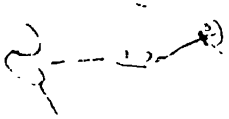

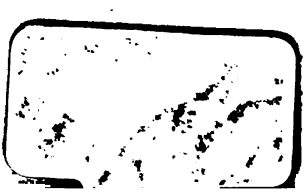

Joseph Chitty Junior

REPORTS OF CASES

ARGUED AND ADJUDGED

IN THE

Court of King's Bench,

DURING THE TIME

LORD MANSFIELD PRESIDED IN THAT COURT;

FROM

Michaelmas Term, 30 *Geo. II.* 1756, *to Easter Term*, 12 *Geo. III.* 1772.

IN FIVE VOLUMES.

BY SIR JAMES BURROW, KNIGHT,

LATE MASTER OF THE CROWN-OFFICE, AND ONE OF THE BENCHERS OF THE HONOURABLE SOCIETY OF THE INNER TEMPLE.

THE FIFTH EDITION,

WITH THE ADDITION OF CRITICAL NOTES AND OBSERVATIONS, AND REFERENCES TO OTHER REPORTS AND AUTHORITIES.

VOL. I.

From Michaelmas Term, 30 *Geo. II.* 1756, *to Trinity Term*, 31 *Geo. II.* 1758, *inclusive.*

LONDON:

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1812.

W. Flint, St. Sepulchre's, London.

PREFACE.

IT may naturally be asked—"Why I publish *at all*?" "Why "I begin from Lord RAYMOND's *death*, rather than from any "*prior* æra?" "Why I have postponed the three former parts of "this work, and publish the *fourth* part, *first*?" "Why I venture "to print, without the sanction of a *license* to authenticate my "reports."

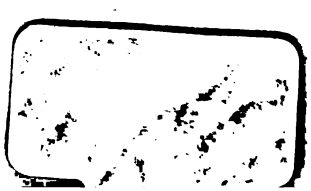
In ANSWER to the *first* question—

I found myself reduced to the necessity of either *destroying* or *publishing* these papers, which were originally intended for my own private use, and not for public inspection. For as it was become generally known "that I had taken *some* account, (good "or bad,) of all the cases which had occurred in the court of "King's Bench for upwards of * forty years," I was subject to continual interruption and even persecution, by incessant applications for searches into my notes; for transcripts of them; sometimes for the note-books themselves, (not always returned without trouble and solicitation;) not to mention frequent conversations upon very dry and unentertaining subjects, which my consulters were *paid* for considering, but I had no sort of concern in. This inconvenience grew from bad to worse, till it became quite insupportable: and from thence arises the present publication.

In ANSWER to the *second* question—

My notes taken *at the bar*, previously to my becoming *clerk of the crown*, had no particular claim to the least degree of AUTHENTICITY:—Therefore I do not presume to expose *them* to public view, but when I entered upon that office, I thereby came to have all the records and rule-books on the *crown*-side of the court in my own power, and could inspect or transcribe them at pleasure: besides which, as I never after that time stirred out of court

* It is now upwards of forty-five years.



matter relative to a cause *depending*, or *soon* after it was over, have been punished as guilty of a contempt; most justly and wisely, for many reasons: but a publication of reports at a *distance of time*, merely as matter of *science*, has not been animadverted upon; though within the *letter* of the law. Where they have been published *surreptitiously*, without consent of the reporter, the printers have been proceeded against *civilly* upon the foundation of his property; but *not criminally:* and after the surreptitious edition has been stopped by an injunction, the book has been published, with consent of the reporter, *without* leave or licence; and NO *notice* taken, or *complaint* made of it.

I trust my excuse, (as Mr. Justice *Foster* did) to my INTENTION. If I find I have done wrong, or that I give offence, I will certainly put a *stop* to *this* part and *suppress* the *other three*.

The work must make it's *own* way in the profession. Its merit consists in the correctness of the *states* of the cases. In *this* respect, it must be of *some* use; especially when compared with other notes. In all *other* respects, I know it is very faulty: and I beg pardon of the *bar*, and much more of the BENCH, for innumerable injuries I must have done them, as to language and argument. I do not take my notes in short-hand. I do not always take down the *restrictions* with which the speaker may *qualify* a proposition, to guard against its being understood universally, or in too large a sense. And therefore I caution the reader, always to *imply* the exceptions which ought to be made, when I report such propositions as falling from the judges. I watch the *sense*, rather than the *words*; and therefore may often use some of my own. If I chance not fully to understand the subject, I can then only attend to the *words*; and must in *such* cases, be liable to mistakes. If I do not happen to know the authorities shortly alluded to, I must be at a loss to comprehend (so as to take down with accuracy and precision) the *use* made of them. Unavoidable inattention and interruptions must occasion chasms, want of connexion, and confusion in many parts: which must be patched up and connected by memory, guess, or invention; or those passages totally struck out, which are so inexplicably puzzled, in the original rough note, that no glimpse of their meaning remains to be seen.

I am thoroughly aware of all these faults. I am conscious too,

that, not having had the good fortune of acquiring that knowledge in the science of the law which is gotten only by a lucrative experience at the bar, (from which I was very early removed;) and not being blest with the quickest natural parts, I may have misapprehended topics and allusions; I may have made blunders in the sense, by endeavouring to rectify those of my pen. *These* are imperfections which diligence could not cure. I am only concerned, lest my errors should be imputed, not to myself, but to those whose discourses I may happen (through my infirmities) to misrepresent.

Therefore let me, once for all, caution the reader, especially the young student: I pledge my credit and character, ONLY "that the *case* and *judgment*, and the *outlines* of the ground or "reason of decision are right." As to the *rest*—I took the notes, for my own amusement and use: where the matter or manner is liable to objection, it may probably have arisen from my mistake.

I have *omitted* all cases where the question turned upon FACTS and EVIDENCE *only;* or where the order followed almost of *course*, in consequence of maxims fully settled; or was *not contested.*

I have *omitted* common *sentences* in ordinary criminal prosecutions; and, in short, every thing which I thought could not be of general use.

Before I conclude, I must again entreat the indulgence and forgiveness of the *bar*, and, still more, of the BENCH, for the wrong I may have done them.

If the candid and judicious shall give a favourable reception to *this* part, it may encourage me to finish my design and publish the preceding periods.

Inner Temple,
29th Nov. 1765.

JAMES BURROW*.

* Sir James Burrow, as appears by the preface, had intended to have published a collection of Reports, from the death of Lord Raymond, in four parts, the last of which only he published.

ADVERTISEMENT.

THE body of this book is calculated for such as may be inclined to look into it at their leisure; the ABRIDGMENT, for such as desire only a *summary* account of the determinations.

The FORMER is therefore designedly *copious*: for, "* IMPERFECT reports of facts and circumstances, especially in cases "where *every* circumstance weigheth *something*, in the scale of "justice, are the bane of all science that dependeth upon the "precedents and examples of former times."

The LATTER was meant to be as *concise* as the nature of a *complete* abridgment would bear.

It is hoped, that nothing very trifling is *inserted* in the *one*; nor any thing very material *omitted* in the *other*.

MEMORANDUM.

The TABLE of the *Principal Matters*, or *Abridgment* of the *Cases* contained in this first volume, was very much *enlarged*, in the *second* edition of it.

In the former edition, it bore the following title—"A *short* "REFERENCE to the principal matters contained in it." It is now a *full abridgment*: and therefore it would have been improper to *continue* to call it "a *short reference*." The difference will appear, by comparing the articles of the two editions with each other; as "*Bail*, *Bank-Notes*, *Bankrupts*, *Baron and Feme*, "*Bishops*, *Common Recovery*, *Declaration*, *Demurrer*, *Devise*," and other titles, as far as letter L. The *subsequent* titles were copious enough, in the *old* edition.

The *abridgments* of the SETTLEMENT-*cases* remain in the *table*, under title "*orders of removal*:" but it would have unnecessarily enlarged the bulk of this edition, to have repeated them at length, in the body of it, when they (together with many *others* preceding and succeeding them) are now printed by themselves, in a separate *quarto* edition now continued up to 22d *June* 1776.

* See Mr. Justice Foster's Discourses on the Crown Law, p. 234.

MICHAELMAS TERM,

30 *GEO. II.* 1756.

THE COURT OF KING'S BENCH,

(When it became complete on the 3d Day of the Term, as below), was composed of

(*a*) *Lord* Mansfield,
(*b*) *Sir* Thomas Denison,
(*c*) *Sir* Michael Foster, *and*
(*d*) *Sir* John Eardley Wilmot.

(*a*) His *Lordship* was sworn in upon the 8th of *November* 1756; and took his seat upon the bench on the 11th of the same month.

(*b*) Mr. Justice *Denison* was sworn in upon the 11th of *February* 1741; and took his seat the next day.

(*c*) Mr. Justice *Foster* was sworn in upon the 22d of *April*, 1745; and took his seat upon the 1st of *May* following (being the first day of *Easter* Term 1745).

(*d*) Mr. Justice *Wilmot* was sworn in upon the 11th of *February* 1755; and took his seat upon the bench the next day.

Monday, 8th November, 1756.

His Majesty's Attorney General, the Honourable *William Murray*, was this morning called Serjeant; and about eight in the evening, was sworn in Lord Chief Justice of this Court (in the room

of the late Lord Chief Justice, Sir *Dudley Ryder*, who died on 25th *May* 1756), before the Lord Chancellor (the Earl of *Hardwicke*), at his house in *Great Ormond-street*, in the presence of the three Judges and most of the Officers of the Court of King's Bench.

His Lordship took the oaths of allegiance and supremacy on his knee; and the oath of office, standing. Immediately afterwards, the Great Seal was put to a patent, which had before passed all the proper offices, creating his Lordship BARON of MANSFIELD in the county of *Nottingham*, to him and the heirs male of his body.

Thursday, 11th *November* 1756, Lord *Mansfield* took his place as Lord Chief Justice.

Friday, 12th Nov. 1756.

[See 2 Wils. 40. Bath. 180. Bul. N. P. 194. S. C. See also Beach q. t. v. Turner, 4 Burr. 2450. One not qualified to exercise trade, entering into partnership with a qualified person, without intertering in the trade personally, is not within stat. 5 El. c. 4.]

RAYNARD *versus* CHASE.

THIS was an *action of debt* for a penalty on 5 *Eliz.* c. 4. for exercising the *trade of a* BREWER, without having served an apprenticeship. (*a*) In the declaration there were two counts. To the former "*nil debet*" was pleaded: and there was a general verdict for the defendant; (*viz.* "That the defendant does not owe, &c.") But on the 2d count *there was a special verdict*: which was to the following effect, *viz. that the defendant Chase and one Coxe, were and have been*, during all the time charged in this count, *partners in the trade; and that the trade was carried on*, and has been for four years carried on, *in their joint names*; that *Coxe* did serve an apprenticeship, &c. but *Chase* never did; and *that Coxe is a working brewer*,

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(*a*) Exercising a trade by servants or apprentices has been held to be within the stat. 5 *Eliz.* c. 4. *Willis q. t.* v. *Jephson*, *Hil.* 16 *Geo.* 2. *B. R.* 4 *Mod.* 2. vide also 1 *Vent.* 193. The judgment in the above case of *Raynard* v. *Chase*, therefore, appears to be against a positive precedent, and against law and justice; for one of the reasons for making the statute 5 *Eliz.* c. 4. was to prevent idleness in youth; and therefore the allowing one not entitled to trade, without serving as an apprentice, is injustice to all who have served an apprenticeship, and taking off part

1756.
RAYNARD
v.
CHASE.

and was paid a salary for his labour; which salary was always deducted, and allowed to him, previous to a division of the profits: and the entries at the Excise-office were in their joint names: but that the defendant John Chase NEVER exercised the trade HIMSELF; (which was wholly managed and carried on by Case); but only shared the profit, and stood the risks of the partnership. And they find it to be a trade within 5 Eliz. c. 4.

[3]

Question, on 5 Eliz. c. 4. § 31. "Whether the defendant "John Chase is within the act, upon this special finding?"

Mr. Morton pro quer'.

This attempt to evade the force of the act by the scheme of a PARTNERSHIP with a qualified trader, would entirely frustrate the intention, and is directly contrary to the words of the act.

The short of this case is—Chase not being HIMSELF qualified, takes a PARTNER who is qualified; which qualified partner is the only acting person in carrying on the trade; and Chase never interfered in it.

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of the excitement to honest industry which it is the interest of all society to encourage.

The construction in favour of the exercise of trades, without being qualified, strictly as the act directs, had, before this case of *Raynard* v. *Chase*, been carried far enough at the least, but never so far as by the determination here, which is not only further in favour of encouraging persons, to neglect serving apprenticeships, or putting their sons to serve them; and it is expressly against former determinations, in which the courts have decided, 1. That the person who *exercises* a trade, is *the trader*, because he employs the rest, who work but as his servants, and the loss and gain is to be his. 2. That he that hath not served an apprenticeship, is by the statute restrained to work as a trader either by himself or others: for that the intent of this act is to annex the benefit of trade to such as underwent the hardship of learning it, thereby to encourage learning in youth; and few would undergo the trouble of being apprentices if they might employ others to work for them. *Sulk.* 610. *Co.* 54. See the same point reported accordingly in several other cases, and in one, notwithstanding the using the trade was only for *dying cloths to be used by the defendant*, who was indicted, in his own trade of a clothier; and it was upon that ground only that *Dolben*, J. was of a contrary opinion from the other justices, as appears by 1 *Show.* 241, 260, notwithstanding *Carthew*, in his report of the same case, only takes notice that *Dolben* was of a contrary opinion, without giving the reasons why he was so.

1756.
HAYNARD
v.
CHASE.

There was the like point before the court in *P.* 13 *G.* 2. *B. R. Rex* v. *Driffield.*

But *per Denison* and *Foster*, Justices, that case was never determined: it went off upon an objection to the jurisdiction.

Morton:—But the Lord Ch. J. *Lee* then said, "that he "had never known a person exempted from the statute, "who had not served an apprenticeship."

And as to his not interfering in the trade, the case of *Hobbs, qui tam*, &c. vers. *Young*, reported in 2 *Salk.* 610. and in *Carthew*, 162. and in 3 *Mod.* 313. is a determination in point, and not to be distinguished from the present case.

Therefore he prayed judgment for the plaintiff.

Mr. *Bishop contra, pro* defend', said, he would first consider how this matter stood *before the statute*, with regard to the free and unlimited right that every man naturally and legally had, of exercising whatever trade he pleased; 2*dly*, The *constructions* that have been *favourably* made upon it, *in extension* of the qualifications to exercise trade; and 3*dly*, distinguish this case from the cases cited.

[4]

And first, The liberty of trade is a natural and common law right, and was long unrestrained. The statute of 37 *E.* 3. *c.* 5. which *first restrained* it, was very soon *repealed* by 38 *Ed.* 3. *c.* 2. And Lord *Coke* in 4 *Inst.* 31. says, "That *such* acts of parliament never live long." He cited the case in 2 *Bulstr.* 186. *Dominus Rex and Allen plaintiffs*, against *Tooley defendant*, as an authority for him, though the court did not indeed formally pronounce any final judgment therein: and he also cited 11 *Co.* 53. the case of the taylors of *Ipswich*. Secondly, The before-mentioned case in 2 *Bulstr.* 186. *The King and Allen* v. *Tooley*, proves the constructions to have been favourable. *Jenk. Cent. case* 15. *pa.* 284. "A private brewer is not within the "statute." *Keilwey*, 96. *pl.* 6. proves that the statute ought to be taken strictly; being penal, and in derogation of the common law. And judges have dispensed with the rigour of it: as in *Froth's* Case, 1 *Salk.* 67. where seven years apprenticeship beyond sea, though without binding, was holden sufficient. So *Queen* v *Maddox*, 2 *Salk.* 613. *S. P.* accordingly: and the Court there call this statute of the 5th of *Eliz.* a hard law. *Comberb.* 254. *Rex* v. *Goller, per Eyre* Justice: one brother living with another seven years (at the trade of a tallow-chandler) though not bound, may set up the trade. 1 *Mod.* 26. *pl.* 69. *Dominus Rex* v. *Tarnith*, proves too that this statute ought not to be extended further than necessity requires.

Now it is not found by the present special verdict, in the affirmative, "That this man has occupied, used and "exercised the trade:" but it is found (on the contrary), negatively, "That he has NOT *interfered* in it; but it was

1756.
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v.
CHASE.

"wholly carried on by *Coxe*." And *Hob.* 298. says, the rule is, "That affirmatives in statutes that introduce "new laws, imply a negative, &c." However, here is an *express* negative.

Thirdly, with regard to the cases cited——

As to *Rex* v. *Driffield*, whatever was found in the affirmative in that case, is found in the negative here. And as to the case of *Hobbs* v. *Young*, there was *no partner* skilful in the trade; but only *servants*: whereas here is a skilful partner to conduct it; and the servants are employed and set to work BY *this partner*, who is skilful; and are *not* employed and set on work *by* the defendant.

Then he added (4thly) some arguments *ab inconvenienti*.

First, This will affect all great undertakings: for it seldom happens, in such great undertakings, that *all* the partners are duly qualified, in strictness. So, likewise, it would affect all cases where *infants* and *trustees* are entitled to shares of profitable trades. So where *creditors* have shares in them. [5]

And *apprenticeships* in *great breweries* are not in fact usual or customary.

Mr. *Morton*, in reply, premised, that the rule of construction upon this act must be *uniform*, with regard to *all* the trades within it: and *breweries* cannot be distinguished from the rest.

In answer to Mr. *Bishop*'s argument, he observed,

1st, It is of no importance what was the right before the statute: the statute was made *expressly*, to RESTRAIN such right in future, for the good of the public.

2dly, He said, he did not want to *extend* this law: this case is fully and completely *within* it, without straining it at all. And the constructions that Mr. *Bishop* calls favourable, in the instances which he has cited, are no more than just and reasonable, upon the circumstances of the respective cases in which they were made.

3dly, as to the NEGATIVE-*finding* in the present case, it amounts to no more than "that this man did *not mind his* "*business*;" (which the other partner did.)

And as to setting to work, it is plain that *Coxe* is set to work by *Chase*: and, *virtually*, he sets all the servants to work. Indeed, *Coxe* is here both a journeyman and a partner to *Chase*: for *Chase* pays him as a journeyman; and besides that, gives him a share of the profits. And my Lord Ch. J. *Holt*'s opinion in the case of *Hobbs* and *Young* is quite applicable to the present case.

4thly, He endeavoured to shew that the construing this man to be within the penalty of the statute, could not be attended with any sort of inconvenience.

Therefore he prayed judgment for the plaintiff.

As this was the first argument, it was expected (as of course) that it would be argued again: but Lord *Mansfield* gave his opinion immediately, to the following effect:

1756. REYNARD v. CHASE. [6]

Lord *Mansfield*. Where we have no doubt, we ought not to put the parties to the delay and expence of a farther argument; nor leave other persons who may be interested in the determination of a point so general, unnecessarily under the anxiety of suspense.

The defendant is to share the profits with *Coxe* in moieties, and is liable to the debts of the partnership: but it is *positively and expressly* found, "That during all "the time charged *he* NEVER ACTED *in or* EXERCISED *the* "*trade*." He was not, by the *terms* of his agreement, to act in the trade: the *other* partner was to do the whole, and had a particular salary on that account. It is not found that either *Coxe* or any servant under him was set to work *by* CHASE; nor that *Chase* did *any act* whatever of exercising the trade: he was only concerned in the *profit*.

Palmer, 325.

Now *though this may be to* SOME *purposes exercising a trade, in respect* of third persons, who deal with the partnership as *creditors, and within the meaning of the statutes concerning bankrupts*; yet the present question is, "Whether it be exercising a trade, CONTRARY TO THIS ACT?"

I think Mr. *Bishop* has laid his foundations right against extending the penal prohibition beyond the express letter of the statute.

1st, *This is a penal law*;

2dly, It is *restraint of natural* right; (*a*) and

3dly, It is *contrary to the general* right given by the *common law* of this kingdom: I will add,

4thly, The policy upon which the act was made, is from experience become doubtful. (*b*)—Bad and unskilful workmen are rarely prosecuted.

(*a*) *Eyre*, J. in *Show*. 266. said he took the statute to be a politic law for the accustoming men to labour and industry in their youth; and *Gregory*, J. in the same case said, that the design of this statute was to encourage them who had been apprentices.

(*b*) The stat. 5 *Eliz. c.* 4. was not enacted, only to the intent that workmen should be skilful, but also that youth should not be nourished in idleness, but brought up and educated in lawful sciences and trades. *Per Cur. Ipswich Taylors' Case*, 11 *Co.* 54. *a.*

He that hath not served an apprenticeship is by the statute restrained to work as a trader, *either by himself or others*; for the intent of this act is to annex the benefit of trade to such as underwent the hardship of learning it, thereby to encourage labour in youth, and *few would undergo the* trouble of being apprentices if they might employ others to work for them. *Per Cur. Hobbs q. t. v. Young, Salk.* 610.

1756.
BAYNARD v. CHASE.

This act was made early in the reign of Queen *Elizabeth*. Afterwards, when the great number of manufacturers who took refuge in *England* from the Duke d' *Alva's* persecution, had brought trade and commerce with them, (a) and enlarged our notions, the restraint introduced by this law was thought so *unfavourable*, that in 33 *Eliz.* in the Exchequer (4 *Leon.* 9. *pl.* 39.) it was construed away; for it was holden clearly by the judges in that case (which construction, however, I take *not* to be law *now*), that "if "one hath been an apprentice for seven years at *any* one "trade mentioned within the said statute, he may exercise "ANY *trade named in it*, though he hath *not* been an ap-"prentice to IT. (b)"

All these observations only shew "That this act, as "to what enforces the *penalty* of it, ought to be taken *strict-*"*ly*." And accordingly the constructions made by former judges have been favourable to the qualifications of the persons attacked for exercising the trade, even where they have not *actually* served apprenticeships. They have, by a liberal interpretation, *extended the qualifications* for exercising the trade, *much beyond* the letter of the act; and have *confined* the *penalty and prohibition* to cases *precisely within* the express letter. [7]

Let us consider whether the *present* case be within the *letter*, or even the *meaning* of this act. Vide 2 Salk. 610. n. 3.

The *general policy* of the act was to have trades carried on by persons who had *skill* in them.

Now here the *personal* skill of the defendant makes no *real* difference in the case. For the person who *is* skilful, *acts every* thing, and *receives no directions* from this man: he neither did, nor was to interfere.

The case of *Hobbs* and *Young* is not parallel. There the defendant, a *single* man, directed the whole trade: was the *master*; and *directed* all the servants. *As between master* and *servant*, no doubt, it is the *master* who carries on the trade, and NOT *the servant*. But in *Hobbs* and *Young* there was *no partnership*; nor (what is the distin-

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(a) The statute only extends to such trades as were then used or occupied within *England* or *Wales*: so that the makers of it had then in contemplation, the bringing new trades into the kingdom, and cautiously guarded against restraint on such trades. See *Hob.* 211. *Ld. Raym.* 514. but *Palm.* 396. and 2 *Rol. Rep.* 392. *contra*.

(b) That is, according to the custom of *London*, *Show.* 166. *Bulst.* 190. But see *Cro. Car.* 361, 517, 578. that the custom does not extend to manual trades, but only to trades of buying and selling. 1 *Lev.* 15. 7 *Vin.* 173. (O) 240. *pl.* 12.

1756. RAYNARD v. CHASE.

guishing character of the present case) a *mere naked* sharing of the profits, and risquing a proportion of the loss; without his acting or directing at all, in any manner whatsoever. (*a*)

In many considerable undertakings, it is absolutely necessary to take in persons as partners, to share the profits and risque the loss. And the general usage and practice of mankind ought to have weight in determinations of this sort, affecting trade and commerce, and the manner of carrying them on.

It is notorious that many partnerships are entered into, upon the foundation of one partner contributing industry and skill, and the other money.

Many great breweries and other trades have been carried on for the benefit of infants and residuary legatees, under the direction of the Court of Chancery.

Now if the plaintiff's construction was to hold, the whole direction and decree of the Court of Chancery was contrary to law and to an express act of parliament.

So it is likewise practised in *other* great trades. The late Mr. *Child* directed his business of a *banker* (*b*) to be

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(*a*) Be this as it may, itdoes seem, that the allowing *Chase* to be exempt, from the penalty of the 5 *Eliz.* is contrary to one of the reasons for making that statute, as appears by the authorities cited in these notes; and none of the instances in favour of extending the qualification beyond the letter of the act urged for the defendant (*Barnard. Ch. Cas.* 75, 77.) were like that, in the present case, but were founded on some special reasons; whereas, according to this case of *Raynard* and *Chase*, any person whatever, hath it in his power to enter into partnership with any one who hath served an apprenticeship, and will take him in as partner, to share the profits which must be prejudicial to those entitled to the trade.

(*b*) *Quære*, Whether this instance be any thing to the purpose; for the statute is confined to such trades as were then used or occupied in *England* or *Wales*; and it appears by *Anderson* on Commerce, 2 vol. 77, 127, that the rise of banking in *England* was about 1645: it was first carried on by the goldsmiths, as appears there, and is so recited in the stat. *Car.* 2. The trade of a goldsmith is therefore within the statute, but when banking ceased to be carried on by them, and became a distinct branch of business, as in the instance of *Child's* house: it seems then clearly not to have been within the prohibition of the statute.

It seems also that bankers were not within the bankrupt laws till expressly made so by stat. 5 *Geo.* 2. *c.* 30. *s.* 39.

carried on for the benefit of his children and other persons. Many other instances might be mentioned. 1756. RAYNARD v. CHASE.

It would introduce the utmost confusion in affairs of trade and commerce, if this construction should prevail.

On the *other* hand, I see no inconvenience; it is exactly the same thing as to the trade, in ever iöta, "whether "this partner has or has not served an apprenticeship."

Therefore I think the defendant *not* liable to the *penalty* of 5 *Eliz.*

Mr. Just. *Denison* said, That this was a new case.

For though the cases of *Rex* v. *Driffield*, (*a*) and *Adcock* v. *Gell*, (*b*) were indeed before the Court, yet *no opinion* was delivered in either of those cases. [8]

He concurred that it was *not* an *exercise* of the trade *within* 5 *Eliz.*

The true intent of that act was, That no man should *exercise* any of those trades, unless he had *skill* in them. It has never been extended, by any liberal construction of it, in point of enforcing the *penalty*.

And the present question is, "Whether this man has "*exercised* the trade, within the meaning of it, so as to be "*liable to the* PENALTY?"

Now it is here found, "That he *never* did *interfere* in "the trade *himself*." In the case of *Hobbs* v. *Young*, the defendant was the *superintender* of the work, and *did exercise* the trade, without having any skill in it.— And *this* is the *point in question*, and the principal determination in that case of *Hobbs* v. *Young*; whatever else might drop from the judges in giving their opinion. But *here* the defendant *never meddles at all*, but leaves *all the management* to a partner who had skill; he himself *never acted* in carrying on the trade.

It may be said, indeed, "that *Chase* is liable to the *sta-* "*tutes of bankrupts*."—True: but the construction of *those* acts made for the benefit of the bankrupt's creditors, is very different from the construction of this *prohibitory* and *penal* act; which ought to receive a *strict* construction in point of extending the *penalty*.

Therefore for these reasons, and those given by the Lord Ch. Just. he held, "That this was *not* an *exercising* "the trade *within the act*."

Mr. Just. *Foster* concurred; and said, he had prepared himself to give his reasons *at large*: but as the Lord Chief Justice had gone through them so fully, and enforced them in so clear and satisfactory a manner, he would only, *in general*, declare his concurrence.

(*a*) S. C. *Bull.* 193.
(*b*) S. C. *Sayer's Rep.* 60.

1756. RAYNARD v. CHASE.

Mr. Just. *Wilmot* was of the same opinion.
By the Court unanimously judgment was given for the defendant. (*a*)

(*a*) The words of the act 5 *Eliz. c.* 4. *s.* 31. are, "that "it shall not be lawful for any person to set up, occupy, "use, or exercise any craft, mystery, or occupation now "used or occupied within the realm of *England* or *Wales*, "except, &c." Now the defendant did set up the trade of a brewer, which is one of the trades mentioned in the statute, *Sec.* 3. and therefore need not to be averred to be a trade used in *England* at the time of the act; now it does appear that the defendant was guilty of a breach of the law, according to the express letter of it: for it is an established rule that in disjunctives, it is sufficient if either part be true.

The defendant was also an offender within the intention of the act, which was as well to encourage putting out youth as apprentices, as that workmen should be skilful (11 *Co.* 54. a. *Salk.* 610.); and the judgment in the case of *Hobbs* v. *Young*, that a person not qualified according to the law cannot carry it on, though he never works himself, but employs only those who were qualified, was founded on the first of those reasons, (*Salk.* 610.) which holds equally strong at least in the present case; and the judgment in *Hobbs q. t.* v. *Young* may be easily eluded by the unqualified person allowing a small part of the profits, either instead of a salary, or, as in the present case, over and above the salary, to a qualified person for carrying on the same: and the defendant was admitted to be a tradesman for other purposes, though not within this act: so that this judgment seems to have introduced a distinction not supported by any principle, and must facilitate the practice of introducing dormant partners: for *à fortiori*, such if discovered would not be liable to the penalty of the act; and there is great danger to purchasers and mortgagors by dealing with such.

[9]

Enlarged rules of a preceding term must be brought on before the last week of the ensuing one.

REGULA GENERALIS.

THE Court declared, that all *enlarged rules* to shew cause, which were made in the last term, should be moved *before the last week* of the present term; *unless time* for postponing them should be particularly applied for, and granted: and this rule to prevail hereafter, in all future terms, in the same manner.

Monday, 15th *November* 1756, Lord *Mansfield* took the oaths: He was (as is usual) sworn first and *alone*.

Roades *versus* Barnes.

1756.
ROADES v. BARNES.

THIS was a plea of a *stated account*, pleaded to an action upon *simple contract*; to which plea there was a bad replication, and a demurrer to that replication: consequently, the question was only upon the validity of the *plea*.

[2 Black. 65. S. C. under the name of Rolls v. Barnes.]

After a long argument for the defendant in support of the plea, the Court, without hearing the other side, held the plea *bad in substance*; and so, they said, it has been determined in this Court, last *Hilary* term, in a case of *Atherly* v. *Evans*. A promissory *note* cannot be pleaded in bar to an action upon simple contract: though a *bond* may, because it extinguishes the debt. One bond cannot be pleaded to an action brought upon another bond.

Judgment for the plaintiff.(*a*)

Tuesday, 16th November 1756.

An account stated is no plea in bar to the demand of a debt of the same degree. A note of hand cannot be pleaded in bar to an action upon simple contract; though a bond may, but one bond cannot be pleaded to another.

Rex *vers.* Fonseca. (*b*)

[10]

MR. *Norton*, on behalf of the prosecutor, shewed cause against discharging the defendant's recognizance.

Wed. 17th Nov. 1756.

This was a recognizance entered into by the *defendant* and two other persons, upon his removing this indictment (which was for an assault with intent to ravish) from *Hicks's Hall*, where it was originally found.

Recognizance to remove an indictment from a court of oyer and terminer, is a recognizance at common law, not within 5 & 6 W. and M. c. 11. s. 2.; and may be discharged without costs.

The defendant had been tried, convicted, and fined in this Court; and had paid his fine.

After which Mr. *Morton* had moved to discharge the defendant's recognizance; it being a recognizance at *common law*, and all the terms of it having been complied with. For he insisted,

1st, That it is not within the statute of 5 & 6 *W.* & *M.* c. 11. § 2. being from the court of *Oyer and Terminer*, not from the Sessions: and this statute relates only to indictment found *at the Sessions*.

2dly, That the *principal* is here bound, as well as the securities; therefore also, it is not within the said act; which requires only two manucaptors, *without* the principal.

3dly, The *sum* is also different: for it is not a recognizance in 20*l.* but in 100*l.* himself, and each security 50*l.* Therefore, for this reason too, it is not within the said act. In proof of which, he cited 2 *Salk.* 564. *Regina* v. *Ewer*; where a *scire facias* was brought on a recog-

(*a*) See 2 *Durn.* 481. 5 *Durn.* 514.
(*b*) See *Sayer's* Law of Costs, 220. 2 *Ed.* 269.

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REX
v.
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nizance taken before a judge, upon granting a *certiorari* to remove an indictment from the sessions of the peace, in the sum of 40l. whereas the sum prescribed by the statute is 20l. And Lord Ch. J. *Holt* held this recognizance to be good at common law; but not to be a recognizance according to this statute.

[S. C. Strange, 1165.]

M. 15 *G.* 2. *B. R. Rex* v. *Sidney*, was also cited and relied upon by him, as in point to the present case.

In answer to which, Mr. *Norton* urged,

[15 Vin. 25 A.]

1st, That the court at *Hicks's Hall* is both a court of *Oyer and Terminer*, and ALSO a court of *Quarter Sessions*. And as to the

[11]

2d and 3d Objections. The defendant has availed himself of this recognizance; and has, *upon it*, removed the record: and therefore he ought to be bound by it, *as* by a proper recognizance.

And *Sidney*'s case was, he said, upon different circumstances.

Here, he is not to depart the Court WITHOUT LEAVE: Therefore the Court will first oblige him to do us justice, and pay the *costs*, in the same manner *as if* the recognizance had been *regularly* taken under this act.

[Qu. See 15 Vin. 25 (A.) and 4 Ed. 3. c. 2. Fortes. Rep. 101.]

N. B. The sessions at *Hicks's Hall* sit in *both* capacities, *viz.* of sessions of the peace, and also of *Oyer and Terminer*: and they draw up their orders with the *one* title, *or* with the *other*, according to the DEGREE of the offence: (*viz.* common assaults, and offences of a low nature, under the title of the Court of *Sessions*; and assaults with intent to ravish, riots, &c. and offences of a high nature, under the title of a Court of *Oyer and Terminer*:) And the *certioraris* are directed accordingly. And the present *certiorari* was directed to them AS a court of *Oyer and Terminer*.

The Court looked upon the case of *Rex* v. *Sidney* to be in point. (*a*)

And accordingly Mr. *Norton*'s rule for discharging the defendant's recognizance, was made absolute. Vide *post* p. 1461. *Rex* v. *Lyon*.

(*a*) There is nothing new in this case, for the case of *Rex* v. *Sidney*, in *Strange*, 1165, is in point: of this case I have got a MS. note, whereby it appears the indictment there was found at *Hicks's Hall*, but whether it was an indictment at the Court of Sessions of the justices of peace, or at the Sessions of General Oyer and Terminer, does not appear by that note; but in *Strange* 1165, it is mentioned as an indictment from the Sessions of Oyer and Terminer.

1756.

MACROW v. HULL.

MACROW *vers.* HULL.

THE defendant's counsel shewed cause against the Court's granting a new trial upon payment of costs; which had been moved for, by the plaintiff's counsel, upon the foot of the verdict's being *against evidence:* (which verdict was for the *defendant;* and, consequently, the application to set it aside, had been made on the part of the plaintiff.)

13th Feb. 1764. Verdict though against evidence, if found for the defendant, and the action be vexatious, new trial refused.

Mr. Just. *Foster* (who tried the cause) reported it to be an action of trespass, *extremely frivolous;* but sufficiently proved. He said that the defence was a very strong one indeed, in *mitigation of damages;* but yet was NOT *a sufficient denial of the trespass:* so that, in strictness, the verdict was undoubtedly against evidence. However, he thought the action *so trifling, frivolous, and vexatious,* that he should have thought sixpence damages to have been enough.

[12]

Whereupon the Court held, that NOTWITHSTANDING *its being a verdict* AGAINST *evidence* (which in general is a good reason for setting aside a verdict and granting a new trial), yet the action appearing, in *this* case, to be *frivolous, trifling,* and *vexatious,* and the REAL *damages* little or none, they ought to refuse, and accordingly did refuse to set aside the verdict: And,

Lord *Mansfield* added, that it would even be a cruelty to the plaintiff, to grant his motion; as he must pay the costs of the former trial, if he should prevail in it; and yet could hope for such very small damages upon a new one.

Rule discharged. *Vide post, pa.* 54. *Farewell* v. *Chaffey,* S. P. *accord*.

HARRISON, KNT. CHAMBERLAIN OF LONDON, *vers.* GODMAN.

Thursday, 18th Novem. 1756.

MR. Serjeant *Poole* and Mr. *Eliab Harvey* shewed cause against the issuing of a *procedendo* in this cause.

Bye-law to oblige a person who has a right to be free of the city, to take up his freedom in some particular company, is in restraint of trade, and bad. [See 3 Burr. 1322. also 7 Durn. 702. 3 Bos. & P. 60. and Calthorp 50.]

It came into this court, upon the return of a *habeas corpus cum causa,* directed to the mayor, aldermen, and sheriffs of *London,* commanding them to bring up the body of the defendant, together with the cause, &c.

The return was to the following effect, *viz.* That there is a custom in *London,* "that if any *ancient custom hard* "*and defective* in any thing *newly arising,* wants amend- "ment, the mayor and aldermen, with the consent of "the commonalty, have always, &c. *appointed fit remedy,* "for the common good of the citizens: so as such their

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HARRISON, Chamberlain of London, v. GODMAN.

" ordinances be consonant to faith and reason, and in no " wise prejudicial to the king or his people, nor repugnant " to the laws or statutes of *England*." And that the customs of *London* are confirmed by act of parliament, 7 *R.* 2.

They then certify, that there is within the city of *London*, a company of *butchers*; and that at a common council holden on the 27th of *June*, 20 *G.* 2. the lord mayor, aldermen, and common council, made an *ordinance*, " That " whereas many persons who *exercise the trade of butchers*, " have obtained *freedoms of* OTHER *companies*, by redemp- " tion or otherwise; by reason whereof the *company of* " *butchers* is much *diminished and fallen into decay*; for " *remedy* THEREOF, it is ordained that every person, not " being already free of the city, occupying, using, or " exercising, or who shall occupy, use, or *exercise the art*, " *trade, or mystery of a butcher* within the said city or its [13] " liberties, shall take upon himself the freedom of the " COMPANY *of butchers*; and that no person now using, " or who shall hereafter use or *exercise the trade of a* " *butcher* within the said city or liberties, shall be admit- " ted into the freedom of the said city, by the chamberlain " thereof, *of or in any* OTHER *company than* the said com- " pany of *butchers*: Provided always, that every person " not being already free of the said city, who are or shall " be *entitled to freedom of any* OTHER *company* by patrimony " or service, *shall be* ADMITTED *into* THIS *company of butch-* [Hard. 55.] " *ers*, upon payment of a like fine and fees as are usually " paid upon admission of a child or apprentice."

And that it was then and there further enacted, " That " if any person or persons (except such as are already " free, *&c.*) shall *use the trade of a butcher*, not being free " of THIS *company of butchers*, he, *&c.* shall pay 5*l.*" And directions are given how the penalty of 5*l.* shall be levied, and also concerning costs.

They then further certify, " That the defendant was " taken, on an action brought against him in the mayor's " court of *London*, for the penalty of this bye-law."

Upon this return, Mr. *Williams*, on behalf of the plaintiff in the mayor's court, had moved for a *procedendo*.

Mr. Serjeant *Poole* and Mr. *Eliab Harvey*, of counsel for the defendant, objected to this bye-law, as being a bad one: and they principally relied on *the following objection to it; viz.* "That it was a bye-law in RESTRAINT *of trade*; " and therefore could not be good; WITHOUT setting " forth a SPECIAL *and* PARTICULAR *custom* to support " it;" which is NOT *done* by the present return. And they argued that this bye-law is by no means supported by the authority which is set forth in the return as its foundation; *viz.* " A custom to apply fit remedy for the common good " of the citizens, where any ancient customs, hard and de-

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" fective in any thing *newly arising*, wants amendment:" for *neither* is here any *such ancient custom set forth*, and specified, which wanted amendment, nor any hardship or defect, stated: *nor* is there any pretence to say that this is " a matter *newly arising*;" *nor* does the *return so much as even allege*, either that there was any such ancient custom wanting amendment, or any hardship or defect, or that the subject of this bye-law was a matter newly arisen.

The cases adduced by each of them in proof of their positions, were as follow:

That it is a bad bye-law, and void, as being in RESTRAINT [14] *of trade*, appears by *Wagoner's* case, 2 *Co.* 125. *a. b.*

Therefore it is bad, without a custom to support it. *Ibid.* in point.

Yet NO *custom* is here *returned*, for support of any *restraint of trade* at all: and therefore the Court *cannot take notice* that there *is* any such custom. 2 *Strange* 1187. *Sir John Hartop* v. *Hoare & al.* The Court could not *judicially* take notice "that every shop in *London* is a market " overt;" that custom *not* being *found or stated*. 1 *Strange*, 187. *Argyl* v. *Hunt* (there cited) is in point, to the same purport. 5 *Mod.* 108. *Robinson* v. *Groscourt* is in point with the present case. *Carthew* 75. *Watson* v. *Clerke*. The court cannot, *ex officio*, take notice of the customs of *London*. *Salk.* 125. *Hodges* v. *Steward*, the fourth resolution, is very strong to the same purport. And *Co. Lit.* 175. *b.* proves the same position.

Now here, though the *general* custom "to make bye-" laws" is set out; yet, the *particular* custom "to make " such a bye-law as *this* is, in restraint of trade," is NOT set out.

As to the case of *Wannel* v. *Camerar' Civit' London*, in 1 *Strange*, 675. There the particular custom was set forth, as appears upon searching the record of that case: (though it has been called AS cited from *J. S.* a case in point). In Sir *T. Raym.* 289. *Player* v. *Vere*, the bye-law made for the better and more regular ordering of cars and carts, was holden to be good: but in 1 *Ro. Abr.* 364. *pl.* 5. (*inter Payne* v. *Haughton*) a bye-law for restraining the liberty of the trade of a carman, was holden *bad*.

Mr. *Williams* and Mr. *Norton*, on the other side, argued for the *procedendo*, and consequently for the validity of the bye-law.

This they said, is *not* a bye-law in RESTRAINT *of trade*: it is only in *regulation* of it. And the *Court* WILL *take* NOTICE of the custom of *London*, "That no man can exer-" cise a trade in *London*, without being *free* of the city, " and of some company of it." 2 *Stout*, R. 4. s. 8.

We have returned a custom, "That we have power to " alter and amend any ancient custom, and to appoint fit

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" remedy for the common good of the citizens, *where* there " is hardship or defect in it."

1 *Strange* 675, is this very case, in the joiners company: and there is *no* return there mentioned or hinted at, of any particular custom: though it is indeed returned, " That " by the custom, no person can be free of the city, with- " out being free of *one* of the companies."

In 5 *Co.* 62. *Chamberlain de Londres* Case, the bye-law about bringing broad-cloths to *Blackwell-hall* to be
[15] searched, &c. was held a good bye-law: and yet there is no particular custom set forth on which to found the bye-law.

In 2 *Rol. Abr.* tit. *Bye-laws, pa.* 365. *pl.* 9. " That none " shall make or use a hot-press in *London*."—There is no particular custom, on which the bye-law is founded: yet it was holden a good bye-law.

8 *Co.* 126. *a. Wagoner's* Case, and also Sir *T. Raym.* 288. *Player* v. *Vere*, prove that customs in *London* may *partially* restrain trade.

They admitted that a particular custom impowering them to make *this particular* bye-law, is *not* minutely set out: but at the same time they insisted, that they had set forth *enough* of a particular custom, to warrant this bye-law. For it is set forth, " That if any ancient custom, hard or " defective, &c. wants amendment, the mayor and alder- " men, with the consent of the commonalty, have by cus- " tom a *power* of appointing *fit remedy* for the common " good of the citizens: so as, &c." Which is a *general* power of making bye-laws by custom: and this power, confirmed too by act of parliament.

Now the present bye-law falls within the provision of this *general* power.

The substance of this bye-law is, " That no butcher by " trade, though free of the city, shall exercise this trade " in the city, without being free of the butchers compa- " ny." And it was both a *hardship* and *defect*, that they *might do so previously* to this bye-law.

Here is a custom shewn, " to *restrain* ALL *grown or* " *growing evils*, within the city:" which *is* a custom *to restrain trade*. And there are hundreds of bye-laws in *London*, founded upon this *general power*.

And *Wannell's* Case is, in substance, *in point*: it is a general return of an authority to make bye-laws under their *general* power; and the same sort of bye-law with the present one is established as a *good* one. (*a*)

(*a*) Whether there be any particular custom or not shall be tried by twelve men, and not by the judges, except the same custom be of record in the same court. *Dr.* and *St. c.* 10. *p.* 34.

Lord *Mansfield:* I suppose it is a *slip* in the return. 1755.

I do not take the objection to be, "that it is necessary "that it must be a particular custom to make a *particular* "bye-law;" but, "that there is *no general* power here "shewn, under the custom, to lay such a restraint upon "trade." HARRISON, Chamberlain of London v. GOODMAN.

This bye-law *is* a *restraint* of trade; and *not* a MERE *regulation of it*: the preamble *does not pretend* it to be made to regulate the trade; but *merely* for the *benefit of the butchers company*. It is founded upon the *general* power of making bye-laws in the city of *London*.

Now under a GENERAL *power to make bye-laws*, it is certain, that a bye-law cannot be made "*to* RESTRAIN *trade*." [*Comyns*, 269.]

And by the general custom of *London*, *every* freeman may exercise *any* trade, *without* being free of a *particular company:* which this bye-law requires him to be.

The case in 1 *Strange* 675, *Wannell's* case, is not a full state of the pleadings.(*a*) But it appears that the return sta-

(*a*) The bye-law in *Strange* 675, is, that no person shall use the trade of a joiner in *London*, who is not free of the company, under the penalty of 10*l*. After two arguments and time taken for consideration, to a subsequent term, the opinion of the court, as delivered by *Raymond*, Ch. J. was, that "this is a good bye-law, being "made in regulation of trade, and to prevent fraud and "unskilfulness of which none but a company that exercise the same trade can be judges: this does not "take away his right to his freedom, but only *his election* of what company he shall be free, it is only to "direct him to go to the proper company." The reasons of that judgment held equally strong in support of the validity of the bye-law, in this as they did of the bye-law in that case; there either is no difference, either in law or in reason, between the two bye-laws: or if there be any it consists in this, that the bye-law in this case, is less liable to exception than that; for by that, all the joiners in *London*, whether already free of another company or not, were obliged to take up their freedom in the joiners company, under the penalty of 10*l*.: whereas in this case, only such as were not free of any company, were obliged to take their freedom in the butcher's company, under the penalty of 5*l*. It is true that in that case there was a return of the custom of *London*, that no person could be free of the city till he was a member of one of the companies: but the *court could not judicially* take notice of that custom, as it was not returned in the present case; yet that was no ground, as it should seem, for their holding the bye-law to be bad, for they ought rather to have

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" ted that no person could be a freeman of the city, till " he was a member of one of the fraternities;" then stated a power to make bye-laws; (but *how* that power was set out, does not appear:) then the bye-law itself is there set out; which professes to be a *regulation* of trade, and recites " that several persons not free of the joiners company had " exercised the trade of a joiner in an *unskilful* and *fraudu-* " *lent* manner, which could not be redressed whilst such " persons were not under the orders and regulations of " the company;" and *therefore* it enacts that no person shall use that trade, who is not free of the company.

The bye-law for ordering and disposing of carts and cars, in Sir *Tho. Raym.* 288, 289. is a *mere regulation* of trade.

And as this power to make bye-laws to *restrain* trade, is NOT *set out*, in the present case, we *cannot presume* it, from any printed book, or any other way whatsoever. We cannot take *judicial* notice of any *particular* custom supporting such a bye-law as this; when no such particular custom is set out; and it certainly is not good under the *general* power which is set out (*a*)

Mr. Just. *Denison* concurred, that the Court could not take *judicial notice* of any such particular custom to warrant this bye-law, without its being *set out*.

[17] And the custom here set out, of a power " to mend " any hard or defective customs," is *not sufficient*: for

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adjourned the cause, and have given leave to amend the return on payment of costs.

It is also to be noted here that in *Strange*, 462, this bye-law was adjudged good, viz. " that the corn " porters should be *a* company, called free porters, who " should work at a particular settled rate; and that none " but the free porters should intermeddle in importing " or exporting any corn, roots, &c. within the bounds " mentioned in the custom, on penalty of 20s. for every of- " fence, except in time of danger, or urgent necessity, " or in the case of *bona peritura*;" and the chief doubt there was with respect to the extent of the custom, or whether it was confined within proper bounds, being not limited to the walls of the city.

(*a*) If there be a custom in London, the court ought to take notice of it, if a judgment given there, be brought before them; otherwise the court might reverse the judgment without cause, 1 *Rol. Rep.* 106. And *quære*, if it is not so in the case of a *hab. corp. cum causa* to the city courts? though it seems not, because the court below hath an opportunity of informing the superior court of the custom by stating it in the return, and therefore they ought to return the custom.

there is *no* hard or defective custom particularly set out. And every man, free of the city, had a right to set up any trade: which original right is here taken away by this bye-law. 1756. HARRISON, Chamberlain of London, v. GOOD MAN.

Indeed they may make bye-laws to *regulate* trade; but *not* to *restrain* it, unless they have a particular custom to support such bye-laws. As to the case of the ordering and disposing of carts, cars, carters and carmen, in *Raym.* 288. *Player* v. *Vere, that* was a bye-law for regulation of trade, and prevention of nuisances in the streets and lanes: but *this* is a bye-law to RESTRAIN trade, not warranted by any particular custom. Therefore he held it bad.

Mr. Just. *Foster* concurred; and spoke to the same effect.

Mr. Just. *Wilmot* expressed himself to the same purport.

By the Court unanimously, the bye-law was holden a *bad* one: and the rule for shewing cause "why a *pro-*" *cedendo* should not go," was discharged.(*a*)

REX *versus* KILLINGHALL.

Inquisition found by the grand jury at the general sessions of oyer and terminer quashed.

[*S. C. Umfre. Lex. Cor.* 481, 482, 483.]

MR. Serjeant *Poole* and Mr. *Clayton* shewed cause against a rule which had been moved for by Mr. *Norton*, "to quash a presentment or inquisition found "by the *grand jury* of the county of *York*, at the general "sessions of *oyer and terminer* for that county:" which Mr. *Norton* objected to, as being *coram non judice*; for, he said, the grand jury had no authority to make such a presentment, or find such an inquisition *under their* GENERAL *charge* from the judge of assize; whatever might be the case if the judge had *particularly* directed and presided over an inquisition of this kind, upon the neglect of the coroner.

The fact found was, "That the mare of *John Killing-*"*hall*, Esq. was the cause of the death of one *William* "*Stelling*, and was of the value of 10l."

It happened that the coroner had not taken any inquisition at all, upon his death: so that the lord of the manor, finding himself likely to lose his deodand, had made this application at the assizes; where the grand jury found this inquisition or presentment; which was afterwards removed hither by *certiorari*.

Mr. Serjeant *Poole* and Mr. *Clayton* endeavoured to support it.

(*a*) It is somewhat remarkable that the very same bye-law in *totidem verbis* as that here holden to be a bad one, was afterwards, in 3 *Burr.* 1322, holden to be a good bye-law.

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This inquisition, they said, before a grand jury is *traversable*, (which a *coroner*'s inquisition is *not;)* and therefore does no body any injury. And as the coroner had taken *none* at all, upon the present occasion, *this method* was *necessary* to be taken, in order to come at the deodand.

1 *H. H. P. C.* 419. *c.* 32. Of Deodands, shews most expressly that this may be done, before commissioners of gaol delivery, *oyer and terminer*, or of the peace, if omitted by the coroner. So does 1 *H. P. C.* 414. in treating of Inquisitions; where *Laughton's* case, *H.* 37 *Eliz.* is cited; and it is said to be "inquisible before the justices "of *oyer and terminer*, yea, or of the peace; and that it "had been adjudged accordingly, *M.* 1656, in *Greeve*'s "case."

3 *Inst.* 55. *c.* 8. *note b. in margin*, makes a difference between inquisitions taken before the coroners, and inquisitions taken before justices of the peace, as to having a traverse.

2 *Ro. Abr.* 96. *pl.* 3. proves that an indictment may be taken before justices of peace, and of *oyer and terminer.*

2 *Lev.* 140. *Rex* v. *Parker*, is in point, "that the coro- "ner's omission may be supplied by commission of in- "quiry;(*a*) or the justices of peace, or of assize, may "inquire of it, without commission."

2 *H. H. P. C.* 58, *cap.* 8. concerning the coroner and his court, and his authority in pleas of the crown, proves that grand juries have this jurisdiction in case the coroner neglects it.

[2 *Leo.* 152. *ac.*] 2 *H. H. P. C.* 59. *ad idem.* It is there said "that jus- "tices of peace, or *oyer and terminer*, or of the King's "Bench, may inquire, if the coroner do not: but that "THAT presentment is traversable; which the present- "ment of the coroner of a *felo de se* is *not.*"

Upon these authorities, they said, my Lord *Falconbridge* (the lord of the manor) was advised to take this method: but the judge of assize (Mr. Just. *Birch*) declined to meddle with it, or to have the inquisition taken before him *particularly*, or to give any *particular* direction about it.

They added these cases also, 1 *Ventr.* 352. in the note at bottom. *Poph.* 209. *Anon.:* and S. C. (apparently,) in *Noy* 87. "It *may* be done *before justices of peace*." 1 *Ventr.* 181, 182. *Stanlack*'s case. "If a coroner omits "to enquire, this court may do it, as supreme coroner of

(*a*) So also if the inquisition taken by the coroner be removed by *certiorari*, and quashed. 2 *Lev.* 152.

" *England;* or may make commissioners to enquire: or " commissioners of *oyer and terminer* may inquire. But " then it is not *super visum corporis*; and therefore may " be traversed." 1756. REX v. KILLINGHALL.

Mr. *Norton contra.*

This is a presentment *ex parte*; and a presentment of *entitling*, in order to found an *odious and superstitious* claim; and *all transacted* IN SECRET. [The most colourable reason is that given in 3 Inst. 58. in default of safe keeping in the owner.]

The cases cited only prove, " That, in default of the " coroner's having inquired, the justices of *oyer and ter-* " *miner*, and of the peace, may make the enquiry; and " that it is traversable."

They say " That we could not have traversed the " *coroner's* inquisition;" (which, however, I *deny*:) " but " this we may traverse: and therefore cannot be injured " by it."

But will it be said " that the *putting* a man to a traverse " is *no injury?*"

4 *Inst.* 196, 197, 198. enters largely into the subject of traverses; and condemns secret inquests and offices. [3 Lev. 220.]

Now this is an office of entitling; and therefore ought to be *publicly and openly* found.

Lord *Mansfield.* By express statutes. [14 Ed. 3. st. 1. c. 8. 23 Hen. 6. c. 16. and 1 Hen. 8. c. 8. s. 3.

And I remember a case of the late Duke of *Buckingham*'s heirs; where, upon application to the Court of Exchequer, notice was directed to be given: though in general, *notice* is *not* necessary. 2 Vent. 344. 4 Inst. 196. 3 Lev. 220.]

Therefore I think *this* inquisition cannot be supported.

And inquisitions before the coroner *are* traversable. [*V.* 2 *H. H. P. C.* 416. where that author declares his own opinion accordingly.]

Mr. Just. *Denison:* I think it cannot be supported.

Mr. Just. *Foster:* I am of the same opinion.

Rule to quash the presentment made absolute.(*a*)

Friday, 19th *November*, 1756.

[20]

MEMORANDUM. On this day, the GREAT SEAL was put into COMMISSION; being delivered by his Majesty (immediately upon the Earl of HARDWICKE's resignation of it,) to SIR JOHN WILLES, Lord Ch. J. of the Common Pleas, SIR SIDNEY STAFFORD SMYTHE, third Baron of the Exchequer, and Sir JOHN EARDLEY WILMOT, The great seal put into commission.

(*a*) If deodands were to be abolished, the parliament should do it; but it should not be left to the coroner to find it or not as he chuses, without controul.

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youngest judge of this Court: which prevented Mr. Justice WILMOT from sitting much in *this* Court, the remainder of the present term and the whole of the two subsequent terms.

Saturday, 20th November, 1756.

OPPENHEIM, QUI TAM, *vers.* HARRISON.

Attorney's name set on process without his authority, set aside.

THE proceedings were set aside for irregularity in the want of an *attorney's name*, being duly set to them: it appearing that although they had the name of a regular attorney, *in fact set to them;* yet it was so set, WITHOUT *any authority from him.*

And the Court also granted an *attachment* against one *Habin*, who acted as attorney for the plaintiff, and had so put Mr. *Granger's* name (an attorney of this court) *without* authority or leave from Mr. *Granger.*(*a*)

Tuesday, 23d November 1756.

The property of a bankrupt's goods is, after assignment, in the assignee, from act of bankruptcy.

[1 Black. 65. S. C. Bull. 41 S. C. T. Jones, 196. 3 Wils 314. Salk. 108.]

COOPER, AND ANOTHER, ASSIGNEES OF WILLIAM JOHNS, A BANKRUPT, *vers.* CHITTY AND BLACKISTON, ESQUIRES, SHERIFFS OF LONDON. *Hil.* 27 *Geo.* 2. *Rot.* 869.

THIS cause was twice argued: it came first before the court, on *Monday* 9th *June* 1755; and again, upon *Tuesday* the 16th instant. It was an action of trover brought by the assignees of *William Johns*, a bankrupt, AGAINST *the* SHERIFFS of *London*, who had taken *and sold* the goods of *Johns* in execution under a *fieri facias* which had issued against *Johns*, at the suit of one *William Godfrey.*(*b*)

On the trial, a special case was settled:

Which case states, That *Johns* was regularly *declared a bankrupt*, on the 8th of *Decemb.* 1753. And as to the rest, the following times and facts were stated; *viz.* That on the 5th of *December* 1753, one *Godfrey* obtained judgment in the Common Pleas, against the said *Johns*, and on

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(*a*) Vide 3 *Jac.* 1. *c.* 7. *s.* 2. 2 *Geo.* 2. *c.* 23. *s.* 10, 17, 27. and that an attorney may not, but in special cases, give leave to another attorney to practice in his name, see 1 *East*, 367. 4 *East*, 533. 5 *East*, 412.

(*b*) See *Strange*. 981. 3 *Mod.* 236. 1 *Durn.* 158, 476, 478. See also *Powell* v. *Morrice.* 4 *L.* 261, *n.* 29. that this action does not lie against the sheriff without notice. 2 *Durn.* 754. and *Qu.* 1 *Comy.* 533. (*D.*) 20. and 1 *Lev.* 173. 1 *Sider.* 271. there cited.

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the same day (5th *December* 1753) *execution* upon the said judgment was taken out against him by *Godfrey*, and the *goods seized* by the sheriffs, under it; that *Johns* committed the act of bankruptcy 4th *December* 1753, and on the 8th of the same *December*, a commission of bankruptcy was taken out against him(*a*); and on the very *same* day, the commissioners of bankruptcy *executed an* ASSIGNMENT; and afterwards, *viz.* on the 28th *December*, a *bill of sale* of the goods was made by the sheriffs. The plaintiffs are the assignees under the commission: the defendants are the sheriffs of *London*, who seized the goods under the execution.

The point was, Whether the assignees under the commission of bankruptcy can maintain an action of trover against the SHERIFFS (who executed this process under a regular judgment and execution;) for *seizing* the goods under a *fieri facias* issued and executed *after* the act of bankruptcy was committed; and *selling* them *after* the assignment was executed?(*b*)

Argument for the plaintiffs.

The counsel who argued for the plaintiffs, made two questions, *viz.*

1st, WHOSE *property* the goods were, *when seized* by the sheriffs, by virtue of this *fieri facias*?

2dly, *Whose* property they were, *when* SOLD by the sheriffs?

1st Question. *After* the *act* of bankruptcy, they ceased to be the property of the *bankrupt himself*, (they said;) wheresoever else the property might be between the act of bankruptcy and the assignment.

This *relation* to the act of bankruptcy is like that of *administrations* to the time of the death: and they cited *Kiggil* v. *Player*, 1 *Salk.* 111. (*c*) as S. P. with the present case exactly.

The utmost that the bankrupt himself could be pretended to have was a special property, *defeasible* by the assignment. It is like the case of a distress for rent, where the seizor may sell the distress after five days; but, if

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(*a*) *Quære* whether this was notice to the sheriff or not?

(*b*) This action should have been brought against the plaintiffs without the officer, as in the case in *Strange*, 996.

(*c*) There is an *adjournatur* at the end of it. But *Holt* there said "the assignee was in by relation from the time "of bankruptcy, so as to avoid all mesne acts, but not "so as to be actually invested with the property."

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the money be paid within the five days, he cannot sell: so that, in the *interim*, the right is defeasible.

Here the plaintiffs have declared as assignees under the commission of bankruptcy: therefore their interest *vests* as *from the time of the* ACT *of bankruptcy*.

If the bankrupt *himself* had delivered the goods to a stranger, it had been the same thing: the stranger would be answerable to the assignees.

[22]

Sheriffs execute process *at their peril*: they are answerable *civiliter*, for what they do upon it. 11 *H.* 4. 90. 14 *H.* 4. 25.

A man may, without his own fault, be possessed of a horse which has been stolen: but nevertheless, he is answerable, *civiliter*, to the true owner for it.

The sheriff had no authority to take any goods, in execution, *but* the goods of the *defendant*: if he does take any *other* goods, he is a trespasser.

In writs of execution, it is at their peril if they take *another* man's goods. In *Carthew*, 381. *Hallett* v. *Byrt*, it is so laid down by Ch. J. *Holt* expressly.

Now these were goods of the assignees; and they may maintain an action *either* against the *plaintiff* in the cause, *or* the *sheriff*, OR the *vendee* of the goods: and the sheriff is the *properest* person against whom to bring the action.

The *gist* of an action of trover is the CONVERSION: the *finding* is not the material part.

And they cited several *nisi prius* cases of actions brought by assignees of bankrupts: *viz.*

M. 11 *G.* 1. Trover by *Vanderhagen & al*, assignees of *Daniel*, a bankrupt, *v. Rewise*, a serjeant at mace of the city of *London*; S. P. with the present. Lord Ch. J. *Pratt* held the action maintainable.

The S. P. was also before Lord Ch. Just. *Lee*, in a case of *Bloxholm*, assignee of *Mills*, a bankrupt, v. *Oldham & al*, at the sittings after *Tr.* 1750, at *Guildhall*: in trover against a sheriff, and the former plaintiff, and the vendee, (all of them together.) It was objected "That the *sheriff* "ought to be acquitted:" but over-ruled; and verdict against *all three*.

The seizure there was *before* the *commission*, but AFTER *the* ACT of bankruptcy.

The second question is, "*Whose* the goods were *at the* "TIME OF THE SALE?" The writ only commands the sheriff "to sell the DEFENDANT'S goods:" and if he sells the goods of *another* person, it is a CONVERSION.

[23]

It is beyond doubt, that the assignment has *relation to the act* of bankruptcy: and the assignees stand in the bankrupt's place *from that time*. 1 *Ventr.* 193. *Monk* v. *Morris and Clayton*, proves this.

Here then the *assignees* had *all* the property that the

bankrupt had, at the time of his act of bankruptcy; consequently the absolute dominion was in *them:* and the sheriff could not AFTER such assignment *sell* them, *as* the defendant's. Indeed sheriffs seldom do, *in fact*, sell the goods without indemnity. But the sheriff has here *committed an error* in selling them *at all:* for they were *not* the defendant's. He might, it is true, have summoned a jury "*to inquire whose* goods they were." But still, even their verdict cannot affect the right of the *true* owner of the goods. 1756. COOPER v. CHITTY and BLACKISTON.

The point about *relation* backwards, does not at all affect the question, *as to the* SALE; for the assignment was *prior* to the SALE, though not to the *seizure.*

And they affirmed that the sheriff not only might, but even ought, in this case, to have returned "*nulla bona:*" *that* would have been the proper and the true return; and if it had been disputed, he then might have *brought the money into court.* There is a case of *Rex* v. *Brein*, bailiff of the *Savoy*, 1 *Keb.* 901. where the goods were claimed under a bill of sale; the sheriff returned "*nulla bona;*" and the money was ordered to be brought into court by the sheriff; and the return to be made agreeable to the event of a trial of the validity of the pretended bill of sale, after such validity should be tried in an action.

In the present case the defendants *knew of* the assignment BEFORE *they* SOLD *the goods:* whatever they might do when they *seized* them; and they could not possibly be obliged to sell them: it is contrary to an express act of parliament, which vests the *property in the assignees.* So that here the sheriff has sold the goods, not of the bankrupt, but of the *assignees.*

And supposing that the plaintiffs may being an action against the plaintiff in the original action, OR against the vendee of the goods; yet they seem, both of them, to have better excuses than the *sheriff* has, and are more innocent. Therefore why should the assignees be turned round to *them*, when they can undoubtedly maintain either trespass or trover against the sheriffs, who have *sold* the goods; which is a conversion, and will support an action of trover? That the plaintiffs have this election, to bring either trespass or trover, appears from *Cro. Eliz.* 824. *Bishop* v. *Lady Montague*, and *Cro. Jac.* 50. S. C. [24]

Therefore they concluded that the action was well brought.

The counsel who argued for the defendants, the sheriffs, agreed that the matter would turn upon the solution of the two questions made by the other side. Argument for the defendants.

As to the first question, They said it would be very hard if this action should lie AGAINST *the* SHERIFFS, and

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they be put to controvert the act of bankruptcy, which is a matter not at all within their knowledge.

They argued that the sheriffs shall not be considered as WRONG-*doers*: and to prove it cited 1 *Lev.* 95. *Turner* v. *Felgate*. *Raym.* 73. S. C. 2 *Siderf.* 126. S. C. and 1 *Keble* 822. S. C. 1 *Lev*, 173. *Bayley* v. *Bunning*, 1 *Siderf.* 271. S. C. and 2 *Keble* 32, 33. S. C.

The only acts of the sheriffs that can be considered as a *conversion*, are the acts of *seizure* and *sale*.

Now they were compellable by the writ of *fieri facias* to *seize* the goods and *levy* the debt.

For TILL *the commission and assignment, the property was in the bankrupt*: and it did *not appear* that a commission EVER WOULD *be taken out*.

1 *Salk.* 108. *Cary* v. *Crisp*, is express in point, "that "the property is in the bankrupt, *till* assignment." It was there resolved that the property of the goods is *not* transferred out of the bankrupt *till* assignment. 2 *Str.* 981. *Brassey & al'*, v. *Dawson & al'. accord'*.

1 *Lev.* 173. *Bayley* v. *Bunning*. Judgment was for the officer; he being obliged to execute the writ, and could not know of the act of bankruptcy, or that any commission would ever be sued: and the sheriff was holden not to be liable, although he had notice of the assignment.

1 *Siderf.* 272. S. C. The taking was holden lawful.

Comberb. 123. *Lechmere* v. *Thorowgood*. The officer shall not be made a trespasser, by relation. 3 *Mod.* 236. S. C. 1 *Shower*, 12. S. C.

[25] The *commission* of bankruptcy makes no alteration, TILL *assignment*: and after *assignment*, there shall be a *relation*, so far as to avoid all mesne acts of the bankrupt, and *even to over-reach this judgment*-creditor. Thus far they admitted.

But they insisted that the action *ought not* to have been brought against the sheriff.

The sheriff is to *seize*, *sell*, and *return his writ*. In proof of this, they cited 2 *Ld. Raym.* 1072, 1074. *Clerk* v. *Withers*, 1 *Salk.* 322, 323. S. C. (3d point.) 6 *Mod.* 293, 299. S. C. 1 *Siderf.* 29. *Harrison* v. *Bowden*, *Cro. Eliz.* 235. *Mountney* v. *Andrews*, 1 *Ro. Abr. Execution* 893. Letter B. *pl.* 2. *Dyer*, 98, *b.* and 99, *a.* § 57. and the two cases there cited in the margin; and *Cro. Eliz.* 597. *Charter* v. *Peeter*. From all which cases, it appears that the sheriff is not liable to be molested.

1 *Salk.* 321. *Kingsdale* v. *Mann*, proves that the *seizure* is the *essential* part of the execution: and an execution is an *entire* thing; and *cannot be stopped*, after it is once begun. 2 *Show.* 79. *Cockram* v. *Welbye*.

And after the sheriff had seized these goods, the original plaintiff (*William Godfrey*) could oblige the sheriff

to return his writ: and yet upon the principles advanced the sheriff must be put under the greatest hardships. And he had NO METHOD *to make the assignees* of the bankruptcy to give him any *assistance towards proving* the act of bankruptcy.

Indeed the execution is *good*, though the writ be *never* returned. 5 *Rep.* 90, *a. Hoe's* case: (1st resolution.)

The only return the sheriff could make, must be "That "he *had levied* the money:" (which could only be by sale.) Therefore he was OBLIGED *to sell.* Consequently the law will not make him a wrong-doer *by* selling.

The following cases they said were in point for them, *viz.* 1 *Lev.* 173. *Bayley* v. *Bunning*, 2 *Keble*, 32, 33. S. C. 1 *Siderf.* 271. S. C. 3 *Lev.* 191. *Philips* v. *Thompson*, 1 *Show.* 12. *Lethmere & al'*, v. *Thorowgood & al'*, *Comb.* 123. S. C. 3 *Mod.* 236. S. C. and *Cole* v. *Davies & al'*, 1 *Ld. Raym.* 724. *per Holt*, in point, as against the sheriff most expressly.

And the present plaintiffs may have an *adequate and complete remedy* against the *plaintiff* in the original action.

As to the cases cited, the gentlemen who have argued on the other side, put it upon the question, "Who "had the *property* of the goods?" [26]

Now the property was in the *bankrupt at the* TIME of the execution: it was NOT *in abeyance*; as it is in the case of an administration. (Which is an answer to the case of *Kiggil* v. *Player.*)

The sheriff is not in the case of a *stranger*; for he was OBLIGED *to execute and return* the writ.

Indeed the sheriff is to execute the writ at his peril; and *Carthew* 381. is so: the reason is, because the sheriff may impanel a jury, to inquire "whose the goods are." But here there were *no* means for the sheriff to indemnify himself: the goods were undoubtedly THEN the goods of *William Johns*; even though he had then committed an act of bankruptcy.

The assignees have not a right to recover the SPECIFIC goods, but *only damages.*

Trespass will lie against the *plaintiff* in the original action, even *before* he receives the money; though *trover* indeed would not *till* AFTER.

It is not certain that an action will lie against the *vendee* of the sheriff.

As to *Vanderhagen's* case it is not sufficiently clear how it was, or why it was determined.

But as to the case of *Bloxam* v. *Oldham*, Mr. *Henley* did not insist on the objection, "That the action would "not lie *against* the sheriff;" because it would *not help* his client: for in that case the sheriff and the plaintiff in the original action were *both* of them defendants. And the

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case of 1 *Lev.* 173. was not indeed, by Lord Ch. *J. Lee*, thought apposite to that case: but it was *not* over-ruled by him. And the goods were certainly the goods of the bankrupt *till* assignment.

* N. B. Mr. *Hume*, who was counsel for the defendant in that case of *Bloxam* v. *Oldham*, agreed, "That "the objection against the sheriff's being a defendant" was NOT *insisted upon*; because the plaintiff in the original action (who was also a co-defendant with the sheriff there) had *indemnified the sheriff*: so that it was really a point quite *immaterial* to the plaintiff; (who was at all events liable to the action.)

[27]

They added, that this was a point of great consequence to all sheriffs and officers: on the other hand creditors cannot be injured, though sheriffs should be excusable, and the original plaintiff *only* should be liable to the action.

As to what has been said of *security* taken by the sheriff—the Court can take no notice of a sheriff's taking security; nor can they suppose him conusant of a *private* unknown act of bankruptcy: and it would be very hard if an innocent officer should be hurt by *retrospection* and *relation*.

They agreed that this execution may be avoided *as against the original plaintiff*: 2 *Strange* 981. *Brassey & al'* v. *Dawson & al'*. is a proof "that it may." But they denied it, *as* to rendering the *officer* liable to an action; for *he* is excusable, as appears from the cases before cited.

As to the second question.—The foundation of this action of trover, is *property in the plaintiff*, at the *time* of the seizure, and a *tortious and illegal act* of *conversion*; for without *both* these circumstances, *this* action will not lie.

Now the PROPERTY is *in the* BANKRUPT, TILL *assignment*: and the *subsequent sale* cannot make the sheriff a wrong-doer by a *fictitious relation*. *Raym.* 161. *Bilton* v. *Johnson & al'*. "The relation of a teste shall not justify "a tort."

It is said that "this relation is given *by act of parliament*." But there are no words in the act of parliament that can make the sheriff a *wrong-doer*.

IF *the seizure* was lawful, the *sale* was so too. 2 *Ld. Raym.* 1074, 1076. *Clerk* v. *Withers*. *Cro. Jac.* 515. *Sly* v. *Finch*. *Cro. Eliz.* 440. *Boucher* v. *Wiseman*. *March* 13. *Parkinson* v. *Colliford & al', executors of a sheriff*. *Cro. Car.* 539. S. C. 1 *Jones*, 430. S. C. *Hob.* 206. *Speake* v. *Richards*. *Cro. Eliz.* 237. *Mounteney* v. *Andrews*. The law considers the *whole execution* as one *entire* act: the intermediate days are only allowed for the sake of the sheriff.

Consequently he may execute the whole *at once*; he may seize and sell directly. The execution is an *entire* thing, and can *not be stopped*. *Cro. Eliz.* 597. *Charter* v. *Peeter*. *6 Mod.* 293. *Clerk* v. *Withers*. Therefore the *officer* shall be protected.

Suppose an *action* should be brought *against the sheriff* for the *money*. He might avail himself perhaps by special pleading, *provided* he was able to make out the facts he should specially plead: but *how* could he be able to *prove* the act of bankruptcy, trading, or assignment? to all which he is an entire stranger. Therefore it would be hard to suffer such an action to be maintained against *him*. But *all* these matters are in the *privity of the original plaintiff*: against *whom*, therefore, the action ought to be brought.

[28]

It is said, "the sheriff acts at *his peril*."

But it is admitted that the method of impanelling a jury would be *no protection* to him.

Reply.

The counsel for the plaintiffs replied, That it is stated "That the *assignment* by the commissioners of bankrupt-"cy was *previous* to the *bill of* SALE by the sheriff's."

The sheriff's being always a *responsible* person, and therefore most likely to be made defendant, is the very reason why he *ought* to be liable to the party who has received the injury.

The *finding*, or even the *taking possession* of goods found is *no* wrong: but it is the CONVERSION that makes the person a *tort-feasor*.

They admitted that the sheriff is *not* answerable for the *irregularity of a judgment*; (for he is bound to execute the command of the writ.) But if he take the *goods of* ANOTHER PERSON, *instead of* the goods of the defendant, he *is* answerable for THAT.

It has been said, indeed, that "they were *at* THAT "*time* the goods of the *bankrupt* himself."

But be the TAKING lawful, or not lawful, yet here is an *actual* CONVERSION, an *actual* DISPOSITION of the goods; which makes him a trespasser *ab initio*.

It has likewise been said, that "the Court will protect "the sheriff." But the *relation* goes back, *quite up to the* ACT *of bankruptcy*.

They denied that the execution is *so entire* that the sheriff can *not stop* in it, after seizure and before sale of the goods. Suppose the sheriff had confessedly seized *another person's* goods, should he be obliged to sell *them*? *Dalton's Office of Sheriff*, says "The sheriff may impanel "a jury; and *after that* shall not be answerable." Now here he might either have impanelled a jury, or have kept the money in his hands, or brought it into court, till the property of the goods had been determined.

[Dalton's Sheriff 146, 3 Wils. 316.]

[29]

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They admitted the general *principle* of the cases cited on the head of executions; but *denied the application* of them to the present case. They also denied the principle, "That a sheriff shall never be a tort-feasor *by relation*;" for he shall in *some* cases be so, as where he take the goods with a *bad original intention*.

