is done by the register; and when that is coupled with evidence of cohabitation and reputation, the proof is complete. As the copy of the register only was produced (and was all that was necessary) the witnesses could not have proved their attestation, even if they had been called.

Lord MANSFIELD,—From the report, it appears, that the ground of the nonsuit was an idea, that the identity must be proved by the minister, or some of the attesting witnesses, unless their not being produced is accounted for, in the same manner, as is required in the case of subscribing witnesses to a deed. The counsel for the plaintiff stated other evidence of

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of the identity; whether such as would have been sufficient when produced, (as that might, or might not be, according to the differences arising from the manner of stating it,) I give no opinion. But the judge decided that it was *necessary* to produce some of the subscribing witnesses. The clauses in the marriage act relative to registers are of infinite utility to the kingdom. They were meant, as well to prevent false entries, as to guard against illegal marriages without *licence*, or the publication of bans. The registers are directed to be kept as public books, and accompanied with every means of authenticity. But, besides facilitating and ascertaining the evidence of marriages, they were intended for other wise purposes. They are of great assistance in the proof of pedigrees, which has become so much more difficult since inquisitions *post mortem* have been disused, that it is easier to establish one for 500 years back, before the time of *Charles* II. than for 100 years since his reign. But this advantage would be lost, and it would be very prejudicial, if the act were so construed as to render the proof of marriages more difficult than formerly. I take it for granted, that the law stands as it did before in that respect. Registers are in the nature of records, and need not be produced, nor proved by subscribing witnesses. A copy is sufficient, and is proof of a marriage in fact between two parties describing themselves by such and such names and places of abode, though it does not prove the identity. An action for criminal conversation is the only *civil* case where it is necessary to prove an *actual* marriage. In other cases, cohabitation, reputation, *&c.* are equally sufficient since the marriage act as before. But an action for criminal conversation has a mixture of penal prosecution; for which reason, and because it might be turned to bad purposes by persons giving the name and character of *wife* to women to whom they are not married, it struck me, in the case of *Morris* v. *Miller*, that in such an action, a marriage in fact must be proved. I say, a marriage *in fact*, because marriages are not always registered. There are marriages among particular sorts of dissenters, where the proof by a register would be impossible, and DENNISON, *Justice*, in a case of that kind which came before him, admitted other proof of an actual marriage. But, as to the proof of identity, whatever is sufficient to satisfy a jury, is good evidence. If neither the minister, nor the clerk, nor any of the subscribing witnesses, were acquainted with the married couple, in such a case, none of them might be able to prove the identity. But it may be proved in a thousand other ways. Suppose the bell-ringers were called, and proved that they rung the bells, and came immediately after the marriage, and were paid by the parties; suppose the hand-writing of the parties were proved; suppose persons called who were present at the wedding dinner, *&c. &c.*

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WILLES, and ASHHURST, *Justices*, of the same opinion.

BULLER, *Justice*,—The original register is not necessary to be produced, and it is only where *that* is required, that subscribing witnesses must be called. In this case, the wife's maiden name was *Harriot Champneys*. Suppose a maid servant had proved that she always went by that name till the day of the marriage, that she went out that day, and, on her return, and ever since, was called Mrs. *Birt*? Surely that would have been evidence of the identity.

The rule made absolute [16] [†57].

[16] The cause was tried again, at the ensuing Assizes, and a verdict found for the plaintiff.

[†57] *Vide Hemmings* v. *Smith*, *B. R. M.* 25 *Geo.* 3.

DOE, Lessee of MATTHEWS and Others *against* JACKSON and Another.

Wednesday, 5th May.

A notice to quit "or I shall insist "on double "rent," is good to support an ejectment.

IN this ejectment, which was tried before BLACKSTONE, *Justice*, at the last assizes for *Surry*, the only question arose on the notice to quit. The demise was laid to be on the 27th of *March* 1777, to hold from the 26th of the same *March*, and the notice to quit, which was in writing, was in the following words: "I desire you to quit the possession "at *Lady-day* next, of, *&c. or I shall insist upon double* "*rent* for the same." The judge directed the jury to find a verdict for the plaintiff, but with leave to the defendant to apply to the court, without costs, for a nonsuit. This was accordingly done, and a rule to shew cause was granted, which now came on to be argued.

Peckham, for the plaintiff.—*Dunning*, *Mingay*, and *Lane*, for the defendants.

On the part of the plaintiff, a case was mentioned, (on the relation of *Wheeler*,) which had come before SMYTHE, *Baron*, at *Lincoln*, where he had over-ruled the objection to a similar notice; and cited a prior case of the same sort in which NOEL, *Justice*, having ruled that the notice was good, his opinion had been confirmed by the court of *Common Pleas*.

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On the other side, it was contended, that it was impossible to know whether the cases referred to were parallel to this, unless the words in the notices could be shewn to have been the same. Here, the landlord had proposed an alternative to the tenant, and given him an option, *viz.* either to quit at *Lady-day*, or, (if he chose,) to hold over, paying

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paying double his then rent. It could not be supposed, but that, if the defendant, on receiving this notice, had gone, and offered to continue at double rent, the landlord would have agreed to it. It could not fairly be said, (as had been contended at the trial,) that the latter part of the notice was only meant to declare the legal consequence of holding over, since the statute of 4 *Geo.* 2. *(f)* does not give double *the rent*, in such cases, but double *the value*.

Lord MANSFIELD,—That the landlord may give the tenant the alternative is clear; but the question is, what is the meaning of this notice. If it had really contained the option of a new agreement, and had said, for instance, "*Or else* that you agree to pay double rent," the ejectment could not have been supported. But, here, the landlord does not mean to offer a new bargain. I think this very point has been settled several years ago; but if it is new, I have no doubt. The additional words only prove the landlord's anxiety to get into possession. It is an emphatical way of enforcing the notice, and shewing the tenant that he is in earnest, by informing him of the legal consequence, if he hold over. The tenant may keep him out, by defending an ejectment, and by chicane, for several months, but the notice informs him, that, in such case, the landlord will insist on the penalty. It clearly means to refer to the statute, although the penalty given by the statute is not double rent, but double the yearly value, which is more favourable to landlords, for double rent would be no penalty on the expiration of some leases [17].

WILLES, *Justice*,—The notice is to be considered as having two parts; 1. The common notice to quit; 2. A warning to the tenant of the consequence, if he shall disobey the notice, and put the landlord to the necessity of bringing an ejectment.

ASHHURST, and BULLER, *Justices*, of the same opinion.

The rule discharged [☞].

(f) C. 28. § 1.

[17] By 11 *Geo.* 2. *c.* 19. § 18. the penalty, when *the tenant* gives notice that he means to quit, and does not, is *double rent*.

[☞] *Vide Messenger* v. *Armstrong*, *B. R. M.* 26 *Geo.* 3. 1 *Term Rep.* 53.

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The KING *against* the MAYOR and BURGESSES of LYME REGIS, on the prosecution of ARTHUR RAYMOND.

Saturday, 8th May.

MANDAMUS to restore the prosecutor to the office of a capital burgess.

On a mandamus to restore to the office of a capital burgess, if the return state the ground of the disfranchisement to have been, the non-attendance of the prosecutor at a meeting to which he was summoned for the election of a capital burgess, an averment that the right of such election is in the capital burgesses being the common council, does not assert, with sufficient certainty, that he had a right to concur in the election, and ought to have obeyed the summons, because, consistently with such an averment, he might not have that right, it not appearing thereby that all the capital burgesses are members of the common council.

The return stated, That *Lyme Regis* was a borough by prescription. That the mayor and burgesses had been immemorially accustomed to have, and still ought to have, within the borough, a certain guild-house, called the *Moot-hall*, or *Guild-hall*. That Queen *Elizabeth*, by letters patent of the 26th of *June*, in the 39d year of her reign, granted, (*inter alia* in the return stated,) that there should be in the said borough, a mayor and eleven burgesses in number, only, out of the burgesses of the borough or town aforesaid, [*&c.* as stated within the *parenthesis, supra*, from *p.* 150 to *p.* 151. in the case of *Francis Fane* and *John Luther*]. That the letters patent, in the particulars in the return set forth, had been accepted, and acted under to the present time. That, from the time of granting the letters patent, every capital burgess, upon his admission into the office, had been accustomed to take [the same oath, and in the same manner, and set forth in *hæc verba*, as in the case of *Fane* and *Luther, supra*, p. 149]. That the prosecutor was elected a capital burgess on the 27th of *August* 1759, and sworn in on the same day. That on the 10th of *August* 1778, the mayor duly appointed a meeting or convocation of the mayor and capital burgesses, to be holden at the council chamber within the *Moot-hall*, or *Guild-hall*, on the 15th of *August*, at eleven o'clock in the forenoon, to elect one of the burgesses into the office of a capital burgess, in the room of *Henry Fane* deceased. That before the 15th of *August*, he caused due notice to be given to all the capital burgesses, within the reach of summons, of his having appointed such meeting, and caused such due notice to be given on the 11th of *August*, to the prosecutor in person, whereby he summoned him to attend at the council chamber, within the *Moot-hall*, at the said meeting. That, on the 15th of *August*, the mayor and *George Kirby*, and *Robert Clarke*, two of the capital burgesses, met at the council-chamber for the purpose of holding a meeting of the mayor and capital burgesses according to the notice, for the election of a capital burgess in the room of the said *Henry Fane* deceased, but that they not being a sufficient number for that purpose, and because a sufficient number did not then and there appear, to

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hold such meeting, none could be or was then held, and that the prosecutor did not attend or appear at the hour of eleven, nor at any time on that day, according to the appointment and notice, but, contriving and designing, *wilfully* to prevent the mayor and capital burgesses from holding such meeting for the purpose aforesaid, did *wilfully* absent himself from the council-chamber during the whole day, and did, on the said day mentioned, combine with the Hon. *Henry Fane*, (and six others, by name,) being, or claiming to be, capital burgesses, and having also before received notice [18] of the said meeting, to prevent such meeting from being held, and that, in prosecution of such combination, they wilfully absented themselves from the council-chamber during the whole of the said 15th of *August*; and that, by reason of the absence of the prosecutor, and of a number of other capital burgesses sufficient to proceed to the election, no meeting for the said purpose could be or was held on the 15th of *August*, according to the appointment and notice. That the mayor, on the said 15th of *August*, duly appointed another meeting to be held at the council-chamber, on the 21st of *August*, for the same purpose [Then the same allegations with regard to the meeting appointed for the 21st of *August*, as those above stated, excepting that the charge of combination was not repeated]: And that the prosecutor, by his said wilfully absenting himself from the said several meetings so appointed for the 15th and 21st of *August*, and by his said combination, did *wilfully* neglect and violate the duty and execution of his office, contrary to the duty thereof, and the obligation of his oath. That, at a meeting of the mayor and burgesses, held *according to the immemorial custom of the borough*, at the *Moot-hall* or *Guild-hall*, on the 31st of *August* 1778, *John Coade*, one of the capital burgesses, exhibited certain articles of complaint against the prosecutor, and, *by the second (g)* of the said articles, charged him with having received previous and due notice, and with having been duly summoned to appear at a meeting of the mayor and capital burgesses [*&c.* stating the circumstances relative to the meeting of the 15th of *August*, in the manner before alledged in his return, *with the omission of the charge of combination (h)*]. And that the said *Coade*, by *the third* of the said articles [*&c.* stating in like manner the circumstances relative to the meeting of the 21st of *August*]. And that, thereupon, at the said meeting of the 31st of *August*, it

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[18] There was no allegation that they had been *summoned*, *Infra*, p. 179. *Note (m)*.

(g) This was one of the returns which had been amended. *Supra Rex v. Lyme Regis* on the prosecution of the Hon. *Henry Fane*, *p.* 135 *to* 137.

(h) Infra, *p.* 180. *Note (p)*.

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it was ordered, that a copy [*&c.* stating precisely the same proceedings as in the cases of *Francis Fane* and *John Luther (i)*]. That the mayor and burgesses had adjudged that *Raymond* was guilty of the absences, contempts, neglects, breaches of duty, misbehaviors, and other matters and things objected and charged against him by the second and third articles of the said complaint. That he had not shewn any just cause, *&c.* that the mayor and burgesses had thereupon resolved, that for, *&c.* he ought to be removed, and did then and there remove him, and that he had not since, *&c.* and that for these reasons, *&c.*

Rooke, for the prosecutor, insisted, that, in order to support the disfranchisement, for *wilfully* disobeying the summons of the mayor to attend an election of a capital burgess, it was incumbent on the defendants to shew; 1. That *Raymond*'s attendance was necessary; 2. That he knew it to be so; and 3. That the charges against him were sufficiently clear for him to be able to prepare and make his defence. 1. It did not appear by the returns, that his presence was necessary, for the election to fill vacancies in the office of capital burgesses was there stated to be "*by the other capital burgesses being the common council*," or "*by the rest of the council*" (*i*). It was not stated that *all* the capital burgesses were of the common council, nor that *Raymond* himself was. If the whole of the charter had been fairly stated in the return, it would have appeared that only *six* of the capital burgesses were of the council. Even if they had alleged that all the capital burgesses were of the common council, *that* would not have been sufficient, without going on to allege, that *Raymond* was of it, for, without such allegation, his being so would only appear argumentatively; *Rex* v. *Mayor of Hereford (k)*, *Rex* v. *Stevens (l)*. They ought to have stated how many would have made a majority, so that, if *Raymond* had been present, an election might have been had. They should also have set forth, that the persons with whom he was charged to have combined were *summoned* to attend (*m*). 2. It ought to have been shewn that he knew his presence was necessary, the word *wilfully* not being a sufficient allegation, for it only expresses an inference of law; *Rex* v. *Richardson (n)*, *Clegg's Case (o)*. 3. There is nothing said *in the articles* about combination (*p*), therefore he could not be prepared to answer that part of

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(*i*) *Supra*, p. 152, 153.
(*k*) *M.* 3 *Ann.* 6 *Mod.* 309.
(*l*) *Qu.*
(*m*) *Supra*, p. 178. *Note* [18].
(*n*) 1 *Burr.* 517.
(*o*) *H.* 32 *Geo.* 2. *Rex* v. *Liverpool*, on the prosecution of *Clegg*, 2 *Burr.* 723. 731.
(*p*) *Supra*, p. 178. *Note* (*h*).

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of the offence stated in the return. The words "*contriving* "*and fraudulently designing wilfully to prevent*," &c. are only inducement, and do not amount to a positive charge, and, in a case like this, as in indictments, the charge ought to be direct; *Rex* v. *Whitehead (q)* 2 *Hawk. c.* 25. . 60. *Raymond's* offence, as stated, was in the character of a member of the council, not as a capital burgess, and therefore he ought not to have been removed *from the office of a capital burgess*.

Lawrence, on the other side, contended, 1. That the court could not go out of the return, and consider any supposed part of the charter not stated there. By the charter, as there set forth, three provisions were made concerning the appointment of capital burgesses. 1*st*, A mayor and eleven capital burgesses were created by name. 2*dly*, Four were to be chosen by the mayor and the majority of the eleven, and when one of those sixteen should die or be removed, it was to be lawful for the other capital burgesses, *being the common council*, or the greater part of them, to elect another. 3*dly*, When, afterwards, the place of any of the sixteen became vacant, it was to be filled up by the rest of the council, or the majority of them. The charter then goes on to say, that it should be lawful for *the mayor and capital burgesses* to appoint a guild or council-house, and "that *the* "*said mayor and capital burgesses, the common council* of "the borough or town aforesaid, or the majority, should "and might hold in the *Moot-hall*, a convocation of the "same mayor and capital burgesses, or the greater part of "them *(r)*." All this shews clearly, that all the capital burgesses are of the common council. The expression of "*the said mayor and capital burgesses the common council*," is to be applied by necessary reference to the former part of the sentence, where the words "*mayor and capital burgesses*" only are used. By the oath, which is stated as necessary to be taken by *all* the capital burgesses, they swear to keep secret what is done *in the council-house*. 2. The question whether *Raymond's* presence was necessary, depends on the former, [181] whether, as a capital burgess, he had a vote in the election, and therefore, from the arguments which prove that he had a vote, the necessity of his presence follows of course. 3. The words "*contriving and fraudulently designing*," *&c.* are not mere inducement, but of the essence of the charge. In all cases where the degree of criminality is in question, *that* form of words is proper and sufficient. In an action for a malicious prosecution, it is sufficient to say "contriving and maliciously intending," although malice is essential to ground that action. In an indictment for an assault with intent to commit

(q) *T.* 5 *W. & M.* 1 *Salk.* 371. (r) *Supra*, p. 151.

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commit a rape, or to stab, it is sufficient to say that the party "intending and contriving," *&c.* Confederacy was no part of the accusation, which was only wilfully absenting himself to prevent an election, and the question was, whether that was a sufficient ground for disfranchisement. It appeared that a majority had been summoned, and it would be strange doctrine to say, that because, by the non-attendance of a sufficient number of others, no election could have been had, the prosecutor should therefore pass unpunished for his non-attendance. In the case of the *Mayor of Hereford* it did not appear that the majority could elect, and it might there have been necessary that two thirds, *&c.* should concur.

Lord MANSFIELD,—Undoubtedly the principle is true, that returns must be certain, and not argumentative [F]. In the case of *Rex* v. *The Mayor of Hereford*, it seems very strict to consider the return as argumentative for the reason there mentioned. But the ground suggested by Mr. *Lawrence*, for the decision in that case, seems a very good one. I doubted, for some time, on the question, whether, in the present case, it is sufficiently shewn in the return, that *Raymond* was of the common council. That he should be of it, is of the essence of the crime for which he is stated to have been amoved. There are three parts of the charter which go shew, that the council consists of *all* the capital burgesses, and that the expressions "common council" and "capital "burgesses, are synonymous, *viz.* 1. "capital burgesses "being the common council."—It is not capital burgesses "being of the common council." 2. If a capital burgess die, or is removed, a new one is to be chosen, "by the rest "of the council, or the greater part of them." 3. The passage mentioned by Mr. *Lawrence*, relative to the meeting or convocation. But still all those passages and expressions are ambiguous. They afford a strong inference in point of language. But are they sufficient in this charter to constitute a common council, composed of *all* the capital burgesses? [182] I think not, because the charter refers to a previous known constitution. The council might be created by prescription, or a former charter, to which this charter refers. If so, the constitution of the council, by such prescription, or previous charter, should have been set forth. It would be difficult to maintain an action on this, as a false return, if the council, by the charter, consists of a *part* only, for the return does not say that the council is constituted by the charter.—As to the

[F] So if a return assign *inconsistent* causes, the court will quash the whole. *R.* v. *Mayor, &c. of York*, 5 *T. R.* 66.

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the cause stated for the amotion, there is a great difference between a *charge* as the ground of disfranchisement, and an *indictment*. In criminal prosecutions, technical forms are established, and ought to be followed. If in an indictment, you say that *A.* forged, *and* caused to be forged, the proof of either fact will support the indictment; but to say that he forged, *or* caused to be forged, would be bad. This, being determined, must be adhered to. But such nicety is not required in accusations against a corporator in a corporate court. *There* substantial certainty is all that is necessary; and, in the present case, there is no doubt but the intent is charged as part of the crime, and sufficient notice is alleged to have been given to *Raymond* to prepare to answer it.

WILLES, *Justice*, of the same opinion on both points stated by Lord MANSFIELD.

ASHHURST, *Justice*, of the same opinion on the point of uncertainty concerning the constituent members of the council.

BULLER, *Justice*, also of the same opinion on that point. —He said nothing on the other.

Judgment, that the return be quashed, and a peremptory *mandamus* issue [19].

[19] The returns in the cases of *Francis Fane*, *John Luther*, and several others, *(supra* p. 144. 154.) were quashed, on a motion made for that purpose, immediately after the decision of the present case. It was stated on the part of the prosecutors, that, by the returns in those cases where the disfranchisement had been for non-residence, the prescriptive necessity of residence only applied to the council, and it was not directly averred that the prosecutors were of the council, the non-residence might be no offence in them.—Lord *Mansfield* said, there was no getting over the objection, and that the averment, that, since the charter, the council had consisted of the mayor and capital burgesses *(a)*, was not sufficient, as it did not appear that all the sixteen came to be of the council, which before the charter was stated to consist only of eleven.

(a) Supra, p. 151.

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HOLFORD *against* HATCH.

Saturday, 8th May.

A landlord cannot maintain an action of covenant, for rent, against an under-tenant.

THIS was an action of covenant, for rent in arrear, brought against the defendant as assignee of one *Saunders*. The declaration stated, (in the common form,) that the plaintiff demised to *Saunders* for seven years, by virtue whereof he entered and was possessed, and that afterwards, *all the estate, right, title, and interest*, of *Saunders*, in the premises, came to the defendant, *by assignment* thereof, by virtue whereof he entered and was possessed, and that, after the assignment, rent had become due, which the defendant had not paid. The defendant *pleaded*, that *all* the estate, right, title, and interest, of *Saunders* in the premises, did not come to him by assignment thereof in manner and form as the plaintiff had alleged.

On the trial, it appeared, that the defendant was in possession of the premises during the time when the rent in arrear became due, but that, by the deed under which he held, they were conveyed to him, by *Saunders*, for a day, or some days less than the original term, and that he had actually surrendered them before the action was brought. Some receipts also were produced for rent which had been paid by the defendant to the plaintiff, and which run thus: "Received of *Saunders* by the hands of *Hatch*."

Upon this evidence, it was contended, at the trial, which came on before Lord MANSFIELD, at the Sittings for *Middlesex*, in last *Hilary Term*; 1. That, in point of law, a person holding of the first lessee, by an under-lease, like the present, is not liable to be sued by the original lessor, on the covenant for rent contained in the original lease; 2. That the fact put in issue on the record, *viz.* that *all* the estate, *&c.* of *Saunders* came to the defendant, was not proved.

A verdict was found for the plaintiff, but Lord MANSFIELD saved the points made by the defendant's counsel, for the opinion of the court. Accordingly, in *Hilary Term*, *(Thursday*, the 4th of *February,) Davenport* obtained a rule to shew cause why the verdict should not be set aside, and a nonsuit entered. He cited *Poulteney* v. *Holmes (r)*, *Crusoe* v. *Bugby (s)*, and *Hare* v. *Cator (t)*.

Cause

(r) *M.* 7 *G.* 3. at *N. Pr.* before *Pratt, Ch. Just.* 1 *Str.* 405. Since reported 2 *Blackst.* 766.

(s) *C. B. T.* 11 *Geo.* 3. 3 *Wils.* 234.

(t) *B. R. E.* 18 *G.* 3. [† 58]. *Vide infra*, *Note* (21), p. 184.

[† 58] Since reported, *Cowp.* 766.

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Cause was shewn, on the *Thursday* following, (the 11th of *February*.) The *Solicitor General*, for the plaintiff.—*Dunning* and *Davenport*, for the defendant.

For the plaintiff, it was contended, 1. That the covenant for rent being one of those which run with the land, every person who takes under the original lease is liable to it. To this purpose, the defendant, although he had not strictly taken the whole of the first lesse's interest in point of duration, was to be considered as his assignee. All that had been determined by the case of *Crusoe* v. *Bugby*, was only, that a lease by the original lessee, for a shorter time than his own, was not such an assignment as would produce a forfeiture, under a covenant not to assign *(u)*. Many modes in which the interest may be transferred, though not assignments within the meaning of such a covenant, are considered as assignments, with respect to the covenants which run with the land. A devisee, an executor, an assignee under the bankrupt laws, or one who purchases the term from the sheriff under an execution, are assignees in law, to the effect of being liable to covenants for rent, *&c.* although the transfer to them does not amount to a forfeiture under a covenant not to assign [20]. The landlord is entitled to look for the rent to the person in possession, and ought not to be driven to the necessity of finding out the original lessee, and bringing his action against him. *Poulteney* v. *Holmes* does not apply to this case, for the question there was only, whether a parol agreement by the original lessee, to transfer the remaining interest in a term of more than three years, when there was only a year and a half to run, reserving the rent to himself, not to the reversioner, was void within the meaning of the statute of frauds *(v)*. *Hare* v. *Cator* [21] was determined on

(*u*) *S. P. Kinnersley* v. *Orpe*, *supra*, 56.

[20] This point, which was taken for granted on this argument, and by the court in *Crusoe* v. *Bugby*, according to *Wilson*'s report of the judgment in that case (3 *Wils.* 237), has been since very much agitated, in *Denn*, *Lessee of Earl Stanhope*, v *Skeggs*, *T.* 21 *Geo.* 3. [☞]

(*v*) 29 *Car.* 2. *c.* 3. § 1, 2, 3.

[21] *Hare* v. *Cator* was argued, on a case reserved, by *Morris* for the plaintiff, who relied on *Broome* v. *Hoare*, 1 *Cro.* 633. and by *Davenport* for the defendant.—Lord MANSFIELD in delivering the opinion of the court, in favour of the defendant, said, that the case in *Croke* did not apply, and that the objection was unanswerable.

[☞] In *Roe*, *Lessee of Hunter*, v. *Galliers*, *B. R. M.* 28 *Geo.* 3. On a special verdict, a proviso,—that a lease should become void, upon the lessee's committing an act of bankruptcy and being found a bankrupt,—was held to be good; and that under such a proviso, in case of a bankruptcy, and commission, the lease shall be avoided, and the lessor may re-enter. 2 *Term Rep.* 133.

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on the ground that the defendant was charged for the whole rent, and as assignee of *all* the premises, when, on the evidence, it appeared, that only part of them had been assigned; whereas, in the present case, the *whole* premises had been made over. 2. That, as to the second point, it went merely to the *form* of the issue; but, if the question of law was in favour of the plaintiff, it was enough for him to prove the *substance, viz.* that the defendant had enough of the term transferred to him, to make him liable, under the covenant, for the rent demanded by the action. On this head *Pope* v. *Skynner* (*w*), and a case put in the text of *Littleton* (*x*), were, it was said, in point. In the first, in an action of replevin, the defendant having avowed that he had taken the plaintiff's cattle *damage feasant*, the plaintiff pleaded, in bar, that *A.* being seised of a house and land to which common in the *locus in quo* was appendant, had demised the same to him on the 30th of *March*, to hold *from the* 25th of *March*, &c. and the defendant traversed the lease *modo et formâ*, upon which issue being taken, and the jury having found a lease made on the 25th of *March*, to hold *from thence next ensuing*, the court thought that this was not the same lease [22], and yet gave judgment for the plaintiff, because the *substance* of the issue was, whether the plaintiff had such a lease as by force thereof he might use the common at the time (*y*). The case put by *Littleton* is equally strong, for he there supposes the demandant in a writ of entry in *casu proviso*, to count of an alienation *in fee* made by the tenant in dower, and the tenant to plead that he did not alien *modo et formâ*, &c. and the jury, (on issue being joined,) to find an alienation *in tail*, or *pur auter vie*, and then says, that although the alienation found would not be in manner, &c. yet the demandant should recover.

On the other side, it was insisted, 1. That the case of *Crusoe* v. *Bugby* was in point. There is not a better known distinction in the law than that between an assignee and an under-tenant, Only assignees of the whole term, whether by *actual*

(*w*) *Cam. Scacc. T.* 12 *Jac.* 1 *Hob.* 72.

(*x*) § 483. *Co. Littl.* 281. *a. b.*

[22] One of the variances mentioned by *Hobart* is, that the lease pleaded was *exclusive*, and *that* found by the jury *inclusive*, of the 25th of *March*. This may therefore be added to the series of cases enumerated by Lord MANSFIELD in his argument in *Pugh* v. *the Duke of Leeds* (*) in which "*from the day*," had been supposed to *exclude*, and *from henceforth*, or "*from the date*," to include the day.

(*y*) *Vide Bristow* v. *Wright*, *E.* 21 *Geo.* 3. *Infra.* p. 665.

(*) Mentioned *supra*, p. 53, *Note* [15].

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actual assignment, or by devise, sale under an execution, &c. are liable to the covenants for rent, &c. for, if there is a reversion of a day reserved by the immediate lessor, there is no privity between the under-tenant and the first lessor. The plaintiff seems to have acknowledged this, by the form of the receipts he has given for the rent, which has been paid to him by the defendant in order to save the circuity of an intervening payment to *Saunders*. While the defendant continued in possession, the plaintiff might have distrained upon him for the rent then due, but as he has permitted him to quit the premises without using that process, he cannot now substitute this action of covenant in its place. Even a court of equity would not assist in a case like this, as appears by two cases mentioned in *Bacon's Abr. Title Lease (z)*, and reported in *Vernon*, viz. *Sparkes* v. *Smith (a)*, and *Pilkington* v. *Shaller (b)*. 2. That, by the issue, the plaintiff had affirmed that the *whole* of *Saunders's* estate, &c. had come to the defendant, but the proof was, that only *part* of the term had been conveyed. Surely this proof can as little support such an issue, as evidence of only part of the premises having been assigned, which was the case of *Hare* v. *Cator*. The only allegation consonant to the truth of the present case would have been, "You have been in possession under *Saunders*, "and thereby became liable for the rent, which accrued "during your possession," but, if the plaintiff had stated his demand in that manner, it would have been demurred to. If an under-tenant were to pay the rent to the original lessor, he could not plead that payment in bar to an action by his immediate landlord, nor set it off, because there might be mutual accounts between the original lessor and lessee, and the former might have been, at the time of the payment made to him, indebted, on the balance, to the latter.

BULLER, *Justice*, put this case:—Suppose a lease for 21 years, and that the reversioner aliens his reversion in parts, *viz.* for 40 years immediately, to one, and in remainder in fee, to another. By the covenant for rent, it is to be paid *by* the lessee and *his assigns*, *to* the lessor *and his assigns*. Now could not the assignee of the reversion for 40 years, which is only part of the original lessor's interest, maintain an action on the covenant?—To this it was answered, that the cases were not parallel, for that, in the case put, there was no middle man to whom the lessee could be answerable. That, to make them correspond, the privity between the original lessee and lessor in the case before the court must be annihilated.—BULLER, *Justice*, then observed, that, in the case he had supposed, *that* privity was not an end, for that the original

(z) Vol. iii. 389.
(a) *Canc. M.* 1692. 2 *Vern.* 275.
(b) *Canc. T.* 1700. 2 *Vern.* 374.

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nal lessor would still remain liable to the tenant, under a covenant to repair, &c.

Lord MANSFIELD,—It is fit that we should look into the* authorities; therefore let the case stand over.

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The court were understood to be for some time divided, and judgment was not given till this day, when Lord MANSFIELD delivered their unanimous opinion, as follows:

Lord MANSFIELD,—This is an action of covenant by a *lessor* against an *under-lessee*, and the single question is, whether the action can be maintained against him, as being, *substantially*, an *assignee*. For some time, we had great doubts, we have bestowed a great deal of consideration on the subject, and looked fully into the books, and it is clearly settled; (and is agreeable to the text of *Littleton*,) that the action cannot be maintained, unless against an assignee of the whole term [F].

The rule made absolute [† 59].

[† 59] The following case has been since determined:

PALMER *v.* EDWARDS and Another, *B. R. E.* 23 *Geo.* 3.

This was an action of covenant brought by the plaintiff as assignee of a term, against the defendant as assignee of the lessor, for not finding, providing, assigning, and allowing, proper wood and timber for repairing the demised premises.

The *declaration* stated, that one *Richard Edwards*, being, on the 30th of *September* 1751, possessed, *among other things*, of certain premises particularly specified, for a long term of years then and yet to come, did, on that day and year, demise to one *Edmonson*, his executors, administrators and assigns, *among other things*, the said specified premises, to hold from *Lady-day* then next ensuing, for 30 years, at a certain yearly rent in the indenture of demise mentioned; that *Edmonson*, for himself, his executors, administrators and assigns, by the said indenture covenanted, promised, granted and agreed, that they would, at their own proper costs and charges, (wood and timber excepted,) repair and keep in repair during the said term, *among other things*, the said specified premises; and that *Richard Edwards*, for himself, his executors, administrators and assigns, by the said indenture, covenanted, promised, granted and agreed, that they would find, provide, assign, and allow, proper wood and timber, when they should be required, for repairing, among other things, the said specified premises,

[F] So if lessee for lives grant all his estate, &c. to one and his executors for 99 years, if the lives shall so long live, in as large, ample, and beneficial a manner as the lessee and his heirs held, reserving the rent to the original lessor payable to him, but no rent payable to the lessee, this grant cannot operate as an assignment of the freehold interest; and therefore the grantee is not liable as assignee, to a covenant to deliver up the premises in repair. *Earl of Derby* v. *Taylor*, 1 *East*. 502.

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premises, during the said term; that on the said day and year, *Edmonson*, by virtue of the said indenture, entered on all the said demised premises, and, afterwards, *to wit*, on the 21st of *January* 1752, *assigned*, transferred, and set over, by indenture, to one *Warner*, his executors, administrators and assigns, the said specified premises, to hold from *Lady-day* then next ensuing, for 30 years; and that *Warner*, by virtue of the said last-mentioned indenture, entered into the said demised premises. Then a title was derived, by many mean assignments, from *Warner* to the plaintiff, and it was also shewn, that *Richard Edwards*'s reversionary leasehold interest came, by assignment, to the defendants; and then a breach of the covenant for finding and allowing timber, since the respective titles of the plaintiff and defendants had accrued, was assigned.

The defendants pleaded, 1. That *Edmonson* did not assign, transfer, and set over, to *Warner*, the said, &c. (specifying the same premises specified in the declaration,) in manner and form, &c. 2, 3, 4. three other pleas on which no question arose, 5. performance.

Issue was joined on each of those pleas, and the cause came on for trial before *Eyre*, Baron, at the Lent Assizes for *Huntingdonshire*, 23 *Geo.* 3.

Upon the evidence, it appeared, that the original lease was of certain tenements, including those in the declaration specified, at a rent of £149 7*s.* 10*d.* and that it contained, among other covenants, one, on the part of *Edmonson*, to repair; and another, on the part of *Edwards*, to find timber, as stated in the declaration.

The indenture between *Edmonson* and *Warner*, reciting the lease, witnessed, that *Edmonson* assigned all and singular, &c. (*viz.* that part of the premises specified in the declaration, to *Warner*, his executors, administrators, and as- [188] signs, (subject to the exceptions, reservations, and agreements aforesaid,) at the yearly rent of £26. 2*s. payable to Edmonson*. Then there was a covenant, by *Warner*, for himself, his executors, administrators, and assigns, to repair at their own proper costs and charges, (wood and timber excepted,) and a power *to Edmonson* to re-enter on non-payment of rent. There were also several other covenants, which were admitted at the bar to be different from those in the original lease.

A verdict having been found for the plaintiff on all the issues, a new trial was moved for, on two grounds; 1. that the rent was reserved to *Edmonson*; 2. that the covenants in the indenture between *Edmonson* and *Warner* were not the same with those in the original lease.

Partridge, in support of the verdict, contended, that, wherever the whole interest is conveyed, it is an assignment, and that, in such case, the assignee stands exactly in the place of the lessee, and is entitled to the benefit of all the covenants on the part of the lessor.

Cole, and *Davenport*, for the defendants, relied on *Poulteney* v. *Holmes*, and insisted, that this was not an assignment, because the rent was not reserved to the first lessor, but to *Edmonson*, and because a power of re-entry was given to *Edmonson*. That those circumstances constituted *Edmonson* the landlord of *Warner*; and that, if an action of covenant were to be brought by the defendants, against *Palmer*, for not repairing, he might plead that he was not assignee.

Lord *Mansfield*, and *Ashhurst*, Justice, absent.

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Buller, Justice,—It may be a question, whether the new covenants in the conveyance from *Edmonson* to *Warner* are good. On this I give no opinion. But certainly that was an assignment. There was no reversion left. There is no doubt but there is sufficient privity for the defendants, as assigness of the reversion, to maintain an action on the covenants in the original lease against *Palmer*, and that the remedy is mutual, so as to entitle *Palmer* to the advantage of the original covenants on the part of the lessor. The case of *Poulteney* v. *Holmes* does not come up to this. That case only determined, that what cannot be supported as an assignment, shall be good as an under-lease against the party granting it.

Willes, Justice, concurred in the same opinion.

The rule discharged.

Vide Eaton v. *Jaques*, *M.* 21 *Geo.* 3. *Infra*, 455. *Walker* v. *Reeves*, *M.* 22. *Geo.* 3. *Infra*, 461. *Note* [1]. *Wadham* v. *Marlow*, *B. R. M.* 25 *Geo.* 3.

The KING *against* PUGH.

Saturday, 8th May.

If the inhabitants of an hundred have enjoyed an immemorial exemption from serving on juries, they are not liable to be summoned, under any of the different statutes relative to jurors.

THIS was a case reserved upon an indictment on the statute of 3 & 4 *Ann. c.* 18. § 5. against the defendant, as high constable of the hundred of *Battle*, in the county of *Sussex*, for not obeying a warrant of the justices in quarter sessions, by which he was commanded to issue his precepts to the petty constables, head-boroughs, and tything men, of and belonging to the respective *boroughs** of the said hundred of *Battle*, for the purpose of preparing lists of persons qualified to serve on juries, &c. and for not returning such lists to the said justices, at the *Michaelmas* sessions following. The indictment had been removed by *certiorari* from the quarter sessions, and was tried at the last Assizes for *Sussex*. The case set forth;—That the defendant had been legally appointed to his office; that a warrant, (stated *in hæc verba,*) issued at the *Midsummer* sessions; that he was duly served with it, and neglected and failed to issue forth his precepts, &c. That *William* I. when he founded the *abbey*, granted, among other things [F 1], "*quod habeat curiam suam per omnia*, "&

* *Qu.*

[F 1] In *R.* v. *Thomas Clarke*, 1 *T. R.* 686, this case was referred to by Buller, J. as settling the power of the crown to exempt from serving offices. This power was admitted in that case to extend to exemption by charter from the office of constable; but it was held to be restrained to cases where

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" *& regiam libertatem & consuetudinem tractandi de suis re-* " *bus vel negotiis, & justitiam per se tenendam,*" sanctuary for felons, freedom from all episcopal jurisdictions, *&c.* That *Henry* I. by two several charters, (part of which were set forth,) confirmed* the privileges granted by *William* I. That *Henry* VIII. granted the manor and hundred of *Battle-Abbey* to Sir *Anthony Brown*, his heirs and assigns, with power to hold such views of frank-pledge, court-leet, hundred-courts, law-days, sokes, returns of writs, cognizances of pleas, and other rights, jurisdictions, powers, liberties, *&c.* as the late abbot, or any of his predecessors had held and enjoyed, in right of the said *abbey*. That under this grant, the manor and hundred had come by various mesne assignments to the present proprietor Sir *Whistler Webster*, Bart. That the defendant lived within the manor. That the manor and hundred are co-extensive. That there had been a court of record regularly held within the manor till the year 1744. That, by immemorial custom, the resiants within the hundred had not been returned to serve on juries out of the hundred; and that no precepts had ever been issued, from time immemorial, by the high constable of *Battle*. That no proof was given of any allowance of this privilege. That the town of *Battle* is not a town corporate, that has power by charter to hold sessions of goal-delivery, or sessions of the peace for such town.—The defendant was found guilty, subject to the opinion of the court on the following question, *viz.* " Whe-" ther the above charters and immemorial custom would ex-" empt the inhabitants of the hundred of *Battle* from serving " on juries, and the high constable from issuing his precepts? " or, Whether the several acts of parliament passed, and now " in force, concerning jurors, or some, or one of them, have " not taken away such exemption?"

The case was argued on *Wednesday* the 5th of *May*.—*Burrell*, for the prosecution.—*Peckham*, for the defendant.

In support of the prosecution, it was contended, that the statutes of 4 *&* 5 *W. & M. c.* 24. *(c)* 7 *&* 8 *W. 3. c.* 32. *(d)* and 3 *&* 4 *Ann. c.* 18. *(e)* are general, without any exception as to liberties or local exemptions, unless with regard to cities, boroughs and towns corporate *(f)*, and, therefore, they must be

(c) § 15, 16.
(d) § 4.
(e) § 5.
(f) 4 *&* 5 *W. & M.* c. 24. § 17.

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where a sufficient number were left liable to serve the office, and to be confined to the express terms of the charter: consequently that an exemption from personal service would not apply to the office of constable, which may be executed by deputy.

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be considered as having taken away the privilege claimed by the inhabitants of the hundred of *Battle*, if it ever had a legal existence. This construction of those statutes was, it was said, consonant to the interpretation which had obtained in respect to the statute of *bridges and highways (g)*, for the words in the fourth section of that statute, having given authority "to tax and "set *every* inhabitant," Lord *Coke* expressly says, in his commentary upon it, that, "by these words, *all* privileges of "exemptions or discharges whatsoever from contribution for "the reparation of decayed bridges, (if any were,) are taken "away," and even adds, "although the exemption were by "act of parliament *(h)*."

For the defendant, it was insisted, that it is a general rule, that an *affirmative* statute does not take away a custom *(i)*. Many particular decisions which establish and confirm that rule might be cited. For example, by the statute of 1 *Ed.* 3. *st.* 2. *cap.* 2. it is enacted, "That every man that hath "any wood within the forest may take house-bote and hay-bote "in his said wood, *so that he doth the same by the view of "the foresters;*" and yet, notwithstanding that restriction, a prescription to cut down timber trees in the party's own woods, within a forest, *without the view of the forester*, was held good, in a case in 16 *Eliz.* stated 4 *Inst.* 297. *(k)*. The passage in Lord *Coke*'s commentary on the statute of bridges does not apply, because the words of that statute are much broader, and more comprehensive, than those of the different acts relative to jurors. The principal object of the statute of 4 & 5 *W.* & *M.* (in that part of it which has been relied on,) was to revive that of 16 & 17 *Car.* 2. *c.* 3. with regard to the qualification of jurors in point of estate. The purpose of those of 7 & 8 *W.* 3. *c.* 32. and 4 *Ann. c.* 3. was to provide a method of giving the sheriff authentic information of the persons qualified; but, from a careful perusal of those different statutes, it would appear, that it was never intended thereby to subject persons, who had a right of exemption, to serve. Such exemptions are very common. Tenants in ancient *demesne* "cannot be empannelled to appear at *West-*"*minster* or *elsewhere* in any other court upon any inquest or "trial of any cause *(l)*." So clergymen, *(Beecher's Case) (m)*, coroners, officers of the forest, officers in the army, and other officers, and ministers belonging to the King, are not liable to be summoned on juries; *Bacon's Abr. Title Juries*

(g) 22 *Hen.* 8. *c.* 5.
(h) 2 *Inst.* 704.
(i) *Co. Littl.* 115. *a.*
(k) Also *Co. Littl.* 115. *a.*
(l) 4 *Inst.* 269.
(m) *C. B. M.* 19. *Eliz.* 4 *Leon.* 190.

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Juries (n); and by the statute of 52 *Hen.* 3. *c.* 14. though it is provided, that, in particular cases, persons privileged by charters of exemption, shall, notwithstanding, be sworn on juries, yet their general liberty and exemption is saved, which affords a strong proof of the antiquity of this sort of privilege.

Burrell, in reply, observed, that, if it were to be held that the exemption claimed was well founded, still that was not a sufficient justification of the defendant, because his office, in the execution of the warrant, was only ministerial [23]; but *Peckham* having answered, that the point of the exemption was the only question meant to be tried and brought on upon the case reserved, this seemed to be acquiesced in.

The court took time to consider, and now Lord MANSFIELD delivered their opinion, as follows:

Lord MANSFIELD,—We have considered this matter very fully, and we are all of opinion, that the statutes relative to juries, being affirmative, do not take away the prior exemption; and so is the text of *Littleton* [r 2].

A verdict of acquittal entered for the defendant.

(n) Vol. iii. *p.* 261. cites *Dalt.* 16 & 17 *Car.* 2. *Hardr.* 389. *Sid.* *Sher.* 121. *Trials per pais* 86. 243.

[23] *Vide Rex* v. *Percival*, *B. R. H.*

Tuesday, 11th May.

The KING *against* the JUSTICES of GLOUCESTERSHIRE.

The justices are bound to receive an appeal against an order of removal if offered at the next sessions, although no notice of appeal has been given.

ON an application for a *mandamus* to compel the justices of the Quarter Sessions in *Gloucestershire* to receive an appeal from an order of removal, it appeared, from the affidavits on which the rule was obtained, that the examination of the pauper was taken in *August*; the order of removal dated the 12th of *November* following; and the Sessions, where the appeal was tendered, held on the 12th of *January* in the ensuing year; that *no notice of appeal had been served*, (for which the reason assigned was, that the appellants had not been able to get their witnesses ready, till it was too late to

[r 2] *Vid. Com. Dig. Parliament*, R. 23, 24.

to give such notice [F]; that the court had been moved to receive the appeal, and adjourn the consideration of it till the following Sessions, and had refused.

Dunning now shewed cause.—*Morris* for the prosecutor.

The court were clearly of opinion, that the justices ought to have received the appeal.

The rule made absolute.

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The KING against the JUSTICES of GLOUCESTERSHIRE.

ALSOP and Another *against* BROWN.

[192]
Tuesday, 11th May.

If a bond for the payment of money has been forfeited before a bankruptcy, payment of interest by the bankrupt after the certificate, may perhaps render him liable to be sued upon it.

THIS was an action on a bond, to the trustees under *Samuel Wilson*'s will, in which the defendant pleaded a bankruptcy, as was done in the case of *Alsop* v. *Price (o)*; but here, the defendant was the *principal*. The cause had been tried before BULLER, *Justice*, and a special case reserved, which was this day spoken to, by *Davenport*, for the plaintiffs, and *Morgan*, for the defendant. It was stated in the case, that interest had been paid on the bond, after the defendant had obtained his certificate, but it did not appear whether such interest was paid by the bankrupt, or one of the sureties. Lord MANSFIELD said, that, if the interest was not paid by the bankrupt, there was no question, but that

(o) Vide supra, p. 160.

[F] In *R.* v. *Justices of N. R. of Yorkshire*, 3 *T. R.* 150. it was held that if the Sessions thought there had been time for the appellants to give notice and come prepared to try, they might refuse to enter and respite, where no notice had been given. But in *R.* v. *Justices of Bucks*, 3 *East*. 342. a contrary doctrine prevailed, and the discretion given by the words of 9 *G.* 1. *c.* 7. *s.* 8. ("if it "shall appear that *reasonable time of* "*notice* was not given") was restrained to the reasonableness of the notice according to the practice of the Sessions; the statute being considered imperative on the justices to enter and respite, if in fact no reasonable notice had been given. This latter construcion has been fully confirmed in *R.* v. *Justices of Staffordshire*, 7 *East*, 549. and again in *R.* v. *Justices of Berkshire*, *T.* 48 *G.* 3. *M.S.* in which it was extended to a case where a notice had been given, stating the pauper's name erroneously, which was considered as equivalent to no notice.

It is otherwise where a statute is not imperative to respite as well as to enter, *R.* v. *Justices of Derbyshire*, 4 *T. R.* 488.

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that if it was, it would be an admission by him, that the principal was then due, and he might be liable as on a new contract [24]. The case was ordered to stand over, till *affidavits* should be laid before the court, stating by whom the interest was paid; but I believe it was never brought on again.

[24] *Vide, Webster* v. *Bannister, E. Wilkes, M.* 21 *Geo.* 3. *Infra*, 519. 20 *Geo.* 3. *Infra*, 393, and *Wyllie* v. [† 60].

[† 60] *Vide*, also, *Best* v. *Barber, B. R. M.* 23 *Geo.* 3. cited *supra* p. 101. *Note* [† 42].

The KING *against* the JUSTICES of the East Riding of YORKSHIRE.

*[193] If, from the distance between the parish to which a pauper has been removed and the place where the sessions are held, there is not time to lodge an appeal at the sessions held immediately subsequent to the removal, the sessions next ensuing, are to be considered as the *next sessions* within the statute of 13 & 14 *Car.* 2. c. 12. and the justices will be compelled to receive the appeal at such ensuing sessions.

THIS was an application for a *mandamus* to compel the court of Quarter Sessions to receive an appeal against an order of removal.

The facts of the case were these: The order of removal had been made by the two justices on the 22d of *September*, but the pauper was not removed till the 5th of *October*. *Hull*, (the place to which the pauper had been removed from *Whitby*,) is sixty miles from *Northallerton*, where the Sessions began on the 6th of *October*. At that Sessions, no appeal was entered, and, at the *Epiphany* Sessions following, (which began on the 12th of* *January*,) the parish charged having offered an appeal, the justices refused to hear it, thinking themselves bound by the words of the statute of 13 & 14 *Car.* 2. c. 12. § 2. which says, that persons aggrieved may appeal to the justices of peace "at the *next* Quarter "Sessions."

Lee shewed cause, and insisted, that the succeeding Sessions had no jurisdiction; that an appeal might have been entered at the *Michaelmas* Sessions, on the second or third day, for that no notice is necessary in order to entitle the parties to *enter* their appeal *(p)*, although, if there has not been any, or not reasonable notice, the justices are bound to adjourn the hearing till the ensuing Sessions *(q)*.

The

(p) *Rex* v. *the Justices of Gloucestershire, supra* 191.

(q) 9 *Geo.* 1. c. 7. § 8.

1779.

The KING against the JUSTICES of YORKSHIRE.

The court said, that, by "*next Sessions*," the statute of *Car.* 2. must have meant the next *possible* Sessions [F], and that, here, it was impossible for the appellants to lodge their appeal at the *Michaelmas* Sessions.

The rule made absolute [☞].

[☞] But in *Rex* v. the *Justices* of *Herefordshire*, where the order was dated 18th *April*, the pauper removed 19th, and the Sessions held the 22d, at the distance only of 20 miles from the place to which he was removed, the court refused a *mandamus*. 3 *Term Rep.* 504.

The KING *against* MAY.

Saturday, 15th May.

IN an indictment for perjury tried before BULLER, *Justice*, at the Sittings at *Westminster*, in last *Hilary Term* (r), the perjury was laid to have been committed by the defendant, in giving his evidence as prosecutor, upon an indictment against *A.* for an assault. The defendant having been found guilty, on *Wednesday* the 3d of *February* 1779, *Cowper* moved for a rule to shew cause, why the verdict should not be set aside, and judgment of acquittal entered upon the following ground: The original indictment, in stating the injury which the defendant (then the prosecutor) had received, said,

In an indictment, the words "in "*manner and* "*form following*," "*that is to say*," do not bind the party to recite the instrument, *&c. verbatim*, nor render mere formal omissions or mistakes fatal. If a clerk of the peace in drawing an indictment introduce unnecessary recitals, the court will order him to pay the expence thereby incurred.

(r) *Thursday*, the 28th of *January*, 1779.

[F] This principle has always been admitted. Whether particular cases come within it must necessarily depend upon facts. In *R.* v. *Justices of Wilts*, 2 *Bott. pl.* 799. where the order was made four days before the commencement of the Sessions, and the Sessions lasted three days more, the parties being within ten miles, the court held they ought to have gone to the next Sessions. In *R.* v. *Justices of Flintshire*, where the order was executed at fifty-four miles distance the evening before the day on which Sessions are usually held, and only three days before they were actually held at the place in question, it was decided that the appellants were entitled to come to the next Sessions but one, as the next possible Sessions; though the order had been signed a month before, and was prevented from being executed by the misconduct of the pauper.

1779.

The KING against MAY.

said, "*whereby his life was greatly despaired of.*" The present indictment, after mentioning that there had been an indictment preferred by the defendant, went on thus; "*which* "*indictment was presented in manner and form following,* "*that is to say.*" Then the indictment was set forth in *hæc verba,* but, in the passage above-mentioned, the word "*despaired*" was omitted. It was admitted not to have been *necessary* that the former indictment should be recited,

[194] but it was contended, that the prosecutor, by the words "*manner and form following, that is to say,*" had *undertaken* to recite it, and that, having done so, he was bound to set it forth *verbatim.* This objection had been made at the trial, but was over-ruled by the Judge, who said, that the word, "*tenor*" had so strict and technical a meaning as to make it necessary to recite *verbatim,* but that, by the expression in this case, nothing more than a *substantial* recital was requisite, and that the variance here was only in matter of *form.* He mentioned a case where the variance was "*undertood,*" in the recital of an *affidavit,* in an indictment, instead of "*understood,*" in which, on a motion for a new trial, although the introductory words were "*tenor and effect,*" the court determined, that *the variance was not fatal* [25].

A rule to shew cause was granted, but was afterwards dropped, and the defendant was, this day, called upon his recognizance,

[25] *M.* 15 *G.* 3. *Rex* v. *Beech.* The distinction laid down by the court, in that case, was, that, where the misrecited word is in itself a word, though not intelligible with the context, as, "*air,*" for "*heir,*" there the variance according to the decisions, is fatal, but not if the mutilated words does not make any other word [† 61]. *Qu.* therefore, as to the case of *Turvill* v. *Aynsworth,* (*B. R. H.* 1 *Geo.* 2. 2 *Lord Raym.* 1515. 2 *Str.* 787.) where, in an *action,* the word "*Austrialia*" being used in stating the name of the *South Sea Company,* instead of "*Australia,*" the variance was held to be fatal [☞].

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[61] The case of *Rex* v. *Beech* has been since reported, *Cowp.* 229.

[☞] The introduction of an unmeaning word in the recital of any instrument, in a declaration, (as of "*if*" in setting forth the sheriff's precept to the returning officer, in an action for bribery) is not a fatal variance. *King* v. *Pippet, B. R. E.* 26 *Geo.* 3. 1 *Term Rep.* 235. *Vide Infra, Bristow* v. *Wright,* 665 [F 1].

[F 1] For authorities upon this point, whether an allegation to be proved by record is necessary to be proved accurately, as stated in pleading, see *Purcell* v. *Macnamara,* 9 *East.* 157. and *R.* v. *Emden, ib.* 437.

recognizance, in order that judgment might be pronounced against him.

1779.

The KING against MAY.

The indictment, which had been removed by *certiorari*, from the Quarter Sessions for *Middlesex*, appearing to be of an exorbitant length, stating all the continuances on the former prosecution, *&c.* which is rendered unnecessary by the express words of the statute of 23 *Geo.* 2. *c.* 11. § 1. the court ordered, that it should be referred to the master to see what part of the record was unnecessary, and that the clerk of the peace should pay the expence incurred by such unnecessary part [26] [F 2].

[26] Lord MANSFIELD desired the bar would take a note of this. that it might be publicly known.—A case, in some respects similar, occurred in this term, when I happened not to be in court, *viz. Rex.* v. *Bury*, but I have seen a very accurate note of it. It came on upon a rule to shew cause, why an attachment should not issue against the defendant, who was clerk of assize on the *Norfolk* circuit, for not obeying a writ of *certiorari* to remove an indictment for murder, and a special verdict founded upon it, (*Rex* v. *Borthwick*, *T.* 19 *G.* 3. *Infra*, p. 207.) The defendant insisted, that he had a right to retain the record till he should be paid his fees for drawing, ingrossing, *&c.* * which the attorney for the prisoner refused to do, on the ground of their being exorbitant. However, on the attorney's undertaking to pay as much as should, on a reference to the master, be reported to be due, the record was returned into court, [195] upon which the rule was discharged. Lord MANSFIELD said he should be very unwilling to determine that a clerk of assize has a lien on the records of the court for his fees, for that he foresaw great inconvenience from such a doctrine.

* *Vide Wilkins* v. *Carmichael*, *H.* 19 *G.* 3. *Supra*, p. 101. 104.

[F 2] If the variation makes nonsense, the court will *either add or take away* what is necessary to restore the clear and undoubted context of the original; where the party has not absolutely undertaken to give it verbatim. *R.* v. *Pippet*.

The End of EASTER *Term* 19 GEORGE III.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF KING's BENCH,

IN

TRINITY TERM,

IN THE NINETEENTH YEAR OF THE REIGN OF GEORGE III.

1779.

Saturday, 5th June.

DUNCAN *against* THOMAS.

If a warrant of attorney to confess judgment has been obtained by fraud, the court will order it to be delivered up, upon motion for that purpose, although no proceedings have been had upon it.

THIS was a rule to shew cause why a bond and warrant of attorney to confess judgment *in this court*, should not be delivered up, as having been obtained by fraud, and while the party was in custody under process out of the court of *Exchequer*. Judgment had not been, in fact, entered up, nor any proceedings had on the bond; and it was, therefore, urged, that the court could not entertain the motion, there being no instance in which it had ever extended its equitable jurisdiction so far. The rule however was made absolute; BULLER, *Justice*, observing that the court had the same jurisdiction as if the judgment had actually been entered up. If it were otherwise, he said, the consequences would be extremely inconvenient. The judgment might be entered up in the vacation, and the defendant taken in execution, before any application could be made to the court.

Lord MANSFIELD,—absent.

Howorth, for the plaintiff.—*Morris*, for the defendant.

1779.

HASELAR *against* ANSELL.

Tuesday, 8th June.

On a rule to plead, &c. in four days, if the defendant delay till the morning of the fifth day, the plaintiff may sign judgment [r].

ACTION on a bond.—*Plea*, judgment recovered.—*Replication*, *nul tiel record*; which was delivered with a rule to return the paper-book in four days. The paper-book was not offered to be returned till the morning of the fifth day, before the opening of the office, when the plaintiff refused to receive it, and immediately entered up judgment, and took out execution. Upon this, the defendant obtained a rule to shew cause, why the judgment and subsequent proceedings, should not be set aside for irregularity.

Baldwin, in support of the rule, relied on the authority of the case of *Oxley* v. *Bridge* (*a*), as directly in point, to shew that by an equitable extension of the four days, they are supposed to continue till the office open on the morning of the fifth.

Lane, on the other side, insisted, that the judgment was entered up regularly, and consistently with the rules and practice of the court, and said, that in *Oxley* v. *Bridge* there must have been some particular circumstances which distinguished that case from the present. Lord MANSFIELD having asked the master what the pactice was, he said that, strictly, the plaintiff was entitled to sign judgment, if the paper-book was not returned on the evening of the fourth day, although it is a very common indulgence to allow him till the next morning.

Lane, on being asked by his Lordship, admitted, that the plaintiff would not have been injured by waiting till the next day, and Mr. *Baldwin* on the other hand, could not say the defendant had merits.

Lord MANSFIELD was inclined to believe that *Oxley* v. *Bridge* differed in circumstances from this case; and was clear that a judgment entered up agreeably to what the master had certified to be, in strictness, the practice of the court, could not be set aside for irregularity.

The rule discharged.

(*a*) *E.* 19 *Geo.* 3. *Supra*, *p.* 67.

[r] In *Thomson* v. *Ryall*, 4 *T. R.* 195. this case was reconsidered and confirmed.

1779.

Thursday, 10th June.

WILLIAMS *against* FRITH.

After an attorney's bill has been delivered a month, and no application has been made to have it taxed by the master, the defendant will not be permitted to question the reasonableness of the *items* before a jury.—On notice to execute a writ of enquiry at a certain hour, the party is not tied down to the exact time fixed by the notice.

ACTION on an attorney's bill, judgment by default; and writ of enquiry executed. Rule, (on the motion of *Dunning*,) to shew cause, why the verdict should not be set aside for irregularity. The irregularity complained of was, that notice was given to attend the execution of the writ of enquiry between ten and twelve o'clock, that the defendant and his witnesses did not attend till twelve, and that after the hour was elapsed, and they were gone, the writ was executed. It was also sworn, as a ground on merits, that the amount given by the verdict, which was £75, was £30 more than was really due.

Lord MANSFIELD,—The client has a summary way of trying the reasonableness of the *items* in an attorney's bill, by a reference to the master. If he waive that method, and put the attorney to his action, I never suffer him to go into a discussion of the *items*, at the trial of the cause [†62] [☞]. In this case, it was clearly a trick of the defendant's attorney to leave the place immediately after the hour was passed. When notice is given for the execution of a writ of enquiry at a certain hour, it is never understood that the time is to be scrupulously adhered to. The sheriff may have prior business which may last beyond the hour.

The rule discharged.

[† 62] *Vide* the next case.

[☞] But an attorney's bill may be taxed, after action brought, and at any time before verdict, or judgment, unless the money has been paid. *Shaw* v. *Pickering*, *B. R. M.* 30 *Geo.* 3.

Thursday, 10th June.

HOOPER *against* TILL and his WIFE.

The same point as the *first* in the foregoing case.

THIS was also an action on an attorney's bill, in which there had been judgment by default, and a writ of enquiry executed. On *Saturday*, the 5th of *June*, *Mingay* moved for a rule to shew cause, why the verdict should not be set aside, and the bill referred to the master to be taxed. The motion was made on an affidavit, that the sheriff would not hear evidence to impeach the reasonableness of the charges.

Lord

1779.

HOOPER against TILL.

Lord MANSFIELD was absent.

BULLER, *Justice*, read a note of a case, where Lord MANSFIELD, and the court, had refused to permit a bill to be referred to the master to be taxed, because it had been read in evidence at *Nisi Prius*, on a notice of set-off, in a cause where the attorney was defendant, which shewed that it had been delivered a month [† 63]; and they held that it was then too late to dispute the amount of the *items*. However, in the present case, a rule to shew cause was granted.

Sylvester now shewed cause, and mentioned the case of *Clarke* v. *Taylor*, as directly in point (*c*).

Lord MANSFIELD.—The bill of an attorney cannot be *taxed* at the trial of an action brought upon it, nor after verdict. If there has been an account settled between the attorney and his client, the bill shall never afterwards be taxed as of course: particular cases may be pointed out; the client may, by affidavit, shew that the business charged was never performed, or that the charges are fraudulent; but, if the business was really done, the delay of the defendant for more than a month in objecting to the *quantum* is an admission that he thinks *that* reasonable.

The rule discharged [1].

[† 63] It seems to have been there taken for granted, that an attorney cannot set off his bill till a month after it has been delivered; but the contrary was held by the court, in *E.* 23 *Geo.* 3. in a case of *Martin* v. *Winder*. For in that case, *Law* having moved, on the part of the defendant, who was an attorney, for a rule to shew cause why the proceedings should not be staid till his bill should be paid, or till a month from the delivery of it should expire, that he might be enabled to set it off, the court held, that though an attorney cannot bring an action on his bill till it has been delivered a month, that circumstance is not necessary to enable him to set it off; that he must not produce it, at the trial, by surprize, but that it is sufficient, in such case, to deliver it time enough for the plaintiff to have it taxed before the trial. Upon hearing this opinion of the court, *Law* withdrew his motion as unnecessary.

(*c*) *C. B. E.* 11 *G.* 2. *Barnes*, 4to. edit 124.

[1] This day, another point concerning the taxation of attorney's bills was moved in court, but as I have not preserved the name of the case, I have not mentioned it in the text. The circumstances were these: *Baldwin* moved that the master might be directed to tax those articles in an attorney's bill which related to conveyancing and parliamentary business, the rest being for the management of causes in this court. Lord *Mansfield* said, there was no doubt but the master might tax *the* [r 1] *whole*; that he recollected a case, where the

[r 1] S. P. *Ex parte Williams*, 4 *T. R.* 124. 496. So where part of a bill is for business done in court the bill must be delivered a month before the action is brought, *Winter* v. *Payne*, 6 *T. R.* 645.

1797.

HOOPER against TILL.

the fees paid to a proctor for business done in the ecclesiastical court made part of the bill, and it was determined, that as the *whole bill* had been referred to the master, he might tax that part of it.

Nota. If the *whole* bill is for *conveyancing*, the master cannot tax it. *B. R. M.* 12 *G.* 2. *Anon. Barnes* 4to edit. 41, 42.

I will add here another case still, on this subject, though I did not hear it in court, when it was moved, which was in *M.* 19 *G.* 3. It was the case of *Dixon* v. *Plant*. On the last day of that term, *Dunning* moved that *Dixon*'s bill as agent in town for *Plant*, a country attorney, might be referred to the master to be [200] taxed. *Willes*, *Ashhurst*, and *Buller*, Justices, (Lord MANSFIELD having left the court before the motion was made,) were inclined to think that the bill was not taxable by the master, the act of 12 *G.* 2. *c.* 13. § 6. having enacted that 2 *G.* 2. *c.* 23. § 23. (*d*), for referring attorneys' bills, "should "not extend to any bill due from any "attorney or solicitor, to any other "attorney, solicitor, or clerk in "court." There is a case in *Wilson*, where a single judge in this court having made an order to refer an agent's bill, and the master not having obeyed it, the court was applied to, and held that the order was irregular; the master declaring that he had never taxed a bill for agency (*e*). However, at the Sittings at *Guildhall*, after *M.* 19 *G.* 3. *Buller*, Justice, who that day sat for Lord *Mansfield*, informed the bar, that, upon enquiry, it had been found to be the practice of the court of *Common Pleas*, confirmed by a case decided in that court, to make orders for the taxation of agents' bills, and he read a note of the case which had been lent him by *Gould*, Justice, and was as follows:

"*Ex parte Bearcroft*, an Attorney.—"In *E.* 7. *Geo.* 3. *Davy*, Serjeant, "moved that the bill of *Unwin* an "attorney, agent for *Bearcroft*, should "be referred to be taxed, and said "though it was not within the statute "of 2 *Geo.* 2. by reason of that of 12 "*Geo.* 2. yet that it might be taxed "under the general jurisdiction of the "court, and under 3 *Jac.* 1. *c.* 7. "He made his motion on this general "authority, without any affidavit. "*Nares*, Serjeant, objected, that there "never had been an instance of such "taxation of an agent's bill. But "the court thought proper to grant a "rule to shew cause.—*T.* 7 *Geo.* 3. "*Nares* shewed cause, and observed "that the statute of 12 *Geo.* 2. pro-"vides, that 2 *Geo.* 2. shall not extend, "*&c.* [r 2] and therefore it is not "necessary for an agent to deliver a "bill before he brings an action; the "the reason of which he took to be "that it was not looked upon to be, "subject to taxation. The statute "of 3 *Jac.* 1. requires bills to be "delivered by attornies to *their masters or clients*. They are supposed "ignorant of the steps in a cause, "and the due charges. The agent, "he

(*d*) Made perpetual by 30 *Geo.* 2. *c.* 19. § 75.

(*e*) *B. R. E.* 23 *G.* 2. *Anon.* 1 *Wils.* 266.

[r 2] The conditions of 2 *G.* 2. do not extend to cases where both parties are attornies at the time of the action brought, though one were not at the time of the business being done. *Ford* v. *Maxwell*, 2 *H. Bl.* 589.

1779.

HOOPER against TILL.

" he said, who does the business in " town is entitled to the fees, unless " there is a contrary stipulation be- " tween him and the country attor- " ney. *Darey, contra*, said that he " did not apply on the ground of the " statute of 2 *Geo.* 2. but on the " practice of the court. In 3 *Jac.* 1. " there is no direction as to taxation, " yet an attorney's bill was certainly " taxable before 2 *Geo.* 2. The 12 " *Geo.* 2. shews it to have been thought " 2 *Geo.* 2. extended to agents bills and " properly restrained it, (as various " things in it are not applicable be- " tween attornies and agents, such as " words at length, *&c.*) leaving the " case between them as it stood be- " fore.—The court was of opinion " that the bill should be taxed, and " that they could order it under the " general authority of the court, that " it might be seen that only due " charges were made. After the court " had declared this opinion, *Barnes*, " the secondary, said he remembered, " before 2 *Geo.* 2. applications made " to judges at their chambers to refer " agents' bills to be taxed, and that " it was frequently " done upon the coun- " try attorney's bring- " ing the fees charged " into court.—The " rule was made ab- " solute, but with the " condition that *Bearcroft* should " bring the money into court (*a*)."

Buller, Justice, then said, that, on being made acquainted with this case, he had conferred with *Willes*, and *Ashhurst*, Justices, and that they were all three of opinion, that *Dixon*'s bill should be referred; that the practice of all the courts ought to be uniform; that questions on bills of this sort would be much better understood and settled by the master, than by a jury or judge, at *Nisi Prius*. Upon this, the counsel in the cause agreed, that the bill should be taxed by consent, the defendant bringing into court the sum remaining due on the amount of the plaintiff's claim, and that what should be deducted, if any thing, should be afterwards repaid to him.

(*a*) Mr. Justice *Gould* was so obliging as to furnish me with a copy of his note, from which copy the above is printed.

WIGGLESWORTH *against* DALLISON and Another.

[201]

Thursday, 10th June.

THIS was an action of trespass for mowing, carrying away, and converting to the defendant's own use, the corn of the plaintiff, growing in a field called *Hibaldstow Leys*, in the parish of *Hibaldstow*, in the county of *Lincoln*. The defendant *Dallison pleaded liberum tenementum*, and the other defendant justified as his servant. The plaintiff *replied*, that true it was that the *locus in quo* was the close, soil and freehold of *Dallison*; but,—after stating that one *Isabella Dallison* deceased, (being tenant for life,) and *Dallison*, the reversioner in fee, made a lease on the 2d of *March* 1753, by which

A custom that tenants, whether by parole or deed, shall have the way-going crop after the expiration of their terms is good.

1779.

WIGGLESWORTH against DALLISON.

which the said *Isabella* demised, and the said *Dallison* confirmed, the said close to the plaintiff, his executors, administrators, and assigns, for 21 years, to be computed *from the 1st of May* 1755, and that the plaintiff, by virtue thereof, entered and continued in possession, till the end of the said term of 21 years,—he pleaded a custom, in the following words, *viz.* "That, within the parish of *Hibaldstow*, there "now is, and from time whereof the memory of man is not "to the contrary, there hath been a certain ancient and laud-"able custom, there used and approved of, that is to say, "that every tenant and farmer of any lands within the same "parish, for any term of years which hath expired *on the* "*first day of May* in any year, hath been used and accus-"tomed, and of right out to have, take, and enjoy, to his "own use, and to reap, cut, and carry away, when ripe "and fit to be reaped and taken away, his *way-going* "*crop*, that is to say, all the corn growing upon the said "lands which hath before the expiration of such term been "sown by such tenant, upon any part of such lands, *not ex-*"*ceeding a reasonable quantity thereof* in proportion to the "residue of such lands, *according to the course and usage of* "*husbandry in the same parish*, and which hath been left "standing and growing upon such lands at the expiration of "such term of years." He then stated that, in the year 1775, he sowed with corn part of the said close, being a *reasonable* part in proportion to the residue thereof, according to the course and usage of husbandry in the said parish, and that the corn produced and raised by such sowing of the corn so sown as aforesaid, being the corn in the declaration mentioned, at the end of the term, and at the time of the

[202]

trespass committed, was standing and growing in the said close, the said time not exceeding a reasonable time for the same to stand, in order to ripen and become fit to be reaped, and that he was during all that time, lawfully possessed of the said corn, as his absolute property, by virtue of the custom.—The defendant, in his *rejoinder*, denied the existence of any such custom, and concluded to the country.—The cause was tried before EYRE, *Baron*, at the last Assizes for *Lincolnshire*, when the jury found the custom, in the words of the replication.

Baldwin moved an arrest of judgment, that such a custom was repugnant to the terms of the deed, and, therefore, though it might be good in respect to parole leases, could not have a legal existence in the case of leases by deed. He relied on *Trumper* v. *Carwardine*, before YATES, *Justice*, (*f*), the circumstances of which case were these:

"The plaintiff had been lessee under the corporation of "*Hereford*, for a term of 21 years, which expired on the "4th

[*f*] At the summer Assizes for *Herefordshire* 1769.

1779.

WIGGLESWORTH against DALLISON.

" 4th of *December* 1767. In the lease, there was no covenant that the tenant should have his off-going crop. In the seed-time before the expiration of the term, he sowed the fallow with wheat. The succeeding tenant obstructed him in cutting the wheat, when it became ripe, and cut and housed it himself, for his own use. Upon this the plaintiff brought an action on the case, and declared on a custom in *Herefordshire* for tenants who quit their farms at *Christmas*, or *Candlemas*, to reap the corn sown the preceding autumn. YATES, *Justice*, held that the custom could not legally extend to lessees by deed, though it might prevail, by implication, in the case of parole agreements. That, in the case of a lease by deed, both parties are bound by express agreements contained in it, as that the term shall expire at such a day, *&c.* and therefore all implication is taken away. That if such a custom could be set up, the statute of frauds would be thereby superseded in *Herefordshire* [1]. Accordingly the plaintiff did not recover on the custom, although on another count in *trover* in the same declaration, he had a verdict."