As to *Bayley* v. *Bunning*, they endeavoured to distinguish it. In order to which, they remarked that there is *no finding* of an ACTUAL *conversion*, or of what could be called so by the Court; it is only a *demand and refusal*, which is ONLY EVIDENCE to a jury. And the opinion of the Court there went upon the *taking*, which they held to be legal; whereas here is an ACTUAL *conversion stated*. An action would lie, one would think, against the *vendee* of the sheriff in point of reason, and the *practice* does strongly support it; for nine in ten of these actions *are* brought against the *vendees* of the sheriff.

In the case of *Bloxam* v. *Oldham* there was a very *material difference*, whether the sheriff should have a verdict *for him*, or a verdict *against* him; for in the *one* case he would *receive* costs, in the *other* he must *pay* them.

The plaintiffs had no right to call upon the sheriffs TILL *the* RETURN of the writ; and they might *then* have returned "*nulla bona*." Therefore this is *not* such a hard case upon the sheriffs as is suggested. And this is not the only case where the sheriff is to act at his *peril*; for in taking of bail, &c. he must do so, as well as here.

If the sheriff had returned "*nulla bona*," the *onus probandi* would have lain upon the original plaintiff.

In the case of *Turner* v. *Felgate*, the sheriff was certainly excusable by virtue of his writ.

In the case of *Cole* v. *Davies & al'* in 1 *Ld. Raym.* 724. the goods were sold *before* the commission and assignment. For the case is there put of a commission and assignment, *both* of them SUBSEQUENT to the sale of the goods. The words are, "If he seizes AND *sells*," and then a "commission is granted, and the goods assigned; the assignee may maintain trover against the
[30] "vendee: but no action will lie against the sheriff, because he obeyed the writ." But our reasoning in the present case is founded upon the *sale*'s being an *unlawful* act.

In the case of *Brassey & al'* v. *Dawson & al'*, there was no assignment previous to the seizure.

They did not deny that the bankrupt had in the present case a *sort* of property, a *defeasible property* in him, at the time of taking the goods. But in the case of *Clerk* v. *Withers* (reported in 6 *Mod.* 290. and in 1 *Salk.* 323. and in 2 *Ld. Raym.* 1702,) the defendant in the action had the whole *indefeasible property* in him; and the

sheriff ought to have gone on; but that case is not applicable to the present case, where the property was only *defeasible*.

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As to the cases cited from *Hob.* 206. and *March*, 13. they agreed to them.

The time allowed to the sheriff makes no difference, (they said;) because he has done wrong.

And however *entire* a thing an execution in general may be; yet here it was *irregularly executed*.

The truth of the return of "*nulla bona*," in this case depends upon the present question.

It is very frequent for sheriffs to be entangled in difficulties about their returns. Here he might have taken a writ *de proprietate probanda*.

Bayley v. *Bunning* turned upon the *taking*.

Leckmere & al' v. *Thoroughgood* only proves "that the "goods were *in custodia legis*." And so they were; but to the purposes of the law which in the present case is for the benefit of the creditors of the bankrupt.

CURIA ADVISARE VULT.

Opinion of the Court.

And now (*Tuesday*, 23d *Novemb.* 1756) Lord MANSFIELD delivered the opinion of the court, and said they were *all* agreed, as well his two brethren then present in court, as his brother *Wilmot*, (who was at present engaged in another place,) in their opinion.

There are *few* facts *essential* to this case; and it lies in a *narrow* compass.

He then stated the case, (which see in *p.* 20. *ante*;) and [31] was very particular in specifying the *dates* of the several transactions.

The general question is, "Whether or no the action "is maintainable by the assignees, against the *defend-* "*ants*, the *sheriffs*, who have taken AND SOLD the goods?"

It is an action of TROVER.

The bare defining the nature of this kind of action, and the grounds upon which a plaintiff is entitled to recover in it, will go a great way towards the understanding, and consequently towards the solution of the question in this particular case.

In *form* it is a fiction: in *substance* a remedy to recover the value of personal chattels *wrongfully* converted by another to his own use.

The form supposes the defendant may have come lawfully by the possession of the goods.

This action lies, and has been brought in many cases where, in truth, the defendant has got the possession *lawfully*.

Where the defendant takes them wrongfully, and by trespass, the plaintiff, if he thinks fit to bring *this* action, waves the trespass, and admits the possession to have been *lawfully* gotten.

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Hence, if the defendant delivers the thing upon demand, no damages can be recovered in *this* action, for having *taken* it.

This is an action of tort: and the whole tort consists in the *wrongful conversion*.

Two things are necessary to be proved, to entitle the plaintiff to recover in this kind of action: 1st, *Property* in the plaintiff; and 2dly, a wrongful *conversion* by the defendant.

As to the first, it is admitted in the present case, that the *property* was in the plaintiffs, as on and from the *4th* of *December*, (which was *before* the seizure,) by *relation*.

This *relation* the statutes concerning bankrupts introduced *to avoid frauds*. They vest in the assignees all the property that the bankrupt had at the time of what I may call the *crime* committed, (for the old statutes consider him as a criminal: they make the sale by the commissioners good against all persons who claim by, from, or under the bankrupt, *after* the act of bankruptcy, and against all executions not served and executed *before* the act of bankruptcy.

[32]

[21 Jac. 1. c. 19. s. 9.]

Dispositions by process of law are put upon the same foot with dispositions by the party: to be valid, they must be *completed* before the act of bankruptcy.

Till the making of 19 *G.* 2. *c.* 32., if the bankrupt had, *bona fide*, bought goods, or negotiated a bill of exchange; and thereupon, or otherwise, in the course of trade, *paid* money to a fair creditor, *after* he himself had committed a *secret* act of bankruptcy; such *bona fide* creditor was liable to *refund* the money to the assignees, after a commission and assignment; and the payment, *though* really and *bona fide* made to the creditor, was avoided and defeated by the *secret* act of bankruptcy.

This is remedied by that act, in case *no notice* was had by the creditor, (prior to his receiving the debt,) "That "his debtor was become a bankrupt, or was in insolvent "circumstances."

Therefore as to the *first* point, it is most clear that the *property* was *in the plaintiffs*, as ON *and from the 4th of December*, when the act of bankruptcy was committed.

2dly. The only question then is, "Whether the de-"fendants are guilty of a wrongful CONVERSION?"

That the conversion itself was wrongful is manifest.

[3 Wils. 307.]

The sheriffs had *no* authority to SELL the goods of the *plaintiffs*, but of *William Johns* only; they *ought* to have *delivered* these goods to the plaintiffs the assignees. Upon the foundation of the legal right, the Chancellor, even in a summary way, would have ordered them to be delivered to the assignees.

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It is *admitted*, on the part of the defendants, (*a*) that the innocent *vendee* of the goods so seized can have no title under the sale, but is liable to an action; and that *Godfrey* the plaintiff would have no title to the money arising from such sale, but if he received it would be liable to an action to refund.

If the thing be clearly wrong, the only question that remains is, "Whether the defendants are *excusable*, "*though* the act of conversion be wrongful."

[33]

Though the statutes concerning bankrupts rescind all contracts and executions not completed before the act of bankruptcy, and vest the property of the bankrupt in the assignees by relation, in order to an equal division (*b*) of his estate among his creditors, yet they do *not* make men *trespassers or criminal by relation*, who have *innocently* received goods from him, or executed legal process, not knowing of an act of bankruptcy; *that* was not necessary and would have been unjust.

[The statute 21 Jac. 1. c. 19. s. 9. is express as to executions.]

The injury complained of by this action, for which damages are to be recovered, is *not the seizure*, but the *wrongful* conversion (*c*)

The *assignment* was made upon the 8*th* of *December*; the *sale* not till the 28*th* of *December*; the *return* not till the octave of Saint *Hilary*, (which is the 20*th* of *January*.)

The sheriff acts at his *peril*, and is *answerable for any mistake*: infinite inconveniences would arise if it were not so.

At the *time* of the sale and return, it was more notorious "that these goods belonged to the plaintiffs," than it could probably have been in the case of any third person; because commissions of bankruptcy and the proceedings

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(*a*) This is not consistent with what is before reported, p. 26. though the same admission as here is repeated, *infra*, 34.

(*b*) Post. 35 *ac.* 36 *ac.* with a good reason for it.

(*c*) There is no difference with respect to the sheriff between trover and trespass: he may just as well be liable to the one action as the other: the measure of damages would be the same in both, and he must pay costs in both: and the court of *B. R.* have since determined trover to be an action founded on a tort, and on that ground not maintainable against an executor for a conversion by his testator; and see *Comp.* 371. and 1 *Durn.* 475.

In general a judgment in trespass to trover, and so *vice versa* with proper averments, 1 *Show.* 146. 2 *Bl. Rep.* 27.

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under them are *public* in the neighbourhood, and indeed all over the kingdom.

This conversion is 20 *days* after the assignment.

The defendants have here made a direct *false return*: they have returned "That they took the DEFENDANT'S "goods, *&c.*" whereas they were (at the *time of the return*) notoriously the *goods of the* ASSIGNEES when they were *taken*. They certainly might, and ought to have returned "*nulla bona*," which was the truth; for the goods taken were, beyond all manner of doubt, the goods *of the assignees*, at the *time when* the sheriffs *took* them; and the bankrupt *could* have *no* goods after the *4th* of *December*, when he had committed an act of bankruptcy. They would have been justified by the truth of the fact, if they had made this return; for the *bankrupt* neither had nor could have any goods of his *own*, at *that* time. It is arguing in a circle to say "That they could not return "*nulla bona, because* they were obliged to sell; and they "were obliged to sell, *because* they could not return "*nulla bona*."

The *seizure* is here out of the case; for the point of *this* action turns upon the *injurious* CONVERSION.

[34] Therefore we are all of opinion that the plaintiff is entitled to recover in *this* action.

But objections have been made by the gentlemen who have argued this case on behalf of the defendants.

It has been said "That the execution is *entire*; for "the debt is discharged by a seizure in *fi. fa.* That being "entire, if once lawfully begun it *must* be completed; "for goods taken by a *fi. fa.* shall be sold by the repre-"sentative of the sheriff"

"That they shall be sold, though the plaintiff dies; "and the money arising by the sale shall not be recovered "back by the defendant:" which is the case of *Clerk* v. *Withers*, 1 *Salk.* 323. 2 *Ld. Raym.* 1072. S. C. and 6 *Mod.* 290. S. C.

"That a writ of error is no *supersedeas*."

"That the sale by the sheriff shall not be avoided "against the vendee, by a subsequent writ of error and "reversal:" which is the third point in *Matthew Manning's* case in 8 *Co.* 96.

Answer. All this is true, (and upon the plainest reason,) *as between* the plaintiff and defendant, *parties* to the judgment in consequence of which the execution issues; but no way applicable to the case of a *third* person.

None of these cases authorise the *sheriff to sell* the goods of a THIRD *person*: and it is admitted that the *vendee* is not protected here; because, at the time of the sale, the sheriff had no authority to sell.

[He then went minutely through the cases; shewing the grounds upon which the determinations proceeded, as against the *parties* to the judgment, who are *bound* by it, and every thing done in consequence of it.]

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But the argument from these principles to the present case is this: "Here the *taking* was *lawful*, and *therefore* "the sheriff was *bound* to complete the execution by a "sale." Answer. The premises are not true; and if they were, the conclusion would not follow.

The taking was *not lawful*; because they were *then* the goods of a third person.

But if the taking were lawful, the sheriff ought not to go on to a sale, *after* a full discovery that the goods then belonged to a third person. [35]

To prove the taking lawful, and that therefore the sheriffs shall not be liable to an action, were cited the cases of *Bayley v. Bunning*, (*a*) reported in 1 *Leon.* 173, 174. 1 *Sidert.* 272. and 2 *Keble* 32, 33. [*V. ante* 24, 25.] *Lechmere* v. *Thorowgood*, in *Comb.* 123. 1 *Shower*, 12. and 3 *Mod.* 236. [*V. ante* 24, 25.] and *Cole* v. *Davies & al'*, 1 *Ld. Raym.* 724. [*V. ante* 25.]

The fallacy of the argument from the authority of these cases, turns upon using the word "*lawful*" equivocally in two senses.

To *support* the act, it is *not* lawful: but to *excuse* the

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(*a*) The only distinction between the principal case, and that of *Bayley* v. *Bunning*, is, that this was an action of trover, and that an action of trespass; that the former is founded on a tort, and that no man ought to be made criminal by relation that the other is not founded on tort; but that distinction is not only trifling, for the reasons mentioned in the notes, *ante*; but seems also inconsistent with the judgment in the case in *Comp.* 371. where it was adjudged that trover doth not lie against an executor for a conversion in the life of the testator, because it is an action founded on tort, and therefore *moritur cum personâ*: it seems also not consistent with the reasons given by Ld. *Mansfield* in p. 377, of the same case, in delivering the opinion of the court, "there are express "authorities, that trover and conversion does not lie "against the executor where the commission is by the "testator: the form of the plea was decisive, viz. that the "testator was not guilty; and the issue is to try the guilt "of the testator;" after which Ld. *Mansfield* adds, "that "no mischief is done, for an action for money had and re- "ceived may be brought." But *quære?* for no such action was ever brought, the allowing it would be contrary to 5 *Burr.* 2592.

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mistake of the sheriff through unavoidable ignorance, it is lawful. Or, in other words, the relation introduced by the statutes binds the *property*: but men who act innocently, (*a*) at the time, are not made *criminals* by relation; and therefore they are excusable from being punishable by action or indictment as *trespassers*. What they did was innocent, and in *that* sense lawful: but *as a ground* to support a wrongful conversion by sale, after a commission publicly taken out and an actual assignment made, it was *not* lawful.

[Bath 89. Buller, 131. 1 Durn. 479.]

In the case of *Bayley* v. *Bunning*, the goods were clearly *bound by the teste*. It is best reported in *Levinz*. The question referred by the special verdict was upon the TAKING, *viz.* "Whether the party was guilty in the TAKING?" and the court excuse the bailiff for his *innocent executing* his writ. The case of *Philips* v. *Thompson*, in 3 *Levinz*, 192. expressly says, "that this resolution in the case of *Bayley* and *Bunning* was *only in excuse* (*b*) of the *bailiff* for executing the writ."

(*a*) This excuse is nothing, for that being subject to trover is much the same in its effects.

(*b*) The excuse was not confined to its being an excuse in trespass and not in trover; and his excuse would be of no use to him, at least not after the judgment in this case; for then the action would always be trover, in which the same damages would be recovered precisely as if it was trespass, except the attorney should blunder and bring the wrong action: and that is a further reason against the judgment, as it induces distinctions, that tend only to vexation; but the true reason is, that the sheriff ought to be protected in paying obedience to the writ, and ought not to be exposed to the danger of being injured by facts out of his knowledge; and the old cases were so, and the money in the sheriff's hands was by the courts declared to be *in custodia legis*, for which none could give a discharge, but he who was a party to the record. *Cro. Car.* 166, 176. Therefore the assignees or the creditors under the commission ought to move the court, and not bring an action against the sheriff, if he paid the money into court: for that at all events to be his indemnity, and so ought payment to the plaintiff. If before notice of the property, the effect of such notice ought to be nothing more than to oblige them to pay it into court: and this judgment hath had very mischievous effects, not only against sheriffs and their officers; but by exciting creditors to take out commissions, and bring actions founded on acts of bankruptcy, often pretended probably, or if not unknown at the time of the execution, and which would have continued unknown, had there been no execution; for the reasoning

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Siderfin does not seem to know what the court was going upon; for the court tied it up to the *taking*: whereas he does not seem to distinguish between the *trover* and the *trespass*. [*V.* 1 *Siderf.* 272.]

The case of *Lechmere* v. *Thorowgood* is best reported in 1 *Show.* 12. And this report (which is the only clear state of it in any of the reports) puts it *singly* upon the making the officers, who had *good authority* and took the goods *lawfully*, *trespassers* by RELATION.

Denied to be law, 4 Durn. 405.

Comberbach, in giving the JUDGMENT of the Court, [36] which is the only sensible part of his whole report, (for it is plain to me, that he did not understand the *former* argument on the *former* day, which is the first part of his report of the case,) agrees with *Shower*; and says that "the "Court were of opinion that a construction should not "be made, to make the officer a *trespasser by relation*: (*a*) "for the *taking* was *lawful*, *at the time*." But he must be mistaken in the first part of this report: for Lord Ch. Just. *Holt* could never say "That the property of the "goods is vested by the delivery of the *fieri facias*; and "the extent for the king afterwards comes too late." No *inception* of an execution can bar the crown. This matter was lately fully discussed in the Court of Exchequer in the case of the *King* and *Cotton*.

As to the case of *Cole* v. *Davies & al'*, reported in 1 *Ld. Raym.* 724. "That *no* action will lie against the "*sheriff*, who, *after* the bankruptcy, seizes *and sells* the "goods, under a *fieri facias* to him directed;" (which is there said to be ruled by Lord Ch. Just. *Holt* at *Nisi*

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in this case goes that length, and hath had that effect, according to the maxim, *in relatione juris semper est æquitas*, under pretence that all creditors ought to be paid equally: which is true in general, but not when applied against such particular creditors as have used due diligence and been at the expence of recovering their debts, in favour of others, who are allowed by this fiction to defeat the legal proceeding, and recover upon their own oaths before commissioners, equally with those who have taken a legal course, and ought to be reimbursed their costs, by the others who have acquiesced, and ought to do equity, if they will have equity: this holds where there is no direct fraud in the others, which no one can doubt frequently is the case; and to which this judgment gives great encouragement, and even in this case the act of bankruptcy found by the jury, was but one day before the execution was taken out and the goods seized.

(*a*) See 4 *Durn.* 407. and *vide* 412. contra. Qu. 2 *Black.* 1296. *Parker*, 125, and 4 *Durn.* 402.

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Prius, in *Hil.* 10 *Will.* 3.) *These notes were taken in* 10 *W.* 3. *when Lord Raymond was young, as short hints for his own use: but they are too incorrect and inaccurate, to be relied on as authorities.* The note states four general resolutions upon evidence, in a trial at *Nisi Prius*; but does not state the case or question to which the resolutions were applied: (though, by the particularity of the fourth resolution, I conjecture *that* to have been most immediately adapted to the case then in judgment.) The first resolution is an *obiter* reference to the determination in *Bayley* and *Bunning*; and it might not be at all material, to attend to the distinction between trover and trespass. Besides, the case there put is of a sale by the sheriff, *before the commission*; and the conversion might be as excusable as the taking, *because he obeyed the writ:* whereas here, the goods were not *sold* till AFTER *both* commission and assignment. It is a loose note for what was said *obiter:* it manifestly refers to the case of *Bayley* and *Bunning;* but is no authority applicable to the present case.

There are, in the course of trade, numberless acts of bankruptcy *in fact committed*, where no commission is ever taken out. Therefore it would be very hard, to make the sheriff a TRESPASSER for TAKING the goods of a person who might *privately* and *secretly* have committed an act of bankruptcy, and perhaps many *years before* too, and on which no commission might ever afterwards issue; and which the sheriff could not possibly know. But none of these reasons hold, to justify the making a *false return*, and *selling the goods, after* a commission and an assignment.

[37] Arguments have been urged from inconvenience, if the sheriff should be made liable, because he is *obliged* to sell. (*a*)

But the sheriff may take an *indemnity* (*b*) from the

(*a*) The court cannot command the sheriff to take an issue with any person. 21 *H.* 7. *fol.* 9. *a. pl.* 9.

(*b*) *Ld. Raym.* 278, 279. *Lutw.* 686, 687.—And *quære* whether he, (or, which is the same his bailiff,) being shewn the goods and informed by the plaintiff that they were the defendant's, could have refused to levy thereon the execution: it seems reasonable if there was a doubt about the property that he should have an indemnity. AND *quære*, if the plaintiff would not give it, whether he might not shew it for cause for not returning the writ? For as he was shewn the goods, it seems he could not lawfully return *nulla bona*, but he might sue out a writ *de proprietate probanda*, and take an inquisition thereon and act accordingly; and that seems to be the proper way for

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plaintiff, in case there be a doubt concerning the property of the goods, Possibly, *this Court* might interfere, if the sheriff was reasonably doubtful about the property; at least, they would have given him *time* to make his return: or he might have put it on the parties concerned in interest to litigate their right, by filing a bill in Chancery against them, to oblige them to interplead, in order to *ascertain to whom* the property belonged. Or he might *oblige* the assignees to prove the act of bankruptcy, and the assignment.

And notwithstanding what has been urged as to the hardships that sheriffs will be under, there can hardly a case exist where there will be any hardship upon the sheriff, where the taking *and* sale, or even the *sale only*, are SUBSEQUENT *to the assignment*; but in the present case, the sheriffs *knew* of the bankruptcy *before they sold* the goods.

There are much *greater* hardships upon *other third* persons (*a*) concerned in pecuniary transactions with bankrupts; which hardships they are nevertheless left subject to, because it was necessary that they should be so, in order to secure the *end* and intention of the acts relating to bankrupts: namely, the securing their effects for the equal satisfaction of their creditors.

The commission and assignment are both *notorious* transactions; so that a sheriff cannot well be hurt by being left liable to this action: whereas there would be danger, if it were otherwise, of great collusion being practised by sheriffs, on these occasions; which might be encouraged by a contrary resolution. The *seizure* here is after the act of bankruptcy committed, and therefore after the property by relation is vested in the assignees: but *that* was *innocent* and *excusable*; and the sheriff shall *not* be *liable by relation* as a WRONG-*doer*. The gist of *this* action is the *wrongful* CONVERSION by the *sale* and *false return*, long *after* the commission and *assignment*. [Qu. Bath. 39. 12 Mod. 324.]

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him to avoid the dilemma of being subject to an action for a false return by the plaintiff, in case he should return *nulla bona*, and the goods should appear to be the defendant's; or an action by the owner of the goods, in case he should levy them, and they should not prove to be the defendant's goods.

(*a*) Though voluntary payments are not protected, yet payments enforced by coercion of law are valid against the assignees, in case any commission should afterwards be taken out. 2 *Durn.* 479. *n.*

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Therefore, *per Cur.* unanimously. The action is maintainable, in *this* case, against the defendants; and there must be judgment for the plaintiffs.

Judgment for the plaintiffs.(*a*)

[38]

ROBINSON *versus* ROBINSON.

This was a case out of Chancery, on a will. (*b*)

Devise of all the testator's real estate (except that at E.) and of the perpetuity of his presentations to L. H. for his life, and no longer, provided he take the name of the testator, and live at his house at B.; and afte his decease, to such son as he shall have lawfully begotten, taking the name of R., and for default of such issue, then to W. R. in fee; is, an estate in tail male in L. H. (he and the heirs of his body taking the name of R.) in order to effectuate the general intent of the testator, notwithstanding the express estate devised to L. H. for life and no longer.

[S. C. 17 vol. of Cas. in Dom. Proc. p. 139. 3 Atk 736. 2 Ves. 225. 231. Qu Cases in the time of Lord Talbot, 262. Comyns, 289. Viner, Devise Y. (a) p. 233,234. 1 Atk. 432. 1 Bos. 217.]

ON the 27th of *July* 1723, *George Robinson, of Bochym*, in the county of *Cornwall*, Esq. duly made his will, and, after giving his wife one guinea, and his father-in-law a groat, he devised as follows:—"I bequeath ALL *my real* "*estate* (excepting my estate in the parish of *Endellyon*, "late Mr. *Newman's*, and all my presentations in the said "county), to *Lancelot Hicks*, of *Plymouth*, in the county "of *Devon*, gentleman, for and during the term of his "natural life, AND NO LONGER; provided (*c*) that he al-"ter his name, and take that of *Robinson*, and live at my "house of *Bochym*; and after his decease, to SUCH *son* as "he shall have, lawfully to be begotten, taking the name

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(*a*) This judgment is against a former solemn determination in 1 *Lev.* 173, and is in other respects new; and many suits have followed therefrom. See *Doug.* 244.

(*b*) This case has been often recognized, and very strongly in 1 *East.* 235. 2 *Wils.* 324; see also 5 *Durn.* 303, 323. 6 *Durn.* 513. 8 *Durn.* 7. 7 *Durn.* 533. 2 *Ves. jun.* 708. 4 *Durn.* 87, *ac.* 3 *East.* 550. 5 *East.* 202, 551. 1 *East*, 235. 2 *Brown*, 573. 4 *Vez.* 304. *Doug.* 415. 4 *Durn.* 49. 2 *Bos. and Pul.* 489. 3 *Brown*, 414. 1 *Brown*, 249. 3 *Burr.* 1633. S. C. also cited in the appellant's second reason in his printed case, *Chapman*, lessee of *Oliver, and others* v. *Brown and others, Feb.* 1767, in *Dom. Proc.* 2 *Wils.* 88. 322. See also 3 *Bosan.* 623. The principle is this, that where there are *two intents*, one general, and the other particular, if both cannot take effect, the general intent shall prevail. *Wilmot*, 272.

(*c*) *Lucas* 402, 10 MS. 344. *Vin.* Devise, p. 233. 3 *Burr.* 1574, 1580, 1633. 1 *Vent.* 231. *non aliter.* See also 1 *Vent.* 232. 2 *Harg. Arg.* 371.

Qu. *Et vide* 8 *Vin.* 184. *Ambler* 355, 3. And as to general and particular intents, see *Park.* 31. and 2 *Vez.* 195.

" of *Robinson:* and for default of SUCH *issue*, (*a*) then I be- 1756.
" queath the same to my cousin [the defendant] *William* ROBINSON
" *Robinson*, rector of *Laudewedneck*, and his heirs for v.
" ever." (*b*) ROBINSON.

" *Item.* My will and desire is, that *he* [meaning *Wil-*
" *liam R.* rector of *Laudewedneck*] have liberty to present
" whom he pleases to any vacancy that shall happen in
" any of my presentations, during his life; and in case any
" of his children shall take or be designed for holy orders,
" then it is my desire that in case of any vacancy in either
" of my presentations, that bonds of resignation be taken,
" to such child or children, if the vacancy happen before
" he or they attain such orders: and after the same shall
" be disposed of as aforesaid, then I give *the* PERPETUITY
" *of the said presentations*, to the said Mr. *Lancelot Hicks*,
" in the *same manner*, and to the *same uses* as I have given
" my estate."

And after bequeathing some legacies, he gave all the rest of his goods and chattels together with his estate at *Endellyon*, to his said kinsman *William Robinson*, and made him sole executor.

This *William Robinson* was heir at law to the testator.

On the 30th *September* 1728, the testator died without issue; leaving the said *William Robinson* his heir at law.

Lancelot Hicks was then living, and took the name of *Robinson;* and *after* the testator's death had two sons; *George*, his eldest; and the plaintiff *Edmund* (both of them born after the testator's death.) *Lancelot Hicks* entered upon the estate, and lived at the testator's house at *Bochym:* and his *eldest* son *George* was called by the name of *Robinson*, and DIED *in March* 1738, an infant; in the life-time of the said *Lancelot Hicks*, his father, and of the plaintiff, his younger brother. [39]

Lancelot Hicks, alias Robinson, died in *July* 1745, leaving the plaintiff *Edmund Hicks, alias Robinson*, his only SURVIVING son, an infant; who brought his bill in chancery to have a conveyance. [See 2 Vern. 490.]

Short state of the case.—The title of the plaintiff ap-

(*a*) *Blackstone*, when of counsel, said the determination in this case went clearly upon the words *default of such* issue, which overpowered the words *and no longer*, in the devise to *Lancelot Hicks*, 1 *Black.* 505.; but qu.? as observed, *post.* 47. if one son only could take, it does not follow of course, that the words, *and for default of such issue*, are restrained to such one son only.

(*b*) No difference between this and 3 *Lev.* 442.

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pears to be stated thus—That *Lancelot Hicks* took the estate and complied with the condition; and then had two sons born; the *eldest* son died an infant, *in his life-time*. Then *Lancelot* himself died; on whose death *William Robinson* claims the estate; the *first* devise "to "the *son* of the body of *Lancelot*," being already SATISFIED by the BIRTH and DEATH of *George Lancelot's eldest* son, as the claimant supposes.

Question. "*Whether* ANY, *and* WHAT *estate or interest* "is vested in the plaintiff *Edmund Robinson*, the infant, "(*Lancelot's* second son,) by virtue of the said will?"

This case was thrice argued: 1st, in *P.* 26 *G.* 2. on 15th *May* 1753, by Mr. *Pratt* for the plaintiff, and Mr. *Yorke* for the defendant; again, in *P.* 29 *G.* 2. on 14th *May* 1756, by Mr. *Norton* for the plaintiff, and Sir *Antony Abdy* for the defendant; and lastly, in *M.* 30 *G.* 2. on 23d *November* 1756, by Sir *Richard Lloyd* for the plaintiff, and Mr. *Perrot* for the defendant.

Argument for the plaintiff.

For the plaintiff (*Edmund Robinson*) it was urged that the testator certainly *meant* to give an estate-tail to Mr. *Lancelot Hicks* and *all* his issue: and the INTENTION *shall prevail where it may. Ow.* 29. *Cosen's* case. *Cro. Jac.* 448. *King* v. *Rumball. Doe ex dimiss. Barnard* v. *Reason, Tr.* 28 *G.* 2. *B. R.* That the estate to *Lancelot Hicks* was *intended* to be an estate TAIL; but, at least, here is either an estate in *fee*, or for *life*, in his SON, the plaintiff.

As to the condition, "to take the name of *Robinson*," the estate must *first* VEST, before the condition can be performed.

This is a condition *subsequent*: as appear by *Plowd.* 23. *Colthirst* v. *Beiushin*: and therefore has nothing to do with the *vesting* of the estate. *Cases in Chancery in Lord Talbot's time*, 166. Sir *John Robinson* v. *Comyns*. "No "particular technical words are requisite to make either "precedent or subsequent condition." And it was holden by the Lord Chancellor, in the case of *Trafford & Ux'* v. Sir *Ralph Ashton & al'*, 2 *Vern.* 661. that this clause in a will, "taking on him the name and arms of *Vavasor*," was a condition *subsequent*, to defeat the estate; and NOT *precedent*. Therefore they should lay this condition out of the case.

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And then the simple limitation will stand thus: it will be to *Lancelot Hicks* for life; remainder to SUCH SON *as he shall have, lawfully, &c.*; remainder (for default of *such* issue) to the testator's cousin *William Robinson* in fee. This is the *simple* limitation, putting the condition subsequent out of the case.

First point.

And this is intended to be an estate *tail* in *Lancelot Hicks*.

It may be objected, that this cannot be an estate tail in

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Lancelot, because here are *no words of limitation*; for that the word "son" is a word of *purchase not of limitation*, even if it was in the plural; and that here "son" is in the *singular* number, ("and to such SON as he shall have lawfully begotten;") which, it may be urged, cannot be considered otherwise than as a word of purchase.

Another objection may be raised, because it is limited to *Lancelot Hicks* himself for *his life*, "*and* NO *longer*:" and therefore it may be urged that the court cannot raise an estate tail by *implication*, contrary to these *negative* words.

But 1st, the word "*son*" must here be taken as a word of LIMITATION: because otherwise it would not be agreeable to the testator's *manifest intention*, "that the "*issue* of such son should have it afterwards, and that *William Robinson* should not take, *till* the issue of *Lancelot* "*Hicks* should be *all* of them extinct."

The *change of name* shews that the *intention* of the testator extended to the *whole family* of the *Hicks's*. So do the words "*lawfully to be begotten*:" which words properly belong to estates tail. So, "for *default of such* "*issue*."

The words will *bear* this construction. They are, "To *such* son as he shall have, lawfully to be begotten;" *i. e.* lawfully issuing from his body.

"*Son*" is *here* nomen COLLECTIVUM. *King* v. *Melling* is in point; (*a*) and so is *Byfield's* case there cited (1 *Ventr.* 231.) and many other cases there cited. (*b*)

So that *William Robinson* was not to have it, TILL *Lancelot Hicks* should be dead *without* ANY *issue*. (*c*)

2dly, As to the words "for life, *and* NO *longer*:" there had been no difficulty or impediment, if the latter words "*and no longer*," had not been added. 1 *Ld. Raym.* 203. *Luddington* v. *Kime*. 1 *Peere Wms.* 605. *Blackborn* v. *Hewer Edgely*. 9 *Co.* 127. *b. Sunday's* case. [41]

And yet they have really no force at all in them, beyond the former words: they are certainly tautologous, and have no additional effect. An estate for life was given by the former words: and such an estate can last no longer than that life lasts.

(*a*) Not so exactly; but very like in 1 *Vent.* 233.

(*b*) It appears that this case of *King* v. *Melling* was much relied on in the argument of this case; but Ld. *Raym.* 2 *Str.* 804. in delivering the opinion of the court, said, that case appears to have been ruled with great difficulty; and *Hale* himself was of two opinions, but that it must now be taken to be law.

(*c*) It should be "son."

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In *Archer's* case, 1 *Rep.* 66. *b.* it was ruled to be an estate for life in *Robert Archer*; because it was an *express* estate for life, devised to him. But tautology does not make it MORE *express*.

1 *Ro. Abr.* * 837, is in point, contrary to what my Lord Ch. J. *Hale* is reported in 1 *Ventris* 231. in the case of *King* v. *Melling*, to have said. He there cites from *Rolle* 839. (as that report says) the case of a devise "to "the testator's eldest son for life, *& non aliter*;" (for so, says he, were the words, though not printed in the book;) "and after his decease, to the sons of his body." This, says my Ld. Ch. J. *Hale*, was but an estate for life, *by reason* of the words "NON ALITER."

* Note; this case is cited in 1 Ventr. 231. as from Rolle 839. but that is a mistake of the page; for it is really in 1 Ro. Abr. title Estate. letter P. page 837. pl. 13. [S. C. 8 Vin. 212. pl. 13.]

But the *true* reason of the determination of that case in *Rolle's Abridgement*, appears from what *Levinz* says in his own argument of *King* v. *Melling*. [*V.* 2 *Lev.* 58, 59.] For *Coleman*, who argued "that *Bernard* took only "for life," had cited that case from *Rolle* as an authority on his side. *Levinz*, *contra*, argued that *Bernard* took an estate tail. And in answering the cases cited against him, he says, "And as to the case 1 *Rol.* it there appeared, "the *devisor's intent* was, that the father should be only "tenant for life, the estate tail to the son: *for* that the "*clause to restrain alienation* is added *only* to the estate "of the *son*." So that if this was not a mistake of the reporter, it is, at the most, but an extrajudicial opinion of a single judge, and not the point of the case then under consideration. Therefore *that* could not be the principle of law upon which that case was determined: it must have been a *regard* to the *intention* of the testator; and the particular words must have been considered as a *key* to that intention. And the same observation will hold with regard to the cases of *Loddington* v. *Kime*, *Backhouse* v. *Wells*, *Lomax* v. *Homeden*, *Plunket* v. *Holmes*, and *Shaw* v. *Weigh*; and will serve to reconcile them.

The true rule is, that where the issue cannot take an estate tail, without taking it *through* the father, the father
[42] shall have an estate tail: otherwise not. *Archer's* case, 1 *Rep.* 66. Where the estate is given over. *Cro. Eliz.* 313. *Clerk* v. *Day*. 1 *Ro. Abr.* 139. letter U. *pl.* 4. S. C.

Backhouse v. *Wells*, in *Equity Cases Abr.* 184. *pl.* 27. in *Trin.* 11 *Ann. B. R.* "devise to *J. B.* for *his life* ONLY, "without impeachment of waste." *J. B.* was *not* MEANT to be tenant in tail. [See *Fortescue's Reports* 133. and *Lucas* 181. S. C.]

Langley v. *Baldwin* is, in *Equity Cases Abr.* 185. *pl.* 29. said to have been certified to be an estate for *life only*. (*a*)

(*a*) It is not so said in either of *Hill's* editions, which are the 3d and 4th of *Eq. C. Ab.* but on the contrary it is said

But this is a mistake: for it was certified [and so it appears, as Lord *Mansfield* said, by the register's book,] to be an estate tail. 1756. ROBINSON v. ROBINSON.

However, the principle of that determination was, *to* pursue the testator's intention: which was "that it should "go to *all* the children of his grandson."

Loddington v. *Kime*, 3 *Lev.* 432. 1 *Ld. Raym.* 203. was an estate devised to the *issue of* the issue male. So no violence done to the intention, by construing the *first* estate to be an estate for life.

Shaw v. *Weigh*, *P.* 1 *G.* 2. *B. R.* reversed *in Dom' Proc.*: and determined to be an estate tail. [See *Modern Cases in Law and Equity*, 252, 389. *Fitz-Gibbons*, 7. and *Parliament Cases* of *April* 1720, and *Fortescue's Reports*, 58.]

Be the circumstances as they may, yet the testator [1 East, 229.] plainly means, *not merely* an estate for life to *Lancelot Hicks*; but he *also* means to give an estate *tail to the Hicks* FAMILY. Therefore let the intention of a life-estate be ever so strong, yet the court will construe his plain and clear *intention for the benefit of the* FAMILY, to prevail.

2dly, But if it be not construed an estate *tail*, but "*son*" be considered as a word of *purchase*; then these questions will arise; 1st, WHO shall be the taker? 2dly, At WHAT TIME? 3dly, WHAT ESTATE? Second point.

1st, The present case *was* indeed uncertain *at the creation*; though *rendered certain*, by the event. And perhaps it was not a *vested* remainder; from the uncertainty who should take.

2dly, But supposing it to be a *contingent* remainder, yet the original uncertainty was removed within sufficient time. The limitation over seems to confine it to the time of the father's death: and *then* the plaintiff *Edmund was the* ONLY *son*. And the contingent remainder vests time enough, if it vest *then*. [43]

3dly, It is a devise of all his real estate, except that at *Endellyon*; which alone will pass the fee-simple. 6 *Mod.* 109. *Countess of Bridgwater* v. *Duke of Bolton*. 1 *Salk.* 236. S. C. *Scott* v. *Alberry*. *Comyns* 337, 340. *Ibbetson* v. *Beckwith*, reported by Mr. *Forrester*, in his *Cases in Equity*, *pa.* 157.

And the exception shews that he did not mean the *rest* to go to his heir at law.

The testator plainly meant it to be a *fee*: he would never

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to have been certified, and also decreed an estate-tail; and there is a reason added there (as said by Lord *Raymond*, C. J.) because the devise was not to all the sons, but only to the sixth son, and then a devise over if the father should die without issue male.

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oblige the devisee to part with his family name, and take his *name*, only for an estate for *life*.

Then he gives the *perpetuity* of all presentations in the same manner as he had given his estate: which must mean A PERPETUITY in *both*; and consequently proves him to have *meant a* FEE in the land.

And the limitation over proves the same, *viz.* "That "*William Robinson* was never to take, *but* on *L. Hicks's* "*dying* WITHOUT ISSUE."(*a*) However, if this was not a devise of a fee, it must then be an estate *tail*. 1 *Ventr.* 225. *to* 232. *King* v. *Melling*. *Moore*, 397. *pl.* 15. 1 *Anderson*, 43. No. 110. S. C. *Bendloe*, 30. *pl.* 124. S. C.

But it is at least an estate *for life*: otherwise, all this part of the will must be rejected.

Argument for the defendant.

The counsel for the defendant *William Robinson* made two questions—First, what estate is devised to *Lancelot Hicks*, the father of the plaintiff; *viz.* Whether for *life*, or in *tail*?

Secondly, If for *life*; then whether the contingent remainder is to *vest* UPON *the birth of a son, during* the life of *Lancelot Hicks* the father; (which, if it be so, has been *satisfied* by the birth of *George Hicks* the son;) or whether it vested ON *the* DEATH *of the father*, in his THEN eldest son? (which *then* eldest son is the now plaintiff.)

They laid out of the case—

1st, The words of condition annexed to the estate of the father; conceding that they were conditions *subsequent*, to defeat the estate, and not precedent, to hinder it from vesting.

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2dly, The *son's* taking the name: for they allowed that the construction of the words, *as* to the *son*, must be the *same* as of those relating to the *father*.

But they considered as material—

1st question.

1st, Whether the estate to *Lancelot Hicks* be an estate for *life* or in *tail*? Which they subdivided into two other questions; *viz.*

[2 Brown, 573.]

First, "Whether the Court CAN *raise* an estate *tail*

(*a*) The words are, "and for default of such issue;" and therefore there is no ground in reason or authority to raise a larger estate by implication in *L. H.* than was before expressly and in negative terms devised to him: the word SUCH refers to the precedent devise to the son; and the words *for default of such issue*, are used only to connect the subsequent devises with those that are precedent; and for authorities hereon, see *Forrest.* 262, 267. 1 *Bulst.* 163. 1 *Wms.* 605. So that this case though adjudged in *B. R.* and affirmed in *Dom. Proc.* seems not consistent with former cases.

" *by* IMPLICATION, *at all*, in *this case*; this being an " EXPRESS estate for life, and even confirmed by *negative* " *words*?" 1756. ROBINSON v. ROBINSON.

Secondly, " Whether the Court can raise an estate tail " *by implication, upon* EITHER *of these expressions; viz.* " After his decease, to such SON as he shall have;" or, " and for default of *such* issue?"

First—In the case of *King* v. *Melling*, Lord Ch. Just. *Hale* was the first great judge who put the cases together to raise an estate tail *by implication*. But succeeding judges differed from him: and in the case of *Luddington* v. *Kime*, in 1 *Ld. Raym.* 204, Mr. Just. *Powell* argued against Lord *Hale's* opinion; Ch. Just. *Treby* agreeing with Lord Ch. Just. *Hale*.

In 1 *Peere Wms.* 605. *Blackborn* v. *Hexer Edgely, et e contra*, Lord Chancellor *Parker* explodes that opinion, " that words of implication should *not* turn an express " estate for life into an estate tail:" and says " That " a devise to *A.* for life; and after his death without issue; then to *B.*, *will* give an estate tail to *A.*" *Yet* this construction would be directly contrary to the words of the testator.

But the present case is within Lord Ch. Just. *Hale's* distinctions. He says that " *non aliter*" is sufficient to make it an estate for life *only; viz.* where the devise is, " to *A.* for life, *& non aliter.*" 1 *Ventr.* 231.

In *Backhouse* v. *Wells*, *Fortescue* differs from Lord *Raymond* in the account of it; and lays stress upon the word " *only*," as being explanatory and restrictive in a doubtful case, [See *Backhouse* v. *Wells* reported by *Lucas*, *fo.* 181. and *Fortescue* 181. and cited in 2 *Ld. Raym.* 1439, 40.] And in *Bagshaw* v. *Spencer*, Lord Chancellor said it was determined upon the word " *only*," in that case of *Backhouse* v. *Wells*.

In *Bamfield* v. *Popham*, 1 *Peere Wms.* 54, 55. Lord Ch. [45] Just. *Trevor* reasons against Lord Ch. Just. *Hale*. So also does Mr. Just. *Powell*, in the same case, *fo.* 57. And surely nothing can be stronger than *express* words, *with* NEGATIVE *ones* ADDED *to them*. And they shall not be rejected; according to 2 *Bulstr.* 176. *Mirrill* v. *Nicholls*, and 2 *Peere Wms.* 282. *Barker* v. *Giles*. *Plowden*, 523.

In the case of *Humphry* v. *Taylor*, 5th *February* 1752, the Court of Chancery held resulting trusts to be rebutted by negative words.

Goodtitle ex dimiss. Cross v. *Wadhold*, *Mich.* 19 *G.* 2. *C. B.* was a devise to the testator's eldest son, ONLY *for life*, and in the case of *failure of issue*, *&c.* it shall descend and come to his (the testator's) male children, *&c.* And they held this to be an estate for LIFE ONLY; because, being expressed to be given for life *only*, with *negative* words, it

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could not be *enlarged by implication:* and Lord *Hale's* opinion, in the case of *King* v. *Melling*, and the determination in *Backhouse* v. *Wells*, were there relied on by the Court of Common Pleas.

2d subdivision of the first point, *viz.* Whether the Court can raise an estate tail by implication, *upon either of these expressions, viz.* "After his decease, to such *son* "as he shall have," or, "and for default of *such* issue?"

And they argued that they could *not*. For,

First the word "*son*" must be taken as a word of PURCHASE: "and from and after his decease, to such *son* as "he shall have, lawfully to be begotten." "*Son*" is here a word of *purchase;* whether it be taken singularly or collectively.

If ONE *son* ONLY be meant, then the words "for de- "fault of *such issue*," *refer* TO SUCH *son*, taking an estate for life. And the word "*son*" is *singular;* not collective, *here*. He might have used the terms "heir," "heir male," &c. 1 *Ventr.* 230. *Burley's* case, there cited; where the remainder is limited to the next heir male. *Miller* v. *Segrave, M.* 10 *G.* 1. *B. R.* cited in *Robinson's Treatise of Gavelkind*, 96. The remainder was "to the next *heir* "male:" (which case was cited to shew the construction of the word "*heir*," in the singular number.)

In *Trollop* v. *Trollop*, in *C. B.* (*V. Robinson on Gavelkind*, 96.) *Eyre* argued against the opinion of Lord *Coke* in the case of *Clerk* v. *Day*, *Moore*, 593. (the best report of that case.)

[46] They cited 2 *Ventr.* 311. *Burchet* v. *Durdant*, only to shew that no application can be made of those cases to the present.

2d branch of this 2d subdivision, *viz.* as to the word "*issue.*"

This word, taken *technically*, is indeed a word of *purchase*.

King v. *Melling* was the first case where it was holden to operate as a word of *limitation in a* WILL.

The word "*children*" is less operative than the word "*issue.*" Each of these is a *nomen collectivum:* but "*son*" is *designatio personæ;* unless other words explain it. 1 *Ro. Abr.* 837. letter P. *pl.* 12, 13.

[Hut. 41.] As to *Byfield's* case, mentioned only in Lord Ch. Just. *Hale's* argument in 1 *Ventr.* 231. and in no other book—It comes the nearest to the present case, of any other cited on the part of the plaintiff. The word "*son*" was there holden *to be nomen collectivum*. But there was no EXPRESS devise to the son: it is a devise to *A.*: "and if he dies, *not* "*having a son*, then to remain, &c." Whereas here the words are, "*to such son* as he shall have, lawfully issuing "from his body."

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But if "son" be taken as a word of purchase—it is asked WHAT *son* is meant? And *what estate?*

Answer. It can mean *but* ONE SON: The sons of *Lancelot Hicks* could not *all* take as tenants in tail, or as joint-tenants. In the case of *Luddington* v. *Kime*, 1 *Ld. Raym.* 206. Lord Ch. Just. *Treby* is very express on this head, "that if it had been the word *son*, it had been "without controversy."

2 *Leon.* 35. *Leonard Lovelace*'s case, [*Cro. Eliz.* 40. S. C. *Savile*, 75. S. C.] and *Moore*, 371. S. C. cited, is very strong to the same effect. Devise to *A.* and to his *eldest* issue male *de corpore suo exeunti*; (or "*seniori exitui mas-culo suo*," according to *Moore*:) it is only an estate for life in *A.* remainder to his *eldest* son, &c. for life.

In Canc': In another part of this very (present) case, on this very will, 17th *April* 1733, Sir *Joseph Jekyll* held *Lancelot Hicks* to be entitled to an estate for life; remainder to his eldest (and but one) son for life; remainder to *William Robinson*, the devisee over. This cause was between the widow of the devisor, and *Lancelot*, the first devisee. And the deeds were brought *into court:* [47] whereas they must have been delivered to *Lancelot*, if he had been tenant in tail. In 1734, Lord *Talbot*, on a rehearing, was of the same opinion. And we cite it for *their* opinions only: we do not say that the present plaintiff is *bound* by this decree.

Then *if* ONE SON *only* could take, it follows, of course, that the words "and for default of *such issue*," are *restrained to* SUCH *one son* ONLY.

And as to the estate, it is only an estate for *life*, in that *one* son: for here are *no words of limitation*, at all.

As to the arguments drawn from the *advowsons*, and the obligation to take the *name* of the testator.—The *advowsons* are given for the benefit of any of *Lancelot*'s children that should go into orders: and then the testator gives the *perpetuity* of them to *Lancelot Hicks for his life*; and afterwards, to *such son* as he shall have lawfully issuing from his body. Now it can never be supposed that the testator meant to give *Lancelot* a fee in the land; *because* he gives him the perpetuity of the livings. And the *latter* devise shall be construed by and agreeable to the *former*: Consequently, neither did he mean to give *Lancelot's* son a fee, *because* he gave him the perpetuity of the livings.

As to taking the *name*—no case has been determined, on *that* point. And *Lancelot Hicks* is here enjoined to take the name of *Robinson*; though the estate is expressly given to him "for life, and no longer."

By Mr. *Shepheard* of *Cambridgeshire*'s will, the name of *Shepheard* is to be taken by the tenant *for life*. The case of *Ibbetson* v. *Beckwith*, reported in Mr. *Forrester*'s

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Cases, p. 157, was a devise to testator's mother for life; after which to his nephew *Tho. Dodson*, IF he will take his name of *Beckwith*; if not, only 20l. Lord *Talbot* thought *that* alone to be *too slight* a ground for a construction "that it should be a fee to *Tho. Dodson*."

In order to make it an *estate tail*, the expression ought to be *such* as will put it BEYOND *all possibility of doubt*: according to the cases of *Langley* v. *Baldwin*, *Shaw* v. *Weigh*, and *Bamfield* v. *Popham*.

The case of *Coulson* v. *Coulson*, 2 *Str.* 1125, was *by way of* REMAINDER; not by giving the father an estate tail; and is distinguishable from *all* those that have been mentioned.

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Second question (made by the defendant's counsel.)

The next question is, "*when* the remainder shall vest?" *viz.* whether this contingent remainder in the son is to *vest* upon the *birth* of a son, during the life of *Lancelot Hicks*; or not till *upon* or *after the death of Lancelot Hicks*, (the father.) [*V. ante*, p. 43.]

"After the decease of *Lancelot Hicks*," (the father) are the words of the will. Which can suspend it *no longer* than till the *birth* of his FIRST *son*: for, here are no words to lead to a contrary determination.

It must vest, either before the immediate estate ceases, or *eo instante* that it does cease. *Hutton*, 119. *Napper* v. *Sanders*. *Chancery Cases*, 33. *Sackville* v. *Lockwood*.

Swinburn, *part* 7. *c.* 11. proves, "that the words shall "*not* relate to the time of the *testator's* DEATH; but to "the time of MAKING *the will*." And at that time *Lancelot Hicks* had *no* son; nay, nor even at the time of the *testator's death*. A contingent remainder must take effect as soon as any person is born, who comes within the description: it can remain no longer contingent. Therefore *it here* VESTED *by the* BIRTH *of a son*; *and was* THEN *and* THEREBY SATISFIED: the estate for life vested in him, on his birth; and ceased with him, on his death: and then went over to the defendant *William Robinson*, the devisee over.

Indeed the son *might* have been born between the making the will and the death of the testator: and have died before the testator. *Thrustout* v. *Peak & al*, 1 *Strange* 12. And so, in the case of *Lomax* v. *Holmden*, 2 *July* 1749, *in Canc*. A son was born and died in the life-time of the testator. But here, the testator died *before* either of *Lancelot Hicks's* sons was born. Here the elder brother (*George*) was the first who could take, after the death of the testator.

And as to the intention of the testator—it is out of the present case: for the INTENTION *of the testator* CANNOT be pursued by ANY construction upon *this* will, *without straining the rules of law*.

Therefore the plaintiff can take nothing by it. 1756.

The plaintiff's counsel replied, that the word "*son*" ROBINSON is here a word of *limitation*. v.

Some words are words of purchase: and may, by *circumstances*, be turned into words of limitation: others are, *primâ facie*, words of limitation; and may, *by circumstances*, be *turned into* words of purchase. The words "son, children, issue, and heir," in a will, where no son is in being at the time of the devise, are *nomina collectiva*, and sufficient (in a will) to create an estate of inheritance. ROBINSON. Reply. [49]

Now, *here* ARE *such circumstances* as shall determine the word "*son*" to be, HERE in this will, a word of *limitation*.

The case of *Taylor* v. *Sayer*, 41 *Eliz.* is not law: Lord Ch. Justice *Hale* says, "it is too rank." [1 *Ventr.* 220.]

They agreed to the case of *Trollop* v. *Trollop*; as the words stand singly there: but alledged the rule to be, "that the INTENTION of the testator shall *fix the construction* of such words, as MAY be construed *either* as "words of limitation, *or* of purchase."

And if this word "son" be a word of *limitation*, then what hinders this from being an *estate tail*? And they insisted that this was so. And they said that though here was a necessary implication, yet they needed not to rely singly on its being an estate-tail by IMPLICATION: For here is even an EXPRESS *estate tail* devised.

In the case of *Shaw* v. *Weigh*, the intention was plain. But the *apparent intention* "to *give an estate tail* to the "issue," over-ruled it. And this is the last case, in point of time.

In the case of *Backhouse* v. *Wells* it is not agreed, *which* of the two expressions the court went upon: *viz.* "*without impeachment* of waste;" or "for his natural life "*only*."

Therefore they concluded that the plaintiff is entitled to an estate tail, in the present case.

2dly. The son must be *such* a son as could *take*.

They said, they never contended, that the sons should take as joint-tenants, or tenants in common: They were to take *in succession*.

The word "*son*" may be here enlarged into "*issue*." It does not at all appear that the testator meant *Launcelot's eldest* son, and his *eldest son* ONLY: On the contrary, his intention appears to be the ISSUE MALE of *Launcelot*, *generally*.

And the cases cited by the other side do not prove their point. For, in 2 *Leon.* 35. *Leonard Lovelace's* case, the word "*eldest*" was expressly added to the words [50] "*issue male*;" (the devise being to the father, and to his

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"eldest issue male:") so that it was the same as "eldest "*son*;" and it better answered the testator's purpose, that the children of this devisee should take as *purchasers*.

As to the determination said to have been made in 1733 and 1734, of this point, *upon this same will*, by Sir *Joseph Jekyll*, and Lord Chancellor *Talbot*; the widow of the testator there claimed *paramount* the will; she brought a bill to establish her jointure: and there was indeed a cross cause. But *non constat, what Lancelot claimed*; nor does it appear how it was defended. However, it is plain, that the *present* Lord Chancellor does *not* rest satisfied with these opinions: Because *he* has sent it hither for the opinion of *this* court.

The words, "such son" must let in *all* sons; and cannot exclude ALL *sons* BUT the eldest. It was a contingent remainder, that the court will keep open, till there is a necessity to determine it. And there is no need to determine it, (for there is no need that the remainder should vest,) TILL *the death* of the tenant for life: *then* indeed it must vest, *eo instante*.

In *Hutton*, 119. and in *Chancery Cases*, 33, it *was* an *eldest* son: whereas here it is not necessarily an *originally eldest* son; but may be any *other* son, who BECOMES *eldest* before the contingent remainder vests.

ALL the sons of *Lancelot* could *not* take, *unless* the father took first: a *posthumous* son certainly could not.

As to the contingent remainder vesting—it is *enough* if it vested *eo instante* that the particular estate determined.

And as to the devise of the *perpetuity* of the advowsons, the latter devise is not to be construed *by the former*: but both the former and the latter words are to be taken *together*, and a reasonable construction made upon them, agreeable to the general intention of the testator.

Upon the whole, this is an estate either in *fee*, or in *tail*; or at lowest, for *life*.

The JUDGES OF THIS COURT, on the 1st of *December* 1756, unanimously CERTIFIED to the court of Chancery, in the words following:

[2 Ves. 186. 4 Burr. 2162. Vaugh. 262. Qu. Salk. 238. pl. 17. 14 Vin. 341. pl. 4. and 5 Vin. Devise (A. B. Q.) 1 Wms. 605.]

"We are of opinion, that, upon the true construction "of the said will of the testator *George Robinson*, the said "*Lancelot Hicks* must, by *necessary implication*, to *effec*- "*tuate* the *manifest general intent* of the said testator, "construed to take an estate in *tail male*, he and "the heirs of his body taking the name of *Robinson*; "NOTWITHSTANDING *the* EXPRESS estate devised to the "said *Lancelot Hicks* "for his LIFE and NO LONGER."

[51]

Note; The course has always been, for the judges not to give any *reasons in court*, upon a case sent out of Chancery for their opinion. But the above cer-

tificate seems carefully penned, to mark the grounds upon which it was founded. 1756.

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The estate tail is said to vest in *Lancelot Hicks*, the father. The *manifest intent* of the testator, expressed by his will, was, that the estate should *not* go over to his *heir at law*, till failure of issue male of *Lancelot Hicks*.

The difficulty was, how to mould an estate *agreeable to the rules of law*, to effectuate the testator's intent; and to construe his sense and meaning into *apt* words of *limitation*.

If the father could have taken an estate for life, and the sons successively an estate in tail male, the whole intention of the testator would have been *better* answered: for, by *such* construction, *all* the words in the will would have received their natural sense and meaning, *without rejecting* any words, and none should be rejected, *unless* the testator's intent cannot be otherwise attained. But THAT could *not* be, by law. An estate to the heirs male of the body of *Lancelot Hicks*, is *implied*, though an estate for life only is *given* to him; because the testator's heir was not to take, *till failure* of such heirs male. But by law the testator could, by *no* words, have made the father tenant for life, and the heirs male of his body *purchasers*. [Vaugh. 264.]

If he had devised "to the father for life, remainder to "the son for life, remainder to the heirs male of the "body of the father;" Or, "to the father for life, re- "mainder to the son, and the heirs male of the body "of the father;" In *either* of these cases, the *father* must have taken an estate in *tail male*. The case put in *Lit. Sect.* 30. and the determination mentioned in Lord *Coke's* comment upon that section, (In *pa.* 26. *b.*) on the gift "to *Roberge* and to the heirs of *John de* "*Mandevile*, her *late* husband, on her body begotten," are no exception to this rule: For, in *both* cases, the *father* was DEAD at the time of creating the entail.

It is said too, "That he must, by necessary implication, "to *effectuate* the manifest *general* intent of the tes- "tator, be construed to take an estate in tail male; [52] "NOTWITHSTANDING the *express* estate devised to "him, for his life, and *no longer*."

Those words seem intended to express the *governing reason* in this case, to have been the *manifest main intent* of the testator, collected from all the parts of his will taken together; *without shaking* the authority of *Backhouse* v. *Wells*, and other cases which have laid a stress upon the words "*only*," "*not otherwise*," or *like* expressions, after an estate for life together

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with other clauses and circumstances in favour of the manifest intent of a testator, to make the issue or heir take as a purchaser designed by a personal description. (*a*)

This certificate was confirmed in Chancery; and a decree made accordingly.

ON APPEAL to the House of Lords from that decree, the opinion of *all the judges* was asked. It was delivered by Lord Ch. Baron *Parker*, with the reasons at large; and they unanimously agreed with the above certificate, *upon* the above grounds suggested thereby.

Whereupon the *decree* was *affirmed*, by the lords, on the 14th of *February* 1758. (*b*)

(*a*) This seems to be the true reason: In other cases, the main intention, as sometimes called, or the general or principal intention, hath been preferred to an intent of an inferior nature. 1 *Vent.* 379. 3 *Lev.* 371. 1 *Ves.* 22.

(*b*) The construction of the court in this case does appear to be the worst that could be put on the will, and in itself absurd; for under pretence of supporting an implied general intention, it defeated the whole Will, by enabling the first devisee, contrary to the most determined intention of a testator, and declared in the strongest terms, by recovery to dispose of the estate: this surely was sufficient to stigmatize this case, as there was no technical term that would have been violated by a contrary construction. Where that is the case, there may be good reason, for the sake of certainty in property, to determine according to the settled legal operation of technical terms, notwithstanding such determination be contrary to the intention. The determination in this case was against the legal operation as well as the most express declaration of the testator. If the principle on which the determination was founded, viz. that *a particular intention, though declared ever so strongly*, shall *not prevail against a general intention to be inferred from the will*, be right, and applicable to this case, then the son of the present devisee ought to have taken an estate to him and *his heirs male* of the body of his father. But besides this a rule of law and reason was violated by this determination, which is, that "the "testator's heir at law shall not be disinherited without "express words, or a necessary implication." There have been opinions, that an implication, though not strictly necessary, if strong will be sufficient: and doubts have been, in particular cases, whether the implication was or was not sufficiently strong to disinherit the heir; and it has always been agreed that a slight implication is not sufficient: but in the present case, there is no implication at all; but express words to prevent any such being raised

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Friday, 26th November 1756.

Causes in special paper for argument to come on in regular course.

The court declared a new order concerning *special causes* in the paper; which was, in substance, that all causes should come on to be argued, in the *same*

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to disinherit the heir of the reversion in fee, in case the devisee should never have a son; and yet the court disinherited the heir by their judgment.

If it be objected that *Lancelot Hicks* might have sons by different wives; the answer is, that it was a remote event, which probably never occurred to the testator, and therefore was no objection to the construction. There is also another ground, on which a fee might have been construed to have passed to the son, which is the same as one of the reasons given by Lord *Talbot* for passing a fee: for there the testator devised to his mother, all his estate at N. for her life, and to his nephew after her death, if he would change his name to *Beckwith*. And Lord *Talbot* in *Forrest.* 102. held that the word "estate" carried a fee; and held that the limitation to the mother for life, in the first instance, "where the "second limitation is general, could make no difference." See also 2 *Saund.* 388.

There may be cases where a testator had two intentions, viz. "a general, and a particular intent in a will; and "that the latter must give way when the former cannot "otherwise be carried into execution," as observed by Ld. *Kenyon*, in 1 *East's Rep.* 284.

This case of *Robinson* v. *Robinson* hath been undeservedly mentioned as one of those cases often, and in particular in the case above mentioned in *East's Rep.*; yet there are several others mentioned, 8 *Lev.* 371, 372. and also in 2 *Wils.* 22, 23, 75. In that in 3 *Lev.* it was argued by counsel, that a deed shall not operate by way of use, when by the scope of the deed, the intent appears to have it operate by the common law. Now certainly where, by the deed, it appears that the intent was that the party should have the estate, it is a more worthy consideration how to make his intent good, by passing the estate, if by any manner it may be done, than by considering the manner of passing it to defeat his intent, in the principal, viz. the passing the estate, than in the manner how it shall pass: and so has the law been often taken, as 3 *Leon*; and so, 2 *Rol. Abr.* 786, 787. by which cases it appears, that the judges in these later times, have had more consideration of the substance, viz. the passing of the estate, than the shadow, viz. the manner of passing it, and was afterwards adjudged accordingly.

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order that they were entered; and that they should *continue* to stand in the paper, in the same order, *till* they should be argued, (without being entered anew:) and that no cause should be put off, without a special application to the court, upon some sufficient ground, before the day upon which it stood in the paper for argument.

Note;

[Entitling cases on orders of removal.] It may not be amiss, to mention a general rule for *entitling* all cases arising upon ORDERS OF REMOVAL: the want of knowing, or the want of attending to which general rule, has been the occasion of infinite confusion in tabling and citing cases of this sort.

The constant method of entering them in the *rule-book*, is to name the *king* as *prosecutor*; and the parish *last charged* with the paupers, and consequently *appealing* to this court, as *defendants*. For instance—Two justices [59] remove a pauper from *A.* to *B.* and *B.* appeals to the sessions. If the sessions *confirm* the order, and *B.* brings the *certiorari*, the rule thereupon is entitled "*Rex* versus "*inhabitantes de B.*;" but if the sessions *discharge* the original order, and consequently *A. remains charged* with the pauper, and brings a *certiorari* to remove the orders, then the rule bears for its title, "*Rex* versus *Inhabitantes* "*de A.*"

This case of *Robinson* v. *Robinson* was determined contrary to two principles.—1st. That no implication shall be raised against express words (though this principle was long exploded before this case)—2dly, The power of suffering a recovery has been considered as affording an argument against estates tail, where it would plainly destroy the whole of the intention, except where technical words are used, which necessarily compel the court to take them in the technical sense.

But to make the principle apply, the power of a recovery by the first taker is not to be presumed: and it is so mentioned in *Roe* v. *Grew*, *Wilmot*, 278, 279. and the same is mentioned in several other cases; and yet in some the contrary is mentioned by the court. As to the above principle, vide 2 *Fonb.* 58, 59.

N. B. This case has been often approved by *Lord Kenyon*, and very strongly, as above mentioned, so late as in 1 *East's Rep.* 235.; and there too, he seems to have fully settled the case as far as possible. *Doe ex dem. of Cooks* alias *Hopkins* v. *Cooper*, *Hil. T.* 41 *Geo.* 3. *East's Rep.* 229.

REX *versus* Inhab. de AYTHROP RODDING. 1756.

FAREWELL v. CHAFFEY and others.

[Mr. Justice *Wilmot* was absent; sitting in Chancery as one of the commissioners of the great seal.]

See this case *abridged*, in the Table; and *at large* in the quarto edition of my SETTLEMENT CASES, No. 131. p. 412.

Monday, 29th Nov. 1756.

FAREWELL, Esq. *versus* CHAFFEY AND OTHERS. [54]

A new trial not to be granted to gratify litigious passions.

THIS cause was tried upon the western circuit, the last summer assizes, before Mr. Serjeant *Willes*, who certified "that the *weight of the evidence* was *against* the "verdict." But a *new trial* was denied, upon the nature of the action, the *value* of the matter in dispute, and *other circumstances* of the case.†

† V. ante, p. 11' 12. Macrow v. Hull S. P. and Post pa. 664. Dr. Burton v. Thompson, M. 1758. S. P. [2 Vez. 664. 1 Bos. 339. n.]

Lord *Mansfield* said, A NEW TRIAL ought to be granted, to attain REAL *justice*; but *not*, to gratify litigious passions, upon every point of *summum jus*; and cited *Smith* v. *Bramston*, and *Smith* v. *Frampton* in 2 *Salk.* 644; and an anonymous case there also mentioned, of *P.* 8 *W.* 3. *B. R.* and likewise *Smith* v. *Page*, *M.* 8 *W.* 3. *B. R. ibidem*; also *Deerly* v. *the Duchess of Mazarine*, *H.* 8 *W.* 3. *B. R.* 2 *Salk.* 646. and *Sparks* v. *Spicer*, *H.* 10 *W.* 3. *B. R.* in the same book, *pa.* 648. To which may be added, what is said by the court, in the case of *Dunkly* v. *Wade*, *P.* 5 *Ann.* 2 *Salk.* 653.

In these cases, the verdicts were against evidence and the strict rule of law, or obtained through surprise: but the court would not give a second chance of success to a *hard action*, or an *unconscionable defence*.

Therefore the COURT, upon the *same principles*, refused to grant a new trial in the present case, and discharged the rule to shew cause why there should not be one.

REX *versus* JOSEPH SMITH.

Recognizance to remove indictment from sessions, not discharged before payment of costs to prosecute after conviction.

AN indictment for a nuisance had been removed, by *certiorari*, from the quarter-sessions in *Devonshire*, into this court, by the defendant: which indictment was afterwards tried, and the defendant was found guilty. He then moved in arrest of judgment: but his objections were over-ruled. After which, the prosecutor moved for his costs; and obtained a rule to shew cause. And now Mr. Serjeant *Hewitt*, on behalf of the defendant, shewed cause, "why the *prosecutor* should not have his *costs*; be- "fore the recognizance should be discharged; and why "it should not be referred to me, to tax such costs."

[S. C. Sayer's Law of Costs, 218, 267. 2d ed. See 2 Durn. 47.]

His cause was this, That *no name* of any person *as being* either the party grieved or injured, or a *public civil officer*, is INDORSED upon the indictment, according to

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the directions of 5 & 6 *W. & M. c.* 11. § 2 & 3. And he argued that *without* such INDORSEMENT, no costs were payable to the prosecutors.

Mr. *Hussey contra*, for the prosecutor, acknowledged that there was no name indorsed: but, at the same time, insisted that an INDORSEMENT of the name of the prosecutor, as being the party grieved or injured, or a civil officer, is *not at all necessary*, in order to the court's giving him costs; though the second section does indeed *direct* the recognizance to be certified into this court, with the *certiorari* and indictment, *and the name of the prosecutor* [Bul. 197.] (if he be the party grieved or injured) or some public officer to be indorsed on the back of the indictment.

He said he had an AFFIDAVIT "that the prosecutor "*was* a civil officer, *&c.*" And the words of the 3d section of the act "are that *if he* BE *so*, the recognizance "shall not be discharged, *till* the costs shall be paid," But the act does *not* say "That the prosecutor shall *not* "have his costs, *unless* his name be INDORSED."

Lord MANSFIELD: It is enough if it be PROVED "that "the prosecutor was a civil officer, *&c.*" And here it *is* proved, by *affidavit:* which is sufficient.

Rule made absolute for the prosecutor's having his costs, (to be taxed by me *ut supra)* before the recognizance should be discharged.

SMADWELL, Esq. *vers.* ANGEL, Esq.

Declaration de bene esse may be delivered at the return of the process.

Vide 5 Mod 346.

THIS was a long litigation concerning the regularity of a judgment; which on Mr. *Nares's* motion *(ex parte def')* had been referred to the master, who thought it irregular: and now Mr. *Norton* (*ex parte quer'*,) appealed to the court from the master's opinion.

The question depended upon the meaning of a rule of this court, made *M.* 10 *Geo.* 2. 1736. and upon the practice of the court, pursuant to that rule.

The import of this rule was, that upon process returnable, the first or second return of a term, a plaintiff may (in certain cases) deliver a declaration *de bene esse*, at the return of the process; *with* NOTICE "for the defendant "to plead within *eight days after delivery* of the declara- [56] "tion:" And if the defendant shall not file common bail, and plead within such eight days after, *&c.* the plaintiff (having first filed common bail for such defendant according to the then late act for preventing frivolous and vexatious arrests,) may sign judgment for want of a plea, a rule to plead being duly entered.

The present fact was, that the process was returnable on *Saturday*, 15th *November* (the second return of the term.) The declaration "to plead in eight days," was

left *in the* office on *Monday*, the 24th of *November*: And upon the defendant's not pleading within the eight days, nor even before the time of signing the judgment; the plaintiff on the 3d of *January*, (six weeks afterwards,) filed common bail for the defendant, and (a rule to plead having been duly entered) signed judgment *upon the* SAME day.

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The master, Mr. *Clarke*, thought this to be irregular; For that when the defendant was once in court, the plaintiff ought to proceed against him *as being* in court: by which expression he seemed to mean, either that the plaintiff should deliver a declaration *afresh*; or that he should give a *fresh* rule to plead.

And Mr. *Nares* (in support of the master's opinion) urged that when the eight days (the time for pleading) are out, the *de bene esse* declaration is at an end: and he mentioned a case of *Llewellin* v. *Skyrm*, as in point.

But Mr. *Norton* denied this; and said that the eight days were *not* out; but the declaration *de bene esse* was delivered *within time* (though not indeed till the 9th day;) because there were *two Sundays* included, *viz.* 16th and 23d of *Nov.* And that the plaintiff might have signed his judgment on *Tuesday* the 25th.

Master *Clarke* was, at first, inclined to think that the *Sunday* was no excuse; and that this was not a sufficient reason to allow the plaintiff time till the 9th day, for delivering the declaration *de bene esse*. But all the officers thought otherwise; and the court seemed to think so too: whereupon Master *Clarke* seemed to give that point up.

The COURT were of opinion that the judgment was regular.

Lord *Mansfield* was clear, that no *further* notice (besides that given on delivering the declaration *de bene esse*) was necessary.

Mr. Just. *Denison* said the defendant had eight days AFTER *the delivery* of the declaration *de bene esse, whenever* it may delivered (either sooner or later.)

And this was *left in the office*, (which he held to be a good delivery,) on the 24th, which was *within time;* and the defendant did *not* plead within eight days; whereupon, the plaintiff files common bail for him, upon the 3d of *January;* and signs judgment the *same* day: which is regular; for the rule is *complied with*, and the defendant is not at all hurt; on the contrary, he has had *longer* time than he was entitled to. [57]

Mr. Just. *Foster*. The whole objection is "that the "plaintiff has not proceeded with so much speed as he "*might* have done:" for he *might* have signed his judgment on the 25th of *November*. The defendant might have filed common bail for *himself*, if he had thought

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proper: and then he might have had a fresh rule to plead.

By the COURT unanimously, the rule of reference to Master *Clarke*, for irregularity in this judgment, was discharged.(*a*)

MEMORANDUM.

[Remanet motions.]

The new lord chief justice, at his first setting out, instituted a *different method* of going through the MOTIONS *at the bar*, from that which had been usually (and indeed almost universally) practised heretofore: which new method was not only advantageous to the younger part of the barristers, but also exceedingly convenient to the

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(*a*) By rule of court, *Trin.* 1 *Geo.* 2. where process is served upon, and common bail filed for, the defendant, pursuant to 12 *Geo.* 1. *c.* 29. the plaintiff's attorney shall leave a copy of the declaration in the office, and likewise deliver notice thereof to the defendant, or leave the same at his house: in which notice shall be expressed the nature of the action, and at whose suit, and the time limited by the rules of the court for pleading; and if the defendant do not plead by the time, judgment shall be entered without any other or further calling for a plea; and from the time of such notice, the declaration shall be deemed well delivered and not otherwise.

By another rule, *Trin.* 5 & 6 *Geo.* 2. if the process be returnable the first or second return of any term where the plaintiff declares in *London* or *Middlesex*, and the defendant lives within twenty miles of *London*, the declaration shall be delivered with notice to plead within four days; and in case the plaintiff declares in any other county, or the defendant lives above twenty miles from *London*, with notice to plead within eight days, and in default of pleading, the plaintiff may sign his judgment.

By another rule, *Mic.* 10 *Geo.* 2. on all process returnable the first or second return of any term where no affidavit shall be made and filed, pursuant to the act for preventing frivolous and vexatious arrests, the plaintiff may deliver the declaration *de bene esse* at the return of such process, with notice to plead in eight days; and if the defendant doth not file common bail and plead within the said eight days, the plaintiff having filed common bail, according to the statute, may sign judgment for want of a plea, a rule to plead being duly entered.

Quære, Therefore if this case ought not to have been governed by the first of the above rules? and if so, the judgment was irregular for want of notice.

suitors, as it took away that delay to business which arose *from the* unreasonable preference hitherto given to gentlemen within the bar. For, the *repeated* preaudience, hitherto allowed them, had thrown almost the whole business into their hands: which, as the barristers were entitled to move only once in a day, could not always be sufficiently dispatched in *one* day.

The course had been, ever since I remember, and was in Lord Ch. Just. *Holt*'s time, (as the late Mr. Justice *Page* has often told me,) "*to* BEGIN EVERY DAY, with "the *senior* counsel within the bar, and then to call to "the next senior, in order, and so on, as long as it was "convenient to the court to sit; and to proceed again "in the same manner, upon the *next*, and EVERY *subsequent* day; although the bar had not been half, or "perhaps a quarter gone through, upon any one of the "former days: so that the juniors were very often "obliged to attend in vain, *without being able* to bring "on their motions, for many successive days."

This was the *settled* and *general* rule: though perhaps the judges, out of mere compassion to the juniors, would, two or three times in a term, give them leave to move, upon the next day, such motions as were real *remanets* of the former day.

[58]

Whereas Lord *Mansfield* professed and most punctually practised the *going* QUITE THROUGH the bar, even to the youngest counsel, before he would begin again with the seniors, even though it should happen to take up two or three or *more* days, before all the motions which were ready at the bar upon the first day, could be heard.

The end of *Michaelmas* Term, 30 *Geo.* 2. 1756.

HILARY TERM,

30 GEO. II. B. R. 1757.

(Lord Commissioner Wilmot absent, in Chancery.)

KILWICK v. MAIDMAN. Monday, 24th Jan. 1757. A plea of tender is an issuable plea. [See 1 Hen. Black. 370.]

KILWICK *vers.* MAIDMAN.

TIME was given by a judge's order to plead: (*viz.* until two days before the essoign day of this present term;) on the usual terms, "of pleading *issuably, &c.*" This order was not obtained till after the four-days rule for pleading was expired. BEFORE *the* term, and *within* the time allowed by the judge's order, the defendant pleaded a plea of *tender*; which plea was entitled (as it was agreed that it regularly might,) as of the *preceding* term.

Mr. *Aspinall* moved, *ex parte quer'*, to set *aside* this plea, with costs, as irregular; and for leave to sign judgment: and he cited 1 *Barnes*, 246. *Dacvenhill* v. *Barrit*, in point.

Mr. *Winn pro def.* shewed cause: *viz.* that it was a *fair issuable plea*, in its own nature; and that it was *within time*, not being after imparlance, but AS *of the* LAST *term*; and also that it was an ISSUABLE *plea*, within the meaning of the judge's order: though he acknowledged that a plea in *abatement*, (though in strictness indeed issuable,) would *not* be so; because it tended to delay the plaintiff.

The COURT concurred entirely in what Mr. *Winn* had urged in support of the regularity of the plea: and the motion was denied. (*a*)

(*a*) It does not appear what the action was: if it was assumpsit it seems that tender ought to have been pleaded, with *touts temps prist*, which is inconsistent with the order for time; and according to *Strange*, 638, the money ought to be paid into court, or else it is no plea; and the plaintiff may sign judgment on a certificate that no money was paid in; but the authority of that case appears by the N. B. there to be doubtful: but without relying on that, the law seems to have been generally holden that a plea of tender after an imparlance is bad, 5 *Comyns*, 227.

TAYLOR, ex dimiss. ATKYNS, Esq. *vers.* HORDE, Esq. & al'.

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TAYLOR v. HORDE.

Tuesday, 25 Jan. 1757.

The limitation of estates by virtue of powers must be strictly pursued. [See 7 Ves. 113. 8 Ves. 112. Cowp. 689. Herne's pt. 480. cited in Talb. 174.]

IN ejectment brought in *Michaelmas* term 1752, by *John Atkyns*, esq. (in the name of *Cyprian Taylor*) against *Robert Atkyns*, esq. the heir at law, and others; upon the general issue pleaded, and issue joined thereon and tried at the bar of this court, the jury find a special verdict: which was, in substance, as follows.

That Sir *Robert Atkyns* the elder, knight of the *Bath*, on 8th *June* 1669, was (amongst divers other messuages, lands, tenements, &c. in *Gloucestershire*,) seised in fee of the manor of *Lower Swell* and the other premises in question; and, being so seised, made and executed three several indentures, (which are set out in the special verdict:) one of which is dated on the 11th and the two others on the 12th of *June* 1669.

[Vide 9 Vin. 84 (C.) 1 Durn. 707. and Butler's notes on Co. Lit. 330 b. n. 1.]

By one of these indentures, which was dated on the 12th of *June* 1669, (which the counsel on both sides, for distinction's sake, called the *lesser* deed,) made between Sir *Edward Atkins*, knt. one of the barons of the exchequer, Sir *Robert Atkyns*, knight of the *Bath*, solicitor general to the queen, and son and heir apparent of the said Sir *Edward*, and dame *Mary* (wife of the said Sir *Robert*) *Atkyns*, of the one part; and Sir *Edward Carteret*, knt. and *John Lowe*, gentleman, of the other part; it is witnessed that in consideration of a marriage theretofore had and solemnized between the said Sir *Robert Atkyns* and dame *Mary* his wife, and of her *releasing and acquitting a former jointure* to her made before marriage, and of a *new provision* to be had and made for her the said dame *Mary*, for and in the nature of a jointure, in bar and recompence of her dower and thirds at the common law, in case she should happen to survive and over-live the said Sir *Robert Atkins* her husband, he the said Sir *Robert Atkyns* did thereby covenant and grant to and with the said Sir *Edward Carteret* and *John Lowe*, that he the said Sir *Edward Atkyns*, and the said Sir *Robert Atkyns*

And though 2 *Mod.* 62, is there referred to for an admission that it was good to a bond though in no other case, yet the reason of it there is because it is to save the penalty; which reason does not now subsist, since by the statute a court of law will relieve the defendant on payment of principal and interest; and therefore if that were law before, yet *cessante ratione, &c.* it is not so now; and if a tender is not pleadable after imparlance, there is the same reason why it should not, after an order for time: which was the reason given by the court for not allowing it in 1 *Barnes*, 246. cited by Mr. *Aspinall*, especially after so long time given as in this case.

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and dame *Mary* his wife, should and would, before the end of *Michaelmas* term then next ensuing, levy and acknowledge before the justices of the court of Common Pleas at *Westminster*, one or more fine or fines *sur conusance de droit come ceo, &c.* unto the said Sir *Edward Carteret* and *John Lowe*, with proclamations, of the said manor of *Lower Swell* and the other premises in question: which said fine or fines so as aforesaid or in any other sort to be had, levied, and executed of the said manor and premises alone, or together with any other lands, tenements or hereditaments, by or between the parties to the said indenture or any of them, alone or
[61] together with any other person or persons, were to be and enure, and were thereby declared to be and enure, as to the said manor and all other the premises, to the use of the said Sir *Robert Atkyns* for life, without impeachment of waste; and from and after his decease, to the use of the said dame *Mary* for life, for her jointure and in bar of her dower; and from and after the decease of the said Sir *Robert* and dame *Mary*, to the use of Sir *Robert Atkyns*, knt. son and heir apparent of the said Sir *Robert*, and the *heirs male of the body* of the said Sir *Robert* the son, *on the body of Lovis Carteret* his intended wife lawfully to be begotten; and for default of such issue, to the use of the *right heirs* of the said *Sir Robert* the *father* for ever.

And the said Sir *Edward Atkyns* and Sir *Robert* the father did by this deed covenant with the said Sir *Edward Carteret* and *John Lowe* and their heirs, that in case any defect should happen in the said fine and that assurance, or in case there should not be some good conveyance in the law made according to the intent of that indenture, so that by reason of such defect or failure of such conveyance and assurance in law, the said manor and premises or any part or parcel of them should not, before the thirtieth day of *November* then next ensuing, be sufficiently conveyed according to the intent of the said indenture, then they the said Sir *Edward Carteret* and *John Lowe*, and their heirs, and all and every other person and persons and their heirs, standing or being seised, or which should stand or be seised of and in the said manor and premises, should and would from time to time and at all times from thenceforth for ever stand and be seised of and in the said manor and premises, or so much and such part and parts thereof whereof or concerning which any such defect should happen to be, to the uses, behoofs, intents and purposes therein before declared, limited and contained, according to the true intent and meaning of the said indenture, and to *none other use*, intent or purpose whatsoever.

One other of these three indentures was a lease, dated 11th *June* 1669: and the remaining one was a release,

dated 12th *June* 1669. This *release* bore the very *same date* with the deed already recited (called the lesser deed:) and the counsel on both sides agreed in calling *this deed of release* (for distinction's sake) the *greater* deed, as this contained the settlement of the whole estate.

By these indentures of lease and release, dated 11th and 12th *June* 1669, the release being tripartite, and made between the said Sir *Edward Atkyns*, the said Sir *Robert* the father and dame *Mary* his wife, *Philip Sheppard*, esq. Sir *Clement Farnham*, knt. and *Edward Atkyns*, esq. second son of the said Sir *Edward Atkyns*,) of the first part; the right honourable Sir *George Carteret*, knt. and bart. vice-chamberlain of his majesty's household, and one of his majesty's most honourable privy council, the said Sir *Edward Carteret* and the said *John Lowe*, the right honourable *Edward Montagu*, commonly called Lord *Hinchinbrooke* (son and heir apparent of the right honourable the Earl of *Sandwich*,) Sir *Philip Carteret*, knt. (son and heir apparent of the said Sir *George Carteret*,) and *Edward Swift*, esq. of the second part; and the said Sir *Robert Atkyns*, knt. (the son and heir apparent of the said Sir *Robert Atkyns*,) and *Lovis Carteret* (one of the daughters of the said Sir *George Carteret* and of dame *Elizabeth* his wife,) of the third part; it is witnessed that in consideration of a marriage thentofore had and solemnized between the said Sir *Robert Atkyns* the father and dame *Mary* his wife, and also of a marriage then shortly to be had and solemnized between the said Sir *Robert Atkyns* the son and the said *Lovis Carteret*, and of the sum of 6500l. *paid to Sir Robert the father* by the said Sir *George Carteret*, for the marriage portion of the said *Lovis Carteret*, and of 5s. a-piece to the said Sir *Edward Atkyns*, Sir *Robert Atkyns* the father, *Philip Sheppard*, Sir *Clement Farnham*, and *Edward Atkyns*, paid by the said Sir *Edward Carteret* and *John Lowe*, and for a provision to be had and made *to and for the said dame Mary* (wife of the said Sir *Robert Atkyns* the father,) for and in the nature of a *jointure* in bar and recompence of her dower and thirds at the common law; and also for a provision for the said *Lovis Carteret*, for and in nature of a jointure, in bar and recompence of her dower and thirds at the common law; and for settling all the manors, lands, tenements, and hereditaments therein after mentioned, to the several and respective uses, upon the trusts, to the intents and purposes, and with, under and subject to the provisoes, declarations, limitations and agreements therein after declared; the said Sir *Edward Atkyns* and Sir *Robert* the father did grant, release and confirm unto the said Sir *Edward Carteret* and *John Lowe* and their heirs, the said manor of *Swell* and other the pre-

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mises in question (as described in the lesser deed,) and several other manors, lands, and hereditaments therein mentioned, to hold the said manor of *Swell* and other the premises in question, to the said Sir *Edward Carteret* and *John Lowe* and their heirs, to the several uses therein mentioned; which uses, (as to the said manor of *Swell* and other the *premisses in question*,) are the same as those before set forth in the lesser deed; *viz.*

To the use of Sir *Robert* the father, for life, without impeachment of waste;

[63] Remainder, as to the said premises (except timber-trees,) to dame *Mary* for life, for her jointure, and in bar of dower;

Remainder to Sir *Robert* the son, and the heirs male of his body by the said *Lovis Carteret*;

Remainder to the right heirs of Sir *Robert* the father.

And several other parts of the estates were limited thereby, to Sir *Robert* the son, for life; remainder to the trustees, to preserve contingent remainders; remainder to the said *Lovis Carteret* for life, for her jointure and in bar of dower: and upon the issue of the said intended marriage, in strict settlement.

In which indenture of release is contained a proviso, in the following words—

"Provided always that it shall and may be lawful to "and for the said Sir *Robert Atkyns* the father, the said "Sir *Robert Atkyns* the son, and the said *Lovis Carteret*, "respectively, when they are or shall be respectively "seised in possession of the freehold of such of the pre-"mises as by virtue of and according to the limitations "aforesaid are respectively limited to them for their re-"spective lives by their respective deed or deeds in writ-"ing sealed and delivered in the presence of two or "more credible witnesses, *to make any lease or demise*, "leases or demises, of all or any [part] of the said premises "whereof they shall be so respectively seised in pos-"session for life as aforesaid, (except of the capital "messuage of *Sapperton* aforesaid, and the said lodge in "*Pinbury* Park aforesaid,) unto any person or persons, "for one, two or *three lives* in possession, reversion or "remainder, [*or for any term or terms of years in possession, "reversion or remainder*] (*a*) to end or determine upon the "death of one, two or three persons, or for the term of 21

(*a*) These words introduced within brackets, and distinguished by italics, are copied from the printed case sent to the House of Lords: and at the time this case was determined, and until the judgment in 2 *Burr.* 1147. were generally taken to be material.

" years absolute; so as there be not, in the respective pre- 1757.
" mises or any part thereof, any estate exceeding the TAYLOR
" term or time of *three lives* or twenty-one years, in v.
" being at the same time; and so as such respective HORDE.
" leases be not made without impeachment of waste;
" *and* SO AS *the* USUAL RENTS of such of the premises
" respectively as shall be so leased or demised upon
" fines, and the BEST *rents that* CAN BE *reasonably gotten*
" for such of the premises respectively as shall be so
" leased or demised without fines, BE *respectively* RESERV-
" ED upon *every* such respective lease or leases, demise
" or demises, *to be* PAYABLE DURING *the respective terms*
" in the said respective leases or demises to be con-
" tained; any thing herein before contained to the con-
" trary notwithstanding."

And another proviso is therein also contained, in the [64]
following words, *viz.*

" Provided also that it shall and may be lawful to and
" for the said Sir *Robert Atkyns* the father, at any time
" or times during his natural life, *after* the decease of
" the said dame *Mary* his wife, by any writing or writings
" indented, under his hand and seal, testified by two
" or more witnesses, to grant, assign, limit or appoint
" the said manor of *Swell Inferior, alias Nether Swell,*
" and the lands, tenements and premises in *Swell inferior,*
" otherwise *Nether Swell, Upper Swel* and *Stow in the*
" *Would,* and in either or any of them, or such parts and
" parcels thereof as he shall think fit, unto or to the use
" *of such woman or women* as he the said Sir *Robert Atkyns*
" the father *shall marry or take to wife,* after the de-
" cease of the said dame *Mary* his now wife; for and
" during the term of the *natural life* or lives of such
" wife or wives only, for her or their jointure or join-
" tures; any thing herein contained to the contrary
" thereof in any wise notwithstanding."

And by another proviso in this deed, the like power is given to Sir *Robert* the son, " to make a jointure of all " or any of the lands thereby limited to *Lovis Carteret* " for her jointure, on any *future* wife or wives, whom he " should marry, after the death of the said *Lovis Carteret* " without issue."

And by the same deed, Sir *Robert* the father covenants with Sir *George Carteret,* that Sir *Edward Atkyns,* he, and dame *Mary* his wife, would, before the end of *Michaelmas* term then next, levy one or more fine or fines *sur conusance de droit, &c.* with proclamations, of the premises contained in this indenture, unto the said Sir *Edward Carteret* and *John Lowe:* which, it was thereby declared, should be and enure to the several and respective uses, upon the trusts, and to the intents and purposes, and

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with, under and subject to the provisoes, declarations and agreements therein before declared, limited, and expressed concerning the same. And reciting "that Sir *Clement* "*Farnham* and *Edward Atkyns* were possessed of the pre- "mises in question, or several parts thereof, for several "terms of years then in being, in trust for Sir *Robert* "the father," it was thereby declared and agreed by Sir *Robert* the father, that Sir *Charles Farnham* and *Edward Atkyns* should stand possessed of the premises comprised in the said terms, during the residue thereof, upon trust and to the use and benefit of the person and persons to whom the premises (by virtue of the limitations therein) should belong.

[65] The jury found that the first of the said indentures was executed by Sir *Edward Atkyns*, Sir *Robert Atkyns* the father and dame *Mary* his wife, and *John Lowe*; the second of the said indentures was executed by Sir *Edward Atkyns*, Sir *Robert* the father, *Philip Sheppard*, Sir *Clement Farnham*, and *Edward Atkyns*, esq. and the said indenture of release, by Sir *Edward Atkyns*, Sir *Robert* the father, dame *Mary* his wife; Sir *Clement Farnham*, *Edward Atkyns*, esq. Sir *George Carteret*, Sir *Philip Carteret*, *Edward Swift*, Sir *Robert Atkyns* the son, and *Lovis Carteret*; and that the lease for a year was executed before the release.

That in *Trinity* term 1669, a fine was levied; wherein the said Sir *Edward Carteret* and *John Lowe* were plaintiffs, and the said Sir *Edward Atkyns*, Sir *Robert* the father and dame *Mary* his wife deforciants, of the premises in question, (amongst the said other lands contained in the greater deed;) but no fine was ever levied of the lands contained in the little deed only.

Afterwards, on the 6th of *July* 1669, Sir *Robert* the son was married to the said *Lovis Carteret*.

Dame *Mary* (the wife of Sir *Robert* the father,) *died* on 2d *March* 1680.

After which, *viz.* on 26th *April* 1681, Sir *Robert* the father, being seised of the premises in question, as of freehold, for the term of his natural life, without impeachment of waste, (and being then on the point of marrying a second wife, Mrs. *Ann Dacres*,) duly executed an indenture under his hand and seal attested by three witnesses, bearing date the same 26th of *April* 1681, and made between himself of the one part, and *Sir Robert Dacres*, knt. *John Dacres* and *Ann Dacres* spinster (sister of Sir *Robert Dacres* and *John Dacres*) of the other part: by which indenture, (after reciting the above mentioned indenture of release tripartite of the 12th of *June* 1669, and the power thereby reserved "for the said Sir *Robert* "*Atkyns* the father, after the death of dame *Mary*, to "limit all or any part of the manor and premises in

"question, to any future wife or wives he should happen "to marry, for the term of the natural life or lives of such "wife or wives only; for her or their jointure or join-"tures,") it is witnessed that in consideration of the then intended marriage between the said Sir *Robert Atkyns* the father and the said *Ann Dacres*, and of her marriage-portion, the said Sir *Robert Atkyns* the father, IN PURSUANCE *of the said power to him reserved*, and of all and every power and authority whatsoever, did grant, assign, limit and appoint the said manor of *Swell* and other the premises in question unto the said ANN DACRES, *for and during the term of her* NATURAL LIFE, for her jointure, and in bar and recompence of her dower and thirds at the common law. [66]

On 28th *April* 1681, the said Sir *Robert Atkyns* the father married the said *Ann Dacres*.

On 31st *May* 1698, Sir *Robert Atkyns* the father, being seised of the premises in question, as of freehold for life without impeachment of waste, executed an indenture of *lease*, under his hand and seal, attested by three witnesses, dated on the same 31st day of *May* 1698, and made between himself of the one part, and *Thomas Dacres*, esq. *Robert Dacres*, gent. and *John Dacres*, gent. (the three sons of the before named Sir *Robert Dacres*, knt. and nephews* of dame *Ann Atkyns* then wife of Sir *Robert Atkyns* the father) of the other part. This indenture of release recites the indenture tripartite of release of the 12th of *June* 1699; whereby Sir *Edward Atkyns* and Sir *Robert Atkyns* the father did (amongst other lands) grant, release and confirm to the said Sir *Edward Carteret* and *John Lowe* and their heirs, the said manor of *Swell Inferior* otherwise *Nether Swell*, with the appurtenances, and all those rents of assize of the free tenants of the said manor extending to one half-penny and one pound of pepper; and all the rents of customary tenants of the said manor; and the capital messuage and farm of the *Bold*; and the park called *Swell Park* otherwise *Abbot's Wood*; and all and all manner of tenths or tithes of the said park; and the barcary or sheep-house called *Gannow*, and the grounds or closes of meadow or pasture adjoining or belonging thereto; and the water-mill called *Bold Mill*, with the dams, streams, waters, attachment, fenders, soak, suit, mulcture, grist and appurtenances thereunto belonging; all the tolns of the customary tenants of the said manor, and all and all manner of tenths and tithes of all the premises whatsoever, which unto the late dissolved monastery of *Hales* did belong; all that common of pasture for 400 sheep and twenty beasts, upon the hills and fields of *Nether Swell*, at all times in the year except in the open time, and in the open time

[* *Deleatur verbum* "nephews;" and note, that all the lessees were then much under the age of 21 years.]

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common of pasture within the said fields for all manner of beasts without number, rate or stint; and the several pastures called *Murden Leasows*; all that barcary or sheep-house within the said pasture; all that pasturage or feeding for 600 sheep, or for more or less at the will and pleasure of the tenant of the said pastures called *Murden Leasows* for the time being, in and upon the demesne lands, waste lands and other lands belonging to the said farm of the *Bold* or elsewhere, in such ample manner as the late abbot of the said dissolved monastery of *Hales* aforesaid and his predecessors had kept and occupied the same within the manor of *Swell* aforesaid; all those [67] grounds in *Nether Swell* aforesaid theretofore in the tenure of *John Winsmore* or his assigns; all that half acre of land in *Nether Swell* sometimes in the tenure of the curate of the church of *Stowe* in the said county of *Gloucester*; all that fishing of the river or water of the whole manor of *Nether Swell*, with all profits and commodities to the same belonging; all those portions of tithes whatsoever, and all and all manner of tithe of corn, grain, blade, sheaf, hay, wool, lambs, pasture and other tenths and tithes whatsoever in and upon the premises or any part of them growing, renewing or increasing; (being the premises in question;) to the several uses by the said indenture limited as aforesaid: and it also recites the power to the said Sir *Robert Atkyns* the father, "for leas-"ing the premises," as it is set forth in the said indenture. Then it is witnessed by this indenture of lease, that the said Sir *Robert Atkyns* the father, in consideration of the *rent* thereby reserved, IN PURSUANCE *of the power to him reserved* in and by the said recited indenture, and by virtue thereof, *and of* ALL AND EVERY *power and authority whatsoever*, did, by that his present writing indented, under his hand and seal, testified by the several witnesses whose names are thereupon indorsed, demise, lease, grant, and to farm let, to the said *Thomas Dacres*, *Robert Dacres* and *John Dacres* and their assigns, the said manor, and all and singular the said lands, tithes, tenements, hereditaments and premises, with their and every of their rights, members and appurtenances, in *Swell Inferior* otherwise *Nether Swell*: AND *all and every the* RENTS RESERVED *upon any leases or grants*; to hold to them the said *Thomas*, *Robert* and *John Dacres*, from the making thereof, for and during the *natural lives* of them the said *Thomas*, *Robert* and *John Dacres* and the life of the LONGER LIVER *of them*; YIELDING AND PAYING THEREFORE, during the said term, unto the said Sir *Robert Atkyns* party thereto, and after his decease, to such person or persons respectively to whom the said manor and premises were limited, according to

their respective estates and titles, the *yearly rent of* THREE HUNDRED AND THREESCORE *pounds* at *Michaelmas* and *Lady-day*, by even and equal portions. 1757. TAYLOR v. HODE.

In which said indenture of lease is contained a clause, in these words; *viz.* "*the* TRUE INTENT AND MEANING "*of this estate or term for lives*, so hereby granted and "made to the said *Thomas Dacres*, *Robert Dacres* and *John* "*Dacres*, and the survivor of them, being TO PRESERVE "*the said remainder* so limited in the premises by the "said recited indenture, TO *the right heirs of the said Sir* "*Robert Atkyns, party to these presents*, AND TO SUCH "PERSON OR PERSONS TO WHOM *the said Sir Robert* "*Atkyns, party to these presents shall* ANY WAY DISPOSE "OF *the same*, FROM BEING BARRED *by any* RECOVERY "*to be suffered, or by any other act to be attempted or* "*done for the* BARRING *of the same.*"

On 8th *June* 1698, *John Dacres, one of the lessees* in the [68] last above-mentioned indenture of lease, *alone*, executed a *letter of attorney*, under his hand and seal, reciting the said last indenture of lease, and impowering and authorizing *Thomas Barker*, gent. as his attorney, *to take livery and seisin* of the premises last above-mentioned, from the said Sir *Robert Atkyns* the father; *for* HIMSELF (the said *John Dacres*) *and* FOR *the said Thomas and Robert Dacres* and every of them, *in* THEIR *names and for their use*, according to the purport and true meaning of the said recited indenture of lease: and to enter and take possession of the said manor and premises in the said indenture contained, *to the use of* THEM AND EVERY *of them*; he the said *John Dacres* allowing of all and every the act and acts so done by the said attorney, to be as effectual and sufficient in law, as if he had been personally present and had done the same.

On 5th *July* 1698, Sir *Robert Atkyns* the father, being so seised as aforesaid, and then in the actual possession of the said manor and premises, did, in his own person, *deliver* seisin and possession thereof *unto the said Thomas Barker*, TO THE USE *of the said* THOMAS, ROBERT, AND JOHN *Dacres and of* EVERY *of them*, and of the survivor of them, according to the purport and true meaning of the said indenture; he the said *Thomas Barker* being authorized and appointed, by a letter of attorney under hand and seal of the said *John Dacres*, and by him duly executed, "for him and to his use and in his name, AND *for the said* "THOMAS AND ROBERT *Dacres, and to* THEIR *use and* "*in* EVERY OF THEIR *names*, to take and receive the "said livery and possession of the said capital messuage, "manor and premises, accordingly:" as by an indorsement on the said letter of attorney (which is set out in the verdict) appears.

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But the jury found, that the said *Thomas Dacres*, *Robert Dacres* and *John Dacres*, the lessees named in the last mentioned indenture, or either of them, NEVER WERE IN POSSESSION of the premises in question, otherwise than by the said livery and seisin so given by the said Sir *Robert Atkyns* the father as aforesaid; and that they or either of them *did* NOT *receive or pay any* RENT for or in respect of the said premises; and that the said *indenture of lease was* NOT FOUND IN THE CUSTODY *of Thomas Dacres the surviving lessee*, at the time of his death.

On 27th *May* 1708, Sir *Robert Atkyns* the father, being so seised of the said premises, and of the remainder and reversion thereof as aforesaid, made his will, dated the same 27th day of *May* 1708, attested by four witnesses; and thereby confirmed his wife's jointure; and then recited "that he was seised of the remainder and reversion [69] "in fee, of the said manor and other the premises in "question; and that such remainder or reversion, after "the death of his wife, was also further expectant upon "an estate in special tail, settled upon his son Sir *Robert* "upon his marriage, by the abovementioned deed of 12th "*June* 1669; and that he had made a lease to the said "*Thomas*, *Robert* and *John Dacres*, for their lives, and "the life of the longer liver of them, according to the "power he had reserved to himself upon the said settle-"ment:" after which recital, he disposed of his said remainder or reversion in fee, [and the benefit of the trust of the said lease,] to the lessor of the plaintiff, in tail male.

The whole devise was in the following words—*viz.* "I "give and confirm unto my said wife dame *Ann Atkyns*, "all those lands, tenements and hereditaments in *Lower* "*Swell* aforesaid, which were settled upon her for her "jointure, before our marriage: and I hereby further "give and devise to her, for term of her life, my manor "of *Lower Swell*, and all the rest of my lands, tenements "and hereditaments whatsoever in *Lower Swell* aforesaid, "for term of her life, as an addition to her jointure. And "whereas I am seised of the remainder and reversion in "fee, of the said manor of *Lower Swell*, and of the rest of "the said lands, tenements and hereditaments in *Lower* "*Swell*, so settled, and by this my will given and con-"firmed to my said wife for her life; which remainder or "reversion, after the death of my wife, is also further ex-"pectant upon an estate in the said manor and lands in "special tail settled upon my son Sir *Robert Atkyns* upon "his marriage, by deed dated the 12th of *June* 1669, and "upon his sons by his now wife and no other wife; and "whereas I have made a lease, dated * the 8th day of "*June* in the year of Lord 1698, executed by livery and "seisin, to *Thomas Dacres*, esq. and to *Robert* and *John*

* The testator mistakes the date of this lease: it was 31st May. V. ante p. 66.

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"Dacres, gentlemen, for the lives of the said *Thomas, Robert* and *John Dacres*, and the life of the longer liver of "them, according to a power I reserved to myself upon "the said settlement made upon the marriage of my said "son Sir *Robert Atkyns*; now I give and devise the *said* "REMAINDER *or* REVERSION, and the BENEFIT OF "THE TRUSTS *of the said lease for lives*, to my *grandson* "*John Tracy*, (the now younger and second son living of "my son-in-law *John Tracy of Stanway* in the said county "of *Gloucester*, esq. by my daughter *Ann Tracy* his "wife,) and to the heirs male of the body of my said "grandson by him to be begotten. And if my said "grandson happen to die without issue male, then I give "and devise the said remainder or reversion, to the next "younger son of the said *John Tracy* my son-in-law, cal-"led *Ferdinando Tracy*, and to the heirs male of the body "of the said *Ferdinando*. And for default of such issue, [70]
"then I give and devise the said remainder or reversion "to the next younger son my said son-in-law *John Tra-*"*cy* may happen to have by my said daughter, and to the "heirs male of the body of such next younger son;" and so on, to other still younger sons, &c. (These devises were all upon condition that the said sons respectively so inheriting the said manor and lands, should constantly use to call and write themselves by the name of *Atkyns* only for their surname, and by no other surname.) And then the will proceeds thus—"I do further give and devise all my "houses, and all lands, tenements and hereditaments situ-"ate lying and being in or near *Cursitor's Alley* in *Hol-*"*born* within the city of *London* or the suburbs thereof, "or within the county of *Middlesex*, or in either of "them;" in like manner, and upon the like condition, &c. And, reciting that the reversion or remainder of his manor and lands in and of *Sapperton* aforesaid, and of the advowson of the church of *Sapperton*, and of and in his manor of *Pinbury* and of the lands thereto belonging, as also of *Pinbury-Park*, was in him and his heirs; and also of the seven hundreds of *Cirencester*, and of the hundred of *Bisley*, all in the said county of *Gloucester*; he devised the same in the like manner. The words of his will are these—"I having also made a lease for lives, of the said "manors of *Sapperton* and *Pinbury*, and of the said advow-"son of *Sapperton*, and of the said *Pinbury-Park*, and of all "the said several hundreds, the better to preserve and "support the said remainders and reversions from "being cut off or barred by any recovery. And if my "said younger grandsons happen to die without issue "male, then I give and devise the same reversions and "remainders to my nephew *Richard Atkyns* (eldest son

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" of my late brother Sir *Edward Atkyns* deceased) and " to his heirs."

On the 9th *February* 1709, Sir *Robert Atkyns*, the father, died, seised of the premises in question.

Upon his death, dame *Ann*, his widow and relict, entered thereupon; claiming the same for her life, for her jointure, under and by virtue of the above-mentioned indenture of the 26th *April* 1681: and was in *possession* thereof.

The jury then find an indenture tripartite dated the 18th of *May* 1710; made between *Richard Atkyns*, esq. eldest son and executor of Sir *Edward Atkyns* (the surviving trustee in whom the terms for years mentioned in the greater deed were vested,) on the first part; *Joseph Walker*, gent. on the 2d part; and the said Sir *Robert Atkyns*, (the son) on the 3d part: by which, after reciting the indenture of release of 12th *June* 1669, and that it was therein mentioned, that Sir *Clement Farnham* and *Edward Atkyns* were possessed of several terms for years in [71] the prmises in question, and that they were to stand possessed thereof in trust for such person and persons to whose use and uses the same were limited by the said indenture; and reciting that the said Sir *Robert Atkyns* (the son) then claimed the said manor and premises BY AND UNDER *the* SAID *indenture*: and that Sir *Clement Farnham* was dead, and the said *Edward Atkyns* (afterwards Sir *Edward Atkyns*, knt. lord ch. baron of the Exchequer) survived him, and was also then dead, having first made his will and the said *Richard Atkyns* executor thereof, and that he had proved the same: the said *Richard Atkyns*, at the instance and request of the said Sir *Robert Atkyns* (the son) testified by his executing the said indenture, and in consideration of 5s. paid to him by the said *Joseph Walker*, assigned over the said manor and premises in question, to the said *Joseph Walker*, to hold to him, his executors, administrators and assigns, for all the then residue and remainder of the terms whereof the said Sir *Clement Farnham* and *Edward Atkyns* or either of them were possessed; in trust for the said Sir *Robert Atkyns* (the son) and the heirs male of his body, by the before-mentioned dame *Lovis* his wife; (the said premises being so limited in and by the said indenture of release of 12th *June* 1669.) In which said indenture there is a covenant from Sir *Robert* (the son) to indemnify the said *Richard Atkyns*, his heirs, executors and administrators against any damages he or they might sustain by reason of his making the said assignment to the said *Joseph Walker* as aforesaid.

The jury further find, that dame *Ann Atkyns* being so

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in possession of the premises as aforesaid; in *Trinity* term 1710, 9 *Ann*, an ejectment was brought in the court of Common Pleas for the recovery of the said premises, against her the said dame *Ann* and the tenants in possession of the same premises, by *John Philips*, upon the several demises of the said Sir *Robert Atkyns* the son, and of the said *Joseph Walker*: in which ejectment, the demises were laid upon the 22d day of *May* 9 *Ann*; to hold from the 20th day of the same *May*, for seven years. And the said ejectment was tried at the bar of the court of Common Pleas, in *Michaelmas* term following: and a general verdict was found for the plaintiff; and judgment was entered up thereupon, against her and the rest of the defendants therein, for the said *John Philips*; and he recovered TERMINUM *suum predictum*, and had an *habere facias possessionem*.

The jury further find, that upon this trial, the said two indentures, called greater and lesser deeds, of 12th *June* 1669, were, BOTH *of them*, read and given in evidence to the jury: *but* that the deed of *assignment*, of 18th *May* 1710, was not produced, NOT given in evidence, to the jury..

They find, that soon after the said judgment in ejectment, and during the life of dame *Ann*, Sir *Robert Atkyns* (the son) entered into and was in possession of the premises in question, and in the said declaration in ejectment mentioned. [72]

They find, that on 1st *January* 1710, *John Philips*, the said plaintiff in ejectment, *surrendered* the two terms mentioned in the said declaration in ejectment to be demised to him by the said Sir *Robert Atkyns* (the son) and *Joseph Walker*, to the said Sir *R. A.* (the son) *then in possession* of the premises.

They further find, that on the 17th *January* 1710, the said Sir *R. A.* the son, being *so in possession as aforesaid*, and *during the life-time of the said dame Ann Atkyns, widow*, made a feoffment to *James Earle*, of the premises in question in fee; by indenture tripartite of that date, made between himself on the first part; *James Earle*, yeoman, on the second part; and *John Holmden*, gent. on the third part; which feoffment in fee is therein declared to be *for the docking, barring, and destroying* ALL ESTATES TAIL, *use and uses, reversions* and remainders, at any time theretofore made, created, or limited of and in the manor and premises in question; and for the vesting and settling an estate in *fee simple* therein, to and in the said Sir *Robert* the son. Sir *Robert* (the son) did therefore in consideration of 5s. thereby grant, bargain, sell, enfeoff and confirm unto the said *James Earle* his heirs and assigns, the premises in question, to hold to and to the use of the

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said *James Earle* his heirs and assigns for ever; to the *intent* and *purpose* that the said *James Earle* might become perfect *tenant of the freehold* of the said premises, in order for the suffering a *common recovery* in *Hilary* term then next; wherein the said *John Holmden* was to be demandant, the said *James Earle* tenant, and Sir *Robert* himself vouchee. Which recovery, it was thereby declared, was to be and enure to the use and behoof of the said SIR ROBERT ATKYNS (*the son*) *his heirs and assigns for ever;* and to or for no other use, intent or purpose whatsoever And by this same deed, Sir *Robert Atkyns* (the son) constituted *Edward Carter* and *John Langford* his attornies and attorney, either jointly or severally to enter upon and take seisin and possession of the premises, and to give and deliver seisin and possession thereof to the said *James Earle* and his heirs and assigns for ever, according to the purport and true meaning and for the purposes in the said deed mentioned.

And the jury find, that on 20th *January* 1710, *Edward Carter*, one of the said attornies, entered upon the premises, and gave seisin and possession thereof to the said *James Earle*, by virtue of the said warrant of attorney
[73] contained in the said indenture: As appears by a memorandum indorsed upon the said indenture, and found by the verdict.

They find that in *Hilary* term 9th *Ann.* (1710,) a recovery was suffered of the premises; wherein *John Holmden* was demandant; *James Earle*, tenant; and Sir *Robert Atkyns* (the son) and *Lovis* his wife, vouchees; and seisin executed thereon: which recovery they find to be prosecuted, had and executed to the several uses mentioned in the said deed of feoffment. And they find, that after this recovery, Sir *Robert* the son *continued in possession* of the premises till the 9th of *November* 1711.

They find the death of the said Sir *R. A.* (the son) on 9th *November* 1711, without issue male by the said *Lovis* his wife, who survived him.

They also find, that an ejectment was brought for the premises, against *Robert Atkyns*, esq. and his tenants of the premises in question, in *Hilary* term 1711, 10 *Ann* by *John Miles*, as plaintiff, on the several demises (both laid to be made on 14th *February*, 8 *Ann* 1709. which is five days after Sir *R. A.* the elder's death) of dame *Ann Atkyns* the jointress, and of *Thomas Dacres*, the surviving lessee under the indenture of lease of 31st *May* 1698. And in *Easter* term 1712, 11 *Ann.* a general verdict was given for the plaintiff, on both demises, on a trial at bar in this court: and judgment was entered up accordingly, "that "the plaintiff do recover his several terms aforesaid." And the said dame *Ann Atkyns* entered upon the pre-

mises in question, immediately after this last judgment; and continued in possession thereof till 9th *October* 1712: when she died. 1757. TAYLOR v. HORDE.

Soon after the death of dame *Ann*, the (original) (*a*) defendant *Robert Atkyns*, esq. nephew and heir male to Sir *R. A.* the son (and also heir at law to Sir *R. A.* the father) entered upon the premises, and continued in possession thereof till his death; which happened on 16th *March* 1753. [*Robert's* death (*b*) was just three months after the now lessor of the plaintiff's actual entry: and it was after issue joined in this present ejectment.]

John Dacres, one of the lessees in the indenture of lease dated 31st *May* 1698, died in 1705.

Robert Dacres, another of them, died in 1706.

Thomas Dacres, the third of them, *survived* the other two: and *died on* 23d *July* 1752.

They find that *John Atkyns, the lessor of the plaintiff* [74] NEVER WAS IN POSSESSION of the premises in question or any part thereof, nor in receipt of the rents and profits thereof or of any part thereof; NOR ENTERED thereupon, TILL *the* 15th of *December* 1752; *when* he *made an* ACTUAL ENTRY into and upon the same; claiming the same as *devisee* thereof under and by virtue of the will of the said Sir *Robert Atkyns* the father; and ejected, drove out, and removed the said *Robert Atkyns*, esq. *Charles Coxe*, *Thomas Horde*, &c. therefrom; and was *seised thereof, as the law requires;* and being so *seised* thereof, made the demise to the said *Cyprian Taylor* the now plaintiff, on the 16th of *December* 1752, to hold from thence for fifteen years; by virtue whereof the said *Cyprian Taylor* entered on the 18th, and was ejected by the defendants on the 19th.

(*a*) He was one of the defendants, and all the other defendants were as much original defendants as he was, but that the word original is quite improper. The reporter had probably read some equity reports, and took the epithet *original* from those reports, in which it is properly used. Where a defendant dies, and the cause is revived against his representatives, there the deceased is properly called the original defendant, in contradistinction to his representatives, who were not originally any parties to the suit; and so in case at law, where proceedings may be revived by *sci. fa.* after an abatement, the word *original* may be properly used, but not in the present case, where there are no new defendants.

(*b*) If *Robert* had been the sole defendant, the suit would have abated.

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And then they conclude generally, as usual; submitting the matters of law to the judgment of the court, upon the above facts.

This case was argued four several times; first, on *Tuesday* 3d *June* 1755, by Mr. *Yorke*, for the plaintiff, and Mr. *Knowler* for the defendants; again, on *Tuesday* 11th *November* 1755, by Mr. *Pratt* for the plaintiff, and Mr. *Perrot* for the defendants; a third time, on *Tuesday* 11th *May* 1756, by Mr. *Caldecot* for the plaintiff, and Mr. Serjeant *Prime* for the defendants; and a fourth time, on *Friday* 19th *November* 1756, by Mr. *Caldecot* for the plaintiff, and Mr. *Knowler* for the defendants: but it is unnecessary to repeat the three first arguments particularly; because the last includes the general substance of them.

The sum of what was urged on the part of the plaintiff was, that the leasing and jointuring powers *existed* at the time when they were executed by Sir *Robert Atkyns* the father; that those powers were *well executed* by him; that the lease and jointure made by him, in pursuance of those powers, were an *impediment* to his son Sir *Robert* the younger's suffering a common recovery; that even supposing that *James Earle* was a good tenant to the *præcipe*, yet the *entry of dame Ann* the jointress, within the five years, *avoided* this recovery; and consequently, that the remainder or reversion in fee, devised to the lessor of the plaintiff by Sir *Robert* the father, was *not barred* by the recovery thus suffered by Sir *Robert* the son.

These points were entered into very largely, by Mr. *Caldecot* and the gentlemen who had spoken before him, on the same side.

[75] They, first endeavoured to prove(*a*) that the powers reserved to Sir *R. A.* the father by the two deeds of 12th *June* 1669 were *in being* and *valid* at the time of the execution of the lease to the *Ducres*; and secondly, that they were *well executed:* and consequently that there were estates of freehold subsisting at the time when Sir *R. A.* the son made the feoffment to *Earle: viz.* dame *Ann*'s jointure, and the lease to the *Ducres:* and therefore, thirdly, they insisted that these life-estates were impediments to Sir *R. A.* the son's suffering the common recovery. They denied that Sir *Robert Atkyns*, the son, was tenant in tail in *possession*, at the time that he made the feoffment to *James Earle:* so that *Earle*

(*a*) This is wrong: the powers were only in the greater deed; *lege* therefore that "the two powers reserved to Sir "*R. A.* the father by the great deed of 12th *June* 1669."

could not be a good tenant to the *præcipe*. And they urged, that even admitting that Sir *R. A.* the son was tenant in tail in possession, yet he could not upon this *naked* possession, without the freehold, make a good tenant to the *præcipe* without the *jointress* and the *lessee for life's* joining: And that the court *cannot*, (under 14 *G.* 2. *c.* 20. § 1.) PRESUME *a previous surrender or conveyance* of the estates for life, in order to make the recovery good. 1757. TAYLOR v. HORDE.

They further, fourthly, insisted, that supposing Sir *Robert Atkyns*, the son, was tenant in tail in possession, and also that there was a good tenant to the *præcipe;* (so that the recovery was good, as a common conveyance;) yet the *re-entry* of dame *Ann Atkyns*, the jointress, within the five years (in 1712) actually *avoided* this recovery; which, if not void, was at least *voidable* by the tenant for life: and this re-entry of the tenant for life *re-vested* all the subsequent estates.

The *great* stress of the question lies (as they said) upon the *tenant to the præcipe.*

The first point, in order of *time*, is the *validity of the two powers* created by the greater deed of 1669. First point.

But there is no ground, either for the supposition of a *fact*, "that the lesser deed must have been executed "*last:*" or for any *inference* in point of law, "that it "operates to the *extinction* of these powers."

The *fact* concerning the priority of execution of the two deeds cannot, *now*, be determined by any evidence: Therefore *presumption* must determine it.

Now one of these deeds is an agreement to execute the other: consequently, must have been prior to it. The lesser deed *covenants;* the greater *performs* that covenant: therefore the lesser was prior. If it had been executed *last: that* would have destroyed the very effect of it and the powers raised by it. Dame *Mary* was giving up and exchanging her former jointure: and therefore *she* might desire a single distinct deed, to secure her own interest. For which purpose, a deed of covenant was the most proper: and there was no need to incumber this lesser deed, with the powers inserted in the greater deed; which powers did not concern *her.* Whereas, in order to support a contrary argument, it is necessary to suppose a *new* agreement (without, and even against, any reason for it,) to alter and destroy the former agreement. But if the parties had *meant* so, they would have so *expressed it.* [2 Burr. 713.] [76]

However, supposing the lesser deed to have been *actually* executed *last*; yet being all *uno flatu*, the *law* will order the time, so that the proper deed shall be *taken* to

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be anterior, and the other subsequent, *according to* the *reason of the thing* and the *intent of the parties*. *Digges's* case, 1 *Co. Rep.* 173. *Albany's* case, 1 *Co. Rep.* 107. and 2 *Rep.* 75. the Lord *Cromwell's* case.

And the operation of the *fine* will *follow* the *construction of the deed*.

Countess of *Rutland's* case, 5 *Co.* 26. *a.*

Second point.

Therefore, the existence of the powers being established, the next question is, "whether they have been WELL "*executed*." Dame *Mary's jointure* has *not* been objected to: but the lease made to the *Dacres* has; (first) as being *without a subsisting power* in Sir *R.* the elder, the lessor to make it; (secondly) as being FRAUDULENT, even supposing him to have had power to make it: (thirdly) as the livery and seisin was made to the attorney of ONE *only* of the three lessees, and not to *all* three,* or their joint-attorney.

[*And it might have been added as all three were under age.]

Now it is true, that a tenant in tail *in possession* may suffer a recovery: so also may a tenant in tail in *remainder*, if he can *get in* the *tenant for life*.

But the original donor may interpose as many estates for life, as he pleases, before and prior to the tenancy in tail. And this lease to the *Dacres*, under the power, is just *the same* as if it had been ORIGINALLY *interposed*. And the *declaration of the intention* will NOT *vitiate the estate* limited to these *Dacres*: If it had been even a *condition* annexed, in restraint of alienation, such a condition would have only been void; and the *estate*, good. *Co. Litt.* 24. *a. Corbet's* case, 1 *Co.* 84. *Mary Portington's* case, 10 *Co.* 35. *b.*

[77]

As to fraud—there is nothing fraudulent in this lease. And both the terms have been actually recovered at law.

If Sir *R. A.* the father's superfluous declaration has any effect, it makes the lease good: and it would have been adjudged good, if it had been called in question whilst it subsisted. 2 *Leon.* 132. *Moore* and *Savill's* case.

And no *one* is hurt or defrauded by this lease. *Not the jointress*: for the full and best rent is reserved. Therefore *Cro. Eliz.* 5. *The Countess of Sussex's case* does not affect *this* case; for there, the jointress suffered. Nor is the *tenant in tail* hurt; for the same reason, as to his *rent*: and as to the *postponing* his power to suffer a recovery, it was legal, and might have been done by a real actual demise for life or lives. And the eyes of this court do not pierce further than the *shell*† of the conveyance; not to the *design* of it. As in cases of terms to preserve contingent remainders, this court cannot hinder the trustee from destroying them: So, of terms to attend in-

† Legal trusts.

heritances; which this court cannot hinder the mortgagee from getting in. *Cro. Car.* 190. *The case of Nash* v. *Preston*, is a strong case to shew that the court of *law* will not meddle with the *equity* of the case. 1757. TAYLOR v. HORDE.

Now this lease has *pursued the power*: and this court will not meddle with the *intent*.

Leases made by churchmen, for the benefit of their families, are generally as fictitious as this: and yet they are always allowed to be good.

As to the livery and seisin—this livery to *Thomas Barker* enured to the use of all the *three Dacres*, according to the purport and true meaning of the letter of attorney, most explicitly therein expressed, and so declared at the time of the livery by Sir *R. A.* the elder who gave it.

This sufficiently appears (as the present infeoffment was *by* DEED,) from *Bro. Abr.* Title *Feffements de terres*, *pl.* 16, 67, 72. and *Co. Litt.* 48. *b*, 49. *a*. But 2 *Anders.* 196. *pl.* 14. *the case of Davy* v. *Abbot*, is in point: it is most exactly the same case as this.

So that the *life*-estates of dame *Ann* and of the *three Dacres* appear to have been *well created*.

Consequently therefore, a *double* freehold is sufficiently established; viz. one, in dame *Ann*; the other, in the *Dacres*.

From hence it follows, thirdly, That Sir *Robert Atkyns* the son, was by them precluded from suffering this recovery: as he was not tenant in tail *in possession*, at the time of his making the feoffment to *James Earle*. Therefore he was to gain a freehold as he could; by right, or wrong: and it may be said, that *either* of them will do. [78] Third point.

But even supposing him to have been tenant in tail in *possession*, yet *James Earle* was *no good tenant to the præcipe*.

When he recovered against dame *Ann*, he was *not* tenant in tail in possession: but he recovered against her, upon a supposition "that he *was*." Which supposition was grounded therefore upon a mistake. And the terms which *Philips* recovered as his lessee, and surrendered to him, were both of them *fictitious*. So that the feoffment to *Earle* must fall to the ground; having no foundation to support it. And though livery was given to him by Sir *Robert*, yet Sir *Robert* himself CONTINUED in possession *till his death*.

Which observations being premised, this part of the case may be considered, 1st, on Sir *Robert's* verdict and judgment against dame *Ann*; and 2dly, on his subsequent feoffment to *Earle*.

First—His entry under the judgment cannot amount to a *disseisin*; nor had he thereby, an estate *pursuant to his title*, as there claimed by him; it could *not be more* than

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an estate in tail, EXPECTANT *upon two freeholds.* It could not be a disseisin: because it was an entry UNDER a *verdict.* In truth, he gained only a bare *naked possession, without* the freehold. And so is the writ of *habere facias possessionem:* and the judgment is "to recover the *term*" *only.* And *Cro. Eliz.* 438. *the case of Bateman* v. *Allen,* (upon a devise the same with that in the case of *Newys and Scholastica his wife* v. *Larke,* in *Plowd.* 403.) also proves this.

Therefore the entry under the judgment in *ejectment* could give no title to Sir *R. A.* the son to suffer a recovery: it was a LAWFUL ENTRY; but an UNLAWFUL HOLDING. *Co. Lit.* 57. *b.* A wrongful withholding is not a disseisin; but a deforcement. *Co. Litt.* 277. *b.* 331. *b.* 354. *b.* 355, 356. And this is without the freehold.

It is like the cases of tenant at sufferance: 12 *Assize* 22. *Co. Litt.* 57. *b.* 1 *Ro. Abr.* 659. Title *Disseisin,* letter C. *pl.* 10, 11. *Cro. Jac.* 169. *The case of Butler* v. *Duckmanton. Co. Lit.* 270, 271. *Cro. Eliz.* 238. *The case of* [79] *Allen* v. *Hill.* All which cases concur to prove "that "nothing shall operate by way of disseisin, but a TORTIOUS ENTRY."

And there is NO MIDDLE *kind of holding,* between a *naked possession,* that disturbs nothing; and a *fee,* which disturbs every thing.

Then, secondly, as to the feoffment to *James Earle.* It gained no estate to *Earle.* This is a very great point to families, for the preservation of intails.

If the contrary construction should prevail, even tenants *at will* might do the same thing.

But the line is drawn thus; *viz.* "that a tenant in tail, "WITH *the freehold,* may bar: but *without* it, he can NOT."

A *real* feoffment indeed *may* do it: but a *fictitious* one cannot: but shall be considered as fraudulent and void, like that in *Savile,* 126. *Leon. White* v. *William Bacon.* It is not a discontinuance: *Swift* v. *Heath, Carthew,* 109, 110.

Sir *R. A.* the son, gained no fee by it, to himself; nor any to *Earle;* and the court will consider it as merely *collusive.*

That he gained none, *to himself,* appears from 1 *Brownlow,* 230. *Dame Pett's case.* 2 *Inst.* 412, 413. *Cro. Car.* 302. *Blunden* v. *Baugh. Bracton, lib.* 4. *pa.* 161, 162. *Co. Lit.* 153. *Dy.* 62. 11 *Assize* 6. *Powley* v. *Blackman, Cro. Jac.* 659. *Bull* v. *Wyat, Cro. Car.* 388.

That he gained none *to Earle,* is equally true. *Earle* gained no estate of freehold, by this feoffment; either as a wrong-doer, or as a disseisor. 1 *Ventr.* 360. Serjeant *Maynard's* argument in *Moor* v. *Pitt.*

He might indeed be taken as a disseisor, *at* the election of the right owner; but *not* against it. And here was *no intention* of a disseisin. *Cro. Jac.* 643. *Ferrers* v. *Farmer.* 1 *Mod.* 107. *Fountain* v. *Cook.* In fact, here was NO *actual disseisin:* For sir *R. A.* the son *continued* in possession. Neither was here any force or expulsion. And it is not *every* entry, that is a disseisin: it is no disseisin, unless there be an expulsion. *Co. Lit.* 181. 1 *Salk.* 246. *pl.* 2. most expresaly. 1757. TAYLOR v. HORDE.

Considering this feoffment AS *part* of the CONVEYANCE *of a common recovery*, as a *common assurance*, Sir *Robert* the younger had no power to make a feoffment.

It is not hereby meant that he could not *in fact* make a feoffment: *every* man in *possession may* do it. But this Sir *R. A.* the son, could not convey an estate of freehold, by any *rightful* conveyance, as fine, release, or bargain and sale. And if he cannot do it by a *rightful* method, will the law permit him to do it by a *wrongful* one? Surely not. The possession of a tenant *at sufferance* is not sufficient to build a title upon. *Co. Litt.* 278. *Cro. Jac.* 169. *Cro. Eliz.* 238. [80]

Common recoveries are now considered as a *mere conveyance:* and the recoveror is a *mere instrument and creature* of the tenant in tail. 2 *Rep.* 77. *Cromwell's case. Poph.* 23. *The case of Crocker and York* v. *Dormer. Cro. Jac.* 643. *Sir John Ferrers, and Sir John Curson* v. *Sir Richard Fermor and others.* 2 *Ro. Rep.* 247. S. C. (at the end of it.) 1 *Mod.* 107. *Fountain* v. *Coke.* So, the known case of copyholds, 4 *Co.* 28. *a. Coke's Complete Copyholder;* and the case in 1 *Ro. Rep.* 223. *Herbert* v. *Binion.*

From all which cases it is clearly to be inferred, that the whole transaction is *one common assurance;* that the recoveror is a *creature* and *instrument* of the tenant in tail; and that it shall not be considered as a *tortious* entry and a *disseisin, in* a *common* assurance.

Such a feoffment as this, may be made by *any* person in possession: and, if this should be established, it may be of very mischievous consequence: and will introduce a *new* law, contrary to all *former* rules and doctrines.

The *stat.* 14 *G.* 2. *c.* 20. considers a common recovery as a *common assurance;* and has a proviso, "that the per- "son *had a title to make a tenant to the præcipe.*" And here is not the least ground to presume that the tenants for life either joined or surrendered their estates.

Now if the law considers that some persons *have* this power, and others *have not*; the law will never suffer that to be done by *fraud*, which can *not* be done *fairly and regularly.* And this whole transaction is *fraudulent* and *collusive*, and done *eo animo* to bar the subsequent estates; and is therefore VOID, *as a* FRAUD, within the

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rule of *Fermor*'s case, 3 *Co.* 77. *b.* which considers an estate made by collusion and fraud, as *no* estate.

4th point.

Lastly.—Admitting the facts of Sir *R. A.* the son's being tenant in tail in possession; and also, that there was a good tenant to the *præcipe:* yet THE RE-ENTRY *of the jointress* actually *avoided* it, and *revested* all the subsequent estates.

[81]

If the recovery was not absolutely void, but good AS *a* COMMON *conveyance*, yet it was VOIDABLE: and if it was voidable, then it was *actually* AVOIDED by the entry of dame *Ann*, upon demises laid as far back as the 14th of *February* 1709.

To prove this, they applied the cases in 11 *Co.* 51. *b. Lifford's* case; *Cro. Eliz.* 540. *Holcombe* v. *Rawlyns*; 1 *Anderson*, 352. *Butler* v. *Baker*; *Fitz-Gibbon* 225. *Bunker* v. *Cooke*; *Holt's Cases*, 748; 1 *Co.* 14 *b.* Sir *William Pelham's* case; and a case in *C. B.* in *H.* 12 *Ann*, *Goodtitle* v. *Risden*.

It is like the *regress of a disseisee*, which avoids all intermediate acts, by *relation*.

Argument ex parte def.

Mr. *Knowler*, who twice argued this case for the defendants, included in his last argument all that had been or could be urged on that side of the question: and it was to the following effect.

The *main question* upon this case is, "whether the recovery suffered by Sir *R. A.* the son, be a good *recovery*.

For it is insisted by the lessor of the plaintiff, "that "the recovery is *void*, as being suffered by a person who "had *only* a *bare* possession, and had *no power* to make a "tenant to the *præcipe*."

But *if* the recovery is *good*, the lessor of the plaintiff can have no title: because *he* claims under a limitation in fee, expectant on the determination of an estate tail, which is *barred* by the recovery.

The *limitations*, under which *all* the parties derive their title, are contained in two deeds, dated 12th *June* 1669: which, from their bulk, and for distinction's sake, have been called the *great* deed and the *little* deed.

The *great* deed is a release, grounded on a bargain and sale for a year: the *little* deed is a covenant to levy a fine, and a declaration of the uses of the fine.

In speaking to the question,

Four matters must be taken into consideration, *viz.*

First, the *order* in which the two deeds were executed; and in what manner they *influence* each other. And from

[82]

this consideration it will appear, whether the leasing and jointuring *powers* did EXIST at the time when they were exercised by Sir *Robert Atkyns* the father.

Secondly, supposing the leasing and jointuring powers

did then exist, then whether those powers were WELL EXECUTED by the said Sir *Robert* the father. 1757. TAYLOR v. HORDE.

Thirdly, supposing they were well executed, then whether the *lease* or the *jointure*, made pursuant to these powers, were AN IMPEDIMENT *to Sir Robert Atkyns the* SON'S *suffering the* RECOVERY.

Fourthly, if the recovery was good, then whether the RE-ENTRY *of dame Ann*, under the second ejectment, *did* AVOID *it*.

First, as to the *order* in which the two deeds were executed; and in what manner they *influence* each other. First point.

It is found by the verdict, that Sir *R. A.* the father, being seised of the estate in question and of several other estates, on 12 *June* 1669, made and executed three indentures. By the first, he in consideration of a marriage before that time had with dame *Mary* his then wife, and of her releasing a former jointure made to her before their marriage, covenanted that he and the said dame *Mary* his wife and Sir *Edward Atkyns* (his father) would levy a fine to *Edward Carteret* and *John Lowe*, of the estate in question *only*; to the use of Sir *R. A.* the father for life, *sans* waste; remainder to the said dame *Mary*, for life, for her jointure; remainder to Sir *R. A.* the son and the heirs male of his body by *Lovis Carteret* his intended wife; remainder to the right heirs of Sir *Robert* the father.

By the second indenture (taken in the order as they stand in the verdict) the estate in question is bargained and sold by Sir *Edward A.* and Sir *R. A.* the father, to Sir *Edward Carteret* and *John Lowe*, for a year.

By the third indenture, Sir *Edward A.* and Sir *Robert A.* the father, in consideration of a marriage before that time had between Sir *R. A.* the father and dame *Mary* his then wife, and of a marriage to be had between Sir *R. A.* the son and *Lovis Carteret*, and of her marriage portion, and for a provision to be made for dame *Mary*, of a jointure, release the estate in question (*inter alia*) to *Carteret* and *Lowe* and their heirs, to the use of Sir *R. A.* the father for life, *sans* waste; remainder (except timber) to dame *Mary* for life, for her jointure; remainder to Sir *R. A.* the son and the heirs male of his body on the body of *Lovis Carteret*; remainder to the right heirs of Sir *R. A.* the father. (These are all the limitations in this indenture, concerning the estate in question.) Sir *R. A.* the father covenanted with Sir *George Carteret* (the father of *Lovis C.*) that for the better securing the estate in question to Sir *Edward C.* and *John Lowe* and their heirs, he and dame *Mary* his wife and Sir *Edward Atkyns* would levy a fine to *Carteret* and *Lowe* and their heirs, to the uses before declared. [83]

In *Trinity* term 1669, a fine with proclamations was

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levied, of the estate in question (together with other estates) by Sir *Edward A.* Sir *R. A.* the father, and dame *Mary* his then wife, to Sir *Edward Carteret* and *John Rowe.*

It is NOT found, *which* of the two deeds was executed *first*; (though it was a matter of *fact*:) so that the priority of execution must be determined by the court, from *circumstances* and *presumptions.*

The order in which the two deeds stand *in the verdict*, concludes nothing, one way or the other: since they are placed there, *as* they were given in evidence.

Then he proceeded to compare the two deeds, and to reason upon them; and argued very elaborately, that *either* the *little* deed was executed AFTER *the great deed*; or that the little deed was made with a *view to control or correct the great* deed; or that the *great* deed, and the *little* deed, and the *fine* must be considered as *one* ASSURANCE, (though *not* as incorporated, and as one single *act*:) and in either case, there is an *end* of the *leasing* power, and also of the *jointuring* power.

And he argued very strenuously, that the *fine* would *extinguish* both those powers; because they were powers *appendant* and *annexed* to Sir *R. A.* the father's estate for life, and NOT *collateral* to his estate.

2d point.

Second point or head—supposing the *great* deed was *last* executed, or that it *controls* or *corrects* the little deed; then

Whether the leasing and jointuring *powers* were *well* EXECUTED by Sir *R. A.* the father.

He chose to say nothing as to the execution of the *jointuring* power; no circumstances attending the execution of *it*, having been laid before the jury: but confined himself to the *other*, (the* *leasing power.*)

* See the note at the end of the reply, pa. 104, 105, accounting for curtailing this part of the argument.

Now this lease is *void*, as against law; being made for no other purpose than *to restrain Sir R. A. the son from suffering a recovery.* For *that restraint is against law.*

[84]

The power to *suffer a common recovery*, is a privilege *inseparably incident* to an estate tail: it is a *potestas alienandi*, which is *not restrained* by the statute *de donis*; and has been so considered ever since *Taltarum's* case. [12 *E.* 4. 14. *b. pl.* 16.] And this power "to suffer a common "recovery," *cannot be restrained* by *condition, limitation, custom, recognizance, statute*, or *covenant.*

That it cannot be restrained by *condition*, appears by *Co. Litt.* 223. *b.* 224. *a.* and *Sonday's* case, 9 *Rep.* 128.

That it cannot be restrained by *limitation*, appears by *Cro. Jac.* 696. *Fey* v. *Hinde*; and by *Sonday's* case, and other books.

That it cannot be restrained by *custom*, appears by the case of *Taylor* and *Shaw*, in *Carter* 6 & 22.

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That it cannot be restrained by *recognizance*, or by *statute*, appears by *Poole's* case, cited in *Moore* 810.

That it cannot be restrained by *covenant*, appears by the case of *Collins* v. *Plummer*, 1 *Peere Wms.* 104.

That an ATTEMPT *to suffer a common recovery* cannot be restrained, appears by *Corbet's* case, in the 1 *Rep.* 83. *Mildmey's* case, in the 6 *Rep.* 40. and the case of *Pierce* v. *Win*, in 1 *Ventr.* 321.

And that a CONCLUSION *to suffer a recovery* cannot be restrained, appears by *Mary Portington's* case, in the 10 *Rep.* 35.

So that the question is reduced to this, "whether *that* "can be effected by a LEASE *made pursuant to a power*, "which can *not* be attained by a condition, limitation, "custom, statute, recognizance, or covenant."

Since the law has been thus careful to preserve this incidental privilege of suffering a common recovery, to a tenant in tail, surely it will not permit this *new* experiment, *equally destructive* to that privilege, to take place. This is the *first attempt* of the kind: and it is a sound rule of law, "that what *never has been*, ought *not to be* "permitted."

The LEASE is also *void*, as being *fraudulent:* for it [85] was made to deprive Sir *R. A.* the son, of the profits of the estate, and of an incidental power over it. And the fraud which made it void, was *apparent*. And as the estates affected by the lease, subsisted before the lease was made, the lease was *fraudulent at common law*.

[Plea of non-tenure.]

To prove the lease to be fraudulent, he relied on *Savile*, 126. *the case of White* v. *Bacon*, *H.* 32 *Eliz.* In a *formedon*, the tenant pleaded non-tenure: on which, the parties were at issue. The jury found "that the tenant "made a feoffment to several persons, to their own proper "use, before the writ purchased; and that the feoffees "*never took the profits* of the land; but that the feoffor "took them, until the day of purchasing the writ." And the doubt was, whether the feoffment was fraudulent as against the demandant. And the judgment of the court was, "that it *was* fraudulent and void." Now if the feoffee's *not* taking the profits, but the FEOFFOR'S *taking them*, was a reason for adjudging the feoffment to be fraudulent against the demandant in *that* case; the lessee's *not taking the profits, not paying the reserved rent, not having the lease in his custody;* but the LESSOR'S CONTINUING *in possession* and taking the *profits to the day of his death*, seem in the *present* case, to be full *as cogent* reasons for determining this lease to the *Dacres* to be fraudulent, against dame *Ann* and Sir *R. A.* the son.

If this case should be answered by saying "the feoff-"ment therein mentioned was made void by 13 *Eliz. c.*

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" 5. made against fraudulent grants;" the reply would be " that that statute was made in affirmance of the com- " mon law;" as appears by *Twine's* case in the 3 *Rep.* 82. *b.* But he argued that the lease was fraudulent not only at *common law, but likewise* by the statute. For the marriage of dame *Mary* with Sir *R. A.* the father, and dame *Mary's* releasing her former jointure, were a *valuable consideration* for the estate limited to dame *Mary* for life: and the marriage portion of *Lovis Carteret* was a *valuable consideration*, which extended to the limitation to Sir *R. A.* the son, and the heirs male of his body by *Lovis Carteret.*

Here it hath been observed, " that if the lease had been " called in question *whilst it subsisted*, it could *not* have been " avoided; but *would have been adjudged absolute*, for the " benefit of the lessees;" And 2 *Leon.* 132. *Moor* and *Savill*, and other books, were cited as authorities to support the observation.

Answer—the objection to the lease is, " that it NEVER " DID *subsist*," for the reasons which have been mentioned: and if the lease was *void* from the beginning, it is a [86] *contradiction*, to say " it shall be adjudged absolute." And the authorities cited are, all, of conditions subsequent to the estate created at the same time with the condition. In which cases, there was no objection to the estate; (for the estate was allowed to be well created;) but the objections were to the conditions, which were *subsequent* to the estate.

It has been observed farther, " That the eyes of the " court do not pierce further than the shell of a convey- " ance; *not* to the *design* of the maker of it." Here indeed one must be at a loss for an answer; for want of knowing what the *shell* of a conveyance is. But there is one thing that appears upon this special verdict, which very much favours, if it does not directly establish what we have been contending for: and that is, the *verdict* which is found to have been *obtained* BY *Sir R. A. the son, against dame Ann* the second wife of Sir *R. A.* the father; which verdict is a *disaffirmance* of the *leasing* and *jointuring* powers; and *could not have been obtained*, if those powers *had subsisted*. It is true, there is a deed found also in the special verdict, which was made between the death of Sir *R. A.* the father and the bringing the ejectment, and to which Sir *R. A.* the son is a party: In* which deed there is a *recital* " That Sir *R. A.* the " son then claimed the estate in question, BY *and* UNDER " *the* GREAT *deed*;" which deed was not given in evidence on the trial of the ejectment. But this finding is a matter of no moment: For the little deed was executed either before, or at the time, or else subsequent to

* The indenture tripartite dated 18th May 1710. Vide pa. 70.

the time, of executing the great deed. If it was executed *subsequent* to the execution of the great deed, then the little deed and fine control the great deed, by *extinguishing* the powers. If it was executed *before* or *at* the time of executing the great deed, then the two deeds and the fine may be taken *as one assurance*; (*V. ante* 83.) And in that case, the little deed *corrects* the great one, by limiting the estate in question, to Sir *R. A.* the father, *discharged* of the powers. And in *either* case it may be said, with great truth, "That Sir *R. A.* the son *claimed* "*under the* GREAT *deed*." However, supposing the person who drew the deed, had mistaken the law, and made a *false* recital, surely a *mis-recital* of matter of *law* will *not conclude a court of justice*. And what Sir *R. A.* the son's *own* opinion upon the matter was, will appear by the recent pursuit of his title against dame *Ann*; for Sir *R. A.* the father died in *February* 1709: and in *Trinity* term following Sir *R. A.* the *son* brought his ejectment against dame *Ann*, who was then in possession of the estate under the jointuring power.

But it having been found, "That afterwards dame "*Ann* brought an ejectment, and recovered the estate, "upon two demises, one made by herself, and the other [87] "by the surviving lessee for life;" it hath been insisted that dame *Ann* COULD NOT *have obtained that verdict*, UNLESS the *two powers*, or *one* of them at least, *had then existed*.

To which it may be answered, that it does not appear that the *little* deed was PRODUCED *in evidence*, upon the trial of that ejectment. Or perhaps the *jointuring* power *only* might then be in question: or there might have been *other reasons* for the difference in opinion. But however it might happen, still that verdict is *not conclusive*.

Here, Mr. *Knowler* argued that the lease to the *Dacres* must have determined in 1711, upon the death of Sir *R. A.* the son without issue male: and that the lessor of the plaintiff was *barred of his remedy* by *this* action of ejectment, (being an action grounded on an entry;) because it was not brought within 20 years after his title accrued; and consequently, his *entry was not lawful*, by 21 *Jac.* 1. *c.* 16. [Stat. of limitations]

But these parts of his argument are omitted, for the reason given in the note, *p.* 104, 105.

Third point or head.—But supposing the leasing and the jointuring powers *did exist*, and *were well executed by* Sir *R. A.* the father: the matter which falls next to be consideration is, "whether the lease or jointure made in "execution of the powers, were an IMPEDIMENT to Sir "*R. A.* the son's *suffering the recovery*."

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The point we shall endeavour to establish is, that *James Earle*, the person against whom the writ of entry was brought, *was tenant of the freehold* when judgment was given against him in the common recovery. And we shall begin with observing that the *jointure* or the *lease* could be *no* impediment to Sir *R. A.* the son's suffering the recovery; *because* neither of the lessees or dame *Ann* were *in possession* of the estates, at the *time* when Sir *R. A.* the son made the feoffment to the said *James Earle.*

* *If* the court should be of opinion, on the authority of 2 *Anderson*, 196. "That the livery under the letter of "attorney of *John Dacres*, vested the freehold in his co-"*lessees* as well as in himself; and *not* in himself *only*;" then we insist that the *livery was void*, because the lessees were in possession BY *the* DEED. For if tenant for life has a power to make leases for lives, and makes a lease for life *by livery*, the *livery is void*; because the lease *takes effect* BY *the* DEED; for *by sealing the deed*, the power is executed. 2 *Levinz*, 149. *Wigson and Garret.* 1 *Ventris*, 291. *The Earl of Leicester's case.* And the *livery being void*, the lessees were NEVER *in* POSSESSION: for it is found by the verdict "that the lessees or either "of them were never in possession *otherwise* than BY *the* "LIVERY."

And as the *lease* was no impediment, so the *jointure* could be none. For it is found "that dame *Ann* being "in possession by virtue of the deed of appointment, "and claiming the estate for her life for her jointure, "an ejectment was brought on the demise of Sir *R. A.* "the son and *J. Walker* his trustee, against dame *Ann* "and the tenants in possession, for the recovery of the "estate; and that there was a verdict for the plaintiff, "and judgment on it." And "that a writ of possession "was awarded; and that soon after the judgment, and "during the life of dame *Ann*, Sir *R. A.* the son *entered* "into, and was *in possession* of the estates, and that "he *continued in possession* to the day of his death." By this, it appears that the *jointure and possession of dame Ann* was REMOVED *out of the way.*

It can be no objection to the legality of Sir *R. A.* the son's possession, "that the judgment was not executed "by a *writ* of possession:" since something equivalent to it is found, *viz.* "that soon after the judgment Sir *R.* "*A.* the son entered into and *was in* possession of the "estate." And there is no rule of law more uncontroverted, than, "that a recoveror may enter *without* a writ "of execution, where the demand is certain." The demandant, after judgment in a common recovery, may enter, *or* take out execution at his election. *Shelley's* case, 1 *Rep.* 106. *Mary Portington's* case, 10 *Rep.* 38.

* Note—Upon his first argument, he had urged (upon the authority of Bro. Abr. title Feffement de [88] Terres, pl. 67.) "That no freehold passed by the livery, to any of the three lessees, except John Dacres who executed the letter of attorney to take it: which John dying in 1705, the lease expired then." But he did not now insist upon this point: but seemed, rather, to give it up.

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That it cannot be restrained by *recognizance*, or by *statute*, appears by *Poole's* case, cited in *Moore* 810.

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So that the question is reduced to this, "whether *that* "can be effected by a LEASE *made pursuant to a power*, "which can *not* be attained by a condition, limitation, "custom, statute, recognizance, or covenant."

Since the law has been thus careful to preserve this incidental privilege of suffering a common recovery, to a tenant in tail, surely it will not permit this *new* experiment, *equally destructive* to that privilege, to take place. This is the *first attempt* of the kind: and it is a sound rule of law, "that what *never has been*, ought *not to be* "permitted."

[85]

The LEASE is also *void*, as being *fraudulent:* for it was made to deprive Sir *R. A.* the son, of the profits of the estate, and of an incidental power over it. And the fraud which made it void, was *apparent*. And as the estates affected by the lease, subsisted before the lease was made, the lease was *fraudulent at common law.*

[Plea of non-tenure.]

To prove the lease to be fraudulent, he relied on *Savile*, 126. *the case of White* v. *Bacon*, *H.* 32 *Eliz.* In a *formedon*, the tenant pleaded non-tenure: on which, the parties were at issue. The jury found "that the tenant "made a feoffment to several persons, to their own proper "use, before the writ purchased; and that the feoffees "*never took the profits* of the land; but that the feoffor "took them, until the day of purchasing the writ." And the doubt was, whether the feoffment was fraudulent as against the demandant. And the judgment of the court was, "that it *was* fraudulent and void." Now if the feoffee's *not* taking the profits, but the FEOFFOR'S *taking them*, was a reason for adjudging the feoffment to be fraudulent against the demandant in *that* case; the lessee's *not taking the profits, not paying the reserved rent, not having the lease in his custody;* but the LESSOR'S CONTINUING *in possession* and taking the *profits to the day of his death*, seem in the *present* case, to be full *as cogent* reasons for determining this lease to the *Dacres* to be fraudulent, against dame *Ann* and Sir *R. A.* the son.

If this case should be answered by saying "the feoff-"ment therein mentioned was made void by 13 *Eliz. c.*

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recoveror. And if the judgment in ejectment did not produce this effect, the lessor of the plaintiff could not *enter*, or be *entitled to the writ of habere facias possessionem*: but his having a *right to enter*, and to *sue out that writ*, *infers* his right to the *possession*. WHILST *the judgment stands in* FORCE, it *removes* an intervening estate out of the way: and *during* that time, it is the same thing, *as if it had never existed*. And the recoveror's right to the possession will *continue* till the judgment is *reversed* by error, or *falsified* in another action. Like the case where the tenant in tail suffers an erroneous recovery; so long as the recovery remains in force, it is a bar to the tail, and the issue in tail has no right to the estate tail; for if the tenant in tail should disseise the recoveror, and die, the issue would not be remitted; because he has but one
[90] title to the land, (which is the title by descent;) and there must be two titles in the same person to make a remitter. *Co. Litt.* 349. *a.*

Now the consequence of this is, that the *right to the possession*, and the *remainder in tail*, meeting in the SAME *person*; and that person being Sir *R. A.* the son; the possession and the remainder in tail UNITED, and Sir *R. A.* the son became seised of an estate tail executed, or (in other words) of an estate tail in *possession*.

If the *nature of an action of ejectment*, and the consequence resulting from a recovery in it, be considered, this will appear in a clearer light.

An ejectment is a *possessory action*; in which almost all titles to land are tried: Whether the party's title is, to an estate in fee, fee tail, for life, or for years, the remedy is by one and the same action. In an action of ejectment, the plaintiff recovers *only* the possession of the land: And the execution is, of the possession *only*. But if the lessor of the plaintiff recovers ONLY *the possession* of the lands, it may be asked "*how* he becomes "seized *according to his title*." To which it may be answered, that when a person is in possession *by title*, (as every person is, who enters in execution of a judgment in ejectment, because the law does no wrong,) the possession and title *unite*. For it is a rule of law, "that when a "man, having a title to an estate, comes to the posses- "sion of it *by lawful means*, he shall be in possession "ACCORDING *to his title*:" As where the title is to have a fee, he becomes seised in fee; where the title is to have an estate tail, he becomes seised of an estate tail; and so on; the *law* casting the estate upon him *according* to his title. And were it not so, an ejectment would be the most ineffectual remedy for the trial of *titles* to estates. And it would never answer the purpose for which it was brought into use, if (as the counsel on the other side

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would have it) the lessor of the plaintiff had *no more than a bare* possession, *after* an execution or entry on a judgment in ejectment. But this is not all. For a great *absurdity* would follow, were it otherwise: A man would have a rightful possession, with an *immediate* remainder to *himself in tail*; a notion which never existed, till this case came to be debated.

What is it that converts an estate tail in remainder into an estate tail *executed*, in any case? certainly, nothing more or less than the POSSESSION's *coming* to the remainder in tail. For if there is tenant for life with remainder to a third person in tail, nothing comes to the remainderman upon the death of the tenant for life, *but* the possession: for the estate tail was in him *before*.

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And *whilst* the estate tail *continued* EXECUTED, Sir *R. A.* the son made the feoffment to *James Earle:* which discontinued the tail, and vested a defeasible fee in him: and the *præcipe*, upon which the common recovery was suffered, being brought against him; and Sir *R. A.* the son being a party to the common recovery, as vouchee: the common recovery, thus circumstanced, *barred* the estate tail and the remainders over.