A rule to shew cause was granted.

[203]

The case was argued on *Tuesday* the 8th of *June*, by *Hill*, Serjeant, *Chambre*, and *Dayrell*, for the plaintiff, and *Cust*, *Baldwin*, *Balguy*, and *Gough*, for the defendants; when three objections were made on the part of the defendant, *viz.* 1. That the custom was unreasonable. 2. That it was uncertain. 3. That, (as had been contended on moving for the rule,) it was repugnant to the deed under which the plaintiff had held.

For the plaintiff it was urged, 1. That it was not an *unreasonable* custom, because without an express agreement, or such a custom as this, there could be no crop the last year of a term, for the tenant would not sow, if he could not reap, and the landlord would not have a right to enter till the expiration of the term. That it was for the advantage of the public, as much as customs for turning a plough, or drying nets, on another person's land, which had been held to be good *(g)*. That it bore a great analogy to the right of emblements, and was founded on the same principle, namely, the encouragement of agriculture. It was not prejudicial to any one; not to the landlord, because without it his land must be unemployed and unproductive for a whole season; nor to the succeeding tenant, because he would have his turn at the end of his term. 2. That it was sufficiently *certain*,

[1] *Qu.* This argument seems more applicable to parole leases, because if a parole lease for three years could be extended in some degree for half a year longer by such a custom, it might be said that this would be repugnant to the statute of frauds.

(*g*) *Vide Davis* 32. *b*.

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tain, by the reference to the residue of the lands not sown, and to the course and usage of husbandry in the parish. This is as much certainty as the nature of the subject will admit of, for, if it had been that so many acres might be sown and reaped, that would have been incompatible with those variations in the proportion of ploughed land, which arise, at different times, from circumstances in the course of cultivation and husbandry. *Reasonable* is an epithet which sufficiently qualifies the extent of customs, and is generally used in pleading them; as with regard to customary fines paid to the lord of a manor, estovers prescribed for by a party to be taken for the use of his house, *&c.* In the case of *Bennington* v. *Taylor*, reported in *Lutwyche (h)*, where the defendant, in an action of trespass, had pleaded a right to distrain for twelve pence for stallage, due by prescription, for the land *near* every stall in a fair, and, on a motion in arrest of judgment, it was objected, that the prescription was uncertain, and therefore void, the quantity of land not being ascertained, the court held it to be certain enough, because the quantity was to be ascertained by the common usage of the fair. In all such cases, whether the quantity or amount is in truth reasonable or not, is for the jury to decide. 3. That the circumstances of the plaintiff's lease in this case having been by deed, made no difference. There was no agreement contained in the deed, that the defendant would depart from the custom, although the parties must have known of it when the lease was executed. He did not claim under any parole contract express or implied, and therefore the argument of repugnancy did not apply; and the *Nisi Prius* case, which had been cited, went upon mistaken reasoning. *Hill*, Serjeant, admitted, that *he* knew of no instance in the Reports, of a similar custom to this, in the case of freehold property, but he said, there were several with regard to copyholds that went much farther; and he cited *Eastcourt* v. *Weekes (i)*, where a custom, that the executors and administrators of every customary tenant for life, if he should die between *Christmas* and *Lady-day*, should hold over till the *Michaelmas* following, is stated on the pleadings [2]; and no objection taken to it on the argument of the case.

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For the defendant were cited, *Grantham* v. *Hawley (k)* [3];—*White* v. *Sayer (l)*, in which last case, a custom for a lord

(*h*) *C. B. E.* or *T.* 12 *W.* 3. 2 *Lutw.* 1517. 1519.

(*i*) *T.* 10 *W.* 3. 1 *Lutw.* 799. 801.

[2] It is found by the special verdict, the action being *ejectment*.

(*k*) *T.* 13 *Jac.* 1. *Hob.* 132.

[3] That case, if at all applicable, seems to me to make for the plaintiff. It is curious in one respect, *viz.* that the question was brought on in an action of debt on a common bond conditioned for the payment of £20 to the plaintiff if a certain crop of corn did of right belong to him; or, in other words, if the question of law was in his favour.

(*l*) *B. R. M.* 19 *Jac.* 1. *Palm.* 211.

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lord of a manor "to have common of pasture in all the lands "of his tenants for life or years," which had been pleaded in justification of a trespass in the land of a tenant for years, was held to be void and against law, for that such a privilege is contrary to the lease, being part of the thing demised, and different from a prescription to have a heriot from every lessee for life, because that is only collateral *(m)*;—A case relied on by *Houghton*, Justice, in *White* v. *Sayer*, in which he said the court had decided that a custom for lessees for years to have half a year after the end of their term, to remove their utensils, was void, as being against law; *Startup* v. *Dodderidge (n)*, where the court refused to grant a prohibition, on the suggestion of a *modus* "to pay, upon request, at the rate "of two shillings for every pound of the improved yearly rent "or value of the land," because the yearly rent or value was variable and uncertain;—*Naylor, qui tam* v. *Scott (o)*, where a custom having been found by a jury, "that every house- "keeper in the parish of *Wakefield* having a child born there, "should, at the time when the mother was churched, or at "the usual time after her delivery when she should be "churched, pay ten pence to the vicar," the court, on a motion in arrest of judgment, determined that the custom was void, being, 1. uncertain, because the usual time for women to be churched was not alleged [4], 2. unreasonable, because it obliged the husband to pay if the woman was not churched at all, or if she removed from the parish, or died before the time of churching;—*Carleton* v. *Brightwell (p)*, where the defendant, on a bill for tithes, set up a *modus*, "that the in- "habitants of such a tenement, with the lands usually en- "joyed therewith, should pay such a sum for tithe corn," and it was held by the Master of the Rolls, to be void for uncertainty;—*Harrison* v. *Sharp (q)*, where a *modus*, "that, "when any of the inclosed pastures in a certain vill were "ploughed and sown with corn or grain of any kind, or laid "for meadow and mown and made into hay, tithes in kind "were paid to the rector, but when eaten and depastured, "then the occupier paid to the vicar one shilling in the pound "of the yearly rent or value thereof, and no more, upon some "day after *Michaelmas*, yearly," was held void, on the authority of *Startup* v. *Dodderidge*;—*Wilkes* v. *Broadbent (r)*, where the court of *Common Pleas*, and afterwards, on error brought,

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(*m*) *Cites* 21 *H.* 7. 14.

(*n*) *E.* 4 *Ann.* 2 *Ld. Raym.* 1158. 2 *Salk.* 657. 1 *Mod.* 60.

(*o*) *E.* 2 *Geo.* 2. 2 *Ld. Raym.* 1558.

[4] In that case the custom, as suggested, did not refer to the usage of the parish.

(*p*) *Canc. T.* 1728. 2 *P. W.* 462.

(*q*) *T.* 1724. *Bunb.* 174.

(*r*) *B. R. E.* 18 *Geo.* 2. 2 *Str.* 1224.

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brought, the court of *King's Bench*, held a custom found by verdict, "for the lord of a manor, or the tenants of his collieries who had sunk pits, to throw the earth and coals on "the land *near such pits*, such land being customary tenement and part of the manor, there to continue, and to "lay and continue wood there for the necessary use of the "pits, and to take coals so laid, away in carts, and to burn "and make into cinders coals laid there, at their pleasure," to be void, because, (among other reasons,) the word *near* was too vague and uncertain;—*Oland* v. *Burdwick (s)*, where a feme, copyholder *durante viduitate*, having sowed the land, and then married, it was determined that the lord should have the corn, upon the principle, that, when the interest in land is determined by the act of the party, he shall not have the crop;—An *anonymous* case in *Moore (t)*, where it was held, that a custom, "that lessee for years should hold "for half a year over his term," was bad;—*Roe, Lessee of Bree* v. *Lees (u)*, where, in an ejectment to recover a farm of about sixty acres, of which fifty-one were inclosed, and nine lay in certain open fields, a special case was reserved, which stated a custom, "that, when a tenant took a farm in "which there was any open field, more or less, for an uncertain term, it was considered as a holding from three "years to three years," and though the court decided against the custom on other grounds, yet, by their reasoning, it clearly appeared that they thought it void for uncertainty, because the quantity of open ground was not ascertained, and one rood might determine the tenour of 100 acres of land inclosed. Besides the above authorities [5], the case before YATES, *Justice*, was much relied on. It was admitted, that, in cases where the usual crop of the country is such, that it cannot come to maturity in one year, a right to hold over after the end of term, in a *parol* demise may be raised by implication; as where saffron is cultivated, (in *Cambridgshire,)* liquorice, (near *Pontefract,*) or tobacco, (which formerly used to be planted in *Lincolnshire*); but it was contended, that, in such cases, a lease *by deed* would preclude such implication, as the parties must be supposed to have described all the circumstances relative to the intended tenure, in the written instrument. Such a custom as that set up, in the present case, could not, it was said, be of sufficient antiquity with respect to leases by deed, as in the time of *Richard* the First, and, long afterwards, tenants had no permanent interest in

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(s) *B. R. H.* 37 *El. Cro. Eliz.* 460. 5 *Co.* 116.

(t) *H.* 3 *Ed.* 6. *Moore* 8. *pl.* 27.

(u) *C. B. M.* 18 *Geo.* 3. Since reported, 3 *Blackst.* 1171.

[5] 4 *Co.* 51. *b.* 1 *Roll. Abr.* 563. *pl.* 9. & *Co. Littl.* 55. were also cited for the general principles concerning customs and emblements.

in their lands; or, if there could be such a custom, the plaintiff's lease could not be within it, because the custom must have applied to the first of *May* old stile, and this lease was made and commenced after the alteration was introduced by 24 *Geo.* 2. *c.* 23. [6].

The court took time to consider; and this day, Lord MANSFIELD delivered their opinion, as follows:

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Lord MANSFIELD,—We have thought of this case, and we are all of opinion, that the custom is good. It is just, for he who sows, ought to reap, and it is for the benefit and encouragement of agriculture. It is, indeed, against the general law concerning emblements, which are not allowed to tenants who know when their term is to cease, because it is held to be their fault or folly to have sown, when they knew their interest would expire before they could reap. But the custom of a particular place may rectify what otherwise would be imprudence or folly. The lease being by deed does not vary the case. The custom does not alter or contradict the agreement in the lease; it only superadds a right which is consequential to the taking, as a heriot may be due by custom, although not mentioned in the grant or lease [7].

The rule discharged [8].

[6] The new style commenced the 1st of *January* 1753. But, if this argument were admitted in its full extent, no custom could exist where a certain day of the month made part of it, as from the errors in the former method of computation, the nominal day was continually deviating, by degrees, from the natural day.

[7] *Vide Doe* v. *Snowden*, *C. B. M.* 19 *Geo.* 3. 2 *Blackst.* 1225. where it is said by the court, that if there is a taking from old *Lady-day*, (5th *April*,) the custom of most countries would entitle the lessee to enter upon the arable at *Candlemas* (2d *Feb.*) to prepare for the *Lent* corn, *without any special words for that purpose, i. e.* in a written agreement for seven years; for the court were speaking of such an agreement.

[8] Judgment was accordingly entered for the plaintiff, upon which a writ of error was brought in the *Exchequer* chamber, and the defendant assigned for errors, "That the custom "contained and set forth, *&c.* is a "custom void in law, and is contrary to, and inconsistent with the "said indenture of lease in the said "replication mentioned." The case was argued at *Serjeants-Inn* before the Judges of *C. B.* and the Barons of the *Exchequer*, by *Balguy* for the plaintiff in error, and *Chambre* for the defendant. The objection to the reasonableness of the custom was abandoned. In *T.* 21 *G.* 3. (27th *June* 1781) Lord *Loughborough* delivered the unanimous opinion of the court of *Exchequer* chamber, that the custom was good; and the judgment was affirmed [F].

[F] In *Lewis* v. *Harris*, 1 *H. Bl.* 7. *not. a.* the same point was ruled by Skynner, Chief

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Saturday, 12th June.

The KING *against* JOHN BORTHWICK and sixteen Others.

On an indictment for murder, if the jury find a special verdict, it is necessary, in order to affect principals in the second degree, to state, either, 1. that they were actually present, or, 2. some acts done by them at the very time, which unavoidably shew that they were present, or, 3. that they were of the same party, on the same pursuit, and under the same engagements and expectation of mutual defence and support with the person who did the fact.

THIS case came on upon a special verdict, found at the last *Lent* Assizes, for the county of *Suffolk*, before ASHHURST, *Justice*, on the trial of an indictment for murder.—The indictment set forth, That, on the 7th of *December*, 19 *Geo.* 3. the prisoners feloniously, *&c.* upon one *Thomas Nichols* made an assault; That *Borthwick* [8] with a large stick, which he then held in both* his hands, struck the deceased several times, giving him thereby a mortal bruise on the head, of which he died the next day; and that the other prisoners, at the time of the felony and murder by the said *Borthwick* committed, feloniously, *&c.* were *present*, aiding, abetting, *&c.* the said *Borthwick* the felony and murder aforesaid, in manner and form aforesaid, to commit, "and so the jurors aforesaid, *&c.* say that the said *John Borthwick*, *Edward Barry*, *&c.* (naming all the others,) him the said *Thomas Nichols*, in manner and form aforesaid, feloniously, *&c.* did kill and murder."—One of the persons indicted died before the trial. The others pleaded not guilty.—The verdict stated, That *Richard Hatton*, one of the prisoners, was a midshipman, and a non-commissioned officer belonging to a tender in the government service called the *Charlotte*, lying off *Harwich*, and employed in the said service for impressing men for the purposes of manning his Majesty's ships of war.

*[208]

[8] If several are indicted, *A.* as giving the mortal blow, and the others as present, aiding, *&c.* evidence that one of the others gave the blow, and that *A.* was only present, *&c.* will maintain the indictment, 1 *Hale* 437, 438. [F 1].

Chief Baron, at Hereford Assizes, 18 *G.* 3. where he held, on a question of distress, that the term was continued by the custom of the country, for the purpose of giving a right to the landlord to distrain on the premises in which the way-going crop remained. In *Bevan* v. *Delahay*, 1 *H. Bl.* 5. the same point was ruled; and the present case was cited as an authority.

[F 1] So, if the evidence be that J. S. not named in the indictment, or even that a person unknown, gave the blow, and that A, B, & C, named therein, were present, aiding and abetting. 1 *E. P. C.* 350, and see *Plummer's* case *Kelynge*, 109. in which the doctrine of association in an illegal design, and of precision necessary in special verdicts, are both very much discussed.

war. That the others were part of the crew of the same tender, of which lieutenant *William Palmer* was then commander, who had previously received, and then had in his custody, a *warrant in writing* under the hands of the commissioners for executing the office of Lord High Admiral of *Great Britain, &c.* and under the seal of the office of Admiralty. That the warrant was in the following words, *viz.*

" By the Commissioners for executing the office of Lord " High Admiral of *Great Britain* and *Ireland, &c.* and of " all his Majesty's Plantations, *&c.* In pursuance of his " Majesty's order in council, dated, *&c.* we do hereby em- " power and direct you to impress or cause to be impressed, " so many seamen and sea-faring men, and persons whose " occupations and callings are to work in vessels and boats " upon rivers, as you shall be able, in order to man his " Majesty's ships, giving unto each man, so impressed, one " shilling for prest money, and in the execution thereof, you " are to take care that you do not demand or receive any " money, gratuity, reward, or other consideration whatsoever, " for the sparing any person or persons fit for his Majesty's " service, or exchanging or discharging any person or per- " sons who may be impressed, and also that *every person* " *acting under you* does not demand or receive any conside- " ration whatsoever upon the like account, as you will " answer it at your peril. This warrant to continue in " force till, *&c.* and, in the due execution thereof, all mayors, " sheriffs, justices of the peace, bailiffs, constables, headbo- " roughs, and all other his Majesty's officers, and subjects, " whom it may concern, are hereby required to be aiding [209] " and assisting unto you and those employed by you, as they " tender his Majesty's service, and will answer the contrary " at their peril. Given, *&c.*" [9].

That *Palmer*, being then the only commissioned officer on board the *Charlotte*, and having received information of certain sea-faring men being at *Ipswich*, in pursuance of the said press-warrant, gave *verbal orders* to *Richard Hanton*, and the other prisoners, to proceed thither, and to take such persons as they should there find liable to be impressed. That it is the constant usage and invariable custom of the navy, for all commissioned officers, having in their custody such press-warrants, to give verbal orders to such petty-officers whom they may think fit to employ on such services of impressing men for his Majesty's service, the warrant remaining

[9] It is observable, that this warrant differs, in some respects, from that printed by Mr. Justice *Foster*, particularly in omitting the power to depute the execution of it to a commission officer, by an indorsement on the back. *Fost. Cr. Law. 156.*

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ing in their own custody; and that such petty-officers usually act without any other authority than such verbal order. That the press-warrant was not backed or signed by any magistrate. That, in consequence of, and conformity to, the verbal orders given by *Palmer*, *Hanton* and the other prisoners went to *Ipswich*, and having information, that there were certain sea-faring men at a publick-house in *Ipswich* kept by one *Wiles*, went *all together in company* to that house, between ten and twelve at night. That the gate leading from the street into the yard of the house was *opened by the maid servant of Wiles*, to the prisoners. That the *door being open*, they entered the house. That certain sea-faring men, *viz. Sharpe*, *Bennet* and *Osborne*, were then sitting drinking in an inner room in the house, together with *Wiles* and one *Grimwood*. That the prisoners entered that inner room with large sticks in their hands, such as are usually carried by press-gangs, and were there informed that *Bennet* and *Osborne* belonged to the *Brilliant* storeship in the service of government. That the crews of such storeship are paid by the contractors, and not by government. That no protection was produced, or offered to be produced, by *Bennet* and *Osborne*, or either of them, or demanded by the prisoners, or any of them. That the prisoners, upon entering the inner room, informed *Sharpe*, *Bennet*, *Osborne*, *Wiles*, and *Grimwood*, that they were come *for the purpose of impressing men*, and that *Sharpe* then drew a knife out of his pocket, and brandishing it, said, "*the first man that hinders me from going home* [210] "*to my wife and family, I'll stick him,*" and, in that manner passed through the gang, and quittted the room. That *Wiles*, *Osborne*, and *Grimwood* had no weapons in their hands, but that *Bennet* drew a poker out of the fire for his defence, and said "*He would not be taken alive;*" and, upon this declaration of *Bennet*, some of prisoners attempted to wrest the poker out of his hands; upon which attempt *an affray immediately ensued*, and the poker was, soon after, taken out of the hands of *Bennet*, but the affray continued, during which *Wiles* threw down a table then in the room, and extinguished the light of the candle, which was then burning, and several blows were given. That, during the affray, the deceased came to the door of the room, and stood in the door-way, leaning on a walking-stick, which he then had in his hand, and said to *Bennet* and *Osborne*, "*My lads, do* "*as you have done before,*" (meaning thereby that *Bennet* and *Osborne* should rescue themselves by force;) and that the deceased then said, to one of the prisoners, "*Are not* "*you ashamed to beat a man who is down?*" (meaning *Wiles*). That during the affray, the deceased received a blow on the head from one of the prisoners, with a large wooden stick ("but from which of them the jurors are ignorant") and that the blow was the cause of his death.—

That

That, according as the court should think the killing, &c. felony and murder, or felony and manslaughter, or neither felony and murder, nor felony and manslaughter, the jurors found the prisoners guilty of felony and murder, or of felony and manslaughter, or not guilty.

The case was argued, on *Wednesday* the 9th of *June*, by *Jones*, for the prosecution, and *Graham*, for the prisoners.

Lord MANSFIELD absent.

The counsel for the prosecution came prepared to argue the general question of the legality of pressing; but the court intimated an opinion, that it was unnecessary to agitate that point in this case, as the warrant stated could not authorize a parol delegation of the power vested in the lieutenant [F 2], and, indeed, it was admitted by the counsel for the prisoners, that they were trespassers. But, as none of them could be considered as more than principals in the second degree, the jury not having found who it was that gave the blow, it was insisted, for the prisoners, that the verdict was defective, in not stating them to have been *present, aiding and abetting*. To prove that this was essential, 1 *Hale* 438. was cited *Rex* v. *Messenger (v)*, and *Rex* v. *Royce (w)*. [211]

In answer to this, it was observed, that the technical words "*present aiding and abetting*" are not necessary in a special verdict, as they are in an indictment, and that enough was found for the court to imply, either an *actual* or a *constructive* presence. To shew that the latter was sufficient, a case in 3 *Ed.* 3 *Coron.* 350. and Lord *Dacre's* case, cited in 1 *Hale*, 439. were relied on.

The court took time to consider; and WILLES, *Justice*, now delivered their opinion to the following effect.

WILLES, *Justice*,—In this case, the counsel for the prosecutor offered to argue the general question, whether the warrant stated in the special verdict was legal or not. But, unless the prisoners had a power to execute it, and conducted themselves legally in the execution, there is no occasion for the court to consider that question. It was admitted by the counsel for the prisoners, that they were not strictly justifiable in the execution of the warrant, and therefore were trespassers. The court were all of that opinion, on reading the verdict; for the authority given by the warrant could not be delegated

(v) *Kel.* 70. (w) *E.* 7 *Geo.* 3. 4 *Burr.* 2073.

[F 2] That impressing without a warrant in writing is illegal, was ruled in *Browning's* case at the *Old Bailey*, *A. D.* 1690. 1 *E. P. C.* 312. A similar decision, took place in *Dixon's* case *ib.* 313. where the party acted in the absence of the commissioned officer whose name was indorsed upon the warrant; also in *Broadfoot's* case, *ibid.*

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delegated by *parol* to other persons. On this ground the court stopped the counsel in the argument of the general question, and it is become unnecessary to consider the degree of guilt which might have been imputed to the prisoners, for we are all of opinion that the verdict is substantially defective. It is not expressly found that they all were *present aiding and assisting* when the blow was given, or even when the affray began. That either an *actual* or a *constructive* presence was necessary, to involve the prisoners in the homicide, was rightly admitted. But it was contended, 1. That enough is stated to warrant us in implying that all the prisoners were *actually* present the whole time; 2. That an *actual* presence is not necessary, and that, as the prisoners all went together on one common illegal design, *that* constituted a *constructive* presence, and would, in law, involve all of them in the same degree of guilt. 1. As to the first point, in so penal case as this, where the presence is of the essence of the crime, the court will not presume it. It is undoubtedly true that no technical words are necessary in a special verdict. It is not necessary to say, in words, that the prisoners were all *present*. If it were stated that they did some act *at the time, that* would be sufficient, because the court must

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then unavoidably see that they were present. In *Messenger's Case*, reported in *Kelynge*, the judges say, "where several acts of force are found to have been actually committed in pursuance of the design, there is no need to find the prisoners to have been *aiding and assisting*, for that is only necessary to be found where the jury find a person was there amongst them, and find no particular act of force done by him, but only his presence." There it is necessary to find he was present "*aiding and assisting*" (*x*). *Francis's Case* (*y*) was much stronger than the present. That was an indictment for a highway robbery. All the prisoners were found to be in company together. *Francis* struck the money out of *Cox's* hand, and, upon his offering to take it up from the ground, they threatened to knock out his brains, whereupon he desisted; and the jury further found that the prisoners *then and there* immediately took up the money, and rode off with it, and *Cox* immediately pursued. To constitute a highway robbery, a taking *in the presence of the person robbed* is necessary; and all the judges held that, on that finding, they could not imply that the money was taken up in *Cox's* presence, and that a special verdict cannot be made good by intendment or construction. In the present case, it is not found that the prisoners did any act, during the affray, or that they were *present aiding and assisting*; and the court cannot intend that they were. 2. As to the second point, and the authorities

(*x*) *Kel.* 78. (*y*) *E.* 8 *Geo.* 2. *Str.* 1015. *Com.* 478.

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authorities relied on; in 3 *Ed.* 3. *Coron.* 350. all the prisoners were *actually* present. In Lord *Dacre's Case,* all went with a design to resist every opposition. In *Moore (z)* it is stated, that they went *under an agreement to kill all who should resist them,* and it appears, by that report of the case, as well as by what is said in *Foster (a),* that they were all acting in the same pursuit *at the time* when the murder was committed. *Foster* says, "it was sufficient that, *at the instant the fact was committed,* they were all of the same party, and upon the same pursuit, and under the same engagement and expectation of mutual defence and support with those that did the fact." In the present case, as it is not found that all the prisoners were of the same party, and on the same pursuit, *&c. when the fact was committed,* as it is not found who gave the blow, or who was present, we are all of opinion that the prisoners must be discharged.

The prisoners discharged.

(z) 86. (a) 354.

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Saturday, 12th June.

PENRY *against* JONES.

A writ of *latitat* runs into *Wales.*

HURST moved for a rule to shew cause, why an *exoneretur* should not be entered on the bail-piece, upon an affidavit, that the defendant had been arrested on a *latitat,* in *Brecknockshire* in *Wales,* that the cause of action was a judgment in the great sessions, and that both the parties lived within that jurisdiction. The motion was made on the authority of the cases of *Lampley* v. *Thomas,* and *Jones* v. *Jones,* reported by *Wilson (b),* where the decision is stated to have been, that a writ of *latitat* does not run into *Wales;* but BULLER, *Justice,* mentioned, that the contrary had been held, since that case, in several instances, and particularly in a case, where YATES, *Justice,* had considered the question very fully, and delivered a solemn argument upon it [10]. The

(b) *B. R. H.* 21 *Geo.* 2. 1 *Wils.* 193. 206.

[10] That was the case of *Lloyd* v. *Jones, T.* 9. *Geo.* 3. The plaintiff declared against the defendant *in custodia Marescalli.* The defendant pleaded, that he was resident in *Montgomeryshire* in *Wales,* and denied the jurisdiction of the court. To this plea the plaintiff demurred. After the demurrer had been once argued, (when the cases in *Wilson* were insisted upon by the defendant's counsel,) *Yates,* Justice, went at large into the question, and examined the different statutes and authorities, intimating a very clear opinion in favour of the jurisdiction of the court. The case however stood over to be argued again, but the defendant having declined further argument, judgment was given for the plaintiff, *M.* 10. *Geo.* 3. —The late

1779. The court refused to grant the rule, and said, that, if the court had not jurisdiction, the proper way for the defendant to take advantage of it would be by a plea in abatement.

late *Welsh* act (13 *Geo.* 3. *c.* 51.) seems very clearly to recognize the jurisdiction of other courts, besides the *Exchequer*, (whose jurisdiction has never been denied, though founded on a legal fiction as much as that of the *King*'s *Bench*,) to hold plea, and issue *mesne* process, against parties resident in *Wales*. The words are, "In all transitory actions which shall be brought in *any* of his majesty's courts of record out of *Wales*, &c. if it shall appear that the defendant was resident in *Wales* at the time of the service of *any writ or other mesne process served on him*, &c."

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Tuesday, 15th June.

JONES *against* WILLIAMS and Another.

If the condition of a bond is, that *A.* shall not embezzle any money that shall come to his hands on account of his master, it is necessary in an action against the obligor, to state, in the breach, what particular sum of money was embezzled, and how, or from whom it was received [F].

ACTION on a bond.—The defendant *Williams* craved *oyer* of the condition, which was that one *Carruthers*, who had entered into the service of the plaintiff as his clerk in the distillery business, should, during his continuance in that service, faithfully and diligently serve him, and in case he should at any time lose, embezzle, destroy, purloin, consume, mispend, or unlawfully make away with, any money, notes, bills, drafts, &c. that should be entrusted to him, or *in any way* come to his hands, custody, or possession, by, from, on account of, or belonging to the plaintiff, or any of his customers or employers, that the defendants, or either of them, should, on notice thereof given to them, or either of them, make good the loss thereby sustained.—He then *pleaded*, that *Carruthers*, during his continuance in the plaintiff's service, faithfully and diligently served him, and did

[F] In *Shum* v. *Farrington*, 1 *B.* & *P.* 640. when the condition of the bond was that J. S. should account with plaintiffs for all monies, &c. a general replication, similar to the present, was held good; and this case was over-ruled by the court, as inconsistent with the current of previous authorities; many of which are there cited. The same point was also ruled in *Barton* v. *Webbe*, 8 *T. R.* 459. where the circumstances of the cause were exactly similar to the present; and in *Gale* v. *Reed*, 8 *East*, 80. in which it was held, that on a general covenant that J. S. should not carry on the business of a rope-maker or make cordage for other persons, except under contracts for government, a breach is good, charging, generally, that defendant carried on the business of a rope-maker, and made cordage for *divers and very many persons*, other than by virtue of any contract, &c. The case here reported must therefore be considered as no longer law. *See Acc.* 2 *Wms. Saund.* 411.

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did not at any time lose, embezzle, &c.—*Replication*, that, during *Carruthers'* continuance in the plaintiff's service, to wit, on the 15th of *July* 1777, a large sum of money, *viz.* £13. 14*s.* 9½*d.* came into his hands, custody, and possession, on account of the plaintiff, which he, on the same day, &c. embezzled and mispent; whereof the plaintiff afterwards gave notice to the defendant.—To this replication the defendant *demurred*, and shewed for cause, "That it did not "appear whether *Carruthers* had received the money for the "plaintiff in his business of a distiller, or in what capacity he "had received it; and that it was not shewn from whom he "had received it."

Baldwin argued in support of the demurrer. 1. To shew that it ought to have been stated, that the money embezzled was received in the course of the business in which *Carruthers* was employed, he cited *Wright* v. *Russel* (*c*), Lord *Arlington* v. *Merricke* (*d*), *Houghton* v. *Day* (*e*), *Stibbs* v. *Clough* (*f*), and *Mills* v. *Astell* (*g*). 2. He contended, that the plaintiff should have specified more particularly what the money was which had been embezzled, and from [215] whom it was received; for that, if issue had been taken on the replication, the defendant would not have had sufficient notice what the plaintiff went for, to prepare for his defence: That this objection was more particularly applicable in the case of a surety.

Cowper, for the plaintiff, (being told by Lord MANSFIELD to confine himself to the last point, for that the cases cited on the other did not apply, and that there was nothing in the objection,) insisted, that the replication was a full answer to the plea. That, in such a retail business as that of a distiller, the money was received in very small sums at different times, and it could not be necessary, if the £13 had been received at thirty different times, that each fraction should be assigned as a different breach, and issues taken on each. That perhaps the money embezzled had been taken out of the till, and it could not be known of whom in particular it was received; or, on an account between the *plaintiff* and *Carruthers*, the latter might have admitted the embezzlement.

Lord MANSFIELD,—The breach must be particularly assigned. If the money was taken out of the till, that should have been alleged.

Cowper moved, and had leave to amend, on payment of costs.

(*c*) *H.* 14 *Geo.* 3. 3 *Wils.* 530.
(*d*) *E.* 24 *Car.* 2. 2 *Saund.* 411.
(*e*) *Styl.* 18.
(*f*) *M.* 6 *Geo.* 1. 1 *Str.* 227.
(*g*) 16 *Jac.* 1. *Cro. Jac.* 486.

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Tuesday, 15th June.

FISHER *against* BRISTOW and Others.

An action for a malicious prosecution cannot be maintained till the prosecution is terminated, which must appear upon the declaration.

ACTION for a malicious presentment, (for incest,) in the ecclesiastical court of the archdeaconry of *Huntingdon*. *Demurrer* to the *declaration*, and cause assigned, that it was not stated, how the prosecution was disposed of, or that it was not still depending. The court were clearly of opinion, that the objection was fatal, and said it was settled that the plaintiff in such an action, must shew the original suit, wherever instituted, to be at an end; otherwise he might recover in the action, and yet be afterwards convicted on the original prosecution.

Judgment for the defendants [☞].

[☞] *Vide Morgan* v. *Hughes*, *B. R. H.* 28 *Geo.* 3. 2 *Term Rep.* 225. *S. P.* in the cases of commitments by Justices of Peace on malicious accusations, or of malicious holding to bail [F].

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Tuesday, 15th June.

ABBOT and Another, Assignees of FARR, a Bankrupt, *against* PLUMBE.

In an action on a bond or to prove a petitioning creditor's debt which arises by bond, proof of the acknowledgment of the obligor does not supersede the necessity of calling the subscribing witness [F].

THIS was an action of *trover*, by the assignees of a bankrupt, tried before Lord MANSFIELD, at *Westminster*. At the trial, to prove the petitioning creditor's debt, a witness was called, who swore, that the bankrupt had acknowledged to him that he owed the debt upon which the commission had been sued out. On being asked how the debt arose, the witness said, by bond; and the bond was then produced. The subscribing witness was an attorney, who lived in *Somersetshire*. He was not called, nor was there any proof that he had been required to attend, or that he could not have been procured. A verdict was found for the plaintiffs; but Lord MANSFIELD saved the question on the sufficiency of the evidence; and *Bearcroft*, on *Tuesday* the 8th of *June*,

[F] See the cases on this point collected in *Lewis* v. *Farrel*, 1 *Str.* 114. In *Morgan* v. *Hughes*, it was held, that the action against a justice for maliciously granting a warrant and committing plaintiff to prison, must be trespass, and not case.

[F] This general position, that an acknowledgment of an instrument by the party does not excuse the production

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June, obtained a rule to shew cause, why a nonsuit should not be entered.

Dunning, and *Davenport*, now shewed cause.—They contended, that, even if this had been an action on the bond, the admission of the defendant would have been the best evidence, and would have superseded the necessity of calling the subscribing witness.

Lord MANSFIELD,—To be sure this is a captious objection; but it is a technical rule that the subscribing witness must be produced, and it cannot be dispensed with, unless it appear that his attendance could not be procured. It was doubted, formerly, whether if the subscribing witness denies the deed, you can call other witnesses to prove it; but it was determined by Sir *Joseph Jekyl*, in a cause which came before him at *Chester*, that in such case, other witnesses may be examined; and it has often been done since.

ASHHURST, *Justice*,—If the evidence of the subscribing witness were to be dispensed with by this confession of the bankrupt, the defendant would be deprived of the benefit of cross examining him, concerning the time of the execution of the bond, which might be material.

BULLER, *Justice*,—It is an established rule that assignees must

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duction of the subscribing witness, is recognized in many reported cases, *Cunliffe* v. *Sefton* 2 *East*. 183. *Barnes* v. *Trompowsky*, 7 *T. R.* 267. *Laing* v. *Raine*, 2 *B. & P.* 85. and *Park* v. *Mears*, *ibid*, 217; and in *Call* v. *Dunning*, 4 *East*. 53. it was extended to an admission in an answer in Chancery: But in *Laing* v. *Raine*, it was held that an agreement by defendant to acknowledge a warrant of attorney, "*so as* "*to enable plaintiff to enter up judg-* "*ment*," would excuse the production of the witness; being tantamount to an agreement that plaintiff might act upon it, as if he were produced. In *Bowles* v. *Langworthy*, 5 *T. R.* 366. it was held that the admission and production of a deed by one of the parties, in an examination before commissioners of bankrupt, was conclusive evidence of its due execution, in an action against that party himself. Query, whether this decision would now be supported on either ground? for the first, viz. that it is an *admission* by the *party* in the cause, which was relied on as distinguishing it from *Abbot* v. *Plumbe*, where the admission was by a third person (the bankrupt) is certainly not tenable, *vid.* among other cases, *Call* v. *Dunning*; and the second ground, viz. the *production* of the instrument, which was stated on the authority of *R.* v. *Middlezoy*, 2 *T. R.* 41. seems now questionable, for *R.* v. *Middlezoy* has itself been overruled in *Gordon* v. *Secretan*, 8 *East*. 548. Can *Bowles* v. *Langworthy*, be supported on this distinction? that the production before the commissioners, coupled with the circumstances of examination, is an exhibition of the deed as a *valid instrument*; whereas the production under a notice is a mere exhibition of the instrument required, subject to all objections, and without any admission except that the party had in his custody an instrument so described.

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must prove the petitioning creditor's debt, by the same evidence which must have been produced in an action against the bankrupt; and it is necessary, to recover on a bond, to call the subscribing witness, unless some reason can be shewn for his absence.

The rule made absolute.

Wednesday, 16th June.

MACPHERSON *against* RORISON.

A party in a cause cannot change his attorney without the leave of the court [F].—If notice to justify bail has been given by a new attorney not allowed by the court, the bail will not be permitted to justify.

COWPER opposed the justification of bail for the defendant, who was in custody, on the ground, that he had given eight notices to justify, and four of them in this term, by four different attornies, and without having obtained the leave of the court to change his attorney. The Master certified, that, by the established practice, a party cannot change his attorney without the leave of the court; upon which the bail were not permitted to justify [1]. *Cowper* also insisted, that the plaintiff should be allowed the costs he had been put to, by inquiring after so many bail, and attending to oppose them; and mentioned that it was the rule in the court of *Common Pleas* to allow costs in such cases. This, however, was refused, as it did not appear that this court had ever given costs in such a case.

[1] *Vide S. P.* in *C. B. Kaye* v. *De Mattos, M.* 20 *Geo* 3. 2 *Blackst.* 1323.

[F] But after judgment execution may be sued out by a new attorney, without an order to change. *Tipping* v. *Johnson*, 2 *B. & P.* 357.

GILBY *against* LOCKYER.

Thursday, 17th June.

ON a motion, by *Cowper*, for a rule to shew cause, why the proceedings in this case should not be set aside, for irregularity, it appeared, that the defendant and two other persons had been held to bail, in separate actions, upon one affidavit. The defendant was named *second in* the affidavit. When cause was shewn, on *Tuesday* the 15th of *June*, the Master certified, that it had been settled, that several defendants in different actions, cannot be put into the same affidavit; and ASHHURST, *Justice*, mentioned a case, where several persons having been admitted to the freedom of a corporation upon one stamp, the admission of the person *first* named was held to be good, and that of all the others void. Upon this the court made the rule absolute; but *Dunning* having suggested, next day, that the Master had mistaken the practice, that, both in this court, and in the *Common Pleas*, it was usual to put more than one defendant into the same affidavit, and that, in a case which came before this court, where no less than eight had been inserted in one affidavit, the court had held it to be good against all, Lord MANSFIELD desired the matter might staud over for further consideration.

Two or more defendants in different actions cannot be held to bail upon one affidavit [F].

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This day his Lordship delivered the opinion of the court, as follows:—

Lord MANSFIELD,—The Judges of the court of *Common Pleas*, and the Barons of the Exchequer, have been consulted, and they all agree, that they never *knew* of it's being the practice in their courts, that more than one defendant should be inserted in the same affidavit. If, in fact, such a practice has prevailed, it has been without their sanction or knowledge. They all disapprove of it, and consider it as contrary to the meaning of the act of parliament (*h*), and a fraud

(*h*) 12 *Geo.* 1. *c.* 29. amended by 5 *Geo.* 2. *c.* 27. and made perpetual by 21. *Geo.* 2. *c.* 3.

[F] In *Holland* v. *Johnson*, 4 *T. R.* 695, and the cases there cited in the notes, this rule is confirmed and extended to make it irregular to join two or more defendants in different actions in one *writ*, if bailable. S. P. *Moss* v. *Birch*, 5 *T. R.* 722. S. P. where the affidavit is of separate debts due to two, though one only sue out a writ. *Dean and Chapter of Exeter* v. *Seagell*, 6 *T. R.* 688. But where the affidavit and declaration are against one, by whom also bail is put in; and the capias only is against two, it is no irregularity, *Forbes* v. *Phillips*, 2 *N. R.* 98.

1779. fraud upon the stamp duties. Let the judgment stand as at first pronounced.

The rule made absolute [† 64].

[† 64] *Vide Crooke* v. *Davis*, B. R. M. 11 *Geo.* 3. 5 *Burr.* 2690. where the defendant having been held to bail in an action of debt upon a bond, and also in another of *assumpsit*, upon one affidavit, the court, (in the absence of Lord *Mansfield*,) discharged him upon common bail, in both actions. ☞ *S. P. Southcote* v. *Brathwaite*, B. R. M. 26 *Geo.* 3.

CORT *against* BIRKBECK.

A custom "that all the inhabitants of a manor shall grind all their corn, grain, and malt which by them or any of them shall be used or spent ground within the manor at a certain mill," is good.—On a demurrer to evidence, the party cannot take advantage of any objection to the pleadings.

THIS was an action on the case.—The *declaration* contained fourteen counts.—The first stated, That the plaintiff was possessed of certain water corn-mills, within the manor of *Settle*, in *Yorkshire*, and, by reason thereof, was entitled to the toll and multure of all corn, grain, and malt, ground at those mills; That during all the time of his possession [11], all the tenants, inhabitants, and resiants, within the manor, "ought to have ground, and still ought "*to grind, all their corn, grain, and malt, which by them* "*or any of them had been or should be used or spent ground* "*within the manor, at the plaintiff's mills, and not elsewhere,* "and to have paid and yielded, and to pay and yield * to "the plaintiff for the grinding thereof *certain reasonable toll* "and multure [and ought not to have used or spent, nor "to use or spend within the manor any corn, grain, or "malt *ground* which had been or should be ground else- "where than at the plaintiff's mills]; That the defendant "was a tenant, inhabitant, and resiant, within the manor, "and that he contriving, *&c*, to injure and prejudice the "plaintiff, and deprive him of the profits and advantage of "his mills, and of the toll and multure which would have "accrued to him, *&c.* did knowingly, *&c. use and spend* "*ground within the said manor*, divers large quantities of "corn, grain, and malt, of the defendant, *which had been* "*ground elsewhere then at the plaintiff's mills*, and which "the defendant, at the times of using and spending thereof, "knew to have been ground elsewhere; by means whereof "the plaintiff had been greatly injured in the profits of his "mills, and had wholly lost and been deprived of the toll and

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[11] It was determined, in the case of *Chapman* v. *Flexman*, (cited *infra*, p. 221.) that it is not necessary in the declaration in this action to say that the inhabitants had and ought *immemorially*, *&c.* and in *Coryton* v. *Litheby*, (also cited *infra*, p. 221.) that it is not necessary to lay the mills to be *ancient* mills.

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" and multure which would have arisen, and become pay-
" able to him for the grinding of the said corn, grain, and
" malt, if the same had been ground at his mills."—The fifth count was the same with the first, except that the negative words, printed above in a parenthesis, were omitted. —The defendant *pleaded* the general issue; and, the cause coming on to be tried at the last summer Assizes for *Yorkshire*, the plaintiff, to prove the custom, produced, besides several witnesses; 1. The proceedings in a suit in the Exchequer, *M.* 5 *Geo.* 1. wherein the then occupier of the mills was plaintiff, and some of the tenants and resiants in the manor defendants, and in which an issue was directed to try " *whether by virtue* " *of an ancient and immemorial tenure, custom, or usage,* " *all and every the tenants, inhabitants, and resiants, of* " *and in the manor of* Settle *had been, and were tied and* " *bound, and of right had used, and ought to grind all* " *their and every of their corn, grain, and malt, which by them,* " *or any of them had been or should be used or spent ground* " *within the manor, at the said corn mills, and not elsewhere,* " *and to pay to the owner or occupier of the said mills for* " *grinding the said corn, grain, and malt, such toll and* " *multure as had been accustomably paid or yielded;*" 2. The record of the verdict, *H.* 8. *G.* 1. (whereby the jury found the custom in the words of the issue); 3. A decree of the court of Exchequer, of 28th *January* 1722, establishing and confirming the custom; 4. The proceedings in 1756, and 1757, on a *scire facias* to revive the decree against some of the then inhabitants.—To shew the breach, one *Armitstead*, [220] the plaintiff's miller, proved an acknowledgment by the defendant, " *that he had used American flour.*" He also proved, that, though the defendant was in very substantial circumstances, he had only ground one load of malt at the plaintiff's mills from *October* 1773, to *July* 1774, and only one load of wheat during four years; and another witness proved, that the defendant brewed about four or five times in the year, (but that he had seen the plaintiff's miller bring him malt, and no body else;) that he had known the defendant have fine flour in casks, which he believed might be *American* flour, as none had been brought from the neighbourhood. Several of the witnesses said, on their cross examination, that oat-meal was much more used by the common people in the manor of *Settle*, than flour, that about 40 years ago, they used nothing else but oat-meal, and that there is a weekly market where oat-meal, not ground at *Settle* mills, is constantly brought and sold to the inhabitants.

The defendant demurred to the evidence, and the case came on for argument, in *Hilary Term*, 19 *Geo.* 3. (*Tuesday* the 2d of *February* 1779).

Wood, for the plaintiff,—*Chambre*, for the defendant.

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For the defendant, it was contended; 1. That the custom was not proved; 2. That it was void; 3. That the breach by the defendant was not proved. 1. It was said on the first head, that the negative part of the custom was not part of the issue in the cause in the *Exchequer*, nor established by the decree, nor by the parol evidence. 2. That if the custom, as laid, extended to a prohibition from using corn, or malt, which had come into the possession of the inhabitants already ground, as flour, meal, *&c.* it was so unreasonable a restraint on the liberty of the subject, as could not be supported in law, for that it would prevent them from using flour, *&c.* not made at the plaintiff's mills, even if they received it as a present, or in charity. That formerly the method of trying questions of this sort, was by the writ *de secta ad molendinum*, in the place of which, actions on the case had been substituted in modern times; but that, in all the precedents of either sort, there was no instance of such a custom. That, in *Fitzherbert's Natura Brevium (i)* it is laid down, that the suit *de secta ad molendinum* only lies, where the party withdraws his suit from the mill where he ought to grind, and goes to another; and, in all the declarations in actions on the case, it is stated, that the defendant did not grind at the plaintiff's mill, which implies that he had corn in a grindable state. That all of them, except one in *Brownlow (k)*, go on to tate that he had actually ground at another mill; *Harbyn* v. *Greene (l)*, *Coryton* v. *Lithebye (m)*, *Chapman* v. *Flexman (n)*. That, in the case of *Harbyn* v. *Greene*, a custom "for inhabitants to grind *all their grain whatsoever* by them "spent or sold," at the plaintiff's mills, was held to be void. 3. That, if the meaning of the custom, as laid, was, that the corn which the inhabitants were possessed of in a grindable state, should, if used, be ground at the plaintiff's mills, then no breach was proved, the only evidence being that the defendant had used *American* flour. That buying corn already reduced to flour might, under particular circumstances, amount to an evasion of such a custom, but that the declaration should have been differently framed if the plaintiff had meant to go upon an evasion, which was an injury of a different sort from a direct breach. That the *grievance* stated by the plaintiff was the loss of the toll for the corn used by the defendant; but that he never would have been entitled to any toll for the flour proved to have been used. That it did not appear from the evidence, how the *American* flour had been used. That it might have been bought and resold by the defendant, which would have been neither a breach nor evasion

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(i) P. 123. or in *Ed.* 1755. p. 28.
(k) *Brownl. Ent.* 63, 64.
(l) *T.* 14 *Jac.* 1. *Hob.* 189.
(m) *E.* 22 *Car.* 2. 2 *Saund.* 112.
(n) *Cam. Scacc. M.* 1 *W. & M.* 2 *Ventr.* 288.

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evasion of the custom. That there was no evidence at all of the use of oatmeal, nor any even of malt, not ground at the plaintiff's mills.

Wood, for the plaintiff, insisted, that the custom exactly as laid in the *fifth* count, was proved by the verdict and decree in the court of *Exchequer*; for the negative words were not in that count. That, however, the want of them in the evidence, made no substantial variance on the *first* count, as they only contained matter of necessary inference. That, as to the evidence of the breach, it was not necessary for the plaintiff to shew it with respect to every kind of grain. That in the case of *Harbyn* v. *Greene*, the custom was held to be ill on the ground of its extending to a prohibition of the use of corn not ground at all [12]. He said he rested the case on the first and fifth counts; and read a note of the case of the *Manchester Mills* in the Duchy Court, 21 *May* 1757, before Lord MANSFIELD, and *Clive*, Justice, assisting the Chancellor [13], as being exactly in point.

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ASHHURST, and BULLER, *Justices*, having signified their opinion, that it was not competent to the defendant to call in question the validity of the custom, on a demurrer to evidence, the *Solicitor General* and *Dunning*, spoke to that point. The latter contended, that, in whatever part of a cause a party demurs, the proceedings are stopt, and the case brought before the court in such a manner, as that they are to say, whether, upon the whole record, the plaintiff is entitled to recover. That the defendant could not have taken advantage of the illegality in the custom which he now relied upon, by demurring to the declaration, because he admitted, that in some of the counts a legal custom was laid, and only contended, that in those to which the evidence was pointed, the custom laid was illegal. That if he could not make the objection

[12] The same objection was taken by *Twisden*, Justice, to the custom in *Coryton* v. *Lithebye*.

[13] That was an application to *revive*, by *scire facias*, a decree of 5 *Jac.* 1. against the defendants. The decree had established a custom that all the inhabitants of *Manchester* should send their corn which was to be spent in their houses to be ground at the plaintiff's mills. The defendants had bought bread made of flour, which the bakers had brought from some place in the neighbourhood, and which had not been ground at the plaintiff's mills. Lord *Mansfield*, in a solemn argument which he delivered on the occasion, laid it down; 1. That the decree establishing the custom, and which had been confirmed by others, both of a prior and subsequent date, ought not to be controverted, nor the existence of the custom litigated any further before a jury; 2. That such a decree binds all persons under the same description with the original defendants; but, 3. That it is only in the case of a *direct* breach that such a decree can be revived by *scire facias*, and, if it is *evaded*, the method of proceeding is by a supplemental bill.

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objection now, he would be entirely precluded, in this court, if the evidence should be thought sufficient to maintain the issue, because, in that case, judgment would be instantly pronounced without leaving four days to move in arrest of judgment, which the defendants would have had, if the question had gone to the jury. To this the *Solicitor General* answered; 1. That they might have demurred to the bad counts separately; 2. That the judgment pronounced on this occasion would be only interlocutory, after which a writ of inquiry must issue, to settle the damages, and then before final judgment, they would have the four days as in other cases [14].

[223] ASHHURST, *Justice*, observed, that if the court were to allow the demurrer to the evidence upon objections to the declaration, it would seem to posterity, by the record, that the court had determined that there was no evidence to be left to the jury.

The court took time to consider, and this day, Lord MANSFIELD delivered their opinion, as follows.

Lord MANSFIELD,—This is an action on the case, in which the plaintiff states, precisely, and specially, his ground of action, which is (as stated in the first and fifth counts,) that he is possessed of certain mills at *Settle*, and that no tenant, inhabitant, and resiant within the manor, can spend or use corn ground, which has not been ground at the plaintiff's mills. The breach assigned is, that the defendant used ground within the manor, several quantities of corn, *&c.* which the defendant well knew to have been ground elsewhere than at the plaintiff's mills. To this the defendant has pleaded not guilty. The issue is—on the custom,—the defendant being subject to it,—and the breach. The plaintiff must prove all the three points. The defendant does enough if he disprove any of them. The parties go to trial by the authority of the court, to inquire into the truth of these facts. This is not like an ejectment, or an action for money had and received, where conclusions only are stated in the declaration, and the premises appear in evidence. Every thing to be proved is here set forth, and they have nothing to do at the trial with the question, whether the facts as alledged in the declaration, are or are not sufficient to entitle the plaintiff to recover. If that had been intended to be disputed, it might have been done *in limine*, by a demurrer to the declaration. As to the evidence, it seems to me that the custom established by the decree

[14] If the jury had assessed the damages conditionally at the trial, as they might, and as was done in *Scolastica's Case*, *Plowd.* 410. *Qu.* if the interlocutory and final judgments would have been pronounced *uno flatu*, or an interval of four days left between them.

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decree in the court of *Exchequer* is the same, in substance, with that on which this action is brought. It is admitted on the record that the mills are the same, and that the defendant is resiant in the manor.—(His Lordship then stated all the material part of the evidence).—To this evidence the defendant has demurred, and the only question is, whether, if the jury believed the evidence, *it* is competent to maintain the issue. As to that question, there is no doubt but the proceedings in the *Exchequer*, are evidence to prove the custom, and that the parol testimony of *Armitstead* is evidence to shew that the defendant used flour not ground at the plaintiff's mills. The demurrer seems to be founded on a mistake concerning the nature of this proceeding. It was argued as if it had been a demurrer to the declaration, or a motion in arrest of [224] judgment, on the objection that the custom could not be supported in law beyond the case of corn in a grindable state, and could not extend to flour imported or given to inhabitants, and ground before it came to their possession. But *that* is not now before the court; nor was it under the cognizance of the jury. Nothing can be stronger to shew this, than the judgment which we must give, *viz.* "*That the evidence was sufficient to maintain the issue.*" This will not be final. The consequence will be the same as if a verdict had been given for the plaintiff. But there is one defect which would not have been, if there had been a verdict, namely that no damages have been assessed, and therefore there must be a writ of inquiry. After that, the defendant may take advantage of any objection to the declaration, by moving in arrest of judgment, or bringing a writ of error. We are all of opinion that the evidence was sufficient.

A writ of inquiry having afterwards been executed, and damages taken only on the *fifth* count, *Chambre*, in *Easter Term*, 19 *G.* 3. (*Saturday* the 24th of *April*,) obtained a rule to shew cause, why the judgment should not be arrested, and that rule came on to be argued in this present term, (*Thursday*, the 10th of *June*,) by the *Solicitor General*, *Lee*, and *Wood*, for the plaintiff, and *Dunning*, *Davenport*, and *Chambre*, for the defendant.

For the defendant, the former objections to the validity of the custom, in the extent contended for by the plaintiff were repeated; and it was also urged, that the words in which the custom was stated, meant only, that all the corn which the inhabitants, *&c.* should use ground, *and which should be ground within the manor*, must be ground at the plaintiff's mills. That they would fairly admit of that construction; and, if that was their meaning, the defendant could not be charged with a *direct breach;* and no fraudulent *evasion* was laid, for the formal words "*fraudulently, &c.*" were not a sufficient allegation of an evasion. A great deal was also said on the effect of the evidence, and on the consequence of a

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judgment over-ruling a demurrer to evidence; but what was urged on those heads was contrary to the explanation solemnly given by the court of the effect of such demurrer, in the case of *Cocksedge* v. *Fanshaw (o)*.

The court took time to consider, and now Lord MANSFIELD delivered their opinion, to the following effect.

Lord MANSFIELD,—When we heard this argued, a doubt arose on the extent of the custom, whether it goes only to corn growing in the manor, and ground there, or to all ground corn wherever it may grow, which is consumed within the manor. But it appears from the answers in the suit in the *Exchequer*, (which his Lordship read,) that the defendants then insisted on the restrained sense, and that they were not bound to grind corn which grew out of the manor of *Settle* mills; and the decree established the custom to the extent now insisted upon, and proves it to be reasonable.

The rule discharged.

(*o*) *Supra*, *E.* 19 *Geo.* 3. p. 119. 131 to 134. The argument and decision on the demurrer in this case were prior to those in *Cocksedge* v. *Fanshaw*, but the ultimate determination of the present case was posterior; and I have, as in other instances, thrown together the account of all the proceedings in court upon it.

The KING *against* the Inhabitants of St. JOHN'S, SOUTHWARK.

A person who has actually *paid*, but was not *rated* to the land tax, does not gain a settlement.

BY an order of two Justices, the pauper, (who was the widow of one *Daniel Turner*,) and her three children, were removed from *Mitcham* to *St. John's, Southwark*, and on an appeal, the order was confirmed by the court of Quarter Sessions, subject to the opinion of this court, on the following facts. "The name of the husband was inserted in the "land-tax rate within the parish of *Mitcham*, in the following manner:

Rent.	Landlords rated.	For what	In whose occupation.	Sums assessed.
£5 0 0	*Oxtoby.*	House.	*Daniel Turner.*	*s. d.* 0 10 10

"The

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"The pauper's husband occupied the house of which he "is described as occupier, and *paid* the rate for several "years. The rate throughout was in the same form. The "land-tax, by agreement with the landlord, was deducted "from the rent."

The case came on to be argued this day, when the court confirmed the order of sessions, on the authority of *Rex* v. *Carshalton* (*p*).

Rous, in support of the order.—*Mingay* on the other side [† 65].

(*p*) *E.* 15 *Geo.* 3. *Burr. Settl. Ca.* No. 252.

[† 65] The following case has been since determined.

The KING v. the INHABITANTS of MITCHAM, *B. R. E.* 23 *Geo.* 3.

John Heard, his wife, and children, were removed by an order of two Justices, from *Mitcham* to *Moredon*. On an appeal, the order was quashed, and a special case made, which set forth, that *Heard* inhabited for several years, a house at *Moredon*, which he rented of a Mr. *Gasson*, (also an inhabitant of *Moredon*,) at the yearly rent of £5, clear of all taxes, parliamentary and parochial. That, while he so held and occupied the same, an assessment was made on the parish of *Moredon*, for the land-tax, the title of which was as follows: "SURRBY, &c. "an assessment on the *inhabitants* of "the parish of *Moredon*, for raising "a sum by a land-tax for the service "of the year 177—." That the following was the form of the assessment, as far as it respected the pauper.

Rent.	Landlords names.	Tenants names.	s.	d.
£ 5.	Mr. Gasson.	John Heard.	0	9 9½

That *Heard* paid the said 9*s.* 9½*d.* to the collector who demanded the same.

Mingay, in support of the order of sessions, contended, that the land-tax is a landlord's tax. The agreement, by which the tenant was to pay all taxes, makes no difference, for a private agreement cannot affect the parish. The payment by the tenant is a payment by the landlord. The rate is made on *inhabitants*. The case states, that the landlord was an inhabitant. His name could be inserted for no other purpose but to *rate* him. The reason for inserting the tenant's name is to direct the collector, for, though the tax is imposed on the landlord, it is to be collected from the tenant. He cited *Rex* v. *Carshalton*.

Palmer, on the other side, insisted,

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that this case was very distinguishable from *Rex* v. *Carshalton*. There, the rate was on inhabitants and landholders, and the titles of the columns, being formed into a sentence, signified, that the landlord was rated for a tenement in the occupation of the tenant. The court decided against the settlement, in that case, with great regret. Here nobody is expressly rated. The title states the assessment to be on *inhabitants*. As to the inhabitancy of the landlord, that is merely accidental, and it cannot be supposed that all the landlords in the rate are inhabitants. It is not true, that the land-tax is properly a rate on the landlord. A rate is no more than a designation of the person, who is the object of the authority of the assessors, and is to be called upon for the payment. The intention is, not to rate the persons who are eventually liable, but the visible holder of the land. This is evident from the words of the land-tax act, *viz.* "Persons having or holding any such manors, &c." (*a*). The grantee of a rent-charge is liable to the tax, but is never nominally rated, nor called upon. There may be twenty people interested in different ways, in the same land. Every clause in the act favours the construction, that the tenant is the person meant to be rated. By § 15. the tenant is liable to be distrained upon, and to be committed for want of distress. By § 16. a jurisdiction is given to the commissioners to settle disputes between landlords and tenants, the preceding clause having empowered the tenant to deduct out of the rent, *so much* of the tax as the landlord ought to pay. Therefore, he does not necessarily, pay *all*. How much he ought to pay depends on the private agreement between him and his tenant, which the commissioners have power to inquire into, though the assessors have not. In the present case, the landlord was to bear no part of the tax. By § 62. which imposed a double tax on Papists, the landlords only were made liable, and the tenants discharged by *express words*. The principal reason for inserting the landlord's name in the rate, seems to be, to afford evidence of his right to vote for knights of the shire; and for that purpose only, not with any view to the assessment or collection of the tax; a form is established by 20 *Geo.* 3. *c.* 17. for land-tax assessments, in which there is an express column for landlords.

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Lord MANSFIELD.—The question is, whether the landlord, or the tenant, is the person *charged*. The assessment has no words to shew which of them is charged. We must gather it, therefore, from other circumstances. In the first place, who ought to be charged? Certainly the occupier. The landlord is not known. The land itself, in the hands of the occupier, is the debtor to the public. What does the assessment profess to do? To rate the *inhabitants*; that is the *occupiers*. Of whom does the collector demand the rate, and who pays it? The occupier. The circumstances supply what is omitted in the rate itself.

Willes, Justice,—This rate is on the inhabitants only, and not like that in *Rex* v. *Carshalton*.

Buller, Justice,—In *Rex* v. *Carshalton*, the court went upon the word "*rated*," in the landlord's column. The doubt, here, has arisen from the common phrase, that the land-tax is a landlord's tax. But as to that, Mr. *Palmer's*

(*a*) 4 *Geo.* 3. *c.* 2. § 4.

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Palmer's observations are unanswerable. It is not a landlord's tax with respect to the public, though it is, as between landlord and tenant. Besides, the title alone, in this case, is decisive. It is equivalent to saying, that the tenant was rated.

The order of Sessions quashed, and the original order confirmed.

Vide, also, *Rex* v. *the Inhabitants of the townships of Endon, Longsdon, and Stanley*, M. 24 *Geo.* 3. and *Rex.* v. *the Inhabitants of St. Lawrence*, M. 25 *Geo.* 3. where the doctrine in the above case of *Rex.* v. *Mitcham* was confirmed. But in *Rex.* v. *the Inhabitants of St. James's, Bury St. Edmund's*, M. 25 *Geo.* 3. where there was a column of proprietors, and another of occupiers, in the assessment, and it was not specified which was rated, and the collector having demanded the land-tax of the tenant, he paid it, but, took a receipt in which the sum paid was described to be "*so much assessed on the landlord*," the court held, that the tenant did not gain a settlement. ☞ *Rex.* v. *the Inhabitants of Folkestone*, M. 30 *Geo.* 3. 3 *Term Rep.* 505 [F].

BOATS *against* EDWARDS.

Saturday, 19th June.

ON a rule to shew cause, why the interlocutory judgment, which had been signed for the plaintiff, should not be set aside for irregularity, it appeared, that the defendant had *craved oyer* of the original, which the plaintiff had taken no notice of, but had signed judgment for want of a plea.

A defendant is not entitled to *oyer* of the original, and if he prays *oyer*, the plaintiff may proceed without taking any notice of it.

Lord MANSFIELD desired the bar to take notice, that the practice, for defendants to pray oyer of the original, which is so much used for delay, is not warranted by any rule or principle of justice [F 1]. That it is incumbent on the court to make their proceedings as little dilatory, oppressive, and

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[F] In this case the Sessions found as a fact that the landlord was the person intended to be rated in the rate, and the court held themselves bound by that finding.

By 35 *G.* 3. *c.* 101. *s.* 4. no settlement is now to be gained by paying public taxes, on account or in respect of any tenement of less than ten pounds yearly value.

[F 1] In *Deakins* v. *Head*, 7 *East.* 383. where a plea of abatement for want of addition to the defendant in the original writ was quashed, because it had been pleaded without first craving oyer, the court declared that they would abide by the rule established in this case, not to grant such oyer if craved; though the consequence is, that no such plea in abatement can be pleaded. See also *Murray* v. *Hubbart*, 1 *B & P.* 645.

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and expensive, as possible. That is unnecessary for the defendant to see the original, after he has been informed of the cause of action by the declaration. That the court of *Common Pleas* has rejected the practice (*a*); and that, from henceforth, plaintiffs in this court may proceed, as if such demand of *oyer* had not been made.

Dunning, and *Cowper*, for the plaintiff.—The *Solicitor General* for the defendant.

The rule discharged [† 66].

(*a*) *Vide Ford* v. *Burnham*, *C. B. T.* 11 & 12 *Geo.* 2. *Barnes* 4to. edit. 340.

[† 66] *Vide Durrant* v. *Surecold*, *B. R. E.* 24 *Geo.* 3. & *Durrant* v. *Lawrence*, *B. R. M.* 25 *Geo.* 3.

Monday, 21st June.

ROBSON *against* CALZE.

If some of a bankrupt's creditors are induced by money to sign his certificate, though he does not know of it at the time of the signing, nor even when he makes the necessary affidavit in order to obtain the allowance of the certificate by the Chancellor, yet, if he knows it before the actual allowance, the certificate is void [F].

THE defendant had applied to the court, to be discharged out of custody, on filing common bail, upon an affidavit, that he became a bankrupt after the debt was contracted, and had obtained his certificate. This motion was opposed, on the ground of his having concealed part of his effects, and that the certificate was obtained by fraud. The court, not choosing to determine upon *affidavits*, directed a feigned issue, to try, "*whether the certificate was* "*obtained unfairly and by fraud* (*q*)." This issue was tried at the Sittings for *Middlesex*, before Lord MANSFIELD, in this term, when a verdict was found for the plaintiff, and the case was this day argued upon a rule to shew cause, why there should not be a new trial.

Bearcroft, for the plaintiff.—The *Solicitor General*, *Dunning*, and *Dayrell*, for the defendant.

It appeared from Lord MANSFIELD's report, that, when the counsel for the plaintiff had offered to call witnesses, to prove that the defendant had concealed effects to the value of £10. (*r*), this was objected to, as not within the terms of the

(*q*) 5 *Geo.* 2. *c.* 30. § 7. (*r*) *Ibid.*

[F] In *Holland* v. *Palmer*, 1 *B. & P.* 95. the same point was ruled, where there was no privity in the bankrupt, Eyre, C J. saying that this circumstance made no distinction; and that even where money had been given maliciously, for the purpose of vitiating the certificate (the case here put by Lord Mansfield), it would have that effect; though the bankrupt might obtain another.

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the issue; but his Lordship thought it was, and, at any rate, said he would not turn the plaintiff round, but, if the jury should find the concealment, would order *that* to be indorsed on the *Postea*. There was, however, no such special indorsement, so that the verdict was found on the ground of fraud in obtaining the certificate; on which head the proof was, that notes for money had been given by a confidential friend of the defendant, who had managed all his affairs, to two of the creditors, who were thereby induced to sign the certificate; that the defendant did not know of this, *at the time when he made* the affidavit directed by statute 5 *Geo.* 2. *c.* 30. § 10. by which he swore, that, "the certificate and consent of the "creditors thereunto was obtained fairly and without fraud;" that this affidavit was made on the 4th of *September*, but was not laid before the Chancellor with the certificate, *for his allowance*, till *November*, and that, *before that time*, the defendant had been informed of the notes having been given, and for what purpose.

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For the defendant, in support of the rule for a new trial, it was contended; 1. That a certificate is not void, although some of those who signed may have received money to induce them to it, provided the bankrupt himself was not privy to the giving of the money; 2. That the words "*obtained by* "*fraud*," in the act of parliament, apply to the *signing* by the creditors, not to the *allowance* by the Chancellor.

Lord MANSFIELD,—I am clearly of opinion, that the words of the issue took in the whole question, and were so intended by the court; for, where there is a concealment, the certificate is not fairly obtained. The question now is, Whether the certificate obtained by means of notes given to some of the creditors is fair, and such as the defendant may avail himself of? If there were creditors enough who would sign the certificate, and an enemy of the bankrupt were to give money to one of the creditors to induce him to sign, for the mere purpose of preventing the bankrupt from receiving any benefit from the certificate, this would be a fraud on the bankrupt, and should not hurt him. But the reasoning on the part of the defendant arises from not attending to a distinction, *viz.* that although a third person shall not be *punished* for the fraud of another, he shall not *avail* himself of it. There is no case in the law where that can be done. In the case of simony, the presentation is void, though the money has been given without the privity of the presentee. In like manner all securities obtained by fraud are void. There is no way of compelling the creditors to sign the certificate. They are all left at liberty, and ought to be upon a *par*; and if some are induced to sign it, because others have whom they suppose to be upon a *par* with themselves, but who in fact, have

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have been paid, this is a gross fraud upon them. So the matter would stand if there had been no privity in the bankrupt; but there is strong evidence that * he knew of the notes being given before the allowance of the certificate, which in my opinion, is not complete till it is *allowed*. If the fact had come to the knowledge of any of the creditors, and had been stated by them to the Chancellor, before the allowance of the certificate, he could not have allowed it. However, I put the case on the broad ground that a certificate is void, if obtained by fraud, though without the knowledge of the bankrupt.

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WILLES, *Justice*,—Perhaps it may be difficult to lay down a general rule, how far the certificate of a bankrupt may be affected by the act of a friend; and therefore I shall give no opinion on the first point, although I am inclined to think, that, in this case, the certificate would have been void, if the defendant had not known of the notes having been given. But on the second ground, it was certainly a fraud in the bankrupt to permit his affidavit to be read at the time when the certificate was allowed; for though it might be true when sworn, it certainly was not true then; and therefore I am clear that the certificate is void.

ASHHURST, *Justice*,—It seems to me, that the interference of a friend, though without the knowledge of the bankrupt, is sufficient to invalidate the certificate, because the test which the legislature requires, is the unbiassed approbation of the creditors. I should be clear on this ground alone, but there is another in this case.

BULLER, *Justice*,—I shall found my opinion solely on the act of *5 Geo.* 2. which makes it unlawful for third persons, as well as for the bankrupt, to give money to induce creditors to sign the certificate (*s*). If money is given in order to deprive the bankrupt of the effect of his certificate, where there are creditors sufficient in number and value, without those who are paid to sign it, the bankrupt shall not be hurt by this fraud upon him; but, if the necessary number and value is completed by persons who are induced to sign by money, *that*, though without the privity of the bankrupt is a fraud on the creditors at large, and shall not have the intended effect. A certificate is a bar against all creditors, whether they have signed or not, but they shall not be deprived of their remedy against the bankrupt, unless it is obtained agreeably to the directions of the statute. This is no hardship on the bankrupt. The certificate would not have existed, if it had not been obtained by means which the legislature has reprobated. The bankrupt shall not derive a benefit

(*s*) *5 Geo.* 2. *c.* 30. § 11.

benefit from acts of others which the law has declared to be illegal and void.

The rule discharged [† 67].

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[† 67] Vide, *infra*, 695. *Note* [3].

ARMISTEAD *against* PHILPOT.

Tuesday, 22d June.

If a plaintiff cannot find sufficient effects of the defendant to satisfy his judgment, the court will order the sheriff to retain, for the use of the plaintiff, money which he has levied in another action, at the suit of the defendant.

ON *Wednesday, June* the 16th, *Kirby* moved for a rule, to shew cause, why the sheriff of *Middlesex* should not retain in his hands, for the use of the plaintiff, a sum of money which he had levied for the present defendant, in another action, in which he was plaintiff. The ground of the motion was, that the plaintiff had not been able to levy on the effects of the defendant, to the amount of his demand.

The court, and bar, agreed, that this motion was of the first impression, and Lord MANSFIELD said, he believed there were old cases where it had been held, that the sheriff could not take *money* in execution, even though found in the defendant's scrutore, and that a quaint reason was given for it, *viz.* that money could not be *sold*. However the rule was granted, and, this day, *Bower* having informed the court that he was instructed to oppose it only so far, as that the attorney's bill, in the cause in which the money had been levied, should be paid in the first place, it was made absolute with that qualification [F].

[F] In *Fieldhouse* v. *Croft*, 4 *East*, 510. where the motion was for the sheriff to pay over money, left in his hands as the *surplus* of a former execution against the defendant's goods in another action, the rule was refused, for reasons contrary to the doctrine of Lord MANSFIELD in the present case. The court holding that the plaintiff ought not to have execution of *money* of defendant in the hands of a third person. and that it was contrary to the sheriff's duty *to have retained the surplus*. In two subsequent cases, *Willows* v. *Ball*, 2 *N. R.* 376. where the money in the sheriff's hands was the amount of damages recovered by defendant against himself (the *sheriff*) in another action, and in *Knight* v. *Criddle*, 9 *East*, 48. where the motion was exactly similar to that in the present case, the court refused to *compel* the sheriff to retain and pay over; and it was observed, in answer to the authority of the present case, that it passed here by *consent*.

Wednesday 23d June.

MILLES *against* FLETCHER.

A ship and goods being insured for a voyage, if the ship is taken and recaptured, and on the recapture the captain acting fairly for the benefit of his employers, sells the ship and cargo, and thereby puts an end to the voyage, the insured shall recover as for a total loss.