And though dame *Ann* falsified the recovery *in ejectment* brought by Sir *R. A.* the son, by the judgment in the ejectment afterwards brought by herself, yet that falsification had *no other* effect upon the estate, than to revive HER *right to the possession*. Like the case just now cited, of an erroneous common recovery suffered by the tenant in tail; where, if the issue in tail reverses the common recovery by a writ of error, the reversal revives *his title to the estate tail*; and consequently he is then tenant in tail, by remitter. So that dame *Ann*, by means of the recovery in the ejectment brought by herself, having the right to the possession, *became tenant for life* AGAIN, in possession; with a *remainder* IN FEE thereupon expectant TO *the* RECOVEROR in the *common* recovery, or to the person to whose use the *common* recovery was declared.

That estates may *open and shut*, or be *spread and expand* AS *events happen*, is not unusual in our law. If an estate is limited to *A.* for life; remainder to his first and other sons, in tail; remainder to *A.* and the heirs of his body: *till A.* has issue, he is seised of an estate tail *executed*: upon the birth of a son, that estate *opens*, and lets in the son: and *A.* thereupon becomes tenant for *life*, with remainder to his son in tail. And this was *Lewis Bowle's* case, 11 *Co.* 80. So if lands are limited to *all* the children, either in possession, or remainder; upon the birth of the *first* child, the whole estate vests in him or her; upon the birth of *another* child, the estate *opens*, and

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takes in *that* child; and opens in like manner on the birth of *every* other child. 1 *Ld. Raym.* 310, 311. *Earl of Sussex* v. *Temple.* 2 *Vern.* 525. *Cook* v. *Cook.*

But the resolution of the question now under consideration does not altogether depend on the QUANTITY *of the estate* which Sir *R. A.* the son *had*, at the time when he made the feoffment: it depends on the QUALITY *of the* CONVEYANCE he *made use of.*

All the gentlemen who have argued this case on the other side, *have blended and confounded* the SEVERAL OPERATIONS *of* DIFFERENT CONVEYANCES; and have not considered them with that *distinction and precision* that is necessary for the solution of the present question. If due attention were given to the *operation* of the several conveyances which the law has established, the seeming difficulties of this part of the case would be removed.

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ALL *conveyances* OPERATE AS *a* FEOFFMENT, OR AS *a* GRANT.

[Cowp. 701.] A FEOFFMENT operates on the *possession: without* any regard to the estate or interest of the feoffor. A GRANT operates on the estate or interest which the *grantor has* in the thing granted. But, to be more particular—according to Lord *Coke's* enumeration, a man may purchase or convey lands by *ten* manners of conveyance; *viz.* by *feoffment, grant, fine, common recovery, exchange, release, confirmation, grant of reversion with attornment, bargain and sale, will.*

[3 Atk. 339. acc.] To make a *feoffment* good and valid, nothing is wanting, but *possession:* and where the feoffor has possession, though it be *as* BARE *and* NAKED as the gentlemen would have it, yet a freehold or fee-simple *passes*, by reason of the *livery*. *Poph.* 39. *Litt.* § 595, 599, 611, 698. *Co. Litt.* 366. *b.* 367. *a.*

A *grant* passes nothing but what the grantor may LAWFULLY *grant*. *Poph.* 39. *Litt.* § 608.

[A fine by lessee for years is void, except against parties; all others may plead *nil. hab. in* tenem. Qu. if the conusee only had seisin at the time of levying the fine. See 13 Vin. 335. (G. b. 4.) pl. 1. but it seems it would be sufficient.]

A *fine* and *common recovery* are likened to a feoffment: for one is *called* a feoffment, of record, and the other is said to be in *nature* of a feoffment of record. That which *occasions* the *likeness* between a feoffment fine and recovery, is, that they ALL PASS A FEE; THOUGH the feoffor, conusor, or tenant HAVE none. *Co. Litt.* 9. *b.* But, to give them this uniform operation, the conusor in the fine, and the tenant to the *præcipe*, must be seised of a *freehold; i. e.* an estate for life, at least; otherwise, the fine may be avoided, by the plea of "*partes finis nil habuerunt;*" and the recovery, by the plea of non-tenure, *i. e.* "that the person against whom the writ was brought, "was not tenant of the freehold, by *right*, or by *wrong*." By this, it appears that a *fine* and a *common recovery* are

both void, for *want of a freehold:* but it no where appears, notwithstanding what has been urged, that an *estate* in the feoffor, is necessary, to support a FEOFFMENT. But it does appear, and I have a great authority for it, that it is *no plea*, in avoidance of a feoffment, to say that "the *feoffor has nothing* in the land, at the time of the "*feoffment*:" because the *land passes by the* LIVERY: if the operation of the feoffment is questioned, the *only* plea is "*N' enfeoffa pas:*" which puts in issue *only the* LIVERY. This is the opinion, and this is the language of *Littleton:* 10 *Ed.* 4. 8, 9.

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ALL OTHER *conveyances*, as *exchange, release, confirmation, grant of reversion, bargain and sale, will*, pass nothing but what the grantor may LAWFULLY *convey*, WITHOUT *livery;* and, on that account, are in the *nature of a grant. Litt.* § 606, 607, 609, 610. *Hardr.* 410. *Edwards* v. *Slater.* It is the operation of THESE conveyances, that the gentlemen, in the course of their argument, have APPLIED *to a* FEOFFMENT: but with what *propriety*, is submitted to the court, upon what is now disclosed.

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But it has been said, "that such a feoffment as this, "may be made *by* ANY *person in* POSSESSION; and if "established, will introduce a NEW *law* in *Westminster-*"*Hall*, CONTRARY *to all* FORMER rules and doctrines."

To which objection, the answer is, "that it is most "clear, that a feoffment MAY *be made by* ANY *person in* "POSSESSION:" for it is the doctrine the *law* teaches; and it has been the language of the *greatest professors* of it. Lord *Coke*, in his comment on the 25th chapter of *W.* 2. (which gives a writ of *novel disseisin*, where tenant for years aliens in fee, by feoffment,) grounds his distinction between cases which are within the act and cases which are not within the act, *on* POSSESSION ONLY. For he says, though the act speaks of an alienation by feoffment, by a tenant for years; yet it *extends* to tenant "by *elegit*, statute *merchant*, statute *staple*, tenant at "*will*, and tenant at *sufferance;* BECAUSE all these have "a POSSESSION: but it is otherwise of a bailiff; FOR "he hath *no* POSSESSION *at all.*" This shews how greatly one of the gentlemen is mistaken, when he asserts "that "a conveyance of an estate of freehold, by a tenant *at suf-*"*ferance* would be VOID*:" since it appears by the statute, and by the comment upon it, "that a feoffment by "a tenant *at sufferance* (who has no more than a bare "possession) will unquestionably pass a freehold." And the case of *Butler* v. *Buckmanton, Cro. Jac.* 169. proves no more than that the release of tenant in tail to a tenant at sufferance, is not good for want of a privity between them. Besides, a release, (as has been already observed,)

* V. ante p. 86.

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passes no greater estate than the releaser can *lawfully* convey.

Lord Ch. Just. *Holt* lays it down as clear law, in the case of *Hunt* v. *Burn*, *Il.* 1 *Annæ*, "that if lessee for *years* "makes a feoffment *with livery*; though the lessor be "on the land, protesting against it, yet the land passes; "*because* the lessee was entitled to the *possession*." And Lord Ch. Just. *Holt* is supported in his opinion, by the case of *Read and Morpeth* v. *Errington*, *Cro. Eliz.* 321. where the question was, "if a feoffment by lessee for
[94] "*years*, the lessor being upon the land, was a good feoff-"ment:" for it was pretended that his being upon the land guarded the land, so that no feoffment could be made. But the court was of opinion that the feoffment was good; "*because* the lessee had the sole right to the "POSSESSION; and livery ought always to be given of the "*possession*."

Notice has been already taken, that it is *no plea* in avoidance of a feoffment, to say "that the feoffor had "nothing in the land at the time of the *feoffment*." Let us here add the *form of pleading a feoffment*, by tenant for *life*, and tenant for *years*; good pleading being an infallible test of the law. If feoffment in fee is pleaded by tenant in fee the conclusion is, "that the feoffee was by "virtue thereof seised, in fee:" and the *same* conclusion is made on the feoffment in fee of the tenant for life and tenant for years, "that by pretext thereof the feoffee was "seised *in fee*." The entry of *Albany's* case in 1 *Rep.* 108. is a proof of this.

It appears by *Jenning's* case in the 10th *Rep.* 43. "that "the feoffee of lessee for *years* was a *good* tenant to the "*præcipe*." In the case of *Smith* v. *Parkhurst*, or *Dormer* and *Fortescue*, it was admitted that there *would have been* a good tenant to the *præcipe*, *if* Mr. Just. *Dormer* had made a feoffment. And the question in Sir *William Pelham's* case, 1 *Co.* 14. *b.* is an admission "that the feoff-"ment of lessee for *years* will *pass a freehold*."

"That *possession* ONLY would support a feoffment," was the doctrine at *Westminster-Hall*, in *elder* times. In *Perkins* (a book of no mean authority,) section 200, it is laid down as a rule, "that WITHOUT *possession*, a man can-"not make livery." A feoffment by the lessee for years, though the lessor be upon the land, passes the land: and the reason for this is rendered in the book; "*because* the "lessor had nothing to do with the POSSESSION."

It was the law, when lands were devisable only by custom, that a man might devise "that his lands should be "sold by his executors." In which case, the lands descended, upon the death of the testator, to his heir at law: and the executors took no interest by the will. *Bubing-*

That it cannot be restrained by *recognizance*, or by *statute*, appears by *Poole's* case, cited in *Moore* 810.

That it cannot be restrained by *covenant*, appears by the case of *Collins* v. *Plummer*, 1 *Peere Wms.* 104.

That an ATTEMPT *to suffer a common recovery* cannot be restrained, appears by *Corbet's* case, in the 1 *Rep.* 83. *Mildmey's* case, in the 6 *Rep.* 40. and the case of *Pierce* v. *Win*, in 1 *Ventr.* 321.

And that a CONCLUSION *to suffer a recovery* cannot be restrained, appears by *Mary Portington's* case, in the 10 *Rep.* 35.

So that the question is reduced to this, "whether *that* "can be effected by a LEASE *made pursuant to a power*, "which can *not* be attained by a condition, limitation, "custom, statute, recognizance, or covenant."

Since the law has been thus careful to preserve this incidental privilege of suffering a common recovery, to a tenant in tail, surely it will not permit this *new* experiment, *equally destructive* to that privilege, to take place. This is the *first attempt* of the kind: and it is a sound rule of law, "that what *never has been*, ought *not to be* "permitted."

The LEASE is also *void*, as being *fraudulent*: for it [85] was made to deprive Sir *R. A.* the son, of the profits of the estate, and of an incidental power over it. And the fraud which made it void, was *apparent*. And as the estates affected by the lease, subsisted before the lease was made, the lease was *fraudulent at common law*.

[Plea of non-tenure.]

To prove the lease to be fraudulent, he relied on *Savile*, 126. *the case of White* v. *Bacon*, *H.* 32 *Eliz.* In a *formedon*, the tenant pleaded non-tenure: on which, the parties were at issue. The jury found "that the tenant "made a feoffment to several persons, to their own proper "use, before the writ purchased; and that the feoffees "*never took the profits* of the land; but that the feoffor "took them, until the day of purchasing the writ." And the doubt was, whether the feoffment was fraudulent as against the demandant. And the judgment of the court was, "that it *was* fraudulent and void." Now if the feoffee's *not* taking the profits, but the FEOFFOR'S *taking them*, was a reason for adjudging the feoffment to be fraudulent against the demandant in *that* case; the lessee's *not taking the profits, not paying the reserved rent, not having the lease in his custody*; but the LESSOR'S CONTINUING *in possession* and taking the *profits to the day of his death*, seem in the *present* case, to be full *as cogent* reasons for determining this lease to the *Dacres* to be fraudulent, against dame *Ann* and Sir *R. A.* the son.

If this case should be answered by saying "the feoff-"ment therein mentioned was made void by 13 *Eliz. c.*

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ger, *after* he had conveyed the use, would have made the *fine undoubtedly good*; the LIKE *feoffment* would have made a *good* TENANT TO THE PRÆCIPE: and for this plain reason; "because the *feoffment* PASSED *a* FREE-"HOLD." How would this great judge have been surprized, to have heard the operation of a conveyance which *he* relied on as the *basis* of his titles to his estates, doubted and debated! This case is an additional authority, "that the "feoffment of a tenant *at sufferance* will pass a fee." For *after* the *cestuy qui use* had conveyed the use by bar-
[96] gain and sale, he was *no longer* a tenant at will, to his feoffees. It is likewise a proof "that the feoffment of a "*deforceor*, who is a *wrongful with-holder*, *passes a fee.*" For *after* the bargain and sale, the *cestuy qui use* had *no right to the possession*; but was a *wrongful with-holder.* Upon this, it is submitted, whether the *confirmation* of this doctrine, by the judgment of the court, will *introduce a* NEW law into *Westminster-Hall*, CONTRARY *to all* FORMER rules and doctrines; or whether it will not rather REVIVE *a doctrine* almost worn out of memory. It is so long since a feoffment was in common use, that it is no wonder the gentlemen should think the doctrine NEW; and that the PROPERTIES *of a feoffment* should be so little known.

But it has been said "that the feoffment of tenant in "tail *in remainder expectant* upon an estate for life, will "NOT *make a* DISCONTINUANCE: *though* the feoffment "was made with the consent of the tenant for life:" and for this, the case of *Swift* v. *Heath*, *Carthew*, 109, 110. was cited. This must be admitted, because a feoffment does *not* make a *discontinuance*, *unless* the tenant in tail is seised of the estate tail, in *possession.* But does this case prove "that a feoffment by a remainder-man with the "consent of the tenant for life, *is* VOID?" nothing less. The question, in the case cited, "whether the feoffment "*made a discontinuance*," *admitted* the feoffment to *be* GOOD: for the doubt was upon the *operation* of it.

To put an end to the question, there is a case, in which it was determined "that the *feoffment of him in reversion* "*or remainder*, in the absence *of the tenant for life*, is *a* "GOOD feoffment." It is in *Dyer*, 340. The case was, that he in remainder in fee enfeoffed a stranger, in the absence of the tenant for life; who neither attorned, nor assented to the feoffment, but occupied the estate, during his life: and it was holden to be *a* GOOD *feoffment* for the fee-simple. Where is the difference between this case, and the present? In the case before the court, was not the feoffment made by the remainder-man, in the absence of Dame *Ann*, the tenant for life? Did she ever attorn or assent? And did not she occupy the estate, during her life?

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[85]

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If this case should be answered by saying "the feoffment therein mentioned was made void by 13 *Eliz. c.*

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If tenant in tail in remainder *disseises* the tenant for life, and during the continuance of the disseisin suffers a common recovery; by their own admission, the common recovery is NOT *avoidable* by reason of the *disseisin*. So, where trustees to preserve contingent remainders during the life of a tenant for years, have conveyed the freehold, [98] to make a tenant to the *præcipe*, in order to give the remainder-man in tail an opportunity of suffering a recovery; there is no instance of *such* a recovery being *set aside* at law, upon a *supposed practice* between the tenant for years, the trustees, and the remainder-man in tail. And if a remainder-man in tail, who comes *to the possession* by a *wrongful act*, or by *stratagem* and *contrivance*, may make a tenant to the *præcipe*, in order to suffer a recovery; surely, a remainder-man in tail who comes to the possession by a *lawful* act, may do the same.

Where *tenant in tail is party* to the recovery, as tenant or as vouchee, such recovery is not in the eye of the law either fraudulent or collusive: because THE LAW *has made* the estate-tail, and all the remainders, and the reversion expectant on it, SUBJECT *to the* PLEASURE *of the tenant in tail*, and *given* HIM *a* RIGHT *to* BAR THEM ALL. *If* a reversioner expectant upon an estate tail *could avoid* a recovery suffered by the tenant in tail, AS *fraudulent*, *collusive*, *unfair*, or *irregular*; the *law would have* devised some *means* for avoiding it: and the reason why there are NO such means is, because a *reversion* expectant on an estate tail is of *no consideration* in law. A reversion expectant on an estate tail is *no assets*. The reversioner cannot FALSIFY a common recovery suffered by tenant in tail: neither is *resceit* given by the statute of *W.* 2. *c.* 3, to a reversioner on an estate tail. The reason of all this is, *because* the estate *tail* is an inheritance which *may* continue for ever. There is *no provision* by the statutes of 32 *H.* 8. *c.* 31. and 14 *Eliz. c.* 8. to *preserve* a remainder or reversion expectant on an estate *tail*, as there is when they are expectant on an estate *for life*, and the tenant for life is only vouched.

But *Fermor*'s case, 3 *Co.* 78. has been objected: as if there was no difference between a fine or recovery *by* tenant for *years*, tenant for *life*, or a *copyholder*, by covin, to the intent to bar the reversioner or the lord of his *inheritance*; and a recovery suffered by *tenant in tail*, to the intent to bar the *estate tail and the reversion*.

It has been matter of surprise, to hear the gentlemen mention the statute of 14 *G.* 2. *c.* 20. Because that statute is made in *aid* of recoveries; and *not* to invalidate them; and more especially as there is a proviso in the act, "that it shall not be construed to prejudice or affect "any question in law, which may arise upon common

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" recoveries not remedied or intended to be remedied by " it: but all *such* common recoveries are to remain and " be of such force and effect as they would have been, if " the act had not been made." Besides, there is a proviso in the act " that no common recovery shall be called " in question *after* 24 *years*."

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The principal argument which the gentlemen have opposed to the doctrine which we have been endeavouring to support, may be reduced to the head of INCONVENIENCE; and they have argued upon it, as if the decision of the question depended on *private opinion*, and not on the LAW. But the question is *not*, " *what* INCONVENIENCE " will attend the determination, either way:" but " WHAT " *is the* LAW." The inconvenience, (if there be one,) *arises* from the NATURE *and* OPERATION *of a* FEOFFMENT; and cannot be avoided, but by *taking away* that conveyance, or *depriving* it of an operation which it has been allowed to have, by all the sages of the law. But to do *this*, is NOT *in the* power of a court of justice: since no maxim of the common law can be abrogated or abolished, *but* by a LEGISLATIVE *authority*.

It was *once* thought to be a great inconvenience, " that " a descent, *immediately after* a disseisin, *should take away* " *the* ENTRY of the person disseised." At another time, it was thought to be no small one, " that the son should " *lose his patrimony*, because he happened to be *born out* " *of time*." And till lately, an *heir might have been deprived of his family-estate*, by the *warranty* of an ancestor who *was never in possession* of it.

The inconveniences occasioned by the maxims I have just now hinted at, were *as great* as that which is pretended to arise from the feoffment of a tenant in tail in remainder expectant upon an estate for life: and yet they continued through ages of the law, *till* the LEGISLATURE took them away. The inconveniences which attended the law in those instances were as *universal* as any that can be suggested to follow from the doctrine we have been endeavouring to support; and yet *courts of justice* never thought themselves *warranted to depart from the law*. [5 Black. 431.]

Could the courts of common law have determined " that a descent, after a *recent* disseisin, did *not* take away " an entry;" without determining at the same time, " that a descent does NOT take away an entry?" *Could* they have determined " that a posthumous child *should* " *take*, though the estate which was the support of the " limitation to it, determined before its birth?" without resolving at the same time " that a *contingent* remainder " should take effect, though it did *not* VEST *during* the " continuance or upon the determination of the estate " created for its support?" Or *could* they have deter-

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mined "that an heir should take an estate, *notwithstanding* "*the warranty* of his collateral ancestor;" without determining "that collateral warranties did *not* bind?" And *can* the court determine, in the present case, "that "the recovery is *void*;" without adjudging "that a feoffment has *not* the operation, which it HAS HAD *ever since* "*it* became a common assurance?"

When the law is *doubtful*, it is allowable to draw an argument from inconvenience: but where the law is *clear* and *precise* (as it is "that the feoffment of a person in "possession, let him come to that possession *how* he will, "*passes a fee*;") *an argument from inconvenience* is NOT *admissible*; because it tends to undermine and overthrow the *law*.

Much has been said of DISSEISIN; and many critical observations have been made upon that subject, in order to shew that Sir *R. A.* the son could not be a *disseisor*. All that needs be said to them, is that Sir *R. A.* the son entered by *right* OR by *wrong*; (for there is *no* medium:) and "that he entered and took the profits," is admitted. Now IF he entered of his *own wrong*, he was a *disseisor*; for he ousted the tenant for life: and *if* he was a disseisor, it is agreed there was a good tenant to the *præcipe*. IF he entered by *right*, then (for the reasons already offered) he *had power* to make a tenant to the *præcipe* by his feoffment; so that in *either* case, *James Earle* was *a* GOOD tenant to the *præcipe*, at the *time* when judgment was given in the common recovery. And so he was warranted, he said, to conclude, that the recovery is good, and barred the estate tail limited to Sir *R. A.* the son; and consequently, the remainder fee, which was limited to Sir *R. A.* the father, and by him devised to the lessor of the plaintiff.

Fourth point. The fourth point or head.—Supposing the recovery to be good, whether the RE-ENTRY *of dame Ann*, under the recovery and judgment in the second ejectment, did AVOID it.

The gentlemen who made this question, said "it seem"ed to be of considerable weight." Whether it be so or not, we shall see presently. What he undertook to maintain, was, "that the entry of dame *Ann*, after she "had recovered in the second ejectment, REVESTED her "estate for life and the remainder in fee; and put the "estate in the SAME *plight* it was in before the common "recovery was suffered." And to make this out, he compared the entry of dame *Ann* to the regress of the *disseisee*, which voids all intermediate acts, by relation; and made that instance the foundation of his argument.

Mr. *Knowler* here observed, how inconsistent this argument of the gentleman was with his *former*. The disec-

tion and force of his former argument under the last head was to shew "that Sir *R. A.* the son entered *by title*, and "could *not possibly* be a *disseisor*." The drift of *this* argument is to prove him to *have been* a disseisor. This shews how difficult it is to be consistent, when a person would reconcile matters not supportable.

The question is not to be determined by the rule or instance which the gentleman has applied to it; but upon *this distinction*, "where the *entire* estate is defeated," and "where ONLY *part* of the estate is defeated, by one who "has a prior title." The case which the gentleman puts, falls under the *first* member of the distinction: the *present* case falls under the *second* member of it.

The subsisting estate, at the time when dame *Ann* entered under the judgment in the second ejectment, was an estate in *fee* in *Robert Atkyns* the nephew and heir of Sir *R. A.* the son. *All* the interest that *she* could derive to *herself* by force of the judgment in the second ejectment, was an estate for LIFE: for she could recover no otherwise than *according to her title*. And therefore dame *Ann's* entry under that judgment *could have no other effect* than to *diminish* and *lessen* the interest of *Robert Atkyns*, *by taking out of it* an estate *for* HER *life*. This will appear by some instances which shall be mentioned. Tenant for life surrenders his estate to the next remainder-man in tail, *conditionally*; to enable the remainder-man to suffer a common recovery; a recovery is suffered; and, the condition being broken, the tenant for life re-enters; the re-entry of the tenant for life will *not* avoid the recovery, and revive the estates that were barred by it. This appears by every day's experience. One of the gentlemen seemed to admit the law to be so; and accounted for it, by saying, "it is because the tenant to the *præcipe* "was made by force of a rightful estate." But *that* is *not* the reason. The *true* reason is (what has been already mentioned) "that ONLY *part* of the estate is defeat-"ed by the entry of the tenant for life; and *not* the EN-"TIRE estate." A tenant for *years*, or by *elegit*, can avoid or falsify a recovery, *during* their particular estates *only*. A *wife* can avoid a recovery suffered by her husband alone, as to her title of *dower* only, and *no further*. Remainder-man in tail, expectant on an estate for life, disseised the tenant for life, and levied a fine with proclamations; the tenant for life entered on the conusee: and it was determined "that notwithstanding the regress of the "tenant for life, the *reversion* remained in the conusee, *not* "*defeated*." And this was the case of *Okes ex dimis. Lord Sturton*, which is cited in *Popham*, 65, 66. Lessor disseises his lessee for life, and makes a lease for life, to another; the first lessee re-enters; he leaves the *reversion* in the se-

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cond lessee for life; who shall have the rent reserved on the first lease. Earl of *Gloucester's* case, cited in Sir *Moyle Finch's* case. *More* proofs might be brought, to confirm this part of the argument: but in so plain a case, *these* may suffice. And with them we may conclude, that the RE-*entry of dame Ann*, under the recovery and judgment in the second ejectment, *did* NOT *avoid* the common recovery suffered by Sir *Robert Atkyns* the SON.

And let it be observed, that the arguments made use of, have *not* been drawn from *general* reasons and reflections; but have been suggested from AUTHORITIES, and from the EXPERIENCE AND PRACTICE *of learned men*.

Upon the whole, he prayed judgment for the defendants.

In reply—it was urged on the part of the plaintiff—

First point. First, as to the great and little deeds—that the little deed did *not* revoke the the greater one, or *destroy the powers* thereby given. Which was supported chiefly by arguments drawn from the deeds themselves.

Second point. As to the * lease to the *Dacres* being fraudulent, (*V. ante* 85,) the case in *Savile*, 120. is not like the present: for *here* were *express legal motives* for making the lease; whereas there were none, in that case, for making the feoffment.

* Here is a like omission as to the argument concerning the validity and determination of the lease to the Dacres, as in the adverse argument, See the notes on p. 83, 87. l. 19. 104, and 105 in margin.

As to *livery*— it was not necessary; and therefore void. 1 *Ventr.* 291.

As to the recovery—the authorities are not *ad idem*:

Third point. Nor as to the *feoffment*. For this is a FICTITIOUS *possession*, and in *nubibus*: NOT an *actual* possession. No *freehold* is recovered in ejectment. So that Sir *R. A.* the son was *not* tenant in tail *in* POSSESSION, for *want* of the *freehold*. And without being tenant of the freehold, the recovery could not be valid. Mr. *Knowler* admits "that the "possession of the *bailiff* would not do." (*V. ante*, 93.) and surely, this case is stronger than that of bailiff.

As to *Cro. Jac.* 169. the case of *Butler* v. *Duckmanton*, (*V. ante* 80. & 93.) the possession of the tenant at *sufferance* was considered as *no* possession at all, in that case. Therefore we may admit all Mr. *Knowler's* cases: because they do not come up to the present case of Sir *R. A.* the son's possession; consequently the remainder is not affected by any thing done under this *nugatory* possession.

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Dame *Ann* was tenant of the freehold: and without disseising her, there could be no tenant to the *præcipe*, who would be tenant of the freehold. Sir *R. A.* the son did not enter *as* a disseisor; but as having a title. And he had a title under the judgment, to enter. And the estate which passed by the feoffment, was according

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to his right. 2 *Ro. Abr.* 5. *Co. Litt.* 52. *b.* And the warranty extended only to the fictitious title in ejectment. The possession *only* was transferred to him; *not* the freehold: and this was a mere *naked* possession; an *accidental* possession. *Carthew*, 110, proves that the remainders were not discontinued for want of tenant to the freehold. Dame *Ann* was never out of possession of the *freehold*.

So that the estate which Sir *Robert* gained by his entry upon dame *Ann* could *not* be an estate tail in *possession;* because there was a prior rightful estate for *life* in ANOTHER person. Therefore it must be an estate tail in REMAINDER.

It is asked, "*when* he *first* began to hold over unlawfully?" the answer is—from his *first entry*.

His ENTRY was *not wrongful:* therefore he cannot be considered as a *disseisor*. But he HELD OVER, *unlawfully*. It is like a tenant by sufferance; or a man who enters upon the king, (who cannot be put out of possession;) or a husband after the death of his wife, *&c.* And it is not easy to apprehend the distinction between entering "*under* the "ejectment;" and entering "in *pursuance* of the ejectment." Consequently, his was a *mere naked possession:* and the freehold remained undisturbed in dame *Ann*.

As to the fraud and collusion of suffering a recovery—there is surely such an *insufficiency of estate* in a tenant in tail in remainder, that he cannot suffer a common recovery. And surely the court will not permit a person who cannot be a tenant to the *præcipe himself*, to MAKE a tenant to the *præcipe*. And they strongly urged the vast *inconveniences* that must attend this doctrine now advanced, "that a tenant in tail in *remainder* only, who can "obtain a mere *naked* possession, may legally suffer a recovery and bar the subsequent remainders."

Fourth point.—As to the *re-entry* of lady *Ann*—the verdict did nothing: it is the *entry* that revests. It *revested* HER *estate*, which was an estate for *life:* whereas Sir *R. A.* the son's entry under his verdict only operated to give him a *naked possession;* he having no right to an estate tail IN POSSESSION. And he could not be tenant in tail in *possession*, to *one* purpose; and in *remainder*, to *another*. Then her re-entry left him tenant in tail in remainder, as it found him. Fourth point. [104]

In the case in 2 *Ro. Abr.* 421. title *Remitter*, letter i. *pl.* 1. the wife entered under an act of parliament, which remitted her.

5th point, (as to the remedy.) The plaintiff is* NOT *barred* of his entry, by the statute of limitations, 21 *J.* 1. *c.* 16. For the recoveree was not intitled to suffer a recovery; not being tenant in tail in *possession*. Fifth point.

* The rest of this argument is omitted; for the reasons given in the subsequent note.

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As to dame *Ann*'s recovery in the ejectment brought by *Miles*—the demise was laid so far back as to overreach the whole term which Sir *R. A.* the son had recovered: it was laid so far back, as to five days after the death of Sir *R. A.* the father. And her estate had never been discontinued; nor her right of entry taken away. So that Sir *Robert* the son was never tenant in tail in possession. The lessor of the plaintiff could not therefore enter till the jointure of dame *Ann* was at an end, and her life-estate determined. Neither could he enter, so long as the lease *to the* DACRES was in being; which did not expire *till* the death of *Thomas Dacres*, the surviving lessee, on 23d *July* 1752.

Note—the last of the four arguments of this case was intended chiefly for the information of Lord *Mansfield*, who had not heard any of the former.

BEFORE it came on, his lordship (having read the case, and seen notes of all the former arguments) sent for the counsel and agents on both sides; and told them, that a point occurred to him, which did not seem to have been particularly attended to in drawing up the special verdict, and which he observed had been very little gone into in any of the former arguments; that it seemed to him material: and therefore he wished to have it spoken to: and he chose to apprize them of it before-hand, to avoid further expence and delay to the parties; because if he should defer mentioning it, till after he had heard them in court, and if they should omit going fully into that point in their argument, and his lordship should continue to think it material, it must occasion a new argument.

The point was, "whether, *supposing* the recovery to be "bad, yet the plaintiff's EJECTMENT was not *barred* by "the statute of *limitations*."

[105] *That* depended, he said, upon many considerations, which he desired them to think of: as, first, whether the *lease* was made *pursuant to the power*, or, (in other words,) whether the *lease* was *void*, as *not* being made pursuant to the power; (secondly) whether it was not *determined*, upon the extinction of the estate tail in 1711; (thirdly) whether, *at* this special verdict was found, an objection from the statute of limitations was *now* open to be made; [15 Vin. 120] and he mentioned some cases to them, which he desired them to look into.

Accordingly, upon this last argument, the said question was very fully discussed, on both sides: but, to avoid prolixity, I have omitted to report *these arguments of the counsel*; because every thing material upon* this point will appear from the following unanimous resolution of the court, given by Lord *Mansfield*.

*They fell under the second point. See ante p. 83. in the margin; and p. 87, and 102.

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LORD MANSFIELD now delivered the resolution of the court; (having first stated the case and special verdict.)

Sir *Robert Atkyns* the son being dead without issue male, the reversion in fee, devised to the lessor of the plaintiff, is come into possession: and consequently, he must be intitled to judgment in this ejectment; unless the defendants can set up a *bar* to his RIGHT, or to his REMEDY by an ejectment.

They set up a bar to BOTH.

In bar of his RIGHT, they insist upon the *common recovery* suffered in *Hilary* term, 9 *Ann. A. D.* 1710. In bar of his REMEDY, they insist upon the *statute of limitations.*

The *common recovery*, if duly suffered, certainly destroyed the right of the lessor of the plaintiff. The *statute of limitations*, if his title of entry accrued above twenty years before the 15th of *December* 1752, has certainly taken away the REMEDY BY EJECTMENT.

The merits therefore must depend upon two general questions.

First, whether the said *common recovery* was *duly suffered.*

Secondly, whether this *ejectment* is barred by the *statute of limitations.*

First general question.

As to the first, the objection is, that there was *not* a good *tenant to the præcipe:* for, Lady *Atkyns*, the widow of Sir *Robert* the father, had an estate for life in the premises; and did not join by surrender or otherwise, in any conveyance of the freehold to *James Earle*, the tenant against whom the *præcipe* was brought. (There is no occasion to entangle this part of the case with the demise to the three *Dacres.*) [106]

The defendants contend that there *was* a good tenant to the *præcipe*, upon two grounds; (1st) because Lady *Atkyns* had no estate for life; and so Sir *Robert* the son, was tenant in tail in *possession;* (2dly) suppose she had an estate for life, yet *Earle* was a good tenant to the *præcipe*, by *disseisin:* which they endeavour to prove two ways, *viz.* 1st, That Sir *Robert Atkyns*, by his entry, was *himself* a *disseisor*, and by his feoffment the 17th of *January* 1710, conveyed the freehold he had *acquired by disseisin*, to *James Earle;* and 2dly, suppose Sir *Robert* the son was not a disseisor, yet his said *feoffment was a disseisin*, and made *James Earle* a good tenant of the freehold *by disseisin.*

As to the first ground, "that Lady *Atkyns* had *no estate* "*for life*,"—the whole argument depends upon this proposition, "that the lesser deed was executed *after* "the greater deed; and consequently, the power to Sir

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" *Robert Atkyns* the father, to make a jointure, was *extin-* " *guished* by the fine levied in *Trinity* term 1669." But the jury have not found the fact, " *which* was *first* exe- " cuted." Both deeds bear the same date. They are both consistent. They are both manifestly but one agreement, executed by different instruments, to answer different purposes, and to suit (probably) the convenience of one party, who was interested only in a small part of the transaction.

The fine levied in *Trinity* term 1669, pursued both deeds, and comprizes all the premises in the greater deed by which the powers were created.

It never could be the intent, to revoke these powers, at the instant they were created; by the lesser deed, which makes no mention of them; or by a fine levied, agreeable to the greater deed, in which they are contained.

[Qu. The force of this.]

Sir *Robert Atkyns*, who survived the transaction above thirty years, has shewn by many acts, that he understood the powers to be well created and subsisting.

[See ante 75, 76, 83. also 20 Vin. 269, 270.]

If it was necessary, we ought to presume the lesser deed first executed, to support the clear intent of parties, in a family settlement made for valuable consideration; for it is impossible to suppose, they could really mean to revoke or extinguish these powers, and take this way of doing it. But, in this case, there is no room for presumption: the internal evidence of the thing itself, speaks them to be one transaction; and the same, to all intents and purposes, as if expressed in one instrument.

[107]

As the jointress clearly had an estate for life, the *next* ground is " that *James Earle* was a good tenant to the " *præcipe*, by *disseisin*."

[For the law of disseisin see Fortesc. de Laud. Ang. 38. Co.Lit.153. (b.) 181. (a) Vin. Tit. Diss. c.]

The better to judge of this question, it may be proper to try to find out what the *old law* meant by a *disseisin* which constituted the tenant of the freehold, in respect of every demandant suing out a *præcipe;* although the owner's entry was *not* taken away: (for where the *right of possession* was acquired, and the owner put to his real action; *there* without doubt the possessor had got the freehold, though by wrong.)

All the law concerning disseisins, which is any way applicable to the present inquiry, existed, and was in use and practice, *before* the assize of novel disseisin. The *assize* was introduced, (probably from the usage of *Normandy*, for the Grand Coustumier treats of assizes,) in or before the reign of *Henry* the IId. *Glanville*, who wrote in that reign, calls the great assize a benefit " *clementium* " *principis, de consilio procerum, populis indultam:*" And the * *My rrour, fo.* 93. says " *Glanville* introduced it."

* C. 2. § 25. p. 150. edit. 1649.

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Seisin is a technical term to denote the completion of that investiture, by which the tenant was admitted into the tenure; and without which, no freehold could be constituted or pass. *Sciendum est feudum, sine investitura, nullo modo constitui posse. Feud. Lib.* 1. *Tit.* 25. *Lib.* 2. *Tit.* 1. 2 *Craig. Lib.* 2. *Tit.* 2.

DISSEISIN therefore must mean some way or other turning the tenant *out of* his tenure, and *usurping* his place and feudal relation. At the time I speak of, *no* tenant could alien *without licence of the lord.* When the lord consented, the only form of conveyance, was by feoffment publicly made, *coram paribus curiæ*, with the *lord's concurrence.* Homage, or fealty, was solemnly sworn; and suit of court and services were frequently done. [Salk. 246. pl. 2.]

The freeholder represented the whole fee, did the duty to the lord, and defended the whole fee against strangers.

The freehold *never* could be in *abeyance:* because the lord must never be at a loss to know upon whom to call, as his tenant; nor a stranger, at a loss to know against whom to bring his *præcipe.* From the necessity of there being always a *visible* tenant of the freehold, and the notoriety *who* acted, and did suit and service *as such*, many privileges were allowed to innocent persons deriving title from the freeholder *de facto.* [108]

If the *disseisor died:* after one year's non-claim,* the descent to his heir gave *him* the *right of possession*, and took away the true owner's *entry.* The stat. of 32 *H.* 8. *c.* 33, requires five years non-claim. The feoffee of a disseisor acquired title and possession, at the time I speak of, by one year's non-claim. The descent to *his* heir remains privileged as it was at common law: for the 32 *H.* 8. *c.* 33. extends not to any feoffee of the disseisor, immediate or mediate, *Co. Litt.* 256. *a.* The *feoffee* of a disseisor was favoured; because he came innocently into the tenure, by a solemn and public investiture, with the *lord's concurrence.* [Qu. If he had died soon after the wrong possession? see Co. Lit. 238. a. and Gilb. T. 3d ed. acc.]

But the statute* "*Quia emptores terrarum*," (which took away subinfeudations, and gave free liberty of alienation to the tenants of subjects, and to those who held of the king, as of an honor or manor; and other statutes which extended the power of alienation to the king's tenant *in capite*: the frequent releases of feudal services; the statutes of uses, and of wills; and, at last, the total † abolition of all military tenures; have left us little but the names of *feoffment*, *seisin*, *tenure and freehold:* without any precise knowledge of the *thing originally signified*, by these sounds; the idea *modern* times annex to *freehold*, or *freeholder*, is taken merely from the *duration* of the estate.

* 18 E. 1.

Vide Introduction to the Law of Tenures, fol. 153. to 157.

† Vide 12 C. c. 24 and 15 C. 2. c. 7.

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Copyholds, and the *customary freeholds* in the north, retain faint traces in imitation of the old system of feudal tenures. It is obvious how a man may visibly be the copyholder, or customary freeholder *de facto*, in prejudice of the rightful tenant. It is obvious too, that *usurping* such copyhold or customary *tenure*, is a different fact, from a *naked* possession, or occupation of the *land*.

But, whoever will look into the practice of *other* countries, where tenures subsist with all the solemnities of feoffments and seisins, upon every change of a tenant by descent or alienation, and upon every usurpation of the real right; will easily comprehend, that at the time I speak of, it may be as notorious *who was the feudal tenant de facto*, as who is now *de facto* incumbent of a living, or mayor of a corporation.

DISSEISIN was a complicated fact, and differed from *dispossessing*. The *freeholder by disseisin*, differed from a *possessor by wrong*. *Bracton*,* *c.* 2. *De Assisa Novæ Disseysinæ*, *fo.* 160, puts many cases of possession wrongfully taken, which he calls *intrusion*; because there is no disseisin: "possessio quæ nuda est omnino, et sine aliquo "*vestimento*; quæ dicitur intrusio." *Vestimento* is seisin, investiture; (from whence, the *Saxon* term vest;) a metaphor, the feudists took from clothing: by which, they meant to intimate, "that the *naked possession* was *clothed* "with *solemnities of the feudal tenure*." A particular tenant, according to feudal notions, was *in* as of the *seisin of the fee*, of which his estate was a part. If he aliened the fee, (which he could only do by solemn feoffment with the concurrence of the lord of whom the fee was held,) he forfeited his particular estate, for having betrayed his *seisin* with which he was intrusted; but on account of the *privity* and *confidence* between him and the reversioner; and the *notorious solemnity* of the act of investiture, *his* feoffment DISSEISED the reversioner.

*Vide lib. 4. c. 1, 2.

[109]

Bracton, who wrote in the reign of *Hen.* 3. (before tenants could alien without licence,) mentions the *disseisin* in this case, as a *necessary consequence*, and as a thing which *could not possibly be otherwise*; *c.* 3. *De Assisa Novæ Disseysinæ*, 161. *b.*(*a*) "Item facit quis disseysinam, "*cum quis in seysina fuerit* ut de libero tenemento & ad "vitam, vel ad terminum annorum, vel nomine custo- "diæ, vel aliquo alio modo: ALIUM *feoffaverit, in* "PRAEJUDICIUM VERI *Domini, & fecerit* ALTERI *liberum tenementum*; CUM DUO SIMUL ET SEMUL, *de eodem* "*tenemento & in solidum, esse non possunt in seysina*." He

(*a*) This seems to be a mistake of *Bracton*: it may not be easy to understand clearly all his distinctions;

considers it as impossible for the true tenant not to be put out, when the other actually came into his place.

So late as the 32d of *Eliz.* in the case of *Matheson* v. *Trot*, 1 *Leon.* 209, (*a*) the distinction upon which the judgment turns is "that *Henry Denny* gained a *wrong-*" *ful possession in fee*; but did *not* gain any SEISIN; so "*no disseisor*: therefore the descent to his heir is not "privileged."

Nobody can *disseise* the king; neither can any one be disseised to the use of the king. The king may be wrongfully *dispossessed*: but the intruder's injurious possession is *sine aliquo vestimento*, and called *intrusion*. The king cannot be made a disseisor; not because it is wrong: (for he may, in fact, withhold the possession of land from a subject contrary to right:) but the reason seems, according to the feudal system, to be this: a subject never could stand in the king's *seisin* or *tenure*; and the king never could be in the *seisin*, *tenure*, or *feudal relation* of a subject. By that policy, all real property was held, mediately, or immediately, of the king; in the king himself, all real property was *allodial*. [Co. Lit. 1. a.]

The precise definition of what constituted a disseisin which made the disseisor the tenant to the demandant's *præcipe*, though the right owner's entry was not taken away, was *once* well known; but it is not *now* to be found. The more we read, unless we are very careful to distinguish, the more we shall be confounded. For, *after* the assize of *novel disseisin* was introduced, the legislature, by many acts of parliament, and the courts of law, by liberal constructions in furtherance of justice, *extended* this remedy, for the sake of the owner, to *every* trespass or in- [110]

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but this is clear, that disseisin was not, in his idea of it, a complicated fact as here represented: thus much is certain; that in *his* sense of intrusion, that might be without disseisin, and he defines it in the beginning of the second chapter to be *ubiquis, &c.*

(*b*) It appears by the report of that case in 2 *Leon.* 190, and by the reference to it in *Co. Lit.* 240. (*b*) that the judgment was not founded upon the point here mentioned, but upon one very different, *viz.* as expressed by Ld. *Coke* there, that an entry by an heir of the devisor, and dying seised, would not by law take away the entry of the devisee; for if it should it would be a bar to his right, because the devisee hath only a title of entry, like the case of a title of entry for breach of a condition or mortmain, in which and other like cases, no dying seised and descent will take away an entry.

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jury done to his real property; if, by bringing his assize, he thought fit to *admit* himself disseised.

It lay aginst advisers, aiders, or abettors, who were not tenants. *Co. Litt.* 180. *b.* It lay against the tenant who was no disseisor; as the heir of a disseisor, or his feoffee. *Stat. Gloucester.* It lay for the owner, against the disseisor of the disseisor. The tenant's not being ready to pay a rent-seck when demanded, was, for the benefit of the owner's remedy, a disseisin. *Lit.* § 233. It lay for outrageous distress. 2 *Inst.* 412. It lay against guardian, or particular tenant who made a feoffment, as well as against their feoffees. 2 *Inst.* 412. The stat. of *Westm.* 2. *c.* 25. extends it to a man's depasturing the grounds of another; or taking fish in his fishery. If one receives my rent without my consent, I may elect to make him a disseisor. *Style*, 407. If a guardian assigns dower to a woman not dowable; the owner may elect to make her a disseisoress. 24 *Ed.* 3. 43. (cited in *Cro. Car.* 203.) In a word; for the sake of the remedy, as between the true owner, and the wrong doer, to punish the wrong; and as between the true owner and naked possessor, to try the title; the assize was *extended* to almost every case of obstruction to an owner's full enjoyment of lands, tenements or hereditaments.

[Qu. If he never had seisin, had he any remedy either in law or equity before the stat. 4 Geo. 2.]

The reports of assize can only relate to cases, where the owner *admits* himself disseised.

The law-books treat of disseisin, with a view to the *assize;* which was the common method of trying titles, till ejectment came in use.

Littleton, who wrote long after the remedy by assize was enlarged by statutes and by an equitable latitude of construction, speaks of disseisins principally as between the owner and trespasser or possessor, with an eye to the remedy by *assize.*

These are the common places from whence many descriptions have been cited of a DISSEISIN. But such authorities can give little light to the *present* question, which depends upon the nature of *such* a disseisin as made the disseisor tenant to every demandant, and freeholder *de facto*, IN SPITE *of the true owner.* Yet the definitions in the books, (though very imperfect,) savour often of that which originally was an actual disseisin, *in spite of* the owner.

[1 East. 575.] [111]

[Vide ante 107.] *Littleton*, in § 279. defines disseisin, with an *&c.*; "where a man enters into lands or tenements (where his "entry is not congeable,) and ousteth him which hath "the freehold, &c."—The comment says, "*every* entry is "no disseisin, unless there be an *ouster of the freehold.*" And *Co. Lit.* 153. *b.* says, "*disseisin* is putting a man out "of *seisin*, and ever implies a wrong: but *dispossession* or "*ejectment*, is putting out of *possession*, and may be by

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" right *or* wrong. *Disseisin est un personal trespass de* " *tortious* ouster del seisin."

Though the *term* " DISSEISIN," used, happens to be the same; the *thing signified* by that word, as applied to the two cases of *actual* disseisin, or disseisin *by election*, is very different. This distinction of disseisin *at election*, is made in the case of *Blunden* v. *Baugh*, *Cro. Car.* 303. of which case, we have seen a manuscript report, fuller than the printed one. The three judges, with whom agreed the four judges of the Common Pleas, argued and held " that the lessee for years of the tenant at will, was a " disseisor at the *election* of the original lessor, for the " sake of his remedy; but never could be looked upon " as the freeholder, or a disseisor *in spite* of the owner, or " with regard to *third* persons." The manuscript report says, if a *præcipe* was brought against him, he might say " I am not tenant to the freehold." A variety of like cases are put in *Cro. Car.*; (to which I refer—:) in the manuscript report, there are more. [Salk. 224, 225 Ld. Raym. 209. 9 Vin. 89. pl. 45.]

When the easy specific remedy was by *assize*, where the entry was not taken away, the injured owner might, for his benefit, elect to consider the wrong as a *disseisin*. So, since an *ejectment* is become the easy specific remedy, he may elect to call the wrong a *dispossession*.

Where an *ejectment* is brought, there can be *no disseisin*; because the plaintiff may lay his demise when his title accrued, and recover the *profits* from the *time* of the demise. The entry confessed is previous to making the lease: but there is *no* real or supposed *re-entry*, after the ejectment complained of. If it was considered as a disseisin, no *mesne profits* could be recovered without an *actual* re-entry.

If the lessee for life, or years, makes a feoffment, the lessor may still distrain for the rent, or charge the person to whom it is paid, as a receiver; or bring an ejectment; and *choose* whether he will be considered *as disseised*. *Metcalf on the demise of Kynaston* v. *Parry and others*; a case reserved at *Sulop* assizes 25th *March* 1742, for the opinion of the court of Exchequer; (who gave judgment in it, on the 24th of *November* 1743,) was this. Tenant in tail, of lands leased by his father, to a second son, for lives (*a*) (under a power,) upon his father's death received the rent from the occupier, as owner, and as if no such [112] [See 2 Lev. 52. 3 Lev. 35. 4 Leon. 35.]

(*a*) That and the case *Cro. Car.* 302. were cases only of recovery of rents, and not of an actual possession by the feoffee; besides, according to the report of the case of *Metcalf* v. *Parry*, it was not material whether the recovery was good or not; for the lessor of the plaintiff was lessee

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lease had been made, during his whole life. He suffered a common recovery. It was holden "that this was only "a disseisin of the freehold *at election*; and that therefore "he could *not* make a good tenant to the *præcipe*:" and the recovery was adjudged *bad*.

Except the special case of fines with proclamations, (which stands entirely upon distinct grounds,) and the construction of the stat. of 4 *H.* 7. *c.* 24. for the sake of the bar; I cannot think of a case, where the true owner, whose entry is not taken away, *may not* elect, (by pursuing a possessory remedy,) to be deemed as *not* having *been disseised*.

[8 Vin. 421. pl. 13. 5 Bur. 2830.]

The consequences of *actual* disseisins, considered *as such*, continue law to this day. The disseisee cannot dispose, or devise: the descent takes away his entry. There are two cases cited in the case of *Blunden* v. *Baugh*, material to this point. *Pously* v. *Blackman*, *B. R. Trin.* 18 *Jac. Rot.* 1230. *Palmer*, 201, which is more fully stated in the manuscript report, than in * *Croke*. The case (in effect and operation) was this. Tenant at will made a lease for years: the original lessor devised. Though the lease by tenant at will, at the *election* of the original lessor was a *disseisin*, yet they adjudged his devise good; because he had *not elected* to *admit* himself disseised; and, by making a will, intimated the *contrary*.

*V. Cro. Jac. 659. S. C.

[Vide God. 384.]

Another case, (not in the report in *Cro. Jac.* but cited in the manuscript,) was in the 14th of *Eliz.* Sir *Ambrose Cone*, of his own head, entered into lands of Sir *William Hollis*; and paid Sir *William*, afterwards, a certain rent, claiming to hold as tenant at will: and died. His heir entered: upon whom, Sir *William* entered. It was adjudged "that at the *election* of Sir *William*, Sir *Ambrose* "was a disseisor: but as Sir *William* had not determined "his election before the death of Sir *Ambrose*, and entered upon his heir, it was *no disseisin*; and consequently, the descent no bar to his entry."

[113]

In the case of *Pously* v. *Blackman*, *Palmer*, 205. it is said, "if a disseisee devise, and afterwards enter; the devise is good:" which *Dodderidge* denied, and said there must be a new publication. Which seems right, *if* there ever *was* a disseisin: for, where an *actual entry* is necessary, it will not make good a conveyance made *before*; as was holden in *B. R. & Dom Proc.* in the case of * *Berrington* v. *Parkhurst*. The *actual entry could not support* the lease made *before*. Yet in † *Salk.* 237. It is agreed,

* May 1738.

† 1 Salk. 237. Bunter v. Coke.

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under a power in the settlement creating the entail; and therefore his title did not at all depend on the invalidity of the recovery, but singly on the question whether the power was well executed or not.

" the devise is good, because he was *seised ab initio*, so as he " might bring trespass:" *i. e.* He *never* was *disseised* at all, *by his election;* and he might make *that election*, without an entry; he might bring his ejectment, he might bring trespass, *without* a re-entry. If it was not for this doctrine of *election*, what a condition would men be in!

In the case of *Pously* v. *Blackman*, there was *no entry:* and after much argument, it was at last resolved unanimously by the whole court, from the inconveniences which will be introduced if a lessee by a secret contract with a stranger could defeat the will of his lessor, " *that* " *the devise was good.*" And in the manuscript report where it is cited, one point said to have been resolved, is " that the owner, *by making a devise*, shewed his ELECTION, " NOT *to be disseised.*"

I will now consider whether *James Earle* can be deemed a good *tenant of the freehold by disseisin.*

DISSEISIN is a *fact.* It is *not found:* all the jury say, is, " that soon after the judgment in ejectment, Sir *Robert* " *entered and was in possession.*" This must be taken to be an entry *in consequence of the judgment*—It was so considered upon settling the special verdict: otherwise the defendants have no case; for it is not found, that Lady *Atkyns* was ever ousted, or quitted the possession, or that Sir *Robert* ever was seised.

Taking possession, *under a judgment in ejectment*, never could be a *disseisin of freehold.* [7 Mod. 67; Cowp. 701.]

Suppose it a *real* proceeding—the termor of a disseisee might, at the old law, recover against the disseisor: he might recover against the feoffee of his lessor. But he never could thereby become a *disseisor of the freehold:* he never could be other than a termor, enjoying, in the nature of a bailiff, by virtue of a real covenant. In respect of the freehold, his possession enured always by *right*, and never by *wrong.* If the lessor had infeoffed, it enured to the *alienee;* if the lessor was disseised and might enter, it enured to the *disseisee;* if his entry was [114] taken away, it enured to the *heir or feoffee of the disseisor*, who in *that* case had the right of possession.

Suppose the proceeding (as it is) a *fictitious* remedy. Then in truth and substance, a judgment in ejectment is a recovery of the *possession*, (not of the *seisin* or *freehold*,) without prejudice to the *right*, as it may afterwards appear, even between the parties. He who enters under it, in truth and substance can only be *possessed according to right, prout lex postulat.*

If he has a freehold, he is in as freeholder. If he has a chattel-interest, he is *in* as a termor; and in respect of the freehold, his possession enures *according to right.* If he has no title, he is *in* as a trespasser; and, without any

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re-entry by the true owner, is liable to account for the profits.

It is found, that the ejectment was brought by Sir *Robert Atkyns*, to recover the *possession*: but it is not found, that he claimed the *freehold*.

The title must *now* be taken as in *this special verdict*. Therefore it appears he had *no right* to the *possession*. His *feoffee* could be in no other condition than *himself*: he had a possession, without prejudice to the *right*; and could convey *no other*. He was not *in* as a particular [Cowp. 702.] tenant;—there was no privity of any seisin:—he had only a *naked* possession.

But the case is still stronger. The true owner cannot even elect to make a person in possession *under a judgment in ejectment*, a DISSEISOR. He could not bring an assize of *novel disseisin*: the entry is *not injustè & sine judicio*; but *under* authority of a court of justice, and *lawful*; therefore not liable to punishment by fine, (as every disseisin was.)

The true owner may enter upon a disseisor: but after a judgment in ejectment, an actual entry would not be permitted. If there *had* been any election in this case; "the true owner elected *not to be disseised*," and recovered by ejectment: which if there had been a disseisin, would have purged it.

But there is still behind, (though it happens not to be necessary,) a *larger ground*, upon which to determine this question; and more satisfactory, because more intelligible; from the *nature of a common recovery now*, and a feoffment to make a tenant to the *præcipe*, with *that* view *only*.

[115] The sense of wise men, and the general bent of the people in this country, have ever been against making land perpetually unalienable. The utility of the *end* was thought to justify any *means* to attain it.

Nothing could be more agreeable to the *law of tenures*, than a male fee unalienable. But this bent "to set pro-"perty free" allowed the donee *after* a son was born, to destroy the limitation, and break the condition of his investiture.

No sooner had the *statute de donis* repeated what the law of tenures said before, "that the tenor of the grant "should be observed;" than the same bent permitted tenant in tail of the freehold and inheritance, to make an alienation, *voidable* only, under the name of a *discontinuance*. But *this* was a small relief.

At last, the people having groaned for 200 years under the inconveniences of so much property being unalienable; and the great men, to raise the pride of their fami-

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lies, and (in those turbulent times) to preserve their estates from forfeitures, preventing any alteration by the *legislature*;—the same bent threw out a **fiction*, in *Taltarum's* case; by which, tenant in tail of the freehold and inheritance, or with consent of the freeholder, might alien absolutely.

* Pigot of Common Recoveries, p. 7, 8, 9, 10.

Public utility adopted and gave a sanction to the doctrine; for the *real* political reason, "to break entails:" But the *ostensible* reason, "from the fictitious *recompence*," (*a*) hampered succeeding times, how to distinguish cases which were within the false reason given, but not within the real policy of the invention. Till, at last, the *legislature* applauded common recoveries, and *lent their aid* by the acts of 11 *H.* 7. *c.* 20. 33 *H.* 8. *c.* 31. 34 & 35 *H.* 8. *c.* 20. 14 *Eliz. c.* 8. and lately 14 *G.* 2. *c.* 20: (which is a retrospective and declaratory law, and seems to have restored the original tenant to the *præcipe*.) Before the statute of *quia emptores terrarum, subinfeudations*, whereupon rents and services were reserved, did not prevent the *præcipe's* lying against the freeholder of the seignory. When common leases to farmers, for one or more life or lives, reserving rent, came in use; they, for that purpose, *resembled subinfeudations*, and ought not to prevent the *præcipe* being brought against the owner of the freehold, under which such leases were granted.

[2 Leon, 66.]

As the *legislature* has, for ages, *avowed* the proposition; we may *now* say "that common recoveries are a mere "*form of conveyance*." All necessary circumstances of form and ceremony are taken from its fictitious original.

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The policy of *this species* of alienation meant to take a *middle* way as to entails, between perpetuities and absolute property.

Alienations were *allowed*; yet in such a shape as necessarily required *deliberation* and *delay*: and they were only allowed to be made by tenant in tail in *possession*; or by tenant in tail in remainder, *with consent* of the owner of the first estate for life. The eldest son was restrained in the life-time of his father, or mother, or any other ancestor or relation, seised for life, under a family settlement.

The act of 14 *G.* 2. proceeds, upon the parties to a recovery having *power to suffer it*. Sir *Robert Atkyns* the son had *no* right to suffer a common recovery, without the *concurrence* of the jointress. Any contrivance to do it *without* her joining, is artifice and evasion.

If tenant in tail in possession is disseised; though the

(*a*) This was not so as to the remainders and reversions. *Pig.* 13, 14.

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præcipe be brought against the disseisor, yet, if *he* is vouched, the recovery shall bar: because *he* had *power to bar.*

In *Lincoln* College case, 3 *Co.* 59. the judges support the collateral warrantry of *Sibil; because* she and *Edward* had *power to bar.*

In *Jenning's* case, 10 *Co.* 44. the recovery is supported, *because* the parties had *power.*

By parity of reason, *this* recovery ought *not* to be supported, *because* the parties had NO power: if it was; the law must be overturned.

Every remainder-man in tail might easily get a *naked* possession, and make a *secret feoffment.*

The plan of marriage and other family settlements, is " to limit a remainder to the first, and every other son " in tail." The *negative* which the father now has upon the eldest son's suffering a common recovery, is the very *means* and *consideration* of getting the estate re-settled, upon the marriage of the eldest son. By *this* method, the moment he attains to the age of 21 years, he may set his father at defiance, suffer a common recovery, and bar all the rest of the family. *This consequence alone,* in a case *unprecedented,* is a sufficient objection.

[117] When a termor, after the 4th of *H.* 7th, made a feoffment, and levied a fine with proclamations, and insisted upon five years non-claim; the judges, with strong sense, said, though a feoffment by tenant for life, or years, or at will, is a disseisin; it shall *not* operate as a disseisin, to enable the *termor himself* to bar the inheritance, by a fine with proclamations according to the 4th *H.* 7. *c.* 20. For, say they, "it was never the intent of the makers of the " act, that those who could not levy a fine, should, by " making an estate *by wrong and fraud,* be enabled to bar " those who had right. For if they themselves, *without* " *such fraudulent estate* could not levy a fine to bar them " who had the freehold and inheritance: certainly the " makers of the 4th of *H.* 7. *c.* 20. did not intend that by " making of an estate *by fraud and practice,* they should " have power to bar them: and such *fraudulent* estate is as " *no* estate, in the judgment of the law." So say I, in the present case. It was never the intent, that those *who could not suffer a recovery,* should, by making an estate *by wrong and fraud,* be enabled to bar those in remainder or reversion who had a right. For if they themselves, *without such fraudulent estate,* could not suffer a recovery to bar those in remainder and reversion; certainly, the framers of this qualified species of alienation, did not intend, that by making an estate *by fraud and practice,* they should have power to bar them: and such *fraudulent* estate is as *no* estate, in the judgment of the law.

[Vide 2 Lev. 52.]

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The judges then put many cases, where a recovery in dower, or other real action; a remitter to a feme covert, or an infant; a warranty; a sale in market overt; the king's letters patent; a presentation; an administration;— in short, all acts temporal and ecclesiastical, shall be *avoided by covin*: and from thence argue that a fine which the parties had *no power to levy directly*, shall not be supported *indirectly* by covin. So argue I, in the present case: a common recovery which the parties had *no power* to suffer *directly*, shall *not* be made good *by wrong and fraud*. [Co. Lit 35. (a.)]

In the spirit of the makers of the 14 *G.* 2. I say the parties to this recovery had *not* power to suffer it: *therefore* it is *substantially bad*.

This is *not* the case of a feoffment to a *third* person, but for *his own* benefit: it is, in effect, to the use of Sir *Robert*, the *wrong-doer, himself*. The law considers a *feoffee to the intent to be tenant to the præcipe*, as a *mere instrument* for *one* purpose of *form only*. His wife shall *not* be endowed; his statutes or judgments shall *not* affect the land: if he had a term for years, it shall *not* merge. Let me appeal then to the oldest authorities, in those times when the solemnity and notoriety of feoffments, and the feudal veneration in which they were held, gave them all that wonderful efficacy we read of: could a man by *his own injurious* feoffment, have acquired an advantage to himself? *Littleton* shall answer: he tells us what was established long before he wrote. *Lit.* § 395. "if a disseisor infeoff "his father in fee, and the father die seised of such es- "tate, by which the lands descend to the disseisor as son "and heir, *&c.*; in this case, the disseisee may well enter "upon the disseisor, notwithstanding the descent: for "that as to the disseisin, the disseisor shall be adjudged "in *but as a disseisor*, notwithstanding the descent; *quia* "*particeps criminis*.

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[1 P. Wms. 518, 519. 3 Brow. 195.]

After the statute *de donis*, tenant in tail in remainder, with the *concurrence* of the freeholder, might make a *voidable* alienation, by *discontinuance:* but he could not acquire to himself that privilege, by an *injurious* entry and feoffment. "He in remainder in tail disseises tenant "for life, and makes a feoffment, and dies without issue, "and the tenant for life dies; he in reversion may enter: "it is no discontinuance." *Co. Lit.* 347. *a. b.* It is no disseisin of the reversion. "If remainder-man for life dis- "seise the immediate tenant for life; after the death of the "immediate tenant, he is in as tenant for life." Neither should a reversioner, by an injurious entry upon the tenant for life, be, in respect of strangers, allowed to transmit to his heir the privilege of descent. If the reversioner disseises tenant for life, and dies seised; the de-

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scent shall not take away the entry of a stranger. *Hob.* 323.

From the whole, we may conclude—*if, before* the introduction of common recoveries as a conveyance, this question had been agitated in an *adversary* real action, upon a plea "that *Earle* was not tenant of the freehold;" it would have been adjudged, from the law and artificial learning of tenures, "that he could *not* be so considered." *If* the question had been, "whether tenant in tail in remainder should, by such *injurious* entry and feoffment, acquire a *benefit to himself*, to the *prejudice of his reversioner*;" it would have been adjudged, from eternal principles of justice, "that an act founded in wrong should *not*, by *virtue of the crime itself*, become legal, for the *author's advantage*."

[Co. Lit. 35. (a.) S. P. acc. Lit. Sec. 658. And note that wrongful act can never turn to the benefit of the wrong doer. Hut. 95. Qu. 3 Atk. 339. Co. Lit. 148 (b). 1 Leon. 331. Branch Prin. 65.]

As it is *now* agitated, when recoveries are established as a *species of alienation*;—the only question is, "whether the *rule* of law which *requires the concurrence* of the owner of the first estate for life, shall be *overturned*." It is better to subvert the rule directly, than suffer it to be done by a *secret injurious* entry and feoffment; which cannot be prevented, and which the owner may never hear of.

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There is no injury or wrong, for which the law does not provide a remedy. But if this stratagem should prevail, redress must follow *too late*; unless the entry of the tenant for life shall *avoid* the recovery. If it would, there is an end of the present question: for, the jointress entered, and was intitled to the profits from Sir *Robert Atkyns* as a trespasser *ab initio*.

In *every* light, and upon *every* ground of law, this recovery is *bad*.

As there is no bar to the RIGHT of the lessor of the plaintiff—

Second general question.

The second general question is "whether the lessor of the plaintiff is, by the *statute of limitations*, barred from recovering in THIS *ejectment*."

This point was certainly not insisted upon at the trial: and therefore the special verdict is not adapted to it. The abstruse learning, upon which the validity of the common recovery depended, might engross the whole attention at the trial: and the special verdict having no facts (which easily might have been found,) particularly applicable to an objection from the statute of limitations, might occasion the question not having been made at the bar, till the last argument. The point however is certainly *open*, upon this special verdict.

[Salk. 685.]

An ejectment is a *possessory* remedy, and only competent where the lessor of the plaintiff *may enter*: therefore it is always necessary for the plaintiff to shew, that his

lessor had a *right to enter*; by *proving* a possession within twenty years, or *accounting for the want* of it, under some of the exceptions allowed by the statute. *Twenty years* adverse possession is a *positive title* to the defendant: it is not a bar to the *action* or *remedy* of the plaintiff, only; but takes away his *right of possession.*

Every plaintiff in ejectment must shew a *right of possession*, as well as of *property*: and therefore the defendant needs not *plead* the statute, as in the case of actions.(*a*) [1 Durn. 759. a.]

The question then is, whether it appears upon this special verdict, "that the lessor of the plaintiff *might* ENTER, "when he brought this ejectment." (*b*)

On the 9th of *November* 1711, Sir *Robert Atkyns* died without issue male.

On the 19th of *October* 1712, Lady *Atkyns*, the jointress, died. *Then* accrued the *title of entry* of the lessor of the plaintiff. His only *excuse for not entering* is, "that "he was *prevented* by the said LEASE of the 31st of *May* "1698, *to the three Dacres.*"—That upon the death of *Thomas Dacres* the surviving lessee, on the 23d of *July* 1752, a *new title of entry accrued: upon which* he entered on the 15th of *December*, 1752; and brought this ejectment. [120]

Three answers are given: any one of which, if well founded, is sufficient.

1st. That the said lease was absolutely *void*, and of no effect.

2d. If good, it *determined* by the estate tail being spent; by the express tenor of the demise.

3d. If subsisting, yet upon the extinction of the estate tail, it was a *trust to attend the inheritance* in the lessor of the plaintiff, and made *part of his title deeds*; therefore could not stop the statute's running to protect an adverse possession, nor give him any new right of entry.

First. That the *lease* was *void.*

First answer to the excuse for not entering.

Sir *Robert Atkyns* the father, being only tenant for *life*, could, by virtue of his *ownership*, make no estate to

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(*a*) This is not necessary; for twenty years possession is a good title in ejectment for a plaintiff as well as for a defendant, 2 *Salk.* 421. *pl.* 5. *Ld. Raym.* 71. let the right of property be where it will. *Salk.* 685.

(*b*) See 17 *Dom. Proc.* 132. that the question put to the judges, was, "whether sufficient appears by the special "verdict in this cause to prevent the lessor of the plain- "tiff by force of the statute of limitations of the 21st of "*James* the 1st, from recovering in this ejectment?"

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continue after his death. This lease, therefore, after his death, can only be supported by his *power;* if it was made pursuant to it.

" Whether it *was* made pursuant to his power," is the question.

[Str. 601, 2. 2 P. Wms. 625. 2 East. 380. 1 Durn. 707.]

The limitation and modifying of estates, by virtue of powers, came from equity into the common law, with the statute of uses. The *intent* of parties who gave the power, ought to gain every construction. He to whom it is given, has a right to enjoy the full exercise of it: they over whose estate it is given, have a right to say " it shall not be exceeded." The conditions shall not be evaded; it shall be *strictly pursued*, in form and substance: and all acts done under a special authority, *not* agreeable thereto, nor warranted thereby, must be *void*.

[3 New Abr. 411. acc.]

Of all kinds of powers, the most frequent is, that " to *make leases*." For the encouragement of farmers, to occupy, stock, and improve the land, it is necessary they should have some *permanent* interest. *Unless* the owner of the estate for life was enabled to make a *permanent* lease, he could not enjoy to the best advantage, during his *own* time; and they who come *after*, must suffer, by the land being un-tenanted, out of repair, and in a bad condition. The plan of this power is for the *mutual* advantage of possessor and successor. The execution thereof is checked with many conditions, to guard the successor; that the annual revenue shall not be diminished; nor those in succession or remainder, at all prejudiced in point of remedy, or other circumstance of full and ample enjoyment.

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There are *two* methods of leasing, in common use in this kingdom: at the best rent; and upon fines; which, as the lives or leases drop, are considered among the annual profits. This power is always adapted to *both*. It is inserted in almost every strict settlement of every kind. It is inserted in the greater deed of the 12th of *June* 1669; and given indiscriminately to Sir *Robert* the father, Sir *Robert* the son, and *Lovis* his wife.

The nature and view of a power, so usually given, is well understood: and courts of justice have always looked with a jealous eye, to see that the conditions in favour of the next taker be *pursued;* not literally only, but *substantially*. It is not sufficient that the ancient rent be reserved: it must be reserved with all the *beneficial circumstances*. If payable before, at four, it cannot be reserved at two payments. Lord *Mountjoy's* case, 5 *Co.* 5. *b*. The whole rent must be payable annually during the whole term. In that case, it was holden " that less

[2 Vern. 544. 19 Vin. Pow. (A.) 3 Danv. 245. n. a. 248. n. i. 5 Co. 6. a. 3 New Abr. 358. 3 Bac. 391.]

" could not be reserved even to the lessor himself, dur- " ng his own life."

One of the reasons in *Elmer's* case, 5 *Co.* 2. shews the rent must be payable annually during the term.

In the case of *Lady Charlotte Orby & al'*, v. Lady *Mohun*, 2 *Vernon*, 531, 542, Lord *Cowper*, *Holt*, and *Trevor*, all three held clearly that a lease " reserving the *best* " *rent*," though good against an owner of the inheritance, was *void under a power*: and *Cowper* and *Trevor* held, that reserving the " *ancient rent*," where lands had been usually demised; though good and certain enough by reference, against an owner of the inheritance; was void *under a power*; because it put the remainder-man *under difficulties* in avowing.

" The intent was," say they, " that the tenant for " life in possession might lease; so it was, on the other " hand, that the revenue should not be diminished; but " the ancient rent, at least, reserved; and in *such beneficial* " *manner*, as might with certainty, and without any dif- " ficulty be recovered."

" The question here is not," say they, " Whether the [122] " lease is void for incertainty, as between the lessor " and lessee; but whether *all requisites* are observed, " and *such beneficial clauses and reservations* as ought to have " been, for the *benefit of a third* person, the remainder- " man."

In the case of the *Earl of Cardigan* v. *Montague*, 6th *June* 1755, a decretal order on the master's report; the Duke of *Montague*, tenant for life, without impeachment of waste, had power to lease, reserving ancient rent where usually demised, and best rent where not usually demised: he made twenty-four leases. The Master's Report, as to many of the leases, which he reported bad, was submitted to: as where ancient covenants " to grind " at mills, or to pay land tax," were not in the new lease; where some part, not within the power, is included in the lease; where many manors were included in the lease, reserving a sum certain* as the best rent; which laid the remainder-man under difficulties, to find out whether it was the best rent or not. As to five of them, which the master reported to be good, exceptions were taken. Their validity turned upon this case. The words in the power were " reserving ancient, usual,† and accus- " tomed rents, heriots, *boons*, and services." In the former leases, the tenants covenanted " to keep in re- " pair:" that covenant was *omitted* in this. The Lord Chancellor was of opinion, that that covenant was a *boon*, and *beneficial to the remainder-man*; and held these leases *void, for want of it*. He took some days to consider; and declared he was clear upon the argument, but took

[S. C. 6 Vin. 472. See also 3 New Abr. 411. 4 Com. 370.]

[*Instead of "certain," see hereon Eq. Abr. 343. Cas. 5. Vin. Power A. 4. pl. 5. Cro. Car. 94. Hetl. 23. 3 New Abr. 361. 2 Vern. 544.]

[† Secus, in case of leases made pursuant to 32 Hen. 8. 3 Danv. 345.]

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time, because there was no case in point. The more he thought of it, the more he was convinced. The principle he rested upon was, that the estate must come to the remainder-man, in *as beneficial* a manner, as ancient owners held it. (*a*)

I have gone so far at large into the general doctrine, not from any difficulty: but because the point is of so much consequence to the lessor of the plaintiff. For, this writing of the 31st of *May* 1698, has not colour enough to make a question.

[Qu. By way of mortgage.]

1st. It is *no lease* at all. The very definition of a lease, is a contract between landlord and tenant, by which *both* are bound in *mutual* stipulations.

A sale and lease are defined to be the same species of contract. A sale cannot be, unless somebody agrees to pay the price; nor can there be a lease unless somebody agrees to hire, and to pay the rent. This writing *purports* to be such a contract. It is an *indenture:* which implies reciprocal instruments tallying one with the other. It

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professes being made by Sir *Robert Atkyns* on the one part, and the three *Dacres* on the other part. But *it is not:* the *Dacres* are *not bound:* They *never executed* this, or any counterpart. It does not appear they *knew* or *consented* to the making of it.

Livery of seisin was immaterial. A lease by virtue of a *power*, takes effect *out of the settlement* that gives the power. But *John Dacres*, who gave the letter of attorney to take livery, died in 1705. *Robert* died in 1706. Sir *Robert Atkyns*, the father, lived till 1709. Suppose, at his death, 360*l.* a year a beneficial rent: those in remainder *could not demand it. Thomas Dacres* had *not executed* the lease; he had *not accepted* it; he *never had entered* under it: no *distress* could be taken from him; *no action* could be brought against him.

One man cannot oblige another to be his tenant, at a high rent, *without his consent.* This is so plain, that on the part of the plaintiff, they have argued that *Thomas Dacres* was bound by acceptance; three ways—

1st. Because livery of seisin was taken in the *name* of *John, Robert and Thomas.*

Answer. THOMAS *gave no authority so to do:* It does not appear that he knew of it. But the *mere* taking livery of

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(*a*) This case of Earl of *Cardigan* v. *Montague*, is cited in 3 *Bro.* 281, 282, by which it appears that the case was removed into the *House* of *Lords*, after *Montague* was became Ld. *Beaulieu*; and there, in 291, it was said, by counsel that the decree of the lords was disapproved by Lord *Thurlow*; but qu. as to the citation. *Ib.* 282.

seisin * if he *never entered or occupied*, would *not* be sufficient to *charge* him with the rent reserved. 1757. TAYLOR v. HORDE.

2d. In the ejectment brought in *Hilary* term 1711, a *demise* was laid *from Thomas Dacres*, as well as the jointress: and the plaintiff had judgment to recover "*separales terminos.*" [* This is wrong, as appears from 9 Bac. 336, 337.]

Answer. The two titles are *inconsistent*: so there *could not* be really a recovery upon *both*. But the judgment pursued the declaration; and was *mere form*. It does not appear that *Thomas Dacres knew* his name was made use of: and he *never entered*, or *took possession*.

3d. That acceptance shall be *presumed*. And it is compared to grants: and *Thompson* v. *Leach* is cited. (*V.* 3 *Lev.* 284).

Answer. The ground of *Thompson* v. *Leach*, and of all the cases there put, is, "That *a gift imports a benefit: and* "*consent to receive a* BOUNTY *may fairly be presumed, till* "*the contrary appear.*" But the offer of lands to a substantial man at a *rack* rent, does *not* import such a benefit, as nobody in his senses could refuse. And here, there is *no room to presume*: for the contrary appears. *Thomas Dacres dissented*, during his whole life: and *never took possession*. The contrary appears too, from the *writing itself*. It never was the *intent* that the *Dacres* should take possession or pay rent. It was to be a conveyance only of the *ideal* freehold: which might nonsuit the remainder-man, in case he brought an ejectment against third persons; or prevent his suffering a recovery: but never could be any security to him for his *rent*. [124]

It is immaterial, whether an owner of the inheritance could convey an ideal freehold, to delay the tenant in tail, claiming under his grant, from suffering a recovery.

The question *here* is, whether it be that *usual* husbandry lease, reserving a *rack* rent, which is *intended* by every power of leasing.

It is very clear that *none of the lessees were bound* by this writing; more especially, that *Thomas Dacres* was not. But I go further: Sir *Robert Atkyns*, the nominal lessor, was *not bound* by it. The *deed* never was out of his *own possession*. The declared intent proves it a *trust for Sir Robert himself*. His will, under which the lessor of the plaintiff claims, avers it to be a *trust*, and devises it *as such*.

It is no objection to a lease under a power, "that it is "*in trust for him who executes the power:*" PROVIDED the *legal tenant be bound*, during the term, in all requisite covenants and conditions. But here, at the death of Sir *Robert* the father, those in remainder had *no tenant* to resort to: and the nominal tenant never did in fact enter, [4 Bur. 1978 acc. and vide 16 Vin. 193. and Shep. Touch. 510.]

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nor could either in law or equity, ever have been *compelled* to *enter*, or pay one farthing *rent*. So that this writing, calling itself an indenture, and purporting to be a contract, is waste paper only, by which *nobody ever was bound*.

But suppose it had been executed by the three *Dacres*; it could not be supported as a lease *within the meaning of the power*; upon a variety of plain objections, in respect of the *premises*, the *rent*, and the *remedy*.

[Ch. Pre. 259. Cro. Jac. 94. 2 Vern. 544. Fortes. 332.]

1st. As to the *premises demised*—it comprizes too much; and lays the remainder-man under difficulties to know whether the best rent is reserved. It extends to things out of which no rents can be reserved; as tithes, rents of assize, rents of customary tenants, commons, feedings, and lands in the several tenures of particular persons.

The condition of the power is, that there should be no term exceeding three lives in being at the same time: yet the demise extends to all and every the rents reserved upon *any* leases or grants.

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2dly. As to the *rent reserved*—the power requires "the "*best* rent that can be reasonably got, to be reserved *payable during* the term."

There is *no covenant for payment*. Under a mere reservation, it could not be payable *till entry*: and therefore, in fact, might *never* be payable, *during* the term. It is not found "to be the *best* rent."

3dly. As to the *remedy*—there being *no covenant to pay* the rent, the lease might be assigned to a succession of beggars. There being *no clause of re-entry*, the ground might lie unoccupied without any, or not sufficient distress upon it: so that the remainder-man could neither have his rent nor his land. There is *no counterpart*; an unusual omission, and very prejudicial.

Therefore the lease could *not* have been supported, *if it had been executed by the three Dacres*: which is *not* the case.

Every fraudulent, unfair, prejudicial execution of such a power, in respect of *those in remainder*, is *void* at law.

If the lease be a void execution of the power, against ALL *claiming under the settlement*, it cannot be made good against the *reversion in fee*, whereof Sir *Robert Atkyns* the father was seized, either by virtue of the livery, or by way of estoppel, supposing the *three Dacres* to have executed: because an *interest* would have passed, during the life of Sir *Robert Atkyns* the father; and there is no *estoppel* where any *interest passes*; and to make it operate by *virtue of the livery, out of the reversion in fee*, would be *contrary to the whole intent* of the deed plainly expressed. Which brings me to a second answer given.

Second answer to the excuse for not entering.

2d Answer. Suppose this pocket [undelivered grant of the ideal incorporeal freehold, a good execution of the

power; they have argued that it DETERMINED *with the estate tail*; that the *only cause* of the grant being "to "preserve the reversion *during* the estate tail" must *qualify the grant*, and *amount to a limitation*; that there is *no technical* form of words necessary to express a contingency, upon which an estate for lives may sooner determine. 1757. TAYLOR v. HORDE.

The deed might have said expressly, "if the heirs "male of Sir *Robert Atkyns* the son continue so long;" or, "that the lease should determine, if, during the lives, "the estate tail should be spent." That the intent of the deed, *plainly expressed*, is *tantamount*.

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3d Answer. Suppose it to subsist;—it is as a *trust*, and devised as such, to *attend the inheritance* of the lessor of the plaintiff; which came into possession the 9th of *October* 1712: his title and right of entry *then* accrued. Third answer to the excuse for not entering.

This lease was one of his muniments; a mere weapon in his hands: and it would be going a great way, to say "such a *form* should take from an adverse possession "the benefit of the statute."

But as we are all, clear, "that at the trial, a *surrender* "of such a lease might, and ought to be *presumed*, to let "in the statute of limitations;" the special verdict, here, *not having found such surrender*, we cannot come at the justice of the case in *that* shape.

It is unnecessary to go into this point, or the former: and it would be very improper, unnecessarily to do it.

If the *Dacres* had *no estate* by virtue of this demise, upon the 9th of *October* 1712, then this ejectment was *not* brought *within* twenty years after the lessor's title accrued: and no facts are found, to excuse him within any of the exceptions. [Qu. 1 Wils. 176.]

Therefore we are *all* of opinion that there should be

JUDGMENT *for the* DEFENDANTS.

A WRIT OF ERROR was brought in the House of Lords; and came on upon *Thursday* 26th *January* 1758. The counsel agreed, and were allowed, to argue the *last point*, for the judgment of the house, first: because, *if* their lordships should be of the same opinion with the court of King's Bench, "that *this ejectment* was *barred* by the "statute of limitations," it would be quite unnecessary to go into the *first* question.

All the judges were ordered to attend. To whom, after the argument at the bar was over, the house proposed the following question, *viz.*

"Whether sufficient appears by the special verdict "in this cause, to prevent the lessor of the plaintiff, by "force of the statute of limitations of the 21st of King "*James* the first, from recovering in this ejectment."

Whereupon, the Lord Chief Justice *Willes*, having

1757. TAYLOR v. HORDE. [127] [15 Vin. 120.]

conferred with the rest of the judges, delivered their unanimous answer, "that sufficient DOES appear by the "special verdict in this cause, to prevent the lessor of "the plaintiff, by force of the statute of limitations of "the 21st of King *James* the first, from recovering in "this ejectment."

Then the judgment of the court of King's Bench was AFFIRMED, with 5l. costs.

GREEN *versus* MAYOR OF DURHAM.

Wednesday, 26th Jan. 1757.

Mr. Just. Wilmot *absent (in Chancery.)*

Bye-law, to prevent persons from being made free, except in certain conditions good. [See 2 Lev. 238, 239. 4 Bur. 2043, 2044.]

THIS case was set down in the crown-paper, as a special verdict, and was so called; and was argued by one counsel on each side, in the same manner as if it had been a special verdict: but it was only a verdict upon six several traverses to the return of a *mandamus* (on 9 *Ann. c.* 20.) directed to the mayor of *Durham*, commanding him to *swear* and admit *Robert Green* into the place and office of a freeman of the *company* or fraternity of free-masons, *&c.* of the city of *Durham*.

The right set up by *Robert Green* was his having been duly *elected* AND ADMITTED a freeman of the *company:* but the objection to his being SWORN *by the mayor*, was, "that he had NOT *conformed* to certain *bye-laws* parti- "cularly specified in the return and found by the ver- "dict."

The return was—that *Durham* is and from time immemorial hath been an ancient city, *&c.*; and also, that a power is given by a charter of *Tobias* then bishop of *Durham*, (in 44 *Eliz.*) confirmed by king *James* the first, to the mayor, aldermen, and COMMON COUNCIL for the time being, or the major part of *them*, (of *whom the* MAYOR AND SIX *of the aldermen to be* SEVEN,) to make bye-laws, in the *stead, for*, and in the *dame* of the *whole* corporate body of the city of *Durham* and *Framwelgate*.

Then the return set forth, that certain bye-laws were *duly made* by the mayor, aldermen *and* COMMONALTY, in due manner met and assembled at the Guildhall, *&c.* on 8th of *November* 1728. And it particularly sets forth and specifies three several bye-laws, as having been then there *made* BY THEM; to wit—

First bye-law.

That for the effectual preventing all persons being made free, that have not a right or title to their freedom in the said city, and for the better regulating of the same, the mayor, one or more alderman or aldermen of the said city, and the wardens and stewards of the several and respective companies for the time being, SHALL *from henceforth* MEET at the Guildhall or toll-both in the said city,

four times in every year, *viz.* on the first *Monday* after *Martin-mas*, the first *Monday* after *Candle-mas*, the first *Monday* after *May-day*, and the first *Monday* after *Lammas*. And *every person* that is hereafter to be admitted a freeman of the *said* CITY *and* BOROUGH of *Framwelgate*, shall be THEN AND THERE CALLED, at *three* of the said several meetings, BEFORE *such his admittance* to be a freeman; AND *to be* APPROVED *of by* the said mayor and one or more alderman or aldermen, and the wardens and stewards of the several and respective company or fraternity (for the time being) whereof he or they is or are to be made and admitted a freeman or freemen respectively, or the majority of the said mayor, alderman or aldermen and wardens of such respective company then and there present.

Second bye-law.

That *any warden, steward,* or *other* freeman *that shall* MAKE any person a *freeman* of the said *city* or of any *company therein*, contrary to the said last ordinance or bye-law above mentioned, shall respectively FORFEIT and pay the sum of 30*l.* to the mayor, aldermen, and commonalty of the said city of *Durham*, to be by them recovered by action, or distress of the offender's goods, or otherwise; and to be paid into the chest or hutch, for the use of the said mayor, aldermen, and commonalty, to defray any public expence that may happen to the said corporation or fraternity.

Third bye-law.

That in case the mayor of the said city for the time being shall swear * any person that has not actually served seven years as an apprentice with a freeman of one of the said companies or fraternities, belonging to or used in the said city, or shall not be *justly entitled* to the same † by ancient usage or custom within the said city, he shall forfeit and pay the sum of 30*l.*: which said sum shall be recovered, *&c. ut supra*, and to be paid *ut supra*.

[*There seems to be an omission of some words here.]

[† This also shews that there is an omission, for there is nothing to which the word *same* can relate.]

All which said several ordinances and bye-laws the return alledges to have, ever since the making thereof, been constantly observed and kept, *&c.* and to be still in their *full force and virtue*, *&c.*

That *Robert Green* was NOT *elected and admitted a freeman of the said* COMPANY of free masons, rough masons, wallers, paviours, plaisterers, slaters and bricklayers.

That *Robert Green* was *never duly called* to be a freeman *of the said city* of *Durham* and *Framwelgate, nor* EVER APPROVED *of by the mayor*, and one or more alderman or aldermen of the city of *Durham* and *Framwelgate* aforesaid, and the warden and stewards of the said company or fraternity of free masons, *&c.* BEFORE his supposed election and admission to be a freeman of the said company or fraternity, according to the first ordinance or bye-law above mentioned, as he ought to have been.

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And for *these reasons* the said mayor has not sworn and admitted him, nor administered the oaths to him usually taken for the due execution of the said office.

Upon this return, *Green* takes six several traverses: on which issues were tried.

1st Issue—that the mayor, aldermen and commonalty *did* NOT *duly meet, &c.* on 8th *November*, 1728, in order to make bye-laws, *&c. modo & forma, &c.*

2d Issue—that they did not in due manner *make the first* bye-law mentioned in the return.

3d Issue—that they *did* NOT in due manner *make the second* bye-law mentioned in the return.

4th Issue—the *like denial* of their *making the third* bye-law mentioned in the return.

5th Issue—that he *was elected and admitted* a freeman of the said company or fraternity of free masons, *&c.* as in the writ is alledged.

6th Issue—that he was *duly called* to be a freeman of the said city of *Durham* and *Framwelgate* aforesaid, and was approved of by the wardens and stewards of the said company to be a freeman of the said city of *Durham* and *Framwelgate.*

The jury find, as to the first issue—that upon the 8th of *November* 1728, the then mayor and aldermen and commonalty *did in due manner meet and assemble,* at, *&c.* in order, *&c.* in such manner and form as the said mayor by his return hath alledged.

As to the 2d issue—that the said mayor, aldermen *and commonalty* did then and there, IN DUE MANNER, make the 1st bye-law in the return mentioned, in such manner and form as is therein by the said mayor alledged.

As to the 3d issue—that they did in *due manner* make the 2d bye-law, in manner and form, *&c.*

As to the 4th issue—the like finding, with regard to the 3d bye-law:

[130] As to the 5th issue—That *Green was* elected and admitted a freeman of the *company,* as in and by the writ is alledged: but that BEFORE SUCH *his admittance,* he was *not called* at any meeting held according to the said bye-law in the said 2d issue mentioned, *nor approved* of by the then mayor, and one or more alderman or aldermen, and warden and stewards of the said company or fraternity, nor by a majority of them, according to the said bye-law.

As to the 6th issue—that the said *Robert Green* was NOT *duly called* to be a freeman of the said *city* of *Durham* and *Framwelgate, and approved of* by the wardens and stewards of the said company or fraternity of free masons, rough masons, *&c.* to be a freeman of the said *city* of *Durham* and *Framwelgate.*

This case was argued on the 24th of *November* 1756,

by Mr. *Ambler* for the plaintiff, and Mr. *Clayton* for the defendant; when the court ordered it to stand for judgment of the then next term. 1757. GREEN v. MAYOR OF DURHAM.

Lord *Mansfield* now delivered the resolution of the court.

The general question depends upon *Robert Green's right* to the franchise which he claims.

The objection to his right arises from his not being *qualified according to the bye-law.*

If the bye-law is good, and binding, and he appears to be an object of it; he is certainly not qualified, and the mayor has returned a sufficient reason for not admitting and swearing him.

All the objections which have been made, therefore, tend to *set aside the bye-law*; or, if the bye-law be good, to shew that *Robert Green's* case is *not within it.*

It has been argued that the bye-law is *void*, upon two grounds;

1st. From *want of authority* to make it;

2dly. From the *subject-matter.*

As to the first—the objection is, that the bye-laws are returned to be made by the mayor, aldermen, *and* COMMONALTY; whereas the power is given to the mayor, aldermen, and twenty-four COMMON COUNCIL or the major part of *them*; of whom, the mayor and six aldermen should be seven.

Answer. The power to the select number is, to " make bye-laws in the *stead, for*, and *in the name of the* [131] " *whole corporate body.*" These bye-laws *might* be made by the select number, *acting* IN THE NAME *of the whole* corporate body; and must be so *intended:* for the jury find, " that they did in *due manner* meet, and in *due man-* " *ner* make the bye-laws."

As to the second—that the bye-law is *unreasonable* and *void:* for it is likened to the case of the taylors of *Ipswich*, 11 *Co.* 53. A bye-law " that none should work at his " trade, until he had presented himself to the company " of taylors, and proved that he had served seven years as " an apprentice, and admitted by them to be a sufficient " workman."

Answer. In *that* case, the bye-law was *against law:* it was against the 5th of *Eliz.*; and a farther restraint than that act had made.

But *this* bye-law is *not* against any law—it is *not* a restraint upon trade: but seems a *reasonable regulation*, to prevent persons being unduly made free, who are not intitled by birthright, service, or purchase. It provides a method for previously examining into the right of those who claim to be made free.

Obj. " That there is *no method to compel a meeting* of the

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" mayor, alderman or aldermen, and the wardens and " stewards of companies."

Answer. This objection extends equally to *all corporate* assemblies, by custom, charter or bye-law. But there *is* a known method, by *mandamus*.

Obj. If a person has a *right* to be admitted a freeman, yet unless he be *approved of* by the mayor, *&c.* he is not to be admitted: and there is *no method to compel* them to *approve*.

Answer. If the mayor, *&c.* disapprove, without cause, a *mandamus* will lie, suggesting the qualification and right of the person claiming to be a freeman, and commanding the mayor to approve and admit.

But supposing the bye-law *good*, it has been argued, that this case is *not within* it.

1st Obj. The *mandamus* is, to admit *Green* to the freedom of the *company:* the bye-law relates only to the freedom of the *city*.

[132] Answer. It appears from the second bye-law, to be the *same* thing.

2d Obj. The bye-law prohibits indeed the election of persons not called, and approved, *&c.*; and subjects disobedience to a penalty; but does *not* make the election *void*, and cannot transfer the right of election *vested* in the electors, to the mayor, *&c.*

Answer. These objections are founded upon a *misunderstanding* of the bye-law, and a *misconception* of the nature of the case. The writ recites " that *Green* had been duly elected and admitted a freeman;" and therefore commands the mayor to swear him—the mayor returns the bye-law, *&c.*; and " that *before Green's* sup- " posed election and admittance (by the company) to be " a freeman, he was not called and approved by the mayor, " *&c.*" And the fact found by the jury is, " that he was " elected and admitted by the company: but not called " and approved by the mayor, *&c.*" So that it appears upon this record, that the intent of the bye-law was, that no person should be elected and admitted a freeman of the *company*, unless he was called at the assembly and approved, *&c.*; which was a *previous* act to be done before the company could elect him; the way to *prevent* the abuse " that the company *unduly* admitted persons to " their freedom:" And the second bye-law inflicts a *penalty on the company*, who should make any one free, *without* the previous calling and approbation; and the third bye-law inflicts a penalty on the mayor, who should swear any *such* person.

The *stating the fact* answers both the objections. For the bye-law makes the appearance and approbation a *necessary qualification*, to the being made free by the *com-*

pany, and a restraint upon *them* to elect any one to his freedom, before his conforming to the bye-law: and the right of election is *not transferred* to the mayor, but *remains* where it was. 1757. GREEN v. MAYOR OF DURHAM.

Obj. It is *not* returned "that there *was* any assembly, "at which *Green* might appear, to be called."

Answer. It shall be *intended*,—and if in fact there was no assembly, *Green* might have *pleaded* it as an excuse.

Obj. He might have been elected and admitted, BEFORE the *making* this bye-law.

Answer. The jury have found, "that he was elected "and admitted: but that he was not called and approved "PURSUANT *to the bye-law*." So that the bye-law *was in being*, at the time of his election, *&c.*

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It is to be observed, that it is *not stated*, what is the *method* of the company's electing freemen, nor any thing in the charter concerning it. For aught that appears,* the first bye-law *may* be agreeable to the ancient usage, and *revived* by this bye-law and enforced with penalties: but supposing it to be *introductory* of a previous qualification, it seems to be *reasonable* and well calculated to prevent improper persons, not entitled, being made free. It is much more reasonable than the custom of *London*, "that no broad cloth should be sold, but what was brought "to *Blackwell-hall* to be examined;" 5 *Co.* 62. Yet this custom was held good; because it was to *prevent fraud*.

*Nothing is to be intended in a return to a mandamus; per Cur. 2 Show. 282.]

WE are of opinion that *none* of the objections are well founded; and therefore that the RETURN ought to be ALLOWED.

Consequently, as this was the case of traversing a return to a *mandamus*, pursuant to the statute of 9 *Ann.* *c.*20. the rule was taken,

[See 1 P. Wms. 351.]

That JUDGMENT be entered for the DEFENDANT.

GOODTITLE, ex dimiss. CHESTER, *vers.* ALKER AND ELMES. Friday, 28th Jan. 1757.

Tr. 26, 27 *G.* 2. *Rot.* 590.

THIS case was first argued on *Tuesday* the 4th of *February* 1755, when there were only three judges; Mr. Just. *Wright* having (two days before) resigned, and Mr. *Wilmot* (who was appointed to succeed him) not being then called a serjeant: and it was again argued, and determined on this day, (when Mr. Just. *Wilmot* was also absent, in the court of Chancery.)

An ejectment lies by the owner of the soil, for land over which a highway lies; and a wall or building upon it, may be described in the declaration as land; but perhaps if a house were built upon it, it ought to be described as such. [3. C. Bull. 99. cited.]

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It was a special verdict in ejectment for *an acre of* LAND lying in the parish of St. *Philip and Jacob* in the county of *Gloucester*. It finds, as to *one* piece of land, containing fourteen inches in length, and thirty-three feet in breadth, (parcel of the premises;) and as to *one other* piece of land, containing three feet six inches in length, and seven feet in breadth, (other parcel of the premises;) and as to *one other* piece of land, containing two feet in depth and fourteen feet in length, (other parcel of the premises contained in the declaration;) that *Thomas Chester*, esq. was in 1648 seised in his demesne as of fee, of and in the manor of *Barton Regis* in the county of *Gloucester*, with the appurtenances. That the said *T. C.* esq. being so seised, certain articles of agreement were, on 24th *June* 1648, made between the said *Thomas Chester* and one *John Gotley* otherwise *Dowle*, reciting a presentment [134] by the homage, at a court leet of the said manor, holden 10th of *April* 1648, "that the said *John Gotley alias* "*Dowle*, in the new building of a house at *Lafford's Gate*, "had *encroached upon the waste* of the said *Thomas Chester* "then and yet lord of the said manor, fourteen inches in "length and thirty-three feet in breadth, without his "house; together with a porch, without the wall ad-"joining to the said house, of three feet and an half; for "the which encroachment, the said *John Gotley alias* "*Dowle* was by the said jury amerced; as by the present-"ment aforesaid, in the rolls of the said court, appear-"ed;" the said *Thomas Chester* and *John Gotley* thereby agreed, not only concerning the said amerciament, (whereof the said *Thomas Chester* thereby acquitted and discharged the said *John Gotley*;) but also the said *Thomas Chester*, for the consideration thereafter mentioned, agreed to permit and suffer the said *John Gotley* his executors and administrators, to continue the peaceable enjoyment of the said ground and waste encroached, without his disturbance; and also to have liberty to set and place a post in the street, *&c.* and three other posts, *&c.* without any disturbance or trouble by him the said *Thomas Chester*, *&c.* for the term of 100 years from the day of the date of the said articles. In consideration whereof the said *J. G. alias D.* for him, his heirs, executors, *&c.* covenanted and agreed to pay to the said *T. C.* his heirs or assigns, the sum of 6s. 8d. *per annum* yearly, *&c.* during the said term: in consideration whereof, the said *T. C.* granted and agreed to let the said encroachment or encroachments to stand, for and during the said term, without any disturbance, *&c.*; so as the said yearly rent or sum of 6s. 8d. be duly paid, *&c.* And it was further found, that the *two first* pieces of land particularly mentioned and described in the verdict, are the two several pieces of land men-

tioned in the said articles to be encroached on by the said *John Gotley* otherwise *Dowle*; and parcel of the waste, and part of the tenement in the declaration mentioned; and *were* so encroached and taken in by the said *J. G.* otherwise *D.* IN *the building or erecting* the messuage or house mentioned in the said articles, some small time before the date of the said articles; and then were lying in and part of the said manor, and were *part of a* PUBLIC STREET *and* KING'S HIGHWAY, called *West-street*, in the parish of St. *Philip and Jacob* in the said county of *Gloucester*, and leading from the city of *London* to the city of *Bristol*. 1757. GOODTITLE v. ALKER and ELMES

The jury likewise find that the said yearly sum of 6s. 8d. was *duly and constantly paid*, in pursuance of the said articles, by the defendants and those whose estate they have, to the said *Thomas Chester* and the successive lords of the said manor, (his descendants,) *during all* the said term of 100 years; *and from* the end thereof, *till Lady-day* 1750.

Then they find that the *defendants Alker and Elmes, sometime in the year of our Lord* 1748, erected certain *palisadoes* before the front of the said house, and thereby *took in and inclosed* the *third* piece of land, above particularly mentioned and described, then lying in and being part of the said manor, and being then other part of the said *public street and highway*; and have kept the same so inclosed ever since, to this time: and that *that part of the said street* where the said encroachments were so made, at the several times of the said encroachments, contained in breadth (including the said encroachments) sixty *feet and no more.* [135]

The jury find *Thomas Chester*, esq. the lessor of the plaintiff, to be heir at law to that *Thomas Chester*, esq. deceased, who executed the articles; and, as such, to be seised of the said manor with the appurtenances, as the law requires: and that, being so seised, he made the demise to the plaintiff: by virtue of which demise, he entered, *&c.*; and was ejected, *&c.* But whether upon the whole matter aforesaid in form aforesaid by the said jurors found, the said *G. A.* and *L. E.* are guilty *of the said trespass and ejectment*, AS TO *the said three pieces or parcels of land*, parcel, *&c.* by them supposed to be done, or not, the said jurors are wholly ignorant, *&c.* and so the verdict concludes in the ordinary form.

The counsel for the plaintiff made two questions; *viz.* Argument for the plaintiff.

1st Question—whether an ejectment will *lie* for these premises AS DESCRIBED in the declaration.

2d Question—whether the defendants are at liberty to *controvert the title* of the plaintiff; or are ESTOPPED from so doing.

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[See Stat. 13 Geo. 3. c. 18. s. 17. Bull. 93.]

First—it may be objected, "that no ejectment will lie "of land which is *part of the king's highway.*" But it is plainly and beyond controversy part of the *lord's soil;* though it is indeed said to be part of the *highway.* This highway is found to be sixty feet wide. Therefore *if enough be left* for a public way, the *rest* belongs to the lord: at least, he is *not* guilty of a *nuisance,* if he should erect any thing upon the *overplus part of it.*

Now sixty feet is much more than enough for any highway: and the encroachment is only from the front of the house; *not in the middle of the highway.*

[S. C. 12 Vin. 78, 79. 2 Barnes, 350.]
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[Post 143.]

The overplus of the soil is not vested in the crown; but in the *owner of the soil.* 2 *E.* 4. 9. *Bro. & Fitzh. Abr.* Tit. *Chimin.* In *Tr.* 13, 14 *Geo.* 2. *C. B.* and at *Serjeants Inn, Selman* v. *Courtney* (concerning giving in evidence, a right to a highway,) it was unanimously holden "that, in trespass, the defendant may justify that it was "a highway, but cannot give it in evidence; and that the "*right to the soil* was *not* in the crown."

[4 Vin. 515.]

If the highway was taken out of the lord's waste, the right and property of it is clearly in the *lord;* and the lord may *distrain* in it: so is 17 *E.* 3. 43 *pl.* 31. If it was not taken out of the waste, it belongs to the owners of the soil on each side. The case of *Selman* v. *Courtney* (*supra*) was so determined by all the judges.

The owner of the soil may cut *down the trees,* and may have an action for *digging* the soil. So is 1 *Ro. Abr.* 392. *pl.* 2. and 1 *Ro. Abr.* 392. *pl.* 3. Title *Chimin private,* letter B.

[S. C. Str. 1004.]

In the case of Sir *John Lade* v. *Sheppard, H.* 8 *G.* 2. *B. R.* The land was the property of the plaintiff, who made it a street; and the defendant's bridge rested upon it; and he had (by leave of the commissioners of sewers) arched over the ditch, and dug the ground, and fixed posts upon it. It was holden "that this making a street was only a "dedication of it to the public, for the particular purpose "of *passing and repassing;* but that the *soil* belonged to "the OWNER." *V.* 2 *Strange* 1004. S. C.*

* My own note agrees with Sir John Strange's. "The property remained in the owner of the soil: He only gave the use of it to the public." [i.e. in ejectment.]

The general question is "whether a *part of a* HIGHWAY *be recoverable in an ejectment.*"

The description of a highway is laid down in *Co. Litt.* 56. *a.* The *property* of the soil of the highway (as has been already proved) is in the *lord of the soil.* An action of trespass must be founded on *possession:* and an ejectment is an action of trespass. In *Cro. Eliz.* 339. *Jordan* v. *Cleabourne—per Popham* and *Gawdy,* it was holden to be but a personal action, and a trespass in its nature. Therefore the plaintiff might be *possessed* of it; and consequently may *recover possession* of it, in an ejectment; for if

has a *right* to the possession, he *must* have a *remedy* for it. 1757. GOODTITLE v. ALKER and ELMES.

It is not *every* encroachment, that is a nusance to the *public*: *some* encroachments may stand. *Fitzh. Abr.* 77. *a.* No. 447. 8 *E.* 3. is one instance of it. But there, the *king* must be intended to be the *owner* of the soil: otherwise, the rent would have belonged to the owner of the soil; not to the king. [*Tit. Assize, pl. 447.]

The sheriff *may* deliver full seisin of the thing here demanded. In proof of which, they mentioned a note of a case before Lord Ch. Baron *Pengelly*, in *Wiltshire*; where an ejectment was brought for a *cottage in the highway*; and it was objected "that it would not lie, *because* the "sheriff could not deliver possession:" But Ld.Ch.B. *Pengelly over-ruled* the objection; and said that Mr. Justice *John Powell* had been of that opinion which himself then went upon, and had done the like. [137]

They insisted very strongly, that the sheriff CAN give seisin of the thing; SUBJECT TO *the rights* of others upon this property, for particular *easements*. *Co. Litt.* 4. *a. Cro. Eliz.* 421. *Welden* v. *Bridgewater*. *Co. Litt.* 48. *b.* For the rights of others are *not* to the POSSESSION; but to *mere* EASEMENTS, which are *collateral* to the thing itself. *Cro. Jac.* 263. *Sir William Wrey* v. *Vesper*. And there is no reason for making any difference between *public* and *private* easements. This argument might as well be used in regard to such an easement, as a right to set up stalls in a fair or market. But the case of the *Mayor of Northampton* v. *Ward* in 2 *Strange*, 1238, is a full proof "that "trespass is the *proper* remedy for erecting *stalls in a mar-* "*ket*." Now if a person should build a *house*, instead of setting up a *stall*; would not an ejectment lie, by the owner of the soil?

Secondly, (under the first question,) it will also be objected here, "that the thing demanded is *not sufficiently* "*described*;" the ejectment being only "for an acre "of LAND."

The plaintiff's counsel said they did not dispute the case of *Knight* v. *Syms*, *Carth.* 204. 4 *Mod.* 97. S. C. [*V.* also 1 *Salk.* 254. S. C. and 1 *Shower*, 336. S. C.] "that an "ejectment of so many acres of *arable and pasture*, with- "out shewing the *quantum* of *each* sort, is *not* good." But they observed that in the present case, two answers may be given to this objection; *viz.* 1st. That this is *no* part of the *doubt* of the jury: therefore the court will not lay any stress upon it. 2dly. That the special *verdict has ascertained* the nature and the quantity and the situation of this land; for, it is found to be *part of the waste*, and is described *even to inches*: so that *the sheriff can have no doubt*, WHAT to deliver possession of.

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Second general question—the plaintiff's counsel said that this is an *unconscientious* defence; as the defendants have already enjoyed this a hundred years under these articles, and have *constantly paid* the rent: and therefore they are ESTOPPED from controverting the *lessor's title*. They cited 1 *Salk.* 276. *Trevivan* v. *Lawrence & al'*, and 2 *Ld. Raym.* 1036, 1048. S. C. in support of this position; and likewise to prove that not only the parties, but also the *court* and *jury*, are *bound* by this estoppel: in further confirmation whereof, they also cited *Co. Lit.* 352. and 231, and *Litt.* § 374.

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And therefore they prayed judgment for the plaintiff.

Argument for the defendants.

The counsel for the defendants began with observing upon particular parts of the verdict, which they thought to be material. As that it is expressly found "that part of "this land is part of the street, which is *part of the* "*king's highway:*" and the third parcel is expressly found to be "*other* part of the said street or *highway.*" And the jury likewise find, "that the way is in breadth (includ- "ing the encroachments) sixty feet, *and* NO *more:*" which is FAR *from* finding a *surplus.* That it is *not* found "that the defendants claim *under Gotley*," That the ejectment is "for *one acre of* LAND with the appurtenances:" but the verdict describes three parcels by inches and feet. The plaintiff is found to be lord of the manor of *Barton Regis;* in which manor this waste lies: and the two pieces first mentioned are found to be encroached upon and taken in, by erecting a *house;* and that upon the third, certain palisadoes were erected. And the doubt of the jury is "whether the defendants were guilty of a tres- "pass upon these *parcels of* LAND."

Then they proceeded to their objections.

1st Objection—the plaintiff's *demand*, and the *finding* of the jury, are *not agreeable* to each other; so as to intitle the plaintiff to recover, upon this verdict. For the *demand* is of an *acre of* LAND, *merely:* whereas it is found "that a house is built upon the former two parcels." And this was a fact within the plaintiff's *privity:* and therefore the ejectment ought to have been brought *for the* HOUSE; not for the land. So is *F. N. B. pa.* 192: though with a *qu.* indeed *there.* But, however, 39 *H.* 6. 8. and *Bro. Demaunde, pl.* 14. S. C. and also *pl.* 5, *& pl.* 33. sufficiently prove "that the demand ought to be, OF *an* "HOUSE; not of *arable* land;" (as the term "*land*," imports.) So also do *Plowden* 168, 170. *Hyll* v. *Graunde. Jenkins*, 6th century, *pl.* 83. *fo.* 268. *Cro. Eliz.* 234. *Hays* v. *Allen. Co. Entr.* 642. S. C. 2 *Roll. Abr.* 704. Title *Trial, pl.* 22. and *Dyer* 47. *b. Banister* v. *Benjamin* (in *margin.*)

And if it was not to be thus *specifically* demanded, *as* it is *at the time;* there could be no certainty how to *deliver possession.* And such specification would be liable to no objection: for in *P.* 12 *G.* 1. *B. R. Sullivan* v. *Segrave,* 1 *Strange,* 695. an ejectment "de *parte* domûs" was holden to be good.

But here, the verdict *finds* what the plaintiff's words of demand are *not* apt and fit to entitle him to recover.

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The sheriff may break open a house, to deliver possession of *part* of it. 5 *Co.* 91. *Semaine's* case, second resolution. *Style,* 238, *more* than enough, is error: and *less* is bad. In 2 *Ld. Raym.* 1470. *Bindover* v. *Sindercomb,* a description of "*part* of a house" was holden to be good; because it sufficed to describe it *to the sheriff.*

Where the land may be ascertained, by being at the plaintiff's peril shewn to the sheriff; yet even there, it must be land of the *same quality,* as was demanded; (*ejusdem generis.*) *Savile,* 28. *case* 67. *The Queen* v. *Aylesworth. Cro. Eliz.* 265. *Scriven* v. *Prince. Cro. Eliz.* 465. *Portman* v. *Morgan.* A demand of land must (in *our* law) be *certain. Luttrel's* case, 4 *Co.* 87. *b.*

There was a case of one *Degony Green* v. *William Johns,* in 1715, where a house was actually *sawn asunder:* (they said they had the declaration from the heir of the defendant.) It was an ejectment of an acre of land, (but *further* described indeed,) of which the Dean of *Exeter* was the claimant: and, though there was no judgment or execution; yet, by consent, the house was *sawn asunder,* in order to deliver possession.

Though *strict* nicety has of late years been gotten over, yet *sufficient* accuracy and precision is *still* necessary: and *part of a* HOUSE can never be said to be within the description of *land. Co. Lit.* 4. *a.* is no authority against this; nor 4 *Co.* 87. *b.* And in *Cro. Jac.* 654. *Royston* v. *Eccleston*—ejectment "de unâ *domo* & de uno *pomario*" was holden good, upon the principle of their conveying a *sufficient certainty,* so as the sheriff might deliver possession. *Palm.* 337. S. C. 11 *Co.* 55. *Savel's* case. 1 *Salk.* 254. *Knight* v. *Syms.* 1 *Show.* 338. S. C.

And it would be very dangerous, if *certainty* of description should not be *strictly* kept to.

Second objection. This appears to have been *parcel of the waste;* and ought to have been *so* described: and also it is *part of the king's* HIGHWAY. Therefore *no possession,* or no *full* possession, at least, can be delivered of it.

P. 15 *G.* 2. *B. R.* In the case of *Popple* v. *Dobson,* "*waste-ground*" was thought a good description: *sed adjourn'.* (*Cur advis'*) *Cro. Car.* 511. *Mulcary and* —— v. *Eyres and others,* on error in ejectment, from *Ireland,* "*bogge*" was holden a good description.

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And it being the *king's public highway*, the plaintiff can *never* have *possession* delivered of it. The owner cannot levy a fine of it: nor can he *distrain* in it; as may be seen in 2 *Inst.* 13.

In cases of encroachments or purprestures on it, these encroachments are *upon* the *king:* and so is 2 *Inst.* 272. expressly; "dicitur purprestura, quando aliquid *super* "*dominum regem* injustè occupatur, ut &c; vel in *viis* "*publicis obstructis.*" And the remedy is by *presentment* or *indictment.* 9 *Co.* 113. 5 *Co.* 73. *a.* 27 *H.* 8. 27. *a.* But an *action* lies, *only* where a man receives a *special* injury.

[This case as here reported was denied by Lord Mansfield, post 143. expressly, and also by Denison J.; and as it seems by Foster, J. who all thought there must have been circumstances in it, not appearing by the state of it. As to Wilmot, J. he was not in court at the argument; and therefore did not give any opinion.]

How can the plaintiff have PLENAM *seisinam* of this? In 1725, 8 *Geo.* 2. there was a case of *Well-advised, ex dimiss. Sir Bourchier Wray & al'* v. *Foss et al'* in ejectment, at the summer assizes at *Exeter.* The declaration described a piece of land, containing forty feet in length, and four feet in width, part of the manor of *J.* But the plaintiff was nonsuited. For the land was part of the *waste:* and upon evidence, it appeared to be *part of the* HIGHWAY, on which the defendant had built. Lord *Hardwicke* held "that no POSSESSION *could* be DELIVERED *of the* SOIL *of* "*the* HIGHWAY; and therefore no ejectment would lie "of it: and if it was a *nuisance*, the defendant might be "indicted."

In the present case, *all* these three pieces of land are part of the *king's highway*, and are encroached upon: and the two former have *subsisting* nuisances upon them.

If a highway lies within a manor, it must be agreed (especially as found here) that the lord *has the property of the soil;* to be used *consistently* with the privileges of the subject: but the question is, *what* REMEDY the lord has, in case of a *nuisance* upon *such part* of his property as lies in the *king's highway.* We say, he has *no specific* remedy, by ejectment. The case of Sir *John Lade* v. *Sheppard*, 2 *Strange*, 1004. does not prove that an *ejectment* will lie: that was *not* an ejectment; but an action of trespass. And perhaps an action of *trespass* might have been *here* maintained: but not an *ejectment.* And if the lord of the soil should recover and *continue* it, he would thereby become a *wrong-doer:* whereas, according to 2 *Inst.* 294. it is the wisdom of the law, so to resolve, "*ut sit finis litium.*"

As to *Fitzh. Abridgment* 77. *a.* It is the case of *the king:* and by his prerogative, *he* may continue it, if it be no injury to the subject. But a highway must *always continue* a highway. *Cro. Jac.* 446. *Fowler* v. *Sanders*, fully proves "that it *cannot be* narrowed: neither can it be "inclosed."

[141] Second general question. As to the *estoppel*—it does

not appear that the defendants claim *under Gotley*, therefore that point is out of the case.

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It was urged by the counsel for the plaintiff, by way of reply—that as to the *estoppel*, the court must necessarily *intend*, upon this finding, that the *defendants themselves* paid the rent, and erected the pallisadoes in 1748: and the rent which was paid *from* the end of the term *till* 1750, must be presumed to be paid BY THEM; they being *then* in possession. A special verdict is not to be taken strictly; like a special pleading.

Reply.

As to the * 1st objection made by the counsel for the defendants—*non constat* that this land is built upon: it is only found "that in the new building of a house at *Lafford's gate* aforesaid, *Gotley* had ENCROACHED upon the "lord's waste, so many feet, *&c.*" But it does not follow that *Gotley* actually BUILT upon the land, which he so encroached upon. For there are very many *other* ways of encroaching upon another's land, *besides* building upon it: for instance, a penthouse *overhanging* and dropping upon it, may be an encroachment. *No express* fact of *building* upon this land is found. Indeed it is said in the finding, that the third piece of land is *taken in* and inclosed with palisadoes, by the said *J. Gotley*. But the palisadoes answer this expression: he *inclosed* it with *them*.

* Observe that the two divisions of the first question were counterchanged, in the course of this argument: the counsel for the defendants having begun first, with that objection which the plaintiff's counsel had taken up (by way of prolepsis) in the second place. Vide pages 137, and 138.

They agreed to the doctrine of the necessity of *sufficient* certainty in the demand: but said and insisted that it is *sufficient*, if the sheriff may know *how to deliver possession*.

The term "*land*" is said by Lord *Coke*, legally to include *castles*, *houses*, and other buildings. *Co. Lit.* 4. *a.* [Cowp. 347.] And by a grant of "all a man's *lands*," all his *houses*, mills and woods would *pass*: as appears in *Lutterel's* case, 4 *Co.* 87. *b.* And by the civil law, "appellatione *fundi*, "omne *ædificium* & omnis ager continetur," *ibidem*. Therefore, as they would pass in a *conveyance*, there is no reason why they should not be included in an *ejectment*, upon a *supposed* lease: which lease, if it was a *real* lease, would undoubtedly carry them.

None of the things described in the declaration differ from the descriptions of them in the verdict.

Indeed it is only fourteen inches in length, that it is *pretended* any part of the house now covers. But the words are, that "whereas it was presented that the said *J. G.* "*had incroached* upon the waste of the manor of the said [142] "*T. C. &c.* fourteen inches in length, and 33 feet in "breadth, *without his house;* together with a *porch* of "three and a half feet in length, and seven feet in breadth, "*without the wall* adjoining to the house." Now it is *not* necessary that the *court* should consider these two pieces

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of land, as a *house*; especially the latter, upon which the porch is erected.

It is *not* found to have been a messuage at the *time* of the demise laid. On the contrary, the pieces of land incroached upon, are found to be parcel of the waste, and part of the *tenement* in the declaration mentioned; which tenement is not a house, but an *acre of land*. However, this objection cannot overthrow the *whole* verdict: for the *third* parcel is clearly *land*, and *not house*.

If a man builds upon my land, it would be very hard if I might not, notwithstanding this, demand my *own* LAND.

If the ejectment was brought *de parte domûs*, (which they did not admit that it could be,) how would the sheriff know WHICH part to deliver possession of? The plaintiff must, in *both cases, shew* him, at his *peril*.

Though "*pomarium*" be good, yet it would equally be good, if called "*land*."

* See the note in p. 141.

As to the * second objection made by the counsel for the defendants, the plaintiff's counsel replied, that the right is *admitted to remain in the owner of the soil*, to be used consistently with the privilege of the subject: which admission is sufficient for our purpose. He may dig sand or stones; provided he does not commit a nuisance in the manner of doing it. Therefore it is plain that he has a private right remaining in him.

An *ad quod damnum* alters no property: the owner retains the old road, *discharged* of the easement, which is *transferred* to another part of his land.

The court have nothing to do with the *nusance*, in this case: it does not appear to the court, to be any nusance to the highway; or that Mr. *Chester* will continue it, if he should recover the land.

Cro. Jac. 446. was for a special injury received from the defendant's laying logs in the highway: but though the king cannot narrow his prerogative, to the injury of the subject, yet it does not follow from that case that the property of the highway is not in the owner of the soil.

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Lord *Mansfield* asked whether they had any note or report of that circuit-case which was said to have been determined by Lord *Hardwicke*; and by whom it was taken; but there was no note or report of it; and it seemed to have been mentioned at the assizes, from some imperfect recollection. He therefore proceeded to give his opinion immediately; putting this case of Sir *Bourchier Wray* out of the way entirely; as being so loosely remembered and imperfectly reported, as to deserve no regard, nor to be at all clear and intelligible. He said it was impossible to suppose that Lord *Hardwicke* had any note or memory of such a point arising at the as-

sizes: otherwise, he would wait till he could know the true state of it from his lordship, from the deference he paid to so great an authority. But from the manner in which it is quoted, there is no ground to say what the state of that case or determination *really* was.

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As to the question "whether an *ejectment will lie*, by "the *owner of the soil*, for land which is *subject to passage* "*over it* as the king's *highway*."

1 *Ro. Abr.* 392. Letter B. *pl.* 1, 2. is express—"that "the *king* has *nothing but the passage* for himself and his "people: but the *freehold and all profits* belong to the "*owner* of the soil." So do all the *trees* upon it, and *mines* under it (which may be extremely valuable.) The owner may carry water in pipes *under* it. The owner may get his soil *discharged* of this servitude or easement of a way over it, by a writ of *ad quod damnum*.

It is like the property in a market or fair.

There is no reason why he should not have a right to ALL *remedies* for the *freehold*; subject still indeed to the servitude or easement. An *assize* would lie, if he should be disseised of it: an action of trespass would lie, for an injury done to it.

I find by the case of *Selman* v. *Courtney*, (*a*) *Tr.* 13, 14 *G.* 2. * that a point which had been before the court of Exchequer in the case of the Duchess of *Marlborough* v. *Gray*, *M.* 2 *G.* 2. is now settled; *viz.* "that it's being a high-"way cannot be given in evidence by the defendant, "upon the general issue:" which proves that the ownership of the soil is *not* in the king. I see no ground why the owner of the soil may not bring *ejectment*, as well as *trespass?* It would be very inconvenient, to say that in this case he should have NO *specific* legal remedy; and that his only relief should be repeated actions of damages, for trees and mines, salt-springs, and other profits under ground. It is true indeed that he must recover the land, SUBJECT TO *the way:* but surely (*b*) he ought to have a *specific* remedy, to recover the LAND ITSELF; notwithstanding its being subject to an easement upon it. [144]

* Vide ante p. 135, 136. [S. C. 12 Vin. 78, 79. pl. 91. in n. See also 1 Rol. Abr. 392. or 4 Vin. 515. pl. 3.]

Second question. As to the *description*.

I do not know whether it is not even *better* described

(*a*) Yet it was ruled, as it seems soon afterwards by *Wm. Fortescue*, J. thatit may be given in evidence on the general issue, that the *locus in quo* was the lord's waste; because it proves the defendant not guilty of any trespass to the plaintiff. *Goodwin* v. *Cooke*. 33. MSS.

(*b*) This right has been since recognize by the 13 *Geo.* 3. *c.* 78. *s.* 17.

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by the name of the *land*, than of a *house*, or *part of a house*.

I think it would have made the objection much *stronger*, if the plaintiff had only claimed the NUSANCE, instead of the land on which the nusance is erected.

Here he does not claim the *nusance:* he claims the *land*. And the tenants in possession of it defend themselves by saying "that they have *erected a nusance* upon "it." Now it would be a strange thing, if *that* should be a good defence against the owner's recovering his *land*.

[5 Burr. 2673.] But, however, this is not a *house*, (which perhaps ought, if it were so, to be particularly named;) but merely a *wall* or PART *of a wall* or building: and there is not such preciseness required in *ejectment*, as there is in *real* actions.

The courts will go to the utmost extent, in *support of ejectments;* that people may have *specific* remedies for their rights.

Dyer 47. *a. pl.* 6. is very strong. There, the recovery was, of "100 acres of land, 20 acres of meadow, and "40 acres of pasture, in *D.*" without mentioning any house or garden: And the better opinion seems to be "that the plaintiff should thereby recover the *buildings* "built thereupon."

That was an action of a *higher* kind than an ejectment: it was a *real* action, a writ of intrusion, in which *that* recovery was had.

But here the building erected is only PART of a house or wall: and it is erected, *by incroachment*, upon the plaintiff's land.

The case of the defendant is most unfavourable: for he insists upon holding the thing demanded without any pretence of title; and insists that the plaintiff shall have no specific remedy for his land.

Therefore I am of opinion that the plaintiff ought to recover upon this special verdict.

[145] Mr. Just. *Denison* concurred.

† Note. Mr. Justice Foster, who tried the cause, had declared this, during the course of the argument. He said he should have had no doubt about it, at the trial; but upon it's being alledged "that

The difficulty at the assizes arose (as the judge who tried the cause has † declared, merely upon an apprehension that there had been a determination at the assizes formerly, by Lord *Hardwicke*, "that an ejectment would "*not* lie for a property in soil, over which there was a "*highway;* because the sheriff could not deliver pos- "session of the highway."

But the *reality* of this authority has not been at all proved, to any kind of satisfaction.

Trespass would undoubtedly lie: why then should not an ejectment?

It is said "that the sheriff cannot deliver *full* posses- "sion."

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But why not? Indeed, it must be *subject* to the easement: but there is *no other* difficulty in the matter.

Therefore I take it for granted, that there was something more in that cited case of Sir *Bourchier Wray's*, than we are now apprized of.

As to the second question—

It might have been perhaps difficult to have described this *part* of a house.

In that case in *Dyer* 47. *a.* I take it that the formedon in reverter was well brought for the LAND, *secundum formam doni:* the plaintiff had nothing to do with what the defendant had done with it, or built upon it. And I think the four judges who held on that side of the question, were in the right.

And upon this special verdict, the sheriff would have no difficulty to deliver possession; for any thing that I can see, to raise any.

I think that case in *Dyer* is good law. That was in a *real* action: and much more will the same reason hold upon *ejectment*, (which would even lie for *tithes*.) (*V. Cro. Car.* 301.)

And I think this ejectment was *better* and more properly brought for *land*, than it would have been for "*part* "*of a house.*"

Mr. Just. *Foster* agreed that the case in *Dyer* was good law.

And he repeated, that he had no doubt of the present case, when it was before him at the assizes, *but* from the *then*-apprehended authority of the cited case, *said* to be determined by Lord *Hardwicke*. (*V. ante* 145.)

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The owner of the soil has right to ALL ABOVE *and* UNDER *ground*, *except* only the right of passage, for the king and his people.

And the case in 1 *Ro. Abr.* 392. Letter *B.* proves this. (*V. ibid. pl.* 1, 2, 3, 4, 5 & 6.)

Therefore he entirely concurred with his lordship and his brother *Denison*, (for Mr. Justice *Wilmot* was * not present in court at either of the two arguments of this case,) that there should be

* V. ante 133.

JUDGMENT for the PLAINTIFF.

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A commission under the Exchequer seal is admissible, though not conclusive evidence. [S. C. Bull. 283. and see 12 Vin. 268.]

A NEW trial had been moved for, on a supposed *misdirection* by the judge who tried the cause, in *admitting* a commission under the seal of the court of Exchequer, *P.* 33 *Eliz. Rotulo* 290. to be given in *evidence*; (*a*) although it

(*a*) *Sayer* in the report of this case (p. 297) states it to

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was objected at the trial, that this commission was "*res* "*inter* ALIOS *acta;* of which the *Beaufort* family could "have *no notice*, nor *opportunity to defend it;* and therefore "it could not *affect* them: consequently, it *ought* NOT "*to have been* AT ALL *admitted as evidence;* for the same "reason that a *verdict* in a cause between *other* parties "cannot be given in evidence in a cause between strangers "to the former cause."

N. B. This commission (*P.* 33 *Eliz. Rotulo* 290, *in Scacc'*) was directed to five commissioners therein named, *ad inquirendum, tam per sacr'um proborum & legalium hominum com' nr'i South'ton, quum per depositiones quorumcunque testium, &c. omnibus aliis viis mediis & modis quibuscunque,* "*si prior aut prioratus* "*Sci' Swithini Winton, in jure domûs sive prioratûs,* "*fuit seisitus in quibusdam terris vocat' Woodcrofts &c.* "UT parcell' *de manerio de Hinton-Daubney;*" *necnon,* "*Si Henricus, pater noster, (in ejus vita,) Dominus* "*Edwardus sextus, Regina Maria, aut nos ipsi, à* "*tempore dissolutionis prioratûs sci' Swithini, &c. &c.*" with an order for the sheriff to summon a jury, &c. (*a*)

[147] [3 Atk. 298. 12 Vin. 120, 121.]

To this, is returned an inquisition taken [thereon] the 9th of *April*, 33 *Eliz.:* whereby it is found "that the "prior of St. *Swithin*, in right of his priory, WAS *seised* of "the said lands called *Woodcrofts, &c.* AS *part and parcel of* "*the* manor of *Hinton Daubney;* and that *from* the dis-"solution of the said priory, King *H.* 8. King *E.* 6. and "Queen *Mary* were seised, and Queen *Elizabeth* herself, "in the same right to the 27th of *May* then last past."

There are also returned the interrogatories administered on her majesty's behalf, and the depositions taken thereon.

The substance of the judge's report was, that he *admitted* this *commission* and the *return* to it, and the *depositions*, to be read in evidence; holding them to be *admissible* evidence, though *not* conclusive. That there was likewise much *parol*-evidence of the possession of *both* parties; and that there had been a *mixed* possession: but that he, in his direction to the jury, did lay great *stress* on this *commission, &c.* and that WITHOUT *its assistance*, he should have thought the verdict for the plaintiff to have been a very hard one.

The report concluded, "that he himself (the Lord Ch. "Baron) thought this piece of evidence to be *admissible*, "but *not* conclusive; that it had great weight with the "jury; and that if the court should be of opinion that

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have been an *exemplification* under the seal of the Exchequer, not a commission. And see 3 *Durn.* 714.

(*a*) On an issue between persons not parties nor privies.

" it was *not* admissible, he thinks there ought in *that* case " to be a new trial."

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This matter having been largely debated at the bar, and afterwards fully considered by the bench; and the court having been of opinion " that the evidence *was* " ADMISSIBLE, though NOT *conclusive*; and therefore that " it was well and properly received;" and consequently, " that the rule for shewing cause why there should not " be a new trial, should be discharged;" the said rule had been accordingly discharged.

But in the interim, whilst this question was depending before this court, (who took time to advise upon it,) the Duke of *Beaufort*, the defendant, DIED.

Whereupon, (on *Saturday*, 13th *November* 1756,) Mr. *Gould*, on behalf of the plaintiff, moved for leave to *enter up his judgment*, as of the *next term after the verdict;* which was the term in which he *might* have entered it up, if the motion had not obstructed it. 1 *Leon.* 187. *Isley*'s case.—It is discretionary in the court to grant this or not. 1 *Sid.* 462. *Crispe and Jackson* v. *Mayor of Berwicke*, in point. 1 *Vents.* 58. 90. S. C. in point. And in *Hilary* term last, the case of *Wyndham* v. *Chetwynd* S. P. (though a premature application.)

[4 Burr. 2277.]

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Lord MANSFIELD—It seems reasonable: take a rule to shew cause.

And

On *Friday*, 28th *January* 1757, on Mr. *Gould's* motion, this last rule (for entering up the judgment, as of the term next after the verdict,) was made* absolute without defence.

*V. post. p. 226. S. P.

REX *vers.* MAURICE JARVIS.

Saturday, 29th January, 1756.

THIS was a conviction, (which stood in the crown-paper,) upon 5 *Ann. c.* 14.

Convictions on the game acts must particularly and negatively specify that the person convicted had not any of the qualifications required by the 22 and 23 C. 2. c. 25, and to which the act of Ann refers. [See also 7 Durn. 31. 1 East. 642. 2 Durn. 19. 6 Durn. 559.]

It was made by *John Bythesea* and *John Turner*, esquires, two justices of the peace, for the county of *Wilts;* and was to the effect following:

Be it remembered, that on, &c. *John Webb* of the parish of *Hilperton* in the county of *Wilts* aforesaid, yeoman, in his own proper person, cometh before us, &c. justices, &c. And now he giveth us the said justices to understand and be informed, that one *Maurice Jarvis* of *Trowbridge* in the county of *Wilts*, labourer, within three months now last past, that is to say, on the fourth day of *September* now last past, in the twenty-eighth year, &c. with force and arms, in a certain field commonly called, &c. lying and being within the parish and manor of *Hilperton* aforesaid, in the county of *Wilts* aforesaid, did unlawfully keep and use, and had in his custody and possession,

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one setting-dog and setting-net for the destruction of the game; and did *then* and there ride with and hunt the said setting-dog, with an intent to kill and destroy game; he the said *Maurice Jarvis* at the time and place when he so kept and used the said setting-dog and net and had the same in his custody and possession, *was* NOT *qualified* BY ANY LAWS OR STATUTES OF THIS REALM, *to kill game, or to keep or use any* nets, dogs or other engines for the destruction of the game; contrary to the form of the statutes in that case made and provided. And thereupon afterwards, that is to say on the said 10th day, *&c.* at, *&c.* aforesaid, *Thomas Webb*, servant and game-keeper to *Edward Eyles*, esq.; for the manor of *Hilperton* aforesaid in the county of *Wilts* aforesaid, a credible witness in this behalf, in his own proper person, cometh before us, *&c.*; and taketh his corporal oath on the Holy Gospel of God, to speak the truth of and concerning the premises above-mentioned and specified in the said information before us, the said *&c.* the justices aforesaid, having sufficient power and authority to administer the said oath to the said *Thomas Webb* in this behalf; and the said *Thomas Webb* being so sworn as aforesaid, afterwards, that is to say, on the said 12th day, *&c.* upon his said oath so taken before us the said justices aforesaid, saith, deposeth and sweareth, of and concerning the premises aforesaid in the said information above-mentioned and specified, "that, *&c.* (fully proving the fact;) he the "said *M. Jarvis*, at the *time* and place *when* he so kept "and used the said setting-dog and net, and had the same "in his custody and possession, *was* NOT QUALIFIED *by* "ANY *laws or statutes of this realm, to kill game, or to keep* "*or use any nets, dogs, guns, or other engines for* the destruc-"tion of game; contrary to the form of the statutes in "that case made and provided."

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Whereupon the said *M. J.* having first been duly summoned in this behalf to answer the premises, and having had due notice thereof, afterwards, that is to say, at the house of, *&c.* appearing and being present in his proper person before us the said, *&c.*: and the said *Thomas Webb* the witness aforesaid also appearing and being present before us the said justices; and the information aforesaid, and the matter therein contained, and also the said evidence thereupon given, having been heard and understood by the said *M. J.* in the presence of the said *Thomas Webb* the witness aforesaid, and of us the said justices; he the said *Maurice Jarvis* is asked by us the said justices, "If he the said *M. J.* hath, knoweth, or can "say any thing for himself in his own defence, touching "and concerning the premises aforesaid; and why he "the said *M. J.* should not be convicted of the premises

" aforesaid, charged on him in and by the said informa- " tion."

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And the said *Maurice Jarvis*, now here before us the said justices, DENIES *that he did* KEEP AND USE the said setting-dog and net, and had the same in his custody and possession, in manner and form as is above charged on him; but *shews no sufficient cause before us* the said justices, *why he should not be convicted* of the offence abovesaid charged on him in the said information. And upon hearing and examining the whole matter aforesaid, and every thing alledged by the said *Maurice Jarvis* touching and concerning the premises aforesaid, it manifestly and plainly appears unto us the said justices, that the said *M. J.* was not THEN *any wise qualified, impowered, licensed or authorized, by or according to the* LAWS OF THIS REALM, to kill game; and that the said *M. J.* is guilty of the premises abovesaid, charged on him in and by the said information.

Therefore it is now here considered and adjudged by [150] us the said justices, that the said *M. J.* upon the testimony of the said *Tho. Webb* the witness aforesaid, on his oath before us the said justices so taken as aforesaid, be and is convicted of the premises aforesaid, according to the form of the statutes in such case made and provided; and that the said *M. J.* do forfeit the sum of 5*l.* for the offence aforesaid, as the statute directs, &c.

Mr. *Gould*, for the defendant, took exceptions to his conviction.

1st, The justices have *not* SHEWN *that they had* JURISDICTION *over* this defendant. For they have not sufficiently shewn his DEFECTS *of qualification*; which ought to have been SPECIFICALLY *particularized*, with an allegation " that he had not *any one* of them:" I mean the qualifications mentioned in 22 & 23 *C.* 2. *c.* 25.

To prove this to be necessary, he cited *Rex* v. *Elders*, (*qu.* what, or where?) *H.* 12 *G.* 1. 2 *Ld. Raym.* 1415. *Rex* v. *John Hill*; most directly in point, *Bluet*, *qui tam*, v. *Needs*, *P.* 9 *G.* 2. in *C. B.* (entered *Tr.* 7, 8 *G.* 2.) *Comyns*, 522, 523. *Pas.* 9 *G.* 2. (which he also cited, to shew the distinction between a declaration and a conviction;) a *general* averment is sufficient in a declaration: but *convictions* must set forth WHAT *was the* WANT *of qualification.*

M. 19 *G.* 2. *B. R. Rex* v. *Pickles*, (the 2d exception in that case;) where it was indeed holden that it was not necessary to insert the *inferred or argumentative* qualification (collected from 5 *Ann. c.* 14. but not mentioned in 22 & 23 *C.* 2.) " of his not being lord of a manor:" but it

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was there agreed, that those required by the act *of* 22, 23 *C.* 2. *c.* 25. *ought* to be negatively specified.

1 *Strange*, 497. *Rex* v. *Sparling*, *H.* S *G.* 1. *B. R.* which was a conviction for swearing: and his occupation was therein said to be leather-dresser; but it was not shewn that he was not a servant, labourer, common soldier, nor seaman. The court held, that giving him the addition of leather-dresser was not enough: and instanced the *necessity of specifying the particulars* of the defendant's want of qualification, in *convictions on the game-act*; in order to give the justices a jurisdiction which they, otherwise, *have not*; and they also held, that conviction naught, because the particular oaths and curses were not set forth. And that conviction was accordingly quashed.

2d Exception. The witness was examined privately and *ex parte, prior to the appearance* of the defendant, and [151] *in the absence of the defendant*, so that the defendant had *no opportunity of cross-examining* him.

3d Exception. The *time when* the defendant was unqualified is not at all ascertained, in the adjudication of his being guilty. For it is only averred "that he was "THEN unqualified;" but *several* days and times, *distinct from* each other, have been antecedently mentioned. (*V.* 148, 149, 150.)

Mr. *Norton contra*, for the conviction, begun with the 2d exception—It was *necessary* for the justice to take a *previous* examination, as a ground and foundation for his issuing the summons: and when the defendant attended, after having been summoned, the evidence was then read to him; and the witness also attended: and the defendant was asked "what he had to say for him-"self;" and did not desire to cross-examine the witness.

To the 1st exception—He answered—first, by citing *Rex* v. *Chandler*, in 1 Ld. *Raym.* 581. Where *Holt*, in delivering the opinion of the court upon a conviction for deer-stealing, says "that it is *sufficient* for the jus-"tices to pursue the WORDS of the statutes; and they "are not, in these summary convictions, confined to "*nice and strict legal* FORMS; it is enough, if they pursue "the *intent* of the statutes."

If the defendant is *really* qualified, *he* may shew it: but how can the PROSECUTOR *prove the* NEGATIVE? Some of the qualifications are such *as cannot* well be proved in the *negative*; but it is easy for *him* to prove the *affirmative.*

Tr. 9 *G.* 2. *Rex* v. *Ford*—Conviction for keeping an alehouse, without license. Objected, that there was an-

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other former law upon which he might have been convicted: and in 3 C. 1. *c.* 3. there is a proviso to exempt such as have been so. But *Cur'.* held that if the defendant had been before punished upon 5, 6. *E.* 6. *c.* 25. he might have shewn this. *V.* 1 *Strange*, 555. S. C.

Rex v. *Theed*, 1 *Strange*, 608. Conviction for obstructing an excise-officer, who came to weigh candles. Objection, that the excise-officer's entry might have been by night, (by 8 *Ann. c.* 9:) and then there ought to have been a constable present. *Cur'.* That might have been shewn on the part of the defendant, if in fact so; and then he would not have been convicted: but they would not presume it.

Now here, the defendant did not insist upon being any way qualified; but only denied the commission of the fact.

This conviction *follows the very words* of the act of Queen *Anne:* which does *not* enumerate the qualifications, as that of C. 2. does: and this conviction is on the * act of Queen *Anne*; and not on 22, 23 C. 2. *c.* 25. [152]

* 5 Ann, c. 14.

10 *Mod.* (*Lucas*) *pa.* 27. *Queen* v. *Matthews*, *Tr.* 10 *Ann. B. R.* (1st exception.)

Viner's Abr. Tit. *Game*, letter A. *fo.* 3. S. C.

Burn, Tit. *Game*, *fo.* 304. S. C. which was a conviction on 5 *Ann. c.* 14. Where one of the qualifications (*viz.* not being a game-keeper, *&c.* being a new qualification allowed by that act) was omitted. And *Cur.'* held that it was *not necessary* to enumerate ANY: But *as* SOME of them were enumerated, it was fatal to omit *another* of them. (*N. B.* This case was *adjourned.*)

Rex v. *Marriot*, 4 *G.* 1. (1 *Strange*, 66.) was the very point. It was holden indeed that the WITNESS cannot take upon *himself* to adjudge the qualification: but no notice at all was taken, in the determination of that case, of the JUSTICE not having adjudged it.

Clearly, this defect can, at the utmost, be only *form:* for in substance, it is the same thing. And it follows the act of 5 *Anne* in terms.

As to the case cited by Mr. *Gould*, of *Rex* v. *Ellers*—it does not appear what the state of the case was.

And the case in *Comyns*, 522, 523. rather makes for us. It is as reasonable that the defendant should make it out, that he was qualified, and shew how, on a *conviction*, as in an *action.*

In the case of *Rex* v. *Pickles*,—the conviction was affirmed: and yet a qualification within the acts was omitted.

And this law can never, or hardly ever, be executed, if the court should think themselves bound down by the case of *Rex* v. *Hill* (in 2 *Ld. Raym.* 1415.)

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3dly. As to the third exception—

But Lord *Mansfield* stopped him from proceeding, and also Mr. *Gould* from replying; for he said it was needless to enter into *many* reasons for quashing this conviction, when *one* alone is *fully* sufficient.

[153] First exception.

It is now settled, by the uniform course of authorities, that the qualifications must *be all* negatively set out: otherwise, the justices have *no jurisdiction* over the persons killing game, or keeping dogs or engines for the destruction of it.

The *obiter* saying in 10 *Mod.* (if it was a book of better authority than it is,) would signify nothing, when the *determinations* are the other way.

There is a great difference between the *purview* of an act of parliament, and a *proviso* in an act of parliament.

In the case of *Rex* v. *Marriot*, *Mich.* 4 *G.* 1. *B. R.* (1 *Strange*, 66,) where the *witness swears* only generally; it was holden insufficient: (*a*) and the *justices* who convict *upon the evidence* of the witness, can have no other or FURTHER ground to go upon than what the witness swears.

[7 Durn. 31.] In the case of *Rex* v. *Hill*, 2 *Ld. Raym.* 1415, in this

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(*a*) The case in *Strange*, 66. was in substance this; "Conviction reciting that one *W. T.* informed that the "defendant being a person not qualified to keep a grey-"hound, did nevertheless keep one at A. and killed an "hare at A. and being summoned, did appear, and being "asked what he had to say, offered nothing in excuse, "and *ideo* the justice convicted him. THE CH. J. seem-"ed to think the conviction would be good, having fol-"lowed the words of 5 *Ann.* and that if the defendant "was qualified, he ought to have shewn it before the "justice, being summoned for that purpose; but then "*Eyre*, *J.* started an objection that it was not the justice "that had taken upon him to say the defendant was not "qualified, but only the witness: so that he takes upon "himself to judge of the defendant's qualifications, and "the justice is only made an instrument to reduce the "opinion of the witness into a conviction. C. J. The "*existens*, &c. should be the conclusion of the justice, "and not the words of the witness, for he ought not to "swear generally a man is not qualified; and such a "general proof will not be good: this is only an invention "to support a conviction in general terms which would "be bad, if the particular facts were alledged. And this "conviction was quashed, and the principal reason "declared to be because the witnesses had taken upon "themselves to judge of the qualifications."

court, *H.* 12 *G.* 1. It is the very point established and settled, " that the *general* averment is NOT sufficient; and " that it must be averred that the defendant had NOT " the particular qualifications mentioned in the statute, " as to degree, estate, *&c.*" 1757. REX v. JARVIS.

In the case of *Blust, qui tam,* v. *Needs, Comyns,* 525, the *general* averment of the defendant's not being qualified, was holden to be sufficient upon an *action*; though insufficient upon a *conviction.*

The distinction is obvious between an *action* and a *conviction.* And there it was agreed, (and it is given as the reason why it is not good upon a conviction,) " that " it must be made out, before the justice, that the party " had *no* such qualifications as the law requires," before the justice can convict him: and the justice must return " that he had no manner of qualification."

Here, the witness *swears* only *generally,* " that the de- " fendant was *not* qualified, *&c.*" The justices *adjudge* it GENERALLY, *only.* The *stream* can go no higher than the *spring-head.* So the conclusion which the justices draw from the testimony of the witness must be as general as that testimony.

In the case of *Rex* v. *Pickles,* it was laid down as a rule, " that the want of the particular qualifications re- " quired by 22 & 23 *C.* 2. *c.* 25. *ought* to be *negatively* set " out in convictions:" And the only question there was, whether it was necessary to add—"nor lord of the manor." *Exceptio probat regulam:* nor was the *general* rule at all doubted or disputed, in that case. [Vide 2 Bl. 807.]

In indictments upon 8, 9 *W.* 3. *c.* 26. for having a coining-press, every thing which shews that the defendant had no authority, must be negatively set out. And so it was done, in the indictment of *Bell,* which was lately argued before all the judges. [154]

I take the point to be SETTLED *by the constant tenor of all* the authorities; and I think, upon very good reason, (if there was need to enter into the reason at large, after it has been *fully settled* already.)

Therefore I am of opinion that the conviction ought to be quashed.

Mr. Just. *Denison* concurred with Lord *Mansfield.*

He said it was a clear case; and that it was fully set- First exception. tled and established, " that in these *convictions,* the want " of the particular qualifications mentioned in the act of " 22 & 23 *C.* 2. *ought* to be *negatively* set out:" if not, the justices have *no* jurisdiction to convict the defendant as an offender. And the evidence and adjudication ought, *both of them,* to be, " that he has *not* these qualifications, " which are specified in that act; nor any of them." [1 Durn. 127.]

Indeed you are not obliged to go *further* than the *words*

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of *this* act of parliament of 22 & 23 *C.* 2. and that was the case of *Rex* v. *Pickles*. But however, in that case, the *present* point was established, and taken to be indisputable.

It is said, that "it is sufficient to lay the offence *in the* "WORDS *of the act of parliament.*"(*a*)

But that is *not* ALWAYS sufficient: it *may* be necessary to go *further*. *P.* 28 *G.* 2. *B. R. Rex* v. *Chapman*, about robbing an orchard, was a case where the mere pursuing the words of the statute was *not* sufficient.

[S. C. Sayer's Rep. 203.]

But this point now before us is a *settled* case: and therefore there is no need to enter into *arguments* about it.

The conviction ought to be quashed.

Mr. Just. *Foster* concurred.

[155] Second exception.

On negative acts of parliament, the point is fully settled and established, "that the particular qualifications "mentioned in the purview of them, must be negatively "specified in convictions made upon them."

By the court unanimously,

CONVICTION QUASHED.

Tuesday, 1st Feb. 1757.

ROYAL-EXCHANGE ASSURANCE COMPANY *versus* VAUGHAN.

Royal Exchange Assurance Company assessable to the land tax.

THIS case was just mentioned to the court on 18th *November* 1755; and again, on 3d *February* 1756: but was first argued on 7th *May* 1756: and now, lastly, on this day.

It was an action of trespass, brought by the company: and the question (upon a special verdict) was, "whether

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(*a*) It doth not seem to be always sufficient to pursue the very words of the statute, unless by so doing you fully, directly, and expressly alledge the fact, in the doing or not doing whereof, the offence consists, without any the least uncertainty or ambiguity. 2 *Hawk.* P. C. 249. Sec. 3.

A conviction for deer-stealing, by a justice of peace, was removed by *certiorari*, and exceptions argued and overruled; and *Holt*, pronouncing the opinion of the court, said that "in these convictions by justices of the peace "in a summary way, where the ancient course of pro"ceeding by indictment, and trial by jury is dispensed "with, the court may more easily dispense with forms; "and it is sufficient for the justices in the description of "the offence to pursue the words of the statute." *Rex* v. *Chandler*, 1 *Ld. Raym.* 581.

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EXCHANGE ASSURANCE COMPANY v. VAUGHAN.

"this company are *at all*, or *how far* they are *liable to be* "ASSESSED *to the* LAND *tax*."

The special verdict was very long. In it were found, at large, the *statute* of 6 *G.* 1. *c.* 18. which gave rise and establishment to this company; and the several *charters* from the crown which increased its fund, and enlarged its powers beyond what they were originally intended (or at least explicitly established) by that act of parliament; the original foundation of it being only for insurance of *ships* * with a smaller fund: but the subsequent charters extended their powers, to insurances of *houses* and *goods* from fire, and upon *lives*; and also increased their *fund*.

[* And goods at sea, or going to sea, and lending on bottomry.]

In the above-mentioned act of parliament, (*b*) the *original* fund was *expressly exempted* from being taxed.

Several facts were also found: particularly, the manner in which this company have carried on their business under *all* these powers *jointly*, and not under each *separately*.

The present assessment is for their *whole* stock, and in their *corporate* capacity.

They *never had* been taxed *at all*, till now. And they were now taxed, in their *corporate* capicity, under the land-tax act of 27 *G.* 2. *c.* 4: (of which, see *pages* 48, 64 & 75.) (*c*)

By the act of 6 *G.* 1. *c.* 18. their capital was 1,500,000*l.*: and they were thereby *exempted from all parliamentary taxes*. This was only a power to insure ships and goods at *sea*.

A few years after, the very same persons obtained a charter to extend their power to insure houses and goods at *land*, and upon *lives*; and also to *extend their capital* 500,000*l.* farther than the former sum. [156]

Upon the first argument—

The court seemed, all of them, to see this matter pretty much in the same light: and they all made two questions; into which, they divided the whole of this case; *viz.*

1st, Whether the *original* capital that was raised under the act of parliament of 6 *G.* 1. *c.* 18. (§ 2.) and was *now*

(*a*) *Qu.* if that does not afford an argument that they were not liable to the land tax?

(*b*) Sec. 10; by which the stock of the *corporation to be established pursuant to this act*, and the shares of the members in the same, are exempted from all taxes, rates, and impositions whatsoever by act of parliament or otherwise.

(*c*) Vide sections 3, 21, and 54.

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become part of the fund of the PRESENT CHARTER (*a*) *corporation*, was exempted from parliamentary taxes, *by virtue* of the exempting clause *contained in* 6 G. 1. c. 17. (§ 10.) which act of parliament related *only* to the *original* company for insurance of *ships*; but did not extend to the *present* corporation established by *charter*; which charter has extended their power and *enlarged* their capital.

2dly, Whether this *original* capital was the personal estate *of the* COMPANY; and liable to be taxed *as* the COMPANY's personal estate, in their *corporate* capacity: or whether the tax ought to have been laid upon *each individual member* of the company, for his *respective share*, in his *own proper ward*.

As to the first question—the court were unanimous and clear, that the exemption under the act of parliament of 6 G. 1. was *confined* to the *original* fund and company established by that act; and could *not* be extended to the present corporation, which was founded upon a subsequent *charter* of the crown, which neither did nor could give any such exemption.

And they thought that this *original* capital having been part of the *statute*-company's fund, and only *continued* by the *charter*-corporation, made no difference in the case.

[20 Vin. 159. pl. 7,]

As to the 2d question, they thought it a point of importance and extensive consequence, and therefore desired a further argument: though they seemed inclined to think that it was PROPERLY *taxed*, as part of the *company's* personal estate, in their CORPORATE capacity, by virtue of the clauses in *fo.* 48 & 64 of 27 G. 2. *c.* 4. It therefore stood over, for an

ULTERIUS CONCILIUM.

[5 Bur. 2697.]

Upon which further argument, Lord *Mansfield* was so extremely clear, that he said he had been endeavouring (to the utmost of his power) to *raise* a doubt; but could not.

(*a*) As the subsequent charter departed from the original institution, by extending the powers of the corporation to insurances from fire, and on lives as mentioned by *Burrows* (which charters Mr. Serj. *Hill* said he had not seen;) and the exemption was not confined by the above-mentioned 10th Sec. *to the corporation to be established* pursuant to the act, *and to the stock to be raised* for the purposes in the acts; and by the latter charters the corporation was not pursuant to the statute, nor the stock for the same purposes as before, the exemptions ought to cease; and the sections of the land tax act as above, seem to have been particularly introduced with a view hereto.

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In 4, 5 *W. & M.* the districts and divisions were allotted. So that the question here is only between the DIVISIONS: not between the *city*, and the *company*.