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THIS was an action on a policy of insurance, on the ship the *Hope*, and her freight from *Montserrat* to *London*. The plaintiff went for a total loss. The defendant insisted that he was only entitled to recover for an average loss. The jury found a verdict for a total loss, and, upon a motion for a new trial, the facts of the case appeared to be as follows:—The ship, when proceeding on her voyage, was captured on the 23d of *May*, by two *American* privateers, who took the captain, and all the crew, and part of the cargo (which consisted of sugars) out of her. The rigging was also taken away. She was afterwards retaken, and carried into *New-York*, where the captain arrived on the 23d of *June*, and taking possession of her, found that part of what had been left of the cargo was washed over-board, that 57 hogsheads of what remained was damaged, and that the ship was leaky, and in such a state that she could not be repaired without unloading her entirely. The owners had no store-houses at *New-York*, where the sugars could have been put while the ship was repairing, nor any agent there to advise or direct the captain. No sailors were to be had. The only method he had of paying the salvage, which amounted to the value of 40 hogsheads of sugar, was by sale of part of the cargo, or the ship. The captain did not know of the insurance. If he had repaired the ship, his expences would have exceeded the freight by more than £100. There was an embargo on all vessels at *New-York* till the 27th of *December*, and, by the destination of his ship, she was to have arrived at *London* in *July*. Under these circumstances, he consulted with his friends at *New York*, and resolved upon their opinion, and his own, to sell the ship and cargo, as the most prudent step for the interest of his employers. The cargo was accordingly sold and paid for. The ship was also contracted for, but the person who had agreed to buy her ran away, and the captain left her in a creek near *New-York*, and returned to *England*, where he arrived in the *February* following, and gave the plaintiff notice of what had been done, which was the first information he received of it, and the plaintiff immediately claimed as for a total loss from the underwriters, and offered to abandon.

Lord MANSFIELD told the jury, that, if they were satisfied the captain had done what was best for the benefit of all concerned, they must find as for a total loss.

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The *Solicitor General* shewed cause, and was to have been followed by *Dunning*, and *Davenport*, but Lord MANSFIELD stopped them.—*Lee*, and *Baldwin*, for the plaintiff.

Lord MANSFIELD,—The great object in every branch of the law, but especially in mercantile law, is certainty, and that the grounds of decision should be precisely known. I took great pains in delivering the opinion of the court in the cases of *Goss* v. *Withers* (*t*), and *Hamilton* v. *Mendes* (*u*). I read both those cases over last night, and I think that from them, the whole law between insurers and insured as to the consequences of capture and recapture may be collected. Whenever a question of law arises at *nisi prius*, I propose a case, or grant one when asked for by the counsel, and I avoid as much as possible blending fact and law together, having seen the inconvenience of it in *Poole* v. *Fitzgerald* (*v*). But, on the trial of this cause, it did not [233] appear to me, that there was any question of law, and no case was asked for. It was impossible to ask for one, till the facts were ascertained, and, when they were, it would have been impossible to state them in any way which could have left a doubt on the law. It was not contended, that a capture *necessarily* amounts to a total loss as between insurer and insured; nor, on the other hand, that on a capture and recapture, there may not be a total loss, though there remain some material tangible part of the ship and cargo. Neither was it contended, that the captain has an arbitrary power by his act, to make the loss either partial or total, as he pleases. A great deal has been said about what the Admiralty could or would have done in such a case, in order to pay the salvage. As to that, if no owner appeared, they would condemn the whole; but if they saw from the ship's papers, that there was one, they would not. If there were different claimants of the ship and cargo, they would leave it to them to say what part should be sold, and, if they differed in opinion, would order the sale of such part as would be attended with the smallest loss. But all *that* is foreign to the present question, which is singly this, whether the consequences of the capture were such as, notwithstanding the recapture, occasioned a total obstruction of the voyage, or only a partial stoppage, as in the case of *Hamilton* v. *Mendes*. In that case, and in *Goss* v. *Withers*, great stress was laid on the situation of the ship and cargo, at the time when the insured had notice, at the time of the offer to abandon, and at the time of the action brought. No cases say, that the bare existence of the hulk of the ship prevents the loss being

(*t*) *M.* 32 *Geo.* 2. 2 *Burr.* 683.
(*u*) *T.* 1 *Geo.* 3. 2 *Burr.* 1198.
(*v*) *E.* 23 *Geo.* 2. cited in *Goss* v. *Withers*.

since reported, 1 *Blacket.* 276.

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being total. In *Hamilton* v. *Mendes* it is laid down [F 1], that "if the voyage is lost, or not worth pursuing, if the "salvage is high, if further expence is necessary, if the in-"surer will not at all events undertake to pay that expence, "*&c.* the insured may abandon, notwithstanding a recapture." Here, at the time of the capture, there were no hopes of a recovery; no friend's ship in sight; no means of resistance; all the crew was taken out, and part of the cargo; and the rigging also taken away. Afterwards the ship was retaken, and brought into *New-York*. When she was brought there, it still continued a total loss. Neither the insured, nor the in-
[234] surers, had any agent in the place. The court of Admiralty must have proceeded *secundum æquum & bonum*, and might have sold her for the benefit of those concerned. When the insured first had notice, and offered to abandon (which was when the captain came to *England*), and when the action was brought, it was still a total loss. The voyage was abandoned, the cargo sold, and the ship left to be sold. The only answer the defendant makes, or can make to this is, that the loss was total indeed, but that the captain made it so by his improper conduct, for that on his taking possession of the ship the loss became partial, and that he ought to have pursued the voyage. But is this defence true in fact? The captain, when he came to *New-York*, had no express order, but he had an implied authority from both sides, to do what was right and fit to be done [F 2], as none of them had agents in the place; and whatever it was right for him to have done, if it had been his own ship and cargo, the under-writer must answer for the consequences of, because this is within his contract of indemnity. Suppose there had been no insurance, what ought the captain to have done? 1. As to the cargo; according to the course of the voyage, the ship should have arrived at *London*,

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[F 1] These principles were cited and confirmed by the court in *Hadkinson* v. *Robinson*, 3 *B. & P.* 388; but held not applicable to that case, in which the captain, learning that if he entered the port of his destination, the ship *would be* lost by confiscation, *avoided* the port, and sold the cargo; and the court were of opinion that the loss was not occasioned by a peril insured against not coming within the description of a restraint of princes.

[F 2] In *Reid* v. *Darby*, 10 *East*, 152. this case was cited by Lawrence, J. for the point here stated. In that case it was decided that the captain has no discretionary authority so sell, as against the owners, even under a decree of a vice-admiralty court for sale of a ship reported upon a survey to be unseaworthy. The distinction between that case and the present appears to be, that here "the sale was ratified by the "owners, and being *bonâ fide*, was "held to bind the underwriters."

1779.

MILLES against FLETCHER.

London in *July* [r 3]. On the capture, part had been taken out, some was washed over-board, 57 hogsheads damaged, and the whole, from the leakiness of the vessel, in a perishable state. There were no store-houses, nor could the ship proceed in the state she was in. The crew was gone, and an embargo laid on till *December*. What, shall a cargo which was intended to arrive at *London* in *July*, be kept in a perishable state at *New York*, in a leaky vessel, till *December*? 2. As to the ship; it was certainly better to sell her, than bring her to *London*. There was no crew belonging to her, and she had no cargo. Even if all the cargo had been left, the expence of repairs would have exceeded the freight. If she had been brought home the expence of bringing her might have been more than what she would have sold for in *London*. It has been said, that the damage would not have fallen on the underwriters; but the argument drawn from thence is a fallacy, for that circumstance goes to determine it to be the interest of the insured to abandon the voyage. The point is, what did the owner suffer by the capture, and it appears that he suffered so much, that it was not worth while to pursue the voyage. The whole voyage was lost. As the captain did not know of the insurance, he had no temptation to give the turn of the scale to one side or the other. I left it to the jury to determine, whether what the captain had done, was for the benefit of the concerned. If they had found that it was in words, where would have been the question of law? [235]

The rule discharged [† 68].

[† 68] *Vide Baillie* v. *Modigliani*, *B. R. H.* 25 *Geo.* 3. ☞ *Cazalet* v. *St. Barbe*, *B. R. E.* 26 *Geo.* 3. 1 *Term Rep.* 187. *Mitchell* v. *Edie*, *B. R. H.* 27 *Geo.* 3. 1 *Term Rep.* 608.

[r 3] In Park on Insurance, p. 156. the accuracy of this report is confirmed, as contra-distinguished from another report by the name of *Milles* v. *Hayley*, published in Weskett on Insurance, p. 4. in which most of the following facts as to the state of the ship and cargo are omitted; facts which the learned author observes, were very material to the decision of the cause.

Wednesday, 23d June.

FISHER, *qui tam*, &c. *against* BEASLEY.

If a sum of money is lent upon an agreement to pay legal interest, and a premium over and above is paid when the money is advanced, such premium not of itself exceeding the legal interest, the security is void, but the penalty is not incurred till more than legal interest is actually received [F].

THIS was an action of debt on the statute of Queen *Anne (w)*, for taking more than at the rate of five *per cent.* by the year, for the loan of money. The case was this: One *Grindall* had borrowed £100 of the defendant, for which he had given him a bond conditioned for the payment of the principal and interest, at the rate of £5 *per cent.* at the end of six months. He also paid two guineas to the defendant, as a premium, at the time when the money was advanced. At the end of the six months the capital was repaid, and £2 10s. for interest. The action was brought within a year after the payment of the capital and interest, but more than a year after the two guineas were paid, and the money advanced. Lord MANSFIELD, at the trial, was of opinion, that the usury was complete, and the penalty incurred, when the premium was paid, and therefore nonsuited the plaintiff [15].

On *Tuesday*, the 8th of *June*, *Wood* obtained a rule to shew cause, why the nonsuit should not be set aside, and a new trial granted; and, on *Tuesday* the 15th of *June*, the case was argued, by *Bearcroft*, and *Wood*, for the plaintiff, and the *Solicitor General*, *Dunning*, and *Morgan*, for the defendant.

For the defendant, it was contended, that the offence was committed at the time when the two guineas were received,

(*w*) 12 *Ann. st.* 2. *c.* 16.

[15] By *st.* 31 *Eliz. c.* 5. §. 5. all *qui tam* actions upon any statute made or *to be made* (except the statute of tillage) shall be brought *within one year* after the offence committed.

[F] So where there was a loan of £500 for five years, and the borrower *returned* £50 to the lender, after the execution of the securities, in pursuance of the usurious agreement between them, and paid £25 per annum to the end of the five years, it was held that the usury was not completed by the return of the £50, but continued on the payment of each sum of £25, being interest for that which in fact was a loan of only £450. *Scurry* v. *Freeman*, 2 *B. & P.* 381.

Where the lender received a premium at the time of a loan for a year, and afterwards in the course of the year *received the interest then due*, at 5 per cent. it was held that the offence of usury was then complete, without waiting to the end of the year, the period for which the loan was made. *Wade* v. *Wilson*, 1 *East*, 195.

1779.

FISHER against BEASLEY.

ceived, and that it would have been usury although neither the interest nor the capital had ever been paid. That the contract was not to pay £4. 12s. *per cent.* for half a year, but to give two guineas for the loan of a sum of money, for which legal interest was also to be paid. *Lloyd* v. *Williams* (x) was cited, and a case of *Mallory* v. *Bird*, mentioned in *Pollard* v. *Scoly* (y), where it is said, "That if a man con- "tract to have twenty pounds for the loan of a hundred, and "take nothing, he is not punishable by the statute (z), but if "he taketh any thing, if but one shilling, this is an affirm- "ance of the contract, and he shall render for the whole "contract."

[236]

BULLER, *Justice*, said, that the answer given by ASTON, *Justice*, to that case, when it had been cited on some former occcasion, was, that it meant one shilling above the legal interest.

For the plaintiff, it was observed, that the case of *Mallory* v. *Bird* is only a loose note of the reporter. That there are two distinct provisions in the statute of Queen *Anne*. 1. That all bonds, contracts, and assurances for the payment of any principal, or money, to be lent, whereupon or whereby there shall be *reserved* or taken above 5 *per cent.* shall be utterly void. 2. That all persons, who shall upon any contract, *take*, *accept*, and *receive* for the forbearing or giving day of payment, more than at the rate of 5 *per cent. per annum*, shall forfeit treble the sum lent. That under the first, the offence is complete as soon as the contract is made, though nothing has been paid for the loan; but, to incur the penalty, more than the legal interest must have been *actually received*. That the contract here was to forbear for six months, and £2. 2s. which was all that had been taken, accepted, and received, more than a year before the bringing of the action, was less than at the rate of 5 *per cent.* by the year; but that, when the additional £2. 10s. was paid, then, and not till then, the offence for which the penalty is given, was committed; for that, till the payment, the law allowed the party time to repent, and to avoid incurring the penalty by relinquishing the usurious interest. They cited *Brown* v. *Fulsbye* (a), where it was held, that when for the loan of £80, a bond was given to pay £90, at the end of the year, the penalty for taking more than £10 *per cent.* (the legal interest at that time,) was not incurred, although the £90 had been tendered, because,

(x) *C. B. M.* 12 *Geo.* 3. 3 *Wils.* 250. since reported in 2 *Blackst.* 792.

(y) *C. B. E.* 25 *El. Cro. El.* 20.

(z) 13 *Eliz. c.* 8. That statute revived the statute of 37 *H.* 8. c. 9. and the words there are, that the penalty shall be incurred if the party "*have*, "*receive*, *accept*, or *take*," &c. § 3. 5.

(a) *C. B. T.* 19 *El.* 4 *Leon.* 43.

1779.

FISHER against BEASELEY.

because the lender had not actually taken and received more than the legal interest; but that the security was void; *Body* v. *Tassell (b)*, *Martin Van Hanbeck's Case* (c), and *Hawkin's Pleas of the Crown, title Usury (d)*, where the same distinction is made, were also cited.

*[237] The court took time to consider, and this day, Lord MANSFIELD delivered their opinion, as follows:

Lord MANSFIELD,—It became material, in this case, to determine, when the usury was complete. One side contended, that it was so upon the payment of the premium, and I long inclined to that opinion, because it was paid *eo nomine* as above legal interest [☞]. But I am now satisfied, as we all are, that the offence was not complete till the half year's interest was received. There are two branches of the statute. Under the first, every agreement, contract, and security, for more than legal interest, is void. Therefore the bond given to the defendant in this case was void. But under the second, the penalty is incurred only by *taking*, *accepting*, and *receiving*, more than legal interest. All the authorities lean this way, both ancient and modern. In *Lloyd* v. *Williams* more than legal interest had been paid at first.

The rule made absolute.

(*b*) *Scacc. T.* 30 *El.* 3 *Leon* 205.
(*c*) *Scacc. T.* 30 *El.* 2 *Leon.* 38.
(*d*) *B.* 1. *c.* 82. § 8.

[☞] It is not usury for a country banker in discounting bills to take over and above the 5 per cent. discount, a commission, agreeable to the usage, upon the amount of the bill. *Benson* v. *Parry*, *B. R. M.* 21 *Geo.* 3. 2 *Term Rep.* 52. *Winch.* v. *Fenn*, *G. H.* Sittings after *H.* 26 *Geo.* 3. *cur. Buller*, J. *ibid.* n. (*c*).

The End of TRINITY *Term* 19 GEORGE III.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF KING's BENCH,

IN

MICHAELMAS TERM,

IN THE TWENTIETH YEAR OF THE REIGN OF GEORGE III.

1779.

Saturday, 6th Nov.

WELSH *against* HOLE.

If a plaintiff compromise the debt and costs with the defendant before the plaintiff's attorney has been paid, the court will not oblige the defendant to pay him, unless he gave notice to the defendant not to settle with the plaintiff till his bill should be paid.

ON a rule to shew cause, why the defendant should not pay to the plaintiff's attorney his bill of costs, the case was this: In an action of assault there was a verdict for the plaintiff, damages £20 judgment, and a writ of error brought. Pending the writ of error, the plaintiff personally compromised the debt with the defendant (who had lain in jail two years) and executed a release; having accepted of ten guineas for the debt and costs.

The *Solicitor-General* argued in support of the rule,—*Cowper* for the defendant.

Lord MANSFIELD,—An attorney has a lien on the money recovered by his client, for his bill of costs; if the money come to his hands, he may retain to the amount of his bill (a). He may stop it *in transitu* if he can lay hold of it. If he

(a) *Vide supra*, p. 104.

1779.

WELSH against HOLE.

[239]

he apply to the court, they will prevent its being paid over till his demand is satisfied. I am inclined to go still farther, and to hold that, if the attorney give notice to the defendant not to pay till his bill should be discharged, a payment by the defendant after such notice would be in his own wrong, and like paying a debt which has been assigned, after notice. But I think we cannot go beyond those limits [F 1]. Though there may be some room to think that there was collusion here to cheat the attorney, yet, on, on the other hand, ten guineas may be a reasonable compensation from a man who has lain two years in jail. Besides this application goes to the extent of controverting the validity of a payment of the *whole* debt and costs to a plaintiff without the privity of his attorney, and it would be too much to say, that a defendant shall not transact the business of a cause with the plaintiff himself [F 2], in a case where there has been no notice not to do so from the attorney, either express or implied—nothing even like saying, "I have no security for my bill," or, "I "shall never be paid unless the plaintiff recover in this "action."

The rule discharged [☞].

[☞] *Vide Griffin* v. *Eyles*, *C. B. H.* 29 *Geo.* 3. *H. Bl.* 122.

[F 1] In *Swain* v. *Senate*, 2 N. R. 99. this case was quoted, to shew that a defendant may, under any circumstances, safely pay over the debt and costs to the plaintiff, where he has received no notice not to do so. But the court there held that if he did so collusively, with intent to defraud the attorney, the payment would not be good, though without notice: and in that instance they allowed the plaintiff's attorney to proceed against the bail to recover his costs.

So if the payment be after notice from plaintiff not to pay, although it be *bonâ fide*. *Reed* v. *Dupper*, 6 *T. R.* 361.

So where a cause had been referred, and a sum awarded to plaintiff, notwithstanding plaintiff had collusively given a release to defendant. *Ormerod* v. *Tate*, 1 *East*, 464.

[F 2] But the general rule is that attornies have a lien on judgment for their costs; and when a party applies to get rid of a judgment the court will take care that the costs are paid, *Mitchell* v. *Oldfield*, 4 *T. R.* 123: and this was confirmed in *Randle* v. *Fuller*, 6 *T. R.* 456. without any restriction in *K. B.* and defendant was not allowed to set off the costs of one cause against plaintiff's demand for costs in another, without first satisfying plaintiff's attorney.

1779.

The KING *against* STRATTON and Others.

Thursday, 11th Nov.

The court will not give leave to quash an information filed *ex officio* by the Attorney General —He may stop the proceedings upon it by *noli prosequi*, and file another.

AN information had been filed *ex officio*, by the *Attorney General*, in consequence of a resolution of the House of Commons, against the defendants, for imprisoning the governor (Lord *Pigot*) and subverting the government of the settlement at *Madras*, where they were members of the council. The defendants had pleaded, and the parties were at issue, and notice of trial given for the Sittings after last term; but the prosecutor countermanded the notice, and, on *Tuesday* the 9th of *November*, the *Solicitor General* applied for a rule to shew cause, why the information should not be quashed, suggesting as the ground of the application, that another was ready to be filed, which stated the offence more particularly, and was better adapted to the nature of the charge. The rule was granted, and cause was, this day, shewn, by *Dunning*, *Wilson*, *Arden*, and *Erskine*.

They said, there never had been an application of this sort, but that, in the case of *Rex* v. *Philip Carteret Webb* *(a)*, where the prosecution was by indictment, on a motion to quash the first, another having been found, the court would not permit it, but upon terms, and by consent; and said, that it was by no means a motion of course. That, in all cases where indictments have been quashed on the motion of the prosecutor, it has been on the ground of *insufficiency* *(b)*, [240] which was not pretended in the present instance. That in the case of *Rex* v. *Purnell* *(c)*, which was an information filed *ex officio* by Sir *Dudley Ryder*, then *Attorney General*, against the defendant as vice-chancellor, and a justice of peace in the university of *Oxford*, the *Attorney General* had put an end to the first information, without any application to the court, by a *noli prosequi*; but that he had done this on the express order of the King, which order was stated in his warrant to the master of the Crown-office (*d*) to enter the *noli prosequi*. That, at all events, the court would not grant the motion without obliging the prosecutor to pay costs (*e*).

The

(*a*) *E.* 4 *Geo.* 3. 3 *Burr.* 1468. Since reported, 1 *Blackst.* 460.

(*b*) *Vide Sir William Withipole's Case*, *H.* 4 *Car.* 1. *Cro. Car.* 147. *Rex* v. *Swan & Jefferys*, *Fost.* 104.

(*c*) 1 *Wilson* 239. Since reported, 1 *Blackst.*

(*d*) *Sir James Burrow.*

(*e*) *H.* 6 *Geo.* 2. *Rex* v. *Moore.* 2 *Str.* 946.

1779.

The KING against STRATTON.

The *Solicitor General*, in support of the rule, observed, that the defendant could not suffer any injury by the quashing of the information, because the crown might go on to trial, and judgment, on the new one, notwithstanding the pendency of the other; for that, on indictments or informations for *crimes*, the pendency of another prosecution for the same offence cannot be pleaded, as it may to informations for penalties *(f)* [1]. He said, that leave to quash indictments is often granted in the first instance, without a rule to shew cause [F].

Lord MANSFIELD having asked the *Solicitor General* if there was any authority or precedent for quashing an information *ex officio* upon the application of the prosecutor, he admitted, that he knew of none; and his Lordship said, that if it was proper to stop the information, he did not see why the *Attorney General* might not do it by entering a *noli prosequi*, without the interference of the court.

BULLER, *Justice*,—What the *Solicitor General* has stated, *viz.* that the pendency of the first information would be no plea to the second, is decisive against this motion. It is certainly not of course to quash informations. All the litigated cases are upon *insufficiency*, and if the court has even permitted it in the first instance, it has been because they gave credit to the counsel in stating the insufficiency.

[241]

The rule discharged.

(f) Sir *William Withipole's Case*, *Rex* v. *Swan & Jefferys*.

[1] *Hawkins*, (*B.* 2. *c.* 26. § 63.) says, that another information depending may be pleaded in abatement to an information *qui tam*, and cites *Cro. El.* 261. 1 *Roll. Rep.* 49, 50. 134. But he says nothing on that point as to other informations. In *B.* 2 *c.* 34. § 1. he says generally, that another prosecution depending is no good plea to an indictment, as it is *to an appeal or information*; but he refers to the former passage, and therefore probably meant only *qui tam* informations.

[F] After plea pleaded, the court will not quash an indictment on the motion of the prosecutor, before another good indictment be found. *R.* v. Dr. *Wynne*, 2 *East.* 226.

1779.

RIGHT, Lessee of CATER, *against* PRICE and Others.

Friday. 12th Nov.

If a testator is in a state of *insensibility* when his will is attested, the will is not duly executed according to the meaning of the statute of frauds, although he be *corporally* present.

UPON an ejectment, tried at the last Assizes for the county of *Gloucester*, a special case was reserved, which stated the following facts: On the 5th of *December* 1777, one *Bridges* was sent for, to make the will of one *Wyatt Cater*, (under which the defendants claimed,) and received his directions accordingly. It was prepared on five sheets, and a seal affixed to the last, and also the form of the attestation written upon it. The will was then read over to the testator in the presence of the three witnesses who afterwards subscribed it, (one of whom was *Bridges*,) and he set his mark to the two first sheets, in their presence, and attempted to set it to the third, but, being unable from the weakness of his hand, he said, "*I can't do it, but it is my will.*" After this the three witnesses went away, being desired to come again. On the day following, *Bridges*, in the presence of two other persons, not being the two other subscribing witnesses, said to the testator, "*Will you sign your will?*" He said, he would, and again attempted to sign the two remaining sheets, but was not able. Then *Bridges* went away, and returned the next day with the two other subscribing witnesses, when the testator *being in a state of insensibility*, *Bridges* proceeded to write the form of an attestation on the second sheet, and he and the two other witnesses put their names to it, in the room where the testator lay. He died two days afterwards.—The question was, Whether this will was duly executed for passing lands, according to the statute of frauds?—The lessor of the plaintiff was the heir at law.

(The words of the statute are, "That the will shall be "signed by the devisor, or by some other person in his "presence, and by his express directions, and shall be "attested and subscribed *in the presence of the said devisor*, "by three or four credible witnesses (*a*)).

The case was argued, by *Cowper*, for the plaintiff, and [242]
Adair, Serjeant, for the defendants.

Adair mentioned, before the argument, that the case was imperfect, in not stating, as the fact was, that all the five sheets were in the room, and annexed to each other, at the time of the different subscriptions; but Lord MANSFIELD said, he had no doubt it was so, from the manner in which the

(*a*) 29 *Car.* 2. *c.* 3. § 5.

1779.

RIGHT against PRICE.

the case was drawn up, and desired *Cowper* to go on, as if that had been expressly set forth.

Cowper.—This will was not attested agreeably to the meaning of the statute. In *Shires* v. *Glascock* (*a*), the will was signed by the witnesses in an adjoining room, having a window, which was broken, between it and the room where the testator was, and it is expressly stated, that he *might* have seen the witnesses. The reason for requiring the attestation in the testator's presence is there mentioned to be to prevent the obtrusion of another will. There had been several other cases of the same sort, where, if the testator *could* see the witnesses sign, the court has presumed that he *did*. But here the testator being in a state of insensibility, he could not possibly know what was passing. He was indeed corporally present, but his mind was not there, no more than if his dead body had been in the room.

Adair, Serjeant—It does not clearly appear what is meant by the word "*insensibility*." It is certainly something considerably short of death, and, if the testator was alive, I do not see how it can be said, that the will was not attested in his presence. The question is, Whether the testator, having done all that was necessary on his part, (for nothing is disputed but the validity of the attestation) and the attestation having been made according to the *words* of the statute, a fair transaction shall be set aside, because a formality required according to an implied intention of the legislature has not been complied with? The court has been very liberal in construing the formalities prescribed by the statute. Actual signing is one of them; yet that has been dispensed with, as appears by a case in *Skynner* (*b*). As to the attestation, the expression at the end of the case of *Shires* v. *Glascock* seems to go farther than the line drawn by Mr. *Cowper*; for it says, the signing of the witnesses would be sufficient, although the testator should be sick in bed, and the curtain drawn. In such a case, he *could not*, by any reasonable presumption, be supposed to have it in his power to see them. Even in the present case it does not appear, but that the testator might, by possibility, have opened his eyes, while the witnesses were subscribing their names. If he had been perfectly in his senses while he signed, and till they began to attest the will, and had then been seized with a delirium, would not the attestation, if completed immediately, have been sufficient? The principal intent of the act, in requiring the solemnity of the attestation by witnesses, is truly stated

[243]

(*a*) *C. B. E.* 3 *Jac.* 2. 2 *Salk.* 688. *S. C.* in *Carth.* 81.

(*b*) *B. R. H.* 36 & 37 *Car.* 2. 3 *Skyn.* 227. The will in that case was all written by the testator's own hand. *Vide* also, *Le Mayne* v. *Staney*, *C. B. E.* 3. 33 *Car.* 2. *Lev.* 1 *S. P.* ☞ "The sealing is a signing." *Dict.* per *Holt*, *Ch. J. Lee* v. *Libb*, *B. R. M.* 1 *W. & M.* 1 *Sh.* 68, 69.

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stated in *Shires* v. *Glascock, viz.* to prevent the obtrusion of another will for the true one; but there was no danger of that sort here, since the testator had actually signed the will he meant to execute before he became insensible. I have been informed of a case which was before this court very lately, by a gentleman who was counsel in it, in which the word "*presence*" was construed to mean actual corporal presence. It was a *quo warranto* from *Plymouth*. By the charter of that borough, seven aldermen must be present when a new one is elected. To make up that number, at the election the legality of which was questioned, one who had been in a state of absolute idiocy for several years was brought to the hall, and it was held, that this was sufficient to satisfy the charter; and the court refused either to grant an information, or an issue to try the sanity.

Lord MANSFIELD,—There are many particular circumstances in this case besides the general question. The testator, when he signed the two first sheets, had an intention of signing the others, but was not able. He therefore did not mean the signature of the two first as the signature of the whole. There never was a signature as of the whole. The court, to be sure, would lean in support of a fair will, and not defeat it for a slip in *form*, where the meaning of the statute had been complied with. It was upon that principle that *Shires* v. *Glascock*, and other cases of that sort, were decided. But this is not a measuring cast, where there is room for presumption. All the witnesses knew, at the time of the attestation, that the testator was insensible. He was a log, and totally absent to all mental purposes. It was no sudden delirium, or suspension of the understanding. In such a case, perhaps, the court would lay hold of a very slight presumption. Another thing: it is usual in precedents of wills to say, that the witnesses subscribed *at the request* of the testator. That indeed is not *expressly* required by the statute, but the practice shews the general understanding, and the nature of the thing *implies* a request.

[244]

WILLES, and ASHHURST, *Justices*, of the same opinion.

BULLER, *Justice*,—I am of the same opinion. The attestation in the testator's presence is as essential as his signature, and all must be done while he is in a capacity to dispose of his property. *Shires* v. *Glascock* was determined soon after the statute passed, when the reason and meaning of the clause in question were exactly known. Here the trunk remained, but the man was gone. He could not know whether the will that he had begun to sign was that which the witnesses attested. He was dead to all purposes or power of conveying his property. As to the signing of the testator, it has never been and cannot be dispensed with. The courts have only had

1779. had occasion to decide, in different cases, what shall be a signing within the true meaning of the statute [2].

The *Postea* to be delivered to the plaintiff.

[2] The statute of frauds is often supposed to have been made upon great consideration; on an attentive perusal, however, it will not appear to have been very accurately penned. It is, I believe universally understood to be the meaning of the statute, that the testator *must sign in the presence of the subscribing witnesses* [☞]. Yet there is no express provision for that purpose in the clause (§ 5.) describing the solemnities which are to attend the execution. It is as universally understood that an express written revocation must be executed with the same solemnities as an original will; but, in the clause (§ 6.) relative to such revocations, the *subscription* of the witnesses is not directed, while, on the other hand, the *signing by the testator in their presence* is in such case expressly prescribed.

[☞] But *Vide Grayson* v. *Atkinson*, *Canc.* 1752, where Lord *Hardwicke* determined, that it is not necessary, in the case of a will, that the testator shall sign in presence of the witnesses; and that it is sufficient if he acknowledge his hand-writing to them all, though at different times. 2 *Vez.* 454. See also, 3 *Mod.* 218. & *Lee* v. *Libb*, *B. R. M.* 1 *W. & M.* 1 *Show.* 68, 69. *Dict. per Dolbin*, *S. P.* and *Stonehouse* v. *Evelyn*, *Canc. E.* 1734, where the same was determined by Sir *Joseph Jekyl*. 3 *P. W.* 252. And in *Ellis* v. *Smith*, *Canc. H. & M.* 27 *Geo.* 2. Lord *Hardwicke*, assisted by *Willes*, Ch. J. *Strange*, Master of the Rolls, and the Chief Baron, decided that a will attested by three witnesses, in the presence of the testator, and acknowledged by him in their presence to have been signed and sealed by him, but not signed in their presence, was a good revocation of a former will under § 6.

Friday, 12th Nov.

WOOLLEY *against* CLOUTMAN.

Actions for use and occupation cannot be maintained in the court of conscience in *London* [F].

AFTER a verdict for the plaintiff in an action, in this court, for use and occupation, the damages being only £1. 7*s*. 6*d*. *Baldwin* obtained a rule to shew cause, why the defendant should not have leave to suggest on the roll that the damages recovered were under 40*s*. and that the defendant

[F] Otherwise in the county court of Middlesex, under 23 *G.* 2. *c.* 33. *s.* 19.; there being no express exception in that statute. *Parkes* v. *Vaughan*, 2 *B. & P.* 29. In *M'Collam* v. *Carr*, 1 *B. & P.* 223. it was held that the jurisdiction of the county court does not extend to contracts on the high seas; nor to demands originally for a larger sum, but reduced by payments to less than 40*s*. on a balance of accounts.

fendant at the time when the action was brought, was an inhabitant, &c. in the city of *London*, and liable to be sued in the court of conscience there, under the statute 3 *Jac.* 1 c. 15. [1].

*That statute (*sect.* 4.) enacts, that if it shall, in any action of debt or *assumpsit* prosecuted any where out of the said court of requests, appear that the debt to be recovered doth not amount to 40*s.* and the defendant [2] shall prove by sufficient testimony, or his own oath, that he was inhabiting and resiant in *London*, or the liberties thereof, when the action was commenced, the plaintiff shall not have any costs of suit, but shall pay the defendant his costs. But by *sect.* 6. it is provided that nothing in the act shall extend to "any *debt* "for any rent upon any lease of lands or tenements, or any "other *real contracts*, or any other debt that shall arise by "reason of any cause concerning a testament or matrimony, "or any thing concerning or properly belonging to the eccle- "siastical court." [F 2].

*[245]

Dunning,

[1] This was the first of those courts of summary jurisdiction called courts of conscience. It had been erected before, but did not receive the sanction of the legislature till the statute of *Jac.* 1.

[2] By § 2. *the right of suing* in this court, is only given to "every citizen and freeman or any other person inhabiting within the city or its liberties, being a victualler, tradesman, or labouring man," *against* persons of the same description. The 4th section, which gives the defendant costs when the damages are under 40*s.* makes it necessary for him to prove that *he* was inhabitant and resiant of the city *as above*, but says nothing restrictive of the description *of the plaintiff*. However, I should suppose both clauses must be taken together, and that, the defendant ought to shew that the plaintiff was such a person as is authorised by § 2. to sue in the city court. So it seems to have been understood in *Hickman* v. *Colley*, *B. R. M.* 13 *Geo.* 3. 2 *Str.* 1120; and in *Brampton* v. *Crabb*, *B. R. H.* 3 *Geo.* 1. 1 *Str.* 46. and *Pitts* v. *Carpenter*, *B. R. T.* 16 *Geo.* 2. 2 *Str.* 1191. the suggestion stated both the plaintiff and defendant to be citizens of *London*. The affidavit in this case of *Woolley* v. *Cloutman*, stated only the *defendant's* resiancy, and the rule did not go to the suggestion on the roll of any thing touching the *plaintiff's* description, or where *he* inhabited.—By 23 *Geo.* 2. *cap.* 30. which established the court of the *Tower Hamlets*, there is no restriction as to the plaintiff, and any person may be sued who resides, keeps a shop, shed, stall, or stand, seeks a livelihood, or trades, or deals within the district (§ 5.)

[F 2] In *Sandby* v. *Miller*, 5 *East.* 194. it was decided that an exception similarly penned in 39 and 40 *G.* 3. c. 104. (local act) did not apply to assumpsit on a quantum valebant for tithes due to plaintiff retained by defendant. So in *Foott* v. *Coare*, 2 *B. & P.* 588. the court held that actions of debt on judgments were within 39 and 40 *G.* 3. But in *Jonas* v. *Greening*, 5 *T. R.* 529. the court held that a *special* action on the case for breach of an agreement was not within the court of requests' acts.

1779.

WOOLLEY against CLOUTMAN.

Dunning now shewed cause. He insisted, that this case was within the exception, the words of which are not "*any* "*action of debt for rent*," but "*any debt for rent*;" and therefore the substance not the form of the action was what the legislature had in view, the intention being to prevent questions of title from coming before this inferior jurisdiction. He mentioned a similar case which had been before the court some time ago, on the statute erecting the court of requests in the *Tower Hamlets(a)*, in which there is an exception *(b)* in the very same words with that in the act of *James* I.

The *Solicitor General*, and *Baldwin*, argued in support of the rule. They stated, that such actions had been usually brought in the city court of conscience, and contended, that, by "*other real contracts*," was meant, covenants for rent by deed, and that the exception only extended to actions for rent upon specialties.

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Lord MANSFIELD,—It may have been usual to bring such actions in the city court; if the defendant makes no objection, the cause proceeds of course; but there is no instance where the point has been litigated, and the jurisdiction allowed. The title may come in question in this sort of action; if brought, for instance, by a devisee or purchasor. We think this case is within the exception; and, in the case alluded to by Mr. *Dunning*, we had all formed the same opinion; but it was compromised. It was trespass against the officers of the court of conscience of the *Tower Hamlets*, for taking goods in execution upon a judgment in that court [1].

BULLER, *Justice*, said, the construction put upon the words "*real contracts*," was very improbable, because, at the time when the act passed, it was not necessary that leases should be in writing, much less by deed, which even yet is not required. That, before this action for use and occupation came to be used, (after 11 *Geo.* 2. *c.* 19. § 14.) it was common to bring debt for rent on parol leases.

The rule discharged (*a*) [†69].

(*a*) 23 *Geo.* 2. *c.* 30.

(*b*) § 20.

[1] By 23 *Geo.* 2. *c.* 30. § 1. execution is given against the body or goods.

(*a*) *Vide* the next case, *Ailway* v. *Burrows*, *infra* 263. and *Wiltshire* v. *Lloyd*, *infra* 381.

[†69] *Vide Stean* v. *Holmes*. *C. B. E.* 11 *Geo.* 3. 2 *Black.* 754.

1779.

WASE, Administrator, *against* WYBURD.

Monday, 15th Nov.

If an action of *assumpsit* is brought against an inhabitant of *Middlesex* by an *administrator*, and the damages found are under 40*s.* the defendant is intitled to have that suggested on the roll in the same manner as if the plaintiff had sued in his own right.

THIS was an action of *assumpsit* upon a running account, and the statute of limitations being pleaded, it appeared, on the trial, that none of the *items* were within the six years, except one article of 10*s.* and the plaintiff accordingly had a verdict only for that sum. The defendant having applied for leave to suggest on the roll, that he lived, at the time of the action brought, in the county of *Middlesex*, and was liable to be summoned to the county court under the statute of 23 *Geo.* 2. *c.* 33. by which, in such cases, the plaintiff is not to have his costs, but to pay double costs to the defendant. A rule to shew cause was granted.

Howorth now shewed cause, and contended, that this case was not within the meaning of the act, as persons suing in the character of administrator or executor, are not liable to the payment of costs even where there is a verdict against them.

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The *Solicitor General*, on the other side, insisted, that the defendant had a right to the suggestion whatever consequence it might have, and said, that if it should not entitle him to costs from the plaintiff, it would exempt him from the payment of costs.

Lord MANSFIELD asked if there was any exception as to administrators in the statute, and it appeared that there is no such exception[F].

The rule made absolute *(a)*.

(a) *Woolley* v. *Cloutman*, *supra*, p. 244. *Ailway* v. *Burrows*, *infra* 263. *Wiltshire* v. *Lloyd*, *infra* 381.

[F] So assignees of a bankrupt may sue in the Southwark court of requests, under 23 *G.* 2. *c.* 27. and are liable to costs, if they recover in the superior courts less than 40*s.* *Keay* v. *Rigg*, 1 *B.* & *P.* 11.

1779.

Monday, 15th Nov.

DINGWALL *against* DUNSTER.

Nothing but an *express* declaration by the holder will discharge the acceptor of a bill of exchange.

THE plaintiff, as indorsee of a bill of exchange for £400, dated 10th July 1774, and payable in five months, brought an action of *assumpsit* against the defendant, as acceptor. The cause came on to be tried before Lord MANSFIELD, at the last Sittings for *Middlesex*, when two sorts of defence were set up. 1. That the bill was given for money won at play. 2. That the plaintiff by his conduct, (though not in express terms,) had agreed to discharge the acceptor, and seek his remedy only against the drawer. To prove that the money was won at play, the defendant's counsel called the drawer, (one *Wheate,*) who had been discharged under an insolvent debtors' act; but, as his future effects still remained liable to the debt, his Lordship rejected him as an inadmissible witness [† 70]; and the cause went to the jury only on the other question [1]. They found for the defendant; upon which the plaintiff obtained a rule to shew cause why there should not be a new trial, which came on to be argued this day. The most material facts of the case were as follows: The bill was accepted by the defendant, merely to lend his
[248] credit, and accommodate the drawer. *Fitzgerald*, the payee, indorsed it to the plaintiff, and delivered it to him, in payment for jewels. After it became due, the plaintiff, understanding that the acceptor never had any consideration for accepting it, and that *Wheate* was the real debtor, wrote to one *Ready*, (*Wheate's* attorney,) on the 6th *February*, and on the 4th of *November* 1775, pressing him for the payment. *Dunster*, on the 13th of *February* 1775, wrote a letter to *Dingwall*, thanking him in strong terms for not proceeding against *him*, but mentioning in the same letter, that he had been informed by a person who had been sent from him to *Dingwall* on the business, that *Wheate* had taken up the bill, and given another, to *Dingwall's* satisfaction. It did not appear that *Dingwall* took any notice of that letter. *Dingwall* for some time received interest upon this bill from *Wheate*, and also the principal due by another bill, which was made at the same time, and drawn and accepted by the same parties, and under like

[† 70] But, *vide Abrahams, qui tam,* v. *Bunn*, *B. R. T.* 8 *Geo.* 3. 4 *Burr.* 2251.

[1] If it had been proved, that the bill was for money won at play, it would have been void in the hands of the plaintiff, though an innocent indorsee for a valuable consideration. *Vide* the case of *Bower* v. *Bampton*, *B. R. T.* 14 *Geo.* 2. 2 *Str.* 1155. and *Lowe* v. *Waller*, *T.* 21 *Geo.* 3. *infra* 736.

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DINGWALL against DUNSTER.

like circumstances. The plaintiff suffered several years to elapse without calling upon *Dunster*, or treating him as his debtor.

Dunning, and *Cowper*, in support of the verdict.—The *Solicitor General*, *Peckam*, and *Baldwin*, for the plaintiff.

For the defendant, it was argued, that the holder of a bill of exchange may discharge the acceptor without receiving payment, or delivering up or cancelling the bill. That such discharge may be implied as strongly from circumstances in the conduct of the holder, as if he had expressed it in direct words. That the question was a mere question of fact, to be determined by a jury; and the behaviour of the plaintiff in this case shewed clearly, that he had abandoned all recourse against the acceptor. They cited a case of *Black* v. *Peele*, which was first tried before Lord MANSFIELD, and afterwards before DE GREY, *Chief Justice*, and also *Walpole and others* v. *Pulteney*, in the court of *Exchequer*, which had been tried a few months ago, and in which, they said, there had been an *implied* discharge of the acceptor, and, upon that ground, (the jury having found a verdict for the plaintiff) the court had granted a new trial.

On the other side, it was insisted, that there was no case where any thing short of an *express* discharge had been held to preclude the holder from having recourse upon the acceptor. That silence towards him, for any length of time within the years prescribed by the statute of limitations, is not enough. The holder may proceed against a drawer or indorser, (if he has given proper notice of the non-payment by the acceptor when the bill fell due,) and recover part against him, and yet recur for the remaining part, to the drawer. In the case of *Black* v. *Peele*, there was an express discharge. The case was this: One *Dallas* was the drawer, *Peele* the acceptor, and *Black* an indorsee. *Black* arrested *Peele*, but finding that no consideration had been given for the acceptance, his attorney took a security from *Dallas*, and sent word to *Peele*, "that he had settled with *Dallas*, and he need not trouble "himself any further." *Dallas* afterwards became a bankrupt, and then *Black* demanded payment of *Peele*. In *Walpole* v. *Pulteney*, a book of the plaintiff's own was produced, in which the bill was entered, and over against it this memorandum, "*Mr. Pulteney's acceptance annulled* [2]."

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Lord

[2] That case was tried, a second time, at *Guildhall*, at the Sittings after this term, before *Skynner* Chief Baron, when *Alexander*, who had indorsed the bill to *Walpole*, was produced as a witness on the part of the defendant, and swore, that *Walpole* had positively agreed to consider *Pulteney's* acceptance as at an end. The jury found for the defendant. *Walpole* had kept the bill from 1772 to 1775, without calling upon *Pulteney*.

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DINGWALL against DUNSTER.

Lord MANSFIELD,—There is no doubt but a holder of a bill may discharge any of the parties, but there is this difference between the acceptor and the others, that the acceptor is first liable, and, to be entitled to have recourse against him, it is not necessary to shew notice given to him of non-payment by any other person [F]. In the present case the question is, whether any thing has in fact been done to discharge the defendant. The plaintiff being apprised that *Wheate* was the person for whose benefit the bill was drawn, did right in considering him as his debtor, and recurring to him for payment. The defendant was sensible of his kindness in not resorting to *him* in the first instance, and wrote to thank him for it. No use was made at the trial, nor on the present argument, of what might have been a material circumstance, *viz.* the defendant's having written to the plaintiff, that he had been informed by a person who had been sent from him to the plaintiff to talk with him about the bill, that it had been delivered up to *Wheate*. Probably the fact did not warrant him in this assertion. If the plaintiff, by any thing in his conduct, had confirmed him in such a belief, it might have altered the case; but nothing of that sort appears. I think there is no ground to say he was discharged.

WILLES, *Justice*,—I am of the same opinion. I do not think silence can discharge the acceptor. No case of a tacit discharge has been produced. In *Black* v. *Peele*, the discharge
[250] was in express words. In *Walpole* v. *Pulteney*, the case was put upon the entry in the book being an express discharge. Besides that case is still depending.

ASHHURST, *Justice*,—I am of the same opinion. An acceptor makes himself a debtor, and his case is different from that of the other parties to the bill. Nothing but an express discharge will do. The defendant endeavours to prove a discharge from letters, but they do not come up to it, and the conduct of the plaintiff amounts only to indulgence towards the acceptor.

BULLER, *Justice*,—I am clearly of the same opinion. Nothing but an express agreement can discharge an acceptor. And nothing of that sort appears in this case. The plaintiff's conduct meant nothing more, but that he would try to recover from

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[F] So forbearance, after protest, to sue the acceptor does not discharge the drawer, in those cases where the drawer is entitled to no notice; as where he has no effects in the acceptor's hands. Otherwise, if the holder forbears to present for payment; or enter into a new agreement with the acceptor, so as to give him a new credit. *Walwyn* v. *St. Quintin*, 1 *B. & P.* 652.

from the drawer, who was the original and true debtor, if he could. 1779.

The rule made absolute [† 71].

[†71] ELLIS *v.* GALINDO, *B. R. M.* 24 *Geo.* 3.

Assumpsit, by the payee of a bill of exchange, for £30, against the acceptor. The drawer and acceptor were brothers. When the bill became due, the plaintiff received of the drawer, £3. 15*s.* 4*d.* and, at the same time the following indorsement was made on the bill, *viz.* "Received on account of this bill £3. 15*s.* 4*d.* Balance remaining £26. 4*s.* 8*d.* I promise to pay to Mr. *Thomas Ellis* within three months from the date of this." Signed by *James Galindo*, who was the drawer. The balance was never paid, and, at the distance of three years, this action was brought against the acceptor. The cause was tried before Lord *Mansfield*, who thought the acceptor was discharged, and non-suited the plaintiff.

On a rule to shew cause, why there should not be a new trial, Lord *Mansfield* said, he did not think the case at all interfered with the determination in *Dingwall* v. *Dunster*, which had been cited as a ground for the application. However, the rule was granted.

The *Solicitor General (Lee)*, and *Baldwin*, for the plaintiff contended, that the indulgence for three months could no more be held to amount to a discharge, than the payment of part; and that it was clear law, that payment of part by the drawer would not discharge the acceptor. An acceptor and drawer stand in different situations. The indorsement was made to prevent an imputation of *laches*, because delay in coming against an acceptor, may discharge a drawer or indorser. But nothing under the limitation of six years will discharge the acceptor.

Lord *Mansfield*,—The doubt is, whether, instead of a nonsuit, the question should not have been left to the jury, it being a question of intention arising out of the circumstances. The bill was probably an accommodation bill, as the drawer and acceptor were brothers.

WILLES, *Justice*,—It was established by *Dingwall* v. *Dunster*, that *laches* will not discharge the acceptor. My doubt is, how far this indorsement *necessarily* discharges the acceptor, and I think that question ought to have been left to the jury.

BULLER, *Justice*,—There is no doubt as to the law. It is as has been stated by the counsel for the plaintiff. I rather think the case should have gone to the jury. But I am not therefore of opinion, that there should be a new trial. The indorsement could not have been meant as an additional security, for the drawer was equally liable before. I should have left the question to the jury, but with very strong observations; and, as the demand is so small, I do not think there should be a new trial.

The rule discharged.

Monday, 15th Nov.

PLANCHÉ and Another, *against* FLETCHER.

If goods are insured on board a ship from *London* to *Nantz*, with liberty to call at *Ostend*, and she is cleared only for *Ostend*, but sails directly for *Nantz*, that being the known course of the trade in order to save certain duties both in *England* and *France*, there is no fraud on the underwriter so far as to vacate the policy —If an insurance is made before the commencement of hostilities, but when every body expects a war immediately, the insured is not bound to give the underwriter notice, though the ship do not sail till after the war takes place, and the underwriter is liable in case of *capture*— The courts in this country do not take notice of foreign revenue laws.

THE plaintiffs, *Planché* and *Jacquery*, merchants in *London*, insured goods, "on board the *Swedish* ship called "the *Maria Magdalena*, lost or not lost, at and from *Lon-* "*don* and *Ramsgate* to *Nantz*, with liberty to call at *Ostend*, "being a general ship in the port of *London* for *Nantz*." There was a declaration in the policy, that the insurance was made on account of "certain persons carrying on trade under "the name and firm of *Vallée & du Plessis, Monsieur Lusseau* "*le Jeune, Guillaume Albert, et Poitier de la Gueule*." The defendant underwrote the policy for £300, at three guineas *per cent.* The ship's clearances from the custom-house in *London*, and her other papers, were all made out as for *Ostend* only, but the ship and goods were intended to go directly from *London* to *Nantz*, without going to *Ostend*. Bills of lading, in the *French* language, dated the 18th of *July* 1778, were signed by the captain in *London*, but purporting to be made at *Ostend*, and that the goods were shipped there to be delivered at *Nantz*. The policy was subscribed by the defendant on the 7th of *July*, and the lading was taken in between the 24th of *July* and the 17th of *August*. The proclamation for making reprisals on *French* ships, &c. bore date the 29th, and appeared in the Gazette on the 31st of *July*. Two underwriters had signed the policy after the proclamation, at the same premium of three guineas; one on the 31st of *July*, and the other on the 7th of *August*. The ship sailed on the 24th of *August*, and was taken by a King's cutter on her way to *Nantz*. After her departure from *Gravesend*, the captain threw overboard all the papers he had received from the custom-house at *London*. They had been obliterated by the custom-house officers at *Gravesend*, and were no longer of any use. The ship was released by the Admiralty, but the goods were condemned. The plaintiffs had no connection or share in the ship. Such were the material facts of this case, as they were stated this day, by Lord MANSFIELD in his report, upon a rule to shew cause why there should not be a new trial. The cause had been tried at the last Sittings at *Guildhall*, and a verdict found for the plaintiffs. The grounds of the application for a new trial were two. 1. That there was a fraud on the underwriters, the ship having been cleared out for *Ostend*, and yet never having been designed for that place. 2. That, as hostilities were declared after the policy

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PLANCHE against FLETCHER.

licy was signed, and before the ship sailed, the defendant ought to have had notice, that he might have excercised his discretion whether he would chuse for a peace premium to run the risk of capture. Besides the facts above-mentioned, his Lordship stated, that the plaintiffs had produced evidence to shew, that all ships going with goods of *British* manufacture to *France* clear out for *Ostend* without meaning to go thither, and that this is universally understood by persons concerned in that branch of commerce. The reason suggested for clearing out for *Ostend*, and afterwards making bills of lading as from that place, were, that the light-house duties are saved, which are payable when the voyage is known to be directly down the Channel, and that the *French* duties are less upon goods from *Ostend*, than from *England*.

The *Solicitor General*, and *Bower*, for the plaintiffs—*Dunning*, and *Davenport*, for the defendant.

For the defendant, the fabrication of false and colourable papers, and the suppression of the true destination of the ship, were urged as circumstances of fraud, tending to mislead the underwriter, as to the voyage intended to be insured, and the nature of the risk. But the second objection was chiefly relied upon, and it was said, that it was the duty of the insured to have given the underwriter information, that the ship continued in the river after the proclamation. It was also contended, that in time of war, the exportation of enemy's property, even in neutral bottoms, was illegal, and that an insurance upon such goods was void.

In answer to this, it was said, in the first place, that there was no compulsion, by the terms of the insurance, for the ship to go to *Ostend*. If her fixed destination as understood by the underwriters, had been from *England* to *Ostend*, and from *Ostend* to *Nantz*, the policy would have been otherwise worded; and the course of the trade being notorious, the defendant could not be deceived or misled by her being cleared out for *Ostend*. As to the second objection, the rupture with *France* was impending and expected by all the world at the time when the policy was signed. The proclamation did not contain an interdiction of commerce between the two nations, the packets and mails passed regularly between *Dover* and *Calais* long afterwards. There was nothing illegal in exporting or insuring *French* [253] property in neutral bottoms after the proclamation, and the premium on such goods in neutral ships did not rise for a long time after the commencement of hostilities. If the transaction had *not* been strictly legal, there were cases where the court had refused to grant a new trial on that

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ground when the objection was against the justice and conscience of the case (*a*).

Lord MANSFIELD,—This verdict is impeached upon two grounds. 1. It is said, there was a fraud on the underwriters in clearing out the ship for *Ostend*, when she was never intended to go thither. But I think there was no fraud on them,—perhaps not on any body. What had been practised in this case was proved to be the constant course of the trade, and notoriously so to every body. The reason for clearing for *Ostend*, and signing bills of lading as from thence, did not fully appear. But it was guessed at. The *Fermiers Generaux* have the management of the taxes in *France*. As we have laid a large duty on *French* goods, the *French* may have done the same on ours, and it may be the interest of the farmers to connive at the importation of *English* commodities, and take *Ostend* duties, rather than stop the trade, by exacting a tax which amounts to a prohibition. But, at any rate, this was no fraud in this country. One nation does not take notice of the revenue laws of another [F 1] [☞]. With regard to the evasion of the light-house duties, the ship was not liable to confiscation on that account [F 2]. The second objection is, that the policy was made before, and the ship sailed after, the proclamation for reprisals. But every man in *England* and *France*, on the 17th of *July*, expected the immediate commencement of a war. I will not say it was actually commenced; but the ambassadors of both countries were recalled; the *Pallas* and *Licorne* were taken; the fleets at sea; and, as it appeared afterwards, waiting for each other to fight. It does not appear that the goods were *French* property [1]; an *Englishman* might be sending

(*a*) They cited *Deerly* v. *the Duchess of Mazarine*, *B. R. H.* 8 *W.* 3. 2 *Salk.* 646. *Smith* v. *Page*, *M.* 8 *W.* 3. *B. R. ibid.* 644. *Sparkes* v. *Spicer*, *B. R. H.* 10 *W.* 3. 2 *Salk.* 648—*S. P.* recognized in *Allen* v. *Peshall*, *C. B. M.* 18 *Geo.* 3. 2 *Blackst.* 1177. ☞ *Vide* also *Edmonson* v. *Machell*, *B. R. T.* 27 *Geo.* 3. 2 *Term Rep.* 4.

[☞] *S. P. Boucher* v. *Lawson*, *B. R. H.* 8 *Geo.* 2. *Cases Temp. Ld. Hardw.* 85. 89, 90. *Holman* v. *Johnson*. *B. R. T.* 15 *Geo.* 3. *Cowp.* 341. 343.

[1] It was assumed by the counsel for the defendant, from the names of the persons in whom the interest was declared being *French*, and from the condemnation at the Admiralty.

[F 1] *S. P. per* Lord Mansfield at Nisi Prius, in *Lever* v. *Fletcher*, *Park. Ins.* 237.

[F 2] *Qy.* Whether this does not come within the cases where policies have been held void, the voyage being for *illegal purposes*. *Marshall on Insurance*, 462.

sending his goods to *France* in a neutral ship [F 3]. But it is indifferent whether they were *English* or *French*. The risk insured extends to all captures [2] [F 4], and as other underwriters signed at the same premium, after the proclamation, it appears that the war risk was in view when the defendant signed. Shall he avail himself of an event which encreases the risk, but which he had in contemplation when he underwrote the policy? I am of opinion that there should not be a new trial.

The rule discharged [† 72].

[2] The description of the risk was in the usual printed form.

[† 72] *Vide Henkle* v. *the Royal Exchange Assurance Company, Canc.* 1749. 1 *Vez.* 317.

[F 3] But if it had appeared that the goods were the property of alien enemies, the action could not have been supported; *Brandon* v. *Nesbit* 6 *T. R.* 23. in which this was held to be a good plea to an action on a policy; and that a replication stating that the aliens were indebted to the agent (plaintiff) in more money, was no answer. In *Bristow* v. *Towers, ib.* 35. the same point was ruled, the facts being found upon a special verdict, in an action where the plea was the general issue. But if a prisoner of war enters into a contract, he is not disabled from suing upon it while remaining in that condition. R. in a case where the plaintiff was a subject of a state in amity, but was taken in hostility; and *semb.* it would make no difference if he were alien enemy *born*, *Sparenburgh* v. *Bannatyne*, 1 *B. & P.* 163. So, trading with the enemy is illegal, unless licenced by the king: and if the king by his licence imposes any conditions or restrictions, they must be observed, or the trading will not be protected. *Vandyck* v. *Whitmore*, 1 *East*, 475. (and see *Potts* v. *Bell*, 8 *T. R.* 548). But licence to trade with alien enemy in certain *goods*, protects the *ship*; and an action may be supported on policy of insurance on the ship, though the property of alien enemy, provided the plaintiff on the record is not personally disabled to sue. *Kensington* v. *Inglis, in error*, 8 *East*, 273.

[F 4] It has since been solemnly determined that no insurance, though made in time of peace, can protect against British capture. *Furtado* v. *Rogers*, 1 *B. & P.* 191. and see *acc. Kellner* v. *Le Mesurier*, 4 *East*, 396 *Gamba* v. *Le Mesurier, ib.* 407. and *Brandon* v. *Curling, ib.* 410. In which it was held, that capture by the King or his co-belligerents is virtually excepted from every insurance; and that no indemnity for such capture can be obtained even by action brought after the restoration of peace.

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Monday 15.h Nov.

JOHNSTON and Another *against* Sutton.

An assurance of a voyage expressly prohibited by the laws of this country is void.

THIS was an action on a policy of insurance on goods on board the ship *Venus*, lost or not lost, "at and from "*London* to NEW YORK, warranted to depart with convoy "from the channel for the voyage *(a)*."

The cause was tried before Lord MANSFIELD, at the last Sittings at *Guildhall*, and a verdict found for the plaintiffs. The defendant obtained a rule to shew cause why there should not be a new trial, which came on to be argued immediately after the foregoing case of *Planché* v. *Fletcher*. The facts, upon his Lordship's report, appeared these: The ship was cleared for *Halifax* and *New York*. She had provisions on board, which she had a licence to carry to *New York*, under a proviso in the prohibitory act of 16 *Geo.* 3. *c.* 5. But one half of the cargo, including the goods which were the subject of this policy, was not licensed, and was not calculated for the *Halifax* market, but for *New York*. There had been a proclamation by Sir *William Howe* to allow the entry of unlicensed goods at *New York*, and though there were bonds usually given at the custom-house here, by which the captain engaged to carry the goods to *Halifax*, those bonds were afterwards cancelled, on producing a certificate from an officer appointed for that purpose at *New York*, declaring, that they were landed there. The commander in chief had no authority under the act of parliament to issue such proclamation, or to permit the exportation of unlicensed goods. The *Venus* was taken in her passage to *New York* [1], by an *American* privateer.

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Dunning, and *Peckham*, for the plaintiffs.—The *Solicitor General*, and *Lee*, for the defendant.

On the part of the plaintiffs, it was contended, that a verdict agreeable to the justice and conscience of the case, although

(a) Vide Lilly v. *Ewer*, *supra*, *H.* 19 *Geo.* 3. *p.* 72.

[1] The statute (§ 1.) prohibits all commerce with the province of *New York*, (amongst others,) and confiscates all ships and their cargoes which shall be found trading, or going to, or coming from trading with them. Then there is a proviso (§ 2.) excepting ships laden with provisions for the use of his Majesty's fleets or garrisons, or the inhabitants of any town possessed by his Majesty's troops, provided the master shall produce a licence, specifying the voyage, *&c.* and the quantity and species of provisions; but by the same proviso it is declared, that goods not licensed, found on board such ships, shall be forfeited.

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JOHNSTON against SUTTON.

though the transaction might not be strictly legal, would not be set aside by the court. The cases cited on this point in *Planché* v. *Fletcher* (z), were insisted upon, and a modern case of *Burton* v. *Thompson* (a), was also mentioned, in support of the same doctrine.

On the other side, it was said, that the plaintiff's counsel were so well convinced that the objection was fatal, that they called for the cryer to nonsuit their clients, but the jury delivered their verdict before he could be found. That there was no imputation on the defendant in making this defence, because, on the face of the policy, it was lawful; for licensed goods might be legally carried to *New York*. He was to presume that the goods insured were licensed. The insurer has no opportunity of seeing the clearances.

Lord MANSFIELD,—The whole of the plaintiff's case goes on an established practice, directly against an act of parliament. If the defendant did not know that the goods were unlicensed, the objection is fair as between the parties. If he did, he would not deserve to be favoured. But, however that may be, it was illegal to send the goods to *New York*, and, *in pari delicto, potior est conditio defendentis*. It is impossible to bring this within the cases which have been cited, because here there was a direct contravention of the law of the land. —As to the nonsuit, if it had been recorded, I should have set it aside, that the plaintiffs might not imagine themselves injured by the admission of their counsel.

The rule made absolute [☞].

(z) *Supra, p.* 253. *Note (a).*

(a) *B. R. M.* 32 *Geo.* 2. 2 *Burr.* 664.

[☞] *Vide Delmada* v. *Motteux, B. R. M.* 25 *Geo.* 3 [r].

[r] This case is reported in *Park. Ins.* 234. It decides that a voyage in breach of an embargo, laid on in time of war by the government of the country where the ship happens to be, is illegal, and cannot be the subject of insurance. The same principle was admitted in *Camden* v. *Anderson*, 6 *T. R.* 723. and 1 *B. & P.* 273. and in *Wilson* v. *Marryat*, 8 *T. R.* 31. and 1 *B & P.* 430. where the illegality in question was a violation of the charter of the East India Company.

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Tuesday, 16th Nov.

LEE *against* WHITE and Others.

The inhabitants of one market town, city, borough, or town corporate, are not prohibited by 1 & 2 *Ph. & M.* c. 7. from selling woollen cloth, &c. in other market towns, &c. by retail, and not in open fair.

THIS cause, which was an action of trespass for taking the plaintiff's goods, was tried before HEATH, *Serjeant*, at the last Assizes for *Somersetshire*. The defendants justified under the statute of 1 & 2 *Philip* and *Mary*, *cap.* 7. (*a*). A verdict was found for the plaintiff, but subject to the opinion of the court on a case which stated;—That *Frome* is an ancient market-town, but not a town corporate, nor having any guild, fraternity, or liberty; that the plaintiff at the time of seizing the goods in the declaration mentioned, did not inhabit in *Frome*, but was an inhabitant of the city of *Hereford*, carrying on the trade of a linen-draper there; and that, in the room in the declaration mentioned, in the town of *Frome*, and not in any open fair, he proffered to sell, by retail, the goods in the declaration mentioned, being part linen-cloth, part haberdashery, and the residue mercery wares, not being of his own making[1]; that two of the defendants, being constables of *Frome*, and the other defendants in their aid, entered the room, and seized and carried away the goods.

Batt, for the plaintiff.—*Davenport*, for the defendants.

Batt having mentioned the case of *Davis* v. *Leving*, reported in *Levinz* (*b*), (where upon a demurrer, it was adjudged, that the inhabitants of one market-town might sell their goods by retail in another, and were not meant to be prohibited from so doing by the statute of *Philip* & *Mary*,) *Davenport* admitted, that it was decisive; and the court, without argument, declared themselves to be of that opinion.

The *Postea* to be delivered to the plaintiff.

(*a*) § 1, 2.

[1] By § 5. of the statute, there is an exception as to the linen or woollen cloth of the vendor's own making.

(*b*) *B. R.* 25 *Car.* 2. 2 *Lev.* 89.

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JANSON and Another, Assignees of BURTON, a Bankrupt, *against* WILLSON.

Tuesday, 16th Nov.

The depositions of the act of bankruptcy, when recorded according to 5 *Geo.* 2. *c.* 30. § 41. are evidence, in an action at law, to prove the *precise time* when the act of bankruptcy was committed, if specified therein.

THE defendant having obtained a judgment against *Burton*, levied on his effects to the amount of his debt, on the 25th of *January* 1779. On the 25th of *February* following, a commission of bankruptcy issued against *Burton*, and he was found a bankrupt, on the evidence of *Anne Wells*, then his servant, who swore to several acts of bankruptcy on the 7th and 8th of *January*. Before the sheriff had paid the money over to *Willson*, the assignees gave him notice not to part with it, stating to him, that an act of bankruptcy had been committed before the execution of the writ of *fieri facias*. The sheriff applied for, and obtained, leave to pay the money into court, and the assignees having moved that it might be paid over to them, the court directed a feigned issue to try, "whether *Burton* became a bankrupt before "the 25th day of *January* 1779." At the trial, the plaintiffs proved, that *Anne Wells* was dead, and produced an office-copy of the *record* of her deposition, made according to the directions of the statute of 5 *Geo.* 2. *c.* 30. § 41. in order to shew, that *Burton* had committed an act of bankruptcy before the 25th of *January*. It was objected, at the trial, that it was not the meaning of the statute, that the depositions, when entered of record, should be evidence of the precise time of the party's becoming a bankrupt, but merely that he was so before the commission issued. Lord MANSFIELD, before whom the cause was tried at the last Sittings at *Guildhall*, admitted the evidence; and a verdict was found for the plaintiffs; but his Lordship saved the point; and the defendant, in the beginning of this term, obtained a rule to shew cause why the verdict should not be set aside.

The case came on to be argued, this day, by the *Solicitor General*, and *Davenport*, for the plaintiffs.—*Dunning*, and *Erskine*, for the defendant.

In support of the rule, it was argued, that the purpose of the provision for making a record of the depositions is declared, by the preamble, to be, to protect the titles of purchasers under commissions of bankrupt, which purpose is attained, if depositions so recorded are only admitted as evidence of every thing necessary to support the commission; and, for that end, proof that there was an act of bankruptcy *before* the commission issued, is sufficient. If the more extensive construction were received, the effect, in numberless instances, would be to overturn, instead of establishing titles

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under commissions. A man who has been in possession almost twenty years might lose his estate, in an ejectment, on this sort of evidence. When a commission is opened, the commissioners never inquire, or cross-examine the witness, as to the precise time of the bankruptcy, and therefore no precision on that point is to be looked for in the depositions; and Lord HARDWICKE publicly approved of that method of proceeding, and said, that the commissioners ought not to find the exact time, not thinking *that* within their province. When a statute encroaches on the general rules of law, by making *that* evidence which otherwise is not, it ought to be construed strictly, and not carried beyond the purpose for which the innovation was introduced.

On the other side, it was said, that the act of parliament was compulsory as to reading the depositions in evidence. The degree of credit a jury might chuse to give to them was another question. They might be contradicted or disbelieved. The argument from the manner in which the preamble of the clause of the statute on which the point arose was worded, could have no weight. It specifies only the inconvenience to purchasors of *messuages, lands, tenements, or hereditaments:* would it be contended, that purchasors of *personal property* could not avail themselves of the depositions, when recorded to prove their title? If those depositions are to be read in evidence, they must be taken all together, and cannot be garbled, and part considered as admissible, part not. Besides, the enacting part is general, and says, that copies of the record of depositions made up in the manner directed by the act, "shall and may be given in evidence to prove such "commissions, and the bankruptcy of such person against "whom such commission hath been or shall be awarded, or "*other matters or things* [1]."

Lord

[1] There is a remarkable inaccuracy in this section of 5 *Geo.* 2. *c.* 30. which was not mentioned on the present occasion. After prescribing the manner of entering the commission, deposition, proceedings, and certificate of record, it says, that true copies, "signed and attested *as hereinafter mentioned,*" shall and may be given in evidence, but there is not in the subsequent part of the clause, nor of the act, any provision for attesting or signing the entries so made. It is only enacted that the Chancellor shall appoint a person who shall by himself or his deputy, by a writing under his or their hands, enter of record such commissions, *&c.*—*Qu.* How the copy of the deposition in this case was attested and signed? [P 1.]

[P 1] *Peake's Law of Evidence, p.* 67. "On a liberal construction of "this act it might possibly be im-"plied that power was given to such officer

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Lord MANSFIELD,—At the trial, I had a recollection that this question had come before the court upon some former occasion, and that Sir *Fletcher Norton* had argued it, but I did not remember the event. The objection to the evidence seemed to me to have weight in this cause, where the only fact in issue is the *time* when the bankruptcy took place. I took the safest way. I admitted the evidence, and left the jury to judge of the weight of it, but saved the point for the opinion of the court. Upon consideration it seems clearly determined by the act of parliament itself. The witness cannot tell his story before the commissioners, without saying *when* the act of bankruptcy was committed [F 2]. He must mention *that*, naturally, and of course, and therefore is the more likely to speak the truth. In many cases its being an act of bankruptcy depends on the time. The legislature considered the commissioners as indifferent persons, examining the witnesses with impartiality, and taking care of the interests of all parties. It is very common for the enacting part of a statute to extend beyond the evils mentioned in the preamble, and the *English* language does not afford more general words than those used in the enacting part of this statute. It turns out that this very point was agitated in the case of *Alderson* v. *Temple (a)*, and, after consideration, the court was unanimous, that the act is conclusive, and the depositions admissible evidence to all purposes.

WILLES, and ASHHURST, *Justices*, of the same opinion.

BULLER, *Justice*,—I have a note of *Alderson* v. *Temple*, which mentions this point, and Mr. *Davenport* has lent me one of his, which is very accurate *(b)*. The court, at first, were not aware of the words of the act, but afterwards, though there was no express decision, the audience were impressed with the idea that they were all clearly of the opinion just stated by his Lordship. The preamble of the act does not merely recite the inconvenience arising to purchasors under a commission, but also those to which the *creditors* of a bankrupt were exposed. What Lord HARDWICKE

(a) *T.* 8 *Geo.* 3. 4 *Burr.* 2235. Since reported, 1 *Blackst.* 660. But this point is not mentioned by either of those reporters.

(b) *Buller*, Justice, read *Davenport's* note.

" to certify his inrollment; and then " his certificate would be sufficient " evidence of the copy: but the safer " way would certainly be, to prove " it examined with the original also."

[F 2] In *R.* v. *Erith*, 8 *East.* 539. the court held that hearsay, of the parents, although evidence of the *fact* of birth, was not admissible evidence of the *place*.

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WICKE said has been misunderstood. He was speaking of the *adjudication* by the commissioners, not of the depositions, which must mention the time, so as to fix it after the date of the petitioning creditor's debt, and before the issuing of the commission[2]. Some acts of bankruptcy depend entirely on the time. Thus keeping house on a *Sunday* cannot make a man a bankrupt. It is unnecessary, in this case, to determine, whether the depositions might have been contradicted.

The rule discharged.

[2] The *Solicitor General* said, Lord *Hardwicke*'s reason for advising commissioners to find the bankruptcy generally was, that they might allow all who were creditors prior to the date of the commission to prove their debts.

Tuesday, 16th Nov.

MACDOWALL *against* FRASER.

In a representation that a ship was seen safe on such a day and had performed two thirds of her voyage, if it turn out that she had got as far as was represented, but was lost two days before the day mentioned, the mistake is material, and makes the policy void.

THIS was an action upon a policy of insurance on the ship the "*Mary and Hannah*, from *New York* to *Philadelphia*." At the time when the insurance was made, which was in *London*, on the 30th of *January*, the broker represented the situation of the ship to the underwriter as follows: "The *Mary and Hannah*, a tight vessel, sailed with several armed ships, and was seen safe in the *Delaware on the 11th of December*, by a ship which arrived at *New York*." In fact, the vessel was lost *on the 9th of December*, by running against *a chevaux de frise*, placed across the river. The cause came on to be tried before Lord MANSFIELD, at the last Sittings at *Guildhall*. The defence was founded on the misrepresentation as to the time when the ship was seen; and the representation and the day of the loss being proved, the jury found for the defendant. On *Monday*, the 8th of *November*, *Dunning* obtained a rule to shew cause, why there should not be a new trial, which came on to be argued this day.

The *Solicitor General*, and *Dunning*, for the plaintiff.—*Lee* and *Davenport*, for the defendant.

On the part of the plaintiff, the difference between a warranty and a representation was much enlarged upon. It was admitted, that the representation in this case was false in point of fact, though the insured, at the time, believed it to be true. It was also admitted, that a representation, if false, in a *material* point, annuls the contract. But it was contended, that the particular day when the ship had been seen in the *Delaware* was not material. That the meaning of the

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the representation was to inform the underwriter, that the ship had got safe through two thirds of her voyage from *New York*, and beyond the reach of capture. What was * stated as to that material part was perfectly true, and that was all that was necessary, as was decided in the cases on the insurance of the *Julius Cæsar* (*a*). If the representation had been, that she had been seen on the 8th or 9th in the *Delaware*, it would have made no difference in the premium. There *might* have been circumstances which would have rendered the day material, as a bad storm on the 9th or 10th; but there was nothing of that sort in this case. An intentional misrepresentation was not imputed to the insured. The manner in which the mistake arose was this [1]: The captain who had met the ship said, that he had seen her on the fifth day after her departure from *New York*. It seems a ship is said to sail from *New York* indifferently either when she sails from the quay at *New York*, or from *Sandy Hook*. When the captain mentioned her departure from *New York*, he was understood to mean from *Sandy Hook*, and it was known that she had sailed from thence on the 6th; but it turned out that he meant to speak of her departure from the *quay*, which was some days before.

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For the defendant, it was urged, that the materiality of the fact misrepresented was before the jury, and that they had exercised their judgment upon it, and determined by their verdict, that it was material.

Lord MANSFIELD,—The distinction between a warranty and a representation is perfectly well settled. A representation must be fair and true. It should be true as to all that the insured knows: and, if he represent facts to the underwriter, without knowing the truth, he takes the risk upon himself[☞]. But the difference between the fact as it turns out, and as represented, must be material. The case of the *Julius Cæsar* was very different from this. The ship, there, was only fitting out when the insurance was made. No guns nor men were put on board. It was only said what was meant to be done, and what was done, though different, was as advantageous, or more so, than what had been represented. There was no evidence of actual fraud in the present case, and no question of that sort seemed to be made. But there was a positive averment, that the ship was seen in the *Delaware*, on the 11th of *December*. The underwriter was deceived as to that fact, and entered into the contract under that deception. There was

(*a*) *Patson* v. *Ewer*, *&c. supra*, *p.* 11. *Note* [3].

[1] This was stated from letters written from *New York*, but which had not been produced at the trial.

[☞] So, if the agent of the underwriter does so, his principal is liable. *Fitzherbert* v. *Mather*, *B. R. M.* 20 *G.* 3. 1 *Term Rep.* 12.

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was no evidence at the trial *when* she was seen in the *Delaware*, or in what condition; but, suppose the fact had been explained in the manner now suggested, why did the insured take upon him to compute the day of the month on which she had been seen? Why did he not mention exactly what his information was, and leave the underwriter to make the computation? In insurances on ships at a great distance, their being safe up to a certain day, is always considered as a very important circumstance. I am of opinion, that the representation concerning the day was material.

WILLES, *Justice*,—This is certainly only a representation; but, in an insurance on so short a voyage, it might have made a material difference whether the ship was known to be safe two days sooner or later. It ought to have been shewn, on the part of the plaintiff, that it was not material, but there was no evidence that the ship was met on the 9th, or any other day. The materiality was proper for the consideration of the jury.

ASHHURST, *Justice*,—The distinction which the court has made in the cases on the *Julius Cæsar*, and some others, between a representation and a warranty, is extremely just. There is no imputation of fraud in this case; but the insured should have been more cautious. In the former cases the representation was of what was intended; here, it was of a fact, stated as having happened within the knowledge of the insured. He should have made the representation in the same words in which the intelligence is said to have been communicated to him.

BULLER, *Justice*,—We cannot say the difference of the day was not material. The safety of the ship is the most material fact of any, in cases of insurance. The plaintiff admits, that the place where she was met in safety was material. Why was not the time equally so? There was no intentional deceit, and it is perhaps unfortunate that the insured made the mistake; but I think the verdict right.

The rule discharged [☞]

[☞] *Vide Stewart* v. *Dunlop*, *Dom. Proc.* 1785 [F].

[F] See *Barber* v. *Fletcher*, and *Shirley* v. *Wilkinson*, *infra*, 305, 306.

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PRITCHARD *against* PUGH.

Wednesday, 17th Nov.

ON *Monday*, the 8th of *November*, *Mingay* had moved, as of course, to change the venue from *Middlesex* to *Montgomeryshire*, on the usual affidavit, that the cause of action arose there. The court however expressed considerable doubts, and * only granted a rule to shew cause, which was argued on *Tuesday* the 17th, by *Davenport* for the plaintiff, and *Mingay* for the defendant. *Mingay* relied on the case of *Waddington* v. *Thelwell*, reported in *Burrow (a)*. He read a manuscript note of that case lent him by *Kenyon*, who was counsel in it. There a similar rule was granted, and made absolute, but there was no opposition. The other cases cited in *Waddington* v. *Thelwell* were also mentioned, and BULLER, *Justice*, read several of them from manuscript notes in his possession. He said the doubt was to whom the writ of enquiry must be directed in case of judgment by default. The court desired the case to be mentioned again this day, but *Davenport* now produced an undertaking of the plaintiff to give material evidence in *Middlesex*, which rendered it unnecessary for the court to determine the question [1].

It is not settled whether the court can change the venue from an *English* to a *Welsh* county.

*[263]

The rule discharged.

(a) *T.* 3 *Geo.* 3. 4 *Burr.* 2450.

[1] In *M.* 15. *Geo.* 3. a similar motion came on in *C. B.* in the case of *Freeman* v. *Gwyn*, reported in 2 *Blacket.* 962. The rule there was made absolute, but no cause was shewn against it, so that the point is still undecided [†73].

[†73] *T.* 22 *Geo.* 3. in a cause of *Jones* v. *Thomas*, a rule was obtained by *Bower*, to shew cause, why the venue should not be changed into *Carmarthenshire*; *H.* 24 *Geo.* 3. in *Jones* v. *Rees*, *Le Blanc* obtained a similar rule, to change the venue into *Glamorganshire*; and *M.* 25 *Geo.* 3. in *Wilkins* v. *Williams*, a like rule was obtained by *Douglas*, for changing the venue to *Breconshire*; but the first and last never came on again, and that in *Jones* v. *Rees* was made absolute without opposition. ☞ A similar rule was afterwards obtained on the motion of *Caldecott* in *Hiles* v. *Meredith*, *B. R. T.* 25 *Geo.* 3.

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Wednesday, 17th Nov.

AILWAY *against* BURROWS, Executor.

An executor cannot be sued in the court of conscience for the county of *Middlesex*.

THIS was an action brought upon an apothecary's bill, owing by the defendant's testator, in which the plaintiff had a verdict for £1 5*s*. *Peckham*, some days ago, obtained a rule to shew cause, why the defendant should not have leave to suggest on the roll that he lived in *Middlesex*, and that the debt was under 40 shillings.

DAVENPORT now shewed cause, and insisted, that it could not be meant that executors should be sued in the county court of conscience. That the legislature could not intend to give to such a court an authority to enquire into the conduct of executors, and take an account of assets. That the jurisdiction is only given against persons who *owe* any debt to the plaintiff, and an executor is not in law considered as *owing* his testator's debts.

[264] *Peckham*, on the other side, observed, that, in the establishment of several courts of this sort, there is an express exception relative to testamentary questions (*a*), and, as there is none in the act of 23 *Geo.* 2. *c.* 33. [1], it was a fair inference that no such exception was meant. That the expression of "*owing*" is not to be found in that act, and is in the others (*b*). At any rate, the court would, (as they had done in a very late case of the same sort (*c*), allow the suggestion of the fact, leaving the consequence in point of law for subsequent consideration.

Lord MANSFIELD,—The court will not permit the suggestion of a matter on the roll, unless it appear to be relevant, and it could not be meant to give this court of conscience a jurisdiction over executors. If there is no express exception, there is one implied from the nature and reason of the thing.

The rule discharged (*d*).

(*a*) *Vide* 3 *Jac.* 1. *c.* 15. § 6. (cited *supra*, p. 245) and 23 *Geo.* 2. *c.* 30. § 20.

[1] The only exception in this statute, when the defendant lives in *Middlesex* and *is liable to be summoned to the court*, is in cases where the "judge "shall certify *in open court* on the "back of the record; that 1. the freehold, or 2. the title to the plaintiff's "land, or 3. an act of bankruptcy, "principally came in question." § 19. —None are liable to be summoned but such as were so, to the old common-law county court, and the new court can hold plea of no action, cause, or suit, except such as were within the old jurisdiction, § 4.

(*b*) As in 3 *Jac.* 1. *c.* 15. and 23 *Geo.* 2. *c.* 30.

(*c*) *Wose* v. *Wyburd*, *supra*, *p.* 246.

(*d*) *Vide supra Woolley* v. *Cloutman*, *p.* 244. *Wase* v. *Wyburd*, *p.* 246. and *Wiltshire* v. *Lloyd*, *infra*, 381.

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GOODRIGHT, Lessee of DOCKING, and two Others *againſt* DUNHAM and Another.

Wednesday, 17th Nov.

If an estate is devised,—to the testator's son for life, and after his death to the son's children and their heirs, and in case the son die without issue then to the testator's two daughters (then *in esse*) and their heirs—the estate to the children of the son and that to the daughters are both *contingent* remainders in *fee*, and a recovery by the tenant for life bars them both.

THIS was an ejectment, tried before SKYNNER, *Chief Baron*, at the last Assizes for *Norfolk*, when a case was reserved for the opinion of the court, which, (as far as was material,) was as follows: *Thomas Laming*, being entitled to a remainder in fee, in the premises in question, expectant on the death of *Ann Bulver*, tenant for life, by a codicil to his will, devised them, in the following words: —" I give my " messuage, &c. (describing the premises,) *to my son* Jeffrey " Laming *for his life, and, after his death, unto all and* " *every his children equally, and to their heirs, and, in case* " *he dies without issue, I give the said premises unto my said* " *two daughters and their heirs, equally to* * *be divided be-* " *tween them.*"—The testator died in the life-time of *Ann Bulver*, having left the said *Jeffrey* his only son and heir at law, who, after the death of *Ann Bulver*, entered upon the premises, and suffered a recovery thereof, to the use of himself in fee, and afterwards conveyed them to the defendants. He died in 1778, without having ever had any issue. Two of the lessors of the plaintiff were the two daughters of *Thomas Laming*, mentioned in the codicil to his will, and the the third was a person to whom they had, in 1776, conveyed their interest expectant on the death of their brother.

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The case was argued, on *Tuesday*, the 16th of *November*, by *Le Blanc*, for the plaintiff, and *Lee*, for the defendants.

The court desired *Lee* to begin.

He argued, that, wherever a freehold estate is first limited, sufficient to support the subsequent limitations as *remainders*, they shall never be considered as *executory devises* (*a*) [☞]. Here, the estate given to *Jeffrey* was for life, and the limitation to his children and their heirs was clearly a contingent remainder in fee. The remainder over must, therefore, of necessity, be contingent also, because there cannot be a vested remainder after a limitation in fee (*b*). *Luddington* v. *Kime* (*c*), is so directly in point as not to be distinguishable from the present case. The devise there was to *A.* for life, without impeachment of waste; and in case he should have any issue-male, then to such issue-male, and his heirs *for ever*; and if

(*a*) *Purefoy* v. *Rogers*, 2 *Saund.* 388. (*b*) *Vide* 10 *Co.* 85.
[☞] *Wealthy, Lessee of Manley*, v. *Bostille*, *B. R. E.* 9 *Geo.* 2. *Ca. Temp. Ld. Hardw.* 258, 259. (*c*) *C. B. E.* 9 *W.* 3. 1 *Ld. Raym.* 203. 1 *Salk.* 224. 3 *Lev.* 431.

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if he should die without issue-male, then to *B.* and his heirs for ever. *A.* entered, suffered a common recovery, and died without issue; and it was held, that the two remainders over after *A.*'s life-estate were concurrent [† 74], contingent remainders in fee, and both barred by the recovery. Though it seems very clear that *Jeffrey* took only an estate for life, yet it will answer the purpose of the defendants equally well to consider him as having taken an estate-tail, because, in that case, there can be no doubt but the recovery barred all subsequent remainders. *Doe, Lessee of Browne,* v. *Holme & Longmire (d),* is another case almost exactly in point. An estate was there left to the testators's son for life, with impeachment of waste, and, after his decease, unto the heirs-male [266] or female lawfully to be begotten of the body of his said son, they paying out of the same, a sum of £400, &c. which if they did not pay within a limited time, then the estate to go to his daughter and her heirs, till the said legacies should be raised out of the rents and *mesne* profits, and, when that should be done, to *return* to the heir-male or female lawfully begotten by his said son, and to his or her heirs *for ever;* but, *if his said son should die leaving no issue,* then to his said daughter, and his heirs for ever. The son entered, and suffered a recovery, and died, without ever having had any issue. The daughter, upon his death, brought an ejectment, but the court of *Common Pleas* held clearly, that her interest, *quàcunque viâ,* was barred, being a contingent remainder in fee limited after a prior contingent remainder in fee.

Le Blanc said, he took it to be admitted, that the estate to *Jeffrey* was only an estate for life, and contended, that the limitation to his children was only in tail, and therefore the remainder over, being to persons *in esse,* was vested, and, of course, not destroyed by a recovery suffered by a mere tenant for life. At least the question was still open; for, in the two cases relied on, on the other side, the words by which the intermediate estate was limited, were different from those in the present will. In *Luddington* v. *Kime,* the expression "*for ever*" is super-added, which is a strong indication of the intent to give a fee-simple. In *Doe* v. *Holme,* there is the same expression, and the estate limited is charged with the payment of a large sum of money, which is a circumstance that has always weighed considerably in questions whether the estate intended was for life, in tail, or in fee. In a will, it is not of course that the word "*heirs*" shall carry an estate in fee-simple. If subsequent expressions manifest an intention only to give an estate-tail, the court will

[† 74] *Vide infra, p.* 505, *Note.* 3 *Wils.* 237. 241. Since reported, 2. *Blackst.* 777.

(d) C. B. T. 11 & M. 12 Geo. 3.

will lay hold of them [☞]. Now, here, the daughters were *collateral-heirs* to their brother's children; if, therefore, the testator had meant that the estate to the brother's children should be a fee-simple, the limitation over would be nugatory, and without any meaning, because the heirs of the children could never be exhausted while the daughters or their heirs continued to exist. There are many cases of this sort, where a limitation to *heirs* has been restrained to *heirs of the body*, when the limitation over has been to a *collateral* heir of the person named in the prior limitation. Thus, in *Webb* v. *Hearing* (*a*), the limitation was to the testator's son, *and, if the testator's three daughters should overlive their brother, and his heirs*, then to them; and the daughters being collateral heirs to the son, the words "*his heirs*" were restrained to *heirs of the body* [1]. 1779. GOODRIGHT against DUNHAM. [267]

Lord MANSFIELD.—In that case, the court put the only possible construction on the words. The daughters could not outlive the son's collateral heirs, and therefore it was necessary there to restrain the sense. But here the words are very different; the limitation over is not "if the daughters "survive *the son's children and their heirs*," but "*if the* "*son die without issue.*"

Lee, in reply, admitted the general doctrine, that subsequent words, indicating an intent to give an estate-tail, will restrain the sense of the word "*heirs*," in a will, but insisted, that here the intention was clear the other way. He said, if the words had been, "*and if those children*" (*i. e.* of the son) "*should die without issue*," the case would have been within the rule mentioned by *Le Blanc*, and like the case of *Doe, Lessee of Barnard, & another* v. *Reason*, (*a*), where, after an estate to the testator's niece for life, there was a limitation to such issue of the niece as should be living at her death, and to the *heirs* of such issue; but which was followed,

[☞] And this in the case of a grant, as well as of a will. "*Come* "*mettons que jeo donne terre* a vous et "a vos heirs a toujours *en le primes* "*del' fait, et puis jeo di oultre* et si "contingat que vous deviez sans heir "de votre corps, il remaine a un "autre, *en cest cas le ley entendra per* "*le* si contingat, *que votre estat est* "*estat tail.*" 19 *Hen.* 6. 74. *B.*

(*a*) *B. R. H.* 14 *Jac.* 1. *Cro. Jac.* 415.

[1] *Vide* also *Tyte* v. *Willis*, *Ca. temp. Talb.* 1. *Nottingham* v. *Jennings*, 1 *P. Will.* 23. *Parker* v. *Thacker*, 3 *Lev.* 70. *Attorney-General* v. *Gill*, 2 *P. Will.* 369. *Tilburgh* v. *Barbeck*, 1 *Vez.* 89 [† 75].

(*a*) *B. R. T.* 28 & 29 *Geo.* 2. cited at large *in* 3 *Will.* 244.

[† 75] *Morgan* v. *Griffith*, *B. R. H.* 15 *Geo.* 3. *Copp.* 234.

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followed, not only by the words, "*in case my niece shall* "*die without issue of her body then living,*" but also by these words, "*or in case all such issue shall die without* "*issue.*"

The court took till this day to consider, Lord MANSFIELD observing that the case must be determined exactly in the same manner as if *Jeffrey* had had children.

His Lordship now delivered the opinion of the court as follows:

Lord MANSFIELD,—Neither side thought it could be maintained that *Jeffrey* took an estate-tail. The words, "and in case he dies without *issue*," being tacked to the preceding clause, must mean the same thing as "and in "case he dies without *children*" [F. 1]. But, for the defendants, it was contended, that both the limitations over were contingent remainders in fee; and, for the plaintiff, that the first was a contingent remainder in tail, and the second a vested remainder in fee [F 2]. None of us have a doubt but that both are contingent remainders. There are no expres-

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sions to restrain the sense of the word "*heirs*" in the limitation to *Jeffrey's* children. If *Jeffrey* had children, the testator meant to give them an estate in fee. Upon the contingency of his not having any he meant the estate to go immediately to his daughters in fee. The word "*heirs*" in the limitations over to the daughters, certainly does not mean "*heirs of the body,*" and we cannot give the same words two different senses, in different parts of the same will [1].

The *Postea* to be delivered to the defendants [† 76] [F 3].

[1] In *Webb* v. *Hearing*, the word "*heirs*," did not occur in the *last* limitation.

[†76] *Vide Denn, Lessee of Geering*, v. *Shenton*, *B. R. H.* 16 *Geo.* 3. *Cowp.* 410. *Doe, Lessee of Hanson*, v. *Fyldes*, *B. R. T.* 18 *Geo.* 3. *Cowp.* 833.

[F 1] So in *Doe* v. *Collis*, 4 *T. R.* 294. the word "issue" was held a word of purchase, and not a word of limitation, in order to effectuate the devisor's intention. See also *Lewis* v. *Waters*, 6 *East*, 336. In *Seale* v. *Barter*, 2 *B. & P.* 485. the words "and "his children lawfully to be begotten" were held words of limitation, and to give an estate tail. In *The King* v. *the Marquis of Stafford*, 7 *East*, 521. the court held a devise "to A. for life, remainder to preserve, &c. remainder to the issue of A's body, in such shares, manner, and form as A. should appoint, and in default of appointment to all the *children* of A. and *their heirs*, as tenants in common, and *in default of such issue*, then over," (A. dying without appointment) gave a fee to A's only child: the word *issue*, referring, as here, to *children*. And see *Robinson* v. *Grey*, 9 *East*, 1.

[F 2] If the preceding estate be less than a fee, the subsequent remainder will vest. *Vide Fearne Cont. Rem.* 341.

[F 3] In *Doe* v. *Perryn*, 3 *T. R.* 484.

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SIMOND and Another *against* BOYDELL.

Wednesday, 17th Nov.

On an insurance on goods,—to be shipped on board a certain ship, to return part of the premium, "*if sails* "*with convoy* "*and arrives,*" —the arrival of the ship is what is meant, and, the full return is to be made on the whole sum insured, although there should be an average loss on the goods.

THIS action was brought against an underwriter, for a return of premium. The material part of the policy was in these words: "At and from any port or ports in *Grenada* "to *London*, on any ship or ships that shall sail on or be- "tween the first of *May* and the first of *August* 1778, at "eighteen guineas *per cent.* to return £8 *per cent. if sails* "from any of the *West India* islands, *with convoy for the* "*voyage* (*a*), *and arrives.*" At the bottom there was a written declaration, that the policy was, "on sugars, (the "muscavado valued at £20 *per* hogshead,) for account of "*L. Q.* being on the first sugars which shall be shipped for "that account." The ship, the *Hankey*, sailed, with convoy, within the time limited, having on board fifty-one hogsheads of muscovado sugar belonging to *L. Q.* She arrived safe in the *Downs*, where the convoy left her; convoy never coming farther, and indeed seldom beyond *Portsmouth*. After she had parted with convoy, she struck on a bank called the *Pan Sand*, at *Margate*, and eleven of the fifty-one casks of sugar were washed over-board, and the rest damaged. The ship was, afterwards, got off the bank, and proceeding up the River, arrived safe in the port of *London*, and was reported at the custom-house. The sugars saved were taken out at *Margate*, and,

(*a*) *Supra*, *Lilly* v. *Ewer*, *H.* 19 *Geo.* 3. p. 72.

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484. The authority of this case was recognized; and there under a devise to B. the wife of A. for life, remainder to trustees to preserve, &c. remainder to *all and every the children of A. & B. and their heirs for ever*, to be divided among them equally, and if one child only, to that child and his, or her heirs for ever, and *for default of such issue*, remainder over, A. & B. having no children at the death of the devisor, it was held that the estate limited to their children was a contingent remainder in fee, becoming vested at the birth of each child. So, in *Doe* v. *Burnsall*, 6 *T. R.* 30, where the devise was of all testator's estates to A. and the issue of her body as tenants in common, but in default of such issue, or if, being such, they should die under twenty-one, and without leaving issue of their bodies, then over; it was held that the estate limited to the children was a contingent remainder in fee; and consequently that all the limitations subsequent to A's life estate were contingent, and destroyed by a recovery suffered by A. The same construction was put on the same will in *Burnsall* v. *Davy*, 1 *B. & P.* 215.

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and, after undergoing a sort of cure, by a person sent from town for that purpose, they were carried to *London* in other vessels; and the forty hogsheads being sold, produced £340 instead of £800, which was their valuation in the policy The defendant had paid into court the value of the sugars lost, and a return of £8 *per cent.* on £340. The plaintiffs insisted, that they were entitled to have eight *per cent.* also returned on the *valued* price of the eleven hogsheads of sugar which were lost, and on the difference between what the remaining forty hogsheads produced, and their valued price. The cause was tried before Lord MANSFIELD, at *Guildhall*, at the Sittings after last *Trinity Term (b)*, when a verdict was found for the plaintiffs, to the amount of their demand. On *Monday* the 8th of *November*, *Bearcroft* obtained a rule to shew cause, why there should not be a new trial, which was argued this day.

The *Solicitor General*, *Dunning*, and *Douglas*, for the plaintiffs,—*Bearcroft*, *Lee*, and *Davenport*, for the defendant.

For the plaintiffs, it was insisted, as at the trial, that the word "*arrives*" applied only to the arrival of the ship. That, in policies of this sort, the intention is, that the underwriters shall take the war risk upon themselves, but that, if the vessel is protected by convoy from *that risk*, and actually arrives, they shall then return as much of the premium as was meant to cover it. That this is more advantageous for them, than when they receive the *short* or *peace* premium, and the insured warrants a departure with convoy, and runs the hazard of captures; because, in such cases, the underwriters must pay the whole loss, for a *short* premium, if the ship sail with convoy, although she should founder as soon as she gets out of the harbour; whereas, on a policy like the present, by the addition of the condition of arriving, they keep the *long* premium, unless two events happen; 1. that of the ship sailing with convoy, 2. her arrival. The additional premium therefore of eight *per cent.* having been given upon the whole valued amount of the sixty-one hogsheads, to be retained only in case the ship should not sail with convoy, or should not arrive, the whole ought, from the words, as well as meaning of the contract, to be returned, since both those events happened.—(It was suggested, that, after the return of the £8 *per cent.* the underwriters would be great gainers, for that the peace premium from *Grenada* in summer, is only two, and in winter, three guineas).—It could never be meant, by the word "*arrives*," that all the goods should arrive in a sound state, because it is impossible in so long a voyage that some proportion,

(b) *Thursday*, 17th *July* 1779.

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tion, greater or less, should not be lost, or damaged. The very use of the word in the singular number shewed the general understanding that it was meant to apply to the ship.

On the other side, it was contended, that the return of premium to which the plaintiffs were entitled, could, at most, only be on the sum produced by the sugars which had actually come to *London*. The words in the policy must be applied to the subject-matter of the insurance, which, in this case, was on goods, not on the ship, and therefore the condition of arrival applied to them. They had not all arrived at *London*, nor any part of them in the vessel in which they had sailed from *Grenada*; so that the defendant might here have fairly contended, that, as the second branch of the condition had not been performed, he was not liable to make *any* return. However, eight *per cent.* on the produce of the sugar which was actually brought to *London* had been paid into court; but if it were to be held, that the defendant must pay the valued amount of the sugars lost, and the balance between the valued price and actual produce of the sugars saved, and also return eight *per cent.* upon the whole, the insured would be gainers considerably by the loss. This would be clear upon considering that, in calculating the value in a valued policy, the merchant includes the full premium of insurance. The £20 at which each hogshead of sugar was valued in this case comprehended, over and above the value of the sugar, an addition at the rate of eighteen guineas *per cent.* upon that value [1]. If therefore the insured were to be paid £20 for each hogshead of sugar lost, and also eight *per cent.* more, as a return of premium, they would get £8 *per cent.* more by the loss of the sugar than they would have got by it if it had arrived. But this would be contrary to the nature of insurance, which is a mere contract of indemnity, not of profit.

Lord MANSFIELD,—The antient form of a policy of insurance, which is still retained, is, in itself, very inaccurate, but length of time, and a variety of discussions and decisions, have reduced it to a certainty. It is amazing when additional clauses are introduced, that the merchants do not take some advice in framing them, or bestow more consideration upon them themselves. I do not recollect an addition made which has not created doubts on the construction of it. Here a word or two more would have rendered the whole perfectly clear. However I have no doubt how we must construe this policy. Dangers of the sea are the same in time of peace and of war, but war introduces hazards of another sort, depending on a variety

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[1] The whole argument turned upon this suggestion, which was said to be founded on the acknowledged practice but was not supported by any proof, in this case.

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variety of circumstances; some known, others not, for which an additional premium must be paid. Those hazards are diminished by the protection of convoy, and if the insured will warrant a departure with convoy, there is a diminution of the additional premium. If the insured will not warrant a departure with convoy, he pays the full premium, and in that case the underwriter says, "If it turn out that the "ship departs with convoy, I will return part of the pre-"mium." But a ship may sail with convoy and be separated from it by a storm, or other accident, in a day or two, and lose its protection. On a warranty to sail with convoy, *that* would *(a)* not be a breach of the condition; but, to guard against that risk, the insured adds, in policies of the present sort, "the ship must not only sail with convoy, but she must "*arrive*, to entitle you to the return." The words "*and arrives*" do not mean that the ship shall arrive in the company of the convoy, but only that she herself shall arrive. If she does, that shews either that she had convoy the whole way or did not want it. But, in the stipulation for the return of premium, no regard is had by the parties to the condition of the goods on the arrival of the ship. The construction contended for by the defendant, is adding a comment longer than the text. If it had been meant that no return should be made unless *all* the goods arrived *safe*, they would have said, "if the ship arrive *with all the goods*," or "*safely with all the goods*." The total or partial loss of the goods was the subject of the indemnity, and must be paid for by the underwriter. But, as to the return of the additional premium, whether the goods arrive safe or not, makes no part of the question. The single principle which must govern is, that in the events which have happened, the war-risk has been rated too high.

WILLES, and ASHHURST, *Justices*, of the same opinion.

[272] BULLER, *Justice*,—I am of the same opinion. The question is for the decision of the court, not of a jury, since it arises on the construction of a written instrument. What gives rise to an increase of the premium? The danger of capture. When that danger is diminished, the construction must be, that there shall be a proportional return of premium.

The rule discharged [F].

(a) *Vide supra*, *Lilly* v. *Ewer*, p. 72, 73.

[F] In *Aguilar* v. *Rodgers*, 7 *T. R.* 421. the present case was referred to as a leading case of established authority: and it was there decided on an insurance on freight, that the assured was entitled to a return of premium on the arrival of the ship at her destined port; though she had first been captured, and recaptured, and taken into another British port, and the salvage paid by the underwriters. But *semb. aliter*, if the destined

HOTHAM and two Others *against* the EAST-INDIA COMPANY.

Thursday, 18th Nov.

THE ship *York*, of which two of the plaintiffs were part-owners, and the third captain, had been freighted by a charter-party between them and the *East-India Company*, on a voyage from *London* to *India* and back to *London*. On her return home she met with a most uncommonly violent storm, off *Margate*, where she was stranded, on the first of *January* 1779, and sunk under water. By this misfortune, a great part of her cargo (being salt-petre) was lost; the principal part of what remained, which consisted chiefly of pepper, was greatly damaged by the sea-water, but was got out of the ship, by persons sent down by the *Company*, and brought to town in other vessels, where a particular process was employed, at a great expence to the *Company*, to restore it, in some degree, and render it marketable. The ship, after being in a great measure unloaded, was, with much difficulty raised out of the water, and arrived in the port of *London*, with a small part of the cargo still remaining on board. The plaintiffs insisted, that she had arrived at her port of discharge, and had performed her voyage within the meaning of the charter-party, and that, notwithstanding the misfortune which had happened, and the loss of part, and the damage done to the rest, of the cargo, they were entitled to be paid the freight of the goods saved, and the demurrage. The defendants contended; *First*, that in the events which had happened, they were discharged from the payment of any freight, or demurrage; *Secondly*, that if they were liable for freight and demurrage, yet, by certain clauses in the charter-party, they were entitled to deduct therefrom the value of the goods lost; the loss upon those which were saved in a damaged state; and the expences they had been put to in getting those damaged goods to

If one covenant with another, to do a certain act in consideration of a reward, and the other prevent the stipulated thing from being literally performed, and accept of an equivalent, he may be sued for the reward, and the reason of the non-compliance with the literal terms may be *averred*—Freighters of ships under charter-parties with the *East India Company*, are not answerable for *damage* or *loss*, occasioned by the act of God—*Ship-damage*, in those charter-parties, means, damage from negligence insufficiency, or, bad stowage in the ship.

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tined port had been neutral, and the ship had been taken thither by *an enemy* after capture; because that would not have been an arrival *in the course of her voyage*.

In another case, where the ship arrived, and was unloading several days, when she was captured in port, and the underwriters on goods were liable for a total loss, Sir J. Mansfield, C. J. at *Nisi Prius*, held, on the authority of the present case, that the assured were also entitled to the return of premium. *Horncastle* v. *Haworth*, 2 *Marsh. on Ins.* 674.

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to *London* and rendering them marketable. A common action of covenant was at first brought on the charter-party, to which the defendants pleaded; but afterwards both parties consented to try the questions in dispute between them in four different feigned issues, which were as follows:

1. Whether the plaintiffs were, or were not, entitled to any and what freight or demurrage in respect of the ship and voyage in the charter-party mentioned?

2. Whether the plaintiffs were liable to pay or allow to the defendants any sum or sums of money in respect of the goods and merchandizes which had been shipped on board the said ship, and which had been *lost*, or not delivered to the defendants on her arrival in *England*?

3. Whether the plaintiffs were liable to pay or allow, *&c.* in respect of a certain quantity of pepper which had been shipped, *&c.* and which had been prejudiced, wet, and damnified, before the arrival of the ship at *London*?

4. Whether the plaintiffs ought to pay or make satisfaction to the defendants, for the expences they were at, in saving and bringing to *London* certain goods and merchandizes which were taken out of the ship when she was stranded, or otherwise concerning the said goods?

These issues came on to be tried, before Lord MANSFIELD, at *Guildhall*, at the Sittings after last *Trinity Term*.

There were two clauses in the charter-party on which the defence on the *first* issue was founded; *viz.*

1. "And as touching the freight to be paid or allowed by "the *Company*, it is agreed, and the *Company* covenant "with the said part-owners, that the *Company* shall, and "will, *in case and upon condition that the ship performs her "voyage and arrives at London in safety*, and the said part-"owners and masters do perform the covenants on their "part, and *not otherwise*, well and truly pay and allow the "freight herein mentioned (*a*)."

2. "It is hereby agreed, that in case the ship does not "arrive *in safety* in the river *Thames*, and there make a "right delivery of the *whole and entire* cargo and inding on "board the said ship as aforesaid, the *Company* shall not be "liable to pay *any of the sums of money herein before "agreed to be paid for freight and demurrage*, nor subject "to any demands of the said part-owners or master on ac-"count of the said ship's earnings in freight, voyages for "the *Company*, or on account of any other employment, "any other law, usage, practice, or custom, notwithstanding "(*b*)."

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The following clause was the foundation of the defence on the *second* issue.

"And

(*a*) P. 8 of the printed form of the *East India Company*'s charter-parties.

(*b*) *Ibid.* p. 11.

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" And, if any of the homeward-bound cargo shall be " *lost or undelivered into the said Company's warehouses* at " the said ship's arrival in *England*, (except that no such " payment shall be made if there happens an utter ine- " vitable loss of ship and cargo, nor shall any other payment " be made for such goods as shall necessarily perish or be " cast into the sea for the preservation of the ship and cargo, " than by an average to be borne by ship, freight, demurrage, " and cargo,) the part-owners, and master, *shall pay or* " *allow* to the *Company* the prime cost of such goods, and " £30 for every £100 on such prime cost (*c*)."

On the *third* issue they relied on the following clauses:

1. " But, if any of the homeward-bound cargo, when " delivered into the *Company's* warehouses in *England, shall* " *be found to be* prejudiced, wet, or damnified, *by any oc-* " *casion or accident whatsoever*, it shall be lawful for the " *Company* to refuse such goods, and in such case the part- " owners and master shall take them, and allow to the " *Company* the sums which they are invoiced at, with " charges, customs, and duties; and in such case the *Com-* " *pany* shall pay no charges or freight for the said goods " so prejudiced, wet, or damnified, unless in cases of da- " maged pepper, which the part-owners and master are " to allow the *Company* for at the current price of sonnd " pepper in *London*, and the *Company* are to pay the " freight and charges on such pepper as if it were not damni- " fied (*d*)."

2. " But the said part-owners shall not be charged with " any sum of money in respect of goods damaged on board " the said ship, but such as shall, by the condition and " appearance of the package thereof, or by some other " reasonable proof, appear to be *ship-damage;* any thing " herein-contained to the contrary thereof in anywise not- " withstanding (*e*)."

3. A provision for paying demurrage to the owners, if the ship should be dispatched safe from the *Malabar* coast, and should not make the passage in a limited time; and which adds, " and the owners shall not be responsible for *any* " *damage* that may happen to the homeward-bound cargo, " *occasioned by such late dispatch (f)*."

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The jury having found for the plaintiffs on the three first issues, (*viz.* That freight was to be paid for all the *Company's* goods delivered, and demurrage, as specified in the charter-party; 2. That the plaintiffs were not liable to pay for any goods lost, or not delivered; 3. That they were not liable to pay or allow for any loss on the pepper), and for the defendants on the last, (*viz.* That the plaintiffs were to pay to the

(*c*) *Ibid.* p. 4, 5.
(*d*) *Ibid.* p. 4, 5.
(*e*) *Ibid.* p. 13.
(*f*) *Ibid.* p, 14.

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the defendants their proportion of the expences in saving the goods and merchandizes, by way of general average, as specified in the charter-party, and the whole *extra* expence of bringing the goods from *Margate)*, a rule was obtained by the defendants to shew cause, why there should not be a new trial on all the issues found against them; and the case was argued this day, by *Lee*, *Davenport*, *Baldwin*, and *Erskine*, for the plaintiffs, and the *Solicitor General*, and *Dunning* for the defendants.

The counsel for the defendants relied, as to the freight and demurrage, on the strict terms of the instrument, by which it was stipulated, that neither should be paid for, unless the ship should arrive *in safety* in the river *Thames*, and *there* make a right delivery of the *whole and entire* cargo. If the plaintiffs had proceeded in covenant, such an arrival and such a delivery must have been averred, and was now necessary to have been proved to make out the case on the part of the plaintiffs. In a court of law, the stipulations of the deed must appear to have been exactly complied with; and, if any relaxation was to be allowed, on principles of equity, recourse must be had to a court of equity.

The same reasoning was equally applicable to the second issue.

On the third, they insisted, that "*ship-damage*" was synonimous to "sea-damage," and meant, damage happening at sea, in contradistinction to any injury the goods might have received before they were put on board, not merely damage at sea occasioned by insufficiency in the ship or the misconduct or negligence of the master or mariners, which was the interpretation contended for on the part of the plaintiffs. Without any stipulation, the owners and master would have been answerable to the *Company* for losses arising from those causes. The word "*ship-damage*," it is true, was meant to *controul* the general words in a preceding part of the instrument, by virtue of which the plaintiffs would otherwise have been liable if the goods had been prejudiced or damnified by any occasion or accident of *any sort*; but, according to the construction contended for by the plaintiffs, this prior clause would be totally *annulled* by the other. The saving in case of a late departure from the *Malabar* coast, affords an additional proof that sea-hazards from weather, storm, *&c.* were meant. For how could a detention beyond the usual season increase the danger of damage from insufficiency in the vessel (independent of what the weather might occasion), or from misconduct in the master or the crew?

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On the other side, it was insisted, that this sort of instrument ought to receive a liberal construction. The non-compliance

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compliance with the letter of it, in not delivering the cargo in the river *Thames*, was owing to the act of the defendants themselves, in sending their servants on board, who took it out of the ship without any participation with the plaintiffs. This discharged them from the necessity of performing strictly that part of the contract (as to which the case of *Sparrow* v. *Caruthers*, reported in *Strange (a)*, was in point), and the discharge might have been averred in an action of covenant. That, as to the goods damaged or lost, the charter-party was certainly very confused and ill-digested, full of contradictions, owing to the circumstance of different clauses having been added at different times, without attention to the coherence and consistency of the whole. But it must be interpreted in a manner the most consistent with good sense, and the nature and the general tendency of the whole contract. The expression of "*ship-damage*" could not be used in opposition to damage received before the goods are put on board, because the owners could never be answerable for that sort of injury, and therefore it never could have been thought necessary to introduce words to declare that they were not [1]. It must mean damage received on board of the ship, and occasioned by negligence or misconduct; surely not damage arising, as in the present case, from the act of God, which no human care could prevent. If there were any doubt, the special jury who had exercised their judgment upon it were certainly most competent to determine it, no question being more exclusively fit for their consideration. The owners therefore were by that clause exempted from responsibility for any other sort of damage but ship-damage so understood, and the foregoing words "by any accident whatsoever" were thereby controuled and restrained. Then, as to the goods lost, this being the clear meaning of ship-damage, and universally so understood by persons conversant with the subject, it could never be the intention of the contract, that, though the owners were not to be answerable for goods *damaged*, they were for goods *lost*, by the act of God. The strict compliance with the words on which the defendants relied as to the goods lost, was never expected. The cargoes of *Indiamen* are never delivered into the *Company's* warehouses, but only into lighters belonging to the *Company*. *Edwin* v. *The East India Company (a)*, and *Edwards* v. *Child (b)*, were cited. Lord

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(a) *T.* 18 *Geo.* 2. *Str.* 1236.

[1] It was said, that the clause mentioning ship-damage was first introduced in 1759, when the *Ilchester East-Indiaman* was lost. The then *Solicitor-General* had given an opinion, that the charter-party, as it then stood, would make the owners liable for losses by storms, and with the express design of preventing that construction, this new clause was adopted.

(a) *Canc. H.* 1690. 2 *Vern.* 210.

(b) *Canc. M.* 1716. 2 *Vern.* 727.

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Lord MANSFIELD,—I have no doubt, but that, if the delivery at *Margate*, was in the contemplation of the parties, substituted for a delivery at *London*, it might have been averred in an action of covenant *(c)*, because there can be no material fact in a cause which may not be put upon record, or given in evidence on the general issue. The *Company* are not liable to any imputation. The part they took, when the calamity happened, was what humanity and justice required, and can be of no prejudice to either side. The charter-party is an old instrument, informal, and, by the introduction of different clauses, at different times, inaccurate, and sometimes contradictory. Like all mercantile contracts, it ought to have a liberal interpretation. In construing agreements, I know no difference between a court of law and a court of equity[1]. A court of equity cannot *make* an agreement for the parties; it can only explain what their true meaning was; and that is also the duty of a court of law. I told the jury, that the instrument must have a liberal construction, according to the true intention, and I left the construction to them more than in common cases ought to be done, because the province of construing written instruments belongs to the court. On the point of *ship-damage* I had considerable doubts, which I stated fully to the jury. The *Company* have thought fit to bring the case before the court, but, upon hearing the argument, I am now clear that the verdict was right on all the issues. As to the first, the *Company*, by receiving part of the cargo, have waved all objections concerning the delivery[2]. The principal question is, whether the owners are to pay for the damage occasioned by the storm—the act of God; and this must be determined by the intention of the parties, and the nature of the contract. It is a charter of freight. The owners let their ships to hire, and there never was an idea that they insure the cargo against the perils of the sea. The *Company* stand their own insurers. Words must be construed according to the subject-matter. What are the obligations upon the owners which arise out of the fair construction of the charter-party? Why, that they shall be answerable for damage incurred by their own fault, or that of their servants, as from defects in the ship,

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(c) *Vide Jones* v. *Barkley*, *infra*, *T.* 21 *Geo.* 3. p. 684.

[1] In the case of *Edwin* v. *The East India Company*, *Vernon* makes the court say, "Though the charter-party is so penned, that nothing can be recovered at law, yet the plaintiffs have a just demand, and ought to be relieved in equity."

[2] His Lordship had interrupted the defendants' counsel to ask, whether the Company could mean seriously to insist, that they were to have the use of the ship, and the goods which had been delivered, and not pay for the freight of them.

ship, or improper stowage; such as mixing commodities together which hurt one another, *&c.* If they were liable for damages occasioned by storms, they would become insurers, not freighters [F]. Many of the difficulties which have been raised, are occasioned by the multiplicity of unnecessary words, introduced with a view to be more explicit; an effect which often arises from the same cause in acts of parliament. It seems the question had occurred in the year 1759, and the clause mentioning ship-damage was introduced in order to fix the risks for which the owners were to be answerable. That clause rides over all the former part of the charter-party. As to the other point of *the goods lost*, the whole is one entire contract, and must be understood in a manner consistent with itself; and it never could be intended, that the owners should be protected from the lesser loss, and remain answerable for the greater.

WILLES, *Justice*, absent.

ASHHURST, *Justice*,—I am of the same opinion. The consideration, that the owners are not insurers, controuls every branch of the instrument. If the proviso concerning ship-damage had been wanting, there might have been some doubt; as the case stands there is none.

BULLER, *Justice*,—I am of the same opinion. There could have been no doubt on the subject of the first issue, if the parties had gone on in the usual way, by an action of covenant on the charter-party. If an act undertaken to be done is dispensed with by the other-party, it is sufficient so to state it on the record; special pleading being nothing but a bare narration of facts in a legal form.

The rule discharged.

[F] There is a distinction in this respect between *goods* and *ship*: "for "it is in common experience that the "owners of ships are in some sort "their own insurers," per Lawrence, J. in *Beatson* v. *Schank*, 3 *East*, 233.; where it was provided by the charter-party, that in case of the "inability "of the ship to execute or proceed on "the service," an abatement should be made in the freight; and it was held, that inability by reason of disease among the crew, and desertion from apprehension of it, was inability within the terms of the proviso.

1779.

Friday, 19th Nov.

Moss *against* GALLIMORE and Another.

A mortgagee, after giving notice of the mortgage to the tenant in possession under a lease prior to the mortgage, is intitled to the rent in arrear at the time of the notice, as well as to what accrues afterwards, and he may distrain for it after such notice.—In a notice for the sale of a distress under 2 *W. & M.* c. 5. it is not necessary to mention when the rent became due for which the distress was made.

IN an action of trespass, which was tried before NARES, *Justice*, at the last Assizes for *Staffordshire*, on not guilty pleaded, a verdict was found for the plaintiff, subject to the opinion of the court, on a case reserved. The case stated as follows:—One *Harrison*, being seised in fee, on the 1st of *January* 1772, demised certain premises to the plaintiff for twenty years, at the rent of £40, payable yearly on the 12th of *May*; and, in *May* 1772, he mortgaged the same premises, in fee, to the defendant Mrs. *Gallimore*. *Moss* continued in possession from the date of the lease, and paid his rent regularly to the mortgagor, all but £28 which was due on and before the month of *November* 1778, when the mortgagor became a bankrupt, being, at the time, indebted to the mortgagee in more than that sum for interest on the mortgage. On the 3d of *January* 1779, one *Harwar* went to the plaintiff, on behalf of *Gallimore*, shewed him the mortgage deed, and demanded from him the rent then remaining unpaid. This was the first demand that *Gallimore* made of the rent. The plaintiff told *Harwar*, that the assignees of *Harrison* had demanded it before, *viz.* on the 31st of *December*; but, when *Harwar* said that *Gallimore* would distrain for it if it was not paid, he said he had some cattle to sell, and hoped she would not distrain till they were sold, when he would pay it. The plaintiff not having paid according to this undertaking, the other defendant, by order of *Gallimore*, entered, and distrained for the rent, and thereupon gave a written notice of such distress to the plaintiff, in the following words: "Take "notice, that I have this day seized and distrained, *&c.* by vir- "tue of an authority, *&c.* for the sum of £28, *being rent, and "arrears of rent, due to the said* Ester Gallimore, *at* Mi- "chaelmas *last past, for*, &c. *and unless you pay the said "rent*, &c." He accordingly sold cattle and goods to the amount of £22. 2*s*.—The question stated for the opinion of the court, was, Whether, under all the circumstances, the distress could be justified?

Wood, for the plaintiff.—*Bower*, for the defendants.

Wood,—The plaintiff's case rests upon two grounds. 1. The defendant, *Gallimore*, not being, at the time when the rent distrained for became due, in the actual seisin of the premises, nor in the receipt of the rents and profits, she had no right to distrain. 2. The notice was irregular, being for rent due at *Michaelmas*, whereas this rent was only due, and payable in *May*.—1. Before the statute of 4 *Anne*, *c.* 16. (*a*), a con-

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(*a*) § 9.

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a conveyance by the reversioner was void without the attornment of the tenant *(b)*, which was necessary to supply the place of livery of seisin. Since that statute I admit that attornment is no longer necessary to give effect to the deed; but it does not follow from thence, that a grantee has now a right to distrain, before he turns his title into actual possession. The mortgagor, (according to a late case *(c)*,) is tenant at will to the mortgagee, and has a right to the rents and profits due before his will is determined. Nothing, in this case, can amount to a determination of the will, before the demand of the rent on behalf of the mortgagee, and the whole of that for which the distress was made became due before the demand. If the mortgagor himself had been in possession, he could not have been turned out by force; the mortgagee must have brought an ejectment. The assignees had called upon the plaintiff for the rent, as well as *Gallimore*, and how could he take upon himself to decide between them? The mortgagee should have brought an ejectment, when any objection there might have been to the title could have been discussed. It does not appear from the case, that the interest in arrear had ever been demanded of the mortgagor, and there is a tacit agreement, that the mortgagor shall continue in possession and receive the rents till default is made in paying the interest.—2. The notice is irregular, and, on that account, the distress cannot be justified. By the common law, the goods could not be sold. The power to sell was introduced by the statute of *William* and *Mary (d)*, but it is thereby required, that notice shall be given thereof "*with the cause of taking*," &c. These requisites are in the nature of conditions precedent, and, if not complied with, the proceedings are illegal. It is true, this irregularity, since the statute of 11 *Geo.* 2. *(e)*, does not make the defendants trespassors *ab initio*, but the action of trespass is still left by that statute, for special damages incurred in consequence of the irregularity.

Lord MANSFIELD observed, that the plaintiff was precluded, by the case, from going for special damages arising from any supposed irregularity in the sale, no such special damages being found, and the question stated being only, whether the distress was justifiable; and BULLER, *Justice*, said, that it was not necessary by the statute of *William & Mary*, to set forth, in the notice, at what time the rent became due.

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Bower,

(b) Co. Litt. 309. *a. b.*
(c) Keech v. *Hall*, *supra*, *M.* 19 *Geo.* 3. *p.* 21.
(d) 2 W. & M. sess. 1 *cap.* 5. § 2.
(e) Cap. 19. § 19.

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Moss against GALLIMORE.

Bower,—If the law of attornment remained still the same as it was at common law, the conversation stated to have taken place between the plaintiff and *Harwar* would amount to an attornment; and, when there has been an attornment, its operation is not restrained to the time when it was made: it relates back to the time of the conveyance, and makes part of the same title; like a feoffment and livery, or a fine or recovery and the deed declaring the uses; *Long* v. *Heming* (*a*). *Now*, however, any doubts there might have been on this subject are entirely removed, by the statute of Queen *Anne*, the words of which are very explicit, *viz.* (*b*), "that "all grants or conveyances of any manors, rents, reversions, "or remainders, shall be as good and effectual to *all intents* "*and purposes*, without any attornment of the tenants, as if "their attornment had been had and made." The proviso in the same statute (*c*) which says, that the tenant shall not be prejudiced by the *payment* of any rent to the grantor before he shall have received notice of the grant, shews, that it was meant that all the rent which had not been *paid* at the time of the notice should be payable to the grantee. The mortgagor is called a tenant at will to the mortgagee. *That* may be true in some respects, but it is more correct to consider him as acting for the mortgagee in the receipt of the rents as a trustee, subject to have his authority for that purpose put an end to, at whatever time the mortgagee pleases. It is said, the proper method for the mortgagee to have followed would have been to have brought an ejectment, but it is only a very late practice to allow a mortgagee to get into the possession of the rents, by an ejectment against a tenant under a lease prior to the mortgage (*d*). The interest, it is said, is not stated to have been *demanded*; but the case states, that, at the time of the notice and distress, more than the amount of the rent in arrear was *due*. It is said, the tenant could not decide between the mortgagor, (or, which is the same thing, his assignees,) and the mortgagee; but that is no excuse. He would have had the same difficulty in the case of an absolute sale; a mortgage in fee being, *at law*, a [282] complete sale, and only differing from it in respect of the equity of redemption, which is a mere *equitable* interest.

The court told him it was unnecessary for him to say any thing on the other point.

Lord MANSFIELD,—I think this case, in its consequences, very material. It is the case of lands let for years and afterwards mortgaged, and considerable doubts, in such cases, have arisen in respect to the mortgagee, when the tenant colludes

(*a*) 1 *Anders.* 256. *S. C. Cro. El.* 209.

(*b*) 4 *Anne*, *c.* 16. § 9.

(*c*) § 10.

(*d*) *White* v. *Hawkins*, *supra*, *M.* 19 *Geo.* 3. *p.* 23. *Note* [7].

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Moss against GALLIMORE.

lades with the mortgagor; for, the lease protecting the possession of such a tenant he cannot be turned out by the mortgagee. Of late years the courts have gone so far as to permit the mortgagee to proceed by ejectment, if he has given notice to the tenant that he does not intend to disturb his possession, but only requires the rent to be paid to him, and not to the mortgagor [F 1]. This however is entangled with difficulties. The question here is, whether the mortgagee was or was not entitled to the rent in arrear. Before the statute of Queen *Anne*, attornment was necessary, on the principle of notice to the tenant; but, when it took place, it certainly had relation back to the grant, and like other relative acts, they were to be taken together. Thus livery of seisin, though made afterwards, relates to the time of the feoffment. Since the statute, the conveyance is complete without attornment, but there is a provision, that the tenant shall not be prejudiced for any act done by him, as holding under the grantor, till he has had notice of the deed. Therefore the payment of rent before such notice is good. With this protection he is to be considered, by force of the statute, as having attorned at the time of the execution of the grant; and, here, the tenant has suffered no injury. No rent has been demanded which was *paid* before he knew of the mortgage. He had the rent in question still in his hands, and was bound to pay it according to the legal title. But having notice from the assignees, and also from the mortgagee, he dares to prefer the former, or keeps both parties at arm's length. In the case of execution it is uniformly held, that if you act after notice, you do it at your peril. He did not offer to pay one of the parties on receiving an indemnity. As between the assignees and the mortgagee, let us see who is entitled to the rent. The assignees stand exactly in the place of the bankrupt. Now, a mortgagor, is not properly tenant at will to the mortgagee, for he is not to pay him rent. He is so only *quodam modo*. Nothing is more apt to confound than a *simile*. When the court, [283] or counsel, call a mortgagor a tenant at will, it is barely a comparison. He is *like* a tenant at will. The mortgagor receives the rent by a tacit agreement with the mortgagee, but the mortgagee may put an end to this agreement when he pleases. He has the legal title to the rent, and the tenant, in the present case, cannot be damnified, for the mortgagor can never oblige him to pay over again the rent which has been levied by this distress. I therefore think the distress well justified; and I con-

[F 1] This is no longer admitted, *vide* notes to *White* v. *Hawkins*, *supra* 23.

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Moss against Gallimore.

I consider this remedy as a very proper additional advantage to mortgagees, to prevent collusion between the tenant and the mortgagor.

Ashhurst, *Justice*,—The statute of Queen *Anne* has rendered attornment unnecessary in all cases, and the only question here arises upon the circumstance of the notice of the mortgage not having been given till after the rent distrained for became due. Where the mortgagor is himself the occupier of the estate, he may be considered as tenant at will; but he cannot be so considered, if there is an under-tenant; for there can be no such thing as an under-tenant to a tenant at will. The demise itself would amount to a determination of the will. There being in this case a tenant in possession, the mortgagor is, therefore, only a receiver of the rent for the mortgagee, who may, at any time, countermand the implied authority, by giving notice not to pay the rent to him any longer.

Buller, *Justice*,—There is in this case a plea of the general issue, which is given by statute *(a)* but if the justification appeared upon the record in a special plea, the distress must be held to be legal. Before the act of Queen *Anne*, in a special justification, attornment must have been pleaded. But since that statute, it is never averred in a declaration in covenant, nor pleaded in an avowry. In the case of *Keech* v. *Hall*, referred to by Mr. *Wood*, the court did not consider the mortgagee as tenant at will *to all purposes*. If my memory do not fail me, my Lord distinguished mortgagors from tenants at will in a very material circumstance, namely, that a mortgagor would not be entitled to emblements. Expressions used in particular cases are to be understood with relation to the subject-matter then before the court.

The *Postea* to be delivered to the defendants [† 77] [ᵖ 2].

(a) 11 *Geo.* 2. *c.* 19. § 21.

[† 77] *Vide Eaton* v. *Jaques*, *M.* 21 *Geo.* 3. *infra*, 455.

[ᵖ 2] In *Birch* v. *Wright*, 1 *T. R.* 378. this case was confirmed by the court, and fully re-stated by Buller, J. who declared by Lord Mansfield's desire, that his Lordship continued satisfied with the decision. In that case it was determined that the grantee of a reversion, in trust for payment of an annuity, might recover in an action for use and occupation against a tenant from year to year, who came in under the grantor before the grant, all the rent unpaid in his hands at the time of notice of the grant.

1779.

The KING *against* MILES.

Friday, 19th Nov.

A RULE had been obtained to shew cause, why leave should not be given to file an information against the defendant, as the author of a libel, accusing the prosecutor (Mr. *Sykes*) of having been concerned in a monopoly in the *East Indies*, which produced a famine, and occasioned the death of 30,000 people.

It is a *general* rule, that the court will not grant an information for a private libel charging a particular offence, unless the prosecutor will deny the charge upon oath.

Upon shewing cause, it was objected, that the prosecutor, in the affidavit on which the rule was granted, had not sworn directly, and pointedly, to his innocence of the charge, which it was said, was universally required by the practice of the court, before an information will be granted for a libel accusing a private individual of a specific crime.

Lord MANSFIELD said, this was a *general* rule, though not *universal*, for that he recollected some instances, where, under particular circumstances, it had been dispensed with (*a*), but that there was nothing in this case to make it an exception to the general practice.

The rule discharged.

(*a*) *Vide Rex* v. *Bate*, *E.* 20 *Geo.* 3. *infra*, *p.* 387. ☞ *Rex* v. *Webster*, *T.* 29 *Geo.* 3. 3 *Term Rep.* 388.

LAVABRE and Another *against* WILSON;—BIZE *against* FLETCHER;—and LAVABRE and Another *against* WALTER.

Friday 19th Nov.

THE first and last of these cases were actions on the same policy of insurance, on the *Carnatic*, a *French East Indiaman*. The first was tried at *Guildhall*, at the Sittings after *Easter Term* (*a*), and a verdict found for the plaintiffs. Afterwards, at the same Sittings (*b*), *Bize* v. *Fletcher*, which was an action upon a *different* policy, but on the *same* ship, came on to be tried; and a verdict was also found for the plaintiff in that cause, and acquiesced in. In *Trinity Term*, 19th *George* III. (*c*), a rule was granted

If an insured ship quit the course described in the policy, from necessity, she must pursue such new voyage of necessity in the direct course, and in the shortest time, otherwise the underwriters will be discharged.

(*a*) *Wednesday*, 19th *May* 1779.
(*b*) *Monday*, 31st *May* 1779.
(*c*) *Monday*, 7th *June* 1779.

1779.

LAVABRE against WILSON.

granted to shew cause why there should not be a new trial in the case of *Lavabre* v. *Wilson*, which rule stood over till this term. In the mean time, at the Sittings after *Trinity Term*, 19th *George* III. *(d)*, *Lavabre* v. *Walter* was tried, and a verdict having been found in that case likewise for the plaintiffs, a new trial was moved for in the beginning of this term *(e)*, and a rule to shew cause being granted, the court directed that this last-mentioned rule, and that in *Lavabre* v. *Wilson*, should come on to be argued at the same time. All the three trials were before Lord MANSFIELD.

In *Lavabre* v. *Wilson*, and *Lavabre* v. *Walter*, the voyage insured was described in the following words: "At and from "*Port L'Orient* to *Pondicherry*, *Madras* and *China*, and "at and from thence back to the ship's port, or ports of discharge in *France*, with liberty to touch in the *outward* or "*homeward-bound voyage*, at the *Isles* of *France* and *Bourbon*, and at all or any other place or places what or whersoever." And there was this additional clause in a subsequent part of the policy, *viz.* "And it shall be lawful for the "said ship, *in this voyage*, to proceed and sail to, and touch "and stay at any ports or places whatsoever, as well on this "side, as on the other side of the Cape of *Good Hope*, without being deemed a deviation."

In *Bize* v. *Fletcher*, the description of the voyage insured was as follows, (being nearly the same with that commonly used in insurances upon *English East-Indiamen:*) "At and "from *L'Orient* to the *Isles* of *France* and *Bourbon*, and to "all or any ports and places where, and whatsoever, in the "*East-Indies*, *China*, *Persia*, or, elsewhere, beyond the *Cape* "*of Good Hope*, from place to place, and during the ship's "stay, and trade backwards and forwards, at all ports and "places, and until her safe arrival back at her last port of "discharge in *France*." But, at the same time that this policy was subscribed, there was a slip of paper wafered to it, and shewn to the underwriters, on which was written the following representation *(f)*: "The ship has had a complete "repair, and is now a fine and good vessel, three decks. *In*"*tends* to sail in *September* or *October* next (1776). Is to "go to *Madeira*, the *Isles* of *France*, *Pondicherry*, *China*, "the *Isles* of *France*, and *L'Orient*."

The ship did not sail till the 6th of *December* 1776, and did not reach *Pondicherry* till the 23d of *July* 1777. She continued

(d) *Friday*, 16th *July* 1779.
(e) *Tuesday*, 9th *November* 1779.
(f) *Supra*, p. 12. *Note* [4]. col. 2. [r].

[r] And see the report of *Bize* v. *Fletcher*, *Park Ins.* 203.

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continued there till the 23d of *August* following, when, instead of proceeding to *China*, she sailed for *Bengal*, where having passed the winter, and undergone very considerable repairs, she sailed from thence early in the year 1778, (being the second ship that left the *Ganges*,) returned to *Pondicherry*, and after taking in a homeward-bound cargo, at that place, proceeded in her voyage back to *L'Orient*, but was taken in *October* in that year by the *Mentor* privateer. The usual time in which the direct voyage between *Pondicherry* and *Bengal* is performed, is six or seven days, but the *Carnatic* was about six weeks in going to *Bengal*, and two months on the way back from thence to *Pondicherry*. Both going and returning, she either touched at, or lay off, *Madras*, *Masulipatam*, *Visigapatam*, and *Yanon*, and took in goods at all those places.

1. On the trial of *Lavabre* v. *Wilson*, it was, in the opening for the plaintiffs, insisted, that, under the general liberty, given by the policy of touching at all places whatsoever, the vessel might go to *Bengal*, which, by the operation of those words, was as much part of the voyage, as if it had been expressly named. That the ship being there, the voyage might be abridged, and her farther progress to *China* abandoned, for that vessels insured may always return back from any point within the limits of the voyage contained in the policy. Lord MANSFIELD, however, having intimated a clear opinion, that the general words were, by the expressions of "*in the "outward, or homeward-bound voyage*," and "*in this voy-"age*," qualified and restrained so as to mean "*all places "whatsoever in the usual course of the voyage to and from "the places mentioned in the policy*," this ground was immediately abandoned, and never farther mentioned by the counsel for the plaintiffs in the progress of these causes [1]. The plaintiffs rested their case *chiefly* on another ground, *viz.* that the voyage to *Bengal* was adopted by necessity for the safety of the ship, upon the *bonâ fide* opinion of the captain and the rest of the officers, and of one *Berard* the supercargo, who had the principal management. To prove this necessity, it was sworn by *Berard* and four mates, that the ship had been detained longer in *Europe*, than at first was foreseen, and that she met with extremely bad weather on her outward passage, and at *Pondicherry* was so leaky, that it appeared [287] to them, upon consultation, that she must be careened, which could only be done at *Bengal*, there being no other place so near as for her, in her then situation, to be able to proceed to it

[1] The plaintiffs had several opinions of *Dutch* and *French* lawyers in their favour, on this point.

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it with safety, where that operation could be performed; for that no harbour between *Pondicherry* and *the Ganges* on one side, and *Pondicherry* and *Bombay* on the other, would admit of so large a vessel being hove down, her burthen being near 800 tons. Indeed, it turned out when they got to *Bengal*, that she could be repaired without careening, but this was only discovered, they said, after she was unloaded of much more of her contents than could have been done with safety in the open road of *Pondicherry*. All the witnesses for the plaintiffs swore that they took the resolution of going to *Bengal* much against their inclination, for that it would have been not only more for the advantage of the owners, but also more for their private interest as individuals, to go to *China*, they having prepared their own adventures for that market. Besides the circumstance of the leak, they assigned an additional reason for relinquishing the voyage to *China*, *viz.* that they had been detained so long at *Pondicherry*, from delays in unloading their outward-bound cargo, that they were not ready to leave that place, till it was too late to undertake the *China* voyage with any degree of prudence or safety, and they said *Bengal* was the best place they could go to winter at.

The defence set up was; 1. That the ship had never sailed on the voyage insured, her destination, *when she left Europe*, having been for *Bengal* and not *China*; 2. That, supposing her to have *sailed* on the voyage described in the policy, yet her going from *Pondicherry* to *Bengal*, instead of proceeding to *China*, was a deviation, and was not justified by necessity. In support of the *first* ground of defence, certain secret instructions were relied upon, which were found on board the ship, and were addressed by the owners at *L'Orient* to *Berard* the supercargo, and which, though obscurely penned, gave great room to contend, either that at her departure it had been resolved to substitute *Bengal* for the *China* voyage, or, at least, that the alternative was left with *Berard*, to be decided one way or the other, according to certain events in *India*, which events turned out in the sort of way that, according to the instructions, was to determine the voyage for *Bengal*. On the *second* ground they contended, that from the account given by the plaintiffs' own witnesses, there was no necessity for going to *Bengal*, and, that it appeared, that, instead of going directly thither, a trading voyage had been made from *Pondicherry*, which afforded a strong presumption, that trading was the object and motive; and that the leak, or lateness of the season, were only after-thoughts, and mere pretexts. They called two or three captains of *English East-Indiamen* to prove that, in the situation and at the time of year specified by the witnesses for the plaintiffs, the ship might have proceeded to *China*, or have returned

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to *Europe*, or might have stretched over to *Achem*, or *Malacca*, or have gone to *Ceylon*, with more propriety than to *Bengal*, for the purpose of careening, if that had been necessary. But, on these matters of opinion, the defendant's witnesses differed from one another very considerably, in several particulars.

Lord MANSFIELD told the jury; 1. That *Bengal* was certainly not within the words of the policy; But, 2. That, if they should think, that, at the time of the ship's departure from *Pondicherry*, the captain and officers were, *bonâ fide*, of opinion, that to go to *Bengal* was a matter of necessity, or what common prudence rendered their indispensable duty, and that there was no other motive for going to that place instead of *China*, they must find for the plaintiffs; for that going to any port, though out of the course of the voyage, is, in the eye of the law, no deviation, if necessary for the safety of the ship. On the other hand, if they thought the necessity set up a mere colour and pretext, and that the voyage to *Bengal* was determined upon from other motives, they must find for the defendant. But, in considering this question, they must not lay much stress on the opinions of other people, formed after the event, when the real state of the ship, and the nature of the leak, had been discovered. Men of different degrees of skill, experience, or understanding, might differ extremely in their judgment on the same subject, as they had seen by the diversity of opinions delivered by the different captains who had been examined.

2. On the trial of *Bize* v. *Fletcher*, the counsel for the defendant contended, that the representation accompanying the policy restrained the voyage to the limits therein specified, and brought the merits of the case to be the same as in *Lavabre* v. *Wilson*; and they produced some additional evidence, (particularly some letters written by the owner to their correspondents who had got the policy underwritten,) to raise a presumption, that the necessity of going to *Bengal* was merely [289] a pretence, devised after the capture, and when the insured began to apprehend that the words of the policy would not cover a voyage to that place.

Lord MANSFIELD, in summing up to the jury in this cause, after stating very fully the difference between a representation and warranty, told them, that, if they were satisfied that the real intention at the time of the representation was to go to *China*, the plaintiff would be entitled to their verdict; for that the insured might change the intention in this case, and go to *Bengal*, and yet be protected by the policy, which clearly admitted of that voyage, and must have been understood by both parties in a greater latitude than the representation, being expressed in different and much more comprehensive terms. His Lordship then stated, and observed upon, the evidence which was given on the part of the defendant to

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shew that the necessity was fictitious; being (I presume) of opinion that if the jury had believed it to be so, it would have afforded a presumption that the original plan, even at the time of the representation, was to go, not to *China*, but to *Bengal*.

When the motion was made for a new trial in *Lavabre* v. *Wilson*, the new evidence which had been produced in *Bize* v. *Fletcher* was relied upon; but Lord MANSFIELD told the counsel, that, if they meant to make the discovery of new and material evidence the ground of their motion, they must lay it before the court by affidavit, that there might be an opportunity given to the other side of answering it; for that he could not, in his report of what passed on the trial of *Lavabre* and *Wilson*, state any of the evidence produced in the other cause.—Such affidavits were afterwards produced.

3. The evidence in the case of *Lavabre* v. *Walter*, was nearly the same as in *Bize* v. *Fletcher*. The secret instructions given to *Berard* had been more attentively perused, and afforded stronger reasons than they at first seemed to do, to suspect that the voyage to *Bengal* was predetermined, before the departure from *L'Orient*. The plaintiffs' witnesses were much pressed on this occasion, to say, whether the lateness of the season alone was such as, independent of the leak, would have determined them to abandon the *China* voyage; and, on the other hand, whether the leak, independent of the other reason, would, in their opinion, have rendered it necessary so to do. To this they said, that they could not give a certain answer; for that, as neither of the cases had happened, they had not exercised their judgment upon them.

The counsel for the defendant insisted, that, if the lateness of the season was the sole or predominant reason for abandoning the voyage to *China*, the insured could not justify the deviation to *Bengal*; for that, when an insured voyage is *abridged*, the ship must return back in the course insured, and cannot justify a deviation for the sake of wintering in a harbour more commodious perhaps than any to be found on that course.

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Lord MANSFIELD now summed up very strongly against the plaintiffs, on the head of fraud. But, independent of that ground, he stated a new point against them, *viz.* that if necessity were admitted to have been the sole motive for substituting the voyage to *Bengal* in the place of that to *China*, still it was incumbent on the insured to have pursued that voyage of necessity directly, in the shortest and most expeditious manner, and that the delay in going from *Pondicherry* to *Bengal*, and the repeated stops by touching at different places, and trading there, were deviations, and not within the protection which the supposed necessity afforded to the direct voyage.

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The rules to shew cause why there should not be new trials in the two cases of *Lavabre* v. *Wilson*, and *The same* v. *Walter*, came on to be argued this day.

The *Solicitor General*, *Cowper*, and *Douglas*, for the plaintiffs.—*Dunning*, *Lee*, and *Rooke*, for the defendants.

For the plaintiffs it was argued, that, if it was true that there was a necessity sufficient to justify the voyage to *Bengal*, the time employed in going thither could not alter the case, as the risk had not been thereby increased, the coasting voyage really performed being free from all hazard, and it being sufficient if the ship arrived in the *Ganges* before the winter set in. At least, whether the risk had or had not been increased was a question of fact, for the consideration of the jury, and they had given their opinion, that it was not, by finding for the plaintiffs. It was unquestionable, that, under the words of the policy, it was competent to the ship to have stopped and touched at different places, within the usual course of *the voyage described*, though not mentioned by name, and a voyage *superadded by necessity* ought to be subject to the same qualifications, and entitled to the same sort of latitude as the original voyage, it having become, by operation of law, a part, as it were, of that original voyage.

For the defendants, it was insisted, that this new point was a mere question of law, but that, in truth, it could not admit of a doubt, since it was only this, whether, upon a deviation for a justifiable purpose, that purpose may be abandoned, [291] and the ship stop at various places for other unnecessary purposes. It was absurd to say, that protracting the time of the voyage did not increase the risk. As well might it be contended, that lengthening the distance would not increase it. *Clayton* v. *Simmonds (a)*, was cited, where it was held, by LEE, *Chief Justice*, "that, if a ship puts into a port, "not usual, or stays an unusual time, it is deviation."

Lord MANSFIELD, (after observing upon the evidence of fraud, and of an original intention, or commercial motive, for going to *Bengal*,)—If this application were upon the ground of impeaching the testimony of the plaintiffs' witnesses, whatever my private sentiments might be, after two concurrent verdicts, I should not be inclined to interpose. But, without impeaching the evidence, I think there ought to be a new trial, or rather, that the case has been ill decided. The question is, whether, without imputation on any body, circumstances have not happened to take the voyage out of the policy. A deviation from necessity must be justified, both as to substance and *manner*. Nothing more must be done than what the necessity requires. The true objection to a deviation

(a) *Guildhall*, 11th *March* 1741, cited 1 *Burr.* 343.

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tion is not the increase of the risk. If that were so, it would only be necessary to give an additional premium. It is, that the party contracting has voluntarily substituted another voyage for that which has been insured. If the voyage to *Bengal* was unavoidable, where was the necessity to trade? All the ports touched at were out of the direct course, and six weeks and two months were consumed instead of six days.—The justice of the case required a different decision.

The rules made absolute [1].