And this special verdict was only meant, (as it is plain by the finding,) to try the *first* point. Nothing is found about shares of proprietors: nor was this second point then thought of.

It is plain they are to be rated AS *a* CORPORATE body, by *fo.* 76. And to rate the *individuals*, would be *almost impossible*. The argument would prove too much: *viz.* that no corporation could be taxed.

The *Hudson's Bay Company* are said to be rated *for their stock*: and there is a particular direction given, *where* the Bank of *England* are to be rated.

Mr. Just. *Denison* concurred.

The *original* capital raised under 6 *G.* 1. *c.* 18. was intended for *another purpose*. The question was certainly made upon the *first* point; and this second point was not, I dare say, at that time, thought of. And here is nothing stated, to bring this second point within the clause in *fo.* 75 & 76 of the act of 27 *G.* 2. *c.* 4. Therefore we cannot take this to be any more than the common case. They are taxed as a *corporate* body, within the clause in *fo.* 48.; and I do not see how they could have been taxed otherwise.

Therefore judgment ought to be for the defendant.

Mr. Just. *Foster* was of the same opinion.

The first point, he observed, was determined before the present argument, and rightly. The company had imposed both upon the crown, and upon the adventurers, by blending their different stocks together.

As to this second point, it cannot bear a question "whether they should be taxed in their *corporate* capa-"city, *or as individuals*." It was intended, and it is the natural and proper way, to tax the *corporation*, in their CORPORATE capacity. And this is what the act manifestly meant: the tax is to be paid out of the stock; and this will occasion a proportionable deduction out of the dividends.

By THE COURT unanimously, (except that Lord Commissioner *Wilmot* was, at the time of the second argument, absent in Chancery,)

JUDGMENT for the DEFENDANT.

1757.
ST. JOHN'S COLLEGE v. TODINGTON.

Thursday, 3d Feb. 1757.

Visitor of an ancient college is visitor also of engrafted foundations, unless a special visitor is appointed. [S. C. 1 Bl. 71. 81. 2 Ves. 78. See also 2 Durn. 310, 312. 4 Durn. 238. 2 Ves. Jun. 617.]

Master and Senior Fellows of John's College, Cambridge, *versus* Todington, Clerk.

A PROHIBITION had been prayed by the college, to be directed to the Bishop of *Ely*, to prohibit him from proceeding upon a monition issued by him against them, upon Mr. *Todington's* application and appeal to him, as VISITOR *of the college*: and the college had thereupon obtained a rule to shew cause, why a prohibition should not go. Which rule to shew cause was made upon a suggestion "that the bishop was NOT *visitor* of the college, AS TO "*elections* into fellowships and other offices;" and also, "that admitting him to be so, yet the *present* matter "(which related to a SOUTHWELL-fellowship) was NOT "*within his jurisdiction*:" for, the suggestion set forth a deed of covenants (all on the part of the college,) relating to a foundation of two fellowships and two scholarships by Dr. *Keton:* in which deed and covenants, a power is reserved to Dr. *Keton*, to make statutes (to which his fellows and scholars were to be sworn,) so as they should be conformable to the statutes of the foundress of the college. And there is also a PENALTY and forfeiture given to Dr. *Keton* and his trustees, and also to the church of *Southwell;* and a *clause of* DISTRESS, for the said forfeiture or penalty, upon two of the college manors, in case the college should break the covenants. The suggestion adds "that Dr. *Keton*, in fact, never gave any statutes, "or made any declaration, in relation to these fellow-"ships."

The gravamen complained of, is a citation from the Bishop of *Ely* to the master and senior fellows, upon the complaint of the said *Tho. Todington*, clerk, on his being refused an election into one of these two *Southwell*-fellowships; shewing, "that *he was* within the description of "the endowment; whereas they had chosen one *William* "*Craven*, who (as Mr. *Todington* alledged) was NOT so; "and that the bishop had also cited the said *William* "*Craven*, as well as the said master and senior fellows, "to appear before him at *Ely*-house, &c."

In order to have a clear and full conception of this case, it may be necessary to specify this suggestion at large; and also to premise some other particulars which are requisite to be known; which are, 1st. The *deed* between the executors of *Margaret* Countess of *Richmond* (the foundress) and Bishop *Fisher*, confirmed by the prior and convent of *Ely*: 2dly. Some extracts from Bishop *Fisher's statutes*; and 3dly. Some extracts from *those statutes* which Queen *Elizabeth* afterwards gave to this college, and under which the college have ever since acted.

The SUGGESTION, (at large—) 1757.

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Hilary term in the 29th year of the reign of King *George* the Second.

England, to wit. Be it remembered that on the eleventh day of *February* in this same term, come into court here *John Newcome* doctor in divinity master of the college of St. *John* the Evangelist in the university of *Cambridge*, and the senior fellows of the said college; and give the court here to understand and be informed, that whereas all pleas of and concerning any lands and tenements, and of and concerning any estate or interest of freehold, and also of and concerning the construction and operation of deeds and writings under seal, and of debts arising thereby, and the cognizance of the same pleas, to the lord the king and his royal crown especially appertain and belong, and at the common law in the courts of record of our lord the king, and not in the ecclesiastical court, nor by any ecclesiastical judge, ought to be tried, discussed and determined, and always hitherto have been so accustomed to be tried, discussed and determined; and whereas the Bishop of *Ely* for the time being is *not visitor* of the said college, *as to elections into fellowships or other offices* in the said college, nor hath any visitatorial power or jurisdiction whatsoever over the master and fellows of the said college, or any of them in *that* respect; and whereas by an indenture tripartite made the twenty-seventh day of *October*, in the twenty-second year of the reign of our sovereign lord King *Henry* the eighth, between Sir *Anthony Fitzherbert*, knight, then one of the king's justices of his Common Pleas and *John Keton* doctor of divinity and canon of the cathedral church of *Salisbury* upon the one part, the chapiter of *Southwell* within the county of *Nottingham* upon the second part, and the then master, fellows, and scholars of the college of Saint *John* the Evangelist, in the university of *Cambridge* upon the third part, it was covenanted, condescended, and agreed between the said parties for them their heirs and their successors for ever in the form following that is to wit, First, the same master, fellows, and scholars of the college of Saint *John* aforesaid had granted, for them and their successors for ever, unto the aforesaid Dr. *Keton*, that *he* for himself, at the nomination and appointment as thereafter expressed, should have *two fellows* and two disciples founded and sustained at the costs only of the said masters, fellows and scholars within the college of Saint *John* aforesaid, there *to continue for ever* of his foundation, over and above other fellows, scholars or disciples then founded or thereafter to be founded by the foundress of the said college or any other

[5 MSS. 979.]

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person or persons that then had given or thereafter should give lands or goods to such purpose and intent; and the said master, fellows and scholars of the said college thereby covenanted and granted unto the said Sir *Anthony Fitzherbert*, Doctor *Keton and to the said chapiter*, and to their heirs and successors, that the said fellows and scholars or disciples of the foundation of the said Doctor *Keton* should have and enjoy all manner of profits, as well meat, drink, and wage, as all other commodities, easements, and liberties, *like and in as large manner as other* fellows and scholars of the same college by the foundress' foundation of the same college then had or in time then coming should have in any manner of wise, at the proper costs and charges of the same master, fellows and scholars of the college of Saint *John* the evangelist aforesaid and of their successors for ever; and the same master, fellows and scholars by the said indenture covenanted and agree unto the said Sir *Anthony Fitzherbert*, Doctor *Keton and chapiter of Southwell* and to their heirs and successors, that the same two fellows of the foundation of the said Doctor *Keton* should have, receive and perceive of the said master, fellows and scholars and their successors every year twenty-six shillings and eight pence sterling over and above the wage limited to other fellows of the foundress' foundation, that is to say, to either of them eight shillings and four pence sterling, at the feasts of *Easter* and Saint *Michael* yearly, by even portions: furthermore, the said master, fellows, and scholars of Saint *John* aforesaid thereby covenanted and granted for them and their successors unto the said Sir *Anthony Fitzherbert* and Doctor *Keton* or the longer liver of them, that they from thenceforth should have the *nomination and election of the said fellows* and scholars or disciples during their lives naturally, and after the decease of the said Sir *Anthony Fitzherbert*, and Doctor *Keton*, then the said fellows and scholars or disciples should be at the nomination and election of the said master, fellows and scholars of the college of Saint *John* aforesaid, and of their successors for ever *after and according to* such ordinance and writing as the said DOCTOR KETON *should thereof make and declare by his last will or otherwise*; PROVIDED ALWAY that the said fellows and scholars or disciples should be elect and chosen *of those persons* that be or had been *queristers of the chapiter of Southwell* aforesaid, if any such able person in manners and learning could be found *in Southwell* beforesaid; and in default of such persons *there*, then of such persons as had been choristers of the said chapiter of *Southwell*, which persons should be then inhabitant or abiding *in the said university* of *Cambridge*; and IF NONE SUCH should be found able in the

university aforesaid, *then* the same fellows and scholars or disciples to be elected and chosen of *such* persons that should be most singular in manners and learning, *of what country soever* they should be, that should be then abiding in the same university. Furthermore the same master, fellows and scholars covenanted and granted by the said indenture unto the abovenamed Sir *Anthony Fitzherbert* and Doctor *Keton and to the said chapiter* their heirs and successors, that when the said two fellows and two scholars or disciples of the foundation of the said Doctor *Keton* or any of them should chance to *die or otherwise depart* from the said college and leaved or leased his or their title or profits of the same, that then immediately after that leasing, leaving, departing, or ceasing, at the then next time of election of fellows or disciples of the said college limited by the statutes of the college of Saint *John* aforesaid, *other fellow or fellows*, disciple or disciples, as the case should require, should be *elected, named and chosen* by the said master, fellows and scholars ACCORDING *to those then present covenants and agreements, according to such ordinances or will* as the same *Doctor Keton* SHOULD *thereof make and declare.* And also it was covenanted and agreed by the said indenture, that the said master, fellows and scholars of Saint *John* aforesaid, and also the fellows and scholars of the foundation of the said Doctor *Keton*, at the time of their admission should be *sworn to observe and keep* the statutes and ordinances that then were made *or thereafter* should be ordained and made by the said Doctor *Keton* for the foundation of the said fellows and scholars; *so that* the said statutes should be conformable with the statutes of the *foundress* of the said college. For the which all and singular the premises well and truly to be observed and kept by the said master, fellows and scholars and their successors in manner and form as is aforesaid, that is to say, *as well for the elections and admissions of the said fellows* and scholars and for their finding, as for wages yearly to be paid to the same, with all other liberties, commodities and profits likewise pertaining unto them, *as for all other covenants and agreements* with all and singular the premises according to the ordinances above rehearsed, the said Doctor *Keton had contented given and paid* to the said master, fellows and scholars, in money, plate, and other jewels, the value of four hundred pounds sterling. Further it was covenanted and agreed by the said indenture, between the said parties, for them and their successors, that *if* the said master, fellows and scholars and their successors *did fail in taking, admitting or receiving of the said fellows* and scholars in any time of election next after the avoidance, and * not chosen or admitted into the said college according to the ordinances and agreements above rehearsed, or had not nor enjoyed not

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* Here seems to be an omission or mistake of some words.

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their full commodities and profits as is aforesaid, then the aforesaid master, fellows and scholars and their successors *should* FORFEIT as well to the said Sir *Anthony Fitzherbert* and Doctor *Keton as to the chapiter of Southwell*, and to their heirs and successors, in the name of a PENALTY or pain *for every default made or no due election of the said fellows* and scholars or any of them, TWENTY SHILLINGS *for every month* that it should happen the said fellows and scholars not to be chosen nor admitted into the said college as is aforesaid, or restrained of any profits, commodities or easements as is aforesaid; and that then it should be lawful as well to the said Sir *Anthony Fitzherbert* and Doctor *Keton* on their party, *as to the chapiter of Southwell*, and to their heirs and successors for their party, *into the manors of Marflete and Millington* in the county of *York*, and *into the manor of Little Markham* in the county of *Nottingham, to enter, and* DISTRAIN *for the same* twenty shillings, and the arrears of the same for every time or times of forfeiture, and the distress to withhold until the said twenty shillings with the arrearages of the same should be to them well and truly satisfied, contented, and paid. Also the said master, fellows and scholars by the said indenture covenanted and granted unto the said Sir *Anthony Fitzherbert* and Doctor *Keton*, that they the said master, fellows and scholars and the successors, at every time and times during the life natural of the said Sir *Anthony Fitzherbert* and Doctor *Keton*, should give notice and knowledge to the said Sir *Anthony Fitzherbert* and Doctor *Keton* or to the longer liver of them, within six days, when and as often as it should fortune any of the said fellowships or discipleships to be void or vacant; so that the said Sir *Anthony Fitzherbert* and Doctor *Keton* or the longer liver of them might nominate and appoint other fellow or fellows disciple or disciples apt and able to have, receive and take the said fellowships or discipleships so then being void. And whereas the said *Doctor Keton did* NOT *at any time, by his last will or otherwise*, MAKE *or* DECLARE *any statute or ordinance*, other than what was contained in said above recited indenture, *of or concerning the said fellowships* called *Southwell fellowships*, or of or concerning either of them; nevertheless the Right Reverend *Matthias* by divine permission Lord Bishop of *Ely*, well knowing the premises, but contriving and intending to aggrieve and oppress the said *master and* SENIOR *fellows* of the college aforesaid, against the due course of the law of this realm, and to disinherit our lord the king and his crown, and to draw the cognizance of a plea which belongs to his majesty's *temporal courts* and ought there to be tried, discussed and determined, to *another trial before the said lord bishop*, hath lately drawn into a plea the said master and senior fellows of the college aforesaid, before the said lord

bishop, by a certain inhibition, citation and monition bearing date the twenty-ninth day of *January* in the year of our lord one thousand seven hundred and fifty-six, reciting that, " whereas on the part and behalf of the Reverend *Thomas Todington*, clerk, of the same college, bachelor of arts, it had been (with grievous complaint) alledged and shewn to the said lord bishop, that the Reverend *John Newcome*, doctor in divinity, master of the said college, and the senior fellows of the same *unjustly and unduly proceeding in the election of fellows of* the said college, did on or about the seventeenth day of *March* last *choose and elect the Reverend William Craven*, bachelor of arts, *into a fellowship* in the said college commonly called a *Southwell fellowship*, founded by the Reverend *John Keton*, doctor in divinity, vacant by the resignation of the Reverend *Theophilus Lindsey* bachelor of arts late one of the *Southwell* fellows of the said college aforesaid, and did REFUSE *to elect and admit*, at least *did* NOT *admit and elect the said Thomas Todington* into the said vacant *Southwell* fellowship, notwithstanding the said *Thomas Todington* who was *an inhabitant abiding within* the said college and *had been chorister of the church of Southwell* in the county of *Nottingham* several years OBSERVED *himself a candidate and* PRAYED *to be elected and admitted into the said fellowship*, and NO OTHER *chorister of the said church of Southwell* offered himself a candidate for the said vacant fellowship: and that he the said *Thomas Todington*, apprehending himself to be greatly *injured and aggrieved by the pretended election aforesaid* and other pretended *proceedings of the said master and senior fellows*, as well by virtue of their pretended office as at the unjust instigation, solicitation, procurement, and petition of the said *William Craven*, and justly fearing that he might be further injured and aggrieved thereby, had FROM *the same* and every of them, and ESPECIALLY *from the said pretended choice and election of the person of the said William Craven into the aforementioned vacant fellowship* in the said college, so made or pretended to be made by the said master and senior fellows, notwithstanding the said *Thomas Todington* offered himself a candidate and prayed to be elected and admitted into the said vacant fellowship, and no other chorister of *Southwell* offered himself a candidate for the same; and FROM *their refusing to elect and admit* at least *not electing and admitting the said Thomas Todington into the said vacant fellowship*; and *from* all and every thing that did or might follow therefrom: and *from* all and singular other grievances, nullities, iniquities, and errors in proceeding; and *from* all other

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" acts, facts, and things illegally done, that might be col-
" lected from the pretended proceedings of the said mas-
" ter and senior fellows in the said pretended election;
" to *the said lord bishop*, VISITOR OF THE SAID COLLEGE,
" rightly and duly APPEALED, and of and concerning the
" nullity and iniquity of all and singular the premises
" aforesaid had equally and alike principally alledged and
" complained;" and also reciting that " whereas the said
" lord bishop, rightly and duly proceeding, had at the
" petition of the proctor of the said *Thomas Todington*
" (justice so requiring,) *decreed the inhibition, citation and mo-*
" *nition* thereunder written, the said lord bishop did there-
[164] " fore thereby authorize, impower and strictly injoin
" and command all and singular clerks and literate per-
" sons whomsoever and wheresoever, jointly and sever-
" ally, that they should *inhibit or cause to be inhibited*,
" personally, if they conveniently could so do otherwise,
" by publicly affixing the said monition for some time
" on the outward door of the chapel belonging to the
" said college, and by leaving there affixed a true copy
" thereof the said *master and senior fellows*, and *also the*
" *said William Craven*, in special, and all others in gene-
" ral who by law were required to be inhibited in that
" behalf; all and every of whom, the said lord bishop
" also by the tenor of the said monition did inhibit and
" injoin that they nor any or either of them should inno-
" vate be attempt or cause or procure to be done, inno-
" vated or attempted any thing to the prejudice of the
" said *Thomas Todington* or his said cause of appeal or
" the authority or jurisdiction aforesaid of the said lord
" bishop, pending the said cause of appeal and complaint,
" and so long as the same should remain undecided
" before the said lord bishop, so that the said *Thomas*
" *Todington* the appellant might have free liberty and
" power (as in justice he ought) to prosecute that his
" said cause of appeal and complaint, under pain of the
" law and their contempt; and also that they should
" in like manner CITE *the said master and senior fellows*
" and also the said *William Craven*, or cause them to be
" peremptorily cited *to* APPEAR *before the said lord*
" *bishop* at his mansion house commonly called *Ely*
" House situate in the parish of Saint *Andrew Holborn*
" in the county of *Middlesex*, on *Monday* the ninth day
" of *February* then next ensuing, between the hours of
" three and six in the afternoon of the same day; then
" and there *to* ANSWER *to the said Thomas Todington* in
" his said business of complaint; and further to do and
" receive as to law and justice should appertain, under
" pain of the law and their contempt: and moreover
" that they should monish or cause to be monished pe-

" remptorily, in like manner, the said *master and senior* 1757.
" *fellows and officers* of the said college in special, and all ST. JOHN'S
" others in general, that they some or one of them should COLLEGE
" *transmit or cause to be transmitted* to the said lord bishop V.
" at the time and place aforesaid, all and singular the TODING-
" statutes, acts, original exhibits, books, indentures, mini- TON.
" ments, instruments and proceedings in or any wise con-
" cerning the said pretended election or the said cause of
" appeal and complaint, and more especially the statutes,
" books and indentures in the thereunderwritten schedule
" mentioned, under pain of the law and their contempt;
" and what they should do in the premises, they should
" duly certify to the said lord bishop, together with the
" said monition, and the said lord bishop hath annexed
" the following schedule to the said monition, (to wit)
" the original statutes of the college given by queen
" *Elizabeth* or an authentic copy thereof, the indenture [163]
" bearing date the twenty-seventh day of *October* in the
" twenty-second year of the reign of King *Henry* the eighth
" relating to Doctor *Keton's* or the *Southwell* fellowships
" founded in the said college, the book or books wherein
" the election of fellows and the proceedings thereon
" are entered, the book of battles or buttery book for the
" months of *February* and *March* last;" as by a copy of the said monition, and schedule thereto annexed, here in this court read, more fully appears. And although the said master and senior fellows of the said college *have pleaded and alledged* all and singular the matters aforesaid by them above suggested and alledged, before the said lord bishop, in their discharge of and from the premises aforesaid; and have *offered to prove* the same by undeniable testimony and proof; yet the said lord bishop hath wholly REFUSED *to receive or admit the said plea, allegation and proof*, and then by definitive sentence of the said lord bishop, in the said premises, with all his might doth endeavour and daily labour to condemn; in great contempt of our lord the now king and his laws, and to the great *damage and injury of the said master and senior fellows* of the said college: all which said premises the said master and senior fellows of the said college are ready to verify and prove, as this court here shall direct. Wherefore the said *master and senior fellows* of the said college, imploring the aid and munificence of this court here, pray relief and his majesty's *writ of* PROHIBITION to be directed to the said lord bishop in this behalf, *to prohibit him that he do not any further hold plea before him*, touching the premises aforesaid or any part thereof. And it is granted to them, &c.

1737. The *Deed*.

ST. JOHN'S COLLEGE v. TODINGTON.

Suppressio Domûs Sancti Johannis in Cantab.

THIS indenture made the twelfth day of *December* in the second year of the reign of ours overeign lord King *Henry* the eighth, between the reverend father in God *Richard* Bishop of *Winchester*, *John* Bishop of *Rochester*, Sir *Charles Somerset*, knt. Lord *Herbert*, Sir *Thomas Lovell* knight, Sir *Henry Marney* knt. Sir *John Saint John*, knight, *Henry Hornby* clerk, and *Hugh Asheton* clerk, *executors of the testament of the* excellent Princess *Margaret late Countess of Richmond and Derby* and grand-dame to our said sovereign lord King *Henry* the eighth, on the one party, and the reverend father in God *James Bishop of Ely* and ORDINARY *of the house or priory of Saint John in Cambridge*, on the other party, witnesseth, that whereas our holy father the pope by his bulls under lead, for the increase of virtue learning and doctrine and preaching of the word of God, and to the establishing of Christ's [166] faith, and for divers considerations expressed in the said bull, hath *suppressed* extinguished and determined the foundation and religion of the *said house and priory*, by the royal assent of our said sovereign lord the king that now is, by his letters patents under his great seal, and also by the *assent and agreement* of the said reverend father *James Bishop of Ely*, confirmed by the prior and convent of the cathedral church of *Ely*, as in the said bulls letters patents and other writings thereof made, more plainly appeareth; it is now covenanted betwixt the said parties and fully concluded, and *by the said reverend father Bishop of Ely granted*, that *he* for the better execution and assurance of the premises, shall before the sixteenth day of *January* next ensuing after the date of these presents, avoid and cause to be avoided and removed out of the said house and priory, all such and as many religious persons as now be incorporated and possessed in the said house and priory of Saint *John*, or that can or may pretend or claim any right title or interest in or to the said house or priory or to the possessions thereof by reason of their profession or incorporation within the same; and utterly make void and dispose the said religious persons from the said house and priory, and all such right title claim and interest as they or any of them have pretended or claim to have within the same house and priory or to the possessions or to any thing thereunto belonging; and also cause the same religious persons and every of them, by authentic instrument, in sure and sufficient form to be made, to resign and renounce all such right title claim and interest as they or any of them have or in any manner of wise may have to the said house or priory or to the possessions

or to any thing thereunto appertaining; and that the same bishop shall translate or cause to be translated all the same religious persons into other house or houses of the same religion, and cause them and every of them clearly to renounce relinquish and leave the same house and priory and all the possessions thereof, and clearly to depart and to be utterly excluded from the same for ever, and to be really and effectually accept and incorporate in some other house or houses of the same religion: and cause the said house and priory of Saint *John* and the foundation and corporation thereof to be clearly dissolved and determined for ever, before the said sixteenth day of *January* next ensuing. And also the said *Bishop of Ely covenanteth* and granteth to the said executors, by these presents, that *he*, before the feast of the Purification of our Lady next ensuing, and at all times after, when he shall be reasonably required by the said executors or any of them, *shall make and cause to be made all such grants and assurances* TO THE SAID EXECUTORS *their heirs and assigns*, OF *the said house and priory* of Saint *John*, and *of all* the manors lands tenements and possessions and all other that belongeth and at any time belonged thereunto, to have and hold *to the same executors their heirs and assigns*, as shall be advised by the learned counsel of the same executors, their heirs and assigns or any of them, at their costs and charges; and *cause* all the same grants and assurances *to be confirmed* by the prior and convent of the said cathedral church of *Ely*, by their deed and deeds sealed with the common seal, in such wise as shall be advised by the said executors or any of them; so that the said executors or some of them, by reason and authority of the said bulls and of the said letters patents and other premises, may make lawful perfect and sure translation of the said house and priory of Saint *John* and the possessions thereof, unto a perpetual COLLEGE, of a perpetual master and fellows, and there *erect found and establish a perpetual* COLLEGE, of a perpetual master and fellows, *according to the will mind and intent of the said princess, and according to the ordinances and statutes of the said executors*, thereof to be made by virtue and authority of the said bulls and letters patents, there perpetually to endure: and on this, the said *Bishop of Ely covenanteth and granted to the said executors*, by these presents, that the same bishop and his successors, and also the said prior and convent of the said cathedral church of *Ely* and their successors, shall at all times do and cause and suffer to be done all things necessary and requisite for the said translation and for the foundation and establishing of the said college for ever to endure, as by the learned counsel of the said executors or any of them shall be advised, at the costs and charges

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of the said executors. And the said *executors*, by these presents, *permit and grant to the said reverend father Bishop of Ely*, that the said *master and fellows*, within one month next after that they shall be founded and have real and corporal possession of the same house and priory and of the manors lands and tenements and possessions of the same, *shall grant*, by their sufficient writing under their common seal, for the exhibition and finding of the said religious persons during their lives, to every of them or to other persons at their nomination, an annuity of 6l. 13s. 4d. by the year, to be had and perceived to every of them during their lives, out of the said house manors lands and tenements, at two feasts of the year, that is to say *Easter* and *Michaelmas*, by even portions, with a sufficient clause of distress in the same house and in all the said manors lands and tenements, for sake of payment of the same. And the said *executors covenant and grant to the said reverend father in God Bishop of Ely*, by these presents, that after the said translation of the said house and priory and foundation of the said college, the same executors, in their statutes and ordinances thereupon to be made and ordained for the ordering and continuance of the same college, *shall ordain and establish* (among other things) that the *jurisdiction ordinary of the same college* and of the said churches and chapels thereunto belonging *shall appertain and belong to the same bishop and his successors for evermore*, and that the master and fellows shall pray for the good estate of the said bishop during his life, and for his soul after his decease, *as the* SECONDARY *founder* benefactor and partner in the said holy and meritorious work, and also for the good estate of all his successors in time to come Bishops of *Ely*, during their lives, and for the souls of his predecessors patrons and founders of the said house and priory, and for the souls of his successors *as secondary founders of the said college*; and on that, the said executors shall provide and make statutes and ordinances of the said college, in such manner that there shall not be any ambiguity in the elections of the masters and fellows of the said college. And also the same executors granted to the said reverend father in God Bishop of *Ely*, by these presents, that the same reverend father in God, during his life, shall name and choose three apt and able persons, scholars; and his successors, after his decease, one apt and able person, scholar; to be made fellows of and in the said college, and there to be accepted and admitted fellows of the same college, at their nomination and election; and that to be renewed and used, as oft as the place of any of them shall happen to be void: and on that, the said executors granted to the said reverend father in God Bishop of *Ely*, that

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they shall ordain and provide in the said statutes, that the master and fellows of the said college shall be bounden to pray for all singular persons as well alive as dead, for the which the said religious brethren of the said house and priory were bound to pray, in like wise as the said executors have before this time promised and covenanted with the same reverend father in God to be done. In witness whereof the said parties to these present indentures interchangeably have set their hands and seals, the day and year abovewritten. 1757. ST. JOHN'S COLLEGE v. TODINGTON.

The Confirmation of the above Indenture, by the Prior and Convent of the Cathedral Church of *Ely*.

And we the prior and convent of the cathedral church of *Ely*, having and taking these present indentures and all and singular premises contained therein, freely agreed, accept and approve; and the indenture, and all the same premisses contained and specified therein, unto the said executors their heirs and assigns, for us and our successors, ratify approve and confirm, by these presents; (rents consuetudes and *all other rights* of our monastry and priory of *Ely*, to us and our successors, in all things, alway *saved and reserved*.) In witness whereof, we the said prior and convent to these presents have set our common seal. Given in our Chapter House, the fifth day of *January* in the year of our Lord God 1510.

EXTRACTS from Bishop *Fisher's* Statutes. [169]

Statuta pro Collegio Divi Johis Evangelistæ infra Gimnasium Cantabrigiense sito.

Preamble.

Ut constet universis qui statuta præsentia lecturi sunt, quânam auctoritate sancita fuerint, hoc frontispicio locandum censuimus instrumentum quoddam sigillis et subscriptionibus omnium executorum præstantissimæ Viraginis Dominæ Margaretæ Richmondiæ, fundatricis collegij divi Johannis Evangelistæ in Cantabrigia: quo instrumento per eosdem executores confecto, planè constat plenariam auctoritatem mihi Johanni Episcopo Roffensi traditam, pro condendis legibus et statutis, quibus tam magister quam socij et scholares pariter et discipuli teneantur obedire. Cujus quidem instrumenti tenoris est, qui sequitur.

"Universis Christi fidelibus præsentes literas inspecturis, Ricardus Winton. Episcopus Carolus Somerset "Comes Wigorniæ Thomas Lovel Miles Henricus Verney Miles Johannis Seynt John Miles Henricus Horne-

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" by et Hugo Assheton Clerici, executores testamenti et " ultimæ voluntatis nuper excellentissimæ principissæ " Margaretæ Comitissæ Richmondiæ et Derbiæ, matris- " que et aviæ duorum regum nimirum Henrici septimi " et octavi, salutem in domino, et fidem indubiam præ- " sentibus adhibere. Quum sit optandum potiùs ut non " erigerentur collegia, quam ut erecta malè gubernarentur, " nos executores antedicti, qui sumptibus et impensis " præfatæ principissæ collegium Sancti Johannis in Can- " tabrigia extrui curavimus, simul et dotari, magno af- " fectu cupimus id ipsum justis legibus sanctisq; admi- " nistrari, sanctionibus. Verùm quoniam omnes nos unà " adesse commode non possumus, ut vel novam electio- " nem sociorum in collegio prædicto faciamus vel sociis " ita electis leges et sanctiones justas ac sanctas exhi- " beamus, denique juramentum ab eisdem exigamus " pro legibus hinoi inviolabiliter observandis; idcircó *nos-* " *tras vices committimus* reverendo patri *Johanni Roffen* " *Episcopo*, ut *ille* tàm nostrà quàm suâ auctoritate possit " numerum sociorum ibidem augere, *magistroq; et sociis* " *omnibus statuta salubria nostro nomine exhibere*, atque " ab eisdem juramenta exigere pro eorundem inviolabili " observatione, recusantes verò (si qui fuerint) amovere, " violantes corrigere, ac cætera omnia et singula pe- " ragere quæ pro salubri gubernatione ejusdem collegij " sibi opportuna visa fuerint; æquè ac si nos illic " omnes presentes essemus: quæ omnia et singula uni- " versitati significamus per præsentes. In quorum om- " nium et singulorum fidem ac testimonium, sigilla " nostra presentibus apposuimus. Dat. vigesimo die [170] " mensis Martij, anno Domini millesimo quingentesimo " quinto decimo."

Ad cultum optimi maximi Dei ad honorem divi Johannis Evangelistæ, ac mox ad fidei Christianæ incrementum, *nos Johannes Roffen Episcopus*, unus executorum ultimæ voluntatis nobilissimæ viraginis Dominæ Margaretæ Richmondiæ Derbiæque Comitissæ genitricis et aviæ duorum Regum Henrici septimi pariter et octavi, *nomine et autoritate cæterorum co-executorum* ejusdem comitissæ, nempe Ricardi Wintoniensis Episcopi Caroli Somerset Comitis Wigorniæ Thomæ Lovell Henrici Verney Johannis Seynt John Equitum Henrici Horneby Hugonis Ashton clericorum, *leges et statuta quæ sequuntur* EDIDIMUS, magistroq; et sociis ac scholaribus collegij divi Johannis Cantabrigiæ *tradidimus*, quatenus eisdem omnino se conforment, tam hi qui jam sunt magister socij et scholares, quam eorum successores quotquot futuri sint in perpetuum.

De Electione Magistri. 1757.

ST. JOHN'S COLLEGE v. TODINGTON.

Qd si tunc per* viam spiritus sancti concordibus animis, nemine dissidente, in quempiam ejusmodi virum consenserint, qualis in statuto ante lecto descriptus est; aut si major pars omnium super aliquo ejusmodi consenserit; volumus et statuimus† q'visabsque mora, (nulla prorsus licentia patroni ordinarij *visitatoris* aut alterius cujuscunque jurisdictionem ordinariam prætendentis, nec cessionis aut resignationis hujusmodi eis vel eorum alicui ‡ exhibiasne,aut ab eorum aliquo ejusdem approbatione expectata aut requisita,) per præsidentem magister collegij pronuncietur, his verbis—

* Vim. qu.

† Qu. (forsitan, *quodis*)

‡ Qu. Vide post p. 282. cap. 2. reginæ Elizabethæ, de electione magistri.

De juramento Magistri.

Ego N. in magistrum collegij Sancti Johannis Evangelistæ in universitate Cantabrigiæ nominatus electus et præfectus juro, tactis et inspectis per me hiis sacro-sanctis evangeliis, dictum collegium omnia beneficia terras tenementa possessiones reditus spirituales et temporales jura libertates privilegia et bona quæcunq; ejusdem nec non omnes et singulos socios et scholares et discipulos ipsius collegij, juxta statuta et ordinationes dicti reverendi patris Domini Johannis Fisher Roffen. Episcopi, absque personarum scientiarum facultatum generis et patriæ acceptione quacunque, pro mea virili regam custodiam dirigam et gubernabo, et per alios regi custodiri dirigi et gubernari faciam; nec ero factiosus, magis favens uni quam alii, contra justitiam et fraternitatis amorem; nec eorum alicui gravamina vel molestias injustè inferam; correctiones quoq; punitiones et reformationes debitas justas rationabiles de quibuscunq; delictis criminibus et excessibus sociorum et scholarium et discipulorum dicti collegij, quoties ubi et quando opus fuerit, secundùm rei qualitatem et quantitatem omnemq; vim formam et effectum ordinationum et statutorum per dictum reverendum patrem editorum, absq; favore aut odio affectione consanguinitatis affinitatis aut aliâ quacunq;, diligenter et indifferenter faciam et procurabo: et si hujusmodi correctiones punitiones et reformationes ut præfertur debitè et justè exequi non potero, propter metum et potentiam seu multitudinem delinquentium, ipsorum nomina et cognomina, cum qualitate et quantitate delictorum et excessuum hujusmodi, quam citò potero, intra mensem, *domino Episcopo Eliensi qui pro tempore fuerit*, aut domino cancellario universitatis vel ejus vicem gerenti, denuntiabo et revelabo, *et per eos* hujusmodi correctiones punitiones et reformationes juxta statuta et ordinationes collegij in omnibus solerter et celeriter fieri procurabo.

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Item quoties electio vel assumptio alicujus socij ac scholaris vel discipuli in collegium prædictum fuerit facienda, intendam et enitar ut solùm tales eligantur et assumantur

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quos secundùm conditiones et qualitates in statutis dicti collegij expressas habiles et idoneos reputaverim, et quos in virtutibus et scientiis ad honorem et utilitatem collegij prædicti plus posse proficere et profecturos credideriim, sine personarum vel patriæ acceptione, amore favore odio invidia timore prece et pretio post positis quibuscunq;. Item si ab officio meo amovear, aut si sponte cessero, bona collegij per me recepta aut apud me remanentia præsidenti et thesaurariis collegij aut (precidente absente) socio maximè seniori in universitate præsenti et dictis thesaurariis, si commode potero continuò sin minus saltem infra quindecim dies ex tunc prox. sequen. sine contradictione seu diminutione, per inventarium inde inter me et illos sub testimonio et subscriptione eorundem et meâ, restituam.

Item, si per me seu occasione meâ, aliqua materia *dissensionis* iræ vel discordiæ in dicto collegio (quod absit) *suscitata fuerit*, et per præsidentem decanos vel thesaurarios et duos alios ex septem collegij senioribus finis rationabilis seu placabilis infra quinq; dies factus non fuerit, tunc *cancellarii universitatis* Cantabrigiæ qui pro tempore fuerit *præpositique collegii regalis*, ac *magistri collegii Christi* in eadem universitate, si tunc infra eandem præsentes fuerint, ac, dicto cancellario præposito aut magistro extra universitatem agentibus, absentis aut absentium vices universitate gerentium, una cum totidem ex prænominatis quot in universitate præsentes fuerint, *ordinationi, arbitrio decreto et dictorum* personaliter et effectualiter me submittam: et quicquid dod ex illis pro tempore, secundum formam infra limitatam pro tempore consulti, arbitrati fuerint statuerint
[172] ordinaverint vel diffinierint in ea parte, id omne fideliter observabo et iisdem cum effectu parebo, sine contradictione quacunque, cessantibus, provocationibus appellationibus querelis exceptionibus et aliis juris et facti remediis quibuscunq; quibus omnibus et singulis in vim pacti renuncio in his scriptis.

Item, omnia et singula statuta et ordinationes dicti collegij per dictum reverendum patrem Dominum Johannem Roffen. episcopum, executorem ultimæ voluntatis dominæ Margarettæ Comitissæ Richmondiæ et Derbiæ, edita, et per eum dum superstes fuerit edenda, quantum, me concernunt, secundum literalem et grammaticalem, sensum et intellectum inviolabiliter tenebo exequar et observabo, et quantum in me fuerit faciam ab aliis observari.

Itemque *nulla statuta seu ordinationes* interpretationes mutationes injunctiones declarationes aut expositiones vel glossas aliquas, præsentibus ordinationibus et statutis vel qualitercunq; vero sensui et intellectui eorundem repugnantes vel repugnantia derogantes vel derogantia

contrarias vel contraria, per quemcunq; seu quoscunq; alium vel alios *quam per* reverendum patrem Dominu Johannem Roffen. episcopum prædictum faciendas vel facienda, quomodo libet scienter *acceptabo*, vel ad ea *consentiam*, aut ipsa aliqualiter *admittam*, nec eisdem *parebo* ullo tempore, vel *intendam*, nec illis vel illorum aliquo ullo modo *utar* in collegio prædicto vel extra, tacite vel expressè; sed eis et eorum cuilibet *contradicam* et etiam *resistam* expressè, ipsaq; fieri viis et modis omnibus quibus potero *obstabo et impediam*. 1757. ST. JOHN'S COLLEGE v. TODIN TON.

Item, juroque, quantum in me fuerit et quatenùs meam personam concernat aut concernere poterit, me laudatas ac probas hujus collegij consuetudines *observaturum*, unà cum aliis ordinationibus per magistrum et socios ac scholares editis pro sustentatione quorundam sociorum ac discipulorum, juxta tenorem cujusdam juramenti quo magister olim et socij se devinxerunt *oraturos* tam pro dicto domino Johanne Roffen. episcopo quam Henrico Ediall Archidiacano Roffen. Hugone Ashton Archidiacano Eboracensi Johanne Ripplyngham in sacrâ theologia doctore et Roberto Dokket in eadem Baccalaureo ac Marmaduco Constable Equite aurato et Roberto Symson in artibus magistro cæterisq; qui privatas aliquas aut sociorum aut discipulorum fundationes fecerint aut in posterum facturi sint; simulq; et curabo, quantum in me fuerit, à cæteris omnibus tam sociis quam discipulis idem fieri; neque extortas eorundem interpretationes (per quemcunque factas) admittam, aliter quam sensus eorum apertus patitur et mea conscientia magis conformem indicabit *animo conditoris*.

De Sociorum Qualitatibus. [173]

Nunc itidem et leges dabimus residuo corpori; quod nimirum ex sociis, quocunq; numero eos fore contigerit, tanquam ex potioribus et solidioribus membris, volumus integrari. Pro fundatrice verò, tametsi rex illustrissimus, in carta licentiæ suæ quam aviæ suæ, dominæ fundatrici, concessit, mentionem fecerit de quinquaginta sociis ac scholaribus, nos tamen, qui ob subtractionem reddituum annuorum ad valorem quadringtarum librarum, ipsum numerum implere non possumus, quantum ad præsentem ordinationem spectat (si fieri potest) octo super viginti deputari volumus et ordinamus.

De Sociorum Electione, ac ipsius Circumstantiis.

Et quò possit exactior fieri sociorum delectus, convocari volumus et statuimus, (per magistrum vel ipso absente) præsidentem, cunctos socios in universitate præsentes,

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primo die Lunæ cujusq; quadragesimæ, simul et comonefieri "quatenus quisq; solitam inquisitionem faciet de "juvenibus quibusdam, tàm moribus quam eruditione "magis idoneis, qui in sociorum numerum cooptentur; "et ut repertorum nomina, simul cum nomine comita-"tûs quo quisq; fuit oriundus, in scedula conscribatur, "unâ cum aliis dotibus quibus ipse juvenis fuerit præ-"ditus;" ád quam inquisitionem teneri singulos volumus, in vim juramenti sui: cujus autem nomenclatura non ante septem dies electionis futuræ, tradita magistro fuerit aut ejus vice-gerenti quando magister aberit, hunc, pro eâ vice, ineligibilem pronunciamusò. Porr, delectum hunc quoties eveniet, celebrari volumus et ordinamus quâq; die Lunæ quæ proximè sequitur Dominicam Passionis: quo die magister et socij cuncti præsentes conveniant in sacellum, quum horologium insonuerit octavam; et illic, primùm lecto statuto de cooptandorum qualitatibus, magister primùm, deinde reliqui per ordinem socij jusjurandum quod sequitur, tactis sacris evangeliis præstabunt. "Ego "N. N; deum testor et hæc sancta ipsius evangelia, me "neminem in socium hujus collegij electurum, *nisi quem* "juxta statutum antelectum me *conscientia magis idone-*"*um indicabit;* neq; istud faciam pretio vel mercede "quâvis, à quopiam aut data aut expectata." Juratis itaq; singulis fiat è vestigio scrutinium, per magistrum et duos è sociis maxime senioribus, (sic tamen ut hi non fuerint de numero septem seniorum conscriptorum,) qui prius etiam tactis sanctis dei evangeliis promittant "se veraciter et absq; dolo scrutiniam [174] "ipsam pro futura sociorum electione tractatu-"ros, et secretum penitùs habituros, neq; signo "aut nutû aut alio quovis pacto rem indicaturos." Auditis ergò singulorum votis et suffragiis, illum vel illos in socium vel socios dicti collegij magister pronunciabit, in quem vel in quos ipse magister, cum majori aut æquali parte sociorum, consenserit. Et si magister, cum majori aut æquali parte sociorum, in aliquem aut aliquos eligendum vel eligendos haudquaque convenerint, sed in eâ dissensione triduum ab incepto delectu perseverarint, tùm volumus ut hujus negotij diffinitio, pro hac vice, ad septem conscriptos seniores referatur; itaque pro his de quibus non est consensus factus, electio septem illis senioribus deferenda sit, ad hunc modum ut sequitur. Quarto igitur die post inchoatam electionem conveniant iterùm omnes in sacellum et primitùs, per septem ipsos seniores juramento præstito "quòd illum "vel illos, de quibus fit dissidium, in socium vel socios "cooptabunt, qui suis conscientiis magis videbitur aut "videbuntur idonei;" præstito igitur hoc juramento, fiat alterum iteratò scrutinium, in quo magister et duo

prædicti scrutatores suffragia septem illorum seniorum scrutabuntur: et is vel ij in quem vel quos major septem seniorum pars consenserit, pro electo vel electis habeantur, atq; ita a cæteris acceptentur. Quòd si fonte conscientiis eorum septem seniorum non videatur inter eligendos aliqua disparitas, aut forsitan inter se major eorum pars haudquaquàm consenserit, tum volumus ut is vel ij qui à magistro priùs nominatus aut nominati fuerant, pro socio vel sociis protinùs declarabitur aut declarabuntur. Proviso ut neque in hac electione neq; aliâ quacunq; cujuscunq; personæ infra dictum collegium faciendâ, *suam vocem aut suffragium alterius personæ cujuscunq; arbitrio et dispositioni quovis modo committat, aut incertam personam aut pro incerto comitatu vel diocesi sub disjunctione vel conditione quovis modo nominet aut eligat: contra faciens, et suffragium deinde suum et etiam dicti collegij societatem, ipso facto, ex tunc imperpetuum amittat. Nec liceat, sub pœna perjurij, cuique ex illis scrutatoribus, nomina aliorum eligentium, alii cuipiam, quovis modo per se vel per interpositam personam nutu verbo signo vel scripto, ante completam et publicatam socij electionem, ostendere.

* Here is an omission of the nominative case to committat; viz. "Aliquis socius," or "Aliquis ex electoribus."

De Morum Honestate servandâ, et Dissentionibus sedandis.

Quòd si inter magistrum et alium aut alios hujus collegii socios, aut illius causa, aliqua materia dissensionis iræ rixæ vel discordiæ in dicto collegio suscitata fuerit, et per magistrum decanos et majorem partem septem seniorum finis rationabilis seu placabilis infra octo dies proximè sequentes factus non fuerit, tunc volumus ut partes dissentientes, virtute juramenti sui, triduum post illos octo dies, duos socios eligant, qui electi, in sui virtute juramenti, infra biduum post eorum ad hoc electionem et deputationem, *præfectum collegij regalis, et magistrum collegij Christi, et magistrum sive custodem collegij divi Michaelis*, aut dictis præfecto magistro et custode vel eorum aliquo extra universitate agentibus, tunc eorum vices absentium in dictis officiis infra universitatem gerentes, ac etiam reliquos prænominatos siqui fuerint in universitate præsentes, adeant; et eisdem hujusmodi dissensionis causam sive materiam, in scriptis significent et referant: et quicquid *duo ex illis*, pro tempore consulti, *arbitrati fuerint et decreverint*, illi omnes *parent* et in sui virtute juramenti *obediant*.

De Modo procedendi contra Magistrum, &c.

His ordine dispositis, ad errata quæ accedere possunt pervenimus, adhibituri quæ poterimus, remedia, inci-

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pientes a magistro ut duce et principe, quo bono et provido ut nihil est utilius, ita imprudenti inepto indigno criminoso nihil est detestabilius. Quo circa statuimus ut magister quicunq; propter terrarum tenementorum reddituum possessionum spiritualium seu temporalium sua culpa diminutionem seu alienationem, vel propter detractionem oblationum alienationem illicitam bonorum et rerum ipsius collegij infamiam incontinentiamq; notabilem, negligentiam intolerabilem homicidium voluntarium aliamve causam enormem ipsum magistrum omninò reddentem criminaliter irregularem vel aliter inhabilem, nec non propter infirmitatem infectivam et contagiosam perpetuam, cujus occasione non poterit absque scandalo hujusmodo officium exercere, ab eo penitùs amoveatur: ad cujus amotionem hoc modo procedatur; videlicet, ut statim, vel saltem infra quindecim dies postquam aliquod præmissorum commiserit vel in eorum aliquod inciderit, primò per præsidentem, assistentibus ei aliis duobus officiariis clavi-geris et quatuor aliis sociis ex septem senioribus dicti collegij vel saltem cum assensu et assistentia duarum tertiarum partium omnium sociorum dicti collegij (sic quòd inter eos sint quatuor seniores ex septem electi,) vel, præsidente nolente aut negligente, per decanum theologiæ cum prædictorum assistentia, moveatur magister ut suadeatur ad voluntariè recedendum ab officio. Quòd si sponte infra triduum cedere noluerit, tunc infra octo dies post hujusmodi monitionem, præsidens, assensu et testimonio omnium sociorum dicti collegij vel saltem omnium prædictorum modo aliquo prædicto sibi in magistri monitione assistentium, vel, ipso nolente aut negligente, dictus decanus theologiæ, cum assensu et testimonio prædictorum, DENUNCIABIT *Domino* EPISCOPO ELIENSI, aut, eo in remotis agente, *vicario* in spiritualibus generali, seu (sede vacante) *custodi* in spiritualibus,
[176] EJUSDEM, per duos aut tres socios ipsius collegij seniores, cum literis aliquo sigillo authentico ac signo et subscriptione alicujus notarij publici signatis, vel saltem loco sigilli authentici subscriptione dicti præsidentis vel theologiæ decani et prædictorum assistentium ac notarii publici signo communitis, causas defectus crimina excessus vel enormia magistri continentibus. Proviso quòd omnes hujusmodi assistentes et testimonium peribentes, priùs, tactis sacro sanctis Dei Evangeliis, coram præsidente aut decano theologiæ, ipso primùm id coram eis præstante ac deinde à singulis illorum exigente, jurabunt, " quòd non per invidiam malitiam odium vel timorem " ipsius magistri, amorem vel honorem alicujus pro- " movendi ad illud officium, nec per conspirationem " æmulorum aut confœderationem, nec per procura- " tionem alicujus vel aliquorum, nec prece aut pretio " aut alio quocunq; modo illicito inducti, sed pro bono

" zelo et utilitate prædicti collegij et pro utiliori et con- 1757.
" venientiori regimine ejusdem et honore, testimonium ST. JOHN'S
" illud perhibuisse." EPISCOPUS VERO ELIENSIS, vel, COLLEGE
ipso in remotis agente, SUUS VICARIUS in spiritualibus V.
generalis, aut (sede Eliensi vacante) CUSTOS SPIRITUALI- TODING-
TATIS EJUSDEM, de causis criminosis criminibus ex- TON.
cessibus et defectibus contradictum magistrum expositis, SUMMARIE *et de plano et* EXTRA-JUDICIALITER COGNOSCAT: et si, per informationis sufficientes ministratas, hujusmodi suggesta quæ ad dicti magistri amotionem sufficere debeant, *recipiat esse* VERA, statim, aut saltem infra triduum proximè sequuturum, *ipsum* AB OFFICIO *suo et ab* ADMINISTRATIONE *suâ* AMOVEAT *sine ulteriori dilatione*, dicti quodq; collegij sociis DENUNCIET *et* INJUNGAT *ut ad electionem novi magistri liberè procedere valeant et debeant*, juxta formam in statuto superiùs expressam; CESSANTIBUS APPELLATIONIS RECUSATIONIS QUERELÆ AUT CUJUSCUNQUE ALTERIUS *juris aut facti* REMEDIIS, *quibus hujusmodi* AMOTIO VALEAT IMPEDIRI AUT DIFFERRI; *quæ omnia* IRRITA *esse, volumus statuimus et decernimus.*

De Modo procedendi contra Socios Scholares et Discipulos, in majoribus Criminibus.

—Et præmissa, vel eorum aliquod in præsenti statuto contentorum, coram magistro assistentibus et præsidente decanis et thesaurariis, vel saltem uno decano thesaurario et aliis, quatuor ex septem senioribus, publicè confessus fuerit, vel per testes idoneos prædictorum judicio comprobandos, aut per facti coram eis evidentiam, manifeste reus eorum judicio et sententia convictus fuerit; eum statim à dicto collegio, præsentis vigore statuti nullâ aliâ monitione præmissâ, exclusum et privatum fore ipso facto decernimus, absq; cujuscunq; appellationis vel querelæ remedio.

De ambiguis et obscuris interpretandis. [177]

Distribuisse igitur jam universis collegij membris officia simul et officiorum leges nobis videmur, et exactè quidem: quæ si serventur ad amussim et inviolatè, (quod utiq; vehementer optamus) ex eodem viros haud dubiè speramus prodituros, qui magnæ tùm utilitati tùm honori non solùm huic collegio, verùm etiam toti regno futuri sint. Provisum etiam est, quoad fieri potest per uniuscujusq; juramentum, quo nihil apud christianos firmius aut antiquius haberi debet, ut statuta hæc per nos jam tradita et auctoritate sedis apostolicæ corroborata, exactissimè serventur à singulis, quatenùs unum quemque concernans. Cæterum quia mihi Johanni

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Roffensi, per quem hæc edita sunt, tàm à summo pontifice Julie secundo, quàm a fundatrice cæterisq; omnibus co-executoribus, auctoritas est tributa non solùm condendi statuta quæ mihi viderentur huic collegio conducibilia, verùm etiam magistro simul et sociis eadem exhibendi, juramentaq; à singulis tam sociis quam discipulis pro illorum inviolabili observatione districtiùs exigendi, sed et cætera cuncta peragendi quæcunq; pro salubri collegij hujus moderamine mihi visa fuerint opportuna, atq; id tam efficaciter quam si cuncti simul hic essemus præsentes; ego igitur, horum omnium pariter et meo ipsius nomine, cassatis aliis quibusvis statutis prius excogitatis, quatenùs præsentibus adversantur, hæc præsentia ceu vera et salubri pronuncio: quibus observandis, tàm magistrum quàm socios et discipulos adstringi volo; reservatâ mihi nihilominus protestate quoad vixero, vel adjiciendi vel minuendi seu reformandi interpretandi declarandi mutandi derogandi tollendi dispensandi novaq; rursum alia (si licebit) statuendi simul et edendi, non obstantibus his statutis factis et juramento firmatis; cæteris autem omnibus, cujusvis dignitatis auctoritatis statûs gradûs aut conditionis existant, ac magistro quoq; et scholaribus tam sociis quam discipulis omnibus hujus collegij, prorsus inhibens ne cum aliquo dictorum statutorum dispensent, aut quævis nova statuta sive pro collegio seu pro quovis ejusdem membro, quæ dictorum statutorum alicui repugnabunt, condant aut decernant. Quod si fortè cancellarius aut vice-cancellarius *aut reverendus pater* ELIENSIS EPISCOPUS aut demûm quivis alius contrarium attemptaverit, et *novum aliquod statutum aliud à prædictis* adhibere molitus fuerit, ab ejus obligatione, per hanc autoritatem ab executoribus aliis mihi commissam, magistrum et cæteros omnes tam socios quam discipulos penitûs absolvo, eisque omnibus et singulis interdico ne cuivis hujusmodi statutò aut ordinationi pareant admittantve quovis pacto, sub pœna perjurij atq; etiam amotionis perpetuæ à dicto collegio ipso facto. Cæterùm quia nihil est usq; adèo luculentum quod non à captiosis verti poterit in quæstionem, obeam rem volumus quòd si quicquam in aliquo statutorum prædictorum aut obscuritatis aut ambiguitatis magistro et majori parti sociorum occurrat quoad nos vixerimus, eorum singulos in Christi visceribus obtestamur ut ea dubia nobis proponant quoties oriantur, quemadmodum et hactenus fecerunt; nosq; libentur (ut et ante non semel fecimus) illorum dubiorum obscuritatem exeutiemus: quòd si postquam nos ab hac luce migraverimus, novi quidem scrupuli reperti fuerint aut de novo suscitati, volumus et ordinamus ut rectus et laudabilis statutorum

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usus interea juxta mentem nostram observatus et qui maximè congruat instituto pientissimæ fundatricis, sit magistro pariter et sociis norma quædam et regula quam cum puritate conscentiarum suarum sequantur in ejusmodi scrupulis et ambiguitatibus omnibus. Neque tamen per hoc intendimus, ut si præter notitiam nostram quispiam abusus in statutis ipsis, aut in quavis eorundem parte, per magistrum aut officiarios aut quemlibet cæterorum in cursufuerit, qd is pro recto et laudabili statutorum usu recipiatur; aut si nos cum ipso magistro qui nunc est, aut cum alio quovis sociorum, in ulla statutorum parte dispensaverimus, nolumus tamen ut hoc privilegium, uni aut alteri ex causis nos moventibus concessum, pro communi quada licentia teneatur: sed et cunctos oramus et per Christi vulnera precamur, ut juramentorum suorum meminerint, atq; nostram mentem in ipsis statutis respiciant, màgis quàm aliquem qui præter assensum nostrum clàm irrepsit eorundem statutorum abusum; nam omninò prohibemus, ne per aliquam declarationem aut consuetudinem ullam aut diuturnum quemlibet abusum vel demùm actum aliquem, verbis aut intentioni dictorum statutorum in aliquo derogetur. VISITATIONEM *autem hujus collegij reverendis in Christo patribus* EPISCOPIS ELIENSIBUS COMMENDAMUS; quibus et concessimus cujusdam idonei præsentationem, qui sit futurus in hoc collegio socius. Idoneum autem intelligimus, qui qualitates habeat eas quæ describuntur in statuto de qualitate sociorum: neq; enim alium quempiam recipi volumus à collegio. Eosdem etiam rogamus et per Dominum Jesum obsecramus, ne quenquam præsentent nisi talem qui pro suis meritis hoc sodalitio dignus fuerit, et cui cum statutis per omnia conveniat.

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De Visitatore.

Nihil adeò bonis legibus firmari muniriq; potest, quin ab his qui licenter vivere et luxui libidiniq; frena laxare student, aliquo fraudis commento facilè queat eludi. Nos igitur fiducia benignitatis reverendissimorum patrum *episcoporum Eliensium* freti, et cum primis amatissimi domini dni Nicolai West qui sedem episcopalem jam suis meritis obtinet, nempe quòd tam ipse quàm successores ejus, pro zelo quem erga rem publicam christianam gerunt, *nullis futuris temporibus* PATIENTUR hæc statuta contra nostram mentem et contra sanctissimum pientissimæ fundatricis institutum violari, statuimus ordinamus et volumus quòd *episcopo cuivis Eliensi qui pro tempore fuerit,* QUOTIES *per magistrum et præsidentem decanosq; et thesaurarios, sive per magistrum et quatuor septem senioribus deputatis, sive per quinq; ex eisdem senioribus reluctante*

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magistro aut præsidente, seu per duas tertias sociorum partes, requisitus fuerit, necnon et CITRA *quamvis requisitionem,* DE TRIENNIO IN TRIENNIUM *semel ad collegium accedere liceat,* per se, vel per commissarium suum specialem quem duxerit deputandum, præterquam per cancellarium universitatis Cantabrigiæ seu vice-cancellarium aut procuratores universitatis ejusdem, et præterquam per alios qui ex dicto collegio pro aliquo crimine aut delicto amoti sint aut amotionem hujusmodi fugientes recesserunt, ac præterquam per magistrum aut aliquam aliam personam dicti collegii aut alios quoscunq; in universitate per unam quindenam anno proximo eam visitationem præcedenti studentes, et præterquam per religiosos qualescunq; prædictorumve aliquem aut consanguineum alicujus socij dicti collegij: *liceat* inquam, *ad ejus* VISITATIONEM *libere accedere, magistrumq; ac alios singulos socios scholares ac discipulos ejusdem collegij in sacellum ejusdem* CONVOCARE: *cui quidem reverendo patri* aut ejus commissario, vigore præsentis statuti, PLENAM CONCEDIMUS POTESTATEM, *ut super omnibus et singulis particulis et articulis in nostris statutis contentis, ac de quibuscunq; articulis statum commodum aut honorem dicti collegij concernentibus, aut quæ in dicto collegio aut aliqua illius persona fuerint reformanda aut corrigenda,* præterquam de secretis et occultis, magistrum socios scholares et discipulos *interroget et inquirat,* COGATQUE *eorum unumquemq; in virtute juramenti* ET PER *censuras* si opus fuerit, ad dicend. veritatem de præmissis omnibus et singulis, præterquam (ut prædictum est) de secretis et occultis; excessusq; ac negligentias crimina et delicta quorumcunque dicti collegij qualitercunq; commissa, in ea visitatione comperta, *secundum excessûs exigentiam et criminis aut delicti qualitatem debitè* PUNIAT *et* REFORMET; CÆTERAQUE OMNIA ET SINGULA FACIAT ET EXERCEAT *quæ ad eorum correctionem et reformationem sint necessaria aut quovismodo opportuna, etiam si ad* PRIVATIONEM *aut* AMOTIONEM *magistri aut præsidentis aut alterius cujuscunq; ab administratione suâ vel officio, seu si ad amotionem alicujus socij scholaris vel discipuli ab eo collegio,* si tamen hoc ipsum statuta et ordinationes exigent, procedere contingat. Quos quidem magistrum socios et scholares discipulos, ac præterea ministros quoscunq; etiam famulos, prædicto domino episcopo et hujus commissario, quoad omnia et singula præmissa, volumus et præcipimus effectualiter intendere et parere; statuentes insuper ut nullus in *visitationibus prædictis* seu aliis scrutiniis faciendis in dicto collegio, contra
[180] magistrum aut aliquem alium ipsius collegii quicquam dicat deponat seu denunciet, nisi quod verum crediderit, seu de quo publica vox et fama laboraverit contra eundem, in virtute juramenti ab eis collegio præstiti; ordinantes

præterea quod dominus *episcopus Eliensis* cùm *in personâ propriâ visitare et præmissa facere dignetur*, magister et thesaurarij unicam ei hâc collegium refectionem faciant; si verò per commissarium episcopus visitaverit, commissario duæ refectiones intra collegium exhibeantur: quibus tam reverendum ipsum patrem quam ejus commissarium hrantus ut contenti sint. Cæterum inceptam aliquam visitationem ultra duos dies proximè sequentes, aut ex causis urgentissimis et rationabilibus ultra quinq; dies, prorogat aut continuari nullo pacto volumus; sed lapso et exacto illo triduo, et quando ex causis prædictis ulterius prorogatur sexto die transacto, eo ipso visitatio illa pro terminatâ et dissolutâ habeatur. Et si que in ea parte compererit corrigenda et reformanda, que brevitate temporis corrigere et reformare non potuerit, ea magistro in scriptis tradat: qui ea omnia, secundùm formam et exigentiam statutorum, quam primùm corrigere et reformare, in virtute juramenti et sub pœna privationis ab officio suo ipso facto, teneatur." Prædictiorum quoq; reverendorum patrum Eliensium episcoporum et commissariorum suorum quorumcunq; conscientias, apud altissimum (quantum possumus) gravius oneramus, ac in visceribus Domini nostri Jesu Christi hortamur et obsecramus, ut in faciendo et exequendo præmissa, secundùm apostoli doctrinam "non quærant quæ sua sunt sed quæ Jesu "Christi," solumq; deum habentes præ oculis mentis, favore timore odio prece et pretio coloribus occasionibus post positis quibuscunq; inquisitionis correctionis et reformationis officium diligenter impendant et fideliter in omnibus exequantur, sicut coram Deo in ejus extremo judicio in hoc casu voluerint reddere rationem; statuentes præterea ut magister socius scholaris aut alius quispiam hujus collegij, super excessibus vel delictis, *in visitationibus et inquisitionibus per dictum reverendum patrem vel ejus commissarium ut premittitur faciendis*, accusatus vel detectus, copiam compertorum vel detectorum hujusmodi sibi tradi dedi dari ostendi, ac nomina detegentium vel denunciantium sibi exponi aut declarari, nulla modo petat; neq; ipsa comperta et detecta, aut nomina detegentium, tradantur eidem aut ostendatur; sed super eisdem compertis et detectis, *statim coram ipso domino episcopo vel ejus commissario personaliter respondeat, ac correctionem debitam subeat pro eisdem*, secundùm nostrarum ordinationum et statutorum exigentiam et tenorem, *cessantibus quibuscunq; provocationibus appellationibus querelis et aliis juris et facti remediis*, per quæ ipsius correctio et punitio differri valeat seu alias quovismodo impediri. Si tamen ad *privationem* aut *inhabilitatem* magistri aut *expulsionem* socij aut scholaris per episcopum aut ejus

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commissarium agatur, *tunc ostendantur* ei detecta: quæ si non poterit rationabiliter et probabiliter evitare, et justa defensione propulsare, *amoveatur sine appellatione aut ulteriori remedio;* dummodò ad ejus expulsionem concurrat consensus quatuor è septem deputatis senioribus tunc in universitate præsentibus; *sine quorum consensu* irritata sit hujusmodi expulsio, et nulla ipso facto. Et insuper si contra magistrum, ad amotionem ab officio, per hujusmodi domini episcopi commissarium, etiam consentientibus ut præfertur quatuor illis senioribus, procedatur, non negamus ei omnes querelas et defensiones justas et honestas *apud ipsum dominum episcopum Eliensen, dummodo ulteriùs non appellet;* non obstante nostrâ ordatione prædictâ, aut aliis quibuscunq;. PRÆTER HUNC *visitationis modum, nos* ALIUM NULLUM *Eliensibus episcopus concedimus;* sed nec a sociis tolerari permittimus, aliquo pacto: quod etiam eis mandamus; in vim juramenti sui. Scimus enim quòd eximia virago domina fundatrix dum in humanis egit, *impetravit ab Eliensi episcopo qui tunc fuerat, jus fundationis, eâ quidem ratione ut* ex desolatis ædiculis tam illustre collegium erigerit: quod cum effecerit et consummaverit magno suo sumptu, *par est et Elienses episcopi* NIHILO * MAJOREM *in hoc collegio sibi vindicent autoritatem quàm in* CÆTERIS *academiæ collegiis ubi non sunt fundatores.* His itaq; dictis legibus quas tùm salubres tùm justas existimamus, magistrum et scholares omnes tam socios quam discipulos collegij divi Johannis in Cantabrigia, regi volumus et gubernari: quibus si sese diligenter attemperent, nihil dubitamus quin afflatus aderit divini spiritûs, qui rectà perducet obsequentes ad magnam eruditionem cum pari conjunctà sanctimonia. Neque enim fas est ambigere, quin sacer ille spiritus qui in quàvis congregatione christianorum residet, præsto sit adjuturus cunctos qui cum fide et purà conscientià conversari conantur, justisq; et salubribus monitis obtemperant; præcipuè tamen eos qui studio sacrarum literarum insudant. Nam ob has potissimùm reserandas ille missus fuit; "quum," inquit, "venerit ille qui est spiritus veritatis, ducet vos in "omnem veritatem." At *quos* ducet? nimirùm; *humiles* et *obsequentes.* Super hujusmodi requiescit, fovens eos, et indicibilibus eos consolationibus reficiens: sed et istis quum sit ostiarius, aperit ac reserat arcana scripturarum. Nihil igitur vobis hæsitandum est, fratres, quin si studueritis has leges observare, pariter et unanimes in charitate jugitur conversari, patri nostro complacitum erit suo vos tandem affiare spiritu; quod ut faciat, ipse, tamet si peccator sim, assiduè precabor; et vos vicissim, quæso, pro me precimini.

* Vide post 195, 196, 202.

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De quatuor sociis et duobus discipulis per Johannem Roffensem Episcopum fundatis.

Quinetiam decerno quòd ad exercitamenta scholastica, et ad ea quæ per statuta collegii cæteri socii perimplere tenentur, similiter obstringantur: et ad ea perimplenda, pariter et ad has meas ordinationes fideliter observandas, protinùs ut electi fuerint, juramentum præstent corporale, et cætera faciant quæ ad hunc effectum exiguntur; et si deliquerint, simili modo per omnia subjaceant correctioni: et idem etiam, quantum ad duos illos discipulos attinet, fiat, juxta modum et formam quà cæteri tractantur discipuli. Postremò volo quod ad has meas ordinationes citra fraudem observandas, tam magister quam cæteri socij, mox ut electi fuerint, jurejurando sint obstricti; ne fortè per negligentiam et incuriam suam, ob indenturarum inter nos confectarum violationem, collegio gravis inferatur jactura.

EXTRACTS from Queen *Elizabeth's* Statutes.

Preamble——

Elizabetha Dei Gratia.

Itaq; *multis superioribus statutis abrogatis, multis mutatis et emendatis, nonnullisq; novis additis, hæc,* authoritate nostrâ, inviolabiliter ab omnibus qui in hoc collegio commorantur et commoraturi sunt, custodiri et observari volumus, quem ad modum uniuscujusq; officium in statutis sequentibus descriptum designatumq; fuerit * reservat. semper nobis et successoribus nostris, &c.

* Note, this clause of reservation is not complete, in the original: but it is more fully expressed in the 50th chapter.

Chap. 2d. De electione Magistri.

Quod si tunc per * viam spirjtûs sancti concordibus animis, nemine dissentiente, in unum quempiam ejusmodi virum consenserint, qualis in statuto antelecto descriptus est; aut si major pars præsentium super uno aliquo hujusmodi consenserint; volumus et statuimus absq; morâ (nullâ prorsus licentia, ordinarij visitatoris aut alterius cujuscunq; jurisdictionem ordinariam prætendentis expectatâ) magister collegii pronuncietur: quòd si quinq; illorum de uno aliquo non consenserint, tum *ad* COLLEGII VISITATOREM *veniatur;* et ille pro magistro habeatur, *quem solus* VISITATOR *duxerit præficiendum,* modò is statuto de qualitate et officio magistri in omnibus respondeat.

* Vim, (forsitan,) vide ante p. 170.

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CHAP. 11th. De Electione Præsidis.

Quod si post tria aperta scrutinia, ipse magister cum quatuor de uno non convenerint, tùm is electus erit in quem ipse magister cum tribus maximè senioribus, ex dictis octo senioribus sociis domi præsentibus aut majori eorundem parte, consenserint. Quod si ne ii quidem ante horam tertiam ejusdem diei de uno cooptando (ut dictum est) concordare possint, omnes tamen octo seniores vel septem ex his de uno eligendo unanimiter consenserint, eo casu volumus magistrum illis octo vel septem sic consentientibus assensum suum accommodare. Quod si ne septem quidem sic ut prædictum est unanimiter consenserint, tùm is pro electo habeatur quem IPSE MAGISTER SOLUS nominaverit.

CHAP. 12th. De Sociorum Electione, ac ipsius Circumstantiis.

Porrò, delectum hunc, quoties eveniet, celebrari volumus et ordinamus quàq; die Lunæ quæ proximè sequitur Dominicam quintam quadragesimæ: quo die magister et octo seniores convenient in sacellum, cum horologium insonuerit octavam; et illic, primùm lecto statuto de cooptandorum qualitatibus, magister primùm, deinde reliqui per ordinem seniores, jusjurandum quod sequitur, tactis sacris evangeliis, præstabunt. "Ego "N. N. Deum testor, et sancta ipsius evangelia, me "neminem in socium hujus collegij electurum, nisi "quem juxta statutum antelectum mea conscientia magis "idoneum judicabit; neq; illud faciam, pretio vel mer-"cede aliquâ à quopiam aut data aut expectatâ, neq; "ulla alia sinistrâ aut pravâ affectione." Juratis singulis, fiat statim apertum scrutinium. Seniores vero, ut simulatio promittendi et spes decipiendi è medio tollatur juxta senioritatis ordinem, publice et ut cæteri exaudire possint, suffragia conferant; et de quo magister et quatuor ex dictis senioribus consenserint, is pro socio habeatur: quod si post alterum aut tertium scrutinium, de uno, quatuor cum magistro non consenserint, tùm *eodem modo* procedatur, quo in electione præsidis et lectorum et aliorum officiarium dictum est; et is socius habeatur, qui *eo* modo electus fuerit.

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CHAP. 14th. Jusjurandum electi Socii.

"Quod si contingat me posthac propter contemptum, "rebellionem, inobedientiam, malos mores, vel alia "merita, vel propter causas in præsentibus statutis con-"tentas, per magistrum vel alios in hujusmodi negotiis "habentes interesse, corrigi aut puniri aut à dicti col-"legii sustentatione et societate secundùm formam sta-

" tutorum excludi expelli vel amoveri, ipsum magistrum " aut aliam personam ullam, occasione expulsionis aut " amotionis hujusmodi nunquam persequar seu in- " quietabo, per me, alium, vel alios; nec ab aliis mole- " tari, vexari seu inquietari procurabo in foro ecclesiastico, " seu seculari, seu alio quocunq; modo: sed contra, ex " certa meâ scientiâ purè, sponte, simpliciter et absolutè " omni actioni, occasione correctionis, punitionis, exclu- " sionis, seu amotionis hujusmodi, adversus magistrum, " seu alios dicti collegii socios et scholares, mihi quomo- " dolibet conjunctim sive divisim competenti, appel- " lationi quoque et querelæ in ea parte faciendis, ac " quarumcunq; literarum impetrationi, etiam precibus " principum procerum, magnatum, prælatorum et " aliorum quorumcunq; (quantumcunq; mihi alias pro- " bitatis et vitæ merita suffragabuntur,) in vim pacti " renuntio."

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CHAP. 50th. De ambiguis et obscuris interpretandis.

Distribuimus jam universis collegii membris officia simul et officiorum leges: quæ si serventur ad amussim et inviolata, (quod utiq; vehementer optamus,) ex eodem viros haud dubio speramus prodituros, qui magnæ tum utilitati tum honori, non solùm huic collegio, verùm etiam toti regno futuri sunt: provisum etiam est, quoad fieri potest per uniuscujusq; juramentum, (quo nihil apud Christianos firmius aut antiquius haberi debet) ut statuta hæc per nos jam tradita exactissimè serventur a singulis, quatenùs unumquemq; concernant.

Abrogatis igitur quibusvis aliis statutis pro hujus collegii gubernatione priùs excogitatis, hæc præsentia cum vera tum salubria pronunciamus; quibus observandis, tam magistrum quam socios et discipulos astringi volumus; *reservata nobis* nihilominus potestate vel adjiciendi vel minuendi, seu reformandi, interpretandi, declarandi, mutandi, derogandi, tollendi, dispensandi. novaq; rursus alia, si opus erit, statuendi et edendi, non obstantibus his statutis factis et juramento firmatis; *cæteris autem omnibus*, cujuscunq; dignitatis, authoritatis, statûs, gradûs, aut conditionis existant, ac magistro quoq; ac scholaribus tam sociis quam discipulis omnibus hujus collegii *inhibentes*, ne cum aliquo dictorum statutorum dispensent, aut ulla nova statuta sive pro collegio sive pro quocunq; ejusdem membro, quæ dictorum statutorum alicui repugnabunt, condant et decernant. Quòd si forte cancellarius, aut vice-cancellarius, aut *reverendus pater Eliensis episcopus*, aut demùm quivis alius contrarium attentaverit, et novum aliquod statutum aliud à prædictis adhibere molitus fuerit; ab ejus obligatione, authoritate nostrâ, magistrum et cæteros omnes tam socios quam discipulos

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penitùs absolvimus, eisq; omnibus et singulis interdicimus, ne ulli hujusmodi statuto aut ordinationi pareant, admittantve quovis pacto, sub pœna perjurii atq; etiam amotionis perpetuæ à dicto collegio ipso facto.

Quòd si inter magistrum et socios, aut inter socios ipsos, aliosve nostri collegij, super aliquo articulo statutorum nostrorum, dubium aliquod, aut ambiguitas, controversia seu opinionum varietas, vel discordia, oriatur, cujus decisio seu sensus et planus intellectus, intra octo dies, à tempore exorientis emergentis et commotæ dubitationis computando, nequiverit inter eos haberi; tunc volumus ut partes dissidentes duos ex collegio socios eligant, qui, ita electi, quam citò poterit, REVERENDUM EPISCOPUM ELIENSEM *pro tempore existentem*, (in quo sinceram fiduciam ponimus, quemq; juxta planum, communem, literalem et grammaticalem sensum et ad dubium præteasum aptiorem, omnes hujusmodi ambiguitates interpretaturum, dissoluturum, declaraturum, arbitramur,) ubicunq; intra regnum Angliæ fuerit, *adeant*; vel saltem totam controversiam, in duobus scriptis, suâ ipsorum manu aut notarii publici subscriptione, vel alicujus sigilli authentici appositione, munitis, *eidem reverendo patri* significent.

Cujus quidem reverendi episcopi determinationi, interpretationi et declarationi, super prædicto dubio ita ut præfertur disputato ac ad eum delato, faciendis, magistrum præsidem socios et cæteros omnes dicti collegii obtemperare volumus, et cum effectu parere; sub ipsorum debito juramento collegio præstito, et pœna amotionis perpetuæ à dicto collegio, si contrà fecerint, ipso facto; nolentes quod per consuetudinem ullam, aut diuturnum quemlibet abusum, aut demùm actum aliquem, verbis aut intentioni dictorum statutorum in aliquo derogatur: illud autem imprimis mandamus, ut juramentorum suorum meminerint, atq; nostram mentem in ipsis statutis respiciant, magis quam aliquem (qui præter assensum nostrum clàm irrepsit,) eorundem statutorum abusum. VISITATIONEM *autem hujus collegij reverendis in Christo patribus* EPISCOPIS ELIENSIBUS, COMMENDAMUS; quibus et *concessimus cujusdam idonei præsentationem*, qui sit futurus in hoc collegio socius: idoneum autem intelligimus, qui qualitates habeat easdem quæ describuntur in statuto de qualitate sociorum; *neq; enim aliam quempiam* RECIPI *volumus à collegio*; neminem autem illi præsentent, nisi talem qui pro suis meritis hoc sodalitio dignus fuerit, et cui cum statutis per omnia conveniat.

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CHAP. 51st. De Visitatore; 1757.

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Nihil adeo bonis legibus firmari munirique ; potest, quin ab iis qui licenter vivere et luxui libidini frena laxare student, aliquo fraudis commento facilè queat illudi. Nos igitur fiducia benignitatis reverendi in christo patris *episcopi Eliensis* qui nunc est, *et successorum suorum*, freti, confisiq ; quod orthodoxæ fidei et reipublicæ Christianæ zelo hæc nostra statuta perpetuis futuris temporibus inviolabiliter, ad laudem dei et honorem collegii, observari procurabunt et nitentur ; et ea vel eorum aliqua, contra nostram mentem et sanctissimum piæ fundatricis institutum, minime violari patientur.

Statuimus ordinamus et volumus, ut EPISCOPUS ELIENSIS *qui pro tempore fuerit*, QUOTIES per magistrum et quinque ex senioribus, sive per septem seniores, reluctante magistro, REQUISITUS *fuerit*, ad collegium valeat et *possit accedere* ; magistrum, præsidem, decanos, thesaurarios, socios, scholares et discipulos collegii, in ecclesiam ejusdem convocare ; *collegium tam in capite, quàm in membris* VISITARE ; ac de et super omnibus et singulis, statum commodum et honorem dicti collegii, statuta, magistri, præsidis, decanorum, thesaurariorum, sociorum, discipulorum vel ministrorum reformationem et correctionem, concernentibus, diligenter inquisitionem ; juramentum, " de dicendo veritatem in præmissis omnibus et " singulis," ab iisdem exigere ; crimina, excessus, delicta et negligentias quorumcunq ; dicti collegij, qualitercunq ; commissa in eâ visitatione comperta, secundùm criminum, excessuum, delictorum et negligentiarum qualitatem et exigentiam, debitè *punire corrigere* vel *reformare*, ac JURISDICTIONEM SUAM ORDINARIAM, *quam volumus et hoc statuto nostro ordinamus* ad eundem episcopum Eliensem et successores suos in perpetuum spectare et pertinere, in magistrum et socios dicti collegij *exercere* CÆTERAQUE OMNIA ET SINGULA *facere et exercere quæ ad eorum correctionem et reformationem sunt necessaria aut quovis modo opportuna : etiam si ipsum ad privationem seu amotionem* magistri præsidis aut alterius cujuscunq ; ab administratione vel officio, seu ad amotionem alicujus socij scholaris vel discipuli ab eo collegio, (si tamen hoc ipsum statutum et ordinationes exigant,) procedere contingat. Cum autem volumus, visitatione semel inceptâ atq ; inchoatâ, ut quam citò commodè poterit, causas omnes dijudicet et determinet, ac finem visitationis sum omnino *intra quindecim* postejus ad collegium accessionem dies faciat.

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Statuimus insuper, ut *in visitationibus collegij per reverendum patrem Eliensem episcopum* quemcunq ; pro tempore existentem, nullus sociorum aut scholarium contra ma-

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gistrum aut aliquem alium illius collegii quicquam dicat, deponat, detegat, vel denunciet, nisi quod verum credat, seu de quo publica vox et fama contraeundem laborat, sub poena violationis juramenti ab iisdem socis et scholaribus collegii praestiti: et super excessibus vel delictis in visitatione et inquisitione hujusmodi, detecti, denunciati vel accusati, (copiis detectorum et compertorum, nominibusq; detegentium iis minimè traditis vel ostensis,) super excessibus et delictis hujusmodi constituti coram domino Eliensi episcopo, summarie et de plano procedente respondeant et eorum quilibet respondeat per se, correctionem debitam pro iisdem subeant et eorum quilibet subeat, secundùm nostrarum ordinationum et statutorum exigentiam et tenorem; cessantibus quibuscunq; provocationibus, appellationibus, querelis, et aliis juris et facti remediis, per quae ipsorum et cujuslibet eorundem correctio et punitio differri valeat, seu aliàs quomodolibet impediri. Si tamen ad privationem magistri, aut expulsionem socij scholaris vel discipuli agatur, tunc volumus et statuimus ut ostendantur ei detecta: quae si rationabiliter et probabiliter evitare et justâ defensione propulsare non potest, volumus ut amoveatur, sine appellatione aut ulteriori remedio.

Et si quae alia in membris corrigenda et reformanda fuerint, quae brevitate temporis corrigi et reformari non poterunt, ea omnia et singula magistro in scriptis tradet: qui, secundùm formam et exigentiam statutorum, et in virtute sanctae obedientiae ac juramenti sui, sub violationis poena, hujusmodi corrigenda et reformanda diligenter et fideliter corrigere et reformare studebit, et tenebitur. Dissolutèq; visitatione, pro esculentis, poculentis, expensis, oneribus, et procurationibus ratione visitationis hujusmodi debitis, volumus et statuimus ut summa pecuniaria, in bonae memoriae domini Jacobi olim Eliensis episcopi concessionibus et ordinationibus limitata et declarata, absq; dilatione quàlibet solvatur. Reverendi vero patris episcopi Eliensis cujuscunq; pro tempore existentis conscientiam apud altissimum oneramus, et in visceribus domini nostri Jesu Christi hortamur, ut in faciendo et exequendo praemissa, secundùm apostoli doctrinam "non quaerat quae sua sunt, sed quae Jesu "Christi": solumq; deum habens pra oculis mentis, favore, timore, odio, prece, aut pretio, coloribus aut occasionibus post habitis quibuscunq; visitationis, inquisitionis, correctionis, reformationis officium diligenter impendeat, et fideliter in omnibus exequatur, sicut coram deo, in cujus extremo judicio, in hoc casu voluerit reddere rationem.

[188] His igitur dictis legibus, &c. (sicut in conclusione capitis de visitatore, in Episcopi Fisheri statutis.)*

* Vide p. 181.

CHAP. 25th. De Modestia, et Morum Urbanitate. 1757.

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Omnes lites domesticæ INTRA *collegium* et cognoscantur et dijudicentur. Qui *foras* aliquem in jus vocaverit, sine consensu magistri, aut (eo absente) præsidis et majoris partis seniorum, collegio amoveatur. Dissentionis inter socios discipulosve ortæ intra biduum, si fieri possit, à magistro, aut (eo absente) præside et octo senioribus, sedentur: sin fieri non possit, quatuor socij per dissentientes eligendi, cum magistro, aut (eo absente) præside, litem audiant, et cum æquitate dirimant; et quam illi omnes, vel magister (aut, si illi abait,) præses, cum duobus sic electis, sententiam tulerint, in eâ conquiescant dissentientes: qui secùs fecerit, collegio privetur. Lis verò inter magistrum et socium unum aut plures orta, à præside et reliquis senioribus, aut (si præses unus litigantium sit) à socio maxime seniore, qui unus litigantium non sit, et cognoscatur et (si fieri possit) tranquilletur: sin intra biduum hoc fieri non possit, ad *præpositum collegij regalis, magistros collegiorum Trinitatis et Christi*, per duos socios utrinq; eligendos, lis deferatur; et quod duo ex illis statuerint, juxta formam statutorum aut leges regni nostri, id ratum esto. Qui non paruerit, collegio amoveatur.

Also

In the chapter relating to the election of the master,

It is ordained, that if five of the fellows, after two scrutinies (to be ended upon the same day) should not agree upon one person, then they are to cease to the *visitor of the college*; and he is to be esteemed as master, whom the VISITOR *only shall* THINK FIT *to set over them*: provided he answers to the statute, in all points, concerning the quality and office of master: and the said visiter shall signify to the fellows of the same college, within twenty days from the day of such devolution upon him, by an instrument sealed with the seals of his pastoral office, the same person so promoted to the mastership.

In the chapter relating to the election of president, lecturers, and other officers,

It is ordained, that if the master and fellows should not agree in the election; and the master should be out of the kingdom; then *he whom the Bishop of Ely*, VISITOR *of the said college*, being within the kingdom, *shall nominate* [189] to be elected into the office.

N. B. By the annexed foundation, i. e. the before mentioned foundation of the two *Southwell*-fellowships,) *same* objects of election were made preferable to *Toddington*'s right, upon the merits de-

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pended upon his being a PREFERABLE object; whereas *Craven* was only a *general one*. But the exception taken to *Todington*, against electing *him* into the fellowship, though otherwise a preferable object within Dr. *Keton's* descriptions, was his being MUTILATED, and *thereby* excluded, by the foundation, from being *capable* to be chosen: for that by one of the old statutes, (prior to Dr. *Keton's* deed, which refers to them,) it is ordained "that the persons "eligible as *scholars*, should be *corpore* nullis contagiosis aut incurabilibus morbis vitioso, aliasve deformi *aut* MUTILO." From whence it was inferred that though this clause is not indeed repeated as one of the qualifications of a *fellow*, yet it must be so *intended*: for the statutes could never mean to require less perfection in the fellows than in the scholars; since the fellows are expressly described as *potiora* et *solidiora* membra collegij, and are to be elected *out of the scholars*: and are considered as designed for the ministry and holy orders, into which no deformed or mutilated persons are admissible.

The counsel who shewed cause against the prohibition, and who argued (at first) only from Queen *Elizabeth's* statutes, (for Bishop *Fisher's* were not laid before the court, till some time afterwards,) made three points upon them; *viz.*

1st. Whether the bishop's general visitatorial authority does not extend to the election of fellows, upon the *original* foundation.

2d. Whether it extends to this *annexed* foundation.

3d. Whether the clause which gives *distress* upon the estates of the college, *excludes* the visitor.

And several of Queen *Elizabeth's* statutes were read, on behalf of the visitor; particularly, the 50th (de ambiguis et obscuris interpretandis,) and C. 51st. (de Visitatore,) and also C. 2. (de Electione Magistri.)

Contra, on behalf of the college, were read and relied on, C. 25th. (de Modestia, &c.) C. 13th. (de Electione Sociorum) and C. 11th. (de Electione Præsidis.)

[190] *N.B.* All these were Queen *Elizabeth's* statutes: and it was said by the counsel for the visitor, that though *Bishop Fisher* AS *surviving executor* of *Margaret* Countess of *Richmond*, gave statutes: yet he had no power, AS *executor*, to do so; and that therefore *Queen Elizabeth* afterwards gave *fresh* statutes.

Cur'. Let it stand over till to-morrow: and let us have copies of the material statutes, in the mean time.

On *Friday* the 26th of *November* 1756, this motion proceeded. And on behalf of the visitatorial power, it was argued, 1st. That the bishop had a GENERAL *right of*

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visitation of the college; which *included the* ELECTION OF FELLOWS, as well as *other* matters that concerned the college; 2dly. That this general right extends to the ANNEXED, as well as to the *original* foundation; and 3dly. That the *clause of* DISTRESS, (which had been urged to be a *distinct and particular remedy* given by the annexed foundation,) *did* NOT *exclude* the general right of the bishop to visit.

First—the original foundation of the college was upon *express condition* "That the Bishop of *Ely* should be "visitor." And Dr. *Keton's* foundation is incorporated with the original foundation: he was, in effect, *only a purchaser* of two fellowships and two scholarships.

And the new statutes (of Queen *Elizabeth*) were *subsequent* to Dr. *Keton's* foundation: and Dr. K.'s fellows were *part* of the college, at the time when these statutes commend the visitation of *the college*, i.e. of the *whole* college, *to the bishops of Ely* for the time being. These statutes constantly speak of the bishops of *Ely* AS *general* visitors of the college at *that* time, and *already* so; and *not* as being constituted so, merely and only BY *those statutes* of Queen *Elizabeth*. And his *general* visitatorial power *includes* the election of fellows, as well as other matters.

The *general* visitor, upon *lay*-foundations, is the *founder*: upon *spiritual* foundations, the *ordinary*.

The *general* power of visitation of the college is given to the Bishop of *Ely*, *ex nomine* of "*visitor*."

No particular set form of words is necessary to the appointment of a visitor. *Fitz-Gib.* 305. *Dr. Bentley* v. *Bishop of Ely*—"*visitator sit* Episcopus Eliensis," was the bishop's *whole* right to be general visitor of *Trinity* college.

And he is complete visitor: and such power may cease and revive again. The case of *The King* v. *Bishop of Chester*, warden of *Manchester* college, 2 Strange 797. proves this. [191]

The late case of *Dr. Green* v. *Dr. Rutherford* in Chancery, was only a trust, given upon another footing.

No objection can arise, as to executive part, from the legislative power being reserved to the crown.

Deprivation and admission of fellows are incidental and essential to the general power of a visitor. Sir *T. Jones* 175. *The King* v. *Warden of All Souls College*, in *Oxford*.

Neither is it any objection, "that particular times and "occasions of going to the college, are stated and speci-"fied:" for upon particular gravamens, he may exercise the power of admission and deprivation, *eo nomine as visitor*.

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Second point.—The bishop's general visitatorial authority extends to the ANNEXED foundation, *as well as* to the *original* foundation. *Both* are within the same reason: and these ingrafted fellows are to be bound by, and even to swear to the statutes then in being. And here, no new statutes are given by the annexed founder: and the power he reserved was only to give additional ones *conformable* to the old ones. And the indenture *refers*, throughout, to the original foundation: which is a strong implication. In 5 *Mod.* 421. indeed, this point, "whether the visitor appointed by the founder, can be extended to the new fellows" was doubted. This is called Mr. *Jenning's* case, of *Clare-Hall:* it was then adjourned, and does not appear ever to have been determined. But on 21st *March* 1747, in the case of the *Attorney general, at the relation of Mapletoft*, v. *Talbot*, (the case of the master and fellows of *Clare-Hall* in *Cambridge*,) [2 Ves. 78. 3 Atk. 66?.] Lord *Hardwicke* held "that the *annexed* foundation, "*where no new statutes* are given, must *follow the original* "foundation."

Third point.—This deed giving *another* remedy, *viz.* by DISTRESS, does NOT *preclude the visitor.* It is *not ad idem:* it is given TO *the church of Southwell*; NOT *to the party injured* in point of election and admission. But however, *if it* HAD been given to the party injured, it could not have taken away his *appeal to the visitor*, for relief: for the one is in order to *obtain election and admission:* the other, for the *profits.* The SPECIFIC *relief* must come from the *visitor:* the distress would be only for the [192] *delay*, 2 *Strange* 1061, *Middleton et ux.* v *Croft in B. R.* (the third and last question) it was resolved "that the "statute of 7 & 8 *W.* 3. *did not*, by inflicting a penalty, "take away the jurisdiction of the spiritual court." The distress may be intended, to *prevent collusion* between the college and the visitor; and as a method to bring the matter *collaterally* in question: for notwithstanding what may be said in the books, particularly in the case of *Phillips* v. *Bury* (*Exeter College case*,) it would be very difficult to maintain a *direct* action for such collusion.

These new fellowships were, by the deed, to have *all* the rights of other fellows. Now *one* of these was a right of appeal. And shall the *nomine pœnæ* and clause of distress given to the CHURCH *of Southwell*, take away the DISTINCT *rights* of the CANDIDATE, and of the BISHOP? no: *they* have a right to the *remedy*; but *none* to the *penalty*; the penalty belongs *to the* CHURCH of *Southwell.* But *if* the penalty had been given TO *the* CANDIDATE; would that have DISCHARGED the college's obligation to perform their contract? and the restriction from going "*foras*," does not exclude the *visitor*, (for he is

domestic;) but it only excludes *forensic* jurisdictions, *courts of* LAW.

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And the *collateral penalty* cannot hurt the SPECIFIC *remedy*: for it is *not adequate* to the injury; nay, it is *not* even given to the PERSON *injured*; and it is *temporary*. However, the *same* person may have SEVERAL *remedies*. And this is not the first instance of the present question, in this very college; for Mr. *Pegg's* case in 1726 was in point; and there the college submitted. The case was exactly the same with the present, excepting only that it was upon Dr. *Beresford's* foundation; which also was by *deed*, and with a *clause of distress*, as this is. His foundation was likewise of two fellowships and two scholarships in this college, by indenture tripartite, made 12 *February* 11 *H.* 8. between the college, the dean and chapter of *Litchfield*, and himself: in consideration of 400*l.* given by him to the college: in which indenture, a forfeiture is fixed and a right of entry into the college-lands, given to the dean and chapter of *Litchfield*, to distrain for it. Mr. *Pegg* was elected. Mr. *Burton* appealed to the Bishop of *Ely*, as visitor. Mr. *Pegg* protested against his jurisdiction. Civilians and common lawyers were heard, upon the point of the jurisdiction. The visitor pronounced for his own jurisdiction; and afterwards gave sentence for Mr. *Burton*, the appellant; and issued his monition to the master, president and six senior fellows, "to "admit Mr. *Burton*." This monition was *obeyed*; and [2 Durn. 317.] Mr. *Burton admitted* into the fellowship, by the president: by whom a certificate thereof was duly returned to the visitor.

The right of visitation arises from the common law; as Ld. Ch. J. *Holt* held in the case of *Philip* v. *Bury*: *(though Bishop *Stillingfleet* said it arose from the *canon* law.) There was a case of this very college, which is reported in 4 *Mod.* 233. *Rex & Regina* v. *St. John's College, Cambridge*; and *Comb.* 270. S. C. and *Skinner*, 359, 368, 393, 546. S. C. Where the court thought they ought to see that the law be executed. And another case also, relating to the same college, was Dr. *Rutherford's* case; which was upon a special trust. But the courts of justice will not interfere, unless the visitor abuses his power, in exerting it where he ought not.

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* V. Skinner 483, 484.

Then the counsel for the bishop and Mr. *Todington offered* AFFIDAVITS, as to matters of fact.

But Lord *Mansfield* said, this court cannot enter into the MERITS *of the* ELECTION: for the question *before* us is "whether the Bishop of *Ely* appears to "have a *right to judge* in this case, as visitor." If he has, there is no ground to prohibit: if he has no such jurisdiction, he ought to be prohibited.

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The counsel who argued for the prohibition, began with laying down some *general positions*—as, that *foundatorial right* takes its rise from the property of the donor; that a *founder* may give statutes; that if he does *not*, the right of visiting remains in the founder or his heirs; that he may appoint a visitor, either *general*, or *partial*, (with regard to his powers,) as he himself pleases; that if he gives him *only partial* powers, the visitor *cannot exceed* them; that if the visitor should attempt it, the court will by prohibition *restrain the excess* of jurisdiction; that the court will never refuse *liberty to declare* in prohibition, wherever there is the *least doubt*, (in order that the matter may be solemnly determined upon record, and so be subject to a regular course of appeal;) that a visitatorial power is not to be inferred by *implication*, but must be given by *express and direct* words; (as was determined by Lord Chancellor *King*, assisted by two great judges of the common law, in the case of *Eden* v. *Foster*, reported in 2 *Peere Wms.* 325. the case of *Birmingham* school.)

Then they entered upon their argument, to the following effect. 1st. The Bishop of *Ely is not* GENERAL visitor of this college; but *only* visitor in *particular* instances: and the *general* right of visitation in *all other* instances, remains in the *crown*. This, they said, will appear from the 50th, 51st, and 52d chapters of Queen *Elizabeth's* statutes.

Qu. V. ante 194. c. 25th de modestia.

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C. 50th. "*Reservata* NOBIS potestate vel adjiciendi "vel minuendi, seu reformandi interpretandi," &c. "*Cæteris* "autem OMNIBUS &c. inhibentes," &c. And immediately after, the Bishop of *Ely* is PARTICULARLY *there named*, as one of the persons *prohibited* from counteracting the statutes. And it concludes with giving the Bishop of *Ely* a *compensation, viz.* the nomination of a fellow; who must be *idoneus:* and the *college* are appointed to *judge* of the idoneity; for it is said, "*neque* enim alium quem- "piam *recipi* volumus *a collegio.*" Indeed the bishop is immediately afterwards admonished to offer no other than a proper person: but still the *college* are to be the judges, even of the *bishop's* own nominee.

C. 51st. (de Visitatore) gives him power *accedere*, only *quoties* he shall be requested, &c.; and he is thereby restrained to close his visitation within fifteen *days:* and there are many *particular* powers minutely given him; *which exclude* the supposition "that he has the *general* "power."

C. 25th. (de Modestia) directs that omnes lites domesticæ *intra* collegium et cognoscantur et dijudicentur; and orders expulsion to him qui *foras* vocaverit, &c.; and refers their domestic disputes to be settled either amongst

themselves, in college; or by the resident *masters of the other colleges* particularly therein named.

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They denied that in Dr. *Bentley's* case, the expression "*sit visitator*," was the *ground* of the resolution: (which words, however, are *not*, as they observed, in the present case.) But in that case the *intent* of the crown fully appeared, *throughout*, "to give the *whole* power to the Bishop of *Ely*." Whereas here, the crown *reserves* powers to itself, of various kinds; and might have appointed *new* visitors: but there, on the contrary, the right was *perpetually* given to the bishops of *Ely*. Here, the bishop's visitatorial power is *limited* and *circumscribed*: whereas a *general* visitor might do *all that a founder* could do. Here, he cannot visit *ex officio*, in less than five years.

As to *Strange*, 797. the Bishop of *Chester's* case, as warden of *Manchester* college—they agreed that in certain cases, the visitatorial right may be suspended, and revive again. But that case, they said, was not at all like the present case.

As to the case of Dr. *Green* v. Dr. *Rutherford*—it was only a construction of a will containing a *trust*; which was not an object of the visitatorial jurisdiction. Besides, the point of judgment in that case, they said, was with them.

And they concluded, that therefore no appeal lies to the Bishop of *Ely* in the *present* case, upon the foot of its being, *in general*, ONE of the fellowships of this college. [195]

2dly. Much less does it lie in this case of an ANNEXED fellowship given by a *subsequent* foundation. The law will NOT *imply* that Dr. *Keton's* foundation is subject to any *other* visitor than himself and his heirs. An *ingrafted* foundation does not fall under the former powers, IF the annexed founder gives *other* laws.

Now this is not a *co*-foundation, but a *new* foundation.

It is not true, "that Dr. *Keton knew* the Bishop of "*Ely* to be general visitor." On the contrary, the bishop was NOT *so*, by Bishop *Fisher's* statutes: for by those statutes, the bishop had no right to interfere in the * *election of fellows*. And Dr. *Keton reserved* a power to give statutes consistent with the statutes of the college: and this right is either *still subsisting* in Dr. *Keton's* heir; or *devolved* to the crown. Now at *that time* of Dr. *Keton's* foundation, the Bishop of *Ely* had *no* right of visitation *as to* the *election of fellows*.

*Ante, p. 181. post. 196.

3dly. Here is a COMMON-LAW *redress* given: which no *visitor* can have a right to *discuss*. And the *specific remedy* is not to come from the *Bishop of Ely* at least; whatever it may be, or from whomsoever it is to come. They may

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go to a proper jurisdiction, for it. And as to the case of *Burton* v. *Pegg*; perhaps the Bishop of *Ely* was appointed visitor by Dr. *Berisford:* or the party concerned might not think proper to oppose, or not be able to oppose the bishop's proceeding. However the submission of the *college* cannot take away the *right* of the *founder*, nor the right of *this court; nor give to the bishop* a right which he has not in him.

As to 4 *Mod.* 233. *Rex et Regina* v. *The Master and Fellows of St. John's College*, and *Skinner*, 359. &c. S. C. (Dr. *Gower's* case,) and *Comberb.* 279 *S. C.* The return was not the dictum of *the college:* and such general terms were out of the case and improper. And the case of *Middleton & Ux'* v. *Croft* is not applicable. *The Register of Writs*, title *Prohibitiones, pa.* 38. is similar to this case, as to the being a common-law contract: "cum placita "de annualibus redditibus, &c. &c. &c. ad nos et coronam "et dignitatem nostram specialiter pertineant," &c.

The visitor is *bound by the deed;* and he cannot have any pretence to proceed in this case, *until* the covenants are broken, and the college have incurred the penalty: and of THIS, the courts of *common* law are to judge. If *both* jurisdictions should proceed *together*, their determinations may directly clash—therefore the common-law courts will prohibit him from proceeding at all.

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Dr. *Keton* was a PURCHASER of these two fellowships: and he reserved a *power of distress.* The requisites to his fellowships are, being a *chorister of Southwell*, if, *&c.*; and having *learning* and *morals.* If the college should fail to choose *such* persons, *&c.* they are subjected to a *forfeiture:* for which, a *distress* may be taken: this is the sanction annexed; and this is an *adequate remedy.* And upon this deed, the chapter of *Southwell* are only *trustees for* the candidate; and they would be answerable to him. And this would subject the matter to the court of Chancery, as a trust; and might also subject it to this court, as to granting a *mandamus* to admit him. And therefore, *though* the bishop should even be considered as *general* visitor of the college, yet this court would prohibit him, from proceeding in this particular affair; or at least, give the college leave to *declare* in prohibition. This court will prohibit jurisdictions who are proceeding without right; *although* they themselves cannot, perhaps, give an *adequate* remedy. However, here the founder considers the distress as an adequate remedy.

They concluded with saying that they only desired leave to *declare* in prohibition; not an *absolute* prohibition.

Mr. Just. *Foster* said he had not seen Bishop *Fisher's* statutes; which *though now* repealed, were yet in force *at the time* of this annexed foundation: and they are said

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* *to restrain* the bishop from exercising any powers relating to the *election of fellows*. Now THAT may deserve consideration, *though* these statutes should be *now* expired: for they were understood to be IN FORCE at *that* time when Dr. *Keton* made his foundation.

On the day following (*viz. Saturday*, 27*th November* 1756,) Ld. *Mansfield* said that upon looking into the papers left with him, he found it necessary, towards coming to a complete understanding either of the statutes or of the deed, "that the PRIOR *constitution* of the "college, antecedent to *both*, should be laid before the "court;" as both the deed and also Queen *Elizabeth's* statutes *expressly* REFER to this *prior constitution* of the college, and consequently must be (in some measure) unintelligible and inexplicable, unless it be also known, "WHAT that prior constitution *was*." He proposed therefore that the parties should, in the best manner they could, lay this constitution before the court; and that the case should be spoken to again in the next term: not by all the counsel arguing it over again, but by only *one* counsel on each side, who should apply themselves to *such conclusions* as might arise from such prior constitution of the college, and be applicable to Queen *Elizabeth's* statutes or to the deed of covenants.

* Vide ante 181. and 195.

The case was accordingly adjourned till next term, [197] to be then spoken to by one counsel on each side, on the *prior* constitution of the college, antecedent to Dr. *Keton's* annexed foundation and deed, and consequently to Queen *Elizabeth's* statutes likewise.

On this day (*Thursday*, 3d *February* 1757,) this case was again spoken to, by one counsel on each side.

Mr. *Yorke*, solicitor general, on the part of the bishop and Mr. *Todington*, made three questions, *viz.*

1st. Whether the bishop is not *as extensive a visitor*, under the *old* constitution, as under the *new*.

2dly. Whether the *college* are not *bound* by the *acceptance of the new* statutes.

3dly. Whether Dr. *Keton's fellowships* are not *bound* by the *acceptance of the new* statutes, *as well as the rest* of the college.

First—he insisted that the bishop is as extensive and complete a visitor under the *old* statutes, as under the *new*. This he endeavoured to make out, from the old statutes of the college. (And upon these, the question must depend.)

Secondly—the *college* are *bound by the acceptance* of the *new* statutes.

Ld. *Mansfield*—The college *will not* (most undoubtedly) agitate *that* question: for if they do, they must give

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up all their livings, &c. and all other advantages that they claim UNDER them.

Mr. *Norton*, on the part of the college, readily agreed to this; saying that they *should not* (certainly) make a question of this; having *acted* 200 *years* UNDER *these new statutes.*

Mr. Solicitor General then proceeded to his third question.

Thirdly—he insisted that Dr. *Keton's fellowships* are *bound* by the *new* statutes, *as well as the rest* of the college: for, as he has *not given new* statutes, these fellowships are to be conducted and bound by the *ordinary* statutes of the college; and the rather, for that *these* fellows enjoy all privileges, and come into the seniority, in the *same manner as the rest* of the fellows do.

[198] Mr. *Norton*, *contrà*—for the college.

This case stood over, in order to see what was the state of the college, *at the time* when Dr. *Keton's* deed of covenant was made; *at which time*, *Bishop Fisher's* statutes *subsisted.*

The bishops of *Ely* were owners, originally, of the *site* of the college; and, AS *bishops of Ely*, were *ordinary* visitors of this place: from one or both of which circumstances, they might possibly set up a right of visitation. Now Bishop *Fisher's* statutes professedly mean to obviate any such pretension; and to prevent the bishops of *Ely* from claiming a right of visitation, as *general* visitors of the college. Which position Mr. *Norton* endeavoured to prove from Bishop *Fisher's* statutes. And he said that if the statutes were to be construed otherwise, it would occasion a clashing of jurisdictions and the utmost confusion in the college. As to any power or visitation that the bishops of *Ely* may have *at common law*, he said he did not mean to dispute *that*, with them: but as to the claim of a GENERAL visitatorial power over the college, he prayed leave to *declare* in prohibition; that it might be solemnly determined upon record, and that each side might have an opportunity of appealing elsewhere, if dissatisfied with the determination of the court.

He strongly contended, that it was *premature*, to determine *now* "whether the Bishop of *Ely* had jurisdiction;" that there ought to be a rule for the plaintiffs to *declare*: that such was the course of the court, and it had not been usual to examine the matter upon *shewing cause*: *after a declaration* in prohibition, the whole would appear upon record, be solemnly judged, and the judgment might be reviewed upon a writ of error.

LORD MANSFIELD—*If* the party who applies for a prohibition has a right to declare, though the court should see *no ground for* the motion; a rule "to shew cause why

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" the prohibition should not be granted," is to no purpose; and hearing counsel upon the sufficiency of that cause is time misspent.

When the matter seems *doubtful* to the court, upon a question of fact or law, the plaintiff has leave to declare: that the parties may have the fact properly tried by a jury, or the law solemnly considered, as in a cause. [2 Hen. Bl. 95.]

When the court is clearly of opinion that there *is* sufficient ground for the prohibition, the defendant has a right to put the plaintiff to declare; that his jurisdiction may not be taken from him, in a summary way, where no writ of error will lie. But if the court be *clearly* of opinion that there is NO *ground* for a prohibition; it ought to be denied, *without* putting the defendant to expence, and delaying, in the mean time, the exercise of what appears to them a *lawful* jurisdiction. [199]

This denial is *not conclusive* to the plaintiff. *If* there is no jurisdiction, the sentence will be a *nullity*; and upon any attempt to execute or enforce it, the whole may be tried in an action. The plaintiff may also apply to any *other* court in *Westminster-hall*, for a prohibition; and take *their* opinion.

If, in cases of this kind, the court should too easily yield to hang up the matter, by letting the plaintiff declare in prohibition; redress would come too late, and cost too much.

I was very desirous, as there is no fact disputed, to go fully into the argument *now*; and if I saw no ground to doubt of the bishop's jurisdiction as visitor, to stop unnecessary *delay*, *vexation*, and *expence*.

The *subject-matter* of the complaint to the visitor is a competition for *present* maintenance and education, upon an eleemosynary foundation: the *cause* of the contention is a *controverted election*; which is too apt to engage and animate the electors.

In compassion to the candidates, and for the peace of this learned body; the dispute *ought not* to be suffered to continue longer than is absolutely unavoidable.

If the plaintiff might, *as of right*, demand to declare in prohibition, the *consequences* would be fatal, in both universities. The college, as here, (i. e. the majority, which determines the body,) would support the election they had made, and may easily keep the visitor off for years: their public stock would be applied to defray the charge: in the mean time, elections of new fellows might come on; their validity might depend upon the rights in dispute; the election of masters might come on; great abuses, in such a state of confusion, would naturally creep in; discipline could not be kept up; intestine heats and divisions would counteract the whole intention of the

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founder. The reason of a visitor would be destroyed. He is appointed and made absolute upon *this* principle, "that, in these societies, error of judgment, the chance of "partiality, or injustice, is a *less evil* than the duration "of contention:" but if, by disputing his jurisdiction without ground, his exercise of it may be protracted as long as a cause can be kept up for delay, by parties who do not regard the costs, the members of every college in both universities who complain of an injury done, must be [200] subjected to *both* inconveniences; 1st. to the law's delay, in the most deliberate method of judicial proceeding; and, at last, to the award of an absolute judge, in the most summary method of trial.

If we are clear "that the bishop *has* jurisdiction," we should do injustice in the present case, and set a bad precedent for keeping up groundless strife, if we did not *discharge* the rule. And therefore I think, the merits should be fully gone into *now*.

As to the *merits*—

[2 Durn. 310.] The 1st question is, "whether the Bishop of *Ely* is "visitor of *St. John's* college, *as to* the ELECTION *of fellows* and other officers;" (for so is the suggestion; where the averment is "that he is not visitor *in* THAT "*respect*;" and the master and senior fellows make the complaint.)

The 2d question is, "whether, supposing him to have "this power, as to the fellows of the OLD foundation, "he has also the *like power*, as to the fellows of this NEW "ANNEXED foundation of Dr. *Keton's*."

The visitatorial power, if properly exercised, without expence or delay, is *useful* and *convenient* to *colleges*. However, (be that as it may,) we must take it, as it is now *established* by law: and it is now settled and established, (since the case of * *Philips* and *Bury* in *Dom. Proc.*) "that the jurisdiction of the visitor is *summary* and "*without appeal* from it."

* Vide 4 Mod. 106. and Skinner 447. Show. P. C. 35, &.

These *foundations of colleges* are to be considered in *two views*, *viz.* as they are *corporations*, and as they are *eleemosynary*.

As eleemosynary, they are the creatures *of the founder*; he may delegate his power, either *generally*, or *specially*; he may prescribe *particular* modes and manners, as to the exercise of *part* of it. If he makes a *general* visitor, (as by the general words "*visitator sit*,") the person so constituted has all incidental power: but he may be *restrained as to* PARTICULAR *instances*. The founder may appoint a *special* visitor *for a particular* purpose, *and no farther*. The founder may make a *general* visitor; and *yet* appoint an inferior *particular* power, to be executed without going to the visitor in the first instance.

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No *technical precise* form of words is necessary for the appointment of either general or special visitor. In a case before Lord *Hardwicke*, on 21st *March* 1747, *Attorney General* v. *Talbot*, in Chancery, "the chancellor of "the university was held to be general visitor of *Clare* "*Hall, without* express words of appointment:" but it was *implied*, "from various branches of the visitatorial "power being expressly given to him; from his having "the interpretation of the statutes; and from an express "exclusion of the founder's heir." Therefore it must be collected from the *whole purview* of the statutes considered together, "WHAT power the *founder* MEANT to "give to the visitor."

Under these general rules, I will now consider the present case, as it stands upon the statutes of this college.

The foundation of this college is to be taken (as to *this* question) from the statutes of Queen *Elizabeth:* which are the *now* governing constitution of this college. These statutes *reserve* to the crown the *legislative* power: so that the case of ALTERING *the statutes* is certainly excepted: *if* such power *be included* in the office of visitor. But where *a body of statutes has been given* by the founder, I should doubt extremely, "whether a visitor *can alter* "those statutes, or *give new* laws:" (whatever may have been the notion in former times.)

ALL OTHER visitatorial power is given to the Bishop of *Ely*, by the statutes; and principally by the 2d Chap. De Electione Magistri, the 50th, De ambiguis interpretandis, and the 51st, De Visitatore; (for the *rest* of the statutes are less clear and explicit than these are, as to the proof of this point.)

His lordship then went minutely through these three statutes, and shewed that they gave the Bishop of *Ely* the *general power* of visitation: which he *specified* in many instances, and particularly in the words, "*visita-* "*tionem* hujus collegij episcopis Eliensibus *commen-* "*damus.*"

In the case of *Green* v. *Rutherforth*, in Chancery, 23d *May*, 1750, upon so much of these statutes as was *then* shewn, Ld. *Hardwicke* gave his opinion, "that the Bishop "of *Ely* was *general* visitor of this college; but that he "could *not* make new statutes; and if he should at- "tempt it, the jurisdiction would *devolve* to the king's "courts, as in the *King* v. *Bishop of Chester*, the case of "*Manchester* college, *Pasch.* the first of his present ma- "jesty."* [S. C. 1 Ves. 462.]

*V. 2 Strange 707.

More statutes are *now* shewn; but nothing arises from them, to vary this construction.

Nothing appears upon the *old* foundation or the *other* statutes, to impeach this construction.

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The visitatorial power is almost as strongly given him by the old statutes, as by the new: the difference is, that in the new statutes the ambiguous clause in restraint of the bishop's power, towards the end of the old statute De Visitatore, is *omitted.

What is there said does not restrain the power of the Bishop of *Ely*, so strongly as may at first sight appear.

* Vide ante 188. compared with 181.

The meaning of the provision seems to be, that he shall claim no right as a *co-founder*, though he was owner of the site; but only act as in other colleges, *where he is not* founder. And in colleges where he is not founder he may act under powers of visitation *delegated* to him. However, be the meaning as it may, this clause is *totally omitted* in Queen *Elizabeth's* statutes.

This is *not* the case of *expulsion*; where the master and four senior fellows are to *consent. The *power* of *judging* and giving *relief* upon *complaints* and *appeals*, is incident to the office of general visitor: and if this case related to one of the *old* fellowships, the statutes have laid the visitor under no restraint, as to the mode and manner of exercising it.

* Vide ante 181.

As *general* visitor therefore of this college, (which I think clearly the bishop is,) he would certainly have jurisdiction, if this appeal related to one of the *old fellowships*. Which brings me to the

Second point—"Whether the visitor of an *old* founda-"tion, has the *like* power and jurisdiction over a NEW "ANNEXED foundation, as he has over the *old* one."

It is a question of extent and consequence.

In this college, there are thirty-two original fellowships; and twenty-seven, upon annexed foundations.

I find that the *general method* of *ingrafting* fellowships, is by *indenture*, and *with a clause of distress*. I apprehend that this method took its rise from the old tenures by divine service, (which differ somewhat from tenures in frank almoigne:) where the donor had a power of distress, of common right, when the service was certain. (But this is only a conjecture.)

I have procured information, concerning *most* of the colleges in *Oxford* and *Cambridge*: and I find that *most of the* OLD *colleges*, in *both* universities, consist, and are made up, (less or more,) of INGRAFTED fellowships; and *ingrafted* BY INDENTURES too. And all these are considered as PART *of the old body; unless* there be any particular exception by the terms of the new foundation.

[203]

There was a case (6th *July* 1740,) of University College in *Oxford*, (founded by King *Alfred*,) where *W.* of *Durham* afterwards founded two fellowships, "de "proximis Dunelmiæ partibus." A complaint was

made to my lord chancellor, *as* GENERAL *visitor* of the college in right of the King: and it was determined *against* the college. Yet *W. of Durham* had in that case, *given no statutes himself*; but these *ingrafted* fellowships were considered as subject to the general visitor of the *old* foundation. In *that* capacity Lord *Hardwicke* took cognizance: and the college never made any objection.

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In the case of the *Attorney General v. Talbot*, which I mentioned before, the Countess of *Clare* was foundress of *Clare-hall*. One *Freeman* annexed two fellowships *by indenture*; (I do not observe there is any clause of distress in it.) The contest was for one of *these* fellowships. Lord *Hardwicke* held "that the question belonged to "the *general* visitor of the college: that *new* fellowships "ingrafted must be subject to the jurisdiction and dis-"cipline exercised over the *original* foundation."

In the case of Dr. *Green* v. *Rutherforth*, & *al.* (which I mentioned before,) both Lord *Hardwicke* and Sir *J. Strange*; expressly laid it down, "that *new ingrafted* "fellowships, if no statutes were given by the founders "of them, must follow the *original* foundation, and be "subject to the *same* discipline and judicature.

I am satisfied that, upon mature reflection, the college would tremble at the *consequence* of leaving every election into any of these ingrafted fellowships, or any other disputes concerning them, open to courts of law, and the expence and delay attending suits in them. [2 Dun. 323.]

I think clearly, that Dr. *Keton did so consider* and *intend* "that his new annexed foundation SHOULD BE *sub-*"*ject* to the old statutes and constitution of the college, "in case he himself should happen to die without mak-"ing any ordinance by will or otherwise." These fellows of his foundation are to be elected *as* the other fellows; and at the *time* limited by the statutes. They are to enjoy the *same liberties*, &c. as the other fellows. The oath they were to take during the life of Dr. *Keton*, "to obey such statutes and ordinances as should be "made by him," is qualified with this restriction, "so "*that* the said statutes should be conformable with the "statutes of the *foundress* of the said college;" which necessarily implies that they were, in the first place, to *obey* the statutes of the foundress of the college. [204]

(He explained this, by many other passages in the said indenture.)

Besides, eo NOMINE, the *ingrafted fellow* becomes *subject and liable* to the jurisdiction of the visitor *over the fellows* of the college. These *ingrafted* fellows are exactly *the same* as all the *first* of the fellows, except as to the *money* arising to them *from* the *new* foundation;

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and are intitled to *all* the *like privileges* as the *old foundation fellows* are intitled to.

The objection to the bishop's right of visiting in the present case, arises from the power of *distress* here given for the forfeiture, in case the college do not observe certain terms which are prescribed to them.

But *several other engrafted* fellowships are just in the *same* situation: and therefore it would go a great way, (in point of *consequence*,) if, upon this ground, we were to determine them NOT *to be part* of the old foundation.

These are provisions DIVERSO INTUITU. And indeed the *distress* would be a very INADEQUATE *remedy*, to the *person injured:* nor is it even *given* TO *the person injured*, but to *other* persons. So that it is manifest, that this clause of distress, given to the *church of Southwell*, ought not to take away the SPECIFIC *remedy from the* PERSON INJURED.

It seems to me very clear, that the bishop is as much judge of *this* complaint, as if it related to one of the *old* fellowships: and if it related to one of the *old* fellowships, I think the jurisdiction of the bishop, as visitor, *most evident*. Therefore, I am of opinion, that the cause shewn against this rule is sufficient: and it ought to be *discharged*.

Mr. Just. *Denison* concurred, in the whole, with Lord *Mansfield*.

He thought clearly, that the Bishop of *Ely* was *general* visitor, except in the instances particularly excepted.

No *particular technical words* are necessary to create a visitor. And so was the opinion of the court, in Dr. *Snape's* case, *H.* 2 *G.* 2. *B. R.* as well as in the case of *Philips* v. *Bury*. And the main business of a visitor, is to interpret the statutes.

[205] Now this *deed*, though with a *clause of distress, cannot* take away the authority of the visitor: it is *for another purpose*. And Dr. *Keton never meant to exclude* his scholars and fellows from the *benefit of an appeal*, which the *other fellows of the college enjoyed*. And *his* fellows are sworn *to observe* ALL *the statutes of the college*.

The distress is very little more than the *form* of the conveyance; and it is given to the *church of Southwell* too: but surely it is *not an* ADEQUATE *satisfaction* TO *the* REJECTED *fellow*, who has a right to be elected into the fellowship.

The visitor has a right to the interpretation of the statutes; and the ingrafted fellow has a right to appeal to him; and the clause of distress does *not take it away*

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from him. And there is no manner of reason why the *ingrafted fellow* should not have the *same privileges* as the *other* fellows have.

I am so clear about this matter, that I think there is no reason for suffering the party applying for the prohibition to *declare* in prohibition: but the rule ought to be *discharged*.

Mr. Just. *Foster* also concurred.

He took particular notice of the 50th chapter of Queen *Elizabeth's* statutes, about interpreting what might be ambiguous or obscure. Which statute, he agreed, does reserve to the queen a power to add or diminish, reform, interpret, declare, change, alter or dispense, &c. *But the* DOCTRINALIS *expositio* is expressly given to the *Bishop of Ely*, in the very *same* statute; and the college are thereby injoined, in virtue of their oath, and under penalty of perpetual amotion, to* obey his *determination, interpretation*, and *declaration*.

* Vide ante 185.

He declared that he had no doubt that the *general* power of visitation *is* given to the bishop; and he said, he saw no inconsistency in the statutes. As to the clause of *distress*—*That* would give no sort of *adequate satisfaction* to *this* REJECTED *fellow*; who comes for a *specific remedy* for the injury done to him. Therefore he declared his concurrence with Lord *Mansfield* and Mr. Justice *Denison*.

And *Per Cur.** unanimously
The RULE WAS DISCHARGED.

* N. B. Mr. Justice Wilmot was not present at any one part of this motion; being engaged in the court of Chancery (as one of the lords commissioners,) during the whole of it.

EARL OF BATH *versus* ABNEY, SPINSTER.

[206]
Friday, 4th February, 1757.

A CASE out of Chancery, for the opinion of this court.

The question was, whether an executor of a COPYHOLDER *for* A TERM OF YEARS, was obliged to be *admitted*; (and, consequently, liable to *pay a fine* upon such admittance.)

The executor of a termor of copyhold lands must be admitted, and pay a fine to the lord. (*a*) [Vide Vin. Cop. (I 6.) (W.6.) Strange 1042. 2 Gilb. Ten. 273. 259. 3 Leon. 9. contra.]

The manor in which the lands lay, was *Stoke Newington* in *Middlesex*; the defendant, Mrs. *Abney*, is lady of this manor; the premises demised, were 60 acres of meadow, let at 125l. per annum.

(*a*) Chancery will not compel the lord to give his tenant licence to lease. *Ch. Pr.* 572.

Custom that on payment of 10 years rent, the lord shall licence to let for 99 years; and if he will not licence, the tenant may let without, adjudged a good custom;

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The state of the case was pretty long and particular: but the question was short: (*a*) *viz.* "whether an "EXECUTOR *of a tenant for* YEARS, coming into the "copyhold, as a chattel real, under his testator's will, "is obliged to be *admitted*?" For the counsel for the plaintiff, acknowledged that the being liable to a *fine* would *consequently* follow a necessity of admittance: that is to say, they admitted that *if* he was *compellable* to come in and be admitted, he would also be compellable to pay a fine. (*b*)

The full state of the case was in substance this—

That *Henry Guy* being seised in fee of sixty acres of meadow in the manor of *Stoke Newington*, let at 125*l.* *per annum*, the said *Henry Guy* surrendered the same to the use of his will; and having so surrendered (in a proper manner) to the use of his will, he died seised in fee; having first duly made his will, and thereby devised to *John Taylour* and *Arthur Lake*, their executors and administrators for ninety-nine years, if three persons (in his said will named) or any of them should so long live; upon several trusts, (*c*) *viz.* first, to the use of the present Earl of *Bath*, for life; then to his issue male, (*viz.* first and other sons, &c.) in strict settlement; then in the like manner, to the use of the earl's brother, General *Pulteney*; then to the late Mr. *Daniel Pulteney*,

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yet the licence seems unnecessary, if there be a refusal, since it may be done without it. *Gilb. Ten.* 294.

To prove a custom to grant leases for years, it is not sufficient to prove it for thirty or forty years; but it ought to be "from time whereof, &c." *Cro. Eliz.* 381. *pl.* 3. *Sed vide contra*, 2 *Danv.* 190. *pl.* 1. *in* n.

(*a*) There were, in fact, two questions, but the second was a consequence of the first, if it was decided for the lady of the manor. *Vide post.* 218.

(*b*) The devise was made by will founded on a surrender to the use thereof; and therefore it was the same as if it had been made by surrender, as the lady of the manor or her steward made no objection to an admission for a term of years.

(*c*) The devise was to the trustees for ninety-nine years, in trust to pay life annuities, and on several trusts, not for the benefit of Lord Bath; and after the determination of the term, then to Lord Bath for life, with remainders over. On the testator's death, the trustees were admitted to the copyhold premises as joint tenants, *secundum tenorem testamenti illius*, and paid a fine of 280*l.* which is under two years and one quarter value of the estate.

in like manner: then to the use of the Earl of *Bath* in fee. And after the death of the said testator, the said *Taylour* and *Lake*, the trustees, claimed to be admitted *according to the tenor of the will*; [V. post. 213.] and were thereupon admitted according to the custom of the said manor; did fealty; and *paid a fine of* 280*l.* to the then lord of the manor on such admittance.

One of the three lives is since dead; the other two, living; and both of the said two lessees, *John Taylour* and *Arthur Lake* are dead; but *John Taylour* survived *Lake*. *Taylour*, the surviving, (but now deceased) lessee, appointed Dr. *John Taylour* and another person his executors; and Dr. *Taylour* is now the surviving executor of *John Taylour*, the original and surviving co-lessee. (*a*)

Mrs. *Abney* is now lady of the manor.

It did not appear to the lord or lady of the manor, that the lessees, *Taylour* and *Lake*, were dead, till 1752: when this fact was found by the homage.

Then the executor of the survivor, (which was Dr. *John Taylour*, the surviving executor of the said *John Taylour* the original co-lessee) was summoned to come in, and be admitted; the jury having found that the original lessees were both dead: and proclamations issued, &c. [*N.B.* The proclamation was for the *heir* of *Taylour* or other person claiming, &c. to come in, &c.]

It is stated, that the general custom of the manor is, to grant the copyholds for life, or in fee; and that no OTHER *instance* of a *grant for* YEARS, besides the present instance (now before the court,) has been known in the said manor of *Stoke Newington*. [See 2 Wils. 169.]

The case further states, that *fines* have been usually paid *upon admission*; (*b*) and that the usual *rate* of such

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(*a*) After the death of *Taylour*, the surviving trustee, Mrs. *Abney*, the lady of the manor, caused proclamation to be made for somebody to come and take the estate: whereupon the now plaintiffs, who are the remaindermen, the representative of the surviving trustee, and the two surviving annuitants, filed a bill, and upon allegation *that the trustees were admitted to, and paid a fine for the whole term, and that the representative of the surviving trustee*, has a right to be admitted without fine, (if any admission be necessary,) they prayed that the lady of the manor might be restrained from taking advantage of the forfeiture and from bringing any ejectment.

(*b*) If there be any exception to the rule, that admission universally gives a right to a fine, it is in the case of a widow's estate, or of a tenant by the curtesy; as to which, *vide Gilb. Tenures, Ed.* 1757, page 222, 223.

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fines has been a year and a half's improved rent of the premises to which the tenant is admitted.

And by the usage of this manor, the fine usually taken for two lives, is as much *and* half as much, as the fine for one life: and the fine usually taken for three lives, is as much *and* half as much, as the fine for two lives.

The two questions made upon this case, and sent to this court for their opinion upon them, were, 1st. whether the surviving executor of *John Taylour* (the surviving trustee of the *term* for ninety-nine years) ought to come in, TO BE ADMITTED tenant of the copyhold premises in question: 2dly. In case he ought, then whether the lady of the manor will be entitled to any FINE upon such admittance.

This case was twice spoken to, in this court: first, on *Tuesday*, 18*th May* 1756, by Mr. *Pratt* for the plaintiff, and Mr. *Sewell* for the defendant; and a second time, on *Friday*, 4*th Feb.* 1757, by Mr. *Norton* for the plaintiff, and Mr. *Gould* for the defendant.

[208] And the two questions being reduced into one, as is above-mentioned, (it being agreed "that if the executor "was compellable to be admitted, he would consequent-"ly be liable to a fine;")

It was argued, on the part of the plaintiff, the Earl of *Bath*, that the fine becomes due to the lord (or lady) of the manor, upon every *change of the* ESTATE; not upon the *change of the* TENANT, where there is *no* change of the estate.

For where there are several remainders, to several persons, the *admission of the* FIRST *taker* is the admission of EVERY person in remainder. 4 *Co.* 22. *b. Copyhold Cases;* and 4 *Co.* 23. *a.* Case the 6th. *Cro. Eliz.* 504. *Gyppin* v. *Bunney. Kitchen*, 122.

And here, *Taylour* and *Lake* were admitted *according to the tenor* of their testator's will: which must have been to the *whole estate* comprized in the will. And therefore

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N.B. In a manor in which the tenants held estates by copy, to them and their heirs, by the words (*sibi et suis*) for ninety-nine years, yielding a rent; and mentioned, that by a custom, the lords upon expiration of every estate, ought to renew upon reasonable fines; the lord insisted that there was such a custom to renew, but the fines were always such as the plaintiffs could agree with him for, there being no benefit to the lord, during the ninety-nine years; but the court declared that the plaintiffs on payment of two years value should be admitted to their estates. *Morgan* v. *Scudamore*, 2 *Ch. Rep.* 134.

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the *fine* must have been *proportionable* to the value of the *whole* term of 92 years: and it is against conscience that the executor of the deceased lessee should pay *another* fine for the *same* estate. Neither is he compellable to come in and be admitted afresh; it being the same estate.

And that *no* fresh admittance is necessary, nor any *farther* fine payable, appears from the case of *Dell* v. *Higden* in *Moore*, 358. and the case *Tiping* v. *Bunning*, *Moore*, 465. In both which cases it was holden and resolved "that the admittance of a tenant for life, of a copyhold, "is an admittance of him in remainder; and that no "new fine is due from him in remainder;" and in *Cro. Eliz.* 504. *Gyppyn* v. *Bunney* (which is S. C. with *Moore*, 465.) *Popham* and *Fenner* held accordingly; and that, because they have but one estate in law: and they held that ONLY *one* fine is due; which the first taker shall pay.

In 3 *Lev.* 308. The case of *Barnes* v. *Corke—Tr.* 1 *W. & M. in C. B.* it came directly in question; and Lord *Coke's dictum* in 4 *Rep.* 23 *a.* was taken into consideration, and explained to be restrained to SPECIAL customs only: but the *general* principle of law was settled to be, "that NO *fine* is due to the lord, from the remainder-"man, *without* a *special custom* for it."

And the reason is, (as *Popham* said, in the case of *Gyppyn* v. *Bunney*,) "because both have but one estate in "law, and the lord has already admitted to the *whole*:" which reasoning is quite applicable to the present case.

If a copyholder in fee grants his copyhold upon condition, and enters for the condition broken; there shall be no fresh admittance, nor fine: because he is *in statu quo prius*. *Coke's Complete Copyholder*, § 56. So, if there be two joint-tenants, and one die: the survivor needs no admittance, nor shall pay a fine. *Ibidem.* So the widow of a copyholder, for her customary free-bench: because it is part of the old estate, and is cast upon her and vested by law. [209]

So it is also in dower, and tenancy by curtesy; though there a new *tenant* intervenes.

Noy, 29. *Rennington* v. *Cole*, is full in point. Also *Hutton*, 18. *Jurden* v. *Stone*, S. C. *Hob.* 181. *Howard* against *Bartlet*, S. P. 2 *Danv.* 184. title *Copyhold*, letter M. *pl.* 1. in point. *Cro. Jac.* 573. *Waldoe* v. *Frances Bartlet Wid.* S. C. with *Hob.* 181. (but not this same point.) 2 *Ro. Rep.* 178. *Walter* v. *Bartlet*, S. C. It is considered only as an *excrescence* out of the original estate, by Ld. *Hobart*, *pa.* 181. And an executor of a copyholder for *years* is within the same reason; for it is only the *old estate* continued.

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But the case of DESCENTS may be objected: for there the ESTATE is the *same;* only the *tenant* altered.

Now it may be difficult to enter into the true reason of this. But it may be considered as a change of *estate;* and as a new grant: the lord gave a new admittance, a new grant.

But perhaps that case of descents may be an *exception* from the general rule.

There are several cases in point; for the plaintiff: and no authority against him, except *Weston's* opinion in *Dedicott's* case. *Dedicott's* case itself in 3 *Leon.* 9. is most express in point: and *Dyer*, 251. is S. C. (But *Dyer* does not mention this point at all.) (*a*) The wife's interest was

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(*a*) This case is very clearly reported in *Dyer*, and is a very strong authority against the plaintiff: for the opinion of the whole court there was (according to that report, "that the entry of the administrator of the wife, to whom "also the lord had granted the land, during the non-age "of the son, (that was during the term,) was unlawful; but "the interest which was in the wife, was a term, the "which by the death of the feme vested in the husband by the law and custom of the realm, if there be "not some private custom of the manor to the contrary." Now it is well known that the wife's term in freehold lands will vest in the husband by survivorship, if he outlives the wife in his own right; and that he has no occasion to take out administration if the term was in his possession: but if not, he must then take out administration to entitle himself to it, the same as to other choses in action. *Co. Lit.* 46. *b.* 299. *b.* 300. *a.* This, therefore, shews that the court considered the term as an interest at common law, and this was the point adjudged. The other point there mentioned, which is the same as the point in the principal case there, was probably not taken notice of; because, as appears in 3 *Leon.* 9. there was a difference in opinion about it, and it was not directly the point in judgment, though there is a strong analogy between the two points; because the husband was a new tenant, and holden to be intitled by the common law; and if the common law gave it to him without admission, though he was a new tenant, on the general principle, that a term for years belonging to the wife will vest in the husband by survivorship, there seems no reason why, since the common law will in other cases vest the term in the executors of the termor, they should be obliged to be admitted any more than the husband; for it is not like the case of joint-tenant; for the reason why a joint-tenant shall not be admitted, is, because he was before admitted generally; all the joint-tenants are expressly admitted; but if not, the administration of one is

there a chattel-interest; and she was to have it for sixteen years: and her second husband, who survived her, had it as her assignee, *without* paying any fine, or being

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the administration of all, *Co. Cop.* 40. a. 25. But that reason does not apply to the case of a feme who hath a term for years, in a copyhold, and afterwards takes husband, and dies, which is the case in *Dyer*; and therefore there is no similitude in this respect between the case in *Dyer* and the case of joint-tenants; but the case of the husband surviving and holding during the term, without any admission, is more like the case of executors, because neither the husband nor the executors claim by custom, but by common law: and as the one is not subject to an admission and fine, though he was never admitted, there is no reason why the other should be subject thereto; and *Gilbert*, in his Treatise of Tenures, *Ed.* 1738, *pag.* 272, 273. *Ed.* 1757. *pag.* 289, 290. cites the above case in 3 *Leon.* 9. and *Dyer* 251. and after taking notice that one judge differs from the other two, gives his opinion in favour of the right of the executors, to have the term without any new admittance; for he observes that opinion seems reasonable, for they continue the possession of the testator, and have it only to his use.

Before this determination, all the authorities, or at least the great weight of them, were in favour of the executors; and the principles on which other cases have been determined, are also in favour of the executors; for it was holden uniformly, if the lord hath a particular estate in the manor; if his estate determines before the expiration of the term of years for which the lease was made, and the licence granted by him, that the lease will be determined, 2 *Brownl.* 40. And the reason is, that such a lord cannot discharge the lord's interest any further than his own interest in the manor extends. *Gilb. Ten.* 299.

It is also holden, that if the lord seized in fee gives licence to lease, and the copyholder leases according to the licence, his lessee may assign or make an under-lease without any new licence, *Gilb. Ten.* 299. Though the reference there is not to the point; but the same points are mentioned as of course, though without any state of the case, or any notice taken by whom, in 12 *Mod.* 230.; and this reason is given, *viz.* "because the lord's interest was "bound for ninety-nine years."

N.B. If tenant in fee of a copyhold surrenders to one for years, it seems that he shall hold of the lord; but if the lease be made by indenture, there it seems he holds of his lessor, *Gilb. Ten.* 175. *edit.* 1757. Note also, that the lease for years was in this case, of the *Earl* of *Bath* v. *Abney*, created by devise pursuant to a surrender to the

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admitted. And in 3 *Leon*, 9. *Brown* and *Dyer* put the very present case in terms, of an executor of a copyholder for years; and agree that he shall have the term *without* admittance. And the case of *Otlery* monastery, in 1 *Leon.* 4. and 4 *Leon.* 118. S. C. (twice printed, *verbatim* alike, almost,) mentions a determination of the present question, in point: agreeable to which, is another report of it, called *Heydon's* case, in *Moore* 128. S. C. *Egerton*, in his argument, of that case of *Otlery*, vouches a case as determined in 8 *Eliz.* in *C. B.* which case is expressly in point with us. But the case *itself*, of 8 *Eliz.* in *C. B.* which he so cites, is not to be found. 2 *Danv.* 190. letter Y; mentions S. C. *Sheppard's Court-Keeper's Guide*, 5th edit. *pa.* 186. and *Calthrop's Readings on Copyholds*, 2d edit. *pa.* 67. is express in point: and so again, in *pa.* 72. tenant in dower and freebench. *Tenures* 272, 273. S. P. accordingly: (the Book of Tenures that has noname to it.) And *Comberbach*, 445. express "that the executors "of a termor for years of a copyhold shall pay *no* fine for "admittance."

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They said that the case of *Dell* v. *Higden*, in *Moore*, 358. was but a loose note: and *Cro. Eliz.* 372. which is

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use of the will; and in all such cases the estate passes by the surrender, and the will is only declaratory of the uses: therefore this case is to be considered in the same light, as if the term had been created by surrender, and consequently the termors were tenants to the lord; and therefore on the death of the survivor, a fine would be due from his executors, who would also be tenants to the lady of the manor; and wherever there is an admission there is generally a fine due: but if the lease had been created by deed, and by licence, then the termors would not have been tenants to the lady of the manor (*Gilb. ubi sup.*): therefore *Burrow* ought in this report to have stated how the term was created; and the judgment in this case ought to have been founded upon the above distinction; but as it was not, but is given generally as law, with respect to all terms for years, in copyholds, the judgment, as it appears on this report, and as it seems to have been given by the court, is not law, because it is given as law with respect to leases, whether made by deed by the copyholder with licence, or by grant by the lord; whereas in fact it is law only in the last of those two cases.*

* In the index, Tit. Copyhold, the case is put rightly; for it is there put of a grant of a copyhold, which means a grant by the lord; therefore as there put the case is right; and Qu. if in licences to lease, there are not frequently special reservations so as to prevent any prejudice to the lord? for there are in all or most I have ecu.

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a report of the very same case, does not mention any such question in it.

And as to what was cited out of the case of *Gyppyn* v. *Bunney*, *Cro. Eliz.* 504. and *Moore*, 465, they said it was no more than a dictum of *Popham's*.

Then, *if* the executor is *not* obliged to be *admitted*, no *fine* is due: for no fine is due, BUT UPON *admittance*.

But the inconvenience may be objected, "that a lord "may be stripped of his inheritance, by copyholder's "surrendering for *long* terms (as even for a term of 1000 "years:") and so the lord might lose his fines.

But, 1st. This inconvenience does *not really* exist at present: and, 2dly. The lord might in *such* case *refuse* to admit; and could not be forced to it, either in law or equity. [Vide 2 Vern. 321. contra *cæne semble*.]

2 *Bulst.* 336. *Foorde* v. *Hoskins*, proves "that the copy-"holder cannot bring an action at *law*." (It is a most express determination in point.)

And in *equity*, they would not assist the copyholder in *such* an attempt. *Comberb.* 445.

The present case is a lease to *two* persons, for 99 years determinable upon three lives: in which, the fine might easily, in *fact*, be settled by a *proportional computation*, if it could be done *by law*.

The copyholder derives his estate, *not* from the lord, but from the *custom* of the manor: for a lord who is only tenant for life, may admit in fee.

And "that the lord would *not be bound*, either in law or "equity, to admit, upon a surrender by a copyholder in "fee, for 1000 years," *Comberb.* 445. * expressly proves; "and *also* proves "that in such a case, an *executor* shall "pay NO *fine* for admittance:" which, it must be supposed, was taken down by the reporter, as Lord *Holt's* opinion. (*This is no part of the case of *Sandwell* v. *Sandwell*; but manifestly, a quite distinct case; probably, at *nisi prius*.) [211]

The lord's interest in his fine is sacred: an act of parliament shall not be construed so as to deprive him of it. (*V. Manwood's Diversity*, in *Moore*, 128.)

It would be very hard on our side, if a year and a half's rack rent was to be paid upon every charge of an executor.

Therefore they prayed a certificate in the plaintiff's favour.

On the part of Mrs. *Abney*, lady of the manor, it was agreed, that, in this particular case, the fine and the admittance must depend on *each* other; i. e. that *either both* might be required, *or neither could*.

But it was said that the reason of admittance, in general, depends upon the relation that subsists between

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lord and tenant: and that the *admission* of the tenant, in these cases, was *personal* to the tenant himself only; and the *estate* depended upon the will and pleasure of the lord. He might originally admit *whom he pleased*, on the decease of a tenant. Indeed, at length, a *sort of claim* in the heir at law, to succeed to his ancestor, became established by *custom*. However, a *great deal* STILL *remains* in the lord's power and discretion: and the tenure is still (strictly) at the *lord's will*.

It was always necessary that the new tenant should *personally appear*: and it so remains still, to this day; he must pay his fine, and do fealty *in person*. *Co. Copyholder*, § 19. and 4 *Rep.* 22. *b.* &c. to the like effect.

And they forfeit, if they grant leases without licence. 4 *Co. Copyhold Cases.* 9 *Rep.* 76. *a. Combe's* case.

And they must be persons *capable* of being admitted: for it is impossible to admit one who is *incapable* of admission.

Now *no man* is heir or executor to the tenant *during* the tenant's life. Therefore the thing itself is impossible, "that the admission of the first tenant should be an admission *of* THEM *also, as* heir or executor to such first "tenant."

[212] The "change *of* ESTATE, and *not* of tenant, cannot be "the *true ground* of the fine to the lord." For that notion would let in many inconveniences: and it would be most unreasonable that one *single* fine to the lord should answer to *all* changes of the tenant.

The remainder-man may be tenant for *one* purpose; *not* for another. *Co.* 4. *Rep.* 23. *a. b.*

Admittance *precedes* the fine; and is the *cause* of it. It is necessary, in order to intitle the lord to a fine. And this appears to be the sense of the legislature, by 9 *G.* 1. *c.* 29. "An act to enable lords of manors more easily to "recover their fines, &c." And upon admittance, a fine is due. And 1 *Mod.* 102 & 120. *Blackburn* v. *Graves*, proves that the lord shall *still* have his fine; *although* the admission of the particular tenant *be* the admission of the remainder-man. It does not follow, that because the estate is *vested*, therefore there shall be *no* admittance or fine: for upon *descents*, (where there is no doubt but that a fine is payable,) yet the estate *is undoubtedly* VESTED *in the heir*. And *Coke's Complete Copyholder*, § 56. * *page* 63, is express in point "that he in remainder shall "be admitted, *and pay* a fine; *although* his estate was "vested by the admittance of the tenant for life."

* Vide 3 Keble, 269. 329. S. C.

In the case of *Barnes* v. *Corke*, 3 *Lev.* 308, the principal question, they said, was upon the *forfeiture*: and that the other points were only * *incidental*. (But the 1st point was (in terms) "whether a fine was due.")

In the case just now mentioned, stiled *Batmore & ux'* v. *Graves*, in 1 *Ventr.* 260. Or * rather *Blackburn* v. *Graves*, as it is called in 1 *Mod.* 102 & 120. S. C. It was determined "that the admission of tenant for years "was an admittance of him in remainder, and occasioned "a *possessio fratris*:" and it is there resolved, that the admission of the tenant for years, though it is an admittance of him in the remainder, yet shall NOT *prejudice the lord*, as to the fine from the *remainder* man. And 1 *Ventr.* 260. is express and plain, "that the remainder-"man *must pay* a fine, *when* his estate comes *in esse*."

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*Vide 3 Keble 263, 329. S.C.

Indeed, where the WHOLE fine *has been already* PAID to the lord upon the *first* admission, there is no reason why it should be paid *over again*: and the remainder man is in fact admitted, in *such* case. But where the fine is NOT paid for the WHOLE, upon the *original* admission; there, the remainder-man must *pay* a fine, and must be admitted. (*V.* 1 *Vent.* 260. and 1 *Mod.* 120. where this matter seems to be put upon a right and reasonable foot.)

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If the remainder-man dies during the life of the tenant for life, *his heir* shall be admitted and must pay a fine. Therefore the payment is for lives *in being*; and the fine is payable upon the change of the *tenant*: and the admittance *does not extend* beyond the PERSONS of the tenants admitted. They are *still* only tenants at WILL. *Co. Copyholder.* § 14. § 32. § 41. expressly, 4 *Rep.* 22. *b.* S. P. in point, accordingly. And the estate is only vested in the tenant *personally*.

In the present case, the persons originally admitted, prayed to be admitted "*according to* the tenor of the "testator's will;" and it was granted to them, according to the custom of the manor: there is nothing said of *their executors*. And they were admitted *as trustees*, and not for their own benefit: and their admission was only *personal*.

The admittance of an *heir* is very different. *Compleat Copyholder*, § 41. 4 *Rep.* 22. *b.*

The *heir* has very considerable interest, *before* admission; yet *he* must be admitted.

As to tenants *pour autre vie*, they shall be admitted, and pay fines. *Co. Copyholder*, § 56.

All who allow of a *general* occupant, say *he* must be admitted: and there is no doubt but that a *special occupant must* be admitted and pay a fine.

[There can be no general, though there may be a special occupant of a copyhold. 1 Rol. Abr. or 3 Vin. Cop. (P). 2 Bl. Rep. 1148. 16 Vin. 69. pl. 8.]

Wherever a right is transferred, upon *death*, there must be an admittance.

A termor may die *intestate*, and have *no* administrator; or may make a will, and the executor *renounce*: and shall the lord have *no* tenant? Surely in these cases, the lord shall not be *without* ANY *tenant at all*.

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An *assignee* of a term shall pay a fine; so, a *devisee* of a term; indeed, *every new tenant* shall pay: A *mortgagee*; an *assignee* of a bankrupt; the *heir of the assignee*; in short, *wherever* there is a *change of* TENANT.

If it depended upon the change of *estate* only, an estate in *fee* would NEVER pay.

Dedicott's case is strong for the *defendant*.

Dyer, 251. explains 3 *Leon*, 9. The husband, it appears by *Dyer*, was not the personal representative of his wife: for she had an administrator, appointed by the ordinary. In 3 *Leon*. 9. there was, *as* he reports it, an *obiter dictum* of two judges, indeed; but contradicted by another. In *Dyer*, it appears that the husband held in, in right of his wife: and the dispute was between the wife's administrator, and the husband. The husband was possessed jointly with the wife, on his marriage; and he only *continued* in possession. *Executors* may be considered *as assignees*, (the rather as copyhold estates are not assets:) but the husband could not, in this case of *Dedicott*, be considered as assignee. In 5 *Rep*. 18. *a*. Lord *Coke* cites 29 *E*. 3. 48. and 30 *E*. 3. 14. *Simpkin Simeon's* case; by which it appears "that the baron is *not assignee* to his "wife;" in *Dedicott's* case, there was *no transmission* of estate. It is like the case of *joint-tenants*; where the survivor shall not pay. *Co. Copyholder*, § 56.

Calthrop's Reading, 67. is plainly the same case with 3 *Leon*. 9. and *Dyer* 251. *Hauchet* v. *Rose*; as appears by the margin of *Dyer*, and by the end of the case itself too. It is only a scrap, out of *Leonard*.

As to the case of *Otlery* monastery, reported in *Moore* 128. and in 1 *Leon*. 4. and 4 *Leon*. 117. (S. C. in terms) and the case of 8 *Eliz*. there cited by Mr. Solicitor General *Egerton*; there was no question between tenant and lord: and *Egerton* plainly means *Dedicott's* case, and the dictum there mentioned. For *Dedicott's* case was in *C. B*. and was in 7 *Eliz*. according to 1 *Leon*. 9. and *H*. 8 *Eliz*. according to *Dyer*.

As to *Noy*, 29. *Rennington* against *Cole*—the custom of the manor was for the wife to hold *durante viduitate*: and the wife's estate *durante viduitate* was "but a *branch* "of the *husband's estate*," (*as is rightly there said Hobart*.)

As to *Hob*. 181. the case of *Howard* v. *Bartlet*,—the same custom is stated: and the husband's estate was holden not to be merged; and the last-mentioned case, of *Rennington* v. *Cole*, was there taken notice of and cited by Lord *Hobart*.

As to *Comberb*. 445. it is a mere short, loose, *nisi-prius* note: neither the book itself, nor this note in it, are of any authority. And *non constat whose* opinion it is, that the note mentions. If it were good law, it would render

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all family-settlements ineffectual: for he asserts "that "the surrender may be for a thousand years, and that the "executor shall pay no fine." At this rate, the granting copyholds for terms of years would be, in effect, infranchising them.

We are not now upon any *special* custom of a manor; but upon the GENERAL *custom of manors*: Therefore the cases upon *particular* customs are not applicable to the present. The collateral qualities of dower, freebank, *&c.* are not incident to copyholds; but depend upon special customs. In *this* manor, the fines are uncertain: [2 Wils. 163.] but one year and a half's value of the nett year's rent has been *generally* taken, for one life; two years and a quarter for two lives; and for three lives, half as much more.

And regard ought to be had to the fine paid on the last admittance.

This estate was of the value of 125l. *per ann.* when the two tenants *Taylour* and *Lake*, the first lives were admitted; and the fine paid (*viz.* 280l.) * answers to the two lives admitted, according to the abovementioned rule: and the length of the term is of no consequence. *These two* persons therefore were the tenants: *after their* death the lord has *no* tenant: it makes no difference, whether the admittance be for *lives:* or for a term of years *determinable on lives.*

	l.	s.
* 1 year	125	0
½ a year	62	10
1 year & ½	187	10
½ of a year	93	15
2 years & ½	281	5

Upon the usage stated on this case, a proportionable sum is to be paid for a fine, according to the number of lives. And this is a just rule, and the best rule: and it is better to keep to *this* rule, than to form a *new* rule, upon a suit in equity "to compel the lord to admit."

The point turns merely and entirely upon the change of *tenant.* If it were otherwise, lords of manors, nay even jointured ladies of manors, might make voluntary grants, and incumber their posterity, *ad libitum.* The lady of *this* manor is lessee under a prebendary: and consequently, such lessee (though she were only so for one year) might admit for 500 years, without any fresh fine, upon *their* principles; and so *defraud* the original owner of the manor in fee. It would take it out of the restraining statutes of Queen *Elizabeth.*

The first admission was in 1709; (*viz.* the admission of the two lives who were admitted according to the tenor of the testator's will.)

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REPLY, on the part of the plaintiff.

The dispute between us is, "*upon* WHAT *principle fines* "*are due* to the lord."

They say, "on the change of *tenant*;" we say, "on "the change of *estate*, only."

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They argue the admittance to be *personal*; and urge it, from the doing *fealty*, at the time of admission.

We agree, this was so *originally*: but we say the admittance is not always personal, *now*. The cases of dower, and of tenant by curtesy prove this: for *neither* of *these* tenants appear personally, or do fealty. And the case of *Barnes* against *Corke*, in 3 *Lev.* 308. alone proves the same thing.

And Ld. *Coke*, in his *Copyholder*, agrees "that the *heir* "would not need to be admitted, if it were not on ac-"count of the lord's fine."

And all the remainder-men are admitted under the original admittance, till a descent: but we agree that *whenever* a DESCENT happens, the lord *shall* have a fine.

The gradual diminution of fines, on admitting for several lives, seems to shew that only one fine is due; and that that fine is payable on the *first* admission. (*a*)

The case of an *occupant pour autre vie*, is a NEW *estate*: for the old estate is gone; though the grantor is *estopped* to take against his *own* grant, (which extended beyond the life of the grantee himself.)

As to the *assignee of a term*—he can only come in by surrender and admittance: which is a *new estate*: and he can have *nothing* TILL *admittance*.

So, in case of a *mortgage*, the mortgagee comes in *under a surrender*: which makes a new *estate*.

So, in case of an *assignee of a bankrupt*. And the act of parliament of King *Jac.* 1. requires the assignees coming in thus: it takes express care of the lord's interest. (*V.* 13 *Eliz. c.* 7. 1 *J.* 1. *c.* 15. 21 *J.* 1. *c.* 19. and also *Co. Copyholder*, § 56. *pa.* 62 at the very bottom.)

The case of a *devisee*, is likewise undoubtedly a *new* estate.

[217] And in case of the executor's renouncing, or of no administration being taken out, still the lord will *not lose* his fine.

(*a*) The lord may set a fine for the particular estate, and another for the remainder. *dub.* 1 *Vent.* 260.