[1] The two causes were again set down for trial, but the plaintiffs, when they were ready to be called on, submitted to the opinion of the court, and abandoned their claim against the underwriters.—*Lavabre and Company* were bankers at *Paris*, who had lent the sum which was the subject of this insurance, upon a contract *a la grosse avanture*, (that is, in the nature of *respondentia* and *bottomree* united,) to the owners, *Berard and company*, at *L'Orient*. In this contract the voyage was described as in the policy, and I understand the plaintiffs have instituted a suit in *France* against the owners, which is still depending, on the ground of a deviation from the voyage upon which they advanced their money at the risk of losing it if the ship and goods should be lost.

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Saturday, 20th Nov.

REN, Lessee of HALL, and OTHERS, *against* BULKELEY.

If a tenant for life with power to grant leases in possession for 21 years at the best rent convey his life estate to trustees to pay an annuity for his life, and the surplus to himself, the power is not thereby extinguished, but he may still grant a lease agreeable to the terms thereof.

UPON an ejectment tried before Lord MANSFIELD, at the last assizes for *Surry*, a verdict was found for the plaintiff, upon which the defendant obtained a rule to shew cause, why there should not be a new trial. The case came on to be argued this day, when the facts, as reported by his Lordship, appeared to be as follows:—In 1741, by the marriage-settlement of Lord *Onslow*, the premises in question were settled upon him for life, remainders over in strict settlement, with a power to the tenant for life in possession, to make leases, for any term not exceeding twenty-one years, to take effect in possession and not in reversion, reserving the best rent that could be had without taking a fine. In 1754, Lord *Onslow*, by lease and release, conveyed all his life-estate to *Briscoe*, and his heirs, upon trust to apply the profits in the payment of an annuity of £150 to *Wilson*, during the life of Lord *Onslow*, and the surplus to Lord *Onslow*. The year following he conveyed all his estate to trustees, for ninety-nine years, if he should live so long, for the payment of his debts; but with an express reservation as to all leases granted, or to be granted. Afterwards, in 1760, he made a lease of the premises in question, to *Lewin*, (then in possession as tenant at

at will,) for twenty-one years, which lease *Lewin*, in 1774, assigned to *Hall*, one of the lessors of the plaintiff. Lord *Onslow* died in 1776, and, in 1777, the remainder-man who had come into possession on his death, conveyed to the defendant. The same rent was reserved by the lease to *Lewin* which he had paid for several years as tenant at will, and he had, besides, covenanted for repairs. 1779. REX against BULKELEY.

At the trial, an attempt was made on the part of the defendant, but without success, to prove fraud in obtaining the lease for twenty-one years. The question now was, Whether the operation of the conveyance to *Briscoe* was not such as disabled Lord *Onslow* from making the subsequent lease to *Lewin*?

The *Solicitor General*, *Dunning*, *Morgan*, and *Bower*, argued in support of the rule for a new trial. They contended, 1. That, after the conveyance to *Briscoe*, it was impossible for Lord *Onslow* to grant a lease in possession, he having thereby parted with the whole of his life-interest; therefore, though, in words, the lease to *Lewin* conveyed an [293] immediate estate, yet, in substance, it was a lease in reversion, and could not commence till after Lord *Onslow*'s death, who certainly had no authority by the power to grant such a lease. 2. That, by conveying all his estate in the premises to *Briscoe*, he had extinguished the power, as far as respected him, as effectually as if he had made a feoffment, or suffered a recovery. They cited the case of *Saville* v. *Blacket* (*a*), and *Gilbert* on *Uses* (*b*). They also suggested, that, if this lease were to be established, the decision would shake a great many titles, for that conveyancers considered the grant of a life-estate in the manner in which Lord *Onslow* had conveyed his, as extinguishing a leasing power reserved to the tenant for life.

Lord MANSFIELD, (without hearing the other side,)—Powers came into the courts of common law with the statute of uses (*c*), and the construction of them, by the express direction of the statute, must be the same as in courts of equity (*d*). The creation, execution, and destruction of them, depend on the substantial intention and purpose of the parties. It is said, 1. That the grantor, in this case, was not in possession, and that it was necessary that he should be, to execute the power. But I think possession here means the receipt of the rents and profits, which were applied to his use. If *actual* possession were necessary, a leasing power could never be executed where the land is in the hands of a tenant (*e*). 2. It is contended, that, by granting away his life-estate, he extinguished

(*a*) *Canc. H.* 1721. 1 *P. Will.* 7778.
(*b*) *P.* 5.
(*c*) 27 *Hen.* 8. *c.* 10.
(*d*) 1 *Burr.* 120. 2 *Burr.* 1146.
(*e*) *Vide Goodtitle* v. *Funucan*, *H.* 21. *Geo.* 3. *infra*, *p.* 565.

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extinguished the power. Certainly where the whole life-estate is conveyed away by the intention of the parties, the power must be at an end, and cannot be afterwards exercised to the prejudice of the grantee. But the conveyance here was only to let in a particular charge, subject to which the rents and profits still belonged to Lord *Onslow*; and the lease could not prejudice the security, nor the remainder-man, for the best rent must be reserved. It would therefore be contrary to the intention of all the parties, to hold that the power was extinguished by the conveyance to *Briscoe*. [F]

The rule discharged.

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Saturday, 20th Nov.

BARBER *against* FRENCH.

In an action on a policy of insurance for an average loss, if the account is so complicated that it cannot be adjusted in court, the jury, by consent of the parties, may find for a total loss, the plaintiff entering into a rule to account upon oath for what part of the insured property he may recover.

ACTION on a policy of insurance, on the ship the *True Blue*, tried before BULLER, *Justice*, at the last Assizes for *Lancashire*. The counsel, at the trial, had begun to examine witnesses to prove the amount of an intricate average loss, but the Judge thought it would be impossible to adjust a complicated account of that sort at *Nisi Prius*. He therefore proposed, that a verdict should be found as for a total loss, the plaintiff entering into a rule to account upon oath to the defendant for what he might recover of the property insured. The defendant, upon this, desisted from cross-examining farther as to the particulars, value, &c. and a verdict being found as for a total loss, the rule proposed was entered into; but the defendant, being afterwards dissatisfied, moved for, and obtained a rule to shew cause why there should not be a new trial, on the ground that the evidence did not go to a total but only to an average loss. The plaintiff was a bankrupt, and it was now said, as an argument for making the rule absolute, that his assignees were not bound, and that the rule could not be inforced by attachment against them. This difficulty however was obviated by the counsel for the plaintiff stating, that the assignees would enter into any undertaking for the purpose of making the rule binding upon them. Lord MANSFIELD said,

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[F] See the same doctrine enforced in *Roe* v. *the Archbishop of York*, 6 *East*. 86; when the court held that the acceptance of a new lease from a tenant for life with power of leasing, (which turned out to be not according to the power, and therefore was voidable as against the remainder-man), did not operate as a surrender of a former lease under the same power; on the ground that the *intention* of the parties in making the second lease was, to enlarge the term by the exercise of the power, and not by an estate carved out of the life-estate of the lessor; the lessee having already, under the first lease, the residue of a term much longer than the probable duration of the life of the lessor.

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said, he had often known such rules made, where the account was so complicated, that it could not be taken in court, and blamed the defendant's conduct in desisting, at the trial, from the examination as to the particulars of the damage, after the proposal by the Judge, and then coming to the court for a new trial, on the ground that there was not a total loss. He said, if the plaintiff, or his assignees, should not comply with the rule by which they undertook to account, the defendant might apply to the court to stay execution.

The rule discharged.

BUTCHER and Another, Assignees of REVETT, a Bankrupt, *against* EASTO.

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Saturday, 20th Nov.

A debt contracted *before* a man enters into trade, may be the ground of a petition for a commission of bankruptcy.—The executing a bill of sale of all a trader's stock and effects to pay certain debts, the overplus, if any, to be accounted for to himself, is an act of bankruptcy [F].

THIS was an action of *trover*, by the assignees of a bankrupt, to recover the value of goods which had been conveyed by the bankrupt to the defendant, under a bill of sale. The cause was tried before BLACKSTONE, *Justice*, at the last Assizes for *Suffolk*, when a verdict was found for the plaintiffs. On *Tuesday*, the 9th of *November*, *Graham* moved for a new trial, on two grounds: 1. It appeared that the debt of one of the petitioning creditors (there being six to make up the sum of £200 (*a*),) was on a promissory note, bearing date two years and a half before *Revett* engaged in trade, and it was contended, that the petitioning creditor's debt must be contracted while the bankrupt is actually in trade. That, if contracted previous or subsequent to his being a trader, a commission cannot be sued out upon it: 2. It was insisted, that the bill of sale was a fair, open transaction, not an act of bankruptcy in itself, and anterior in point of time to any act of bankruptcy committed by *Revett*.—The rule to shew cause was granted.

This

(*a*) 5 *Geo.* 2. *c.* 30. § 23.

[F] The same point was determined, principally on the authority of this case, in *Newton* v. *Chantler*, 7 *East.* 138. In that case the conveyance was by a trader in insolvent circumstances (and having writs out against him) to a *bonâ fide* creditor, to satisfy a just debt; and possession was taken under the bill of sale: And it was attempted to distinguish it from the present case, because the vendee was not here himself the original creditor who made the arrest: But the court held the distinction immaterial; and decided on the general principle that any conveyance of the whole of a trader's property in contemplation of bankruptcy must be an act of bankruptcy, although it be made under the pressure of legal process.

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This day, when it came on to be argued, the court desired *Graham* to begin, who abandoned the *first* point, Lord MANSFIELD having observed that the debt, though contracted before, continued a subsisting debt while the bankrupt was in trade (*b*). On the *second* point, the facts appeared, from the Judge's report, to be these: On the 19th of *February* 1779, *Revett* being arrested for a debt of £76. 9*s*. 8*d*. desired the bailiffs to carry him to *Easto*'s, a creditor, whom he requested to bail him. *Easto* refused; but, *Revett* proposing to execute to him a bill of sale of all his effects, for the debt for which he was arrested, and also for his debt to him, which was £25. 9*s*. he consented to give a bond for the £76. 9*s*. 8*d*. payable at the return of the writ. *Revett* was thereupon discharged, and, the same evening, executed a bill of sale of *all his goods and effects whatsoever* to *Easto*, with power to enter
[296] and sell the same, for the purpose, in the first instance, of paying the £101. 18*s*. 8*d*. and afterwards to pay the overplus, if any, to *Revett* himself. The next day, (the 20th of *February*), *Easto* was put into possession of the effects, and continued the possession till he sold them on the 15th of *March* following. The same day, (20th *February*,) *Revett* signed an order, and, with *Easto*'s consent, annexed it to the bill of sale, by which he agreed, that, besides the two debts above-mentioned, it should also stand as a security for another of £33. 18*s*. 10*d*. due to his landlord. On the same day, he committed an act of bankruptcy, by keeping house, and soon after absconded.—BLACKSTONE, *Justice*, had been of opinion, that the execution of the bill of sale, under the circumstances, was itself an act of bankruptcy.

Graham now insisted, that this was not a fraudulent conveyance within the meaning of the statute of *Jac*. I. (*c*). That there were none of the badges of fraud here which are mentioned in *Twyne's Case* (*d*); no secrecy, no collusion, nothing that could make it a fraud upon the general creditors. The assignment was only partial, for the particular purpose of paying certain debts, after which the surplus was to be accounted for to *Revett*, and, therefore, this could not be considered as a conveyance of *all* his effects. He cited *Worsley* v. *Demattos* (*e*), *Wilson* v. *Day* (*f*), *Hague* v. *Rolleston* (*g*), *Alderson* v. *Temple* (*h*), *Rust* v. *Cooper* (*i*), and *Linton* v. *Bartlet* (*k*); and endeavoured to distinguish them from this case.

Lord

(*b*) *Vide Penriz* v. *Daintry*, *B. R.* 19 *Car*. 2. 1 *Sid*. 411. *Meggot* v. *Mills*, *B. R.* 9 *Will*. 3. 1 *Ld. Raym*. 286.
(*c*) 1 *Jac*. 1. *c*. 15. § 2.
(*d*) *M*. 44 *El*. 3 *Co*. 80. *b*.
(*e*) *H*. 31 *Geo*. 2. 1 *Burr*. 467.
(*f*) *T*. 32 & 33 *Geo*. 2. 2 *Burr*. 827.
(*g*) *H*. 8 *Geo*. 3. 4 *Burr*. 2174.
(*h*) *T*. 8 *Geo*. 3. 4 *Burr*. 2174.
(*i*) *B. R. T*. 17 *Geo*. 3. cited *supra*, 87.
(*k*) *C. B. H*. 10 *Geo*. 3. 3 *Wils*. 47.

Lord MANSFIELD, (without hearing the other side,)—This is a stronger case than any of the former. The bill of sale was a fraud on all the bankrupt laws. It was a conveyance of all he had in the world; and for what purpose? To pay the man who had arrested him, but who had no judgment against him, and two other creditors. Why prefer the person who arrested him to other persons who had not proceeded with so much rigour? He must have had the act of bankruptcy, which he committed in twenty-four hours afterwards, in contemplation, at the time. Before *Worsley* v. *Demattos* it had been determined, that a conveyance of all the effects is an act of bankruptcy; because it puts an end to all trading. Was it possible for this man to carry on his business after the bill of sale had swept away all his stock and effects [1]?

The rule discharged [† 78].

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[1] *Vide Law* v. *Skinner*, *C. B. E.* 15 *G.* 3. 2 *Blackst.* 996. which was a case very similar to the present, and determined in the same manner.

[† 78] *Vide Devon* v. *Watts*, *H.* 19 *Geo.* 3. *supra*, p. 86. & *Hassels* v. *Simpson*, *B. R. H.* 24 *Geo.* 3. *supra*, p. 89. *Note* [† 39].

MASON *against* HUNT and Another.

Tuesday, 23d Nov.

An agreement to accept a bill on certain conditions is discharged if the conditions are not complied with.—If there is a *virtual* acceptance, on consideration that goods shall be consigned to the acceptor to answer the bill, together with a policy of insurance upon them, the holder of the bill, by taking to the goods and selling them, discharges the acceptance.

THIS was an action brought against the defendants, who were partners, as acceptors of six bills of exchange to the amount of £3200. *Rowland Hunt*, one of the defendants, happening to be in *Dominica* on the 17th of *April* 1778, wrote the following letter to his partner *Thomas Hunt*, the other defendant, in *London*:—"As our friends *Vance*, *Caldwell* and *Vance*, (who were merchants in *Dominica*,) have made purchase of about 100 hogsheads of *prize*-tobacco, and purpose shipping them, or as many of them as they can get, by this convoy, I have agreed that, on their giving you orders for insurance on any part of the same, and sending bills of lading consigned to you in *London*, what bills of exchange they draw thereon at the rate of £80 *per* hogshead, from 90 days to six months sight, as shall be determined, will be duly accepted and paid by you, and doubt not your punctual adherence thereto."—On the first of *May* following, *Vance*, *Caldwell*, and *Vance*, wrote to the defendants, ordering insurance upon 40 hogsheads of tobacco,—£3600: without taking any notice of having drawn any bills. This letter was received on the 6th or 7th of *July*, and, in consequence thereof, *Thomas Hunt* got the sum mentioned insured for a premium of £303. On the same 1st of *May*, *Vance*, *Caldwell*, and *Vance*, wrote another letter to *Thomas Hunt*, apprising

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apprising him, that they had drawn six bills of exchange for £3200 in consequence of *Rowland Hunt*'s letter, payable to *Robert Vance*, and indorsed by him to the plaintiff, drawn on forty hogsheads of tobacco. This letter was received on the 10th of *July*. On the 11th, the bills arrived and were presented for acceptance, together with *Rowland Hunt*'s letter of the 17th of *April*. *Thomas Hunt* refused to accept them, and, after a negociation of two or three days, a memorandum was signed by the plaintiff, which, after stating the bills, proceeded in these words: "Whereas forty hogsheads of tobacco "have been consigned to Messrs. *Thomas* and *Rowland Hunt*, "on account of the above bills, and they being apprehensive "that the net proceeds thereof may not be sufficient for that "purpose, have refused to accept the said bills, we therefore "accept the bill of lading of the said forty hogsheads of to- "bacco, and the policy of insurance for £3600 to cover the "same in case of loss (being valued in the said policy at £90 "*per* hogshead) both which we now acknowledge the receipt "of, and that we will apply their net proceeds when in cash "to the credit of Mr. *Robert Vance*, as far as the said pro- "ceeds will go, in part payment of the above bills. *Kender* "*Mason* for self and late Co." The tobacco afterwards arriving was received and sold by the plaintiff, and produced only about £1400. The occasion of the difference between this sum and the valued price in *Rowland Hunt*'s letter did not appear.

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The cause was tried before Lord MANSFIELD, at the last Sittings at *Guildhall*, when the plaintiff insisted, that *Rowland Hunt*'s letter of the 17th of *April* was a virtual acceptance of the bills, and that nothing had happened to discharge this acceptance. That he was therefore entitled, as holder of the bills, to recover the difference between their amount and the price for which the tobacco sold.—The defence was, that the letter did not amount to such virtual acceptance; but, if it did, that the memorandum had cancelled it.—There was a verdict for the defendants, and a rule for a new trial was obtained, which was argued on *Tuesday* the 16th of *November*, by *Dunning*, and *Cowper*, for the plaintiff, and the *Solicitor General*, and *Lee*, for the defendants.

In support of the verdict, it was contended: 1. That the agreement contained in the letter, on which the plaintiff relied as a virtual acceptance, was only conditional, qualified by the contingency, of tobacco of the value of £80 per hogshead being consigned to the defendants. If the bills, together with the letter of the 17th of *April*, had been shewn on the Exchange, and the refusal of *Thomas Hunt* to accept them mentioned at the same time, no merchant would have taken them as bills payable by the *Hunts*. But, 2. If there had been an unqualified virtual acceptance, it would have been discharged by

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by the subsequent transaction. The inducement to the agreement to accept was the profit of the commission. Could it be supposed, that it could be the meaning of the parties, that the defendants should continue bound for the difference between the produce of the tobacco, and the amount of the bills, and yet relinquish, to the plaintiff, the profit of the commission, the power of selling when he pleased, and the security of the bills of lading and insurance?

For the plaintiff, the case of *Pillans* v. *Van Mierop (a)* was cited, as an authority to prove, that there may be, by letters, or agreement, a virtual acceptance of a bill of exchange; which, independent of any authority, they said, was clear upon reason and principle. The letter of *Rowland Hunt* was such an acceptance; and, as to the transaction which was contended to be a discharge, how could it be imagined that *Mason* had consented to take, in lieu of the whole, what was likely only to produce part of the amount of the bills, when he had an acceptance for the whole? The clear intention was, that the plaintiff should sell the tobacco to discharge the demand on the bills, as far as the produce should go, but without prejudice to either side.

The court took time to consider; and, this day, Lord MANSFIELD, after stating the facts as above set forth, delivered their opinion, as follows:

Lord MANSFIELD,—The defence at the trial was, that the tobacco was not of the stipulated value, and that the *Hunts* never meant to be in advance for the drawers. As to the first question, there is no doubt but an agreement [F 1] to accept may amount to an acceptance, and it may be couched in such words as to put a third person in a better condition than the drawer [☞] [F 2]. If one man, to give credit to another

(a) *B. R. E.* 5 *Geo.* 3. 3 *Burr.* 1663.

[☞] The *parole* acceptance of inland bills of exchange (as well as foreign) is good, notwithstanding 9 & 10 *W.* 3. cap. 17. § 1. & 3 & 4 *Ann. cap.* 9. § 5. *Lumley* v. *Palmer*, *B. R. M.* 8 *Geo.* 2. *Ca. Temp.* Lord *Hardw.* 74. 2 *Str.* 100.

[F 1] But an agreement to accept a *non existing* bill does not amount to an acceptance, as between the drawee and an indorsee for a valuable consideration, who has had no communication with the drawee, to *induce* him to take the bill and give value for it. And *semb. per Lord Kenyon*, C. J. that *no* verbal agreement to accept a bill, made before it is drawn, can be valid as an acceptance. *Johnson* v. *Collings*, 1 *East*. 98.

[F 2] Thus in *Clark* v. *Cock*, 4 *East*, 57. where there was an agreement to accept upon a certain consideration, which failed, and the request to accept was thereupon withdrawn by the drawer; it was held that the drawee was discharged as between him and the *drawer*, but remained liable as acceptor

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another, makes an absolute promise to accept his bill, the drawer, or any other person, may shew such promise upon the Exchange, to get credit[F 3], and a third person, who should advance his money upon it, would have nothing to do with the equitable circumstances which might subsist between the drawer and acceptor. But an agreement to accept is still but an agreement, and if it is conditional, and a third person takes the bill knowing of the conditions annexed to the agreement, he takes it subject to such conditions. Here there were many things specified as the conditions of the acceptance—the insurance—bills of lading—consignment—a certain number of hogsheads to be delivered—of a certain value rated by the hogshead. On the face of the agreement, I thought, at the trial, and still incline to think, that the meaning of the parties was, that tobacco should be consigned [300] which should be worth £80 *per* hogshead. *Prize*-tobacco must, at that time, have meant *American* tobacco; and it is well known, that there is a very great difference between the value of the *American* tobacco, and what comes from the *French* islands. The difference here is immense. The produce of the tobacco consigned was only about £1400. It is plain the *Hunts* never *meant* to be in advance, and I think so great a difference in the value is such a fraud as to entitle the defendants to relief against the agreement. But, as to this, the rest of the court have doubted, chiefly because there is no evidence to shew how the decrease in the value arose; whether, from the inferiority of the quality, or the fluctuation in the market. If it arose from buying up refuse tobacco from the *French West Indies*, the fraud would be clear. But the rest of the court are extremely clear that the second instrument makes an end of the whole, and I think the grounds and reasons are unanswerable. As to that part of the case it stands thus: The *Hunts* say, "We are not bound. This is an imposi-"tion. The tobacco is of an inferior value. The letter re-"presents it as worth £80. The insurance makes it £90 "*per* hogshead, and it turns out not to be worth £40." If *Mason* had meant to say, "you are liable, and shall pay the "bills," what would his conduct have been? He would have left the policy of insurance, and the bills of lading, in their

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acceptor to the *holder* of the bill, to whom it had been indorsed for a valuable consideration, upon the credit of that agreement to accept, before the circumstances took place which discharged it is as to the drawer.

[F 3] But it makes no difference whether the promise was *communicated* to the indorsee, or was even made *after* the indorsement, and therefore could form no part of the inducement to the indorsee to take the bill, *R. Wynne* v. *Raikes*, *5 East*, 514. In which it was also held that a promise to accept *or* pay a bill is good as an acceptance in either alternative.

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their hands, and sued them upon the acceptance. The temptation to accept was the commission on the consignment, and they were to have the security of the goods and the insurance. But the plaintiff undoes all this, and says, "Then I will take "all from you—security, commission, *&c.*"—This was saying, "I will stand in your place, but not so as to be answerable "for more than the produce of the tobacco." It is impossible the defendant could mean to accept, without any benefit or security. We are all clear that this made an end of the agreement.

The rule discharged [79].

[†79] *Vide Dingwall* v. *Dunster*, *supra*. p. 247.

The KING *against* JONES, *alias* THOROWGOOD.

Wednesday, 24th Nov.

THIS was an indictment for forgery, which was tried before Lord MANSFIELD, at the last Assizes for *Essex*. The indictment consisted of six counts. Upon the first, second, and fifth, (which charged an intent to defraud the *Bank of England*,) the prisoner was acquitted. The third set forth, that he "having in his custody a certain forged "and counterfeited paper-writing *purporting* to be a Bank-"note, the tenor of which forged and counterfeited paper-"writing is as follows, *viz.*—*No. F.* 946. *I promise to pay* "*to* John Wilson, *Esq. or bearer, ten pounds.* London, "March 4th, 1776. *For self and company, of my bank,* "*in* England. L. 10. *Entered* John Jones—feloniously "disposed of and put away the said forged and counterfeited "paper-writing, as and for a good and true Bank-note, well "knowing the same to be forged and counterfeited, with in-"tent to defraud *James Rayner*, against the form of the "statute, *&c.*" The fourth count only differed from the third, by calling it *a certain forged and counterfeited note*, instead of *paper-writing*. The sixth charged, that the prisoner did utter and publish, as true, a certain false, forged, and counterfeited paper-writing, *purporting* to be a promissory note for payment of money, (and then set forth the note as above,) with intent to defraud the said *James Rayner*.

In an indictment for uttering a forged Bank-note, the words, '*purporting* to be a Bank-note,' mean, that the note, upon the face of it, appears to be a Bank-note, and the want of such appearance cannot be supplied, so as to support the indictment, by any representations of the party when he disposed of it.

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On these counts a special verdict was found, *viz.* as to the *third*; that the paper-writing, purporting to be a Bank-note, in the said third count set forth, was not a note filled up by any of the officers of *the Governor and Company of the Bank of England*, or entered in any of their books, but was forged; that the prisoner well knowing it not to be a note of

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The KING against JONES.

the Governor, &c. but to be forged, averred it to be a good *Bank-note*, and disposed of it as such to *James Rayner*, with intent to defraud him, and that *Rayner* took it from the prisoner, and gave him £10 for it, believing it to be a true *Bank-note;* that the Bank frequently pay Bank-notes which are filled up by their officers, and entered in their books, although they happen not to be signed. The finding on the *fourth* count was the same, only calling it, as in the count, a *note*, instead of paper-writing. On the *sixth*, they found, that the said paper-writing, purporting to be a promissory note, &c. was not filled up, &c. and that the prisoner knowing, &c. averred it to be a good Bank-note, and uttered and published it as such, &c. as on the third count.

Fielding argued, on the part of the prosecution, that the *charge* and *finding* were sufficient to convict the prisoner. That, if a forged note is made in the form and appearance of a Bank-note *(a)*, it *purports* to be one, although not signed, differing in this respect from a forged deed, which
[302] cannot be said to *purport* being a deed till it is signed, the signature being of the essence of that sort of instrument. That, from the finding, it appeared, that the note *purported* to be a Bank-note to the man who received it, and that similitude is not at all necessary to constitute a forgery. He admitted, that the finding did not support the sixth count.

Mingay was of counsel for the prisoner; but Lord MANSFIELD stopped him, and said, that the representations of the prisoner to *Rayner*, after the note was made, could not alter the *purport*, which is what appears on the face of the instrument itself. Such representations might make the party guilty of a fraud or cheat [1].

The prisoner discharged.

(a) Which this was.

[1] The prisoner had been indicted, and brought to trial, as for a *fraud*, before *Blackstone*, Justice, at the former Assizes, but, as he entertained a doubt whether the offence was not rather a *forgery* with intent to defraud the Bank, the prisoner was acquitted on that occasion, and the present indictment preferred. Lord *Mansfield* said, he thought the case clear at the trial, but that he had directed a special verdict on account of the doubt of *Blackstone*, Justice.

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JONES *against* MAUNSELL.

Monday, 29th Nov.

It is not settled, whether the *herbage* and *pannage* of a forest are rateable under 43 *El.* c. 2.

THIS was an action of trespass, for taking the plaintiff's cattle, on a distress for the poor-rate. The question was, whether he was rateable under the statute of the 43d of *Eliz. cap.* 2. in respect of the *herbage* and *pannage* of part of *Rockingham* forest, called the *Lawn* of *Bedingfield*. A verdict having been found for the plaintiff, the case was argued, in *Michaelmas* Term, 19 *Geo.* 3. (*a*), on a rule to shew cause why there should not be a new trial, by *Hill*, Serjeant, *Wheeler*, *Green*, and *Lee*, for the plaintiff, and *Cust*, *Dunning*, and *Dayrell*, for the defendant. After the argument, the court directed, that inquiries should be made on both sides, in order to discover whether there was any instance of such property being rated in any part of the kingdom. The result of those inquiries was, that no instance could be found; and there being a difference of opinion in the court, the cause stood over for judgment till this day, when Lord MANSFIELD stated the case, and the reasons for granting a new trial, to the following effect:

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Lord MANSFIELD,—This is an action of trespass. The declaration consists of two counts. The first for entering the plaintiff's close, and taking his cattle. The other for taking his cattle generally; and upon this the cause proceeded; and not guilty being pleaded, the question was, whether the herbage and pannage of the *Lawn*, part of *Rockingham* forest, is a species of property rateable to the poor. If it is, the defendant was entitled to a verdict; if not, the plaintiff. The plaintiff's interest was as occupier under Mr. *Hatton*, but whether as tenant, manager, or servant, did not fully appear; but it did appear that he was a person in the visible occupation of the property. Mr. *Hatton*'s title was under a grant from Queen *Elizabeth*, to Sir *Christopher Hatton*, of the office of keeper of the *Lawn* and deer, and of the *herbage* and *pannage*. In the 4th Institute, *herbage* and *pannage* is thus explained. "He "that hath the *herbage* or *pannage* of a park by the grant "or demise of the King, or any other, cannot take any "*herbage* or *pannage*, but of surplusage, over and above "the competent and sufficient pasture and feeding of the "game; and if the owner of the game suffer the game so "to

(*a*) *Thursday*, 19th *Nov.* 1779.

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" to increase, as there is no surplusage, then he that hath " the herbage and pannage cannot put any beasts in the " park." The same definition is adopted by Sir *Francis North*, in his arguments in the case of *Potter* v. *North* (*a*). The form of the assessment was on the lodge and *Lawn*, but there was no question on any thing but the herbage and pannage. The cause was first tried before BLACKSTONE, *Justice*, and he inclined to think, that the property was not rateable, but the jury found for the defendant. It then came on here, on a motion for a new trial, when a great deal was said about the situation, whether parochial or not; but the court stript the case of every thing of that sort, and without giving any opinion, directed a new trial on the single question, whether rateable or not. On the second trial, ASHHURST, *Justice*, delivered it as his opinion to the jury, that the property was not rateable, and they found for the plaintiff. Another motion for a new trial has been made, and the question fully argued at the bar. Since the argument, there have been considerable doubts in the court, which have been the occasion that the case has stood over till now. We have long been agreed upon two propositions: *viz.* 1. That the uncertainty of the value is not material; *that* merely affects the quantity
[304] of the rate: 2. That whether the herbage and pannage is enjoyed by the grantee in fee, or by a tenant for life, years, or from year to year, or by a keeper or servant, is not material. If the property is rateable, any of those sorts of occupiers are. These two propositions lay out of the case all the particular circumstances concerning the nature of the plaintiff's occupation, and bring it to the simple question of law. Upon this we have been long divided, and we have consulted some of the other Judges, but without satisfaction. The arguments against the rateability were, that the owner or grantee of the forest might destroy the property entirely, by increasing the number of the deer. Such grantee would be rateable to the full value of the whole, for the forest is only exempted from the poor-rate while in the hands of the crown. By disafforesting, the herbage and pannage might be extinguished. It is a species of property which does not lie in occupancy, and trespass or ejectment will not lie for it. There is no instance where it has been rated, though there is a great deal of this sort of property in the kingdom. The authorities on this side were *Vaughan* 188. 2 *Bulstrode* 249. *Croke, Car.* 492 (*a*). 1 *Levinz.* 213. On the other side of the question, the consequence from the cases concerning occupancy was denied; for, though this property might not

(*a*) 1 *Ventr.* 383. 391. (*a*) *Pl.* 17.

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*[305]

not lie in occupancy, according to the strict common-law sense of the word, it might be occupied within the meaning of the statute of *Elizabeth*. If so, the usage would not alter the question. The case of *Rowlls* v. *Gell* [1] was *much relied on; but it did not convince, because there the profits arose from the ownership of the soil, (whereas herbage and pannage is only a privilege,) and ejectment will lie for a mine, *Cro. Jac.* 150. (*b*). Another case, in 3 *Keble* 540, was more material (*c*). That case goes to shew, that *tolls* are rateable, and *they* do not lie in occupancy, according to the legal definition, nor can they be the subject of an ejectment. The authority of that case however was much doubted. It is a loose note, by a bad reporter, of a rule to shew cause; and it does not appear that cause was ever shewn. But the case was so apposite that, in the last vacation, I got an inquiry made in the country to which it relates, and I found that the toll there mentioned has been rated as far back as memory goes [2]. This confirms the note

[1] The case of *Rowlls* v. *Gell* & *Another*, was determined in this court in *E.* 16 *Geo.* 3. [† 80.] It was an action of trespass for taking lead ore; verdict for the *plaintiff*, and a case reserved, which stated; that the plaintiff was, (in consideration of £1590, paid to the King as a fine,) lessee of all the lead mines, with the *lot* and *cope*, in the soak or wapentake of *Worksworth*, in *Derbyshire*, for 31 years, at £144 *per ann.*; That he was assessed to the poor for *lot* and *cope*, and having refused to pay was distrained upon; That *lot* is a duty of the 13th dish or measure of lead ore, made merchantable; *cope* 6*d.* for every nine dishes raised at the mines; Those duties were without any risk to the plaintiff; they produced in that year £500, but varied and were uncertain in their value; All the King's subjects may dig ore in the place, and are entitled to a quarter of a yard of ground adjoining to their work; and great quantities of land are rendered useless by working the mines; *These* duties had never been rated, but, in the neighbouring parish the Duke of *Devonshire* had been rated, under the same circumstances, for 40 years; The miners, or the proprietors of mines, in the county of *Derby* had never been rated.

BULLER, *Justice*, (then at the bar,) argued for the plaintiff, and *Wheeler* for the defendants.

The court held that this property was rateable, and not within the reason of the cases of the *Smelting Company* v. *Richardson*, *M.* 3 *Geo.* 3. 3 *Bur.* 1341. and *Rex* v. *Vandewall*, *E.* 33 *Geo.* 2. 2 *Burr.* 991.

(*b*) *B. R. H.* 4 *Jac.* 1. *Comyn* v. *Kincto.*

(*c*) *Corporation of Wickham* v. *the Mayor*, *pl.* 36.

[2] The toll of *Putney* bridge is regularly related in *Putney* parish and also in *Fulham*, being valued at the same sum, (£700 a year,) in each. There are collectors at each end. At first there was none at the *Putney* end, and

[† 80] Since reported, *Cowp.* 453.

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JONES against MAUNSELL.

note in *Keble* very much, and shakes the opinion against the rateability. The question is of great consequence, and affects many persons, and therefore, we are all of opinion that there should be a new trial, in order that the parties may have an opportunity of having the point settled upon a special verdict in the most solemn manner known to the constitution.

The rule made absolute (*d*).

and then the bridge was not assessed in *Putney*. ☞ *Rex* v. *Aire* Navigation, *M.* 29 *Geo.* 3. 2 *Term Rep.* 660. 667. Since the last edition of this work, the gate on the *Putney* side has been taken down.

(*d*) ☞ In Lord *Bute* v. *Grindall*, *B. R. T.* 26 *Geo.* 3. 1 *Term Rep.* 338. the court were clearly of opinion, that the plaintiff as ranger of *Richmond* park, was not rateable in respect of the *herbage* and *pannage*.

Monday, 29th Nov.

BARBER *against* FLETCHER.

A representation made to the first underwriter extends to all the others. A representation, that the ship is *expected* to sail from the coast of *Africa* on such a day, is not material, so as to vitiate the policy, although it should turn out, that she actually sailed six months before.

* [306]

THIS was an action on the same policy with *Barber* v. *French* (*a*), tried at the same time, the same rule entered into, and a similar verdict found; but here, besides the ground mentioned in that case, there was another stated, *viz.* that, since the trial, a material representation which had been made to *Shulbred* the first underwriter on the policy, and which turned out to be false, had been discovered. After the other case was disposed of, this stood over, on this point, till an affidavit of the fact should be procured from *Shulbred*.

* Cause was this day shewn, when it appeared from *Shulbred*'s affidavit, that, when he signed the policy, in *March* 1778, the broker was getting several others, on other ships, subscribed at the same time, all belonging to the same owner, and said, speaking of them all—"Which vessels "are expected to leave the coast of *Africa* in *November* or "*December* 1777."—In truth, the vessel in question had sailed in *May* 1777, and *Shulbred* swore, in his affidavit, that, if he had known that circumstance, he would not have signed. There had been actions brought against all the underwriters on the policy, except *Shulbred*.

Davenport, for the defendant, insisted, that a representation to the first underwriter is considered as made to all who sign after him; and that the representation here was material, or at least such as ought to be submitted to a jury, for them to judge of its materiality.

Lord

(*a*) *Supra*, p. 281.

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Lord MANSFIELD,—It has certainly been determined, in a variety of cases, that a representation to the first underwriter extends to the others. But under what circumstances has the defendant gone to trial in this case? He certainly knew what had been represented to himself. He was acquainted with *Shulbred*, and had an opportunity of asking before the trial what had been represented to *him*. If therefore this evidence is *new*, it is owing to his own negligence. But the representation is not material. It was only an *expectation*, and the underwriters did not inquire into the ground of the expectation. This was lying by till after a trial, in order to make an objection if the verdict should be for the plaintiff.

The rule discharged [† 81].

[† 81] In the case of *Shirley* v. *Wilkinson*, which came on in *B. R. M.* 22 *Geo.* 3. upon a motion for a new trial, Lord *Mansfield* and the rest of the court were clearly of opinion, that, if the broker, at the time when the policy is effected, in representing to the underwriter the state of the ship, and the last intelligence concerning her, does not disclose the whole, and what he conceals shall appear *material* to the jury, they ought to find for the underwriter, the contract, in such case, being void, although the concealment should have been innocent, the facts not mentioned having appeared immaterial to the broker, and having not been communicated merely on that account [F].

[F] See *Macdowall* v. *Fraser*, *supra*, 260.

The End of MICHAELMAS *Term* 20 GEORGE III.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF KING's BENCH,

IN

HILARY TERM,

IN THE TWENTIETH YEAR OF THE REIGN OF GEORGE III.

1780.

Tuesday, 25th Jan.

GRINDLEY *against* HOLLOWAY.

To entitle a constable, &c. to double costs under 7 *Jac.* 1. c. 5. after a verdict for him, it must be certified, *by the judge who tried the cause*, that he was acting in the execution of his office.

THIS was an action of trespass, in which, on the plea of not guilty, a verdict was found for the defendant. In the last term, *Wood* had obtained a rule to shew cause, why it should not be entered on the roll, that the defendant was a constable, and that the action was brought for what he had done in the execution of his office. By the statute of 7 *Jac.* 1. *c.* 5. (*a*), it is enacted, That if any action shall be brought against a justice of peace, constable, *&c.* for any thing done by virtue or reason of his office, he may plead the general issue, and give the special matter in evidence; and, if the verdict shall pass with the defendant in such action, or the plaintiff become nonsuit, or suffer a discontinuance, in every such case, *the justices or justice, or such other judge before whom the said matter shall be tried, shall allow to the defendant*

(*a*) Made perpetual, 21 *Jac.* 1. *c.* 12.

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fendant his double costs[F]. There was no indorsement on the *Postea*, nor certificate, in this case; but, in an affidavit of the defendant, it was sworn, that the act for which he was sued, was done in the execution of his office.

Wood, in support of the rule, cited *Rex* v. *Poland* (*a*), and *Devenish* v. *Mertins* (*b*), a case on this very statute, where it is said, that when there is a verdict for the defendant, the facts entitling him to double costs are to be put upon the record by way of suggestion. He also mentioned some modern cases, which had been furnished him by the master, particularly one of *Hickman* v. *Goring* (*c*), a note of which was read by BULLER, *Justice*.

Howorth, for the plaintiff, insisted that it was clear, from the words of the statute, that *the judge who tries the cause* must certify, that the act complained of was done by the defendant in the execution of his office. The statute did not say, "such defendant *shall be allowed* his double "costs," but "*the justice or justices*, &c. *shall allow him*," &c. Whether the defendant was or was not acting in the execution of his office, was an inference of law to be drawn from the particular facts proved, which the judge at *Nisi Prius* was able to do, but the court could not without trying the cause again. The defendant's affidavit was absurd; it was swearing to matter of law. The cases cited did not apply. In that of *Devenish* v. *Mertins*, the plaintiff having moved to discontinue, the court made the payment of the double costs part of the terms on which the motion was granted; and what was there said about a suggestion was foreign to the case before the court. But the point was expressly decided in a case in *Ventris* (*d*), where a suggestion, like that now prayed for, after a verdict for the defendant was refused, on the ground that it was the province of the judge before whom the cause was tried to *allow* the double costs.—He stated an affidavit, (which was read), by which, he said, it would appear,

(*a*) *B. R. E.* 3 *Geo.* 1. 1 *Str.* 49.
(*b*) *B. R. E.* 7 *Geo.* 2. 2 *Str.* 974.
(*c*) *B. R. H.* 15 *Geo.* 3.
(*d*) *Anon. C. B. E.* 1 *W. & M.* 2 *Ventr.* 45.

[F] In *Harper* v. *Carr*. 7 *T. R.* 448. This case was cited and confirmed as to the necessity of a judge's certificate. It was there held that the certificate may be granted at any time; and that under circumstances bringing the case within the statute, it is imperative on the judge to grant it: in both which respects it differs from a certificate under 8 & 9 *W.* 3. *c.* 11. *s.* 4. to entitle a plaintiff to full costs for a wilful and malicious trespass. *Vide Good* v. *Watkins*, 3 *East*. 495.

1780.

appear, that the defendant was not acting in the execution of his office.

The rule discharged[†82].

[†82] But where there is a special verdict, and it appears by the facts there found, that the act for which the action was brought, was done by the defendant by virtue or reason of his office, as a justice of peace, &c. the master must tax double costs, though there has been no certificate, nor allowance by the Judge who tried the cause. This was determined in the case of *Rann* v. *Pickins*, *B. R. M.* 28 *Geo.* 3. Lord *Mansfield*, and *Buller*, Justice, said, upon that occasion, that, in common cases, where it does not appear, upon the record, in what capacity the defendant was acting, an allowance by the Judge is necessary, but not when it does appear on the record, that he was acting by virtue of his office; that the case of a discontinuance, provided for by the statute, shews, that the right to double costs was not meant to be confined entirely to such allowance of a Judge at *Nisi Prius*. The master being asked, said, he had no doubt, but that he ought to tax double costs.

*[309]

Wednesday, 26th Jan.

The KING *against* the INHABITANTS of UNDER-BARROW and BRADLEY-FIELD.

If there is a hiring for a year and service in the parish of *B*, and, before the end of the year, the servant removes with the master to the parish of *C*, serves out the year there, is hired to the same master for another year, with an increase of wages, and serves him several months longer in *C*, a settlement is gained in *C*.

TWO justices having removed *Thomassine Hallhead*, from the town and hamlet of *Ulverton*, in *Lancashire*, to the township or division of *Under-Barrow* and *Bradley-Field*, in *Westmoreland*, the court of quarter sessions for *Lancashire* confirmed their order, and stated the following case.

"*Thomassine Hallhead* single woman, being settled in the "township of *Under-Barrow* and *Bradley-Field*, in the "county of *Westmoreland*, by a derivative settlement from "her father, was hired for one year, from *Whitsuntide* 1770, "to *Whitsuntide* 1771, to *D. Burrow*, then an inhabitant of "the said township, for the yearly wages of 18*s*. where she "lived with him, under this hiring, till the 12th of *May* "1771. Her master then removed with her into the town-"ship of *Strickland Roger*, in the said county of *West-"moreland*, and she there continued seven days in the said "service, (which completed the year,) and received her "wages. Then she again hired herself to the same master "for another year, from *Whitsuntide* 1771, to *Whitsuntide* "1772, for the wages of 25*s*. and, under this last hiring, "she continued in *Strickland Roger*, from *Whitsuntide* "1771, till *Candlemas* following, when, by mutual consent, "she quitted her service, and received her wages up to that "time."

Wilson and *Wood* now shewed cause against quashing the orders. They endeavoured to distinguish the case from that of

1780.

The KING against UNDER-BARROW.

of *Rex* v. *Crosscombe* (*a*), where the pauper, having been hired for a year in one parish, and having lived that year there, and received his wages, continued a quarter of a year longer, and then went with his master into another parish, and lived with him there six months, without coming to any new agreement; and the court held that he was settled in the last parish. That case, they said, was argued on the ground of there being no interruption,—no new contract,—but a continuance, and prolongation of the term of service, under the first hiring. So when there is a demise for a year, and the tenant holds over without any new bargain, he is still considered as holding under the original demise. But here the first contract was at an end, both in form and substance; there must have been a new bargain; the wages were different; and the sessions had not stated that there was *not* a chasm in point of time between the first and second hiring. The second must be considered exactly as if there had been a change of masters. The services in the two places could not be tacked together, as in the case of *Rex* v. *Crosscombe*, because the pauper having already a derivative settlement in *Under-Barrow*, the time she served there could not have operated so as to gain a settlement there, and therefore it ought not to be taken at all into the account.

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Dunning, *Chambre*, and *Howorth*, argued on the other side. They observed, that, although, in the case of *Rex* v. *Crosscombe*, the circumstance of there being no new bargain was relied upon at the bar, the court did not decide upon that distinction, but, on the contrary, LEE, *Chief Justice*, mentioned several cases, in which a settlement was held to have been gained, where there was a year's service under two hirings (*a*), and said he could see no difference. If a chasm of an hour or two were to be admitted to have taken place in this case, between the end of the first year, and the new bargain for an increase of wages, *that*, they said, would not make such an interruption as to prevent a settlement. For this, they cited, *Rex* v. *Fifehead Magdalen* (*b*), where there was an interruption and absence from the master's house for above an hour; *Rex* v. *Ellesfield*, where the interruption was still longer, but not for a whole day[1]; and

(*a*) *M.* 19 *Geo.* 2. 2 *Str.* 1240. *Burr. Settl. Cases*, No. 87.

(*a*) *Burr. Settl. Cases*, *loc. cit. p.* 259.

(*b*) *M.* 11 *Geo.* 2. *Burr. Settl. Cases*, No. 37.

[1] That case was argued *H.* 17 *Geo.* 3, by *Lawrence* on one side, and *Mansfield*, *Dunning*, and *Kirby*, on the other. The circumstances were very nearly the same with those in *Rex.* v. *Fifehead Magdalen.* The ground of the decision, in both, was the maxim, that there is no fraction of a day. The pauper was in the service every day in the year. If a discontinuance however

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and also a case from this very township of *Under-Barrow* (*c*).

Lord MANSFIELD,—We are all very clear, that this was a continuance of the same service, with an increase of wages.

Both orders quashed.

ever short were to prevent a settlement, there could never be one gained where the year was served under two hirings, because there can be no new hiring without some degree of interruption.—

In the former case of *Rex* v. *Under-Barrow*, cited in this, it was attempted to overturn the doctrine in favour of settlements gained by a year's service under two hirings tacked together, as being contrary to the true sense of the words of 8 & 9 *Will.* 3. *c.* 30. and Sir *James Burrow*, in his report of the case has investigated with great accuracy the history of the first decisions on this point. The court thought themselves bound by the authority those decisions

(*c*) *H.* 6 *Geo.* 3. *Burr. Settl. Cases*, 1128. No. 175.

Thursday, 27th Jan.

ROBERTS and Another *against* HARTLEY.

If a prize is taken by two or more privateers, they are to share proportionably according to the number of men of which their respective crews consist.

IN an action for money had and received, which was tried before Lord MANSFIELD, at the last Sittings, at *Guildhall*, the case was this: Two letter of *marque* ships, one called the *Henry*, belonging to the plaintiffs, the other called *the Two Brothers*, which belonged to the defendant, had taken the *Gaston*, a *French East-India-man*, and the defendant, in the character of agent, had received the prize-money for both. The plaintiff demanded *his* share, and the defendant was willing to pay him what he, (the defendant,) said he was entitled to, after deducting 5 *per cent.* for commission, which he claimed as agent. The plaintiff insisted upon a larger proportion than what the defendant offered, and also refused to allow the commission, on the ground that the defendant had no authority to act as his agent. The defendant had paid into court what he admitted to be due, and the jury found a verdict for him.

Lee now moved for a rule to shew cause, why there should not be a new trial upon two grounds. 1. Because, according to the evidence given at the trial, the plaintiff's ship had forty-five men on board, and the defendant had only allowed as if she had had forty-four. 2. Because the defendant had no claim as agent. In support of this last ground, he offered to read an affidavit of the plaintiff's denying the appointment of *Hartley* to be agent.

Lord MANSFIELD,—The parties came to trial on two questions. 1. Whether the defendant was agent? 2. What was to be the rule of division between the two joint captors? Upon the last, after a good deal of evidence from persons conversant

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ROBERTS against HARTLEY.

conversant in the distribution of prizes, it came out, and was agreed upon on both sides, on the authority of a case before me at the *Cockpit*, that, where there has been no special proportion of distribution agreed upon, the division shall be according to the number of men on board each ship. In the course of the trial it appeared that both sides had been under a mistake, as to the number of the men in the plaintiff's ship, and it was agreed that they were forty-five instead of forty-four; so that the defendant had not paid enough into court. But I was of opinion, as this was a liberal action, it would be improper to permit the plaintiffs to have a verdict for what is called a *Norfolk groat*; that is, on a question which neither of the parties had come to try (*a*). The question on the agency was a very material part of the cause, but we cannot grant a new trial on the affidavit of the plaintiffs, who could not be examined at the trial.

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The rule refused:—But it was referred to the master to take an account if any thing, and what, was due to the plaintiffs; the defendant, in the mean time, not to take out execution for his costs till further order from the court [† 83].

(*a*) *Vide Longchamp* v. *Kenny*, *supra*, *E.* 19 *Geo.* 3. *p.* 132.

[† 83] *Vide Wemyss* v. *Linzee*, *infra*, 324. *Le Caux* v. *Eden*, *H.* 21 *Geo.* 3. *infra*, 594. *Lindo* v. *Rodney*, *H.* 22 *Geo.* 3. *infra*, 613. *Note* [1]. *Mitchell* v. *Rodney*, *infra*, 620. *Note*. *Cornu* v. *Blackburne*, *E.* 21 *Geo.* 3. *infra*, 641. *Anthon* v. *Fisher*, *T.* 22. *Geo.* 3. *infra*, 649. *Note* [1].

COMERFORD *against* PRICE.

Tuesday, 1st February.

If an attorney is sued by *original*, as acceptor of a bill of exchange, he may plead his privilege in abatement in such a case, as well as in any other personal action.

ACTION, by *original*, against the defendant, as acceptor of a bill of exchange.—The *declaration* set forth, that the drawer had directed the bill of exchange to the defendant, by the name and description of Mr. *William Price*, *attorney at law*.—The defendant *pleaded*, in abatement, that, at the time of suing out the original, he was an attorney of this court, and that, according to the immemorial custom and privileges of the court, every attorney of the court, who is sued in any personal action, ought to be sued by *bill*, filed and exhibited against him as being present in court, and that no attorney is compellable against his will to answer in any personal action prosecuted by original; and averred, that he had been impleaded by the said original writ against his will, and against the custom and privileges aforesaid.—The plaintiff *demurred* generally.

Davenport argued for the plaintiff, that, if this privilege of attorneys were to be held to extend to actions on bills of ex-

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COMERFORD against PRICE.

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change, it would be productive of great inconvenience to trade, for a bill could not be filed in the vacation; and if the bill of exchange became due in the vacation, (which *was the case here,) an attorney, who was an acceptor or indorsee, might set the holder at defiance for several months, so that the security would be worse than in the case of other persons, and not what the holder is entitled to by the custom of merchants. By accepting the bill, the defendant ought to be considered as having waved his privilege. When an attorney assumes a new character, as by taking upon him the office of executor or administrator, or by joining with another person in any contract, he loses this privilege, whether he is plaintiff or defendant. Here, by signing the bill of exchange, the defendant had taken upon him, in the eye of the law, the character of a merchant. He said there were no cases on the subject, but that he had known many instances where attorneys had submitted to arrests on original in actions upon bills of exchange, and that the point had never been disputed till now.

Bower was to have argued in support of the plea, but Lord MANSFIELD stopped him.

Lord MANSFIELD,—This case is extremely clear. A man does not make himself a merchant by drawing or accepting a bill of exchange. Here the very bill of exchange itself described the defendant as an attorney. If there are no cases, it is because the privilege cannot admit of a doubt.

BULLER, *Justice*,—It must not be taken for granted, that a bill cannot be filed in vacation. I think there has been a case before the court, since I have been on the Bench, where it was determined, that it may be done to save the statute of limitations [† 84] [F]. As to the inconvenience supposed to attend

[† 84] The following case has been since decided:

LANE v. WHEAT, *B. R. M.* 23 *G.* 3.

Wood had obtained a rule to shew cause, why the proceedings should not be set aside as irregular, the defendant being an attorney, and the action having been commenced by bill filed in the vacation. It appeared, that, if the

[F] It has since been decided that the rule, that a bill may be filed against an attorney in the vacation, is a general rule, and not merely an exception in the case of the statute of limitations. *Waghorn* v. *Fields*, 5 *T. R.* 173. and in another case, where it became necessary to state the precise time at which the action was commenced, in order to shew, on the one hand, that it was after the cause of action accrued, and, on the other, that it was previous to a tender made by the defendant, leave was given to insert in the memorandum of the bill the day on which it was filed. *Dodsworth* v. *Bowen*, 5 *T. R.* 325. In *Heron* v. *Edwards*, 8 *T. R.* 643. it was decided that the same power of filing a bill in vacation extends to actions against prisoners.

attend this privilege in the case of bills of exchange, I do not see that there is any. Every person who takes one, ought to make it his business to inquire into the situation and circumstances of those whose names are upon it. And, with regard to the advantage of the arrest, *that* was originally only meant to compel an appearance; nothing farther can be done in the vacation, so that by filing your bill against an attorney the first day of the term, you are as far advanced in the cause, as if he had been arrested.

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COMERFORD against PRICE.

Judgment for the defendant [† 85].

the plaintiff had waited till the commencement of the term, the statute of limitations would have attached.

Wood now cited, in support of the rule, *Broadwaite* v. *Blackerby (a)*.

Wallace and *Leycester*, for the plaintiff, stated, that it was become the constant practice to file bills against attorneys, in vacation, to prevent the statute of limitations from attaching, (in which they were confirmed by the master,) and relied on what was said by BULLER, *Justice*, in *Comerford* v. *Price*. They also cited *Leadbeter* v. *Markland (b)* as applicable, in point of argument, and principle, and argued from the absurd consequences which would follow, if the rule contended for on the other side were universally established, since, in cases where an action given by statute must be commenced within three months, it might so happen that the three months would begin and expire, before the commencement of the term.

Lord *Mansfield*,—Public justice is concerned in this question. The master states the practice to be to file bills against attorneys in vacation. Fictions are allowed against all the King's subjects for the furtherance, but never for the hindrance of justice. Why should an attorney be in a different situation from other persons?

ASHHURST, *Justice*,—In common cases, there is no occasion to take this course, because no time is gained by it.

BULLER, *Justice*,—The reason of the case in *Comberback* cannot be supported, *viz.* that a bill filed in vacation cannot be referred either to the precedent or subsequent term. If that were true, no proceedings could go on out of term.

The rule discharged.

[† 85] An attorney who is arrested by *capias* on a special original out of the same court, is not entitled to his discharge on serving the sheriff with a writ of privilege, but must plead such privilege in abatement, *Crossley* v. *Shaw*, *C. B. E.* 16 *Geo.* 3. 2 *Bl.* 1085.

(a) *B. R. H.* 9 *W.* 3. 12 *Mod.* 163. *Comb.* 465.—*Vide*, also, a case of *Holloway* v. *Cross*, *B. R. E.* 17 *Geo.* 2. cited by *Denison*, Justice, in 2 *Burr.* 1052, where it is said, "That prisoners are considered in the same light "with attorneys, (who are supposed "to be always present in court), "*against whom bills cannot be filed, "but in term time.*"

(b) *C. B. H.* 17 *Geo.* 3. 2 *Blackst.* 1131.

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Tuesday, 1st February.

The KING *against* MORGAN and Another.

On a rule for an information, though the court may think a ground is laid, yet, if, under the circumstances, the payment of the prosecutor's costs appears an adequate punishment, they will discharge the rule on the defendant's undertaking so to do.

THIS was a rule to shew cause, why an information should not be filed against the two defendants, one of them for sending, the other for carrying a challenge. Upon shewing cause, the court thought there was ground for granting the information. But, under all the circumstances, were of opinion, that it would be a sufficient punishment if the defendants paid the costs; and, therefore, discharged the rule on those terms.

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Monday 7th February.

THELLUSSON *against* FLETCHER.

In an action on a policy on a foreign ship, when there is a stipulation that the policy shall be sufficient proof of interest, if there is judgment by default, the plaintiff on the writ of inquiry needs only to prove the defendant's subscription to the policy, without giving any evidence of interest.

THIS was a rule to shew cause, why the inquisition on a writ of inquiry, in an action on a policy of insurance, should not be set aside. The case was this: The policy was on goods on board three *French* vessels, from *Saint Domingo* to *Bourdeaux*. The material part of it, as to this case, was in the following words: "On all goods loaden or to be loaden "aboard the ships *Le Soigneux*, *La Pucelle*, and *Le Vain-*"*queur*, all or any of them: The said goods and merchandizes "by agreement are, and shall be valued at "(*a*), on 25 casks of clayed sugar, and 12 hog-"sheads of muscovados: The policy to be deemed sufficient "proof of interest in case of loss." The first count in the declaration stated, that goods to a great amount, being the property of certain foreigners, had been shipped on board *Le Soigneux*, and that *she* had been lost. The second averred, that the goods were shipped on board *the three ships, or some or one of them*, to the amount of the sum insured, and that *two of them had been captured, and the other lost*. The defendant had underwritten £300, and having suffered judgment by default, the jury, on the writ of inquiry, assessed the damages at that sum, without any proof of the amount or value, or any evidence whatever, except of the defendant's handwriting to the policy.

The

(*a*) This was left blank, as here printed.

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THELLUSSON against FLETCHER.

The *Solicitor General*, for the plaintiff.—*Bearcroft* and *Davenport*, for the defendant.

It had been urged, on the part of the defendant, before the sheriff, and was now, that it was incumbent on the plaintiff to give some farther evidence of interest, and to prove that some sugars belonging to the insured had been shipped. An affidavit was produced tending to shew that, in fact, the insured had no interest.

The *Solicitor General* contended, that, by the express agreement of the parties, no other proof of interest but the policy was required, and this insurance on foreign ships and property was not within the statute prohibiting such policies *(b)*, so that the plaintiff was entitled to recover the sum insured by the defendant, even if it could be proved that the insured had no property on board.

The court said, that this was not a policy within the [F 1] statute, foreign ships not having been included in that act, on account of the difficulty of bringing witnesses from abroad to prove the interest. The only difficulty there could have been here was from the circumstance of there being three ships, but the second count was so framed as to make the case the same as if there had been but one. By suffering judgment, the defendant had confessed the plaintiff's *title* to recover, and the *amount* was fixed by the stipulation in the policy.

[816]

BULLER, *Justice*, observed, that writs of inquiry are often sued out in cases where they are not necessary [1], as for instance, in actions on covenants for the payment of a sum certain; and, for this, he cited a case in 2 *Saunders*

(b) 19 *Geo.* 2. *c.* 37.

[1] Vide *Bruce* v. *Rawlins*, *C. B. E.* 10 *Geo.* 3. 3 *Wils.* 61, 62. where, on a motion to set aside the inquisition on a writ of inquiry for excessive damages, in an *action of trespass*, the Reporter makes *Wilmot*, Chief Justice, say, "This is an inquest of office to "inform the conscience of the court, "who, if they please, *may themselves* "*assess the damages* [† 86]."

[† 86] *Vide* also, to the same effect, *Hewit* v. *Mantel*, *C. B. E.* 8 *Geo.* 3. 2 *Wils.* 372. 374.

[F 1] In *Andree* v. *Fletcher*, 2 *T. R.* 161. the authority of this case was recognized, but it was decided that the exception in favour of foreign ships does not extend to the case of re-assurance, which is prohibited by the 4th section of the same statute.

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ders (a) [☞ 1]. He said it does not follow, because a writ of inquiry has been awarded, that the amount of the demand is uncertain. In actions upon a bill of exchange, or a promissory note, nothing but the instrument is to be proved before the jury [2], the sum being thereby ascertained. Though, even in cases where there is no necessity for a writ of inquiry, that proceeding is of use, when the plaintiff goes for interest, which the jury assesses in the name of damages.

The rule discharged [3].

(a) Holdipp v. *Otway*, T. 21 *Car.* 2. 2 *Saund.* 106 [F 2.]

[☞ 1] In *Rashleigh* v. *Salmon*, C. B. T. 29 *Geo.* 3. *H. Bl.* 252. which was an action on a promissory note, and judgment by default, the court, on motion, referred it to the prothonotary to ascertain the damages and costs, and calculate interest on the note, without a writ of inquiry [F 3].

[2] In such cases, although the note, or bill is stated, and the execution of it averred, in the declaration, it has been settled in many instances, that it must be *produced* before the inquiry jury. *Billers* v. *Bowles*, C. B. H. 18 *Geo.* 2. *Barnes, quarto edit. p.* 233. *Ellis* v. *Wall*, C. B. T. 19 & 20 *G.* 2. *ibid. p.* 234. *Snowdon* v. *Thomas*, C. B. H. 11 *Geo.* 3. 2 *Blackst.* 748. [† 87] [☞ 2].

[3] There was a similar rule in another action on the same policy, (*Thellusson* v. *Walter*,) which, of course, was also discharged.

[† 87] *S. C.* 3 *Wils.* 155.

[☞ 2] But it need not be *proved*. *Green* v. *Hearne*, B. R. E. 29 *Geo.* 3. 3 *Term Rep.* 301 [F 4].

[F 2] See the note of Mr. Serjeant Williams on this point.

[F 3] In *Shepherd* v. *Charter*, 4 T. R. 275. the practice of referring to the master to compute principal and interest, without the execution of a writ of inquiry, was established in K. B.; and it is now the ordinary practice of both courts.

[F 4] So in a writ of inquiry in an action of assumpsit, where the defendant gave in evidence that she had acted as agent for her husband, and thereupon the jury reduced the damages to 1*s.*; the court held that such evidence ought not to have been gone into. *De Gaillon* v. *Victor Hard L'Aigle*, 1 B. & P. 368.

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WALKER and Others, Assignees of BEAN, a Bankrupt, *against* BURNELL and Another.

Monday, 7th February.

THIS was an action of *trover*, against the sheriffs of *London* for goods taken on a writ of *fieri facias*. The cause was tried at the last Sittings at *Guildhall (a)*, before Lord MANSFIELD. The facts were these:—A commission had been sued out against *Bean*, in *August* 1772. He had been engaged in very complicated and extensive concerns; and debts to the amount of £60,000 were proved under this commission. In *December* 1772, he obtained a certificate. He never removed from his house, nor were the furniture, houshold goods, and plate, sold or removed, but he remained in possession of them, and, after his certificate, engaged in trade on his own account, and continued to trade till some time in the summer 1779, and after the execution in question. But though he traded for himself, he was continued in the house by his assignees, (the present plaintiffs,) as an agent for them in getting in and settling his affairs, and, in all the statements of the bankrupt estate and effects, which they had laid before his creditors at different times down to *March* 1779, the houshold goods in question, (which had been inventoried and valued immediately after the commission issued,) were included. In *March* 1779, an action was commenced against *Bean* by two creditors, *Davis* and *Prothero*, who afterwards recovered a judgment, and sued out the *fieri facias* which gave rise to the present cause. A *distringas* having issued to compel an appearance in that action, the officer came to *Bean*'s house, to levy on his goods, when *Bean* paid the 40*s*. The same attorney acted for *Bean* and for the assignees. In a note which *he* wrote to the attorney for *Davis* and *Prothero*, stating to him that he thought there was an irregularity in the *distringas*, and desiring him to return the 40*s*. he took no notice that the goods in the house did not belong to *Bean*. The execution came in in *June*, and, about the same time, the assignees had the goods again appraised, when they were valued at £353. They then proposed that they should be sold by auction to the best bidder, and the produce paid into court, to abide the event of an action to be brought by them to try the property. The attorney for *Davis* and *Prothero* agreed to this, but the sheriff's officer would not, but removed the goods from the house, in *June*, and, on the

If a bankrupt after his certificate and who trades again for himself is left for several years in possession of his house, household goods, and furniture, in order to assist in settling the affairs of the bankrupt estate, the assignees repeatedly stating the goods, &c. in their accounts with the creditors as part of the estate, such possession does not fall within the 21 *Jac.* 1. *c.* 19. § 11. so as to vest the goods in assignees under a second commission.

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(*a*) *Saturday*, the 18th of *December* 1779.

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the 17th of *November* 1779, sold them, under a writ of *venditioni exponas*, for £260. The present action was commenced on the 11th of *November*, and two days afterwards, (13th *November* 1779,) a second commission issued against *Bean*. The time of the act of bankruptcy, on which this second commission was founded, did not appear. The present plaintiffs proved a debt under it Their attorney in this cause was also solicitor to the second commission.

The defence was: 1. That, after permitting such a long possession by *Bean*, who continued the visible owner, and held forth the credit of the effects to the world while he traded on his own account, the present plaintiffs had precluded themselves from claiming them against his *bonâ fide* creditors: 2. That, if this were not so clear, yet *Bean*'s possession was such as intitled the assignees under the second commission to the goods, by virtue of the statute of *Jac.* 1 (*a*), and therefore, *quâcunque viâ*, the present plaintiffs could not make out a property in themselves to support their action.

The answer given on the part of the plaintiffs was: 1. That, from the extensive nature of *Bean*'s former business, his creditors were extremely numerous, and, as the goods had always been stated to them as belonging to the assignees, and that even so lately as *March* 1779, it was a matter of general notoriety, that he was not the owner: 2. As to the second commission, it did not appear that the act of bankruptcy on which it was founded had been committed before the goods were taken out of *Bean*'s possession; the new assignees had not claimed them; and, besides, his case did not fall within the meaning of the statute.

Lord MANSFIELD told the jury, that this was an action in which the plaintiffs must prove property in themselves, and a conversion by the defendants. That there appeared to be strong evidence, particularly from the last statement, (in *March* 1779,) that the plaintiffs, as assignees under the first commission, meant to keep up their claim to the goods. This would be an answer in any question between them and *Bean*. But the point now was, whether, as between them and strangers, they were not to be considered as having made a present of the goods to the bankrupt. The goods were chiefly of a perishable nature; the possession was not for a few days or months, but for seven years; and *Bean* having begun as a new man in 1772, his new creditors dealt with him on the faith of the appearance he made in the world. As to the other ground of defence, by an express statute, if a bankrupt shall, by the permission of the owner, have in his possession, order, and

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(*a*) 21 *Jac.* 1. c. 19. § 11.

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and dispoitions, goods whereof he shall be reputed owner, &c. at the time of his bankruptcy, such goods are, by the commission and assignment, vested in the assignees as completely as the rest of his estate. They must therefore consider whether these goods were in *Bean*'s possession, &c. at the time of his second bankruptcy.—If they should find for the plaintiffs, and should consider the *sheriffs*, or their officer, as the real defendants, they ought to assess the damages at the appraised value of the goods. But, if they should look upon *Davis* and *Prothero* as being, in substance, the defendants, the damages ought only to be what the goods actually produced.

The jury found for the plaintiffs, with £353 damages, being the appraised value.

Bearcroft, on *Tuesday* the 25th of *January*, obtained a rule to shew cause why the verdict should not be set aside, which he moved for on both the grounds above stated.

The *Solicitor General* shewed cause.

Very little was said, now, on the first ground. On the second, it was objected for the plaintiffs, (as at the trial,) that there was no proof that the second bankruptcy was prior to the execution; the only answer to which was, that the attorney for the plaintiffs was possessed of the proceedings, and as he had not produced them, it might fairly be presumed, that they would shew such a prior act of bankruptcy.

Lord MANSFIELD,—The bias of my mind, at the trial, was very much in favour of the judgment-creditor; I suspected the fairness of the second commission; but, afterwards, I was satisfied with the verdict. There has been little said, now, on the first point. On the second, I thought, that as the plaintiffs had proved a debt under the new commission, they could not question its *validity*, though they might the *time* of the act of bankruptcy. The time was not proved, but I am satisfied the case cannot be brought within the statute. What are the words? "If any persons, at the time of their "becoming bankrupt, by the consent and permission of the [320] "true owner and proprietary, have in their possession, order, "and disposition, any goods or chattels, whereof they shall "be reputed owners, and take upon them the sale, alteration, "or disposition, as owners." Many cases have arisen upon this act, where the party left in possession might sell, but *Bean* had not the disposition so as to sell the goods. If he had sold them, it would have been a breach of trust towards the plaintiffs. If I send my plate to a banker's, to be sure he may dispose of it, but he has not my permission or consent so to do.

WILLES, *Justice*,—As to the first point, it was a matter fit for the determination of the jury, and I think the evidence was strong in favour of the plaintiffs. With regard to the question

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question on the statute, the words are, "if the bankrupts take "upon them the sale *or disposition* as owners." *Bean* could not sell, but he was permitted to use goods as visible owner for seven years. I shall not give a decisive opinion on the point. It may come often before the court. This does not seem to me to be like the case of plate sent to a banker's. But it would be improper to grant a new trial on the ground of the act of parliament, because it could be of no service to the defendant. It could only be granted on payment of costs, and the second assignees would be entitled to bring an action, and recover the value of the goods.

ASHHURST, *Justice*,—The statute certainly does not extend to every case of possession.—Not, for instance, to the case of a ready-furnished lodging. I look upon this in the very same light. *Bean* gave his *service* in settling and arranging the affairs of the estate in lieu of *rent*.

BULLER, *Justice*,—Questions of this kind have much more of fact than of law in them. The sort of possession, disposition, *&c.* are facts to be proved, and for the consideration of the jury. The statute says, "whereof they shall be *reputed* "owners." Here the bankrupt was not the reputed owner. Possession of the goods exposed for sale in a shop may be within the statute, but possession of furniture in a house is no more evidence of a right to that furniture, than of a right to the house.

The rule discharged [† 87].

[† 87] *Vide*, on the construction of the statute of 21 *Jac.* 1. *c.* 19. § 11. *Mace* v. *Cadell*, *B. R. M.* 15 *Geo.* 3. *Cowp.* 232. ☞ *& vide* also *Collins* v. *Forbes*, *B. R. T.* 29 *Geo.* 3. 3 *Term Rep.* 316.

[F] This doctrine of Mr. Justice Buller was referred to and confirmed by the court in *Horn* v. *Baker*, 9 *East*. 215. in which it was held that goods of which a trader, or a partnership of traders, have the possession and the apparent ownership, order, and disposition, by permission of the real owner, shall pass to their assignees, although they may not have such powers *as against* the real owner. See also the very full and learned report of the case of *Lingham* v. *Biggs*, and the cases there cited, 1 *B. & P.* 82.

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DAVIE and Another *againſt* STEVENS and Others.

Tuesday, 8th February.

THIS was a case sent from the court of *Chancery*, which stated;—That *Christopher Stevens*, being seised in fee-simple of the estate in question, devised the same in the following manner:—"I also give and bequeath to my son *William Stevens*, when he shall accomplish the full age of twenty-one years, *the fee-simple and inheritance of Lower Shelstone, to him and his child or children for ever.* I also give and bequeath to my wife *Elizabeth Stevens* my estate of *Lower Shelstone* until my son *William Stevens* shall accomplish his full age of twenty-one, she paying to my said son, the sum of £5 a year before he shall be of the age of twenty-one, and then to have the possession of the whole estate of *Lower Shelstone;*"—(Then a particular provision for his wife;)—"Also my will is, that my wife *Elizabeth Stevens* shall find and provide for my son *William Stevens*, before he shall be of the age of twenty-one, sufficient meat, drink, washing, apparel, and attendance; neither shall there be any of the timber on the estate of *Lower Shelstone* cut or felled down, except what shall be wanting to be used on the same, before my son *William Stevens* shall be of the age of twenty-one; and then to have quiet possession of the same. But if my son *William Stevens* shall happen to die before he shall accomplish the full age of twenty-one, then I give and bequeath *the fee-simple, and inheritance* of *Lower Shelstone* to my wife *Elizabeth Stevens for ever.*"—The testator died, leaving *Elizabeth Stevens* his widow, and *William Stevens* his only son, who was then about fifteen, and afterwards attained the age of twenty-one, and was married, and had several children. *William Stevens* afterwards died, leaving *Mary Stevens*, (one of the defendants,) his widow, and *John Stevens*, (another defendant,) his heir at law.—The question was, what estate *William Stevens* took under the will.

By a devise of the fee-simple and inheritance to A. and his child or children for ever when he shall be 21 years of age, but if he die before that time, then the fee-simple and inheritance to B. A. takes only an estate-tail.

(The bill was filed against the heir at law, for a specific performance of an agreement entered into by *William*, for a sale of the estate.)

Rooke, for the plaintiffs, contended, that, by the manifest intention, and upon the fair construction of the will, the son took an estate in fee. The testator had used the strongest words possible, except "*heirs*," and *that* is not necessary to pass

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pass a fee-simple by will. *In Coke Littleton (a)*, it is laid down, that an estate in fee-simple passes by a devise to a man *for ever*, or *in fee-simple*, or *to him and his assigns for ever*; and, in the case of *Widlake* v. *Hardinge*, in *Hobart (b)*, a devise "to my cousin *A. H.* for 99 years, and my said cousin *A. H.* shall have *my inheritance*, if the law will allow "it," was held to pass the fee-simple. Here the words "*fee-simple*," "*inheritance*," and "*for ever*," are all used. The will further says, that, at the age of twenty-one, the son should have the *whole* estate, and this would clearly carry the absolute property and inheritance, according to what is laid down in the *Countess of Bridgwater's Case (c)*; but the last clause in the will is decisive, for by *that*, if the son should die before twenty-one, the testator gives the *fee-simple* and *inheritance* of *Lower Shelstone* to his wife *for ever*. This must mean the same fee-simple and inheritance, which, in the event of the son's coming of age, he had before limited to him. There is no devise over if the son should attain his age of twenty-one; but, if an estate-tail had only been meant, it is clear the wife was so much an object of the testator's favour that he would have limited the remainder in fee to her, and not have left it to go in a course of descent. The presumption is, in general, against a partial intestacy. It must be argued, on the other side, that the words "*child or children*" restrain the preceding words, and confine the estate to a fee-tail. Cases will be cited in support of this construction; but all that can be mentioned, were cases where the question was, whether there should be an estate in fee-simple, or for life. No case can be produced where expressions, which otherwise would clearly carry a fee-simple, have been restrained by the words "child or children," to an estate-tail.

Batt, for the defendants, said, he should rely on two clear rules of construction. 1. That the intention must prevail if consistent with law. 2. That effect must be given to all the words of the will, if possible. The words "*fee-simple and inheritance*" may very fairly be understood as descriptive of the interest the testator had *himself* in the estate. But if they are taken to apply to the *interest devised*, they are restrained by what follows. It was in *Wild's Case (d)* laid down, that an estate-tail passes by a devise to a man and his children, if he have no children at the time; (otherwise, as was the case there, the father only takes for life.) This doctrine is also recognized in *Cook* v. *Cook* in *Vernon (e)*, and in *Gilbert's* law of *Devises*. Unless the words "*child or children*"

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(a) *Co. Littl.* 9 *b.*
(b) *H.* 8 *Jac.* 1. *Hob.* 2.
(c) *B. R. H.* 2 *Ann.* 6 *Mod.* 106. 110.
(d) *B. R. H.* 41 *El.* 6 *Co.* 16. *b.* 17. *a.*
(e) *Canc. E.* 1706. 2 *Vern.* 545.

children" should be construed to restrain [F] the interest devised to an estate-tail, they will have no operation, and, according to the second rule mentioned, they must, if possible, have some effect given to them. There are numerous authorities to shew that subsequent expressions may narrow the sense of those which go before, not only in wills, but in deeds. Thus, in *Coke Littleton (f)*, it is laid down, that if lands are given to *B.* and his heirs, *habendum* to *B.* and his heirs *if he have heirs of his body*, and, if he die without heirs of his body, to revert to the donor, this is only an estate-tail. So in *Leigh* v. *Brace*, in *Carthew (g)*, a feoffment being to feoffees and their heirs to the use of *A.* for life, and afterwards to the use of *B.* and *his heirs for ever*, and for *default of issue of the body of B.* then to the use of the heirs of the feoffer, the limitation to *B.* was construed to be only an estate-tail; and, in a case in *Dyer (h)*, a devise in words very like the present, *viz.* "I give the *fee-simple* of my *bigger house* to *A.* and "after *A's* decease to *B. A's* son," was construed to pass only a life-estate to *A.* The words "*then to have the pos-* "*session of the whole estate*," in the present case, were only meant to express that the son was, at his age of twenty-one years, to come into the possession of every thing which his mother was to possess till that time. There are no words super-added to the devise over of "the fee-simple and inhe- "ritance" to the wife, which shows that a difference was intended between the estate given to her, if the son should die under age, and that limited to him.

Rooke, in reply, observed, that the devise was of "*the* fee- "simple," and not "*my* fee-simple," which showed, that a description of the *interest*, not the *subject*, was meant. That no cases had been cited where the words "*child or* "*children*" had narrowed an estate to a fee-tail. In the case put in *Wild's Case* there were no words of inheritance in the first part of the devise. The case in *Dyer*, when taken all together, made rather in favour of the plaintiffs.

Lord MANSFIELD,—I had a mind to see whether ingenuity could raise a doubt, on the one side, or supply an argument, on the other, to make the case plainer than it is on the face of it. If the testator had used the words, "all his "estate,"

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(*f*) *Co. Littl.* 21. *a.* 2 *Bac. Abr.* 260, 261.

(*g*) *B. R. H.* 6 *Will.* 3. *Carth.* 343.

(*h*) *E.* 19 *El. Dy.* 357. *pl.* 44.

[F] So the words "children lawfully to be begotten" used in a codicil may be applied to enlarge the estate devised, where that created by the will was only a life estate. *Scale* v. *Barter*, 2 *B. & P.* 485: in which the cases on this subject are brought together, and fully discussed by *Ld. Alvanley*, C. J.

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"estate," "inheritance," or "for ever," and had stopped there, the fee-simple would have passed. But the words, "*child or children*," are to the full as restrictive as if he had said, "and if my son die without heirs of his body." To give the father an estate in fee, would be to strike those words out of the will. They must operate to give him an estate-tail; for there were no children born at the time, to take an immediate estate by purchase. The meaning is the same, as if the expression had been, "to *William and his heirs, that is* "*to say, his children or his issue.*" The words, "for ever," make no difference, for *William*'s issue might last for ever.

The certificate was as follows:

"Having heard counsel, and considered this case, we are "of opinion, that *William Stevens* took, (under the above "will of *Christopher Stevens*,) an estate-tail to him and the "heirs of his body, with reversion to himself in fee, by "descent.

"MANSFIELD.
"E. WILLES.
12th *February* 1780. "W. H. ASHHURST.
"F. BULLER[†88]."

[† 88] Vide *Hodges* v. *Middleton*, *T.* 20 *Geo.* 3. *infra*, 415.

Tuesday, 8th February.

WEMYS *against* LINZEE and Another.

A captain of marines, who happens to be on board a man of war when she takes a prize, but does not belong to her complement, shares only as a passenger [F].

THIS was an action for money had and received to the plaintiff's use. The plaintiff was a captain of marines, (with the rank of major,) and commanded the detachment of marines on board the *Europe*, Admiral *Montague*'s ship, at *Newfoundland*. Hostilities having commenced between *France* and this country, the Admiral sent Commodore *Evans* to seize the two *French* settlements of *Miquelon* and *St. Pierre*, and some marines were draughted from the *Europe*, and other ships, and sent on board the *Pallas*, under the command of the plaintiff, to assist in the expedition. The two islands being reduced, Commodore *Evans* rejoined the Admiral at *St. John*'s, having left the *Surprize*, a frigate of 28 guns, commanded by captain *Linzee*, (brother to one of the defendants,)

[F] The authority of this case was referred to, and admitted in argument in *Ld. Camden* v. *Home*, *in Error* 4 *T. R.* 382. and by Lord Kenyon in *Lumley* v. *Sutton*, 8 *T. R.* 224: in which the case of a captain of a ship on board, but under an arrest (another Captain being put on board to take the command) was distinguished from the present; and such captain under arrest, was held to be entitled as actual captain.

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defendants,) to finish some necessary business, and also the plaintiff, with part of the marines which he had brought with him from the *Europe* and other ships. The complement of marines belonging to the *Surprize* was under the command of a lieutenant *Moriarty*. Captain *Linzee*, soon after, received orders from Admiral *Montague*, to proceed, as soon as the business for which he was left was accomplished, to *St. John's*, taking the plaintiff and the marines left with him on board, and entering them on a *supernumerary list for victuals only*; and, in case the Admiral should have sailed for *England* when he should get to *St. John's*, then to continue the plaintiff and the marines on his supernumery list for victuals only, till he should arrive in *England*. The Admiral having been ordered home, the *Surprize* followed, having the lieutenant and her own complement of marines on board, and also the plaintiff and his additional marines. On the way to *England*, she took a *French* merchantman, called *Les Deux Freres*, and having brought her to *Spithead*, and the two defendants being appointed agents, they sold the ship, made out a list, according to the established regulation for the distribution of prize money, and gave notice in the *Gazette* for the payment of such part of the produce as had come to their hands. At the beginning of a war, it is usual to pass an act of parliament, authorizing the King to order the distribution of the value of prizes to the officers, seamen, marines, and soldiers, on board the ship or ships by which the prize was taken, in such proportions, and after such manner, as he should, by proclamation, order and direct. Such an act had passed on the present rupture with *France (i)*, and a proclamation was issued, in the usual form, dividing the persons entitled to share in prizes into five classes, and fixing a certain proportion for each class. The descriptions of the second and fifth classes are as follows:—*Second class*—"*The captain of marines* "and land forces, sea lieutenants, and master on board."—They are to have one eighth divided amongst them.—*Fifth class*—"The trumpeter, quarter gunners, carpenters, crew, "steward's cook, armourer, steward's mates, cook's mate, "gunsmith, swabber, ordinary seamen, and marines, and "other soldiers, *and all other persons doing duty and assisting on board.*"—This class is to have two eighths divided amongst them.—Upon the advertisement in the *Gazette*, the plaintiff came and claimed a share, when the defendants offered him the proportion of persons in the *fifth* class. He insisted he was entitled to be ranked in the *second*, as a *captain of marines on board* at the time of the capture, and to be paid accordingly. This being refused, he brought the present action,

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(i) 19 Geo. 3. c. 67.

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tion, which came on to be tried before Lord MANSFIELD, at *Guildhall*, at the Sittings after last term *(k)*.

The question turned very much on the nature of the marine service. Every passenger who is accidentally on board a King's ship during an engagement does duty, and is therefore entitled to share in the fifth class, but it was said, on the part of the plaintiff, that being an officer of superior rank to the lieutenant of marines who belonged to the *Surprize*, he superseded him of course, when he came on board, and was therefore, at the time of the capture, to be considered as commanding the marines.

Several officers in the marines were called to establish this position, but their evidence went rather to matter of opinion, than to instances, or facts; and it was suggested, on the part of the defendants, (and, in the further progress of the cause, appeared to be true,) that, by the present regulations of the navy, no officer of marines, above a lieutenant and his party, can be allotted to any ship under 50 guns. It appeared, that the complement of marines belonging to any ship is not fixed and appropriated to that ship in the same manner that the sea officers and mariners are, but that they are frequently shifted and removed, in a sort of rotation, as land troops from different barracks and quarters.

For the defendants, the manner in which the plaintiff was entered on the books was relied on, as well as the above regulation against any higher officer of marines than a lieutenant, serving on board such ships as the *Surprize*. Several officers of very high rank in the navy were examined, (among others Admirals *Montague*, *Barrington*, *Evans*, and *Campbell*,) but who also spoke chiefly to their opinion, which was clear against the claim of the plaintiff, and that a superior officer of marines, coming on board by accident, does not command the complement belonging to the ship.

What was of most weight was the case of the sea officers belonging to the *Gloucester*, upon Lord *Anson*'s expedition, which was shortly this: Lord *Anson*, on his return home, having the *Centurion* and *Gloucester* with him, found it ad-
[327] viseable to sink the *Gloucester*, taking her crew and officers on board the *Centurion*. The men were incorporated with those of that ship, but she having her full number of officers, the officers of the *Gloucester* were entered on a supernumerary list. They continued in this manner on board during the rest of the voyage, and, when the *Acapulca* ship was taken, they took a part in the engagement, (as indeed they had done all along in the business of the ship,) according to their respective ranks. When the prize-money came to be distributed, they claimed to share with the officers belonging to the

(k) Wednesday, 22d *Dec.* 1769.

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the *Centurion*, each according to his respective rank. This produced a suit in the Admiralty, which, in the first instance, was decided in their favour; but, upon an appeal, (in which Lord MANSFIELD was counsel,) the sentence was reversed, and it was determined, that they were only entitled to share in the fifth class. (The regulation for distribution being the same then as now.)

Lord MANSFIELD, in summing up to the jury, observed, that, if it had not been agreed to try the question by this action, there might be a difficulty for want of proper parties.—(The *Solicitor General*, though nominally for the agents, said he was not counsel for them, but for the lieutenants of the *Surprize*).—His Lordship said, the question was of a delicate nature, as the discipline on board his Majesty's ships was necessarily involved in it. In the case of the officers of the *Gloucester*, he said, the determination had been, that the words "*on board*" in the description of the second class, meant *belonging to the ship*, and that being *corporally on board* was not sufficient. He had always thought *that* case was a very hard one, but it was solemnly decided. Opinions were not evidence, and as to facts, the proof was extremely loose on both sides. It was a material circumstance for the plaintiff, that marines are not, like seamen, fixed to the particular ship; but the argument from thence, was in a great measure answered by what had further been sworn, *viz.* that only the complement sent by the Admiralty are entered as belonging to the ship, that no body can add to that complement, so that other marine officers, or men, if they come on board, are only entered for victuals as passengers. It did not appear that the plaintiff was under any orders to continue on board the *Surprize*, or that he might not have quitted her at pleasure, if he had found it more convenient to return to *England* in any other vessel. His Lordship seemed of opinion with the [328] defendants; but the jury, after going out for some time, found a verdict for the plaintiff.

On *Tuesday* the 27th of *January*, the *Solicitor General* obtained a rule to shew cause, why there should not be a new trial, which was granted, upon his undertaking to produce an affidavit of Lord *Amherst* to shew that he and his brother, being on board a King's ship, (the *Dublin*,) on their way from *England* to *America* in the last war, a prize was taken, in which they only shared in the fifth class. An affidavit to that purpose was accordingly produced, and another, stating the order of the Admiralty, (above referred to,) that no captain of marines shall serve on board any ship under 50 guns.

This day, Lord MANSFIELD reported the evidence, to the effect above stated, and cause was shewn against the new trial.

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Dunning, and *Erskine*, for the plaintiff.—The *Solicitor General*, *Davenport*, and *Taylor*, for the defendants.

For the plaintiff, it was said, that Lord *Amherst*'s affidavit only proved that he and General *Amherst*, had not thought it an object to insist upon sharing in a higher class, and the order of Admiralty could not affect the case of a captain who happened, *in fact*, to be on board, a smaller vessel. That the case of the *Gloucester* did not apply, for that a sea officer's existence, as such, depends on the ship, to which he belongs, and if she is sunk or otherwise lost, his rank ceases intirely, till he receives a new appointment. That, if the doctrine contended for by the defendants were to prevail, an officer of marines could never receive any prize money, unless he happened to be on board his own ship, and the marines, being under the command of the Admiral, it would be in his power, by shifting the captains, to prevent them from ever receiving a share in any prizes.

Lord MANSFIELD said, the question was of considerable public consequence, and that farther enquiry might throw light upon it, He, therefore, thought it should be sent back to a jury, without the prejudice of any opinion.

The rule made absolute[1].

[1] The new trial came on at *Guildhall*, before Lord *Mansfield*, on *Monday* the 29th of *May*, and the defendants having given evidence of instances in which officers, under the same circumstances with the plaintiff, had only shared in the fifth class, and having proved that he had not in fact acted as commanding the marines on board the *Surprize*, a verdict was found for the defendants [† 89].

[† 89] *Vide Mackenzie* v. *Mayler*, *B. R. M.* 25 *Geo.* 3.

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Wednesday, 9th Feb.

POLYBLANK *againſt* HAWKINS.

In an action of covenant by the husband of tenant in fee, he must declare on a seisin *in fee in himself, and his wife, in right of his wife.* If he state that he is seised *in his demesne as of freehold in right of his wife*, it will be bad on a special demurrer.

THIS was an action of covenant, against the assignee of a lease, by the husband of the heir at law of the original lessor. The declaration, in stating the plaintiff's title, set forth, That one *William Strobridge* was seised in his demesne as of fee, and being so seised, granted the lease on which the action was brought. That he afterwards became seised of the reversion in his demesne as of fee, and upon his death, the said reversion descended and came to *Joanna* then, and still the wife of the plaintiff, as grand-daughter and heiress

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heiress at law of the said *William*; whereupon the plaintiff became, and from thence till the expiration of the term was, seised *of the said reversion in his demesne as of freehold in right of the said Joanna his wife.*—To this declaration, the defendant demurred, and assigned for cause of demurrer, "that it is stated in the said declaration, that the said plaintiff "was seised of the reversion of the said demised premises "in his demesne as of freehold in right of *Joanna* his wife; "whereas it ought to have been alleged, *that the plaintiff* "*and* Joanna *his wife, in right of the said* Joanna, *were* "*seised in their demesne as of fee, of and in the said de-*"*mised premises.*"

Lawrence, in support of the demurrer, contended that the declaration must set forth some certain, determinate estate, which was not done in this case, for "*freehold*" would apply either to an estate in fee, in tail, or for life, and it would be impossible here for the defendant to traverse the plaintiff's title; *Sanders* v. *Hussey (l)*. The very estate which the party has, and by virtue of which he entitles himself to the action, ought to be stated. Here the allegation implies a *sole* seisin, but when an estate in fee comes to a feme-covert, the interest of the husband and wife is a seisin in fee *in both*, in right of the wife. So it is stated in the declaration in *Took* v. *Glascock (m)* [F]; and that it is necessary so to state it, was directly determined in *Catlin* v. *Milner (n)*.

Wood, for the plaintiff, admitted, that the usual form of declaring was in the manner contended for, but said, such particularity was only necesssary, where, in order to support the action, *the whole estate* must appear. Here an estate for life in the reversion would entitle the plaintiff to the action, and the word "*freehold*" implied that he was a tenant for life. *That* part of the declaration which was objected to, could not be traversed; it was mere legal inference. The facts traversable were the seisin of the wife's ancestor, and the descent to her; and *that* was all that was necessary to be stated; the rest was surplusage. In the case of *Catlin* v. *Milner*, the husband, in a plea in bar, had merely stated, that he was seised in fee in right of his wife. That certainly was not true, and nothing farther appeared on the plea; so that it was a substantive

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(*l*) *C. B. T.* 8 *Will.* 3. *Carth.* 9. 2 *Lutw.* 1231.

(*m*) *B. R. E.* 21 *Car.* 2. 1 *Saund.* 250. 253.

(*n*) *C. B. T.* 7 *Will.* 3. 2 *Lutw.* 1421. 1425.

[F] See note 4 to p. 253. in Mr. Serjeant Williams' edition.

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stantive allegation on which issue might have been taken; but here enough appeared, taking the whole of the facts stated together, to shew exactly the title of the plaintiff. The case of *Took* v. *Glascock* was merely the precedent of a declaration, this point was no part of the case brought before the court; and the case of *Sanders* v. *Hussey* was not like the present, for, there, the declaration merely said, that the plaintiff was *seised*, without any additional words.

Lord MANSFIELD absent.

WILLES, *Justice*,—This is a good objection in point of form, upon a special demurrer.

BULLER, *Justice*,—It is admitted, that it is the established practice to state the exact title, and it is a fault in form to have departed from it.

The court were going to give judgment for the defendant, but *Wood* moved for leave to amend, which was granted, on payment of costs.

Wednesday, 9th Feb.

JACKSON *against* HASSELL.

Bail to the action are not liable beyond the sum sworn to, and the costs [F1].

THE defendant's bail to the action obtained a rule to shew cause, why the proceedings against them upon their recognizance, should not be stayed, on payment of the debt sworn to, and the costs.

Cause was now shewn, and it was insisted, that the bail are liable for the sum recovered by the verdict, though exceeding that for which the defendant was held to bail; but the court said, that the contrary was the settled practice.

Lord MANSFIELD absent.

Baldwin in support of the rule,—*Bolton*, Serjeant, for the plaintiff.

The rule made absolute [☞].

[☞] *S. P. Peterkin* v. *Sampson*, *B. R. M.* 25 *Geo.* 3. *Sheddon* v. *Carnes*, *B. R. E.* 29 *Geo.* 3. But bail to the sheriff are liable, to the extent of the penalty in the bail-bond, to satisfy the full debt and costs [F 2]; although, by

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[F 1] S. P. *Clark* v. *Bradshaw*, 1 *East* 90; in which precisely the same rule was granted, on the authority of this case, and others there mentioned.

The practice in the Common Pleas is otherwise. There each of the bail is liable to the extent of double the sum, whether fixed by a judge's order, or by affidavit. *Dahl* v. *Johnson*, 1 *B. & P.* 205.

[F 2] S. P. *Stevenson* v. *Cameron*, 8 *T. R.* 28; in which this case was cited, and the court refused to permit a defendant, who had been irregularly discharged by the sheriff, to file common bail on payment of the sum sworn to; the same being less than the sum really due.

12 *Geo.* 1. *c.* 29. the sheriff cannot take the bond in a penalty of more than double the sum sworn to. *Mitchell v. Gibbons*, C. B. *M.* 29 *Geo.* 3. *H. Bl.* 76. So the sheriff on an attachment for not bringing in the body, is liable to the whole debt and costs. *Fowlis* v. *Mackintosh*, C. B. *E.* 29 *Geo.* 3. *H. Bl.* 233 [F 3]. 1780.

The KING *against* the INHABITANTS of NORTH SHIELDS.

[331]
Friday, 11th Feb.

No appeal lies from an order for the relief of a pauper. It is not settled whether a person who applies to the parish for relief for one of his children but not for himself, is entitled to such relief, although he refuses to go into the workhouse.

BY an order of a justice of peace, the parish officers of the township of *North Shields* were directed to pay to *Ann Irwin* of that township, the wife of *Thomas Irwin*, a mariner, and then a prisoner in *France*, the sum of two shillings and sixpence weekly, until such time as they should be otherwise ordered, for the support of her three children by her said husband; one aged six years, one three, and one fourteen months. The parish officers appealed to the quarter sessions, where the order was confirmed, and a special case stated to the following effect: "There was at the time of making "the order, within the township, a poor-house, established ac- "cording to the statute of 9 *Geo.* 1. *c.* 7. into which the parish "officers were willing to receive the pauper, with her three "children, and offered so to do; but she refused to go with her "said three children, who were of the ages mentioned in the "order. She had another child of eight years of age, for "whom she did not seek relief; neither did she seek relief for "herself, nor was any order for her. Her husband was a "mariner and prisoner in *France*, (as stated in the order,) and "the pauper unable to provide for her said three children." —The case concluded, "That these children being nurse- "children, the opinion of the court was, that they ought not "to be separated from their mother, and that the mother, "not seeking relief herself, was not compellable to go into "the workhouse."

Upon a *certiorari*, and a rule to shew cause why both orders should not be quashed, the case came on to be argued, on *Wednesday* the 9th of *February*.

Lee, and *Scott*, in support of the rule.—They argued, that the intention of the statute of 9 *Geo.* 1. *c.* 7. § 4. was to secure to parishes a benefit from the labour of persons asking relief. If parents receive assistance for the maintenance of their

[F 3] S. P. *Hippel* v. *King*, 7 *T. R.* 370.

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their children, *that* is, in truth, a relief to them. The case, therefore, states improperly, that the wife had not asked relief for herself; she did *virtually*, by asking it for her children, whom she, if able, was bound to maintain. They relied on the case of *Rex* v. **Carlisle (a)*, as in point. *That* was an indictment against parish-officers for disobeying an order of the quarter sessions, directing the payment of one shilling *per week* towards the mainenance of a pauper and her two bastard children. The trial came on at the assizes, but the point being saved, all the judges held, that the order was void under the 4th section of the statute, which says, "That if any poor "person shall refuse to be lodged, kept, or maintained, in "any work-house erected according to the provisions of the "act, such person shall be put out of the book or books "where the names of the persons who ought to receive col-"lection in the parish are to be registered, and shall not be "entitled to ask or receive collection or relief from the "church-wardens or overseers of the poor of the parish [F]."

Dunning, on the other side, contended, that, as the mother had not asked relief for herself, and the order was only for the support of her children, the case was not within the clause of the statute relied on by the counsel on the other side. As to the children, she was willing to let *them* go into the work-house, and, though nurse-children cannot be separated by any compulsory order from their mother, she may, by her consent, permit the separation, if she thinks it for their advantage. In the case of *Rex* v. *Carlisle*, the relief asked, and granted by the order, was partly *personal*, and therefore it was distinguishable from this case, and within the statute.

Lord MANSFIELD was not present during the first part of the argument.

WILLES, *Justice*, said this was a humane order, and he wished to support it. He did not think the words of the act in the way, and inclined to adopt the distinction made at the bar between this case and *Rex* v. *Carlisle*.

ASHHURST, *Justice*, thought the act extended to the present case; That maintenance for the children was relief to the mother. There might be great inconvenience if the court were to adopt the other construction. One object of the statute was to encourage industry, by holding out the disgrace of going

(a) *M.* 7 *Geo.* 3. 3 *Burn's Justice*, 13th edition, *p.* 537.

[F] But now by 36 *Geo.* 3. *c.* 23. Overseers may give relief to paupers at their homes, or magistrates may order it, notwithstanding there is a work-house in the parish erected according to 9 *Geo.* 1.

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going into a work-house, and if parents could obtain a maintenance for their children without being compellable to go to the work-house, idleness would be thereby promoted among artificers and manufacturers.

BULLER, *Justice*, on the contrary, thought the distinction between this case and *Rex* v. *Carlisle* clear. The act was meant in ease of parishes, but the effect would be quite the reverse if, when *one* of a numerous family wants relief, the *whole* must go to the parish work-house. On the other hand, the parish was not entitled to the labour of a *whole* family, because *one* of them might want relief.

The case stood over till this day, WILLES, *Justice*, expressing a wish that it might be compromised.

He now delivered the judgment of the court.

WILLES, *Justice*,—We think it unnecessary to give an opinion on the question which has been argued in this case [☞], because I, and my two brothers, are satisfied that no appeal lies from an order of maintenance. The statute of 3 *Will. & Mar. c.* 11. § 11. gives a *concurrent* jurisdiction, in the making orders for the relief of the poor, to the justices in or out of sessions[1], and does not authorise an appeal. The act of 9 *Geo.* 1. *c.* 7. made no alteration in this respect. The reason for not giving an appeal is, that the pauper might starve while the cause was in suspence. We have spoken to several gentlemen very conversant with sessions law, and none of them ever heard of such an appeal [2].

The order of the sessions *quashed*[3], and the original order *confirmed*.

[☞] But in *Rex* v. *Haigh*, *E.* 30. *Geo.* 3. it has been determined, that a parent is entitled to relief for his child, without being obliged to go into the work-house. 3 *Term Rep.* 637.

[1] The words of the statute are, "By authority of one justice residing "within the parish, or (if none be there "dwelling), in the parts next adjoin-"ing, or *by order of the justices in* "*sessions.*" This, it should seem, must mean by order of the court of quarter sessions, not of justices, as individuals, when they happen to meet at the quarter sessions. *Qu.* therefore, concerning the case of *Rex* v. *Winship & Grunwell. M.* 11 *Geo.* 3. 5 *Burr.* 1677. where the court is stated to have held, that the sessions could *not* make an original order of maintenance.

[2] *Vide Rex* v. *Woodsterton*, *M.* 6. *Geo.* 2. There was, in that case, *an appeal* from an order of two justices for relief, and the case coming before the court of *B. R.* the appellate jurisdiction of the sessions does not seem to have been disputed. The book indeed where it is reported is not of much authority. 2 *Barnardiston* 207. 247.

[3] Because they had no jurisdiction.

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Saturday, 12th Feb.

The KING *against* the INHABITANTS of BIRMINGHAM.

A hiring for a year to work by the piece, with an implied liberty, from the usage of the place, to be absent when the servant pleases, but not to work for any other master, gains a settlement, though he may have absented himself at different times in the course of the year.

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THIS was a special case, upon an order of removal, which set forth [1];

That *Thomas Baker*, the husband of one of the paupers, on the 17th of *October*, being unmarried, and having no child, was hired * in the parish of *Birmingham*, by *John Jennings*, a wood-screw maker, resident in that parish for a year, *good earn good hire*, to work for him, and no other master, to make screws at so much a gross; and this was all that passed upon the hiring. That persons are often hired at *Birmingham* under the terms "*good earn good hire*," the the meaning of which is, that their pay is to depend upon their work. *Baker* had no wages. He was to have what he got. If he got nothing, he was to have nothing. His master had no business but that of a screw-maker. He was to work in his master's shop, and do no other work. He served a year under the hiring, and, during the year, sometimes lodged with his master, sometimes in another house in the parish, and when he lodged with his master, he paid him for his diet and lodging. He sometimes absented himself to drink or play, for a week or fortnight, and never asked his master's leave for such absence. His master, on his return, was angry, and checked him, but always received him again. During such absence, he never worked for his master, nor did he, nor could he, for any other person. He took the same liberty of absenting himself, as other persons in the same way. The master had often found fault with him, and asked him to work, which he had refused to do, saying, "I won't work unless you will advance me money," to which the master said, it would be worse for him. Masters do usually advance money to persons hired under those terms. *Baker* had said to his master, that he could not compel him to work, and the master, in his absence, had said, that he thought he had no right to compel him. It is generally understood at *Birmingham*, that persons hired to work in shops, under the above terms, may occasionally absent themselves, but cannot work for any other master. Whether the master could or could not prevent *Baker* from absenting himself, or compel him to work, did

[1] The case had come on before in *T.* 19 *Geo.* 3. but having found *evidence*, instead of *facts*, it was sent back to be restated.

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The KING against BIRMINGHAM.

did not appear from any facts, but those above stated. He was hired again under the same terms, and perfected his service in the same way.

The court of quarter sessions, (for *Shropshire,*) confirmed the order of justices removing *Baker's* widow and child to *Birmingham.*

On *Wednesday*, the 9th of *February*, the *Solicitor General* and *Plumer* shewed cause.—They insisted that a complete hiring for a year was stated. The absences in the middle of the service were cured by the master's taking the servant back, so that the only question was on the contract, which [335] was to be construed by what passed when it was made. Payment by the piece had always been held as good, for the purpose of a settlement, as yearly wages [F 1]. The circumstances set forth in the case, (a great deal of which was evidence, and ought not to have been stated), only explained the nature of the service, but did not affect the terms of the hiring. The apprehension of the parties was of no consequence, as was determined in *Rex* v. *King's Norton (a)*. In *Rex* v. *Macclesfield (b)*, and *Rex* v. *Buckland Denham (c)*, which might perhaps be cited on the other side, there was an exception in making the contract, as to certain days or hours in the day when the servant was to be at liberty; in the first, it was particularly "stipulated, that the said service was to be only "*eleven hours* in the six working days; and all the rest of the "time, as well as on Sundays, the pauper was to be at his "liberty, and his own master;" in the other, the pauper was hired, "to work shearman's hours only." In *Rex* v. *St. Agnes (d)*, the court distinguished between an exception which is part of the contract, and one arising from the custom of the country [F 2].

Dunning

(a) T. 13 & 14 *Geo.* 2. *Burr. Settl. Cases*, No. 52.
(b) E. 31 *Geo.* 2. *Ibid.* No. 146.
(c) H. 12 *Geo.* 3. *Ibid.* No. 218.
(d) T. 10 *Geo.* 3. *Ibid.* No. 209.

[F 1] Nor does the nature of the work to be performed by the servant make any difference; even where part of the object of the servant is to learn the business. *R.* v. *Eccleston*, 2 *East.* 298.

[F 2] The same distinction was adopted in *R.* v. *North Nibley*, 5 *T. R.* 21.; in which it was held that a hiring for five years, as a colt-shearman, to work twelve hours each day, was insufficient for the purpose of giving a settlement.—Also in *R.* v. *Sutton*, 1 *East.* 656. where service under a weekly hiring, without any particular stipulation with respect to Sunday, was held a sufficient service for the whole week, so as to give a settlement when coupled with hiring for a year and service under it. See *R.* v. *Winchcomb*, *infra.* 391.

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Dunning and *Leycester*, in support of the rule, argued, that when local terms are used, they must be construed according to the sense affixed to them by the understanding of the place. The court of sessions therefore had done right in stating the meaning in which the terms used in this case are understood in the country, and the question would be, Whether, if instead of the words, the interpretation stated had been used in making the contract, that would have been a sufficient hiring? The contract, according to the explanation set forth in the case, was this, "I hire you for a year, but you may "absent yourself when you please." This therefore was an exception in the contract itself, not of any particular time, but of all times, at the option of the servant. If the bargain had been to work at such hours as screw-makers usually work, the case would not have been near so strong, and yet it would then have been exactly like that of *Rex* v. *Buckland Denham*. In *Rex v. King's Norton*, only the apprehension of the servant was stated. Here it was the general meaning of the whole country in the use of the particular words by which this [336] hiring was expressed. To make a hiring for a year, the master should have it in his power to require the service of the person hired at all times. This was rather an agreement not to work with others, than to work with the master. It was like a contract not to marry any other person, which is void. On such a contract as the present, the master could not have maintained an action for the servant's absence, nor could a magistrate have compelled him to serve.

Lord MANSFIELD absent.

WILLES, *Justice*, said, there was some nicety in the case, and therefore the court would take time to consider of it.

This day, being the last day of the term, he delivered his opinion, and that of the two other Judges who had heard the case argued, that there was a sufficient hiring and service at *Birmingham*. He stated the reasons of the judgment at large, and discussed the cases and arguments which had been produced on both sides; but I had then left the court.

Both orders confirmed.

The End of HILARY *Term* 20 GEORGE III.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF KING's BENCH,

IN

EASTER TERM,

IN THE TWENTIETH YEAR OF THE REIGN OF GEORGE III.

1780.

HODGSON and his Wife *against* AMBROSE and Another.

Tuesday, 18th April.

THIS was a case sent, under an order of the present Lord *Chancellor* (*a*), for the opinion of this court.

'*Susan Jolland*, spinster, being seised in fee, by her will 'duly executed, bearing date the 21st of *August* 1775, de- 'vised in the following words:—"I give and devise unto the "Reverend *William Arnold*, &c. and *Isaac Pennington*, &c. "and their heirs, all that my manor of *H.* &c. and also all "that my other farm called *D.* &c. and also all other my ma- "nors, messuages, lands and tenements whatsoever, &c. to "hold the same unto the said *William Arnold* and *Isaac* "*Pennington*

If there is a devise to *A.* and the heirs of his body, and *for want of such issue* to *B.* and *A.* dies before the testator, leaving issue, such issue shall take nothing, and the limitation to *B.* shall not be construed an executory devise, but shall vest in possession, as an immediate estate, on the testator's death.—The case of *Coulson* v. *Coulson* has been so long considered as law, that the precise question in that case ought not now to be litigated.

(*a*) 7th *December* 1779.

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" *Pennington* and their heirs, to such uses, and upon such " trusts, and to and for such interests and purposes, and un- " der and subject to such provisoes and agreements as are here- " inafter mentioned, expressed and declared of and concern- " ing the same: that is to say, as to, for, and concerning the " said manor and farm called *H. &c.* to the use and behoof of " my dear sister *Elizabeth* the wife of Mr. *John Belchier* and " her assigns, *for and during the term of her natural life*; " and after the determination of that estate, to the use of the " said *William Arnold* and *Isaac Pennington* and their heirs, " during the life of the said *Elizabeth Belchier*, upon trust to " support and preserve the contingent uses and estates herein- " after limited therein, from being defeated or destroyed, and " for that purpose to make entries and bring actions, as the " case shall require, but nevertheless to permit and suffer the " said *Elizabeth* and her assigns, during her life, to receive " and take the rents, issues, and profits thereof, to her and " their own use and benefit, and, *from and after her decease*, " *then to the use and behoof of the heirs of the body of the* " *said* Elizabeth *lawfully issuing*; and for want of such issue, " then to the use and behoof of my dear sister *Catharine Jol-* " *land*, spinster, and her assigns, *for and during the term of* " *her natural life*: and from and after, *&c.*" (the same limitations and in the same words as before, to the trustees for the life of *Catharine Jolland*, and after her death, *to the heirs of her body*,) " and for want of such issue, then to " the use and behoof of my own right heirs for ever. And " as, to, for, and concerning, the said farm called *D. &c.* " and all the said rest and residue of my manors, messuages, " lands and tenements whatsoever, subject to, *&c.*" (the payment of certain annuities,) " to the use and behoof of my said " dear sister *Catharine Jolland* and her assigns, *&c.*" (the same limitations to *Catharine Jolland*, and to the trustees for her life, as in the devise of the former part of the estate to *Elizabeth*,) " and, from and after her decease, *&c.*" (to the trustees and their executors for 1000 years without impeachment of waste upon trust, *&c.*) " and, after the determination " of that term, to *the heirs of the body of Catharine Jolland*, " and for want of such issue, to the use and behoof, *&c.*" (the same limitations over to *Elizabeth Belchier*; to the trustees; the issue of *Elizabeth Belchier*; and the testatrix's right heirs; as to *Catharine Jolland* in the fomer devise.)—' *Eli-* ' *zabeth Belchier* died on the 25th of *September* 1775, (in the ' lifetime of the testatrix), leaving one daughter, *Catharine* ' *Belchier*, one of the defendants. The testatrix died on the ' 11th of *May* 1776. After her death, *Catharine Jolland*, ' being advised thereto, made a demise of all the devised ' estates for 99 years, in trust for herself. She then suffered ' a recovery, to the use of herself in fee-simple, and after- ' wards

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'wards married the plaintiff *Hodgson*, and, in *July* 1778, she 'and her husband entered into written articles to sell the 'manor of *H.* under a good title, to *Ambrose*. In *Michael-'mas Term* 1778, *Hodgson* and his wife, filed a bill against '*Ambrose*, and also against *Catharine*, the daughter of *Eli-'zabeth Belchier*, for a discovery of the said *Catharine's* claim 'and title, and for a specific performance of the articles. The 'defendant *Ambrose* admitted the articles, and all the facts 'above stated, but said, he declined the purchase, being ad-'vised, that, by the construction of the will, *Catharine 'Hodgson* might be deemed to have taken only an estate for 'life, and not an estate-tail, by which means a good title 'could not be made to him. *Catharine Belchier* submitted 'the question, and her interest, to the court.'

'The questions stated for the opinion of this court on the 'above case, were; 1. Whether *Catharine Belchier*, the 'daughter of *Elizabeth Belchier*, took any, and what estate, 'under the will of *Susan Jolland*? 2. What estate *Catharine 'Hodgson*, late *Jolland*, took under the said will?'

The case came on to be argued this day, by *Lee* for the plaintiffs, and *Wilson* for the defendants.

Lord MANSFIELD asked *Wilson*, Whether he meant to contend, supposing the devise to *Elizabeth Belchier* would have been an estate-tail in the event of her surviving the testatrix, that, in the event which had taken place, (of *Elizabeth's* death happening before that of the testatrix,) her issue could take by purchase?

He answered, That he thought he could not maintain that point, after the case of *Goodright* v. *Wright*[1].

BULLER, *Justice*, mentioned *Hutton* v. *Simpson*(*b*), as a prior case exactly of the same sort(*c*).

WILSON said, he meant to argue, on the authority of *Hopkins* v. *Hopkins*(*d*), that the estate to *Catharine Jolland*, (in the first devise,) which would have been a remainder if *Elizabeth Belchier* had survived the testatrix, became, by her death before the consummation of the testament, an executory devise

[1] *B. R. H.* 1717. 1 *P. W.* 397. Devise to *A.* and his issue, remainder to *B.* and his issue, remainder to the heirs of *A.* *A.* dies in the life-time of the testator, without issue. *B.* dies also in the lime-time of the testator, leaving a daughter, who was also heir of *A.* Held by *Parker*, Chief Justice, and the whole court, that the daughter took nothing, either as the issue of *B.* or as the heir of *A.* though it was argued, that, in the events which had happened, she might take by purchase under the description of *A's* heir. *S.C.* at more length, 1 *Str.* 25.

(*b*) *Canc. M.* 1716. 2 *Vern.* 722.

(*c*) *Vide* also *Fuller* v. *Fuller*, *B. R. M.* 37 & 38 *El.* 1. *Cro.* 422. and *Brett* v. *Rigden*, *C. B. T.* 10 *El.* *Plowd.* 340.

(*d*) *Canc.* M. 1734. *Ca. temp. Talb.* 44. *Vide* Ld. *Hardwicke's* opinion on the will in that case, afterwards; 1 *Atk.* 581. *S. C.* mentioned 1 *Ves.* 268.

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devise, and, being limited after an indefinite failure of issue of *Elizabeth*, was void, and the estate descended to the two sisters as co-parceners. That it was held, in *Hopkins* v. *Hopkins*, that an event happening after the execution of the will, and before the consummation of it by the death of the testator, may vary the nature of the estate devised, from a remainder to an executory devise; and the intention here most clearly was, that *Catharine Jolland* should take nothing while any of *Elizabeth*'s issue remained.

Lord MANSFIELD,—The limitation to *Elizabeth Belchier*, on the present supposition, was of an estate-tail. The whole of that limitation was gone at the testator's death, and therefore the estate to *Catharine Jolland* took place immediately. The words, "*and for want of such issue*," mean the same thing as "*and after such estate-tail*," [F] and this is the common case of a remainder after an estate-tail, where, if the first estate never takes place, the remainder vests in possession immediately (*e*). In *Hopkins* v. *Hopkins*, the difficulty was, how an event subsequent to the will should vary the construction; but Lord TALBOT got over it.

Some days before, Lord MANSFIELD had observed, that the question, whether the devise to *Elizabeth Jolland* was an estate-tail, was exactly the same as that determined in *Coulson* v. *Coulson* (*f*); that Lord HARDWICKE[2] had told him, that

(*e*) *Vide* the cases above cited of *Hutton* v. *Simpson*, *Rigden* v. *Brett*, and *Fuller* v. *Fuller*.

(*f*) *B. R. H.* 13 *Geo.* 2. 2 *Str.* 1125. 2 *Atk.* 246. 247. 250.

[2] The case of *Bagshaw* v. *Spencer* was depending at the same time with that of *Coulson* v. *Coulson*, and the determination postponed till the court of *B. R.* should make their certificate in the latter, 2 *Atk.* 246. The traces of Lord *Hardwicke*'s dissatisfaction with that certificate, may be discovered in his arguments, when he determined *Bagshaw* v. *Spencer*, 1 *Vez.* 142. ☞ *Vide Jones* v. *Morgan*, *Canc. H.* 23 *Geo.* 3. 1 *Br.* 206.

[F] So in *Denn* v. *Bagshaw*, 6 *T. R.* 512. it was clearly held, on the authority of this case among others, that under a devise to a daughter for life, with remainder to the first son of her body (if living at the time of her death) and his heirs male, remainder over, the son dying in his mother's life-time, his issue took no estate. The same point was also decided in *Doe* v. *Kett*, 4 *T. R.* 601. notwithstanding the testator knew of the death of the devisee in tail and of the birth of her son; and had afterwards added a codicil containing a republication of the will; and notwithstanding a condition (which is void in law) was annexed to the devise, viz. that the devisee in tail should not do any act to bar the entail. And in *Frank* v. *Stovin*, 3 *East.* 548. it was held to make no difference that the first estate given to the devisee was an express estate for life, without impeachment of waste, with a power of jointuring. Various similar authorities are also there referred to.

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that he was dissatisfied with that decision; but that he thought it was not *now* to be shaken. The point therefore was not argued this day at the bar; but his Lordship, and BULLER, *Justice*, expressed themselves upon it to the following effect:

Lord MANSFIELD,—With regard to the question, whether the interposition of trustees to preserve contingent remainders, shall vary the rule of law, (which says, that where, in the *same* instrument *(g)*, there is a limitation to the ancestor for life, and one to his heirs general or special, the heirs shall not take by purchase,) whatever our opinion might be upon principle and authorities, if the point were new, we all think, that, since this is literally the same case with *Coulson* v. *Coulson*, and *that* has stood as law for so many years, it ought not now to be litigated again. It would answer no good purpose, and might produce mischief. The great object, in questions of property, is certainty, and if an erroneous or hasty determination has got into practice, there is more benefit derived from adhering to it, than if it were to be overturned. Many estates may be enjoyed under the authority of *Coulson* v. *Coulson*, the titles to which would be shaken, if the decision in that case were to be over-ruled; and the case is so generally known among conveyancers, that it is impossible there should be many held under the contrary construction, because, if there were, they would have been controverted. [341]

BULLER, *Justice*,—It was a long time before I could reconcile myself to the determination in the case of *Coulson* v. *Coulson*, but now I am not clear, that, even if the question were quite new, I should not be of the same opinion which the court then entertained. If a testator make use of legal phrases, or technical words *only*, the court are bound to understand them in the legal sense. They have no right nor power to say, that the testator did not understand the meaning of the words he has used, or to put a construction upon them different from what has been long received, or what is affixed to them by the law. But if a testator use other words, which manifestly indicate what his intention was, and shew to a demonstration that he did not mean what the technical words import in the sense which the law has imposed upon them, that intention must prevail, notwithstanding he has used such technical words in other parts of the will. Lord HARDWICKE truly said in *Bagshaw v. Spencer (h)*,—"there can be no magic or "particular force in certain words, more than others; their "operation must arise from the sense they carry."—And I say,

(g) *Vide Doe* v. *Fonnereau*, *M.* 21. *Geo.* 3. *infra*, 470. Where this rule is discussed, and the case of *Hopkins* v. *Hopkins*, as to the point above-mentioned, is also considered.

(h) *Canc.* 12 *Nov.* 1748. 1 *Ves.* 142. 2 *Atk.* 246. 570. 577.

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say, *that* sense can only be found by considering the whole will together. There is no rule better established than that the intention of a testator expressed in his will, if consistent with the rules of law, shall prevail. That is the first and great rule in the exposition of all wills; and it is a rule to which all others must bend. It says, "*if consistent with the "rules of law;*" but it must be remembered, that those words are applicable only to the nature and operation of the estate or interest devised, and not to the construction of the words. A man cannot, by will, create a perpetuity; he cannot put the freehold in abeyance; he cannot limit a fee upon a fee; nor make a chattel descendible to heirs; nor prevent a tenant in tail from suffering a recovery. But the question, whether the intention be consistent with the rules of law or not, can never arise, till it is settled what the intention was. This can only be discovered by taking the whole will together. If it be apparent, I know of no case that says, a strict legal construction, or a technical sense of any words whatever, shall prevail against it; unless a case which made a great noise in *Westminster-Hall* a few years ago, be considered as such (i). I have no difficulty in saying, that I do not look upon that case as such, nor, if ever a similar case should arise, shall I think myself bound by it, but shall consider the question as if that case never had existed; for the most that can be said of it is, that, as far as it respects any rule of law, there were the opinions of six judges against six (k). I am aware, that, as to the decision of the case between the parties, there were the opinions of seven against five. But it will be found, that the opinion of one of the seven (l) went upon the idea, that it did not appear that the testator meant to use the technical words in a different sense from what the law in general imposes upon them. Whether the intention did sufficiently appear in that case, or not, is a question, which I do not now mean to give any opinion upon.—Much was there said of opinions given by eminent men at the bar. Such opinions, however well considered, have no weight in the scale of justice. One, (dated in 1747,) has got into print (m), but I have the strongest reason to believe, that no such opinion was ever given by the then *Solicitor General*, to whom it is ascribed. An opinion which he gave on the same will, the year before, has been

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(i) *Perrin* v. *Blake*, *B. R. H.* 10 *Geo.* 3. *Cam. Scacc. H.* 12 *Geo.* 3. 4 *Burr.* 2579. 2581. 1 *Blackst.* 672.

(k) Lord *Mansfield*, *Aston*, Justice, and *Willes*, Justice, in *B. R.* and *De Grey*, Chief Justice, *Smythe*, Baron, and *Blackstone*, Justice, against *Yates*, Justice, *in B. R.* and *Parker*, Chief Baron, *Adams*, Baron, *Gould*, Justice, *Perrot*, Baron, and *Nares*, Justice.

(l) *Blackstone*, Justice. *Vide* 4 *Burr.* 2581.—The account there given of the substance of Mr. J. *Blackstone*'s opinion was furnished by himself.

(m) *Fearne* on *Cont. Rem.* 3d Edit. 123.

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been furnished me, by an eminent conveyancer, and it is quite contrary to what is printed; and I have also seen a copy of another, given in 1748, which I have the best reason to believe to be genuine, and which clearly proves, that none was given in 1747.—If the intention does not plainly appear, I agree, that the legal sense of the words must prevail, and, on that ground, I should be strongly inclined to say, in the present case, even if the decision in *Coulson* v. *Coulson* had never taken place, that *Catharine Jolland* took an estate-tail; for the testatrix has used nothing but legal words. The devise is to *A.* for life, remainder to trustees to support contingent remainders, remainder to the heirs of the body of *A.* If there had been no devise to trustees, the case would be so plain, that no man could doubt about it. What then is the nature of such devise to support contingent remainders? It is a legal and technical limitation, the peculiar language of conveyancers. The effect of this sort of limitation, in a deed, is settled. There, it is not sufficient to turn words of descent into words of purchase. The testatrix has not shewn, by any other words, that she meant to use the technical expressions in a different sense from what the law has put upon them, and, therefore, the legal sense must prevail. This distinction was expressly recognized by Lord *Northington*, in a case of *Austin* v. *Taylor* (*n*).—It seems to me to be false logic, to put a different sense upon any words from what in general they import to bear, by mere inference from the words themselves, unexplained by any others; though, if other words manifest the intent, I know of no law that says, the intent shall not prevail.—But whatever might have been my opinion on the subject, if neither *Duncombe* v. *Duncombe* (*o*), nor *Coulson* v. *Coulson*, had ever existed, yet, after those decisions, and the great length of time during which they have been considered as law, I look upon them as land-marks, which ought never to be removed, nor shaken.

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Lord MANSFIELD said, since it had been mentioned, he must take notice, that it was most certainly true, that he never gave any such opinion as that in print, nor any opinion at all, on that will in 1747. Several opinions had been taken at different times, as events arose, by Mr. *John Sharpe*, the solicitor, whose brother, Mr. *Joshua Sharpe*, had furnished the court with copies of them, upon the argument of *Perrin* v. *Blake*. There were three given by Sir *Dudley Ryder*, and three by himself. Of those given by himself, the first was before 1746, the second in that year, and the third in 1748. He had the copies still by him, and the third stated, that he had

(*n*) He cited this case from a MS. Note.

(*o*) *C. B. H.* 7 *Will.* 3. 3 *Lev.* 437.

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had perused his two former opinions, dated so and so, and concurred therewith, *viz.* that *John* only took an estate for life, which shewed it to be impossible that he had given a contrary opinion. The author had been too hasty in his publication, and must have been imposed upon [3].

The

[3] Mr. *J. Blackstone* (1 *Blackst.* 672.) states the question in *Perrin* v. *Blake*, as coming on upon a special verdict, whereas it came before the court of *B. R.* on a demurrer to a replication. The short history of the proceedings in that case is this: An ejectment was brought in *Jamaica*, where the estate lay, and a special verdict found, which came over for the opinion of the Privy Council, upon an appeal in the nature of a writ of error. Lord *Mansfield*, (the only law lord who then attended the Council,) knowing the several opinions which had been taken, and considering the question as a point of general tendency, which might affect titles to real property in *England*, was unwilling that judgment should be given in the *Cockpit* merely on his opinion, and therefore proposed, with the consent and concurrence of the counsel on both sides, that the appeal should be adjourned, and, in the mean time, a solemn opinion taken in *Westminster*-hall. At first, it was agreed to state a case for the opinion of the Court of *B. R.* which might have been adjourned on account of difficulty into the *Exchequer Chamber*; but a case from the King, in his judicial capacity, being new*, it was, afterwards, thought better that the point should be brought before the court, upon the pleadings in a feigned action of trespass. *Walker*, Serjeant, settled the record for that purpose, on which, to a declaration in trespass, *(laid in Middlesex* under a *videlicet,)* the defendant *pleaded* the will. The plaintiff *replied* the recovery, (on the ground that the son took an estate-tail,) and to this replication, the defendant *demurred.* After a writ of error had been brought in the House of Lords, from the judgment of reversal in the *Exchequer Chamber*, and had depended for a considerable time, the parties compromised the dispute, and the plaintiff petitioned for leave to non-pros his writ of error, which was granted, as appears from the following entry in the Lords' Journals:

7th *May* 1777.

Blake against *Perrin* and Another. } "Upon reading the petition of *Hannah Blake* plaintiff, in a writ of error depending in this House, and of *William Perrin* and *Thomas Vaughan* defendants in the said writ of error, which stands appointed for hearing, setting forth,—That the matters in dispute between the parties

* It is understood that the *Master of the Rolls* cannot send a case to any of the courts of law, and, therefore, when *he* wishes to take their opinion, the practice is to direct a feigned action or issue, so as that the question of law may arise upon the finding of the jury [† 90].

[† 90] It should seem from 2 *Atk.* 248. that a case was sent to the court of *B. R.* by the *Master of the Rolls* in *Coulson* v. *Coulson*; however, the established notion and practice is as above stated. *Vide infra*, p. 772. *Note* [1].

The certificate was in the following words:

"If *Elizabeth* would have taken an estate-tail, in case she "had survived the testatrix, we think, by her dying before the "testatrix, it is a lapsed devise, and *Catharine*, the daughter "of *Elizabeth*, can take nothing [4]. As to * the question "whether *Elizabeth* would have taken an estate-tail, what- "ever our opinions might be, if the case were new, we think, "as the case of *Coulson* v. *Coulson* is literally the same, the "precise question ought not to be again litigated, and by that "authority we are bound to say, in the words of the certifi- "cate in that case, that, as it appears that there is, after the "determination of the estate for life to *Elizabeth Belchier*, a "devise to *William Arnold* and *Isaac Pennington*, and their "heirs, for and during the life of *Elizabeth Belchier*, we are "of opinion, that *Elizabeth Belchier*, if she had survived the "testatrix, would have taken an estate for life in the premises "devised

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"ties being now amicably compro- "mised between them, the petitioners "therefore humbly pray their Lord- "ships, that the writ of error in this "cause may be *non-prossed*, or with- "drawn without costs on either side; "—It is ordered that the said peti- "tioners do forthwith enter a *non- "pros* on the said writ of error as de- "sired, and that the record be remit- "ted to the court of *King's Bench*, to "the end execution may be had upon "the judgment given by that court, as "if no such writ of error had been "brought into this House."

[4] It appeared, by the pleadings in Chancery, and the printed cases in *Dom. Proc.* (though not by the case sent to this court,) that the testatrix had two brothers, so that *Elizabeth* and *Catharine* were not her *heirs at law*. In the case of *Warner* v. *White* on the demise of *White* (which was a writ of error from *Ireland*, and was argued in *T.* 21 and *M.* 22 *Geo.* 3. and determined in that last-mentioned term,) an attempt was made to make a difference between the case of a first devise *to the heir at law*, and the heirs of his body or his heirs, and one *to a stranger*, when such first devisee dies before the testator; and it was contended, that where an heir at law is the first devisee, the estate shall not go over to the next in limitation, but shall vest in the heirs of the body, or heirs, (as the case may be,) of such heir at law, either as taking by purchase, or, (on the ground of an *eventual* intestacy,) by descent. To maintain this point, the opinion of *Popham*, in *Fuller* v. *Fuller*, *H.* 36 *El. Cro. El.* 422, 3. was chiefly relied on, and the court of *B. R.* in *Ireland* unanimously adopted it; but, here, their judgment was unanimously reversed [F].

[F] See a full report of this case of *Warner* v. *White* from a note of Mr. Justice Lawrence, 6 *T. R.* 518. where it is stated that the judgment of the Court of King's Bench was affirmed in *Dom. Proc.* May 6th 1782. In *Warner* v. *White* the principal case (*Ambrose* v. *Hodgson*) was referred to by Lord Mansfield as an authority.

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" devised to her, not merged by the devise to the heirs of " her body, but by that devise an estate-tail in remainder " would have vested in the said *Elizabeth*. Consequently " *Catharine Belchier*, the daughter of *Elizabeth*, took no " estate under the will of *Susan Jolland*, but *Catharine* " *Hodgson*, late *Catharine Jolland*, took an estate for life, " in all the devised premises, not merged by the devise to the " heirs of her body, but, by that devise, an estate-tail in re- " mainder vested in the said *Catharine Jolland* [5].

MANSFIELD.
E. WILLES.
24th *April*, 1780. W. H. ASHHURST.
F. BULLER."

[5] The Lord *Chancellor*, in consequence of this certificate, having decreed a specific performance of the agreement, an appeal was lodged in the House of Peers, and the two questions stated to the court of *King's Bench* having been put to the Judges, and *Skynner*, Chief Baron, having delivered their unanimous opinion to the same effect with the certificate, the decree was affirmed.

Wednesday, 19th April.

The KING *against* JOHN WHEATMAN.

In a conviction on the game laws, the information must negative, specifically, every one of the qualifications in the *st.* of 22 & 23 *Car.* 2. c. 25.

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THIS was a rule to shew cause, why a conviction for using a gun should not be quashed. The objection was, that the information as set forth in the conviction, did not alledge specifically, that the defendant was " *not* owner or keeper of " any forest, chase, park, or warren."

It was contended, that it is necessary to state in the information, particularly, that the defendant had none of the qualifications enumerated in the statute of 22 & 23 *Car.* 2. *(a)*. The case of *Rex* v. *Maurice Jarvis (b)*, was relied on, as a decisive authority in point.

On the other side, it was argued, that it is sufficient, if the want of every one of those different qualifications appear in any part of the record, and it did appear by the evidence, as set forth, that the defendant had none of them.

Chambre, in support of the rule.—*Dayrell*, for the prosecutor.

Lord

(*a*) C. 25. § 3. (*b*) *H.* 30 *Geo.* 2. 1 *Burr.* 148 [r].

[r] And see a full report of this case, 1 *East*, 643, *in not.*

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Lord MANSFIELD,—This will not do The defendant can be convicted only of the charge in the information, and *that* must be sufficient to support the conviction.

ASHHURST, *Justice*,—The evidence must prove, but cannot supply any defects in the information [☞].

The rule made absolute.

[☞] And, though the information must, the evidence needs not negative specifically all the qualifications. *Rex* v. *Crowther*, *B. R. H.* 26 *Geo.* 3. 1 *T. R.* 125. 127 [F 2].

The KING *against* the INHABITANTS of UTTOXETER.

Wednesday, 19th April.

An appointment of separate overseers for the subdivisions of a parish cannot be supported unless it expressly appear that the parish could not reap the benefit of the st. of 43 *Eliz.* c. 2.

ON *Wednesday*, the 9th of *February*, *H.* 20 *Geo.* 3. *Bearcroft* obtained a rule to shew cause, why an order of sessions, confirming separate appointments of overseers of the poor for the township of *Uttoxeter*, and three other divisions of the parish of *Uttoxeter*, in *Staffordshire*, should not be quashed; and, cause being this day shown, the special case stated by the sessions appeared to be as follows:

The parish of *Uttoxeter* is five miles in length, and five in breadth, and contains the townships of *Uttoxeter*, *Crakemarsh*, *Creighton*, *Stramshall*, and *Loxley*. The town of *Uttoxeter* is a large market town, much burthened with poor. The townships of *Creighton*, *Crakemarsh*, *Stramshall*, and *Loxley*, are in general divided into considerable farms. The said townships were and are one entire parish, and did, till the year 1730, jointly relieve and maintain the poor in and throughout the parish. It appears by the vestry-book of the said

[F 2] It remains quite settled law that the information must negative the qualifications, but whether it be necessary to give evidence on the part of the prosecution to support that negative part of the charge, was made the subject of great discussion in *R.* v. *Stone*, 1 *East*, 639; in which case the court of King's Bench were equally divided in opinion, Lord Kenyon and Grose, J. holding the evidence necessary, and Lawrence, J. and Le Blanc, J. the contrary. There is a dictum of Chambre, J. in support of the former position in 3 *B. & P.* 307: and the same doctrine appears to be favoured by *Williams* v. *The East India Company*, 3 *East*, 192, in which it was held that, where the law presumes the affirmative of a proposition (as where the omisson would make the party guilty of criminal neglect) the party who insists on the negative must prove it.

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said parish, that, from the year 1643, to the year 1703, overseers have been elected for the said respective townships in the following manner, *viz.* Two overseers of the poor for the town of *Uttoxeter*, one for *Loxley*, one for *Crakemarsh*, *Creighton*, and *Stramshall*, one for the *Woodlands*. The *Woodlands* are part of the township of *Uttoxeter*.* It does not appear, from the vestry-book, or other evidence, that, from the year 1703 to 1727, any overseers were elected for the said townships, but two overseers were elected for the said parish, and, during that time, churchwardens were elected for the said parish, and sidesmen for the said townships. On the 10th *November* 1730, in pursuance of a *mandamus* from the court of *King's Bench*, an assessment for the relief and maintenance of the poor of the said parish of *Uttoxeter*, upon all the inhabitants and occupiers of land within the said parish, was duly signed by two justices of the peace. In *Trinity Term*, 5 & 6 *Geo.* 2. 1731, a *mandamus* issued from the court of *King's Bench*, to the justices of the county of *Stafford*, reciting that there were divers householders within the said parish of *Uttoxeter* able to contribute to the relief of the poor of the said parish, and that there were no overseers of the poor of the said parish appointed to make rates on all and every the inhabitants and occupiers of lands, houses, and other things rateable within the said parish, for the relief of the poor of the said parish, and ordering the said justices to appoint two or more overseers of the poor for the said parish of *Uttoxeter*. In pursuance of the said *mandamus*, on the 30th day of *July* following, two justices of the peace for the county of *Stafford*, appointed two overseers of the poor for the said parish of *Uttoxeter*. At the general quarter sessions for the county of *Stafford*, held the 5th of *October*, 6 *Geo.* 2. 1731, the inhabitants of the vills of *Crakemarsh*, *Creighton*, and *Stramshall*, appealed against an assessment made 12th *August* preceding, for the maintenance of the poor of the parish of *Uttoxeter*, and, on full hearing of counsel, and consideration of the evidence given as well for the said vills as for the township of *Uttoxeter*, the court was of opinion, that the inhabitants of the said vills of *Crakemarsh*, *Creighton*, and *Stramshall* (for which vills overseers of the poor were duly and in due time appointed, and poors-rates duly made and allowed, before the making of the said assessment or rate appealed against) ought to maintain, and accordingly did order that they should maintain, their own poor, distinctly and separately from the other parts of the said parish of *Uttoxeter*; and the court did further order, that such part of the said assessment or rate appealed against, as charged the inhabitants of the said vills of *Crakemarsh*, *Creighton*, and *Stramshall*, for or towards the maintenance of the poor of the said parish of *Uttoxeter*,

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in respect of what they hold or occupy within the said vills, should be quashed and discharged. The said order, in *Michaelmas* term following, was removed, by *certiorari*, into the court of *King's Bench*, and the court* of *King's Bench*, in *Michaelmas Term*, 6 *Geo.* 2. ordered, that the order of sessions, as to such part of it as orders that the inhabitants of the vills of *Crakemarsh*, *Creighton*, and *Stramshall*, in the parish of *Uttoxeter*, shall maintain their own poor distinctly and separately from the other part of the said parish of *Uttoxeter*, be quashed for the insufficiency thereof; and, as to the other part of the said order, for the quashing and discharging such part of a certain assessment or rate made for the maintenance of the poor of the said parish of *Uttoxeter*, as charges the inhabitants of the said vills of *Crakemarsh*, *Creighton*, and *Stramshall*, towards the maintenance of the poor of the said parish of *Uttoxeter*, in respect of what they hold within the said vills, be affirmed. In *Michaelmas Term*, 7 *Geo.* 2. 1733, a *mandamus* issued from the court of *King's Bench*, to the justices of the county of *Stafford*, reciting, that there were divers householders within the said parish of *Uttoxeter* able to contribute to the relief of the poor of the said parish, and that there were no overseers of the poor of the said parish, appointed to make rates on all and every the inhabitants and occupiers of lands, houses, and other things, rateable within the said parish, for the relief of the poor of the said parish, and ordering the said justices to appoint two or more overseers of the poor for the said parish of *Uttoxeter*. On the 15th of *April* 1734, two overseers were appointed for the vill of *Crakemarsh*, two other overseers for the vill of *Creighton*, two other overseers for the vill of *Stramshall*, two other overseers for the township of *Uttoxeter*, and two other overseers for the vill of *Loxley*, by five separate appointments, each appointment signed by the same two justices of the peace for the county of *Stafford*. On the 27th of *May* following, a *certiorari* issued to remove the said five appointments into the court of *King's Bench*, which were accordingly removed, and, on *Saturday* next after the morrow of the *Holy Trinity*, 1734, the said five appointments were affirmed by the court of *King's Bench*. Since the year 1734, overseers have been separately appointed for each of the said townships, and the poor of the said townships have been separately maintained[1].

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The *Solicitor General*, *Dunning*, and *Leycester*, shewed cause,

[1] The present division of the parish on which this case arose, was different from that mentioned in the case to have subsisted since 1734. There were but four appointments. They all bore date the same day, and were signed by the same two justices.

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cause, and argued to the following effect.—It appears from
*[349] *the facts found by the special case, that the inhabitants of the parish of *Uttoxeter* have not had the benefit of the statute of 43 *Eliz.* (c), and therefore the appointments of separate overseers for the different townships were authorised by 13 & 14 *Car.* 2. *c.* 12. § 21. It is clear, that at and before the time when the last-mentioned statute was enacted, this parish did not reap the benefit of the act of *Elizabeth*, since more than four overseers had been appointed ever since the year 1643, and that statute does not authorise more than that number [2].—(BULLER, *Justice*,—"Ought it not to have been stated in "the case, as a substantive fact, that the parish had not had "the benefit of the statute of 43 *Eliz.*?")—If enough is clearly and explicitly stated to shew *that* to be the truth, the court will infer it, without an express finding, for the purpose of supporting the order. The rule with regard to orders of sessions is the reverse of what obtains in the case of convictions. The court presumes against convictions, unless facts appear sufficient to support them; but an order of sessions is presumed to be right, unless the facts stated prove it to be wrong. It may be objected, that the present division of the parish is different from that which appears to have been formerly adopted, but no argument can arise from that circumstance, because the statute of *Car.* 2. meant to leave the particular division to the justices for the time being. The determination of this court in *M.* 6 *G.* 2. (as mentioned in the case, and as reported by *Barnardiston* (d),) was a decision of the present question; for, although the first part of the order of sessions was quashed as insufficient, because it did not appear whether the vills of *Crakemarsh*, *Creighton*, and *Stramshall*, were to maintain their poor jointly among themselves, or each vill separately, the other part, quashing the assessment of those vills for the maintenance of the poor of the parish at large, was affirmed. The case of *Rex* v. *The Justices of Middlesex* (e), and *Peart* v. *Westgarth* (f), which will be relied on by the other side, differed materially from the present, for, in both of those, it appeared from the facts stated, that the parishes had had the benefit of 43 *Eliz.*—*Dunning* said, he particularly recollected the case of *Rex* v. *The Justices of Middlesex*, which had happened during his early attendance on the court, and that it was the ultimate
[350] opinion of the court there, (which they afterwards confirmed in *Peart* v. *Westgarth*,) that the parish must have been unable

(c) C. 3.

[2] So determined in *Rex* v. *Loxdale*, *H.* 30 *Geo.* 2. 1 *Burr.* 445. and more fully stated in 3 *Burn's Just.* 289, 13th edit.

(d) 2 *Barnard. B. R.* 198.
(e) *T.* 27 & 28 *Geo.* 2. *Bott.* 17.
(f) *B.R.H.* 5 *Geo.* 3. 3 *Burr.* 1610.

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unable to reap the benefit of 43 *Eliz.* at the time when the statute of 13 & 14 *Car.* 2. passed, which he said was manifestly the case as to the parish of *Uttoxeter*.

Bearcroft, in support of the rule, insisted on *Peart* v. *Westgarth*, as directly in point, and that it was clearly established by that case, that unless the sessions expressly state, that the parish has not had the benefit of 13 & 14 *Car.* 2. the court will presume that it has. That the statute of *Car.* 2. mentions *largeness* as the only reason for a division, and the case of *Peart* v. *Westgarth* shews, that the parish of *Uttoxeter* is not too large; for there, the parish of *Stanhope* appeared to be twenty miles long, and yet *it* was not to be divided, and *Uttoxeter* parish is only five miles. The question now before the court never came on in any of the former cases from this parish.

Lord MANSFIELD stopped *Wilson* from going on, on the same side.

Lord MANSFIELD,—The case of *Peart* v. *Westgarth* decides the question. It must appear to the court that there was a disability to reap the benefit of the statute of *Elizabeth* [F]. Here the contrary appears. Though there were separate overseers, there was a joint maintenance till 1730. The acquiescence of the parish for a number of years will not alter the law. The point never seems to have been made in 1734. I remember the case of *Peart* v. *Westgarth*. It was well considered. The court thought the statute of *Car.* 2. proceeded on a bad principle of policy, for that large districts for the purpose of maintaining the poor are much to be preferred to small ones.

The order of sessions, and the four appointments quashed.

LLOYD *(qui tam, &c.) against* SKUTT.

Thursday, 20th April.

A writ of error from this court to the *Exchequer* Chamber cannot be quashed by this court.

IN the last term, *Dunning* had obtained a rule to shew cause, why a writ of error removing the judgment in this case, (which was an action of debt upon the statute of usury *(a)*,) into the court of Exchequer Chamber, should not be quashed; and, on* Friday, the 14th of *April*, the case was argued by *Dunning*, in support of the rule, and by *Davenport*, on the other side,

*[351]

The

(a) 12 *Ann. st.* 2. *c.* 16. *Vide supra, p.* 62. *Note* [2].

[F] This was expressly confirmed in a similar case, *R.* v. *Newell*, 4 *T. R.* 266; where, besides the extraordinary number of overseers appointed, as in this case, there were other circumstances, viz. a rate collected for two districts separately, and constables separately appointed for each, which were relied upon to shew that they ought to be kept distinct.

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The objections were: 1. to the form of the writ, because it described the action as between the two private parties, *Lloyd* and *Skutt*, not as *a qui-tam* action in which the King was interested; 2. to the substance, on the ground that this sort of penal action is not within the meaning of the statute of 27 *Eliz. c.* 8. which first gave the writ of error from this court to the Exchequer Chamber. The *first* point was but little relied on. Upon the *second*, it was insisted, either that the action is not within the meaning of the description in the statute, or that, if it is, it is within the exception. The *description* is, "any suit or action of *debt*, detinue, covenant, "account, action upon the case, *ejectione firmæ*, or trespass." The words "*action of debt (b)*," it was said, extended only to actions of debt between private parties at *common law*, not to an action on a statute, which is considered as of a higher nature. For this distinction, the opinion of Lord *Holt* in *Ashby* v. *White (c)* was cited, where he refers to *Cro. Car.* 142. and says, "That no writ of error lies in the Exchequer "Chamber by force of the statute of 27 *Eliz.* on a judgment "in the King's Bench in an action *de scandalis magnatum (d)*, "for it is not included within the words of the statute; for "though the statute says such writ shall be upon judgments "in actions *on the case*, yet it does not extend to that action, "*although it be an action on the case*, because it is an action "of a far higher degree, being founded specially upon a "statute *(e)*." The *exception* in the act of *Elizabeth* is, "Other than such (actions) only where the Queen's Majesty "shall be a party *(f)*," and it was argued that the King being a party here, the exception extended to the present case. For this *Whitton* v. *Preston (g)* was cited, in which, according to the report of *Hartop* v. *Holt* in 5 *Mod. (h)*, it appears to have been decided that, for this reason, a writ of error will not lie in the Exchequer Chamber on an action for usury. So in a note at the end of *Parris's Case*, in *Ventris(i)*, the same doctrine is stated as established law. In the late case of *Richards, qui tam*, v. *Brown (k)*, although the action was, as here, by bill [3], the writ of error was brought immediately in the House of Lords.

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On

(*b*) 27 *El. cap.* 8. § 2.
(*c*) *B. R. T.* 2 *Ann.* 2. Ld. *Raym.* 938.
(*d*) 2 *Ric.* 2 *st.* 1 *cap.* 5.
(*e*) 2 Ld. *Raym.* 954.
(*f*) 27 *El. c.* 8. § 2.
(*g*) *B. R. H.* 16 & 17 *Car.* 2. 1 *Sid.* 240.
(*h*) *T.* 8 *Will.* 3. 5 *Mod.* 230.
(*i*) *B. R. M.* 21 *Car.* 2. *Vent.* 49.
(*k*) *Supra*, 109.

[3] The words of the statute of *Elizabeth* do not confine the appellate jurisdiction of the *Exchequer* Chamber to actions by bill, unless the expression "*first* commenced there" can have that operation. In *Comberback* 295. Lord *Holt* says, "It hath ob- "tained, that no writ of error lieth in "the *Exchequer* Chamber where the "action was commenced here by *ori-* "*ginal*, but I never understood the "reason

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On the other side, it was contended, that *Whitton* v. *Preston* did not appear, by the only express report in point of that case (*l*), to have been decided; That the only point determined in *Hartop* v. *Holt* was, that error in the Exchequer Chamber would not lie on an award of execution on a *scire facias*, after the original judgment had been affirmed on a writ of error; That the note at the end of *Parris's Case* is merely a memorandum of the Reporter, not warranted by the case, which is on quite a different subject, nor by any authority; That the case of Lord *Say & Seal* v. *Stephens*, in *Cro. Car.* 142. went on the construction of the statute of *scandalum magnatum*, and on the question whether an action on that statute is an action on the *case*, within the meaning of 27 *Eliz. c.* 8; But that it had been expressly decided, in *Scott* v. *Knapton (m)*, which was posterior to *Whitton* v. *Preston*, that a writ of error will lie on a *qui tam* action of *debt* on a penal statute; and the answer there given to the objection that the King is a party, was, that he is not properly so, though he is to have part of the penalty; That, in truth, no body on the part of the Crown had any thing to do with this action; The informer might be nonsuited, and was liable to costs, and to all the incidents to which a plaintiff in any common action is subject; The King's interest only commenced after a recovery, for a share of the penalty.—Besides, it should seem, (it was said,) that this court ought not to entertain the present motion, according to the opinion of *Croke*, Justice, in the case of Lord *Say & Seal* v. *Stephens*, where he observes that the validity of the writ ought to be discussed in the Exchequer Chamber, where it is returnable.

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Dunning said, the cases shewed that this court had, in fact, exercised the power of quashing such writs; but, if the court were of opinion that they could not give that relief, the rule might be altered, and leave be given to the plaintiff to take out execution, as if no writ of error had been brought. But Lord MANSFIELD thought *that* could not be done, because, if

" reason of it."—By the words of the statute, the Chief Justice is to cause *the record* to be brought before the Judges in the *Exchequer* Chamber, yet the practice has always been to send only a *transcript*, the original record remaining still in *B. R.*—In the pleadings in *Westby's Case*, (3 *Co.* 67. *a.* 70. *b.*) the entry of the proceedings in error runs thus: " Afterwards, *&c.* the " *transcript* of the record and pro- " ceedings, *&c.* by a certain writ of " the Lady the Queen of correcting " errors, *&c.* was brought to the jus- " tices, *&c.* in the Chamber of the " *Exchequer* aforesaid, according to " the form, *&c.*" Yet the subsequent part of the same entry says, " and " thereupon *the record* aforesaid, *&c.* " was sent back, *&c.*"—*Vide Rutter* v. *Redstone*, 2 *Str.* 837. and *Tully* v. *Sparkes*, 2 Lord *Raym.* 1571.

(*l*) *Viz.* in 1 *Sid.* 240.

(*m*) *Scacc. E.* 31 *Car.* 2. Sir *Thomas Raym.* 275.

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LLOYD against SKUTT.

if the objections were good, the writ was not a nullity, but only erroneous :—*improvidè emanavit.*

The court took time to consider; and, this day, Lord MANSFIELD delivered their opinion, as follows:

Lord MANSFIELD,—We have considered this case, and have talked with all the other Judges upon it, and we are all of opinion, that the writ of error cannot be quashed here, but that the application ought to be made, either to the court of Chancery, from whence it issues, or to the Exchequer Chamber, where it is returnable.

The rule discharged [† 91].

[† 91] A similar application was afterwards made, first to the court of Chancery, which refused to entertain the question, and then to the court of Exchequer Chamber, where it was determined, that the writ of error lies to that court.

Friday, 21st April.

The KING *against* the BENCHERS of GRAY'S INN, on the Prosecution of WILLIAM HART.

A mandamus will not lie to compel admission to the degree of barrister.—The only mode of relief is by appeal to the 12 Judges.

THIS was an application for a *mandamus* to be directed to the Benchers of *Gray's Inn*, to compel them to call the prosecutor to the degree of a barrister at law. In the last term *(s)*, *Dunning* had moved for a rule to shew cause, on an affidavit, stating that the ground upon which the Readers and Benchers had rejected him was, his having been discharged under an insolvent debtor's act; but that he had complied with all the usual requisites, such as paying the dues, and performing exercises, and that the two societies of the *Inner* and *Middle Temple*, upon their being consulted by that of *Gray's Inn*, had been of opinion that the ground of rejection was not sufficient. The affidavit also mentioned two late instances, one of a bankrupt, another of a person who had been discharged as an insolvent debtor; who had been called to the bar. It appeared that the society of *Lincoln's Inn* had been of opinion, when consulted, that the cause was sufficient.

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In behalf of the application, it was urged, that it would be highly inconvenient to permit such a body as the Benchers of an Inn of Court to exercise a jurisdiction in such matters, uncontrolable by a court of law, and that in the present instance, there had been manifest injustice in permitting the prosecutor to lose his time, and put himself to expence, in order to qualify himself for the bar, if he was thought to be a person incapable of being called.

Lord

(s) Thursday, the 13th of *April.*

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Lord MANSFIELD said, he had a recollection of some cases, where it had been held that the court could not interpose, but that the recourse must be to the twelve Judges, who have a domestic jurisdiction over the Inns of Court.—WILLES, *Justice*, mentioned *Booreman's Case (t)*,—and BULLER, *Justice*, that of *Rakestraw* and *Brewer (u)*—as confirming what fell from his Lordship. Some passages in *Dugdale's Origines* were also referred to by the court.

The court took time to consider whether they should grant a rule to shew cause, and, on this day, Lord MANSFIELD delivered their opinion as follows:

Lord MANSFIELD,—We have consulted the other Judges on the subject of this application, and I am prepared to state the result. The original institution of the Inns of Court no where precisely appears, but it is certain that they are not corporations, and have no constitution by charters from the Crown. They are voluntary societies, which, for ages, have submitted to government analogous to that of other seminaries of learning. But all the power they have concerning the admission to the bar, is delegated to them from the Judges, and, in every instance, their conduct is subject to their control as visitors. This will appear from a great variety of instances of orders made at different periods, for the regulation of those societies, which are to be found in *Dugdale's Origines Juridiciales*, some of which I will mention.—His Lordship then read different passages from *Dugdale*, (141. 147, 148. 191. 193. 274, 275. 311, 312, 313, 314. 317. 319, 320. 322. 327).—From the first traces of their existence to this day, no example can be found of an interposition by the courts of *Westminster Hall* proceeding according to the general law of the land; but the Judges have acted as in a domestic *forum*. The only case in which an attempt was made to proceed in this court is reported in *March (v)*.—One *Booreman*, a barrister of one of the *Temples*, having been expelled, he applied for his writ of restitution, but it was denied, "because there is none in the inn of court to "whom the writ can be directed, for it is no body corporate, "but only a voluntary society, and submitting to govern-"ment; and the ancient and usual way of redress for any "grievance in the Inns of Court, was by appealing to the "Judges."—In *Townsend's Case*, reported by Sir *Thomas Raymond (w)*, it is assumed, *arguendo*, that no *mandamus* will lie to the Inns of Court [† 92]. I do not take the first reason

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(*t*) *B. R. H.* 17 *Car.* 1. *March* 1777.

(*u*) *Cunc. H.* 1728. 2 *P. W.* 511, 512.

(*v*) *Booreman's Case.*

(*w*) *B. R. H.* 14 & 15 *Car.* 2. *Raym.* 69.

[† 92] S. P. recognized by *Pemberton*, Chief Justice, in the case of *Rex* v. *The College of Physicians*, *B. R. H.* 33 & 34 *Car.* 2. 2 *Show.* 178.

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reason stated in *March* to be the true one. It is not solid. The second is the true reason. As to the first, the Inns of Court had regulations, they acted and were known as a body, and all the orders which I have mentioned were directed to them. But the true ground is, that they are voluntary societies submitting to government, and the ancient and usual way of redress is by appeal to the Judges. There has been a very late instance where this method of appeal had the sanction of all the Judges. I will state it from a report of it drawn up by Mr. *Justice* GOULD, and which he has furnished me with [1].

" The first day of *Hilary Term*, an appeal of one *Maurice Savage* against an order of the Benchers of *Lincoln's Inn*, which rescinded an order for his call to the bar, made about four or five days before, on the ground of misrepresentation or surprise, was heard by all the Judges except Lord *Chief Justice* DE GREY, in *Serjeant's Inn Hall*. He had been a member of the Middle Temple nine or ten years; had kept and paid for his commons, and performed all his exercises there; and, in 1772, was proposed by a master of the bench, the first parliament in the term, to be called to the bar, (the course in that house being to hold a parliament [356] on the first and last *Friday* in every term, the person to be proposed at the first, and called to the bar at the last parliament.) But he waved that proposal, and, in *Trinity Term* last, petitioned to have the proposal revived, but the bench refused it, and no master of the bench would propose him again. On *Saturday*, (as the term ended on *Wednesday*,) he had a certificate (*x*), from the under-treasurer of the *Middle Temple*, of his keeping and paying for commons, and performing his exercises, which he carried to the under-treasurer of *Lincoln's Inn*, that *Saturday*, paid his fees of admission in that society, and, the *Tuesday* following, was called to the bar there, and the next day took the oaths to government in *Westminster Hall*. But he did not disclose to the under-treasurer of *Lincoln's Inn* what had passed in the *Temple*. The society of *Lincoln's Inn*, hearing of this matter, issued a summons to him to appear three days after, to shew cause, why his call to the bar should not be vacated, and after hearing him, four days afterwards, annulled the call to the bar, as irregular, and obtained by surprise. The Judges, being attended by the treasurers of the two societies, and examining the under-treasusers of each, (not upon oath, for they proceeded as visitors,) and the above circumstances fully appearing, and, after hearing *Savage* in support of his appeal, who did

[1] Mr. Justice *Gould* was so obliging as to permit me to copy his note of *Savage's Case*, exactly as it was read in court by Lord *Mansfield*.

(*x*) Dated the 21st of *June* 1776.

did not examine any one to vary the facts, declared their opinion that the call to the bar appearing to have been obtained by surprise, and the bench of *Lincoln's Inn* having proceeded immediately to annul it, the appeal should be dismissed[4]."

The consequence of all this is, that we are all of opinion, that no rule should be made for a *mandamus*; but, if there is a ground for it, the party must take the ancient course of applying to the twelve Judges[5].

[4] A year or two afterwards, *Savage* having appeared as a witness in a cause at *Gloucester*, one of the counsel observing upon his evidence, mentioned the circumstance of his having been called to the bar, and the ignominy with which he had afterwards been disbarred. For this, *Savage* brought an action, declaring as a barrister, and stating the words to have been, "*This* "*is the Mr.* Savage *who was called to* "*the bar in* 1776, *and was afterwards* "*scandalously stripped of his gown*," and that they were spoken with an intent to injure him in his profession. The defendant pleaded not guilty, and also three special pleas of justification, wherein were set forth, the constitution and regulations of the inns of court, respecting the call of barristers, and the different proceedings and orders of the *Middle Temple* and *Lincoln's Inn* referred to in the above report of *Gould*, Justice. The cause was tried at *Gloucester* summer assizes 1780, before *Perryn*, Baron. The plaintiff proved the words *, and produced a book of the society of *Lincoln's Inn* containing the order for his call, which, from the neglect of the officer of the society, had not been expunged. The defendant produced another book containing the order annulling the former, which was in the following words: "Mr. *Maurice* "*Savage*, who was called to the bar on "the 25th of *June* last, having applied for admission to this society, "on the *Saturday* preceding, by a certificate from the society of the *Middle* "*Temple*, and represented that he had, "by mistake, omitted to apply for his "call at the *Temple* in due time for "this term, and it appearing that he "had applied there in time, but his "petition was not moved by any "bencher, and that notice had been "given to him of the manner in which "his petition had been treated by the "under-treasurer of the *Middle Tem*-"*ple*, It is ordered that all the fees "and expences paid by him be re-"turned, and the order for his call "*expunged* as irregular, and obtained "by surprize." The jury found a verdict for the defendant.

[5] *Hart*, afterwards, applied by petition of appeal to the twelve Judges, and, on the 15th of *Nov. M.* 21 *Geo.* 3. he was heard by his counsel, (*Morgan* and *Lind.*) His petition was accompanied with the same affidavit which had been produced to the court of *King's Bench*. At the same time a certificate was laid before the Judges from the treasurer and benchers of *Gray's Inn*, in which they set forth, that they had not refused to call him to the bar merely because he had been discharged by an insolvent act, (although they stated that the society of *Lincoln's Inn* had been of opinion that *that* was a sufficient cause,) but, because

* The witness swore to them exactly as laid, but, though not less severe upon the plaintiff, the words really spoken were, (according to the recollection of several persons present,) somewhat different.

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The KING against GRAY'S INN.

cause it appeared to them from a memorial of his own, (which he had also laid before the Judges,) that he had knowingly become security for money borrowed by others, to a much greater amount than he was able to answer, and for other circumstances of his life mentioned or alluded to in the certificate.—The Judges were unanimous in dismissing the petition.

Friday, 21st April.

EARLE *against* HARRIS.

On a warranty to sail from *Jamaica*, on or before a day certain, if the ship departs from her port on that day, with all her cargo and clearances on board, and proceeds to the place of rendezvous in the island, expecting to find convoy and proceed immediately, but is detained there by an embargo till after the day, the departure is a compliance with the warranty, although the captain knew of the embargo when he sailed, the embargo being only till convoy should be ready.

*[358]

THIS was an action on a policy of insurance, tried before Lord MANSFIELD, at the last Sittings at *Guildhall*, when a verdict was found for the plaintiff. On *Thursday*, the 13th of *April*, the *Solicitor General* obtained a rule a shew cause, why there should not be a new trial, which was this day argued, by *Bearcroft*, and *Davenport*, for the plaintiff, and the *Solicitor General*, and *Dunning*, for the defendant.

The facts of the case, as reported by his Lordship, appeared to be as follows: The policy was on the ship the *Leghorn Galley*, "At and from *Leghorn* to *Jamaica*, with liberty to "call at the *Windward Islands;* and from thence to *Liver-* "*pool;* warranted to sail from *Jamaica on or before the first* "*of* August *next.*" The ship had taken in her *whole lading and papers, and set sail from the port of *Savannah la Mar* in *Jamaica*, on the 1st of *August*, and went to *Bluefields*, which is at the distance of about five miles, and is the general place of rendezvous for convoy. On the 25th of *July*, an embargo had been laid on all the ships in the island by the governor, and inserted in the public news-papers of that date. On the first of *August*, as soon as the ship had crossed the bar, going out of the harbour of *Savannah la Mar*, the captain returned in a boat, and there made a protest against losses or damages sustained, or to be sustained, on account of the embargo, which protest he could not have made at *Bluefields*. He then proceeded the same day over land to *Bluefields*. At that place the ship was detained till the 9th of *August*, when, convoy arriving, the embargo was taken off, and she sailed for *England* with the convoy, but was afterwards separated from it, and taken by an *American* privateer. The captain was examined at the trial, and admitted that he had heard of the embargo; but said, he thought it was only meant to prevent ships from departing without the protection of convoy; that he expected to meet with convoy at *Bluefields* on the 1st of *August*, and that the embargo would immediately cease, and leave him to pursue his voyage, the same day, without interruption.

In support of the verdict, it was insisted, that there had been a fair *bonâ fide* commencement of the voyage for *Europe*, on the

1780.

EARLE against HARRIS.

the 1st of *August*, which brought the case within the determination in *Bond* v. *Nutt (z)*.

On the other side it was contended, that the captain, by sailing, when he knew of the embargo, had been guilty of a wilful breach of duty, and could not thereby acquire any right. There was no inception of the voyage by the departure from *Savannah la Mar*, as he knew he could not leave the island, on account of the embargo. This distinguished the present case from that of *Bond* v. *Nutt*, where the principle of the decision was, that there had been a *bonâ fide* departure from *Jamaica* within the meaning of the policy. Here the sailing was colourable, and merely intended to answer the *letter* of the insurance. In *Bond* v. *Nutt*, the captain had no such purpose in view, for he did not know of the insurance.

Lord MANSFIELD,—Whether there was a *bonâ fide* sailing on the 1st of *August*, or not, depends on the credit of the captain. He positively swore, that he expected to find convoy ready at *Bluefields* that day, in which case the embargo would have ceased immediately. The jury have believed him, and have found accordingly. I dare say the captain never heard of *Bond* v. *Nutt*.

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WILLES, *Justice*,—It appears to me evident, from the captain's conduct, that he did not mean a sailing on the voyage. If he had intended to proceed directly, he had no occasion to quit his ship, in order to make the protest. Upon the whole, I think there was not a *bonâ fide* sailing on the 1st of *August*.

ASHHURST, *Justice*,—To be sure there ought to be a fair sailing; but the whole of the case has been before the jury, who have given credit to the captain. We must set aside the verdict as being against evidence, if at all, and I do not think there is ground for considering this as a verdict against evidence.

BULLER, *Justice*,—On the facts, as stated by my brother WILLES, I should have no doubt that the departure was colourable; but, from the report, it appears, that the captain thought he should find the convoy ready to sail immediately from *Bluefields*, and that the embargo would of course be taken off. If he had expected, and meant to wait for convoy, it would not have been a sailing on the voyage; but the question is mere matter of fact, and the jury having believed the captain, I think we must be bound by their finding.

The rule discharged *(a)*.

(z) B. R. E. 17 *Geo.* 3. stated *infra*, p. 352. col. 2.

(a) Vide Thellusson v. *Fergusson*, *infra*, p. 361.

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Friday, 21st April.

SAMUEL *against* PAYNE and Others.

A peace officer may justify an arrest on a reasonable *charge* of felony, without a *warrant*, although it should afterwards appear that no felony had been committed; but a private individual cannot[F 1].

[360]

ACTION of trespass and false imprisonment, against *Payne*, a constable, and two others. The facts of the case were these: *Hall*, one of the defendants, charged the plaintiff with having stolen some laces from him, which he said were in the plaintiff's house. A search warrant was granted by a justice of peace upon this charge, but there was no warrant to apprehend him. On the search, the goods were not found; however, *Payne*, *Hall*, and the other defendant, an assistant of *Payne*'s, arrested the plaintiff, and carried him to the *Poultry Compter* on a *Saturday*, when no Alderman was sitting, by which means he was detained till *Monday*, when, after examination, he was discharged. The cause was tried before Lord MANSFIELD, and a verdict found against all the three defendants. At the trial, his Lordship, and the counsel on both sides, looked upon the rule of law to be, that, if a felony has actually been committed, any man, upon reasonable probable gounds of suspicion, may justify apprehending the suspected person to carry him before a magistrate; but that, if no felony has been committed, the apprehension of a person suspected cannot be justified by any body[F 2]. His Lordship therefore left it to the jury to consider, whether any felony had been committed. The rule, however, was considered as inconvenient and narrow; because, if a man charges another with felony, and requires an officer to take him into custody, and carry him before a magistrate, it would be most mischievous that the officer should be bound first to try, and at his peril exercise his judgment on the truth of the charge. He that makes the charge should alone be answerable. The officer does his duty in carrying the accused before a magistrate, who is authorised to examine, and commit or discharge.

On

[F 1] In *Stonehouse* v. *Elliott*, 6 *T. R.* 315. an objection being taken, that the action against an individual for an arrest by an officer, made upon such charge given, should be an action upon the case, it was held that it was rightly brought in trespass.

[F 2] To *prevent* a man from committing a felony (in that instance the murder of his wife) a private person may justify breaking open his house and imprisoning his person. *Handcock* v. *Baker*, 2 *B. & P.* 260. Otherwise in case of prevention of a breach of the peace; except (as it seems by the note of the reporters) such apprehended breach of the peace would amount to a riot.

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SAMUEL against PAYNE.

On this ground, a motion was made for a new trial, and, after cause shewn, the court held, that the charge was a sufficient justification to the constable and his assistants, and cited *Ward's Case* in *Clayton (a)*, 2 *Hale's Pleas of the Crown*, 84. 89. 91. and 2 *Hawkins*, *B.* 2. *c.* 12. and *c.* 13 [7].

The *Solicitor General* for the plaintiff.—*Dunning* for the defendants.

The rule made absolute [8].

(a) Clayt. 44. *pl.* 76.

[7] None of these authorities come exactly up to the present case, which is therefore the first determination of the point. In *Ward's Case*, (which is very loosely reported,) it would seem, that the goods had been actually stolen. The very point of this case had been agitated on a demurrer to a special justification, so long ago as the reign of *Hen.* 4. (*Year-book* 7 *Hen.* 4. *p.* 35. *pl.* 3.) and the court seems to have thought, that, if the cause of suspicion should appear reasonable, the justification would be good, though no felony were committed. But the case was adjourned [† 93].

[8] The new trial came on before Lord *Mansfield*, at the Sittings after this term, when a verdict was found against *Hall*, and for the other two defendants.

[† 93] *Vide Ledwick* v. *Catchpole*, *B. R. E.* 23 *Geo.* 3. ☞ *Cald.* 291.

THELLUSSON *against* FERGUSSON.

Friday, 21st April.

A French ship being warranted to sail from *Guadaloupe* on or before the 31st of *December*, if she take in all her loading and papers, and leave her port of loading before that day, and to sail to another part of the island, in the direct course of her voyage, and merely in the hopes of joining convoy, and to take the governor's dispatches for *France*, the warranty is complied with, though the governor there should detain [r] her beyond the day, and although it was a condition inserted in one of her clearances, "that she should pass that way to take the orders of government."—An intention to deviate, if the ship is taken before the dividing point, does not vacate the policy.

THIS was an action on a policy of insurance, on the *French* ship *L'Aimable Gertrude*, "At and from *Guadaloupe* to *Havre*, *warranted to sail on or before the* 31*st of* December." It was tried before Lord MANSFIELD, at the last Sittings at *Guildhall*, when a verdict was found for the plaintiff.

On

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[r] In *Rotch* v. *Edie*, 6 *T. R.* 413. it was decided in the case of a policy in the common form on ship and stores at and from a port that the assured might abandon and recover as for a total loss, the ship having been detained by an embargo in that port.

1780.

THELLUSSON against FERGUSSON.

On *Friday*, the 14th of *April*, *Bearcroft* obtained a rule for a new trial, which came on to be argued this day, by the *Solicitor General*, *Dunning*, and *Douglas*, for the plaintiff, and *Bearcroft* and *Lee*, for the defendant.

The evidence and facts of the case appeared, from his Lordship's report, to be as follows:

The ship took in her compleat lading and provisions for *France*, and all her clearances and papers, at a port called *Pointe a Pitre*, in the island of *Guadaloupe*, and sailed from thence on the 24th of *October*, for *Basseterre*, where there is no port, but only an open road. The town of *Basseterre* is the residence of the *French* governor. The ship arrived there at night, when the captain went on shore, and next day waited on the governor, who would not permit him to depart, and, to prevent it, took his ship's papers from him. At this place he was detained with his ship till the 10th of *January*, when he set sail with a convoy which had arrived some little time before, and being separated after some days from the convoy, the ship was taken by an *English* vessel. The captain, who was the only witness produced at the trial, swore, that notice had been given, on the part of the governor, some days before he sailed, to him and the other captains of ships at *Pointe a Pitre*, who were preparing to sail for *Europe*, that a convoy was expected from *Martinico* to be at *Basseterre*, by the 25th of *October*, and that, in consequence of this intimation, he had worked night and day to get ready, and had paid extraordinary gratifications to obtain his ship's papers and clearances as soon as possible; that the desire of being in time for the convoy was the only reason for this haste; and that, although he was not able to sail till the 24th, he was still in hopes of being in time for the convoy, as he thought it might very probably have been detained at *Martinico* some days beyond its time. The last ship-paper which he received at *Pointe a Pitre*, was *Le Role d'equipage*, or the muster-roll. This paper, which was much relied on by the counsel for the defendant, was dated the 24th of *October*, and was in the following words:

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" Vu par nous, chargé du detail des classes au departement " de la *Grande Terre Guadaloupe*, l'equipage denommé au " role des autres parts au nombre de vingt personnes, le capi- " taine compris. Permis au Sieur *Jean Jaques Lethuillier*, " commandant le navire *L'Aimable Gertrude du Havre, de* " *s'en servir pour faire son retour*, au dit lieu, *passant a la* " Basseterre *pour y prendre les ordres du gouvernment*, en " observant les ordonnances & reglemens de la marine. Fait " a la *Pointe a Pitre, Guadaloupe*, le 24 *Octobre* 1778. " *Montenot.*"

Under this there was written, on the same paper, an account, dated the 30th of *October*, of some changes in the

the number of the crew, and, under that, the following entry: 1780.

"Vu par nous, ecrivain de la marine chargé du detail des "classes, les vingt cinq personnes existantes au present role, "le capitaine compris. Il est permis au Sieur *Lethuillier*, "commandant le navire *L'Aimable Gertrude du Havre, de* "*faire son retour* au dit lieu, en se conformant aux ordon- "nances & reglemens royaux de la marine. A *Basseterre* "*Guadaloupe*, le 2 *Janvier* 1779." THELLUSSON against FERGUSSON.

On another paper, called *Le Congé*, dated the 16th of *October*, which was read on the part of the plaintiff, there was written at the bottom, as follows:

"Vu de relache a la *Basseterre Guadaloupe, pour y* "*attendre un convoi pour France.* Ce 28 *Octobre* 1778. "*Monentheil.*"

The captain swore, that he understood the only reasons for the condition in the muster-roll, that he should go to *Basseterre*, were, that the convoy was to be at that place, and that he might take such dispatches as were ready for *Europe*. He had not objected to it, because, in the regular course of his voyage to *France* from *Pointe a Pitre*, he must have gone that way, close under the guns of *Basseterre*, in order to avoid *Montserrat*, there being no other course, except they were to keep quite close to the leeward, which is not the custom. If he had arrived there in the day-time, he would not have cast anchor, but would have sent his boat for the dispatches, but, having arrived at night, his ship had been detained, contrary to his intention and expectation.

The defendant's counsel, to invalidate the captain's testimony, besides the muster-roll, and the entry under it, as above stated, read the protest made by the captain on his arrival at *Dover*, (10th *March* 1779,) and also his deposition in answer to the 29th interrogatory in the proceedings in the Admiralty, on the condemnation of the ship. The words of the protest on which they relied were as follows: [363]

"Whereupon he, (the captain,) waited on the proper officer "at *Pointe a Pitre* for his muster-roll, and was answered, "it could not be granted, but on condition that he should sail "first to *Basseterre*, and *there wait* the directions of the ge- "neral of the island."

And in a subsequent part:

"Whereupon, at his, (the captain's) instance, the said *John* "*Nicholas Lethuillier*, his father, came to *Basseterre*, and "went with Messrs. *Gobert* and *Boteul*, commissioners of "commerce, to the superintendant, and also to the general of "the island, stating to them, that the said ship and cargo "were insured upon condition that she should have departed "from the island of *Guadaloupe* before the 31st of *December* "next, the terms of which insurance they judged it essential

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"to fulfil, notwithstanding which they were still absolutely "refused permission to depart, and were kept there until after "the said 31st of *December*."

The deposition relied on was as follows:

"At the time the ship was first pursued and taken, she was "steering her course towards *Brest*. Her course was not al- "tered upon the appearance of the vessel by which she was "taken. Her course was at all times, when the weather would "permit, directed to *Brest*, for which port he was directed "to sail, although the destination was for *Havre de Grace* by "the ship's papers. She was *not*, before nor at the time of "the capture, sailing *beyond or wide of Havre de Grace*. She "was then about eight leagues west of *Ushaut*, and her "course was not altered to any other port or place, but was "obliged to be directed to *Brest* in consequence of the orders "he had received, subsequent to the delivery of the ship's pa- "pers."

In answer to the 27th interrogatory, his deposition was, "That all the ship's papers found on board were true and fair, "and none of them false and colourable."

At the trial, the captain swore, that he had received the directions to keep in the course to *Brest* at *Basseterre* from his father, who had formerly commanded the ship, but that this was done as the safest way, in time of war, of getting to *Havre*, which *still continued to be the place of the ship's destination.*

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The grounds of the application for the new trial were two: 1. That there had been no inception of the voyage on the 24th of *October*, nor till after the 31st of *December*; 2. That the ship never sailed on the voyage insured, *viz.* from *Guadaloupe* to *Havre*, but on a voyage from *Guadaloupe* to *Brest*.—1. This case was said to be very different from that of *Bond* v. *Nutt* (*c*), which had been relied on at the trial by the counsel for the plaintiff, because, here, the permission to leave *Pointe a Pitre* was conditional. The captain had no election; he was bound to go to *Basseterre*, and the time of his departure from thence was at the disposal of the governor. Till his orders were received, he could not proceed to *Europe*, and, as he had not been permitted by the governor to depart till long after the day in the warranty, the voyage had not commenced till after that day. The words of the *muster-roll*, as delivered at *Pointe a Pitre*, were materially different from those of the ultimate and unconditional permission to sail, which he received at *Basseterre*. It was manifest from the language of the protest, that he himself did not consider the voyage as begun, because, if he had, he would not have stated to the governor, that his departure from *Basseterre*, before the 31st of

(*a*) *Infra*, p. 367. *Note* [9].

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of *December*, was essential towards fulfilling the terms of the insurance. The act of the captain in *Bond* v. *Nutt* was voluntary, and he proceeded by the way of *Bluefields* as the best and safest course he could take for the interest of the concerned. A *bonâ fide* and complete inception of the voyage they admitted to be sufficient, even although the force of an embargo, or any other compulsion, should oblige the ship immediately to stop, or put back. This had been the case in a cause between these very parties, which had been tried before Lord MANSFIELD, immediately after *Bond* v. *Nutt*, and also in the very recent case of *Earle* v. *Harris*.—2. The deposition above stated was relied on as evidence, that the ship had never sailed on the voyage insured; that she left *Guadaloupe* on a voyage to *Brest*, not to *Havre*; and therefore, independent of the other point, the plaintiff was not entitled to recover.

For the plaintiff, it was said,—On the *first* point, that this [365] case was not so strong as *Bond* v. *Nutt*, because *Bluefields* was out of the straight course of the voyage in that case, whereas here *Basseterre* was in the direct way to *France*, so that the captain must have gone by that place, at all events, and although there had been no such words in the muster-roll as those relied on by the defendant's counsel. The only purposes for which those words were inserted were, that he might be sure of convoy, which was *expected* to be at *Basseterre*, and to carry any government dispatches that might be ready. The voyage to *Europe* was not less commenced on that account; and the opinion the captain or his father might entertain on the meaning and construction of the contract of insurance, as disclosed by the depositions, could not alter the legal import of the policy.—On the *second* point, it was insisted, that the voyage was not to *Brest*, but to *Havre* by the way of *Brest*, *that* being the safest course. A ship loaded with merchandize, (as this was,) could never be destined for *Brest*, which was not a place of trade. But, at most, if the design had been to go from *Basseterre* to *Brest*, still, as the ship had certainly sailed from *Pointe a Pitre* for *Havre*, the voyage to *Brest* was only a deviation intended, but never carried into execution; for, when the capture took place, she had not gone out of the direct course to *Havre*. That an intention to deviate, not carried into effect, does not vacate a policy, had been established by several solemn determinations *(d)*.

Lord MANSFIELD,—1. In my apprehension, there is no contradiction between the parol evidence and the protest and depositions. This captain had never heard of the case of *Bond* v. *Nutt*. Under an insurance at such a place as *Guadaloupe* or

(d) Foster v. *Wilmer*, *Carter* v. *The Royal Exchange Assurance Company*, &c. cited *supra*, *p.* 17.

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or *Jamaica*, the ship is protected in going from port to port in the island. But the question here is, whether the voyage was *bonâ fide*, commenced[F 1], and was stopt by accident. As to the condition about taking the orders of government, the ship could not sail from any part of the island without the governor's leave. But the captain, when he left *Pointe a Pitre*, expected to meet with convoy at *Basseterre*, and to proceed immediately without interruption. A convoy had been published, and he certainly would have gone to *Basseterre* at any rate, independent of the clause in the muster-roll.—2. With

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regard to the second point, the voyage to *Brest* was, at most, but an intended deviation, not carried into effect. I think there should not be a new trial[F 2].

WILLES, and ASHHURST, *Justices*, of the same opinion.

BULLER, *Justice*,—The case in 1777, between the same parties, is in point. There was no embargo there, nor in the present

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[F 1] In *Audley* v. *Duff*, 2 *B. & P.* 111. where the assured under a policy on ship at and from Oporto to Lynn was entitled to a return of premium in case the ship "sailed with convoy from the coast of Portugal," &c. the ship having sailed from Oporto for Lisbon under protection of ships employed by government, there to join a large convoy for England, and having been separated by a storm and then run for England, it was held that the assured had complied with the condition in the policy.

[F 2] The same point was ruled in *Kewly* v. *Ryan*, 2 *H. Bl.* 343.; which was on a voyage to Liverpool; although there were clearances made out for Cork, the port to which it was intended to deviate. In *Middlewood* v. *Blakes*, 7 *T. R.* 162. the voyage was to Jamaica, and the deviation intended was to Nicola Mole in St. Domingo. The track to Nicola Mole and Jamaica is invariably the same to a certain point: from which there are three tracks to Jamaica, more or less eligible according to circumstances. One of these three lies on that side of St. Domingo in which Nicola Mole is situated. In this track, which the ship had taken in pursuance of the intention to deviate, but before she had quitted it to put into Nicola Mole, the loss happened: and the court held that the deviation was sufficiently carried into effect at the point where the three tracks divide: at which, according to the voyage insured, the captain would have exercised a judgment in the choice of the best of the three; whereas in fact, in consequence of the intention to deviate, he had preferred that track which lay by Nicola Mole without any regard to its eligibility. This reason, as stated by Lawrence, J. in his judgment, appears the true ground on which the decision is to be supported, consistently with the principal case and the uniform current of authorities. The jury at the trial, and the rest of the court upon the discussion of the rule for a new trial, relied upon the objection as a concealment of a material fact, viz. the intention to deviate: which objection seems to apply to cases of original intention to deviate, not carried in any manner into execution. Indeed Lord Kenyon intimates a doubt in his own mind as to the propriety of the decision of those cases, though he did not wish to disturb them. *Vide Wooldridge* v. *Boydell*, *suprà*, 16.

present case, when the ship sailed. There must be a lawful *bonâ fide* sailing, which I think there was in this case. The ship was completely ready in all respects. 1780.

The rule discharged [9].

[9] There were actions against twenty other underwriters upon this policy, depending at this time. Nineteen of whom, after the rule in this case of *Thellusson* v. *Fergusson* was disposed of, not being satisfied with the decision, obtained leave to *consolidate* their different causes, upon the usual terms of being bound by one verdict, and not bringing a writ of error. The twentieth *(Pigou)* did not choose to enter into this rule. At the ensuing sittings therefore two actions were entered, *Thellusson* v. *Staples*, the underwriter against whom the plaintiffs had elected to try, (the option in such cases being with the plaintiff,) and *Thellusson* v. *Pigou*. *Thellusson* v. *Staples* stood first. The *second* point was now abandoned. On the *first*, the same evidence was given as at the former trial, the captain being still the only witness called. *Bearcroft*, in his opening for the defendant, insisted upon it, as a proposition not to be controverted, that "to constitute a sailing within the meaning of the warranty in this policy, the vessel, at the time of her sailing from the port of loading, must be, in the contemplation of the captain, at absolute and entire liberty to proceed to her port of delivery in a mathematical line if it were possible." He said, *that* was the case in all those causes to which the present was supposed to bear a resemblance. Lord *Mansfield* summed up to the jury, to the following effect,—The single question on this policy is, Whether the ship sailed on her voyage to *Havre* before the 31st of *December*. She certainly sailed from *Pointe a Pitre* completely loaded before that time. The doubt, on the first question of this sort*, was this: The policy was "at and from *Jamaica*;" now the word "*at*" certainly comprises the whole island, and, under that word, you may sail from one port to another every where along the coast of the island. The ship, therefore, in that sense, was still at *Jamaica* after she had got to *Bluefields*. She did not leave *Bluefields* till after the day named in the warranty, and that place was quite out of the course of navigation from * *St. Anne's* to *England*. I own, at the trial, I thought the voyage to *England* did not commence till the ship sailed from *Bluefields*, and, according to my opinion then, a verdict was found for the defendant. But there was a doubt. I therefore wished, (as I always do in such cases,) that the opinion of the court might be taken, in order to settle the point. The case, when it came on in court, was very ably argued; I was completely convinced; and the court unanimously of opinion, that the voyage to *England* began when the ship sailed from *St. Anne's*, and, upon the second trial, the plaintiff had a verdict. *Earle* v. *Harris* was still a stronger case. *There*, an embargo was actually published before the ship sailed, and the captain immediately, after crossing the bar, returned to make a protest, and sent his ship knowingly into the embargo; but he swore he expected the embargo was to be taken off, and that he should proceed immediately upon his voyage; and the jury believed him. In this case, to go by steps,

* *In Bond* v. *Nutt*.

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steps, there was public notification of a convoy to be at *Basseterre* on the 25th of *October*. The captain thought it might be stopped a day or two at *Martinico*, and that he should get to *Basseterre* in time. He worked night and day, paid double fees for his papers, and sailed with full expectations of pursuing his voyage directly. He knew of no embargo, and *Basseterre* was directly in his road. In that respect this case differs strongly from *Bond* v. *Nutt*. He was even in the regular voyage obliged to pass under the cannon of *Basseterre*. He had his muster-roll on condition of calling there. But he made no difficulty of taking it on that condition, because he knew he must pass that way at all events. Did he not, *bonâ fide*, begin his voyage? He certainly had no idea, when he sailed from *Pointe a Pitre*, of meeting with any stop. So it was in the former case of *Thellusson* v. *Fergusson*. There was no idea of the embargo in that case when the ship sailed. Here, there is not the least suspicion of fraud. The captain certainly did not know of the determination in *Bond* v. *Nutt*. He thought, when he was detained at *Basseterre* beyond the 31st of *December*, that the policy was forfeited, which is a strong circumstance in the plaintiff's favour, for it shews that the sailing was not colourable. This question has undergone the consideration of a special jury, and of the court. Underwriters have a right to litigate questions which seem to them to be in their favour. But, at last, there should be an end of ligitation. If you should be of the same opinion with the former jury and the court, you will find for the plaintiff.—A verdict was accordingly found for the plaintiff, and immediately afterwards the counsel for *Pigou* agreed that one should also be entered, by consent, against him.

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As in these causes, as well as in *Earle* v. *Harris*, *Bond* v. *Nutt* was very much referred to, and, ever since it was determined, has been considered as a leading case in the law of insurance; it will not be improper to subjoin an account of it in this place [† 94]. It was tried before Lord MANSFIELD at *Guildhall*, at the Sittings after *H.* 17 *Geo.* 3. The policy was effected, (on the ship *Capel*,) on 20th of *August* 1776, and was in these words: "*At and from Jamaica* "to *London*, warranted to have sailed "on before the 1st of *August* 1776, "to return 5 per cent. if the ship de- "parted with convoy, or 8 per cent. "if with convoy for the voyage *(f)* "and arrived." The first and second counts in the declaration averred, "That the ship sailed before the 1st of *August*, viz. on the 20th of *July*, *from St. Anne's Bay at Jamaica*, where she had been loaded, and had taken in her cargo for the said voyage, *(i. e.* from *Jamaica* to *London*,*)* ready to perform the said voyage, and proceeded to *Bluefields* for the purpose of joining convoy there, which was then about to sail for *Great-Britain*." The third count stated, "That she sailed before the 1st of *August*, viz. &c. *from Jamaica* aforesaid, on her said voyage." It was admitted by the defendant, that the ship had taken in her complete lading and clearances for *England*, and had sailed from *St. Anne's Bay*, on the 26th of *July*, on purpose to join the convoy there, and proceed to *England*; that she arrived at *Bluefields* on the 28th or 29th of *July*, when she was detained till beyond the day in the warranty, in pursuance of a proclamation from the governor and council of *Jamaica* for a general embargo; that, afterwards, having

[† 94] Since reported, *Coup.* 601. *(f) Vide Lilly* v. *Ewer*, *supra*, *p.* 72.

having had sailing orders, she proceeded with the convoy for *England*, and, on her passage, being separated from the convoy, was taken by an *American* privateer. *Bluefields* was the usual place of rendezvous of the King's ships and convoy on the *Jamaica* station, but the greatest part of the course from *St. Anne's* to *Bluefields* was out of the direct road to *England*. A verdict having been found for the defendant, the case was argued on two several days, by *Dunning*, and *Buller*, for the plaintiff, and *Wallace*, and *Baldwin*, for the defendant. The two points made for the defendants were: 1. That there was no departure till after the day in the warranty: 2. That if there was, the going to *Bluefields* was a deviation. After the first argument, Lord MANSFIELD, said it seemed to be a new question, whether a ship going expressly for the purpose of getting convoy, out of the course of the voyage, is to be considered as in the prosecution of the voyage insured, or whether this is a deviation. He therefore directed that the cause should stand over to look for cases on that subject.

The general scope of the argument for the plaintiff, was as follows:

1. It was urged at the trial, by the defendant's counsel, that it is the practice of ships in the *West-India* trade to sail from port to port for the purpose of taking in different commodities, and till they finally depart from the last port, they still are considered as continuing at the island; but, in this case, the ship had completed her cargo, had all her papers on board, and had nothing further to do at *Jamaica*. It was said, that, if she had sailed from *Jamaica*, the embargo never could have reached her to stop her voyage; but that proposition is not a clear one. If she had not sailed so far as to be beyond the reach of the guns, she would have been compelled to return, and, in fact, many ships of this fleet were forced back after they had sailed.

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2. If there was an inception of the voyage on the departure of the ship from *St. Anne's*, her going to *Bluefields*, for the *express* and *sole* purpose of meeting with convoy, was no deviation. To be sure, as *Bluefields* is on the opposite side of the island, and out of the direct course, there was an *actual* deviation; but if it was for a justifiable reason, it was no deviation in the sense in which the word is used when applied to insurances. Whenever a ship does what is beneficial to all the parties interested, it is as much within the meaning of the policy, as if expressed in words. A deviation which vacates the policy, must be something injurious to the underwriter, something which exposes him to a risk which he did not mean to insure. There was no occasion for any particular clause in the present policy specifying that the ship might go to *Bluefields* to join the convoy. The underwriters knew, and it must have been understood by all parties, that *Bluefields* was the place of rendezvous. It is no port; no motive of trade occasioned the ship's going there; and, to decide whether a departure from the direct course of a voyage, is in law a deviation, the object of such departure, its tendency, and effect, must be taken into consideration. In the case of *Motteux* v. *The London Assurance Company* (g), the insurance was from *Fort St. George* in the *East Indies* to *London*; but the ship, on her arrival at *Fort St. George*, being leaky and unable to proceed for *Europe* without repairs, she went back all the way to *Bengal* for

(g) *Canc.* 6 *Dec.* 1739. 1 *Atk.* 545.

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for the purpose of being repaired. Yet, as this was thought necessary for the interest of all concerned, and was not done for any purpose of trade, the underwriters were held to be liable, although nothing was said in the policy about leave to go out of the insured course for the sake of repairs. Here, in like manner, the deviation was necessary, and not for the sake of trade. The same reason applies to every case where the act is for the benefit of all concerned. Suppose the ship, in the course of her voyage, were to find herself on the point of sailing into the midst of a fleet of privateers; surely she would be warranted in going as far to the right or left as should be necessary to avoid the danger of capture. In all the reported cases of deviation for the sake of convoy, (which are but two or three,) there was, it is true, an *express* warranty to depart with convoy, *viz.* in *Bond* v. *Gonsales* (*h*), *Gordon* v. *Morley* (*i*), and *Stevenson* v. *Snow* (*k*); but, in the present case, there is what is *tantamount* to such a warranty. The premium was to be lessened if the ship should sail with convoy. That event therefore was manifestly in the contemplation of the contracting parties, and was provided for in the contract; and the ship could not depart with convoy without going to *Bluefields*. In the other cases, if the ship departed without convoy, the underwriters were not to be liable at all. In the present, they were to continue liable, but it was to be in a less degree. There is therefore a literal difference; but, as to the question now before the court, the former cases agree in principle, and substance, with the present. In the case of *Pelly* v. *The Royal Exchange Assurance Company* (*l*), the whole doctrine on the subject of the present question was very fully discussed at the bar, and by the court. It was there stated in the case, as a material fact, that what was done was *prudent*, and for the general benefit of all persons concerned in the safety of the ship. The argument and decision went, 1. upon the acts being in the usual [369] course, and, therefore such as must have been in the knowledge of the underwriters, and that what it is known must be done is as much covered by a policy as if it were expressly mentioned (*m*); and, 2. upon its being found to have been *ex justâ causâ*, and for the general benefit (*n*). Those principles are perfectly applicable here. The master looked at the same end; the safety of the property insured. There, the ship was to be refitted, which was necessary for her safety. Here she was to be protected against enemies and pirates. In short, nothing was done which the insurers, if they had known and been consulted, would not themselves have directed. It may be said, that the word *necessity* is used in some of the cases, and that here no necessity existed. To be sure there was not any physical necessity, but there was a necessity in the sense in which the word is made use of in those other cases. The risk was diminished in a much greater proportion,

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(*h*) At *N. Pr.* 14 *Feb.* 1704. Before *Holt*, *Ch. J.* 2 *Salk.* 445.

(*i*) At *N. Pr. H.* 20 *Geo.* 2. before *Lee*, *Ch. J.* 2 *Str.* 1265.

(*k*) *B. R. M.* 2 *Geo.* 3, 3 *Burr.* 1237. *Buller* also mentioned a case of *Le Fevre* v. *Bradshaw*, *C. B. H.* 3 *Geo.* 3. of the same sort.

(*l*) *B. R. E.* 30 *Geo.* 2. 1 *Burr.* 341. *Tierney* v. *Etherington* there cited 1 *Burr.* 348.

(*m*) 1 *Burr.* 350.

(*n*) 1 *Burr.* 351.

tion, by the sailing with convoy, than was counterbalanced by the stipulated return of premium.

The arguments for the defendant were to the following effect.

The parties did not know from what part of the island the ship would sail, and, therefore, they insured *at and from Jamaica* in general. *Bluefields* is as much in *Jamaica* as *St. Anne's*; and the ship was certainly protected under the word "*at*" in going from the one place to the other. But the underwriters would not insure the voyage home unless she would have departed by a certain day. This was the very foundation of the contract, and the reason was, because the risk is greater, and the premium rises of course, if the ship continue longer, so as to be exposed to the tempestuous weather in the end of the year. The argument from the return of premium to be made in case of sailing with convoy is a fallacy. The underwriters only meant that if the ship should, within the time specified, depart under that protection from the war-risk, they would, in such case, insure the voyage for a smaller consideration. The case is very different when there is an express warranty to depart with convoy, for then, as the party insuring must be supposed to know where the convoy will be stationed, the ship is, from the nature of the thing, insured from the port of loading to the rendezvous for convoy. The argument for the plaintiff would have held equally if the captain, having gone there, had remained voluntarily waiting for convoy till long after the day stipulated, and when the dangerous hurricanes had begun. How can the insured, or this court, say, that the underwriter shall be obliged to consider it as more for his interest that the ship should sail later in the season but protected from capture, than earlier, and less exposed to tempest, but more to the danger of capture? If the ship had been disabled by a storm at *St. Anne's* and kept till the 2d of *August*, the underwriters would not have been liable.

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Lord MANSFIELD,— I am glad this case has been so fully and ably argued. It came on by the candour of the parties, in the fairest way. After the verdict was brought in, the foreman told me, that at least £100,000. depended on it. Some things are very clear. The policy was made on the 20th of *August*, on the contingency of a fact, which must have happened one way or the other, before the making of the contract, and which nothing that has happened since could alter. The port from which the ship was to sail, was, if I may use the expression, the whole island of *Jamaica*. The words "*at Jamaica*" in the policy mean from port to port. It is a question of fact whether she sailed from *Jamaica* before the first of *August*. There is no latitude, no equity, no construction that can supply the place of that fact. Certainly if she had been detained at *St. Anne's* beyond that day, though by proper reasons,—as for necessary repairs, tempestuous weather, to avoid an enemy, &c.—the insurance on the voyage home would have been at an end. On the other hand, if she had broken ground on the voyage from *Jamaica*, and had been put back by storm, an embargo, or an enemy, and had then been under a necessity of staying till *September*, still there would have been a sailing within the meaning of the contract. This was the fact in another case, (*Thellusson* v. *Fergusson*,) tried before me immediately after the present. The ship *Hero* was warranted to sail from *Grenada* between the 12th of *January* and the 1st of *August*. On the 1st of *August* she had just got under sail, (having all her [370] cargo and clearances on board,) when an embargo was laid on, and the captain told he would be fired upon from the fort if he proceeded. He therefore stopped, and was detained beyond the day. I held this to be a departure. A verdict was found for the plaintiff, and there has been no motion

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motion for a new trial*. The whole question turns upon this; did the voyage from *Jamaica* begin from *St. Anne's* or from *Bluefields*? When a voyage is once begun, the going a little out of the way may be a benefit to all concerned, and therefore no deviation. Another point very material here is, that as the ship was protected during her stay at *Jamaica*, she had a right to go to *Bluefields*, or all round the island. If the insurance had been at and from the port of *St. Anne*, warranted to sail on or before the first of *August*, the case might have been different. The court wishes to consider this case farther, and to give such an opinion on the real merits as may direct the judgment of the persons interested in all the causes depending on this policy.

Aston, Justice,—I am glad the court takes time to consider. At present it appears to me to be a mere question of fact, whether the ship sailed, *bonâ fide*, from *Jamaica* on or before the first of *August*. It is a different case from deviations occasioned and excused *ex justâ causâ*, such as storm, avoiding an enemy, &c. Here did the ship sail from *Jamaica* when she left *St. Anne's*, or only when she left *Bluefields*? If she had gone to *Bluefields* to join the convoy, and had not met with any, she could not have staid there to wait for it.

Willes, Justice,—The question is certainly a question of fact, and for the decision of the jury. If the ship had found no convoy at *Bluefields*, she must have proceeded, or, having found convoy, if she had been detained there waiting for other ships, this would have exempted the underwriters.

Some days afterwards, Lord MANSFIELD delivered the opinion of the court as follows.—Upon consideration of all the circumstances of this case, we are satisfied that the voyage from *Jamaica* to *England* began from *St. Anne's*. On sailing the ship had no object but to make the best of her way to *England*, she touched at *Bluefields* only as being the safest way she could take. It is manifest, from the value of the property depending on this trial, that it was considered by all the other shipping as the safest measure to be observed, and that the contrary would have been unwise and imprudent. The great distinction (and on which we found our opinion) is, that she left *St. Anne's* for *England*, with her cargo, papers, master, &c. on board, and did not sail to *Bluefields* as a distinct port. If she had gone there for any purpose independent of the immediate prosecution of her voyage, as, for instance, to take in water, *letters*, or even to wait for convoy, none being there, that would have made a great difference; there would then have been a coasting voyage to *Bluefields*, and another from thence to *England*. But here we think the only object was to take the safest course to *England* from *St. Anne's*.

The rule made absolute.

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* The question, in *that* cause of *Thellusson* v. *Fergusson*, came on in the form of an action for a return of premium. There were two policies; one with a warranty that the ship should sail on or before the *first* of *August*; the other, which was made afterwards to provide for the event of her not sailing on or before the *first*, contained a warranty to sail on or *after* the *second* of *August*. The ship, after she had been forced back, obtained leave to sail again on the *third*, which she did, and arrived safe, upon which the insured brought this action against the underwriters on the second policy, on the ground that the risk insured by *them* had never commenced.

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HOARE and Others *against* DAWES and Another.

Saturday, 22d April.

THIS was an action for money lent and advanced, which was tried before Lord MANSFIELD, at the last Sittings at *Guildhall (a)*, and a verdict found for the defendants. On *Friday*, the 14th of *April*, the *Solicitor General* obtained a rule to shew cause why there should not be a new trial; and, this day, the case came on to be argued; when the facts appeared, from his Lordship's report, to be as follow:—The plaintiffs, who were bankers, had advanced a sum of money on certain tea-warrants of the *East-India* Company to *Contencin* a broker who deposited the tea-warrants with the plaintiffs as a security, and also gave them his note of hand for the sum advanced. He had been employed by a number of persons, of whom the defendants were two, to purchase a lot of tea at the *East-India* Company's sale, of which they, (together with himself,) were to have separate shares, the lots being, in general, too large for any one dealer. The practice at such sales is, for the Company to give a warrant or warrants to the broker or purchasor, for the delivery of the quantity of tea purchased, on payment being made. At the time of the sale, £25 *per cent.* is advanced, and is forfeited, unless the whole is paid on the *third*, which is the *last*, day of payment. If paid sooner, allowance is made for prompt payment. The warrants are often pledged, and money raised upon them; generally considerably less than the supposed value of the tea. It happened, however, in this instance, between the time of the deposit of the warrants with the plaintiffs, and the time when the payment was to be made at the *India* House, that the value of the tea sunk so much as to be considerably under the amount of the sum advanced. The broker, in the mean time, had become a bankrupt, and had informed the plaintiffs who his employers were, all of whom, except the defendants, were since either dead, or become bankrupts. The shares of the defendants were to be two sixteenths of the whole lot.—The ground of the action was, that all the employers of the broker were to be considered as partners, and jointly and severally liable for the whole. The defendants owed nothing upon their own two sixteenths. There was not any joint concern in the re-disposal of the tea. The defendant produced several bankers and brokers, (of whom *Contencin* was one,) who said, they had had

To make a man liable as a partner, there must either be a contract between him and the ostensible person to share jointly in the profits and loss, or he must have permitted the other to make use of his credit, and to hold him out as one jointly answerable with himself.

(a) *Friday*, the 3d of *March* 1780.

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had frequent transactions of this sort, (it being a very usual speculation,) and they always understood, that the only security was the pledge, and the personal security of the broker, unless where the principals were enquired after, and declared, which was very rarely done. That, as the practice was to advance considerably under the supposed value of the tea, and it was also usual to stipulate, that if the money was not repaid within a certain time, the lender might sell, the warrant was of itself a general and sufficient security. *Contencin* said, that tea-warrants were considered as cash, and passed by delivery. On the other side, *in answer to this evidence*, (the plaintiffs having, *at first*, rested their case on the fact, that there were persons behind the curtain, for whom the broker acted,) two witnesses were called. One of them, one *Cartony*, a tea dealer, swore, that a broker had once borrowed some money *for him* on tea-warrants, from the plaintiffs, and that the value of the tea having fallen under the sum advanced, and the broker having failed, he had paid the difference, considering himself as liable. The other was a person who had also dealt in tea, and in loans of this sort, and he swore, that his idea had always been, that the persons behind the curtain were liable; but, upon cross-examination, he said, he never knew any loss happen, nor any demand actually made, on the broker's employers.

Lord MANSFIELD said, when the rule was moved for, that he was very glad the motion had been made, that the question might be re-considered. That, at first, at the trial, he was of opinion with the plaintiffs, thinking this was a case of sleeping partners, but that, before the end of the cause, he was very clear, that the different employers were only liable for their own shares.

The *Solicitor General*, *Dunning*, and *Davenport*, for the plaintiffs:—*Bearcroft*, *Lee*, and *Wood*, for the defendants.

Lord MANSFIELD,—I considered this, at first, as a case of dormant partners. The law with respect to them, is not disputed, *viz.* that they are liable when discovered, because they would otherwise receive usurious interest without any risk; but, towards the end of the cause, the nature of the transaction, and of these loans, was more clearly explained, and I was satisfied with the verdict, and am now confirmed in my opinion. The evidence of *Cartony* is irrelevant, because he said the broker borrowed the money *for him*; and besides, he did not dispute the demand. Is this a partnership between the buyers? I think it is not; but merely an undertaking with the broker by each, for a particular quantity. There is no undertaking by one to advance money for another, nor any agreement to share with one another in the profit or loss. The broker undertakes to buy and sell, but makes no advance without the security of the tea-warrants, which are considered

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as cash, and pass by delivery, like *East-India* bonds. These warrants are pawned with the lender, but the broker has no power to pledge the personal security of the principals. He cannot sell the warrants, and borrow more money on such personal security. It makes no difference, whether specific tea, or the warrants, are delivered at the sale. It would be most dangerous, if the credit of a person, who engages for a fortieth part, for instance, should be considered as bound for all the other thirty-nine parts. *Non hæc in fœdera veni.* The witnesses did not merely speak to opinion, but to matter of fact, and their own dealings. They said, the money was lent to the broker alone. Sometimes, indeed, lenders have required to know the principals; *they* did not trust the broker alone; but all others who do not ask after the principals do. The note is given as a collateral security personally by the holder of the warrant, not in the character of a partner with other persons, nor as a broker for them.

WILLES, and ASHHURST, *Justices*, of the same opinion.

BULLER, *Justice*,—This is a very plain case. The plaintiffs had no reason to consider the broker as a partner with the other persons, for though he had a share, he did not act or appear as a partner, nor were they partners as among themselves. They had never met or contracted together as partners. If this transaction were sufficient to constitute a partnership, a broker would have it in his power to make 500 persons partners, who had never seen nor heard of one another, or might, at his pleasure, convert his principals into partners, or not, without any authority from them, by taking joint or separate warrants.

The rule discharged [☞].

[☞] *Vide Coope* v. *Eyre*, *C. B. T.* 28 *Geo.* 3. *H. Bl.* 37. In the case of *Hoare* v. *Dawes*, the plaintiff had first filed a bill in equity, which was dismissed with costs, the Lord Chancellor being of opinion, that it was merely a question of law. *Hoare* v. *Contencin*, *Canc. H.* 19 *Geo.* 3. 1 *Br. Ca.* in *Ch.* 27.

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Monday, 24th April.

The COMPANY of CARPENTERS, BRICKMAKERS BRICKLAYERS, TYLERS, and PLAISTERERS, &c. of *Shrewsbury* against HAYWARD.

To prove the existence of an aggregate corporation consisting of different trades, entries of admissions into the *separate* trades, as "into "the company "of carpenters, "into the com- "pany of plais- "terers, &c." are evidence to be left to a jury. —A person who has acted in breach of an alleged custom is not a competent witness to disprove the existence of the custom.

THIS was an action on the case, against a carpenter, for the breach of a custom, which was laid to be, That none but members of the company, (being a corporation by prescription,) or their apprentices, or journeymen, should exercise, in *Shrewsbury*, or within a certain district round that town, any of the trades mentioned in the title of the company. The cause was tried the last assizes for *Shropshire*, before HEATH, *Serjeant*, and a verdict found for the plaintiffs. On *Thursday*, the 13th of *April*, *Howorth* obtained a rule to shew cause, why a nonsuit should not be entered, or a new trial granted; and the case came on to be argued, this day, by *Bearcroft*, for the plaintiffs, and *Howorth*, for the defendant.

1. The ground for the nonsuit was, that the plaintiffs had not proved the existence of such a company as that described on the record. The evidence on this head consisted of entries of admissions, (some as far back as the reign of *Henry* 8.) of persons, some into the *carpenters'* company, some into the *bricklayers'* company, some into the *plaisterers'* company, &c.; of instances of fines paid for having worked in those trades, without being free of the *carpenters'* company, of the *bricklayers'* company, &c.; and of the testimony of *one* witness (who was only twenty-four years of age) who said, he had been employed to call meetings of the company, and that they were called by the aggregate name stated in the declaration. The Judge told the jury, that the companies might be distinct corporations for some purposes, and yet form but integral parts of one great corporate body; that such a corporate body might legally exist; and whether, in fact, it did exist, was a question for their decision. For the defendant it was objected at the trial, and now, that the evidence given was only proof, at most, of separate incorporated companies, there being no instances of admissions into the aggregate body; no common seal; nor any proof of any corporate parole act done by them. The evidence of the witness was said to be of so recent a nature, that it ought not to have had any weight. 2. The ground for a new trial was, that a competent witness was rejected, who was offered on the part of the defendant, and that many others of the same description were ready to have been

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been produced. The witness rejected was resident in *Shrewsbury*, and was called to prove, that he had worked without molestation as a carpenter in *Shrewsbury*, although he was not free of the company, nor an apprentice or journeyman. The Judge thought the witness was incompetent. For the defendant it was contended, that he was not interested in the *cause*, and that if the sort of interest he might have could render him incompetent, there could be no such thing as a disinterested witness in such a cause, the only persons likely to know the facts applicable to the case, being either persons who had worked themselves in breach of the supposed custom, or who hath employed others; and, if the first class were considered as interested, because liable to be sued, the same objection might be made to the second.

The court thought it unnecessary to hear the counsel for the plaintiffs.

Lord MANSFIELD,—1. It was properly left to the jury to consider, whether the evidence produced was sufficient to shew, that there was such a company; for that was a mere question of fact; and *they* were to decide on its existence, and whether it was originally created by a charter from the crown, or was only a voluntary society. There was evidence of its existence as a corporation. 2. The witnesses rejected were clearly interested in the question. If the company had failed in establishing the custom, they would have been discharged from actions to which they are liable for the breach of it[F].

WILLES, and ASHHURST, *Justices*, of the same opinion.

BULLER, *Justice*,—1. Whether there be *any* evidence, is a question for the Judge. Whether *sufficient* evidence, is for the jury. 2 The objection to the witness produced for the defendant was certainly decisive; nor is it true, that he could have had no other sort of witnesses. The employers might have been witnesses.

The rule discharged.

[F] I apprehend the ground of this decision to be, that if the company succeeded in that action, the record would be evidence of the existence of the custom on which they relied, in an action against the witness rejected. Thus where a right of common is claimed by *custom* for all inhabitants, none such can be witnesses to support the right: otherwise in the case of *prescriptive* rights, where persons having correspondent rights are admissible, per Lord *Kenyon* in *Bent* v. *Baker*, 3 *T. R.* 32.

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EDDOWES, and Another, *againſt* HOPKINS and Another, Executors of HARRIS.

Where there is a general verdict on a declaration consisting of different counts, some of which are inconsistent, or bad in point of law, and evidence has only been given on the good or consistent counts, the verdict may be amended by the judge's notes [F 1].

ASSUMPSIT, tried before Lord MANSFIELD, at *Guildhall*, at the Sittings after last *Michaelmas* Term. The declaration contained several counts; some upon promises made by the testator, others on other promises by the defendants themselves. To the first set of counts *plenè administravit* was pleaded, and the general issue to the others; and, the jury having found for the plaintiffs with £147 damages, a *general* verdict was entered by the officer.

At the trial, the only question was, whether the plaintiffs were entitled to interest on the value of goods sold by them to the testator. They were wholesale linen-drapers, and the testator an *American* merchant, and it appeared to have been the usage of the *American* trade, for merchants here to allow to their *American* correspondents twelve months credit, and then to charge them five *per cent.* for interest, and for the tradesmen here, to allow the merchant fourteen months credit, and then to charge five *per cent.* This was hardly disputed by the defendants, and his Lordship held, that though by the common law, book debts do not of course carry interest, it may be payable in consequence of the usage of particular branches of trade; or of a special agreement; or, in cases of long delay under vexatious and oppressive circumstances, if a jury in their discretion shall think fit to allow it [☞]. But none of the articles for which the testator was indebted

[☞] *Vide Orr* v. *Churchill*, *C. B. E.* 29 *Geo.* 3. *H. Bl.* 227. 232 [F 2].

[F 1] So where evidence has been given on a bad count, as well as on a good count, if it appears by the Judge's notes that the jury calculated the damages on evidence applicable to the good count only. *Williams* v. *Breedon*, 1 *B. & P.* 329.

[F 2] The case of *Orr* v. *Churchill*, does not relate to the allowance of interest for book-debts; but to the period from which interest was to be calulated on money due on bond under particular circumstances. There have been several cases since decided, in which the question of allowance of interest for book-debts has been raised. In *Mountford* v. *Willes*, of which a short report is given in 2 *B. & P.* 337. it is said, that where upon an agreement for a sale of timber, there was a memorandum of "Credit till Christmas," the seller was entitled to recover interest upon the price from that Christmas. But in *De Havilland* v. *Bowerbank*, 1 *Campb.* 50. it was held by Lord *Ellenborough* at nisi prius, that in an action

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indebted to the plaintiffs had been delivered *fourteen months before his death*, so that no interest was owing when he died, and the defendants contended that the usage did not bind the executors. Lord MANSFIELD, however, and the jury, thought otherwise.

In the last term, the *Solicitor General* obtained a rule to shew cause, why the judgment should not be arrested, on the ground that the verdict was general, and the counts inconsistent, and such as require different judgments to be entered, *viz.* judgment *de bonis testatoris* on those where the promises were laid to be by the testator, and *de bonis propriis* on the others.—Some time afterwards, *Baldwin*, for the plaintiffs, obtained a cross rule, for the defendants to shew cause, why the *postea* should not be amended by the Judge's minutes, and a verdict entered for the plaintiffs only on the counts to which the evidence given at the trial applied, and for the defendants on the others.—Both these rules came on to be argued this day.

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The *Solicitor General*, for the defendants, insisted, that, if the court were to alter the *postea*, they would, in fact, do what was properly and exclusively the province of the jury, for that the verdict would then be the act of the court.

Lee, for the plaintiffs, contended, that this was not a new sort of application, and cited a case of *Newcombe* v. *Green*, in *Strange (p)*, where it appeared by the Judge's minutes that the

(p) B. R. M. 17 *Geo.* 2. 2 *Str.* 1197.

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tion for money had and received interest could not be recovered; and his Lordship laid down a rule for the allowance of interest; which he said ought only to be admitted, 1. where there is a contract for payment on a day certain, as on bills of exchange, &c.; 2. where there is an express promise; 3. where it may be inferred from the course of dealing between the parties; or, 4. where the money has been actually used, and interest made of it. With reference to this last ground the Attorney General observed, that the damages were to be estimated, not by what defendant gained, but by what plaintiff lost. See the cases collected in the note to this report. *Ib.* 52. In *De Bernales* v. *Fuller*, 2 *Campb.* 426. the same rule was repeated, and applied there to a case where money received by defendants to plaintiffs' use had been wilfully, and in violation of their duty as bankers, applied to another purpose, *viz.* the liquidation of a debt due to themselves: and in *Gordon* v. *Swan*, *ib.* 429, *in not.* the rule with respect to goods sold was confined to express or implied agreements for the allowance of interest; and the court refused to extend it to the case of credit limited, which they said was only a condition for the benefit of the purchaser, that he should not be arrested or sued till the expiration of that time. Thereby over-ruling the inference drawn from *Mountford* v. *Willes*, and from the latter part of this direction of Lord *Mansfield*.

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the jury had found for the plaintiff with £274. 11s. damages, but the officer only entered a verdict with 1s. damages, and the court directed an amendment to be made according to the Judge's minutes[11].

Lord MANSFIELD said, it was impossible to believe there was such an absurdity in the law, as that a mere mistake of the officer should be without a remedy, and that neither the judge nor jury could possibly have proceeded on what there was no evidence of before them: and he mentioned a case of one *Gibson* who had been tried for robbing Mr. *Francis*, and convicted, and a mistake being discovered in the verdict, upon consultation with all the Judges at his chambers, it was corrected from minutes signed by the jury, and the prisoner executed.

BULLER, *Justice*, said, there was this distinction, that, if there was only evidence at the trial upon such of the counts as were good and consistent, a general verdict might be altered from the notes of the Judge, and entered only on those counts; but that, if there was *any* evidence which applied to the other bad or inconsistent counts, (as for instance, in an action for words, where some actionable words are laid, and some not actionable, and evidence given of both sets of words, and a general verdict,) there the *Postea* could not be amended, because it would be impossible for the Judge to say, on which of the counts the jury had found the damages, or how they had apportioned them[F 3]: That, in such a case, the only
[378] remedy is by awarding a *venire de novo*[12]. He mentioned an instance where Sir *Fletcher Norton* had moved for and obtained a *venire de novo*, in a case of that sort[13].

The rule to arrest the judgment was discharged, and the other rule made absolute; but, on the payment of costs, including those of the motion in arrest of judgment.

[11] *Vide Maye* v. *Archer*, B. R. E. 8 *Geo.* 1. 1 *Str.* 513. 515. where *a venire de novo* was moved for, on an affidavit, that certain facts, which the court thought material, but which were not found in the special verdict, were proved at the trial: but the court directed the verdict to be amended in that respect. *Vide* also *Bois* v. *Bois*, B. R. T. 16 *Car.* 2. 1 *Lev.* 134.

[12] *Vide Auger* v. *Wilkins*, B. R. M. 6 *Geo.* 2. *Barnes*, *quarto* edition 478. where this was done, and said to be according to an ancient rule of court.

[13] *Vide Grant* v. *Astle*, T. 21 G. 3, *infra*, 722.

[F 3] This was so held in *Holt* v. *Scholefield*, 6 *T. R.* 691. in which the court also refused to grant a *venire de novo*.

BLACQUIERE and Others, Assignees of SAMPSON and Another, Bankrupts, *against* HAWKINS, Assignee of WOOLDRIDGE, a Bankrupt.

Thursday, 27th April.

A prohibition does not lie after sentence, unless the want of jurisdiction appear on the face of the proceedings.—The court takes notice of such customs of *London* as appear to have been certified by the recorder.—Inferior courts cannot grant a new trial.

ON a motion for a prohibition to the Mayor's Court in *London*, the case appeared to be this: *Wooldridge* and *Kelly* were indebted to Messrs. *Sampsons* to the amount of £4000, and, the *Sampsons* having become bankrupts, the plaintiffs were chosen assignees under their commission, in which character they brought an action of debt in the Mayor's Court against *Wooldridge* and *Kelly*, (the first of whom was also a bankrupt, and the defendant *Hawkins* his surviving assignee). The serjeant at mace, to whom process was directed to summon *Wooldridge* and *Kelly* to appear, returned that they had nothing within the city or liberties, by which they could be summoned, nor were to be found within the same, "and they being solemnly called, did not appear, on which the plaintiffs alleged, that the defendant owed to *Wooldridge* and *Kelly* the sum of £4000, and then had the same in his hands as their proper money, and therefore prayed process against him, to attach him by the said £4000, that he might appear in that court, and thereupon they proceeded by way of foreign attachment against him." The defendant pleaded that he had no money of *Wooldridge* and *Kelly* in his hands; and the cause being tried before *Glynn*, Serjeant, then Recorder of *London*, it appeared in evidence, that £1041. 10*s*. 2*d*. belonging to the partnership estate of *Wooldridge* and *Kelly*, was in the hands of the defendant, but that it came to him as the assignee of *Wooldridge* under the commission, so that he was only a trustee for *Wooldridge*'s creditors at large; on which ground it was contended, at the trial before the Recorder, that this being trust-money, was not the subject-matter of a foreign attachment. A verdict however was found, and judgment entered, for the defendant, for the £1041. 10*s*. 2*d*. and execution awarded. These facts were set forth in the suggestion. Before this application for a prohibition, the defendant had moved for a new trial, and in arrest of judgment, in the Mayor's Court, but without success. *Adair*, Serjeant, who had succeeded *Glynn* as Recorder, refused the new trial, because there was no report of the evidence, by his predecessor, and because it had, he said, been settled that an inferior court can only grant a new trial on the ground of surprize in obtaining the first verdict, which was not pretended in this case.

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On *Thursday*, the 20th of *April*, the *Solicitor General* and *Sylvester* shewed cause.—They contended, that the application came too late, for that, after sentence or judgment, the court will never grant a prohibition, unless the want of jurisdiction in the inferior court appear on the face of the proceedings themselves. For this, they relied on *Argyle* v. *Hunt*, in *Strange (q)*. Here, they said, the objection was founded on matter *dehors* the proceedings. If, in this case, the defendant had thought the facts did not support the attachment, he might have tendered a bill of exceptions at the trial, but certainly one half of the money come to the defendant belonged to *Kelly* in his own right, as *he* was not a bankrupt, and was therefore liable to the partnership debts, and the plaintiffs could not sever the respective shares of the two partners, but were entitled to attach the whole, in like manner as, on a judgment and execution against one partner, the sheriff must seize the partnership goods. For this they cited *Heydon* v. *Heydon (r)*.

Dunning, *Davenport*, and *Rose*, for the defendant, insisted, that trust-money is not within the custom of *London*, as to foreign attachments, it not being in the hands of the garnishee for the benefit of the original defendant. On a question from Lord MANSFIELD, they mentioned, that the custom was certified by *Starkey*, Recorder of *London*, in 22d *Ed.* 4. as stated in *Rolle's Abridgment (s)*, and that this makes no part of it. In *Argyle* v. *Hunt*, they said, there was a concurrent jurisdiction. Here, if the money were to be paid under

(q) B. R. T. 5 *Geo.* 1. 1 *Str.* 187. ☞ *S. P. Ladbroke* v. *Crickett*, *B. R. M.* 29 *Geo.* 3. 2 *Term Rep.* 649. If the defence stated on the proceedings below, is such, as, if true, ousts the inferior court of its jurisdiction, (as where the party sets up a modus in answer to a suit for tithes,) although there has been an interlocutory sentence in favour of the parson, and on an appeal that sentence has been confirmed and costs awarded, the party sued may have a prohibition both to the original court, and to the court of appeal, to stay execution for the costs. *Darby* v. *Cosens*, *B. R. H.* 27 *Geo.* 3. 1 *T. Rep.* 552 [F].

(r) B. R. M. 5 *W.* and *M.* 1 *Salk.* 392. *Vide Eddie* v. *Davidson*, *T.* 21 *Geo.* 3. *infra*, 650.

(s) 1 *Roll. Abr.* 554. *K.* 5.

[F] For a statement of the law on this subject, see the case of *Gould* v. *Gapper*, 5 *East.* 345, where the decisions are very fully detailed. It was there determined that when an inferior court has tried and decided a matter contrary to the principles and course of the common law, (as by the misconstruction of an act of parliament) the superior courts will grant a prohibition after sentence; although the original subject of the suit was within the jurisdiction of the inferior court, and the matter so wrongly decided arose incidentally.

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under the attachment, the defendant would be still accountable for it to the creditors of *Wooldridge*. Neither *Wooldridge* nor *Kelly* themselves could sue the defendant for it. This is the only remedy in the defendant's power. False judgment will not lie, because the city court is a court of record; nor *audita querela*, because nothing new has happened; nor a writ of error, because there is nothing erroneous on the face of the record.

Lord MANSFIELD,—I think it impossible that this case can be within the custom; but the difficulty is, that you are too late. The objection is not to the judgment, but to the verdict. The allegation is, "You have money of *Wooldridge* "and *Kelly* in your hands." The defendant answers, "I have none." The fact is found against him, and there is no bill of exceptions, nor special verdict. Inferior courts cannot grant a new trial. Nothing appears on the face of the proceedings to ground a prohibition. If the custom had never been certified, the suggestion might have stated the process merely as contrary to the common law, and then the defendant might have set forth the custom in answer to the suggestion, by which means the defence might perhaps have been got at; but, as the custom has been certified, we must take notice of it [14]. We cannot have it certified over again. The defendant should have pleaded otherwise, which would have prevented any mistake or trick at the trial. Do the plaintiffs insist on retaining the judgment below? There must be some way of getting at the defence, though there are difficulties in the mode now attempted. Let the cause stand over till the plaintiffs' answer can be known.

This day, his Lordship being informed that the parties could not agree, he delivered the opinion of the court, that they must take notice of the custom, as it had been certified, and that the objection, being on a matter of fact which did not appear on the proceedings, the prohibition could not be granted.

The rule discharged [†96].

[14] In *Argyle* v. *Hunt*, the court said, they could not judicially take notice of the custom in *London*, for an action to lie for the word "*whore*." —That custom, therefore, has probably never been certified by the recorder [† 95].

[† 96] In a case of *Stainton & wife* v. *Jones*, which came on for trial, before Lord *Mansfield*, at the Sittings after *M.* 23 *Geo.* 3. at *Guildhall*, in an action on the custom of *London*, for calling *Stainton's* wife a whore, the plaintiffs were nonsuited, not being able to

[†95] With regard to foreign attachments, *vide Fisher* v. *Lane*, *C. B. T.* 12 *Geo.* 3. 2 *Blackst.* 834. 3 *Wils.* 297. & *Tamn, widow*, v. *Williams & another*, *B. R. T.* 22 *Geo.* 3. & *T.* 23 *Geo.* 3.

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to prove the custom to cart whores in *London*. A book from the Town-Clerk's office was produced, but it contained no account of such custom. Lord *Mansfield* said, he could not take notice of the custom unless proved. It was stated, on that occasion, that the custom had never been proved in such a manner as to maintain an action in *Westminster Hall*: that, in the city court, the action is maintained, because they take notice of their own customs without proof.

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Thursday, 27th April.

WILTSHIRE *against* LLOYD.

An attorney is not subject to the jurisdiction of the county court of *Middlesex*.

ACTION of *assumpsit*; verdict for the plaintiff, with only 17*s*. damages; after which, the defendant, who was an attorney, obtained a rule to shew cause, why it should not be suggested on the roll, that he resided in *Middlesex* at the time of the action brought, and was liable to be summoned to the county court, in order to entitle himself to double costs against the plaintiff *(t)*.

The case was argued on *Thursday*, the 20th of *April*, by *Peckham*, and *Mingay*, for the plaintiff, and *Cowper*, and *Runnington*, for the defendant.

The arguments against the rule were to the following effect: The privilege of an attorney is not for his personal advantage, but that of his clients, to whom it might be inconvenient, if he were liable to be taken from his attendance on their business, to answer in other courts. The act establishing the summary jurisdiction of the *Middlesex* county court could not mean to affect this privilege [15]. This is manifest from the acts relating to the Court of Conscience for *Westminster*, established in the same year *(u)*, for, it being thought expedient that attorneys and solicitors should be liable to be sued in that court, a particular statute, subsequent to the act establishing the court *(v)*, was necessary to extend the jurisdiction to them [16]. But the question has already been solemnly decided, by the court of *Common Pleas*, on a demurrer, in the case of *Gardner* v. *Jessop (w)*.

On

(t) 23 *Geo.* 2. *c.* 34. § 19.

[15] By § 4. of 23 *Geo.* 2. *c.* 33. no person is liable to be summoned to the county court, as new modelled, who was not so before, nor is the court to hold plea of any action, cause, or suit, which it could not have held plea of formerly by plaint.

(u) By 23 *Geo.* 2. *c.* 27.

(v) 24 *Geo.* 2. *c.* 42.

[16] It is observable, however, that the preamble of 24 *Geo.* 2. *c.* 42. only says, "Whereas *doubts* have arisen "whether attorneys and solicitors are "subject to the processes of the said "court."

(w) *M.* 30 *Geo.* 2. 2 *Wils.* 42.

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On the other side, they relied on a subsequent case, in this court, *viz. Silk* v. *Bennett (x)*, where an attorney having been sued in the city Court of Conscience *(y)*, and having served the commissioners with a writ of privilege, they persisted in proceeding against him, upon which he moved for an attachment; but it was denied by the court, on the ground, that the city court had a mixed jurisdiction, *equitable* as well as *legal*, and privilege does not extend to courts of equity. So the court of *Middlesex*, it was said, has an equitable jurisdiction, being directed by the express words of the statute, to make "such order or decree as shall seem to be just and agreeable "to equity and good *conscience (z)*." At any rate, they said, the suggestion would not be conclusive.

Lord MANSFIELD said, there seemed to be a contradiction between the two cases. He read the Master's note of that of *Silk* v. *Bennett*, which agreed with Sir *James Burrow's* report.

The court took time to consider, and, this day, their opinion was delivered, by Lord MANSFIELD, as follows:

Lord MANSFIELD,—We have spoken to the Judges of the court of *Common Pleas*, and find, that it was decided by the case in that court, that an attorney is not liable to be sued in the *Middlesex* Court of Conscience. Therefore the suggestion cannot be allowed.

The rule discharged *(a)* [† 97].

(x) M. 5 *Geo.* 3. 3 *Burr.* 1583.

(y) Established by 3 *Jac.* 1. *c.* 15. *Vide Woolley* v. *Cloutman*, *M.* 20 *G.* 3. *supra*, *p.* 244.

(z) 23 *Geo.* 2. *c.* 33. § 1. There are similar words in the *Westminster* act, 23 *G.* 2. *c.* 27. § 1.

(a) Vide Wase v. *Wyburd*, *M.* 20. *G.* 3. *supra*, *p.* 246. and *Ailway* v. *Burrows*, *M.* 20 *Geo.* 3. *supra*, *p.* 263.

[† 97] *In Hussey & another* v. *Jordan*, *B. R. T.* 25 *Geo.* 3, it was determined, that, where the plaintiff is an attorney, the defendant is not entitled to the benefit of 23 *Geo.* 2. *c.* 33. though resident within the jurisdiction of the county court [F].

[F] *Semb. contrà Tagg* v. *Madan*, 1 *B. & P.* 629. In *Board* v. *Parker*, 7 *East.* 48. it was held that attornies plaintiffs are not within 39 and 40 *G.* 3. *c.* 104. (court of conscience act); though attornies defendants are specifically made liable.

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Friday, 28th April.

BACHE and Others *against* PROCTOR.

The condition of a bond being, "*to render a* "*fair, just, and* "*perfect account,* "*in writing,* of "all sums re- "ceived," if the obligor neglect *to pay over* such sums, he is guilty of a breach of the condition.

ACTION on a bond, with a penalty of £2000. By the condition, (reciting that *A.* had been appointed treasurer to the poor of the parish of *B.*) it was declared, that, if *A.* from time to time, and at all times, while he continued in that office, should and did *render to the plaintiffs, a true, just, and perfect account, in writing,* of all and every sum and sums of money that he should receive for the relief and maintenance of the poor of the said parish, the bond should be void.—The defendant having prayed oyer, and set forth the condition as above, pleaded; 1. *Non est factum;* 2. That *A.* did from time to time, and at all times, while he continued in the

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office, render to the plaintiffs, a true, just, and perfect account, in writing, of all and every sum and sums, *&c.*; 3. Another plea, not differing materially from the second. The plaintiffs replied to the second plea, that the last account in writing given and rendered by *A.* (as treasurer to the said trustees,) to the plaintiffs, was on the 11th of *August* 1778, that on that account, there appeared to be due from *A.* as such treasurer, to the plaintiffs, £276 6*s.* 5¾*d.*; that he was afterwards requested to *render* and *pay* that sum to them, *according to the form and effect of the said condition,* which he wholly neglected and refused to do, and that the same still remained due; "And so the said plaintiffs say, that the said "*A.* did not, from time to time, *&c.* render to the plaintiffs, "a true, just, and perfect account, *in writing,* of all and "every sum and sums of money, *&c.* according to the condi- "tion of the said writing obligatory, in manner and form as "the said defendant hath above alleged." The replication to the third plea was nearly of the same purport, only concluding, "And so the said plaintiffs say, that the said *A.* did not ren- "der a true, just, and perfect account of all and every sum "and sums of money, *&c.*" without saying "*account in writ-* "*ing.*"—The defendant demurred to the replication to the second plea, and shewed for cause; 1. That the rendering and paying the sum so supposed to be due, was not a matter required by the condition, nor was the refusal of payment a breach of the condition; 2. That the plaintiffs attempted to put in issue, that the said refusal was a breach of the condition, and that therefore *A.* by such refusal, had not from time to time, *&c.* rendered the account in writing in the replication stated, according to the condition; 3. That the plaintiffs did by the replication shew, that the condition was not broken, and did not avoid or deny the matter of the plea; 4. That they had

had attempted to put in issue matters not in controversy between the defendant and them; 5. That the said replication was argumentative and inconclusive.—Then a demurrer, and the same causes shewn, to the replication to the third plea.

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BACHE against PROCTOR.

Davenport, for the defendant, insisted on the strict letter of the condition, and that the non-payment and refusal was not a breach of the stipulation to render an account in writing; that these were two distinct things; the rendering an account being a preliminary step, to enable the plaintiffs to discover exactly what was due, in order that they might know what to call for, when they should require payment.

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Baldwin, for the plaintiff, was stopped by Lord MANSFIELD, who said, it was clearly the intention of the parties, and the fair construction of the condition, that the money should be paid by *A.* or, in his default, by the defendant.

BULLER, *Justice*, resembled the case to one in the *Common Pleas*, where the condition of a bond was, that it should be void, if the obligor *did not pay*, and performance being pleaded on the ground of the literal expression, the court held, that the palpable mistake of a word should not defeat the true intention of the parties. Here, he said, it never could be meant, that so large a penalty should be taken merely to enforce the making out a paper of items and figures.

Judgment for the plaintiffs.

DEVENEGE *against* DALBY.

Friday, 28th April.

THIS was a rule obtained by *Davenport*, to shew cause, why proceedings should not be set aside, for irregularity. The irregularity was, that the defendant had been taken, at *Wimbleton*, in *Surry*, on a bill of *Middlesex*. The application was made before the time to plead was out. One ground for the rule was, that the revenue would suffer, if such a practice were to obtain.

If a party is arrested in another county by a bill of *Middlesex*, the proceedings will be set aside for irregularity.

Baldwin now shewed cause, and said the court would not interfere, nor examine narrowly into the boundaries of counties, and that an attempt of a like sort with the present had been unsuccessful lately, in a case where a defendant was taken in *Gloucestershire* on a writ for *Worcestershire*.

BULLER, *Justice*,—In that case, the writ must have been a *latitat*, in either county. Here there should have been a difference in the form of the writ. A bill of *Middlesex* cannot run over all *England*. Such a practice would put an end to the writ of *latitat*; and if any notion has prevailed, that

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The rule made absolute (*)[☞].

(*) *Buller*, Justice, was absent all the remainder of the term after this day, having gone to *Bath* for his health.

[☞] *S. P. Borman* v. *Bellamy*, *B. R. E.* 26 *Geo.* 3. 1 *Term Rep.* 187.

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Tuesday, 2d May.

AYRES *against* WILSON.

Several owners of different ships having entered into a bond to a trustee, binding themselves and their assigns to indemnify each other to a certain amount if any of their ships should be lost, and one of them having sold his ship and she being afterwards lost, the others are not liable under the bond, unless the vendor has sold (together with the ship) his interest in the agreement of indemnity.

DEBT on a bond with £500 penalty. The condition was set forth by the defendant, and it thereby appeared,—That he and several other persons, being owners or part-owners of different ships in the coal-trade, had entered into an agreement, by which they promised and agreed each with the other, and the heirs, executors, and administrators of each other, that if, at any time within three years, any of these different ships (being employed in the coal-trade) should be taken, sunk, burnt, or destroyed by an enemy, the other co-obligors should, the better to enable the owner or owners of such ship to sustain the loss, pay the sum of £500, or, if the said ship should be ransomed for less, the ransom-money, to the owner or owners, (by name and without adding "*and their* "*assigns*,") of the ship so taken or lost; such co-obligors contributing thereto in equal shares, for each ship;—And the condition was, that the obligors, and each of them, and their heirs, executors, and administrators, and every of them, under the penalty of £500 to be paid to *Ayres* as general trustee for all, should perform and keep the agreement.—The defendant then pleaded, that one *Douglass*, one of the co-obligors, and sole owner of one of the ships, called the *Millhall*, had sold, assigned, transferred and disposed of his ship, and all his right, title, and interest therein, after the date of the bond, to *Ward* and *White*, and that he had, from the time of such sale and assignment, ceased to have any right, property, or interest in the ship; that none of the other ships had been taken, sunk, burnt, or destroyed; that the defendant had kept and performed the agreement with the owners of the other ships; that, from the time of the date of the bond, until the sale of *Douglass*'s ship, and while *Douglass* had any interest in her, she had not been taken, sunk, burnt, or destroyed, and that, during all that time, the defendant had kept and performed the agreement with *Douglass*.—The plaintiff demurred generally.

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Cowper, for the plaintiff, stated, that this was in the nature of a mutual insurance, and contended, that the transfer of the property in *Douglass*'s ship did not make her cease to be an object of the insurance. The action, he said, was properly brought, because the plaintiff was trustee for all, and would be answerable to the person whose ship was taken or lost for the proportion of the £500 he should recover from the other obligors. The parties had covenanted for themselves and their assigns; *Douglass* or his assign would be liable if any of the other ships were lost; and the indemnity must be reciprocal. The case was the same with that of a common policy, where if the ship and policy are assigned, the underwriters continue liable to indemnify.

Baldwin, on the other side, insisted, that the agreement appeared to have been dictated by mutual personal confidence in the skill and care of the different owners and masters who had joined in it. If a ship, insured under a common policy, is assigned without the policy, the ship is not protected in the possession of the assignee, and, here, it does not appear that there was any assignment of the agreement. *Douglass* continues liable if the other ships are lost, because he is bound *personally*, in the same manner as an original lessor is, after the assignment of his lease; but, as the agreement is not assigned, *Douglass* cannot sustain any damage by the loss of the ship sold, and therefore he can have no claim to an indemnity.

Lord MANSFIELD,—There is no difficulty here, as to the form of the action, because the bond is made to a trustee. But, if the agreement was transferred, we have not the whole case upon the record. If the ship was sold without an assignment of this agreement, *Douglass* had the value independent of the agreement, and therefore it remains a mere wager with respect to him. You ought to have replied the fact, if *Douglass* really assigned the agreement, and was damnified by the assignee calling upon him for the benefit of it [17] [F].

Cowper had leave to withdraw the demurrer, and reply, on payment of costs.

[17] *Vide Reed* v. *Cole*, *B. R. T.* 4 *Geo.* 3. 3 *Burr.* 1512. where, in an action on the case on articles somewhat similar to the agreement here, the defendant having pleaded that the plaintiff had parted with his ship; the plaintiff replied, that he had agreed with the purchaser to pay him £500 if the ship was lost within three months, and therefore was interested. The defendant demurred; but the court gave judgment for the plaintiff, because he continued interested in consequence of his agreement with the purchaser.

[F] A marine policy may be transferred: "Though a chose in action "cannot in law be assigned, yet in "equity it may; therefore we will "permit the action to be brought by "trustees." *Per* Ashhurst, J. in *Delaney* v. *Stoddart*, 1 *T. R.* 26.

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Wednesday, 3d May.

The KING *against* HASWELL—and the SAME *against* BATE on the Prosecution of the Duke of RICHMOND.

It is an invariable rule not to grant an information for a libel, without an exculpatory affidavit, unless where the party libelled is abroad at a great distance, or the subject matter of the charge is general imputation, or an accusation of criminal language held in parliament [F].

ON *Monday*, the 24th of *April*, *Peckham* obtained a rule to shew cause, why an information should not be filed against *Haswell*, as printer of the newspaper called the *Morning Post* of the 25th *February* 1780, for a libel inserted in that paper. The libel was in the form of queries addressed to the prosecutor. It imputed to him a variety of treasonable practices and designs; and accused him, among other things, of having, in his speeches in the House of Lords, opposed the increase of the military strength of the kingdom, in order, by preventing such increase, to facilitate a descent in this country by the *French*; charging him also with having conveyed intelligence to the ministers of *France*. The rule was granted on a joint affidavit of the Duke and another person. The Duke swore that he believed himself to be the person meant in the libel, and that it contained *false*, scandalous and malicious aspersions, and insinuations against him. The other deponent spoke to the fact of having bought the paper containing the libel at *Haswell's* shop.

On the *Friday* following, the 28th of *April*, *Dunning* moved for a like rule against *Bate*, as the publisher, upon the same affidavit, accompanied by another from *Haswell*, in which he swore, that the libel was brought to his shop in manuscript, without any name to it; that he sent it to *Bate*, who was the editor, or conductor of the newspaper, and that *Bate* sent it back next day, among others papers for publication.

Lord MANSFIELD now said, he was aware of an objection to which this application, as well as that against *Haswell*, was liable. The prosecutor, in his affidavit, had not specifically denied the particular charges contained in the libel, and this was, in general, expected by the court, before they would interpose by way of information. But his Lordship said, it had occurred to him, that the nature of this libel was such, that it might perhaps be an exception to the general rule. It contained

[F] So where a motion was made against a magistrate for gross misconduct and improperly convicting a man of killing a hare, it was refused because there was no affidavit of the prosecutor denying the fact of which he had been convicted. *R.* v. *Webster*, 3 *T. R.* 388.

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contained, besides allegations of particular acts of a very foul and treasonable nature, general charges of treason, and also imputations of treasonable language held by the prosecutor in the debates in the House of Lords. That as to what was supposed to have been said by his Grace in parliament, it certainly was unnecessary to answer *that* by affidavit, because what passes there can be questioned no where else [18], and general imputations did not seem to fall within the rule which requires a denial of the facts charged. His Lordship, however, added, that, if there should be a difference of opinion on this subject, the defect, which was only in point of form, might easily be cured by a supplemental affidavit.

WILLES, *Justice*, (after expressing his very high esteem for the character of the prosecutor, and his belief that no man was more incapable of the crimes charged upon him in this libel,) said, he did not well see how the court could make any distinction between him and the lowest individual.—This observation had a reference to some topics which had been urged at the bar in support of the application.—If the rule were general, he thought it ought to be adhered to in this case, and no instance had been stated where it had been dispensed with.

Dunning, upon this, mentioned, that, in the late case of *Rex* v. *Miles* (*c*), the court had said, the rule was not *universal*. He recollected *three* instances where informations had been refused, for want of an express denial of the specific charge, but they were all very distinguishable from the present case. In *one* of them, which happened during his early attendance on the court, the libel accused the prosecutor of being the author of a certain number of the news-paper called the *London Evening Post*. FOSTER, *Justice*, said, the imputation was a very gross libel, but there being great reason to think it was true, and there being no denial of it upon oath, the court refused the information. The *second* instance was in the case of General *Plaistow*, who was accused of various specific and circumstantial acts of fraud and *swindling*; and, although the charges were easily to be contradicted, he did not choose to deny them. The *third* was the case of *Miles*. There the prosecutor had taken upon himself to deny the specific charges, and had not done it in a complete and explicit manner. On the other hand, he remembered *two* cases, both of them recent, where a denial of the particular charge had not been insisted on. In the *one*, the libel imputed sodomitical

[18] *Bill of Rights*, 1 *W. & M. sess.* 2. *c.* 2. § 1. *art.* 9. "The free- "dom of speech and debates in parlia- "ment ought not to be impeached or "questioned in any court or place "out of parliament."

(*c*) *Supra*, *M.* 20 *Geo.* 3. *p.* 284.

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sodomitical practices to a Captain *Nichols*. In the *other*, the charge was against Lady *Chambers*, the wife of one of the *East-India* Judges, accusing her of adultery. In both those cases, the rule had been dispensed with; because the parties accused were abroad at so great a distance; but he also conceived that an affidavit was not required, when the court, from their knowledge of the prosecutor, or from general notoriety, were satisfied of his innocence.

ASHHURST, *Justice*, said, he had always understood the rule to be general. If it was, the rank of the prosecutor, however eminent, could make no difference. In the two instances mentioned by *Dunning*, there was an impossibility that the party accused should make an affidavit, but when that was not the case, if the court were to break through the rule on some occasions, they would throw an imputation on the character of every person from whom they should require an affidavit. The court was not to know men, and could only act on what came before them.

BULLER, *Justice*, observed, that the power of granting informations is discretionary, but he thought there ought, in all such cases, to be certain general rules to guide the court in exercising their discretion. Too much latitude was very dangerous, and the original propriety of a rule was of less importance than the strict adherence to it, if it was established. But, as part of this libel contained charges which the Duke certainly was not bound to answer, perhaps it might be proper to grant the rule as prayed, and the prosecutor might make it absolute *only as to that part*.

Lord MANSFIELD seemed to concur with BULLER, *Justice*, in that idea, and WILLES, *Justice*, thought the word "*false*," in the Duke's affidavit, a sufficient denial to ground a rule to shew cause. The rule was granted.

Immediately afterwards, *Peckham* moved to make the rule absolute against *Haswell*. Lord MANSFIELD asked, if they meant to proceed against their own witness. The motion was persisted in, and the rule made absolute.

On *Saturday*, the 29th of *April*, *Lee* acquainted the court, that the Duke had made an affidavit, expressly denying all the specific charges in the libel, except what related to his conduct in parliament. This affidavit was put in, and was an exact echo, (with negative words,) of the terms of the libel.

Lord MANSFIELD said, the court had considered the point very fully, and had had a great deal of conversation upon it, and the result was, that the rule was invariable. That it would be extremely dangerous if it were not so. The distinction hinted by *Dunning* the day before could not be admitted, for how could the court entertain suspicions against one man more than another?

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Dunning read a note of a case of *Rex* v. *Jennison*, in *H.* 13 *Geo.* 3. where the libel contained an accusation of sodomy against Lord *Arundel*; and Lord MANSFIELD, and ASTON, *Justice*, held, that, as the charge was only general, it did not require to be answered by affidavit[☞]. ASTON, *Justice*, also said, that it would be extraordinary if it were necessary to deny the charge, when its being true could not justify the defendant. That, if *false*, it was an abominable calumny, if *true* the defendant ought to have preferred an indictment.

Lord MANSFIELD then added, (as he had stated before,) that it had struck him, that the subject matter might make an exception, for it would be absurd, for instance, to require of a prosecutor to swear, that he was not a traitor or a thief. He said, the court had looked into the proceedings in the case of Lady *Chambers*, and it appeared, that, there, the party applying for the information, (who was a third person,) had gone as far as the nature of the case permitted, by swearing to letters and intelligence from the *Cape of Good Hope*, where the scene of the imputed offence was laid, inconsistent with the allegations in the libel.

This day, cause was shewn by *Bearcroft*, *Howorth*, and *Anstruther*.—They produced a joint affidavit of the defendant and several other persons, tending to contradict that of *Haswell*, whose testimony was also objected to, on the ground of his being an accomplice.

In answer to this, it was insisted, by *Dunning*, and *Lee*, that, in this case, (of a misdemeanor,) he would be a competent witness at the trial; and *Lee* said, he never knew but of one instance where this had been controverted, and then the objection had been laughed at, and over-ruled. It was also contended, that, even if *Bate*'s affidavit had contained a direct and unequivocal denial of his being the publisher, *that* would not be a conclusive reason for refusing the information.

Lord MANSFIELD stopped *Peckham* from going on, on the same side.

Lord MANSFIELD,—(after observing particularly on the affidavits,)—Wherever a strong probable ground is laid, the court will grant an information, if the subject-matter is fit for that mode of prosecution: and there never was a fitter subject than the present. [391]

The rule made absolute[19].

[☞] Thus in Easter Term, 30 *Geo.* 3. the Duke of *Athol* having applied for an information against the printer of a newspaper, for a libellous paragraph in his paper, stating that the Duke and his family were held in such general abhorrence, in the Isle of Man, that if he should succeed in obtaining an act, then depending in parliament, it would occasion a revolt; the Court held, that no affidavit from the Duke was necessary.

[19] The information was tried at the ensuing Sittings for *Middlesex*, before

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fore *Buller*, Justice, when the defendant was convicted, *Haswell* being one of the principal witnesses against him. He was brought up for judgment in *T.* 21 *Geo.* 3. and sentenced to an imprisonment of twelve months in the *King's Bench* prison. The judgment was delayed till that term, because the prison was not till then sufficiently repaired to admit of prisoners, after the devastation committed by the rioters in *June* 1780.

Friday, 5th May.

The KING *against* the INHABITANTS of WINCHCOMB.

A militia-man being hired for a year, with an express exception that he shall be absent on duty for the month, and, in lieu thereof, serve a month, over the year, gains a settlement without serving the additional month.

RULE to shew cause, why an order of the court of quarter-sessions for *Gloucestershire* should not be quashed. The special case stated as follows:

The pauper hired himself in the parish of *Chipping Norton*, five weeks before *Michaelmas*, for a year, and, at the time of the hiring, it was agreed between him and his master, that his wages should be paid weekly, at eight shillings *per* week, and that, being a ballotted man in the militia, he should be absent for the month, and, in lieu of that month, should serve another at the end of the year. He was accordingly absent thirty days in the militia, and then returned to his service, but he only continued three weeks of the month which was agreed to be served in lieu of the month he was absent in the militia, leaving his master a fortnight before *Michaelmas*. He expressly swore, that he did not serve his master a year by one week.—Two justices had removed him from *Winchcomb* to *Chipping Norton*, and their order was quashed by the sessions.

On *Wednesday*, the 3d of *May*, *Bearcroft*, and *Clifford*, argued in support of the order of sessions, and contended, 1. that there was no *hiring*, nor, 2. any *service* for a year, at *Chipping Norton*.—1. The exception was part of the original contract. There was to be an interval, and then the pauper was to come and serve in the ensuing twelvemonth as much more as, pieced to the former service, would make up a year; but a *hiring* under the statute must be for a whole year, without any interruption foreseen and stipulated for at the time of the agreement, as was determined in the case of *Rex* v. *Bishop's Hatfield* (*d*). Indeed the present case was more properly to be considered as a hiring by the week.—2. Here was

(*d*) *H.* 31 *Geo.* 2. *Burr. Settl. Cases*, No. 141.

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was plainly no *service* for a year. In *Rex.* v. *Castlechurch* (*e*), it was laid down by Lord HARDWICKE, that the act of 8 & 9 *Will.* 3. *c.* 30. requiring a year's continuance in the same service, is to be construed strictly, being an explanatory law, and in all the cases where different services have been tacked together to make up the year, there has been no interval of time between them. This case differs from that of *Rex.* v. *Westerleigh* (*f*), which was determined on the ground that the hiring was conditional; there, by the agreement, it was uncertain whether the pauper would be absent or not; if he was, his place was to be filled up by another, *& qui facit per alium, facit per se.*

Dunning, and *Poole*, on the other side, contended, that, if there had been no agreement about the pauper's service in the militia, and the hiring had been, in general terms, for a year, he would have gained a settlement although he had been called out, and had been absent a month on militia duty. If a contrary doctrine were to prevail, militia-men would be in a worse situation, and less capable of gaining settlements, than the rest of the King's subjects, which the legislature certainly never intended. This was the principle of the determination in *Rex* v. *Westerleigh*. The reason for the exception there, and in the present case, was the same; and here, if the militia had not been called out, there would have been no interval of absence. The anxiety of the parties to guard against an event which required no provision to be made for it, could not make any difference in the law of the case.

Lord MANSFIELD,—I have no doubt that if this had been a common hiring for a year, and the pauper had served one month in the militia, and only eleven with his master, he would have gained a settlement. The master could not have refused his consent to his serving in the militia. The only question is, whether the particular agreement in this case does not make the additional month a part of the year. It is a great nicety, and we will think of it.

His Lordship, this day, delivered the opinion of the court.

Lord MANSFIELD,—There is in this case a hiring for a year, and there is also a service for a year, if it were not for the month's absence in the militia. A service must be for a continuation, without interruption, or adding together broken pieces to make up the year. But here the agreement as to the absence for a month, in the militia, was only what would have been implied, and what the master must have consented to. The year was completed five weeks before *Michaelmas*, and the additional month agreed for was only in the nature of a compensation

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(*e*) *M.* 9 *Geo.* 2. *Burr. Settl. Cases.* No. 20.

(*f*) *M.* 14 *Geo.* 3. *Burr. Settl. Cases.* No. 234.

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compensation for the want of the pauper's service while absent in the militia, and equivalent to a deduction of so much wages. This case, if not the same, is very like that of *Westerleigh* [F 1]. The court ought to lean in favour of settlements, and the bad consequences would be very extensive, if we were to determine, that a man should lose his settlement by serving his country in the militia. We are all of opinion, that this was a good settlement [F 2].

The order of sessions quashed, and the order of the two justices confirmed.

Friday, 5th May.

WEBSTER *against* BANNISTER.

By an *express agreement* the obligee of a bond to secure an annuity, may *waive the forfeiture* for non-payment on the day, so as to be entitled to recover against the obligor, although he has been discharged under an Insolvent debtor's act between the time of the forfeiture and the action brought.

THIS case, which came before the court at different times, and in various shapes, was finally disposed of this day. As it was often cited in other cases during the period I have undertaken to report, I have thought it might be proper to state the substance of the pleadings, and the different proceedings, although I cannot give an account of the arguments of the counsel, and the court, on the principal motion, from my own notes, having been absent when it came on.

The case was, an action of debt on a bond—*Plea*, That the plaintiff ought not to have any execution *against the person, or personal estate, of the defendant, except money in the funds, or money lent upon real security only* (g), because he says that the debt in the declaration mentioned was contracted or due before the 22d of *January* 1776, mentioned in a certain act of parliament, entitled, "An act for the relief of "insolvent debtors, &c." (16 *Geo.* 3. *c.* 38.) and that he was, before the 1st of *January* 1776, arrested, and in actual custody,

(g) 16 *Geo.* 3. *c.* 38. § 41. Stated *supra*, *p.* 99.

[F 1] This case, and that of *R.* v. *Westerleigh*, seem to be two insulated cases. In the case of *R.* v. *Over*, 1 *East*. 599. it was held that the reservation of two days out of every half-year made by a pensioner of the *East-India Company* for the purpose of receiving his pension, prevented him from gaining a settlement by service under the hiring. The decision of the principal case is there put on the ground that the law would have compelled the master to permit the absence in the militia, without any stipulation. The judges in many modern cases have disclaimed the principle of leaning in favor of a settlement in one parish rather than another.

[F 2] See *R.* v. *Birmingham*, *supra* 333.

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tody, that he surrendered himself in discharge of his bail, and was thereupon committed a prisoner to the prison of the *King's Bench*, before the 26th of *June* 1776, and was afterwards discharged according to the form of the said act, at the quarter sessions for *Surry*, on the 29th of* *July* 1776, and this he is ready to verify, wherefore he prays judgment if the plaintiff ought to have any execution against his person or personal estate, except money in the funds, or money lent upon real security only.—The *Replication* stated and made *profert* of the condition of the bond—which was, for the payment of an annuity of £30 a year by the defendant, and another obligor, to the plaintiff, in quarterly payments, on the 11th of *January*, of *April*, of *July*, and of *October*; the first payment to be made on the 11th of *January* 1772.—The replication then set forth, That after the 22d of *January* in the plea mentioned, and before the exhibiting the bill of the plaintiff, to wit, on the 11th of *July* 1776, £7 10*s*. for one quarter, and so other quarterly payments, on the 11th of *October* 1776, the 11th of *January* 1777, and the 11th of *April* 1777, became due, and that the defendant had not paid them, or any part thereof, on those respective days or at any other time, but the whole remained due, "by reason of which "premises, the said writing obligatory in the declaration "mentioned *became forfeited*, and the debt and action ac- "crued *after* the 22d of *January*, 1776, in the plea men- "tioned," and so concluded with a verification.—After this replication, there was an *entry of judgment* on the record, for want of a plea in bar to the action, but with stay of execution against the person and personal estate, except, *&c.* until the plea depending between the parties in that behalf should be determined.—*Rejoinder*, That, before the said 22d of *January* 1776, to wit, on the 11th of *January* 1776, £7 10*s*. for one quarter of the annuity became due, and was not paid then, nor at any time since, but still remained due, whereby the bond was *forfeited*, and the said debt, by virtue thereof, accrued to the plaintiff *before* the said 22d of *January*, 1776.—*Sur-rejoinder*, That true it was that £7 10*s*. for one quarter became due on the 11th of *January* 1776, but that the plaintiff afterwards, at the instance and request of the defendant, *agreed* to give him day of payment of the said £7 10*s*. until a future day, to wit, till *April* following, and that, on the 18th of *April*, the said £7 10*s*. was duly paid, and that, at the time when the plaintiff so gave day of payment, he did, at the instance of the defendant, *wave* and relinquish any forfeiture of the bond which had accrued or might accrue to him by reason of the non-payment according to the condition, and acquitted and discharged the defendant from such forfeiture, and all and every debt and debts due thereby; and the plaintiff further says, that the defendant, *by*

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reason of the premises, was acquitted and discharged from such forfeiture and debts.—Rebutter, By which, (protesting that the *sur-rejoinder* was not sufficient in law, and protesting also that the defendant never requested the plaintiff to give such day of payment,) the defendant says, that the £7 10*s.* in the sur-rejoinder mentioned, was not paid to the plaintiff in manner and form, *&c.*—Upon this *issue* was joined.

The cause was tried before Lord MANSFIELD, at the Sittings for *Middlesex,* in *Easter* Term, 18 *Geo.* 3. and a verdict being found for the plaintiff, a rule was obtained by the defendant, for the plaintiff to shew cause, why the judgment should not be arrested; which rule was afterwards enlarged to *M.* 19 *Geo.* 3. when the *Solicitor General,* and *Bower,* shewed cause;—*Dunning,* and *Baldwin,* for the defendant.

The ground of the motion, (as I have been well informed,) was, that, the bond being once forfeited, the debt became absolute, and could not be again made contingent, by any waver of the forfeiture, on the condition of payment at a future day; at least it continued absolute till the compliance with the condition, which was not till after the insolvency; therefore the fact of the compliance with the condition after the insolvency was immaterial, and the plaintiff should have demurred to the rebutter instead of joining issue on an immaterial fact. That the court therefore ought to award a *Repleader.*

On the other side it was insisted, that an obligee might wave the forfeiture, and thereby prevent the debt from becoming absolute even at law, especially since the statute of 4 *&* 5 *Anne, c.* 18. The issue, therefore, was not immaterial, because the debt was to be considered as contingent or not at the time of the insolvency, according as the condition was or was not afterwards complied with. Or, if the issue was immaterial, that was no reason why the plaintiff might not have judgment, provided enough appeared to entitle him to it on any part of the record; for, in such case, all that followed would be rejected *(a)*, and here the conditional waver appeared in the sur-rejoinder, and was not denied, and the debt was to be looked upon as contingent till a breach of the condition, and therefore was so at the time of the insolvency.

[396] BULLER, *Justice,* asked if it was not a rule, never to grant a repleader when the issue was found against the party tendering

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(a) For this they cited 8 *Co.* 120. 133. 9 *Co.* 110. *Hob.* 56. *Salk.* 173.

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ing it[P 1]. He said he thought it was, and that he could find no case of any exception to it.

The rule was discharged.

The defendant when he was arrested in this action, had applied to ASTON, *Justice*, and afterwards to the court, to be discharged on filing common bail, and obtained a rule to shew cause, but which was, afterwards, discharged.

In *Michaelmas* Term, 19 *Geo.* 3. a writ of error was brought, but bail in error not being justified, a *capias ad satisfaciendum* issued in the ensuing term, the effect of which was prevented by a commission of bankruptcy against the defendant. The validity of the commission being afterwards disputed by the plaintiff and another creditor who opposed the allowance of the certificate, the Chancellor directed an issue, which was not proceeded upon, and the plaintiff having brought a *scire facias* against the original bail, the defendant surrendered himself, and, on a former day in this term, obtained a rule to shew cause why he should not be discharged out of custody.

This day, the *Solicitor General*, and *Bower*, shewed cause. *Dunning*, and *Howorth*, for the defendant.

The ground of the application now was, that, although the defendant, by imprudently taking issue on an improper fact, had failed in his defence to the execution against his person, upon the pleadings, yet he was clearly entitled to be discharged under the insolvent act. They produced an affidavit denying that there ever had been an agreement to wave the forfeiture, and said, that no such agreement had been proved at the trial, and, if issue had been taken on that fact, it must have been found for the defendant. The penalty therefore was a debt due at the time of the discharge under the act, and consequently he was no longer answerable for it, with his person.

On the other hand, it was insisted, that if there was any mistake in the pleadings, it was the defendant's own fault, and he had never moved for leave to amend. Besides, they said, (which was not contradicted on the other side,) that it appeared at the trial, that a note had been given to the plaintiff for the payment both of the quarters due on the 11th of *January* 1776, and of that which was to become due on the next quarter day, and that the plaintiff, by taking this note, must be considered as having agreed to give further day of payment.

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[P 1] S. P. in *Kemp* v. *Crews*, 1 *Ld. Raym.* 170. and *Taylor* v. *Whitehead*, *infrà* 747. Because the first fault in pleading is not the taking the issue, but the tendering it.

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Lord MANSFIELD said, he thought the note would have been evidence of such an agreement, if issue had been joined on that fact, and that there was no doubt but the party might wave the forfeiture, and accept what he was equitably intitled to.

BULLER, *Justice*, absent.

The rule discharged[21].

[21] The case of *Perkins* v. *Kempland* was not cited, I believe, in any of the arguments on this case. *Vide Cottrell* v. *Hooke*, *H.* 19 *Geo.* 3. *supra*, *p.* 97. and *Wyllie* v. *Wilkes*, M. 21 *Geo.* 3. *infra*, *p.* 519 [F 2].

Friday, 9th May.

The KING *against* GODWIN.

The court will not decide the validity of the election of a corporate officer, if the question is new or doubtful, on a rule to shew cause for an information in the nature of *quo warranto*.—Qu. Whether, if a mayor *de facto* intervenes, the mayor of the former year, who is returning officer and is entitled to hold over by the charter till a legal successor is chosen, can be chosen the third year, under 9 *Ann.* c. 20. § 8.

THIS was a rule to shew cause, why an information in the nature of *quo warranto* should not be filed against the defendant, for taking upon himself the office of mayor of the borough of *Portsmouth*.

The material circumstances of the case were these: By a charter of 3 *Car.* 1. the right of electing a mayor in this borough is vested in the majority of the aldermen and burgesses. The aldermen are twelve in number, and the mayor must be chosen from among them. He is elected for a year, from *Michaelmas* to *Michaelmas*, and "until one other of the aldermen shall be in due manner and form elected and sworn "mayor of the said borough." The method of electing the mayor is this: A list is prepared of all the aldermen, except the mayor then in office. Each elector makes a mark or scratch against two names in this list, and the two aldermen who have the majority of such scratches are put in nomination. Then the electors ballot for those two, and he who has the majority on the ballot is declared duly elected. The mayor is the returning officer on the election of members to serve in parliament.

By the statute of 9 *Ann.* c. 20. § 8. it is enacted, that no person who hath been, or shall be, in any annual office to which it belongs to preside at the election, and to make return of any member to serve in parliament, shall be capable of being chosen into the same office for the year ensuing; and where any such officer is to continue for a year, and until some other person shall be chosen and sworn in, if such officer shall voluntarily

[F 2] And see *Hodgson* v. *Bell*, 7 *T. R.* 97.

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voluntarily and unlawfully obstruct and prevent the choosing another, he is to forfeit £100.

In *September* 1777, *Linzee*, "*an alderman*," was chosen mayor, and served the office till *Michaelmas* 1778, when *Blissel* "*then acting as an alderman*" (*h*), was elected to succeed him, and sworn into the office. In the mean time, an information in the nature of *quo warranto* having been filed against *Blissel* for exercising the office of an *alderman*, issue was joined in that cause, and, on the trial, a verdict found for the crown. *Blissel* then applied for a new trial, but was refused [22], and judgment of ouster was entered against him; which judgment, on a writ of error in the House of Lords, was affirmed. He continued however still to act as mayor, and, in *September* 1779, presided as such, at the election of a successor, when *Linzee* was re-chosen; but, on the charter-day for swearing in the new mayor, *Linzee* did not attend, being advised, (as he swore in his affidavit,) that he was not duly elected. In consequence of this, *Blissel* still continued to act, till the 21st of *October* 1779, when the aldermen, having given him previous notice, met and amoved him, by

(*h*) These were the words of the affidavits of *Linzee* and others, on which the present motion was made. *Infra, p.* 399. *Note* (*k*).

[22] That motion came on in *E.* 19 *G.* 3. (*Thursday*, 6th *May*). The cause had been tried at the preceding spring Assizes for *Hampshire*, before *Hotham*, Baron. There were six issues, but the material one was, whether *Blissel* had been duly elected an alderman; and this, with three others, was found against him. One of the points on the motion for a new trial was this: In 1778, *Blissel* and one *Pike* were put in nomination at an election of aldermen. The assembly consisted of the mayor, (*Linzee*,) and three aldermen; *Pike* was chamberlain of the corporation, and the mayor objected to him as ineligible on that account, because the auditors of the chamberlain's accounts are aldermen, and he could not hold an office in the exercise of which he would be liable to audit his own accounts. The three aldermen however voted for *Pike*; the mayor alone for *Blissel*; but he told the aldermen that their votes were thrown away, and declared *Blissel* duly elected, and swore him in. The answers given to the objection, just stated, to *Pike's* eligibility were, 1. That, although the usage since the charter of *Car.* 1. had been to appoint the auditors from among the aldermen, there was no provision in the charter rendering *that* necessary, and, before the charter, they had been sometimes chosen from the burgesses at large. 2. That if the two offices were incompatible, then the acceptance of the higher of the two, (that of alderman,) *ipso facto* vacated the other. For this several authorities were cited, (*Com. Dig. Tit. Office B.* 6.) and the court were of opinion that the law was so [☞]. *Bearcroft*, *Grose*, Serjeant, and *Dunning*, shewed cause.—*Davis*, Serjeant, for the defendant.

[☞] But it is now settled that this is not the criterion, but that, when two offices are incompatible, the subsequent acceptance of one vacates the other. *Milward* v. *Thatcher*, *M.* 28 *Geo.* 3. 2 *Term Rep.* 81.

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by virtue of a power vested in them by the charter, and elected *Carter*, another alderman, in his place. *Carter* acted for some time, till being advised that his election also was illegal, he obtained a *mandamus* to the aldermen and burgesses to proceed to the election of a new mayor. In obedience to this *mandamus*, an election was held on the 10th of *February* 1779, at which *Carter* presided as senior alderman. On that occasion, when the town-clerk and chamberlain, (whose business it was,) came to make out the list, *Carter* directed them not to insert *Linzee*'s name in it, treating him still as mayor under the charter, there having been no legal election since he was chosen in 1777. However, *Rickman*, a burgess, (and the attorney in the present prosecution,) was permitted to insert *Linzee*'s name. The greatest number of scratches were for *him;* the next for Lord *Hawke*, (also an alderman,) and the fewest for the defendant; but *Carter* insisted, that, notice having been given of *Linzee*'s being ineligible, the votes for him were thrown away, and that only Lord *Hawke*, (who had sent a letter stating that he was ineligible, being confined by ill health, and not having taken the sacrament within a twelvemonth *(i)*,) and *Godwin* should be balloted for. *Rickman* insisted, on the part of *Linzee*, that, as he had never acted since *Michaelmas* 1778, and there had been intervening mayors, *de facto*, since his former mayoralty, he did not fall within the meaning of the act of Queen *Anne*. Accordingly, his friends proceeded to ballot for him, and, on reckoning the number of balls there appeared to be twenty-one for *Linzee*, and only twelve for *Godwin*; but *Carter* still professing to consider *Godwin* as duly elected, *he* was sworn in, and took upon himself the duties of the office.

Bearcroft, *Grose*, Serjeant, and *Lee*, shewed cause.—They admitted, that the only question was, whether *Linzee* was ineligible, and the votes given for him thrown away; for that, if the law was not so *Godwin*'s election was void. But they contended, that, under the circumstances of the case, *Linzee*'s ineligibility was clear, and that the electors were so fully apprized of it, that the court ought to decide the question in this stage of the proceeding, without the circuity and expence of a trial on an information in the nature of *quo warranto*. *Linzee*'s conduct, they said, was manifestly, and throughout, a meer trick and contrivance, to evade the statute of Queen *Anne*, and entitle him to act as mayor at any time, when he should have a turn to serve as returning officer for the borough. He had not ventured to swear, that *Blissel* was, or that he believed him to be, an alderman, when he was chosen mayor, but only that he *acted* as such (*k*), plainly admitting thereby, that he knew he was not duly entitled to that

(i) 13 *Car.* 2. *stat.* 2. *c.* 1. § 12. 5 *Geo.* 1. *c.* 6. § 3.

(k) *Supra*, *p.* 398. *Note (h).*

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that office, and he had voted him as mayor, knowing his defect of title as alderman, merely that one of his own party might, *de facto*, take upon himself the office, to give *him* a pretext of being eligible for the ensuing year. *Blissel*, not being eligible, was no mayor, and therefore, by the express words of the charter, *Linzee* continued to hold over, and consequently was ineligible at the last election. His not having *acted* during *Blissel's* year could not make any difference, because the statute of Queen *Anne* applied to mayors *de jure*. —They cited the case of *Rex* v. *The Corporation of Cambridge (l)*, in which the court had decided the validity of an election of mayor, *on a rule to shew cause*, upon the ground that the facts were clear and indisputable.

The *Solicitor General*, on the other side, contended, that this case was not within the meaning of the statute of Queen *Anne*, the only object of which was, to prevent the office of returning officer continuing permanently in the same hands. Here, there was no doubt, but *Blissel* would have been returning officer, if an election of a member of parliament had happened while he continued, *de facto*, to exercise the other functions of mayor. He had never been ousted from that office, upon an information in this court, as not having been duly elected, but, on the contrary, was treated as mayor, in the proceedings by which the corporation had removed him. At any rate, this was too important a question to be decided in this summary way. The whole ought to be put upon record, that it might be in the power of the parties to have the point solemnly argued and adjudged, and if they chose, reconsidered, in another place, on a writ of error.

Lord MANSFIELD,—The only question now before the court is, whether the case is so clear, as that we ought to refuse an information to try the title, when it is admitted, that the person sworn in had not the majority of votes. It is contended that *Linzee* was clearly ineligible under the act of Queen *Anne*, because, by the charter, he had a right to hold over, although, in fact, *he* did not act as mayor, and *Blissel* did. The object of the act undoubtedly is, that the same person shall not be *returning officer* during two successive years. But there has been no case on the construction of this act, and the court cannot, in a summary way, decide, whether the intervention of a mayor, *de facto*, makes a difference [☞]. It is said, *Blissel's* election was fraudulent. [401] But both sides have not been heard, and fraud must be manifest and gross before the court will decide in the first instance. In the *Cambridge* case, the fraud was palpable. They had elected a gentleman who was just gone to *America*, and

(l) *H.* 7 *Geo.* 3. 4 *Burr.* 2008.

[☞] *Rex* v. *London*, *M.* 27 *Geo.* 3. 1 *Term Rep.* 423. 425, 426.

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and there was no ground stated of any belief, that he would return within the year. If he had chosen to return on purpose, near half a year must have elapsed, before he could have had notice, so as to come back to *England*. However, in that case, the application was for a *mandamus* to proceed to choose a mayor, and making the rule absolute was not final, for the corporation might have returned to the *mandamus*, that there *was a mayor*, if they had thought the former election could be supported.

The rule made absolute.

Saturday, 6th May.

The KING *against* TOMS.

The parochial assessments for the vicar of *St. Michael's* in *Coventry* established by 19 *Geo.* 3. *c.* 60. are not rateable to the poor.

THIS was a rule to shew cause, why an order of sessions, confirming a poor's rate, should not be quashed.

In the year 1558, which was the 4th of *Philip* and the 5th of *Mary*, a private act of parliament passed, entitled, "An act for the payment of *tithes* in the citie of *Coventrye*," by which, after reciting,—That formerly the *tithes*, profits, and casualties, of the two vicarages, or parishes, in that city, (*St. Michael's* and the *Trinity*,) were sufficient for the maintenance of the vicars, but had, of late so much decayed, as to be insufficient to answer that purpose, and that there was no ordinary way, by the law or statutes of the realm, to enforce the inhabitants to pay any other kind of *tithes* and duties to the vicars, than they themselves should think meet (*a*),—it was enacted, that the citizens and inhabitants of the said city and suburbs should pay their *tithes* to every of the said vicars, after the rate of twelve-pence by the year for every ten shillings rent, by quarterly payments, and every householder paying ten shillings rent, or above, was discharged *of the four offering days*, but his wife, children, or servants, taking their rights of the church at *Easter*, were to pay twopence for their four offering days, yearly. If any variance should arise for non-payment of any tithes, or upon the true knowledge or division of any rent or tithes, so that any house or other things mentioned in the act should escape without rating, or if any doubt should arise on any other thing contained in the act, then, on complaint made by the party grieved, to the mayor, he was, by the advice of council, to call the parties before him, and make a final end, awarding costs at his discretion, and that of his assistants, and if he did not make an end within a month after complaint made, or if any of the parties found themselves aggrieved, then the

[402]

Lord

(*a*) *Infra*, *p.* 403. *Note* [1].

Lord Chancellor of *England*, upon complaint to him made, calling to him the two Chief Justices, was to make such final order, and award such costs as to him or them should seem meet.

This act, manifestly very difficult in the execution, did not appear to have ever been enforced, till *Rann*, the vicar of the *Trinity*, attempted it, a few years ago, against *Green*, one of the inhabitants of that parish, by an application to the Chancellor; in consequence of which, his Lordship, calling in the two Chief Justices, made an order on *Green* for the payment of the rate of two shillings in the pound. *Green* refused to comply with this order, and the act had not provided any particular method of carrying it into execution. *Rann*, therefore, brought an action of *assumpsit* upon it, which was tried before Lord MANSFIELD. In his declaration in that action, the plaintiff described the statute as being of the 4th of *Philip* & *Mary*, whereas the record, when produced in evidence, appeared to be of the 4th and 5th of *Philip* & *Mary*. It was contended by the defendant's counsel, that this was a fatal variance, for that there was no such year as the 4th of *Philip* & *Mary*, since the Queen had reigned a year longer than her husband; this case differing from the common instances of statutes described as of two different years of the same reign. In those instances, as every act has relation to the first day of the session, (unless some other day is fixed in the act itself,) it was, they said, indifferent whether both years were mentioned, or only the first, in the description of the act, but, in the present case, the words "4th and 5th of *Philip & Mary*," made a material part of the description. A verdict was found for the plaintiff, but the same objection being urged on a motion for a nonsuit, (which was made in *Michaelmas Term*, 17 *Geo.* 3.) the court were of opinion, that the variance was fatal, and the rule for a nonsuit was made absolute (*l*) [† 98].

Had it not been for this mistake in pleading, the plaintiff would probably have succeeded, for the court seemed to be clear, that the action of *assumpsit* would lie upon such an order (*m*). But still there were great difficulties in the way.

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(*l*) *Hill*, Serjeant, argued for the plaintiff, and *Wallace* for the defendant. [† 98] That case of *Rann* v. *Green* has been since reported, *Cowp.* 474.

(*m*) *Vide Bell* v. *Burrows*, *C. B. E.* 5 *Geo.* 3. *Law of Ni. Prius*, *Ed.* 1775, p. 129 [F]. *Vide*, also, *supra*, *p.* 10. *Note* [2] [† 99].

[† 99] *Vide*, also, *Brown* v. *Bullen*, *infra*, 407.

[F] In this case it was held, that general *indebitatus assumpsit* lies for money awarded by commissioners of inclosure, under a private act of parliament,

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A new order, and a separate action upon that order, would have been necessary against every individual, who should dispute the payment, and there was great opposition raised in both parishes against the attempt of compelling a regular compliance with the act. At last, both the vicars applied to parliament, and two acts were passed, the first for the parish of the *Trinity*, (19 *Geo.* 3. *c.* 57.) the other for that of *St. Michael's*, (19 *Geo.* 3. *c.* 60.) by which a new mode of rating, and a more easy method of enforcing payment, were established.

The statute relative to the parish of *St Michael's* was intituled, "An act for establishing certain payments to be "made to the vicar of the parish of *St. Michael's*, in the "city of *Coventry, in lieu of tithes*, and for repealing so "much of an act of the 4th and 5th of *Philip* & *Mary* as "relates to the payment of *tithes* in the said parish." The preamble recites, that certain rates and payments had been made to the vicars of the parish, which composed the principal, and almost whole, of their emoluments [1]; that, by an act passed in the 4th and 5th of *Philip* & *Mary*, two shillings in the pound had been charged on the occupiers of all houses, buildings, and gardens, within the city and suburbs, and made payable to the vicars of the respective parishes therein; but no payment or claim had ever been made under the said act, within the parish of *St. Michael's*; that, if enforced, it would now become an intolerable burthen, and a subject of endless expence and litigation, and that the vicar and inhabitants had come to an agreement to raise, by a rate, certain sums of money, to be paid to the vicars for the time being, in lieu of the said ancient rates and payments, and of all rights and claims under the said act *(m)*. The new statute then enacts, that all the ancient rates shall cease, and the statute of *Philip* & *Mary* be repealed, and substitutes a new rate or assessment, declaring, "That such rate or assessment shall be in lieu and full dis-"charge of all ancient payments, *Easter offerings, tithes*, [404] "and other ecclesiastical dues, claims, and demands what-"soever, heretofore paid or payable to the vicar, (except sur-"plice fees, and such stipends, donations, and bequests, as have

[1] So that probably from the time of *Ph. & M.* till this new act the vicars were paid by arbitrary and voluntary contributions, in the same manner as before the old statute. *Supra, p.* 401. *Note (a)*.

(m) § 1.

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liament, to be paid by the proprietors of allotments, to persons who had manured or ploughed the land.

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" have been heretofore, or shall be hereafter, bestowed upon " the vicar for the time being)(*n*);" The rate to be made by assessors, one half appointed by the vicar, and the other by the inhabitants, and the payment to be inforced by distress and sale (*o*). By § 28. an option is given to the parish officers, to raise yearly, by a pound rate made by them in the proportions prescribed by the act, any sum not exceeding £300, nor less than £280, and to pay the same to the vicar by equal quarterly payments, " clear of all taxes, deductions, " charges, and expences, whatsoever, *parochial*, parliamen- " tary, or otherwise howsoever, which said sum is to be in " full satisfaction of all the vicar's claims under this act," and, in such case, during such payment by the parish officers, the power of appointing assessors is to cease.

The order of sessions now brought before the court set forth, " That it appeared, that, in a rate for the necessary re- " lief of the poor of the parish of *St. Michael*, in the city of " *Coventry*, for one month, bearing date the 1st day of *De-* " *cember* 1779, the appellant was rated in the words and " figures following:

" The reverend *Benjamin Toms*, vicar of the said parish, " for his parliamentary payments, in lieu of *tithes*—yearly " rent £200.—£10."

Then, after stating that in the said parish there are generally four or five rates for the relief of the poor in each year, the case recited the provisions of the act of 19 *Geo.* 3. *c.* 60. and set forth, " That in pursuance of the said act, and within the time therein limited, an assessment, bearing date the 13th of *August* 1779, was regularly made, entitled " An assessment by an act of parliament, (stating the title of the act,) for the said vicar for one year, amounting in the whole to the sum of £274 14*s.* the greater part of which hath been collected, and the remainder is now collecting by the said vicar." That the said *Benjamin Toms* was rated as above to the poor of the said parish, in respect of the said revenue accruing to him from the said act of parliament and assessment made in pursuance thereof. That the annual income received by the said *Benjamin Toms* as vicar, before the passing of the act of 19 *Geo.* 3. amounted in the whole to about £90 a year, including the *Easter* offerings, which amounted in the whole to about £40 thereof; but that neither he, nor any of his predecessors, had been assessed to the poor in respect thereof."

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Dunning, *Wheeler*, and *D'Eves* argued in support of the order of sessions.—They contended, that this was a species of

(*n*) § 2. (*o*) § 18.

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of property clearly rateable under the statute of the 43d of *Elizabeth*. *Tithes* are expressly mentioned in that statute, and although there is no direct decision that a *modus* is rateable, the principle has often been recognized, as in the case of *Rex.* v. *Lambeth* (*q*). This is in truth a *modus* established by act of parliament, both the statute of *Philip & Mary*, and that of the present King, declaring, in their very titles, that the payments were to be *in lieu of tithes*. The exemption in the 28th section of the present act, from whence it was argued at the sessions that the assessments, however made, were not liable to the poor's rate, afford the strongest proof to the contrary; for it is very strange reasoning to say, that where an express exemption is given in a particular case, such exemption is also meant to take place in another case, where nothing is said about it. If the vicar was never rated before the new act, *that* only arose from indulgence, on account of the smallness of his income, and is neither a proof that he was not then liable to be rated, nor a reason why he should not contribute to the parish burthens now that his salary has been encreased from £90 to near £300 a year.

The *Solicitor General*, *Lee*, *Digby*, and *Gough*, on the other side.—These payments, though called *tithes*, are, in their nature, quite different, and resemble rents arising from land, which have been determined not be to rateable. Part of the payment is given *in lieu of Easter offerings*, and they are clearly not rateable.—(*Dunning* said he conceived they were). If this attempt succeed, a fraud has been committed both on the defendant, and on *Rann*, for it was certainly not in the contemplation of the parties, when the two acts passed, that there should be any deduction from the new salary.—(*Lee* said he spoke this of his own knowledge, having been counsel for *Rann* in support of his act, when it was depending in parliament.)—If any such deduction had been intended, why was it not expresly mentioned in the bill, which would have given the vicar an opportunity to object or oppose it? By § 30. of 19 *Geo.* 3. *c.* 60. half the expence of the act is to be paid by the vicar out of the first money collected under it, and, as the

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subject of this rate is the first assessment under the act, and he is rated to the full amount, he will pay for what in truth, he will not receive. As to the express words of exemption in § 28. there is little stress to be laid upon any argument from thence, on one side or the other. They may have been inserted from some idea that the salary would otherwise be rateable if paid in a gross sum by the parish.

Lord MANSFIELD,—This is in the nature of a private act of parliament, where the legislature only lends its aid to the agreement

(*q*) *T.* 8 *Geo.* 1. 1 *Str.* 525.

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agreement of the parties, in order to render it effectual, when any public reason stands in the way. The payments established by the act of *Philip & Mary* were not rateable under the statute of 43 *Elizabeth*. They were in the nature of rents for houses, which are not rateable. Those payments, if enforced, would have been double what has been substituted in their place, but, on the other hand, the remedy by application to the summary jurisdiction given to the Chancellor and the two Chief Justices was very inconvenient to the vicar.—(His Lordship here stated the different proceedings in the case of *Rann* v. *Green*)—Upon this the parishioners and vicar of *St. Michael's* came to an *agreement*. For what? Not that the new payments should be made liable to a duty to which those which they were substituted for were not liable. The agreement was, that the vicar should receive to a *less* amount, but *more easily*. If the sum shall amount to £280, the vicar is to receive that sum clear of all *parochial* and other deductions, provided the parish choose to take the collection of the rate upon themselves. This they certainly will do, whenever it is likely to exceed the £280. The vicar will only have the collection to make, when it falls under the sum. Is it possible that it could be intended that when he received *less* than £280, it shall *not* be free from all deductions? I am clear that the true meaning of the act is, that this property shall not be rateable to the poor.

WILLES, and ASHHURST, *Justices*, of the same opinion.

BULLER, *Justice*, absent.

The order of sessions, and the rate, quashed [1].

[1] In *T.* 22 *Geo.* 3. the rateability of the new payments in the parish of the *Trinity* came in question upon a special verdict, in the case of *Rann.* v. *Pickin and others*, when the court declared, that the ground of the decision in *Rex.* v. *Toms*, was the agreement and optional clause; and, as the act relative to *Rann's* parish did not pass by agreement with the parishioners, and contains no clause like 19 *Geo.* 3. *c.* 60. § 28. they held that the payments *there* are rateable.—The case was argued by *Balguy*, for the plaintiff, and *Dayrell*, for the defendants. ☞ *Vide Lowndes* v. *Horne*, *C. B. H.* 19 *Geo.* 3. 2 *Blackst.* 1252.

Monday, 8th May.

PAYNE *against* ROGERS.

If a person who is sued by a landlord in the name of his tenant, procure a release from the nominal plaintiff, the court will order the release to be delivered up, and permit the landlord to proceed.

THE plaintiff was tenant of a commonable tenement, and his landlord had brought an action on the case, in his name, for an encroachment on the common, by inclosure, and had offered to indemnify him against all costs and charges in the action. Pending the suit, the defendant procured a release from the plaintiff, upon which the landlord obtained a rule to shew cause, why this release should not be delivered up to be cancelled, and he be permitted to proceed in the cause, in the name of his tenant [F].

The rule was opposed, on the ground that the court could not interfere, as the landlord was not a party on the record; that he had not been under any necessity of using his tenant's name; but might have sued in his own, for an injury done to the inheritance; and that the defendant could not, with prudence, go on in this action, because the tenant was not able to pay costs, if there should be a verdict against him.

The court expressed great indignation at this attempt of the defendant, to prevent a landlord from trying a right in the name of his tenant. ASHHURST, *Justice*, seemed to doubt, whether the landlord could have sued in his own name, under the circumstances of the case, as stated by the *affidavits;* and Lord MANSFIELD said, that, as to the danger of the defendant's losing his costs, *that* would be the proper subject of an application for the interference of the court.

Howorth, in support of the rule.—*Baldwin*, for the defendant.

BULLER, *Justice*, absent.

The rule made absolute.

[F] It appears that a release by such a party would defeat the action, as a release by the plaintiff in ejectment, when a real person. Thus the declarations and admissions of a party to the record are evidence, though he be but a trustee for another. *Bauerman* v. *Radenius*, 7 *T. R.* 663. In *Legh* v. *Legh*, 1 *B. & P.* 447. where the obligor of a bond had notice of an assignment by the obligee, and afterwards took a release, and pleaded it to an action brought in the name of the obligee, the court set aside the plea, and ordered the release to be cancelled.

BROWN and Another, Executors of GRAVATT, *against* BULLEN, Assignee of Fox, a Bankrupt.

Monday, 8th May.

Assumpsit will lie for a creditor's share under an order of commissioners of bankrupt for a dividend.—In such action, the proceedings before the commissioners are conclusive evidence of the debt.—And the assignees cannot set off a debt due from the plaintiff.

ACTION for money had and received, tried before Lord MANSFIELD, at the Sittings for *Middlesex*, after last *Michaelmas Term*; verdict for the plaintiff, but with leave to move to set aside the verdict, and enter a nonsuit. *Davenport*, accordingly, obtained a rule to shew cause, on *Thursday*, the * 27th of *January*, which came on to be argued on *Wednesday*, the 9th of *February*.

The *Solicitor General*, for the plaintiffs.—*Dunning*, and *Davenport*, for the defendant.

The case, upon his Lordship's report, appeared to be as follows:—The testator, *Gravatt*, proved a debt of £410. 1*s*. 7*d*. under the commission against *Fox*. Afterwards, a dividend of six shillings in the pound being declared by the commissioners, and *Gravatt* having died in the interval, the plaintiffs, as his executors, demanded their share of the dividend, amounting to £123 1*d*. which the defendant refused to pay, alleging, that there was a balance due by *Gravatt* to the bankrupt. Upon this, the plaintiffs brought this action.—The defendant pleaded *non assumpsit*, and delivered a notice of set-off.

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At the trial, it was contended, on the part of the defendant; 1. That the action could not be maintained, the only method of recovering debts, proved under a commission of bankruptcy, being by application to the Great Seal; 2. That, if the action was maintainable, the consideration and circumstances of the debt must be gone into and proved, as in other actions of *assumpsit*; 3. That, if this was not incumbent on the plaintiffs, yet it was competent to the defendant, to avail himself of the notice of set-off.

Lord MANSFIELD over-ruled all those points. He thought, 1. That the action was maintainable; 2. That the only way to question the proof of the debt taken by the commissioners, was by petition to the Chancellor; that by the statutes, the oath of the party is to be the proof of the debt, and a particular penalty is imposed for swearing to a false debt (*r*); and, 3. That as the commissioners have a power of setting off mutual debts (*s*), the sum proved must be taken to be the balance due; but if it should happen, that only one side

(*r*) 5 *Geo.* 2. *c.* 30. § 29. (*s*) 5 *Geo.* 2. *c.* 30. § 82.

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side of the account appeared before the commissioners, or that any article was omitted on either side, on application to the Great Seal, the account would be again opened, and referred to the commissioners, or, in cases of difficulty, to the master.

These topics were now enlarged upon, on the part of the plaintiffs.

For the defendant, it was admitted, that relief might have been obtained by application to the Great Seal; but it was [409] said, that it did not therefore follow, that the defendant might not avail himself of the truth and justice of the case, on the trial of an action at law. Indeed the action itself was novel, and would, if encouraged, tend to disturb the execution of the bankrupt laws, which never meant to subject assignees to actions from creditors. The proper course, and daily practice, is, for them to seek their relief by application to the Chancellor. But if the action is maintainable, as the plaintiffs have chosen to come into a court of law, they must be subject to the same conditions with others suing in the same sort of action; they must give the regular evidence of their debt, there being no instance where a man can, in a court of law, substantiate a demand by his own oath. The intention of the bankrupt laws was only, that the oath of the creditor should be conclusive to the effect of entitling him to vote for assignees. For every other purpose it may be questioned. The plaintiffs must also submit to have the demands of the assignees set off against them, there being no exception of which they can avail themselves in the statutes of set-off. If the defendant were to go before the Chancellor, he would perhaps direct an issue, and then the parties would, after that circuity, find themselves in the same situation as they now are in. If the defendant, not being allowed to set off the debt due by the plaintiffs, should be driven to sue them in another action, they may, in the mean time, have paid away what they shall receive under the dividend, and by pleading *plene administravit* deprive him entirely of all remedy.

Lord MANSFIELD said, this was a general question, and ought to be looked into. That at present of the two opinions, he was rather inclined to hold that the action would not lie, than that proof could be admitted to question the debt, or the amount; for, if that could be done, and the sum found by the verdict should differ from that proved before the commissioners, the action would not make an end of the matter, but the parties must go back to Chancery, to have the dividend altered, which would be circuitous and inconvenient.

The court took till this term to consider of the case, and, now, Lord MANSFIELD delivered their opinion as follows:

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Lord MANSFIELD—(after stating the facts of the case, and the different points which had been agitated,)—I allowed the plaintiffs to recover their share of the dividend against the assignees, as money positively and expressly paid *into the hands of the assignees for their use. We are all of opinion, that the direction was right, that the action was maintainable [r], and that, after a debt is liquidated before the commissioners, it cannot be litigated but by an application to the Great Seal. Mr. *Justice* BULLER desires it may be understood that he concurs in this opinion.

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The rule discharged.

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[r] A bankrupt cannot maintain an action against his assignees for his allowance under *5 Geo. 2. c. 30. s. 7.* (his estate paying 10*s.* in the pound) unless he obtains his certificate before payment of the final dividend: The assignees being merely trustees, acting under the direction of the commissioners, and liable to actions by every creditor for his proportion. *Groome* v. *Potts*, *6 T. R.* 548.

The End of EASTER *Term* 20 GEORGE III.

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