But there ought to be a special custom, otherwise a fine is not due for a remainder, per two judges, 3 *Lev.* 308.; *per ib. Cro. El.* 504. And if another fine is set for a remainder, it is only half. *Kit.* 122. *b.*

And it need not be paid till the remainder comes into possession. *Per Wild*, 1 *Vent.* 260.

If a copyhold be granted to A. for years, who dies during the term, the executor shall be admitted, and pay a fine. *Per Weston*, 3 *Leon.* 9. 2 *Com. Dig.* 392.

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In case of a woman's *free bench*, there is a change of *tenant*. So in a tenant *by curtesy's* case.

As to the case in *Dyer*, 251. the husband is a *new tenant*, it is true? But the *estate* is the *same*.

Just so here, in the case of an *executor*, the ESTATE remains the *same*.

Probably the case mentioned by Mr. *Calthrop is* the same case with that in *Dyer*. But still Mr. *Calthrop's opinion* stands uncontradicted, and it is confirmed by Lord Ch. J. *Holt's* dictum, and by the *Winures*, and by *Danvers*. (*V. ante*, 210.)

As to the *quantum* of the fine—they say the original fine was taken *only* as an equivalent for *two* lives; and that therefore *another* ought now to be paid, as an equivalent for a third.

But the fine usually taken in this manor, where a third life is added to two former ones, is *only* the fine upon two lives, *and* HALF *as much more*.

N. B. The fine for two lives, is the sesqui of that taken for one; and the fine for three is sesqui of that taken for two; by the usage of this manor. Vide 207. ante.

Whereas they *now* demand a WHOLE fine: and they might just as well demand it, if only a few years of the term remained unexpired.

As to the *inconveniences*, the lord *cannot* be compelled to admit, either by law, or in equity, without the tenant's paying a reasonable fine to the lord.

And a *temporary* lord *can never infranchise* the tenants' estates, *by collusion*: for that would be a VOID *grant*, and would be considered as a *voluntary* admission, which would not prejudice the capital lord.

This is owing to the modern fashion of introducing long terms unknown to our ancestors and to our old law: which none but the parliament can change.

Perhaps it would be no bad policy, if *all* copyholds were infranchised. However, though a lord *may* grant a copyhold for a term of years, yet he is *not compellable* to do so: it is voluntary; the lord is NOT *obliged* to admit for *term of years*. (*a*)

(*a*) The husband is seised in right of his wife of customary lands in fee, and he and his wife by licence of the lord make a lease for years by indenture, have issue two daughters, and the husband dies; the wife takes another husband, and they have issue a son and a daughter, and die; the son is admitted to the reversion, and dies without issue: by *Manwood*, that reversion shall descend to all the daughters; for the estate for years, which is made by indenture, by licence of the lord, is a demise according to the common law; and according to the nature of the demise, the possession shall be adjudged, which possession cannot be said possession of the copy-

1757. EARL OF BATH v. ABNEY.

Here they are admitted "*according to the tenor of the* "*will:*" for *so* they pray it; and their *prayer is granted.* (*V. ante* 206.)

The law is clear, "that no *admission* of the remainder-"man is necessary."

And there are no inconveniences attending such a determination but what the lord himself may obviate.

The court took time to advise; and, after advising, to certify.

And, about a fortnight after the end of this term they gave their certificate: which is here subjoined.

N. B. What is said by *Hales* and *Wylde*, in 1 *Mod.* 120. and 1 *Ventr.* 260, seems to be the justice of the case.

The OPINION of the court of King's Bench on the case stated, upon the following questions, *viz.*

1st. Whether the surviving executor of *John Taylour*, (the surviving trustee of the term of ninety-nine years,) *ought* to come in, to be *admitted* tenant of the copyhold premises in question?

2d. In case he ought, whether the lady of the manor will be intitled to any *fine* upon such admittance.

Having heard counsel on both sides, and considered of this case, we are of opinion "that the surviving "executor of *John Taylour*, (the surviving trustee "of the term of ninety-nine years,) OUGHT *to* "*come in to be admitted* tenant of the copyhold "premises in question; and that the lady of the "manor WILL *be intitled to a fine* upon such ad-"mittance."

MANSFIELD.
T. DENISON.
M. FOSTER.
J. E. WILMOT.

24th *February* 1757.

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Saturday, 5th Feb. 1757.

SIR JOHN TRELAWNY, Bart. *versus* BISHOP OF WINCHESTER.

Hil. 26 *G.* 2. Roll. 868.

(*Lord Commissioner* Wilmot *absent in Chancery.*)

Bishops may grant ancient offices with the ancient fees. [S. C. Burn's Ec. L. 2d vol. ed. 1781, p. 341.]

IT was an action of debt for 600*l.* for five years salary of several offices, *viz. great or chief steward to the bishoprick,*

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holder; for his possession is customary, and the other is mere contrary, therefore there shall be no *possessio fratris.* But if one had been the guardian by custom, or the lease had been made by surrender, there the sister of the half blood should not inherit. And *Mead* said, the case of the guardian had been adjudged, 4 *Le.* 38. *a.* 103. 7 *Vin.* 585. *pl.* 35.

and all its castles, lordships, manors, &c.; and *conductor of the men and tenants of the bishop thereof*; with a salary of 100*l. per annum*; and of master *keeper or preserver of the wild beast in all the forests, parks*, chases, and warrens belonging to the bishop, and chief governor of all birds, fish, and beasts of warren, &c. (commonly called *chief parker*;) with a salary of 20*l. per annum*: which offices and salaries were granted to the plaintiff by Sir *Jonathan Trelawney*, bart. late Bishop of *Winton* by letters patent, with clause of distress if unpaid.

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The bishop pleads the § statute of 1 *Eliz. c.* 19. And also that the offices aforesaid are *not ancient* offices of the bishoprick, nor were *usually granted for life*; and that the said fees are *not the ancient fees*; and that the said offices are *useless and merely nominal*, and *no duty or service* to be done for or in respect of them; and that the grants are grants of hereditaments parcel of the possessions of the bishoprick, &c.

§ See the last clause of that statute, which he pleads verbatim, as infra, 220, and 221. [See also 10 Vin. 217. pl. 8.]

The plaintiff replies that they *are ancient* offices; and the fees, the *ancient fees*; and that they have been *usually granted for life*: *absque hoc* that they are *useless and merely nominal*.

The bishop rejoins that the offices *are useless and merely nominal*, and without any duty or service to be done for or in respect of them; in manner and form as, &c. and issue is joined thereon.

The special verdict finds, that the offices of *chief steward*, and of *conductor* of men and tenants of the bishoprick, ARE ANCIENT *offices* of the bishops; and HAVE *been* ANCIENTLY AND USUALLY *granted for life*, with an annuity; and that the annuity of 100*l.* is *the* ANCIENT FEE.

That the same were granted to the plaintiff, by *Jonathan* late Bishop of *Winchester*, on the 4th *July*, 10 Queen *Anne*: which grant was *approved* by the dean and chapter, and *confirmed* by them.

That the plaintiff thereby became seised, and is still seised thereof: and RECEIVED *the annuity* during the life of *Jonathan* late Bishop of *Winton* (the grantor,) and of his successor *Charles* (*Trimnel*,) and of his successor *Richard* (*Willis*,) and also *during the* FIRST ELEVEN *years* of the *present* bishop's time (Dr. *Benjamin Hoadly*;) and that five years annuity, ending at *Michaelmas* 1751, remains unpaid. [220]

Then they find (verbatim) the* private statute of 1 *Eliz. c.* 19. (See *Moore's* Reports 107; and *post.* 221.) By the last clause of which act, "all gifts, grants, &c. made "by any archbishop or bishop, of any honors, castles, "manors, lands, tenements, OR OTHER *hereditaments* be- "ing part of the possessions of his archbishoprick or "bishoprick, or united, *appertaining or belonging* to any

* It is No. 48.

1757. TRELAWNY v. BISHOP OF WINCHESTER.

" of the same archbishopricks or bishopricks: to any " person or persons, bodies politic or incorporate, (other " than to the queen's highness her heirs and successors:) " *whereby any estate or estates shall or may pass from the* " *said archbishops or bishops* or any of them, (other than for " the term of twenty-one years, *or* THREE *lives*, from " such time as any such lease, grant or assurance shall " begin, and whereupon the old accustomed yearly rent " or more shall be *reserved and payable* yearly during " the said term of twenty-one years or three lives;) " shall be *utterly* VOID and of none effect, to all intents, " constructions and purposes; any law, custom or usage " to the contrary in any wise notwithstanding."

That these offices, at the *time of the making* of this act, and *now*, are MERELY NOMINAL, and NO *duty* attendance or service to be done for or in respect of them or either of them; in manner and form as the bishop has alledged.

But whether, *&c.*

As to the *other* office (of *master-keeper* of all the beasts in the parks, or *chief parker*,) they find that *that* is NOT *an* ANCIENT office; and that the bishop for the time being hath NOT *anciently and usually granted* it, nor the annuity for the life of the grantee; and that *that* office also was, at the time of making the act, and still is an office MERELY NOMINAL; and that *no duty*, service, work, labour, attendance or business ever was or is, *&c.*

The question upon this special verdict, was, "whether " Sir *John Trelawny*, the grantee, was entitled to hold " the two first mentioned offices, and to recover these " arrears against the *present* bishop." As to the last mentioned office (of chief parker) the facts found by the special verdict made an end of any question concerning it; and the point was given up.

[221]

This case was first argued, upon *Tuesday* 27th of *January* 1756, by Mr. *Salusbury Brereton* for the plaintiff, and Mr. *Pratt* for the defendant.

Note, Sir *John Trelawny*, the plaintiff, * *died* during the time of the first argument: but as the demand was for arrearages, this event did not prevent the court from proceeding to hear the arguments.

* 8, 9 W. 3. c. 11. s. 6. relates only to plaintiff's or defendant's dying after interlocutory judgment, and before final.

On *Tuesday*, 1st *February* 1757, it was again very fully argued by Mr. *Norton* for the plaintiff, and Mr. Solicitor General (*Yorke*) for the defendant.

Lord *Mansfield* said he was ready to give his opinion *now*: but as Mr. Justice *Wilmot* had heard the first argument, he chose to report to him what had passed upon this, and to know his sentiments, before judgment should be given: and therefore ordered it to stand over till *Saturday* then next.

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And, this day, his lordship gave the resolution of the whole court; after having first stated the case, to the effect as above, &c.

Lord *Mansfield*—at *common law*, a bishop, *with the confirmation* of his dean and chapter, might exercise *every act of absolute ownership*, over the revenues of his see; and *bind his successors*, as much as tenant in fee can bind his *heirs*.

By the *statute* of 1 *Eliz. c.* 19. "All gifts, grants, feoffments, fines and other conveyance, or estates, FROM "the first day of that parliament, had, made, done or "suffered, or to be had, made, done or suffered, by any "archbishop, or bishop, of any honours, castles, manors, "lands, tenements, or other hereditaments, being *parcel "of the possession* of his archbishopriek or bishoprick, "or *united, appertaining or belonging*, to any of the same; "to any person (other than to the queen, her heirs or "successors;) *whereby any estate should or might pass* from "the archbishop or bishop, OTHER *than for the term of "twenty-one years, or three lives*, from such time as any "lease, grant or assurance shall begin; *and whereupon "the old accustomed yearly rent or more*, shall be reserved, "payable yearly during the said term of twenty-one years "or three lives, shall be UTTERLY VOID, any law, "custom, &c. notwithstanding."

Patents of grants of offices, with fees, salaries, or profits annexed to them, are *not mentioned* in the act: there are no general words adapted to the case of *offices*. And yet, there was not a single bishoprick, at that time, *without* some office *granted*. [222]

Had the legislature meant to restrain the *re-granting* them, as they should drop in, it must have been done by a *special provision*, with an *exception* of some, *at least of judicial offices*. As the *general restraint* is *not extended* to the case; there was no occasion to make *exceptions*.

[Contra Noy, 153. which seems to be reasonable: the law however is contrary to to Noy.]

CONTINUING *ancient offices*, with the *ancient fee*, in the *usual* manner, was *not a dilapidation* of the revenue of the bishopriek. Every bishop left this power to be exercised by his successor, *as* his predecessors left it to be exercised by *him*. *Such* grants bring *no new charge* upon the bishoprick: which only remains liable to the *same fees or salaries*, to which it was *liable before*.

The act has *no retrospect*, as to any charges or incumbrances whatsoever, brought upon the revenues of the bishoprick, *before* the first day of that session (23 *January* 1558.)

So little were OFFICES thought within it, that the Bishop of *Ely*, on the 20th of *April* 1558, made a *new grant* of the *office of keeping his house and garden*, (which was *never granted before*,) with a fee or salary of 3*l*. a year.

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This came in judgment in *H.* 10 *Eliz. Ro.* 758. as cited in *Ley* 78. * It was holden *good;* because the office was thought to be a *necessary office*, and the *fee reasonable.* Which is the proper measure whereby to judge, "whether it was an *indirect* alienation, under *colour* of a "new grant:" though it was extraordinary, to hold this office necessary, or the fee reasonable; or indeed, to imagine that any office could be *necessary*, which *never existed before.* (*a*) However, that determination has been esteemed good, and acquiesced in.

The next case was in *Trinity* 30 and *Hilary* 31 *Eliz.* (cited in 10 *Co.* 61. *b.* and *Ley* 72 & 75.) The Bishop of *Chester* granted five marks for life, *pro concilio, &c.* to *Bolton:* and *Bolton* averred that his predecessors had granted reasonable fees, but did not aver this fee ever to have been granted *before.* The opinion of the court was against the plaintiff; so he never had judgment: and the † reason of the opinion was, "that this was a voluntary thing, "and *not an office.*"

At last, in the 43d of *Eliz.* the *true distinction* seems to have been taken, in *Ley* 75;) where the Archbishop of *Canterbury* granted the office of surveyorship, with the ancient fee, *and more:* it was holden void, *on account of the* NEW *addition.* That *was* an injury to the successor.

[223] In the first year of the reign of King *James* the first, the legislature had this act, and the subject matter of it, under consideration. The 1 *Jac.* 1. *c.* 3. extends to the *king*, that restraint which the first of *Eliz.* laid upon grants made by a bishop to a *subject.* But *though* questions had arisen upon grants of offices; *though*, in fact, during the whole long reign of Queen *Elizabeth*, the bishops had regranted their ancient offices as they fell in;—*yet*, the legislature did not interpose; and therefore meant that *this power should continue.* They were satisfied with the distinction of the Archbishop of *Canterbury's* case, in the 43d of *Eliz.* "that no *new* charge could be brought upon "the see."

[A grant of a new office is within the prohibition of the stat. 1 Eliz.]

From the 10th of *Eliz.* (the time of the Bishop of *Ely's* case,) to this day, no grant of a *new* office, with a *new* fee, ever was held to be good. *Such* a grant is within the meaning of the 1st of *Eliz.* by construction; because it is a *colourable alienation;* and under that pretext, the whole statute might be *evaded.*

* Moore, p. 88. reports this case (though he calls the plaintiff Howse, and the mansion Downham,) as of the same term, 10 Eliz. rot'lo 758. But in Cro. Car. 48. it is cited as of H. 10 Jac. ro758. And 2 Brownlow, 137. reports it as of M. 9 Jac. 1611.

† Ley, 75.

(*a*) These might be the reasons, but not mentioned to be so by *Moore*, nor clearly so mentioned in *Ley* 78. The record of the case is *Bendl.* 182. by the name of *Hawse* and the Bishop of *Ely.*

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From the 1st of *Eliz.* to this day, there is no case, where the *re-grant* of an *office in being before the first of Eliz.* in the *usual* manner, with the *ancient fee*, was adjudged to be within the restraint of that statute.

If these grants are not within the statute, but stand as they did at common law; the *utility* or *necessity* of them can never be material. A bishop, at common law, with the confirmation of his dean and chapter, might bind his successors by grants from which they could have no benefit.

There is no case since the 10th of *Eliz.* that has judicially turned upon the *utility* or *necessity* of the office: the only question has been "whether the grant was agreeable "to the *usage* before the first of *Eliz.*"

The Bishop of *Salisbury's* case (10 *Co.* 58. *b.*) *T.* 11 *Jac.* 1614, came before the court upon a demurrer. It is not alledged in the pleadings of either side, "that the office was "or was not *necessary.*" The plea in bar to the avowry was, singly, "that the office *never* was granted *before*, beyond "*one* life:" and the grant was holden good. In the 5th resolution, * it was resolved "that the grant of an *ancient* "*office* to one, with the *ancient fee*, by a bishop, shall not "bind his succcssor, unless it be confirmed by the dean and "chapter: (*a*) for SUCH grants are *not*, as appears before, re-"strained by the statute of the first of *Eliz.*; (*b*) and there-"fore *remain at the common law*; and by consequence *ought* "*to be confirmed* by the dean and chapter." If so, the *utility* or *necessity* of the office was not at all material: for, by the *common law*, the utility or necessity of an office was *no* requisite towards rendering the bishop's grant of it (confirmed by his dean and chapter) good and valid.

* 10 Co. 62. a.

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The Bishop of *Chichester's* case,* in *Cro. Car.* 47. and

* Gee, Bishop of Chichester v. Freedland.

(*a*) Confirmation is necessary.

(*b*) This is but half reasoning; because if such grants are within the 32 *Hen.* 8. *c.* then if made with the requisites of that act, they would be good without any confirmation, if they were not restrained by 1 *Eliz.*; and therefore the statute of *Hen.* 8. remained in force as to such offices, supposing they were made agreeable to it.—But Qu. Why such offices as have been immemorially, are not within 1 *Eliz. c.* 19. as they were resolved to be, *Cro. Eliz.* 259.? And the judgment there was affirmed in *Dom. Proc.* in *May* 1641. And the reason given in *Cro. Car.* for the resolution appears there to have been, that "they "are within the words and the intent of the statutes; "for they be hereditaments, and appertaining unto them:" and note the very words of 1 *Eliz.* c. 9. are "manors, "lands, tenements, or *hereditaments*, part of the posses-"sions of, OR *united*, appertaining or belonging to any "the archbishopricks or bishopricks."

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Ley, 71. (2 *Car.* 1. *Anno Dom.* 1626.) came before the court upon a demurrer too—There is no allegation in the pleadings on either side, as to the office being *necessary*, or not: the question turned *solely* upon the *addition* of a *new fee*.

The case of the register of *Rochester*, in *Cro. Car.* 557. *Hil.* 14 *C.* 1. *Anno Domini* 1638. came before the court upon a special verdict. There is not a word as to the office or reversionary grant being *necessary*: but it is found to have been *usually* granted in reversion; and *therefore* the court adjudged such a grant in reversion to be good against the successor.

† Young v. Fowler, Cro. Car. 555. March 98. 2 Bro. Abr. 153. pl. 7, 8. 154. pl. 5. See also Sir the case, for

William Jones 311. Yonge v. Stowell, Tr. 8 Car. (in an action upon disturbing the plaintiff in the same office.) S. P. accord.

Thus stood the construction of this statute, upon the reason and words of the law, practice, and judicial determinations. But it happened that, *besides the real ground of the judgment*, in the Bishop of *Salisbury's* case, they echoed the *reasoning* of the Bishop of *Ely's*, *without distinguishing* the essential difference between the two cases; and* laboured to prove, "that the office was *neces-* "*sary*."

* V. 10 Co. 61. a. b.

Under the great authority of the reporter, the same reasoning is repeated in the subsequent cases; and where the grant is good, because it was *warranted by the usage* before the 1st of *Eliz.* they needs must, *ex abundanti*, labour to shew, "that the office is *necessary*;" by arguments so inconclusive, and so contradictory, that one is sorry to read, or repeat them. "It is necessary "to grant for one life; but not necessary to grant for "two, or in reversion:" And then, "it is necessary to "grant in reversion; that when the first life drops, "there may be another immediately to fill the office." Whereas in *real truth*, few of these patent offices (except the judicial) are *useful*, or *necessary* in *any* sense: fewer are necessary, or even expedient, to continue *beyond* the bishop's *own* time: none necessary (by any colour of argument) to be granted in *reversion*, or for *more than one life*. But if they *existed before the* 1st *of Eliz.* they are NOT *within* the statute, they are governed by the *common* law; and *therefore* grants of them bind the successors, *how useless soever* they may happen to be.

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The next case that was mentioned, was the case of *Ridley* v. *Pownall*, 2 *Lev.* 136. 27 *C.* 2. *There the *special verdict found* the office to be a *necessary* office; (which is the *first instance* where it appeared judicially to the court, "that the office was necessary;") and that it had

* This was an action upon the case, in B. R. for disturbing the plaintiff in his office of register to the Bishop of Bristol, (a new bishoprick erected temp. H. 8.) See 3 Keble 472, 506, 540, 560. S. C.

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been *separalibus temporibus*, since the foundation of the bishoprick, granted for three lives.

My Lord *Hale* (who distinguished what he read, and thought and reasoned from himself) says "*before the 1st* "*of Eliz.* there was *no difference* between the grant of offices, of *ancient* and *new* bishopricks: *both* made *their* "*grants*, as OWNERS; and if they USUALLY granted for "three lives *before* the statute, they may grant so *after*. "But the verdict is defective, because it does not find "that it was USUALLY so done *before the 1st of Eliz.*" And on account of the incertainty, there was a *venire de novo: otherwise*, judgment would have been given *for the defendant*. So that you see, finding the office to be *necessary*, was *totally immaterial*.

In the case of *Jones* v. *Beau*, in *B. R. 3 W. & M.* 1691, reported in 4 *Mod.* 16. the issue directed out of Chancery was, "whether the office of chancellor of *Landaff*, "had been *usually* granted to *two*, before the 1st of *Eliz.*" And the jury finding "*that* it *had*," the court held the grant of the office to two to be good. And no man alive will say, "that it was *necessary* that the office of a "bishop's chancellor should be granted to *two*."

The office in question in *this* cause, is found "*never* to "have been more useful or necessary than it is *now*:" And yet *all* the bishops of *Winchester*, from the 1st of *Eliz.* have thought the grants of it valid; and every succeeding bishop has submitted to the grant made by his predecessor; and† the greatest men of the kingdom, or the nearest relations to the bishops, have successively held the office. The *present* bishop thought this grant good for *eleven years*; but has conceived a doubt, from the mis-application and repetition of inconclusive and contradictory arguments about the office being *necessary*, which are to be found in the reports of the cases I have mentioned, before the 27th of C. 2d.

† Sir John's Grant was—"To hold in tam amplo modo, as Richard Earl of Portland, Thomas Cary, George Duke of Buckingham, Charles Earl of Nottingham, Thomas Duke of Norfolk, Philip Earl of Pembroke and Montgomery, James Duke of Ormond, or Henry Earl of Clarendon had holden."

Whereas we are all unanimously of opinion, that an *office* and *fee*, which EXISTED BEFORE THE FIRST OF ELIZ. is *not* within the statute; but may be granted *since*, precisely in the *same manner*, in which it was granted *before*; and that the *utility*, or *necessity* of such an office, is no more material, *since* the 1st of *Eliz.* than it was *before*. And this opinion we think agreeable to the *words* and *intent* of the act, and *every precedent* since the statute. And in this opinion, my brother* *Wilmot* concurs with us. And therefore there must be

JUDGMENT for the PLAINTIFF.

[S. P. Cro. Car. 259.]

[4 Mod. 16. acc.]

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* V. ante 219, 221.

Which judgment was ordered, at Mr. *Norton's* request, to be entered as *of the term* in which the *postea* was return-

1757. Goss v. Nelson.

able: because Sir *John Trelawny* was† dead, between that time and the present time of pronouncing the judgment.

† V. ante 221.

Goss *versus* Nelson.

Saturday, 5th Feb. 1757.

Note of hand payable to an infant when he shall come of age, specifying the day, is a good note. [S.C.Bull.273.]

MR. *Gould, pro quer'*, shewed cause why the judgment obtained by the plaintiff against the defendant in an action upon a promissory note should not be arrested: the note having been objected to, as contingent, uncertain, and not negotiable within the act of 3, 4 *Ann.* Mr. *Gould's* answer was, that the sum payable by this note, is *debitum in* PRÆSENTI: though *solvendum in futuro*.

The question depended entirely upon the validity of this note: which was a promissory note given *to* an infant,‡ payable "WHEN *he* (the infant) *should come* OF "AGE;" and SPECIFYING *the* TIME *when* THAT *was to be, viz.* 12th *June* 1750. The defendant's counsel had moved to arrest the judgment, for that this *was* not (as they alledged) a good note, within 3, 4 *Ann c.* 9. § 1: for giving like remedy upon promissory notes, as upon bills of exchange.

‡ V. post—Roberts v. Peake; a like point, (viz. payable on the death of G. H.) [See also 1 Durn. 637. 6 Ves. 248. and Qu. 1 Atk. 486.]

In answer to which, Mr. *Gould* now cited 2 *Strange*, 1217, the case of *Cook* v. *Colehan*; where a note, "to "pay in six weeks after the defendant's father's death," was holden a *good* note.

Mr. *Caldecot contra pro def'*: Here are, in this declaration, two counts on notes of hand indeed: but the notes set forth in the declaration, are not notes for the *benefit of trade*; nor is the money made CERTAINLY *payable*. The note was given to the plaintiff, thirteen YEARS *before* the time when he was to come of age; and it was *not* at all certain that he *would live* to attain that age.

He cited 2 *Strange*, 1151. The case of *Beardsley* v. *Baldwyn*: where a note "to pay within so many days "after the defendant should *marry*," was held *not* to be a negotiable note within the statute.

[227] The case of *Cook* v. *Colehan* (cited by Mr. *Gould*) 2 *Strange*, 1217, was payable six weeks after a *death*: which was a certain event.

In order to have the effect of a promissory note within this statute, it ought to be a *cash-note*, and payable *at* ALL *events*.

No note is negotiable, which is not for the payment of money *absolutely*. 1 *Strange*, 629. *Morris* v. *Lee*. That was a note promising "to be *accountable* to the plaintiff "or order for 100l. value received."—And held good. But a "*quære tamen*" is added by Sir *John Strange*. All notes payable *on contingencies* are bad, within this act: and *this* is a *contingency*, "whether he may arrive at the age "of twenty-one, OR *not*."

Lord *Mansfield*. It would have been clearly good, if it had been made payable on the 12th of *June* 1750 (that is to say, on a *day certain*;) *without mentioning* the plaintiff's being then to come of age; and surely it is *not the less certain*, for *adding* that circumstance. 1757. GOSS v. NELSON.

Legacies are of a different nature: and they are determined by different rules. They are directions to the executor to pay: and in legacies there is a known distinction between the time being annexed to the *substance* of the gift, or to the *payment*. If complete words of gift direct the executor to pay; the other words only *fix the* TIME of such payment: and then the legacy vests, and is transmissible, though the legatee should die before the day of payment: as a legacy given, "*to be* paid at twenty-"one." But if the time is annexed to the *substance* of the gift, as a legacy "*if*" or "*when*" he shall attain twenty-one; it will not vest before that contingency happens.

But *here* the *words of engagement* MAKE *the debt*; and it is *no* direction *to another* person. The former part of the note is a promise to pay the money: and the rest is only fixing the *particular* TIME *when* it is to be paid. It is enough, if it be CERTAINLY and at all events *payable* at that time, *whether* he lives till then, *or* dies in the interim. Therefore it is a good note, within this *remedial* statute.

Indeed a *contingent* note, where it is *uncertain* "whether the money shall *ever* become payable *at all*, or "not," is another case: SUCH a note is *not* within the statute. [5 Durn. 484.]

Mr. Just. *Denison* concurred.

For here is *no condition* or UNCERTAINTY: but it is *to be paid certainly*, and *at all* events; only the TIME *of payment* is *postponed*. [228]

And the case of *Cook* v. *Colehan* was the opinion of the whole court.

He also cited *Boraston*'s case, 3 *Co. Rep.* 19, (which proves "that where the words refer to what *must ne-*"*cessarily* happen, it is no contingency, but a remainder "*executed*." *V. Equity Cases Abridged, fo.* 190. *pl.* 16. S. C.)

Mr. Just. *Foster* concurred.

A legacy may be given upon *any* terms.

But upon a promissory note, the *time* of payment is only for the benefit of the *debtor*. Here, the time of payment is CERTAINLY *fixed*: and the particular day specified for payment of the money, being mentioned to be the day *on which the infant is to come of age*, makes no difference from what it would have been, if that circumstance had been omitted.

1757. GOSS v. NELSON.

And they *all* agreed that this was *debitum in presenti*, though *solvendum in futuro*.

Per Cur' unanimously RULE DISCHARGED: And the *postea* ordered to be delivered to the PLAINTIFF.

Tuesday, 8th February 1757.

GOODTITLE, EX DIMISS. HAYWARD, *versus* WHITBY.

(*Mr. Just.* FOSTER *absent.*)

Devise to trustees, in trust, to lay out the rents and profits for the maintenance of two nephews, and when they attain twenty-one, to be to them and their heirs, is an immediate gift vested in the nephews, immediately, with a trust to be executed for their benefit during their minority. [See 8 Vin. 285. pl. 4. 6 Ves. 246. 3 Durn. 43. 1 Durn. 391. 9 Ves. 228.]

THIS was a case from *Lancaster* assizes, upon an ejectment.

R. P. being seised, *&c.* devised all his messuages, lands, tenements, and hereditaments, whatsoever and wheresoever situate, to the Reverend Mr. *Thomas Hayward* and *John Bates* and the survivor of them and the *heirs* of such survivor; "in trust, that they and the survivor of them, "his *heirs* and assigns, should lay out, employ and bestow "the rents and profits of the devised premises, for the "*maintenance, education, bringing up* and *putting forth* "into the world, of *Thomas* and *John Hayward*, sons of "the testator's sister *Elizabeth Hayward*, DURING *their* "MINORITIES: *and* WHEN *and* AS *they should respectively* "ATTAIN *their ages of* 21, then to the use and behoof "*of the said sons* of his sister *Hayward*, the said *Thomas* "*Hayward* and *John Hayward, and their heirs, equally.*" And the testator made the said two trustees, the Reverend *Thomas Hayward* and *John Bates* his executors.

It is stated that *Thomas Whitby*, the defendant, is the testator's heir at law.——

That *Thomas* and *John Hayward* are the testator's sister's sons.

Thomas Hayward the elder of the testator's said two nephews died *under the age of twenty-one*, and *without issue*.

[229]

Upon his death, his brother *John* being then under age, *Thomas Whitby* the testator's heir at law, was let into the MOIETY *of the* DECEASED *nephew, Thomas Hayward*, by the trustees.

John the surviving brother brings the ejectment, being now come of age; and claiming the *moiety of his deceased brother as well as* his own proper moiety.

Question—"Whether this *moiety of Thomas* the de-"ceased brother, belongs to *John Hayward*, either *as* "*heir* to his brother, *or as* surviving joint-tenant; or "whether it belongs to *Thomas Whitby*, as heir at law of "the testator AS *an undevised estate.*"

Mr. *Perrot* for the plaintiff, (*viz.* for *John Hayward*, the surviving nephew of the testator.)

This point is settled by many resolutions.

1st. This is only a *chattel*-interest in the trustees, (*though*

given to them and *their heirs:*) because it is to last ONLY DURING THE MINORITIES of his NEPHEWS. 1757.

The question is, "whether the remainder VESTED in "*Thomas* and *John Hayward*;" or "whether it remained "in CONTINGENCY, *till* their respective *coming of age.*" GOODTITLE ex dimiss. HAYWARD, v. WHITBY.

All that the *testator had in view*, in this trust, was to provide for the care of his nephews DURING *their* MINORITIES: and he only meant that the time *of their coming of age, should determine the* TIME when they should be capable of *acting for themselves;* NOT to make it CONTINGENT *till* they should come to twenty-one. For at that rate, *if* they had *married* and *died under twenty-one,* THEIR CHILDREN *could* NOT *have taken:* which the testator, most undoubtedly, could *never mean.*

Boraston's case, 3 *Co.* 21. was held a *vested* remainder. [230]

The case of *Taylor* v. *Biddal*, 2 *Mod.* 289. is in point.

The case of *Edwards* v. *Hammond*, 3 *Lev.* 132. (where the estate's being contingent or not, depended on its being a condition precedent or subsequent,) was only held a condition subsequent, and a *present* devise to the eldest son.

Equity Cases abridged, H. 1713. *fo.* 195. *pl.* 4. The case of *Mansfield* v. *Dugard*, is almost the same with the present case.

So here, the estate *vested immediately* in the two nephews, upon the death of the testator; and therefore, upon the death of *Thomas*, his brother *John* is intitled to this moiety; either as heir at law to him, or as survivor.

Mr. *Norton pro def' Thomas Whitby*, the testator's heir at law.

The will is, in substance, no more than this—

The testator gives to *A.* and *B.* and the survivor of them and the heirs of such survivor, all his messuages, lands, tenements, *&c.* IN TRUST that they shall dispose of the rents and profits of the devised premises for the maintenance, education, bringing up, and putting forth into the world, of his two nephews (his sister's sons,) *Thomas* and *John Hayward, during their minorities:* and WHEN and AS they should respectively attain to twenty-one, then to the use and behoof of them the said *Thomas* and *John Hayward* his two nephews, and their heirs, equally.

The cases on this head appear indeed *inconsistent* and *repugnant:* but the *true method of solving* them is, to attend to the INTENTION *of the testator.*

Now here the testator *intended* his nephews a *fee*, IF they should *live* to make use of it; IF *not*, then *only a provision during their minority.*

And it is a rule, "that the heir at law shall NOT *be dis-* "*inherited* by *uncertain* words of a devise."

1757. GOODTITLE ex dimiss. MANWARD v. WHEELER

Here, NOTHING VESTED *in either of the two nephews, during* their *minorities.*

If *the testator had intended* a benefit of survivorship, to his two nephews, he *knew how* to do it; as appears by *another part* of his will.

[231] The two nephews were not each of them *intitled to a moiety* of the *profits during their minority:* for, they were *only* to be *maintained at the* DISCRETION *of the executors.*

The question is, "whether this be, or be not, a *condition* "PRECEDENT; or an estate depending upon a future "event that makes it uncertain whether it shall ever take "effect."

Sheppard's Touchstone of Common Assurances, 117, defines a condition precedent, to be "where the condition "must be fulfilled, ere the estate can take effect."

A gift to *A.* "IF he comes from *Rome*," does not vest *till* he comes from *Rome.*

Just so, a devise to *A.* IF he comes *of age*; cannot vest *till* he comes of age.

And he was not to have the fee, *till* then.

In gifts of *personal* estate or legacies, it is the same. For if the time is annexed to the *legacy* itself, and not to the payment of it, then, if the legatee dies before the time of payment, it is a lapsed legacy: but if annexed to the *payment*, then it is not. 1 *Lev.* 167.*

* V. ante 226. S. P. accord.

2 *Salk.* 415. *pl.* 2. The case of *Smell contra Dee*, 6 *Ann.* in Chancery, 2 *Vern.* 349.

As to the executors taking only a CHATTEL-*interest*; the being *defeasible* does not make it the less a *fee.*

In the case of *Gardner* v. *Sheldon* (*Vaughan*, 259.) it is so laid down by Ld. *Vaughan.*

This is a fee to the trustees and *their heirs*; though *liable indeed to a contingency.* It is the word "*heirs*," that makes it a fee. *Littleton*, § 1.

If so, then it cannot be a vested remainder; but must be an EXECUTORY devise, *a mere contingent interest.* 10 *Co.* 55. *Leonard Loveis's* case.

[232] As to Mr. *Perrott's* cases—

Borastow's case, 3 *Co.* 23. is not at all applicable to the present case: and it was there *necessary*, towards forwarding the *intention of the testator*, that it *should be* a *vested* interest. And that was an *express* devise of a *chattel*: so that the *fee vested immediately.* But here are *no* such circumstances, in *this* case.

As to the case of *Taylor* v. *Biddal*, 2 *Mod.* 289. *there* also was an *express devise* of a *chattel*, to *Elizabeth Wharton*; and the fee descending to her, *would have* MERGED *the term*, *contrary* to the *intention and words* of the testator.

As to the case of *Edwards* v. *Hammond*, 3 *Lev.* 132.

1767.

GOODTITLE ex dimiss. HAYWARD v. WHITBY.

it is no more applicable to the present case, than the other two are. That was a condition *subsequent*.

But *here* are no words to shew the *intention* of the testator to have been, "that if either of his nephews should "die, his heir at law should not inherit."

And here it is stated that the testator's heir at law was let into and held this moiety by *consent of all the parties*, TILL this *July* came of *age*. (*V. ante* 229.)

As to the case of *Mansfield* v. *Dugard*, it is distinguishable from the present case.

Mr. *Perrot*, was going to reply—but Lord *Mansfield* stopped him, and said it was unnecessary.

Lord MANSFIELD—

The case is no more than this. *R. P.* being seised in fee, makes his will to the following effect—"I give and devise all my messuages, lands, tenements and hereditaments, &c. unto the Reverend *Thomas Hayward* and *John Bates*, and the survivor of them, and to the *heirs* of such survivor, in TRUST to and for the benefit of my nephews *Thomas* and *John Hayward*: that is to say, upon trust and confidence that the said *Thomas Hayward* and *John Bates*, and the survivor of them, his *heirs* and assigns, shall lay out and employ the rents and profits of the said premises for the *maintenance*, *education*, *bringing up* and *putting out* in the world, of the said *Thomas* and *John Hayward*, (the testator's two nephews,) DURING *their* MINORITIES: and WHEN and AS they shall attain their respective ages of twenty-one, my will and desire is, that the same premises shall be and remain to them the said *Thomas Hayward* and *John Hayward*, and their heirs, equally." And he makes the same *T. H.* and *J. B.* his executors.

It is stated, that the defendant *Whitby* is the testator's heir at law! but the case does not state *how*, and in what course of consanguinity, *Thomas Whitby* is heir at law. It is probable that he is *not* of the *male* line; because his name is *Whitby*. [233]

The testator died. *T. H.* and *J. B.* the two trustees, entered into possession. Then *Thomas Hayward*, one of the two nephews and devisees died, under age, and without issue. Then, the trustees let the now defendant, the testator's heir at law, into possession of his moiety. But it is not material what *they* did among *themselves*: that will not affect the *right* of the plaintiff.

The question is, "whether the estate *vested* immedi-"ately in the two nephews, upon the death of the testa-"tor; or *remained in contingency*, till their respective "coming of age:" and consequently, "whether this "moiety belongs to *John Hayward*, upon the death of his "brother *Thomas*, *either* as his heir at law, or as survivor;

1757. GOODTITLE ex dimiss. HAYWARD v. WHITBY. [Hale's His. C. L. Ch. 4. p. ult.]

" or whether it descends to the heir at law of the testa-
" tor, as being *undevised*."

In the construction of wills, adjudged cases may very properly be argued from; if they establish general rules of construction, to find out the *intention of the testator*; which intention ought to *prevail*, if *agreeable* to the rules of law.

Here it is agreed that a *fee is devised* to the nephews: but it is made a question " whether it be a fee depending " upon a *precedent contingency*; or, an *immediate* fee."

He said he would lay down a rule or two of construction, previously to giving his particular opinion on this case.

1st. Wherever the *whole* property is devised, with a particular interest given *out of it*, it operates by way of *exception* out of the absolute property.

This rule is laid down in *Matthew Manning's* case, 8 *Co.* 95. *b.*

2d. Where an *absolute* property is given; and a particular interest given, in the *mean time*, as " UNTIL the " devisee shall come of age, *&c.*: and *when* he shall come " of age, *&c.* then to him, *&c.*:" the rule is, that that shall *not* operate as a condition *precedent*; but as a description of the time when the remainder-man is to take *in possession*.

And to this purpose is *Boraston's* case, 3 *Co.* 21. *a.* where this doctrine is fully laid down and explained.

[234] And this is sufficient to answer the intention of the testator: the devisee *does not want it* in the *mean time*.

The case of *Mansfield* v. *Dugard*,—in the *Abridgment of Equity Cases* 195. *pl.* 4. is also very strong, to prove the general rule.

Here, upon the *reason* of the thing, the *infant* is the *object* of the testator's bounty: and the testator does not mean to deprive him of it, in *any event*. Now suppose that this object of the testator's bounty *marries*, and *dies before his age of twenty-one, leaving* CHILDREN; *could the testator intend* in such an event, to *disinherit him*? certainly, he could not. And as to the testator's heir at law, *his* heir at law is only to take what the testator has not devised away from him.

But in the present case the testator takes no notice of this *Thomas Whitby*, who is indeed stated to be (but it doth not appear *how*) his heir at law. And he does not except any thing out of the interest he has given to his nephews; he only makes a trust, to be executed for THEIR *benefit*; and devises *nothing* for the benefit of the *trustees*, who were *also* his executors. And this is *only a* CHATTEL-interest, which CANNOT *last twenty-one years*.

[See 8 Durn. 597. 4 Ves. 400.]

On the rule in *Matthew Manning's* case, here is (at the

utmost) only an *exception*, by this devise to the trustees, *out of* the absolute property given to his nephews.

It is so plain upon the true intent and meaning of this will, that it is a shame to cite cases upon it. But yet I remember an apposite case, in *H.* 17 *G.* 2. in *Canc. Tomkins v. Tomkins*, where the devise was "to his brother, in "trust for his eldest son *B. till* he should attain twenty-"one years; and if he should die before twenty-one, then "a devise over." *The court* held the age of twenty-one to be no limitation of *B.*'s INTEREST: but only a limitation of the *trust*, during his minority; and that *B.* took the whole by implication.(*a*)

So here, the *property* is *absolutely given*: and the limitation is only of the *trust*.

Therefore upon the whole, he held the present case to be An *immediate* gift to the two nephews; with a trust to be executed for their benefit, during their minority.

Per Cur. Let the *postea* be delivered to the plaintiff.

1757. GOODTITLE ex dimiss. HAYWARD v. WHITBY.

MASTER, &c. OF THE VINTNER'S COMPANY, *versus* PASSEY. [235]

THIS was an action of debt brought upon a bye-law of this company.(*b*)

A company's right to have a livery must be founded on charter or custom, and cannot be presumed. [See 1 Bosan. 100, 101.]

The declaration (after a proper introduction) set forth the bye-law, which was made on the 24th *April* 1656, intitled "an ordinance of election of men into the livery "of the corporation or mystery of vintners of the city of "*London*:" whereby it was ordained and established, that the master and wardens of the corporation or mystery of the

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(*a*) That is *B.* when he came of age took the whole by implication; the doubt must have arisen on this, that it was given to *B.* only until he should come of age; without adding, as it ought, these or the like words, *viz.* and *if B. shall live to the age of twenty-one years, then to him.* The omission of these or the like words were supplied by the court, in order to support what the court thought must have been the implied intention of the testator.

(*b*) A bye-law that every member of a corporation chosen into a particular corporate office mentioned in the bye-law, shall accept it under a penalty, is good; though there be no exception of unfit persons: for if such a one be chosen he may give his excuse in *nil debet* pleaded to debt on the bye-law.

The above is all that was determined in this case, and it is nothing new.

1757. VINTNER'S COMPANY v. PARSLY.

vintners of the city of *London*, for the time being, should have a decent livery, comely for themselves, and meet to attend upon the lord mayor and his brethren the aldermen of the said city from time to time and at all times, as need should require; and upon the said master and wardens, at all such time or times thereafter, and in such gowns and liveries, as they should be lawfully warned and summoned to come and be in, upon any necessary occasions concerning the credit and worship of the said company; and also that once in every year, or oftener if occasion should serve, the said master, wardens and assistants, or the major part of them which should be then present at a court of assistants for the time being, to be holden for the said mystery, *should and might* ELECT *and choose into the* LIVERY *or* CLOTHING of the said corporation or mystery, SUCH AND SO MANY *of the yeomanry* of the said mystery, *as should seem most meet and convenient* unto them; and that EVERY SUCH PERSON *of the said yeomanry so chosen into the said livery* as aforesaid, *should*, AT *or* before *his admission into the said livery*, PAY to the said master, wardens and freemen and commonalty of the mystery of vintners of the city of *London*, to their use, the sum of 31*l.* 13*s.* 4*d.* of lawful money of *England*. And then and there, at the same assembly, the said master, &c. did make another bye-law, that *every person and persons* of the said corporation, *which at any time thereafter should be* by the said master, wardens, &c. for the time being, at any court, &c. ELECTED OR CHOSEN *into the livery* of the said mystery; and *should not, upon notice* given to him or them in that behalf, by the clerk or beadle, ACCEPT *of* the same; or, upon acceptance thereof, should, before his admission into the said livery, REFUSE *to* PAY to the said master, &c. the *sum of* 31*l.* 13*s.* 4*d.* that then *every particular so refusing* to accept, &c. or to pay as aforesaid, *should* FORFEIT, &c. to the said master, &c. the *sum of* 25*l.* to be recovered by action of debt, bill, plaint, or information, to be brought in any court of record within the commonwealth of *England*, by the said master, &c.

[236] Then the declaration avers both the said bye-laws to be reasonable, &c.; and also, that at the time of the making them, and ever since, all the freemen of the said mystery, before their admission to the livery, were known by the name of the yeomanry; and that the defendant was a fit and able and proper person to be elected into the livery and clothing of the said company. Then it sets forth his election upon the livery; and that he refused, &c.

To this declaration—

The first plea was "*nil debet*." And there was also, by leave, a 2d plea, that there are twelve *greater* livery-com-

panies, in *London*, and other inferior companies: and that an order was made at a court holden before the lord mayor and aldermen, &c. on, &c. at &c.: at which court it was enacted, &c. "and that no person should take upon himself the "livery of any company being *one of the said* twelve companies, &c. unless he should have an estate of 1000l. "&c." And the plea avers, that this *was one of the* twelve companies; and that he had *not* an estate of 1000l. &c. And therefore he says, that he was *not duly elected* upon the said livery of this company of vintners. 1757. VINTNER'S COMPANY v. PASSEY.

The plaintiffs demur to this 2d plea: and the defendant joins in demurrer.

Mr. *Williams pro quer.* made three objections to the plea.

1st Objection—That it is not set out *by what authority* the court which made this order, was holden. *Clift.* 186. 196.

2d Objection. The court is *uncertain*: for *many* courts are holden before the mayor and aldermen; and *non constat, which* of them this is.

3dly. *Non constat, what authority* the court of the lord mayor and aldermen had *to make* this order.

Mr. Serjeant *Martin pro def.* said—

It was not known, *at the time of the plea*, nor can *now* be known, WHAT *authority* the court of lord mayor and aldermen had to make this order: therefore he gave up the plea.

But he objected to the declaration, in two respects. [237]

1st. The bye-laws are bad.

2d. The defendant was *not duly summoned* to *attend at the court of assistants*, to take upon him the livery.

First—The bye-laws are *arbitrary, illegal, oppressive*, and *not warranted* by custom or charter.

They are, "that the company may elect *such* of the "yeomanry of their members as should *seem most meet* "*and convenient to them*, upon the livery of their com-"pany;" and "that every person so elected, who should "refuse, &c. shall forfeit, &c.: and EVERY *person so elected*, "shall accept the same, and shall upon or before admis-"sion, pay 31l. 13s. 4d. for an admission fee, on forfeiture "of 25l." (which penalty of 25l. is made payable absolutely and in all events.)

Now the livery-men ought to be *persons of substance*, *capable* of being at the expence of serving or paying the fine.

And the averment "that he was a fit and able and "proper person," goes only to the just *execution* of the bye-law; but will not make the bye-law *itself* good, which is in itself void.

1757. VINTNER'S COMPANY v. PASSEY.

(B. Lev. 303. Mayor, &c. of *Oxford* v. *Wildgoose*; (in point, as to this.)

The right "to have a livery" must be founded either on charter or custom.

Pasch. 30 *G.* 2. Innholders Company v. *Gledhill*, *B. R.*—was so determined; and that the court cannot presume it: and the want of shewing this, was holden to be such a fault in the declaration as might be taken advantage of upon general demurrer.

In *Lilly's* Entries there is a precedent of such a pleading upon such a bye-law.

On 27th *July* 1697, the mayor and aldermen made an order (set forth in the pleadings,) which shews the opinion of that court upon this head of *sufficiency* of the persons elected.

In *Raym.* 446. *Taverner's* case, 33 *C.* 2. (which he cited for the sake of the return,) this very company made it part of their return to the mandamus "that every livery-man "of this very company was used and ought to be *de* [238] "*bono statu et substantia*," &c. (But N. B. the fine of 31*l.* 13*s.* 4*d.* was there allowed to be good.)

Comberb. 221. The case of the Stationers Company v. *Salisbury*: (which was cited, as to the first objection of it, and applied to the 1st objection here,) also the 2d exception there, answers (as the serjeant observed) to the 2d objection here. (But that case was not determined.)

2d Objection to the declaration—*non constat* that he was *summoned* to attend at the court of assistants, to take upon him the livery.

The declaration shews, that the master and one warden may appoint a court *whenever* they please; so that the time of holding this court is *uncertain*. And they only shew that he was summoned to attend at the *next* court, *generally*; without specifying WHEN *it was to be holden*.

Mr. *Williams* in reply.

1st. These bye-laws are now of above 100 years standing: and they have been holden good, notwithstanding all objections. Vide *Raym.* 446. *Taverner's* case: (where the return of them was allowed.) And they ought to receive a favourable construction.

If they choose a person unfit, it may be taken advantage of in pleading, or upon evidence.

City of *London* v. *Vanacker*, *Carthew*, 480, 482. A power "to elect such persons as should *seem* to them to "be fit and able"—gives them a discretion. 5 *Co.* 100. *a. Rooke's* case.

This is a discretionary power; and is confined to such as are fit and able; though it must be legally executed.

It is objected also, that the penalty of 25*l.* is made

payable *absolutely*: whereas it ought to be, *unless* he has a reasonable excuse. 1757.

VINTNER'S COMPANY v. PASSEY.

But this is implied.

And if he has a reasonable excuse he may plead *nil debet*.

Carthew 483. City of *London* v. *Vanacker*: (in point) 1 *Lutw.* 402. Bye-law of the city of *Canterbury*: where *non debet* was pleaded. (V. fo. 405.)

[239]

In answer to the 2d objection—

As to the *time* of holding the court, the objection is only to the *form* of the declaration. But,

It is averred "that notice was DULY given him of his "election:" and "that notice was DULY given him, to "attend at the *next* court of assistants."

Besides, HE AS A MEMBER *of the company*, was OBLIGED *to* TAKE *notice* of the *time* of holding their courts.

As to 3 *Lev.* 293. The bye-law there does not even *confine* it to the *inhabitants* of the city: but *this is confined* to the members of the company. (Still, this is no answer to the material objection.)

As to *Comberb.* 221. it was not determined. (No more it was.)

LORD *Mansfield*—

The *plea is admitted* to be bad.

The objections are to the bye-law: which has been of 100 years standing; and, several times, judicially before the court; and yet this objection has never been hit upon.

However, one answer strikes me: which is "that NIL "DEBET *may be pleaded*, if the party was *really* unfit." *Carthew*, 483. *Vanacker's* case, and 1 *Lutw.* 402. 405. Major, &c. *de Cambridge* v. *Herring*—are proofs of this.—By the former it appears that it may be given in evidence, upon *nil debet* pleaded; and in the latter, it was actually pleaded; and issue taken upon it. And this equally holds, as to *any* reasonable excuse. And we *will not intend* him to have been an improper person.

Being a livery-man of the company, he *ought to know* when the next court is: and therefore *this* objection has not much weight.

Mr. Just. Denison.

The bye-law gives power "to elect such and *so many* "out of the yeomanry, upon the livery, as shall seem "to them most meet and convenient." The main design seems to relate to the *number*. As to the *ability*—Bye-laws ought to have a *reasonable* construction: we ought not to construe them so strictly, as to take them to be void, if *every particular* reason of making them, does not appear.

1757. VINTNER'S COMPANY v. PASSEY.

Now here, it is objected "that the person elected MAY "*be* a *beggar*."

But we can *never intend* that they would choose persons NOT *meet and convenient*.

And *if* this *be* done, "*nil debet*" will bring that question before the court.

And you cannot, upon *this record*, take in the order of the court of lord mayor and aldermen; because THAT *plea* is given up.

And the *notice* shall be *intended* to be regular.

This is an ancient bye-law; and nothing unreasonable appears upon the *face* of it.

Per Cur. (*viz.* Lord *Mansfield* and Mr. Justice *Denison*, the other two judges being absent,) JUDGMENT for the PLAINTIFF.

WILSON, CLERK, *versus* GREAVES.

Prohibition to the spiritual court to stay proceedings upon the stat. 5 and 6 Ed. 6. c. 4. s. 2. for smiting or laying violent hands denied.

MR. Serjeant *Hewitt* shewed cause against a prohibition, which Mr. Serjeant *Poole* had moved for (on the 6th of *July* last) to be directed to the Archdeacon of *Nottingham*, to stay his proceeding in a suit against Mr. *Wilson*, (parson of *Newark*,) for *brawling* in the church, and also for *smiting* in the church: but he prayed the prohibition, only as to the latter charge, the *smiting* in the church. (*V.* 5, 6 *E.* 6. *c.* 4. § 2:) which act contains three distinct clauses, levelled against three distinct offences committed in the churches and church-yards; *viz.* the 1st against quarrelling, chiding, or brawling, by words only; the 2d, against smiting, or laying violent hands; the third, against striking with a weapon, or drawing one with intent to strike. *

[* Suits for the offences against the 1st and 2d sections are limited to eight calendar months, by 27 Geo. 3. c. 44.]

His objection was, (*a*) that as to *this* offence of *smiting* in the church, there ought to have been a *previous* CONVICTION *at* LAW; though the statute says "that he shall "*ipso facto* be deemed excommunicate." In proof of which, he cited *Cro. Eliz.* 224. *pl.* 6. *Dethick's* case; where he was *indicted*, upon this statute of 5, 6 *E.* 6. for striking in St. *Paul's* church-yard: though he got off indeed, for want of being named *Garter*.

1 *Ventr.* 146. The case of *Dyer* v. *East*, is full in point, "that the striker in a church-yard does not stand *ipso* [241] "*facto* excommunicated, UNTIL he be thereof convicted "at law, and this transmitted to the ordinary."

(*a*) This case is a trifling case, not worth reporting: not a new point in it; nor any correct citation of any report but 1 *Vent.* 146. and that had been done long before, *Cas. Temp. Hard.* 193.

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And here having been no *previous conviction* at law, he prayed a prohibition *quoad the smiting*; and obtained.

A RULE to shew cause.

Against which rule, Mr. Serjeant *Hewitt* (on *Monday* 7th *February* 1757,) shewed cause, as follows.

On 5, 6 *E.* 6. *c.* 4. there are three sections, and three different offences: and this offence charged in the libel, is not an offence constituted so by this act; but was a matter within the jurisdiction of the spiritual court, *before* that act, and *abstractedly from* it. They have, without dispute, jurisdiction as to the *brawling*. And as to the second branch, for *smiting in the church*, there needs not be a previous conviction at *common* law: it is enough, if the excommunication be in the *spiritual* court. To prove which, he cited *Hetley* 86. The case of *Viner* v. *Eaton*: *Cro. Jac.* 462. The case of *Large* v. *Alton*, *pl.* 7: *Cro. Eliz.* 680. The case of *Baker* v. *Brent and Robinson*; 1 *Hawk. P. C. fo.* 139. *c.* 63. § 27.

2 *Ld. Raym.* 850. The case of *Wenmouth* v. *Collins*. The court denied a prohibition; because this offence was originally and before this statute, conusable in the ecclesiastical court, *ratione loci*; and that the statute, though it provides a penalty, does not alter the jurisdiction.

Therefore he concluded that notwithstanding *this* objection, the spiritual court *have* jurisdiction.

It was then adjourned to the next day; when it proceeded and was determined. Mr. Justice *Foster* and Mr. Justice *Wilmot* were both absent.

Mr. Serjeant *Poole*—I cited 1 *Ventr.* 146. *Dyer* v. *East*, as a case in point, "*that* there *must be* a previous conviction by a trial *at law*:" and "that such conviction must be *transmitted* to the spiritual court." Tuesday 8th Feb. 1757

Cro. Eliz. 224. *Dethick's* case: where there was an indictment actually found and pleaded to.

As to my brother *Hewitt's* cases—

Hetley 86. *Viner* against *Eaton*, is a loose, incomplete note; and gives no reason why the prohibition was denied.

Cro. Jac. 462. *Large* v. *Alton* proves nothing at all to the present purpose: and it was for *brawling*, *only*; in which case, I agree that no prohibition shall go. [242]

Cro. Eliz. 680. is indeed in the alternative, "after sentence, *or* due trial and conviction, and not before." But that is only said by *Dodderidge*, then at the bar, in arguing for the defendant.

Wenmouth v. *Collins might* be for a prohibition *generally*. Indeed a reason is given for denying the prohibition; *viz.* "that the spiritual court originally had jurisdiction to hold plea of this matter, before the act."

But I deny that they had such *original* jurisdiction:

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and the act *gives them none.* This is a force *vi et armis*; an assault and beating: and the temporal courts will prohibit them from proceeding upon it.

Bro. Prohibition, pl. 14. and *Bro. Consultation*, 6. are express, "that where a man sues in the spiritual court: "and an action at common law lies for the same matter; "a prohibition lies, and no consultation shall be granted." (These are both the same case; *viz.* 22 *E.* 4. 20.)

Mr. *Taylor White* spoke on the same side, for Mr. *Wilson.*

He even attempted to shew that a prohibition would be reasonable as to the *brawlings* for that the fact stated could not come within the notion of brawling; and it was only speaking to a third person, to turn *Greaves* out of the church.

As to the striking—the spiritual court had no jurisdiction *before* the statute; and the statute gives them none: they have only power to *pronounce the sentence* of excommunication; but *not* the power of *judging.*

As to the case of *Wenmouth* v. *Collings*, it is but a loose note; and *Holt* was absent; and there might have been a confession.

And there have been many indictments, he said, on this statute; and *this* method of conviction was the *ancient* method.

Lord *Mansfield*—

The statute of 5, 6 *Ed.* 6. *c.* 4. has three degrees of offences, and three different punishments.

[243] And whatever jurisdiction the spiritual court might claim *before* the act, they are *now* proceeding *since* the act; therefore it is not very material how the matter stood *before* the act.

[Except what is mentioned *infra* as to one part of the punishment for the third offence.] The punishment is given, by this act, to the ecclesiastical court: and the punishment is such as can only be executed BY *the ordinary.*

The case stated with regard to the first offence, is sufficiently a *brawling*, within the meaning of the act, *sec.* 1.

The second offence is SMITING *in the church*, or *church-yard.*

[Hobart, 201.] Now this is indeed *still* an offence at *common* law; and he *may* be indicted for it.(*a*) But, besides this, he may, by this act, be *ipso facto*, excommunicated. By whom? by

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(*a*) No indictment is maintainable on the act for this offence, *Cro. El.* 231. *Cro. Car.* 464.; therefore the words *at common law* are properly here made use of by Lord *Mansfield.*

the ordinary. Indeed the ordinary *may* use a conviction at law, as a *proof* of the fact.

And the case in *Raym.* (2 *Ld. Raym.* 850. *Wennouth* v. *Collins*,) is a plain proof that the ecclesiastical court may proceed upon the two first clauses, and are not to be prohibited.

But then there is a third offence and third punishment mentioned in the act, of 5, 6 *E.* 6. *c.* 4: which has made all the confusion. This offence is maliciously striking with any weapon, in any church or church-yard, or drawing any weapon there, with intent to strike. For this third offence, the act inflicts a double punishment; one temporal: the other, spiritual: the temporal punishment is loss of an ear, or marking in the cheek, *after conviction;* the spiritual is, "and *besides*, every such person to be and "stand *ipso facto* excommunicated as is aforesaid."

Here, indeed, there must be a *previous* conviction; and a transmission of the sentence; and a declaration.

But on the second clause, no *previous* conviction is necessary: (though, *if* there is one, it may be used *as a proof* of the fact.)

This libel is upon the *first* and *second* clauses: NOT upon the *third*.

And the proceedings of the two courts being *diverso intuitu*, it is no objection, to say, "that a man will, at "this rate, be *twice punished* for the *same* offence." [2 Atk. 673. Salk. 552 pl. 15. 2 Wils. 79. 17 Vin. 293. pl. 3, 4.]

This is *common*, in many cases: for we proceed, to *punish; they, to amend.*

It is clear, that upon the TWO FIRST *clauses*, the ecclesiastical court HAS a jurisdiction. [244]

The cases upon words do not apply to the present case.

Mr. Just. *Denison* concurred.

Their proceedings are *pro salute animæ*. Indeed if they proceed for *damages*, this court will prohibit them. And that was laid down by the court, in the case of *Large* v. *Alton*, in *Cro. Jac.* 462. where the costs being given only *pro expensis litis*, the court would not prohibit them: but they declared that they would have done otherwise, if it had been *pro damnis*.

And it is plain to me, that the case in 1 *Ventr.* 146, *Dyer* v. *East*, was really a determination upon the *third* clause of the act; and is a mistake: I suppose the words "*with a weapon*," are *left out, by mistake*. The reporter was then a young man.

But however, this is the *only* case to be met with, to this purpose; and it must be a mistake, either in the state of the case, or in the opinion: for on the *second* clause, surely, we can NOT prohibit them; because they are exactly within the *words* of the statute, "that if any per-

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son or persons shall smite or lay any violent hands upon any other, either in any church or church-yard, they shall *ipso facto* be deemed excommunicate."

Per Cur, (*viz.* the only two judges now present) the RULE was DISCHARGED.

Wednesday, 9th Feb. 1757.

WOOLLEY et al' *versus* COBBE et al' (Bail of *Cobbe*, a Bankrupt.)

The bankrupt getting his certificate prior to the fixing of his bail will discharge them. [See 1 Bos. 450. n. 1 Atk. 238. 7 Vin. 72. 2 Bl. Rep. 811.]

THE original defendant became bankrupt, pending the action. The bail was *fixed* in *July*. The bankrupt obtained his *certificate*, in *August* following.

The question was, "whether the *bail* should be "*discharged*, by this *certificate*," (which was not obtained *till* AFTER they were *fixed* and the *debt levied* upon them by *fi. fa.* and the money *actually in the hands of the sheriff*;) or "whether the bail were become *absolutely liable*;" and consequently, the certificate came too late to help them.

[245]

Lord *Mansfield* made a distinction, and Mr. Just. *Denison* and Mr. Just *Foster* agreed to it, "that if the certificate is obtained *before* the bail are *fixed*, they shall be "*discharged*: but if they are *fixed*, before the certificate "is obtained, they remain liable." (*a*)

V. post. 436. *Mich.* 1757. 31 *G.* 2. *B. R. Cockerton* v. *Owston* S. P. agreed to by the whole court. Also, *Ludlam* v. *Maidwell*, 26th *May* 1772, 12 *G.* 3.

REX *versus* GAYER, Esq.

An acting justice of peace a substantial householder, and a lieutenant of marines not compellable to serve as overseers of the poor where there are other sufficient persons within the parish. [See 3 Doug. 131. 2 Durn. 398, 779.]

MR. *Gould* and Mr. *Willes* shewed cause against quashing an order of sessions, which (upon appeal to them, by Mr. *Gayer*,) discharged an order of two justices appointing *James Gayer*, Esq. and *Benjamin Cobley* to be *overseers* of the parish of *Rockbear in com. Devon.*

Mr. *Gayer* alone appealed from this order of appointment; and the sessions discharged it, as to the appointment of Mr. *Gayer* only: (the words of the order are—"*it* "*appearing unto* this court that, &c. and also, &c. *and* "*that*, &c.; this court doth THEREFORE vacate and make

(*a*) This last point was again so determined in *B. R.* 25th *May*, 1772. *Ea.* 12 *Geo.* 3. and Serjeant *Burland* and Serjeant *Davy* acquainted the court that the point had been so held in *C. B.* and the court said it was a new cause of action against the bankrupt.

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"void the said warrant, as to the said *J. Gayer.*") It appearing unto them, that he had some years been, and was at the time of the nomination, and still at the time of making the sessions order, an ACTING JUSTICE *of peace*, for the said county, residing within the said parish of *Rockbear*, and a substantial housekeeper there; and also a *lieutenant of marines in his majesty's service, on half-pay;* and that there are *other sufficient* substantial householders within the said parish, for the doing such office. The court "THEREFORE vacated and made void "the said warrant, as to the said *James Gayer.*"

Mr. *Norton* had, on 13th *November* 1756, moved to quash this order of sessions: for that *neither of these two reasons* were sufficient to justify the sessions in quashing the order of two justices, whereby Mr. *Gayer* was legally and regularly appointed one of the overseers of the said parish.

And a RULE was thereupon granted, "to shew "cause."

On shewing cause, the counsel on both sides went (at large) into a long argument, "whether the reasons *given* "were sufficient:" particularly, "whether the *office* of "justice of peace, and the office of overseer, were *com-* [16 Vin. 132, "*patible;*" and "whether the objection could be remov- 133.]
"ed by appointing a *deputy*-overseer; if it could, then [246]
"whether a justice of peace was *liable* to be appointed "overseer, in order to his executing the office by "deputy."

Lord *Mansfield* said, the *general* questions concerning the *incompatibility* of offices, and the *power of appointing deputies*, are a large field indeed; but the *present* question seems to turn in a very narrow compass.

The *sessions*, upon an appeal, have a right to exercise the *same latitude of discretion*, in judging "who are fit "to be nominated overseers," as the two justices had. They have given their opinion "that Mr. *Gayer* [S. P. 4 Burr. "was *not a proper person* to be appointed overseer." 2102. acc.]
They are *not obliged* to give *any* reason for their opinion: because the legislature has intrusted them, upon an appeal, with the power or authority of appointing overseers.

If they had given *no* reason, their order had undoubtedly been good: we must have *presumed* that they acted upon *proper* grounds.

It is true, that where the *whole* reason is set out, and is *clearly wrong*, we may and ought to quash an order *manifestly* made by mistake, upon an erroneous foundation.

But then the bad reason given must appear to have been their *only* inducement. If there may have been *other*

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grounds, they should be presumed sufficient; and the order ought not to be set aside, because *some* of the reasons, unnecessarily given, appear to be bad.

There was *no necessity* for appointing Mr. *Gayer*: the sessions state "that there were other sufficient substantial householders within the said parish." They might think Mr. *Gayer*, under *all* the circumstances, improper *unnecessarily* to be appointed: his being an acting justice of peace residing within the parish, and a lieutenant of marines, might be two circumstances which weighed among *others*. But it does not follow, neither is it said, that they looked upon both or either of these reasons, as an *exemption* from being appointed, or a *disability* to serve the office of overseer; and that they vacated the warrant of two justices *as illegal* upon *that* account.

The execution of a discretionary power, where it is not necessary to give a reason, ought to be supported, *unless* the *whole* reason is set out, and *manifestly wrong*: Here, the *whole* reason upon which the sessions acted, *is not* given. They say there were other persons, qualified. Supposing Mr. *Gayer liable* to serve the office, they might think him *not* so *proper* as many *others*. And therefore [247] we are not obliged to say "that the *whole* reason they "went upon is bad;" allowing (for argument) that there arose *no legal* objection to the appointment of Mr. *Gayer*: which, I think, there is no occasion now to examine.

Mr. Justice *Denison* concurred.

They were not *obliged* to give *any* reason at all: and if it be *only an imperfect one*, we ought *not* to quash their orders.

He added—I remember a case, (*Rex* v. *Spalding*, I think it was,) where the justices held a man settled in a parish, by reason of an apprenticeship; not saying "that "he had *served forty days* in the parish, under it;" yet the court would *not intend* that they did *wrong*.

We will *intend* EVERY *thing in* FAVOUR of the justices, in their orders.

Now here, the reason *does not appear* to be a *wrong* reason; it is enough, that *they judged* him an IMPROPER *person to be overseer*.

Mr. Justice *Foster* concurred.

Per Cur. unanimously

ORDER of SESSIONS confirmed:
ORDER of TWO JUSTICES quashed.

Thursday, 10th Feb. 1757.

REX *versus* INHABITANTS OF CHIDINGFOLD.

See this CASE abridged in the TABLE; and at large in the quarto edition of my SETTLEMENT-CASES, No. 132. p. 415.

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PLUMMER *versus* BENTHAM.

PLUMMER v. BENTHAM. Saturday, 12th Feb. 1757.

Custom of London to be certified at the bar by the recorder *ore tenus*; [Vidian 29. Brownl. Ent. 100. Inst. Cler. 4 Ed. 30, 452, 2 Inst. 126. 2 Com. 17.]

THE recorder of *London* (Sir *William Moreton*) came to the bar, and CERTIFIED two *customs* of that city *ORE TENUS*.

Mr. Williams moved, (when Sir *William Moreton* was down at the bar,) that the recorder of *London* might return two *writs of certiorari* directed to the lord mayor and aldermen of *London*, to certify two of the customs of their city.

And then Mr. *Williams* opened the case, *viz.* that it was an action of trespass on the case brought by the plaintiff against the defendant, for *obstructing his ancient lights*, by a *new erection or building* which the defendant had raised against them; to which, the defendant had, (by leave,) pleaded two justifications, both of them under the custom of the city of *London*. One of them was, that there is an ancient custom in the city of *London*. "that if any person has a messuage or house in the "city of *London*, adjoining or contiguous to another "MESSUAGE OR HOUSE or to the ancient *foundations of* "*one* in the said city, which former house has *ancient* "*lights or windows* fronting opposite to or over such "other adjoining or contiguous MESSUAGE OR HOUSE "or ancient *foundation of one*: such *other* person, *owner* "*of the* LATTER *messuage or house*, or ancient *foundation* "*of one*, may well and lawfully *exalt* such his *messuage* "*or house*, or *rebuild upon the ancient foundations* of such "his adjacent or contiguous MESSUAGE OR HOUSE any "*new messuage or house, to* ANY HEIGHT *that he shall* "*please, against and opposite to the said ancient lights and* "*windows* of such first-mentioned neighbouring mes- "suage or house to which his *messuage or house* or an- "cient foundations of a *messuage or house* are so conti- "guous or adjoining; and *thereby darken and obscure* "such ancient lights and windows of such first-men- "tioned neighbouring house, having such ancient lights "and windows: unless there has been some writing, in- "strument or record of an agreement or restriction to "the contrary."

On this plea, issue was joined: and a *certiorari* issued, directed to the mayor and aldermen of the city of *London*, to certify "whether they have or have not such a "custom."

[249]

[Rast. Entr. 143, 158.]

The second plea, issue, and *certiorari* were the same with the first, only with this difference or rather *extension* of the custom pleaded; *viz.* "that the owner of any "ERECTION OR BUILDING, or the ancient foundation of "any ERECTION OR BUILDING, might well and lawfully

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"exact such REHEARSAL OR BUILDING, or erect and "build thereon a new ERECTION OR BUILDING to any "height that he pleases, &c." and so on, as in the former plea: only that the former plea confined the claim of the privilege to *messuages* or *houses*; which this latter plea extends to *all erections or buildings*.

Sir *William Moreton*, knt. recorder of *London*, accordingly *certified* ORE TENUS, by command of the lord mayor and aldermen, (after having recited the pleadings and *certiorari*), "that there *is* such a custom as is alledged in the *former* plea; but that there is NO such custom as is alledged in the latter plea."

* See the first case in Sir H. Calthrop's Reports, (prettily reported and worth reading,) where the question was very like the present, and the determination agreeable to the certificate as to this first plea. [See also 20 Vin. (C) 1. 21 Vin. 24, 25, 26, 27.]

The recorder then delivered in both the writs of *certiorari*, with *written copies* of the respective returns annexed; though he had delivered them ore tenus at the bar: (which, he told me, was usual:) The returns were worded as follows: *viz.* the execution of this writ appears in a certain certificate by us the mayor and aldermen of the said city of *London*, made by the recorder of the said city at the day and place within contained, according to the custom of the said city, by word of mouth, as is within commanded.

The Answer of Marshe Dickinson, *Esq. the Mayor, and of the Aldermen of the said City.*

We the said mayor and aldermen of the said city, by Sir *William Moreton*, knt. recorder of the said city, by word of mouth of the said recorder, according to the said custom of the said city, do, in obedience to the said annexed writ, humbly certify that there is now had, and from the time whereof the memory of man is not to the contrary there hath been had and received such ancient and laudable custom in the said city used and approved: to wit, "that if any one hath a messuage or "house in the said city, near or contiguous and adjoining to *another ancient* MESSUAGE OR HOUSE, or to the "ancient *foundation* of *another ancient* MESSUAGE OR "HOUSE in the said city, *of another person his neighbour*
[250] "there; and the windows or lights of *such messuage or* "*house* are looking fronting or situate towards, upon or "over or against the said *other* ancient MESSUAGE OR "HOUSE or ancient *foundation* of such other ancient "MESSUAGE OR HOUSE of such *other person his neighbour*, "so being near, adjacent, contiguous or adjoining, *al-*"*though* such messuage or house and the lights and "windows thereof be or were *ancient*, YET such *other* "*person his neighbour*, being the owner of such other "MESSUAGE OR HOUSE or ancient *foundations* so being

" near, adjacent or adjoining, by and according to the " custom of the said city in the same city for all the " time aforesaid used and approved, *well and lawfully* " *may*, might and hath used, at his will and pleasure, " his *said other* MESSUAGE OR HOUSE so being near, adja- " cent or adjoining, by building *to exalt or erect:* or, of " new, upon the ancient *foundations* of such *other* MES- " SUAGE OR HOUSE so being near, adjacent or adjoining " *to build and erect a new messuage or house* to SUCH " HEIGHT AS THE SAID OWNER SHALL PLEASE, *against* " and *opposite* to the said *lights and windows* near or con- " tiguous to such OTHER MESSUAGE OR HOUSE, and by " means thereof TO OBSCURE AND DARKEN such win- " dows or lights: unless there be or hath been some " writing, instrument or record of an agreement or re- " striction to the contrary thereof in that behalf."

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The return to the other writ of *certiorari* was in the same form, and to the very same effect as to the custom certified by the former; and repeated the return to the former *certiorari in totidem verbis*, very nearly: but it went on further, with a *negation* of the existence of any such custom as the defendant had alledged in his *second* justification. The additional part was as follows:

And that in the said city of *London* there is NOT now or ever was any *such* custom, " that if any one hath a mes- " suage or house in the said city, near or contiguous and " adjoining to an ERECTION *or* BUILDING or to the " ancient foundations of an ERECTION *or* BUILDING, in " the said city, of another person his neighbour there; " and the windows or lights of such messuage or house " are looking fronting or situate towards, upon, over or " against such ERECTION *or* BUILDING or the ancient " foundations of such ERECTION *or* BUILDING of such " other person his neighbour so being near, adjacent, con- " tiguous or adjoining: although such messuage or house, " and the lights and windows thereof be or were ancient, " yet such other person his neighbour, being the owner " of such ERECTION *or* BUILDING or ancient foundations " of such ERECTION *or* BUILDING so being near, ad- " jacent or adjoining, by and according to the custom of " the said city in the same city for all the time aforesaid " used and approved, well and lawfully may, might and [251] " hath used, at his will and pleasure, his said ERECTION " *or* BUILDING so being adjacent or adjoining, by build- " ing to *exalt and erect;* or, of new, upon the ancient " foundations of the said ERECTION *or* BUILDING so " being near, adjacent or adjoining to build and erect a *new* " *erection or building*, to SUCH HEIGHTH *as the owner shall* " *please*, against and opposite to the said lights and win-

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"dows of such messuage or house, and by means thereof "to obscure and darken such windows or lights."

The COURT ordered the *certiorari* to be filed, and the *return* RECORDED.

☞ *Note*—Nothing of this kind has actually happened for many years past, (not even since *H.* the sixth's reign,) in *this* court; (though it has in the court of Chancery.) And a consultation was had in the city, concerning the sort of gown which it was proper for the recorder to put on, to make this *ore-tenus* return: in which consultation it was determined that it ought to be the purple cloth robe, faced with black velvet; and not his scarlet gown, his black silk one, nor the common bar-gown.

[Qu. Co. Ent. 144.]

[See 6 Durn. 680.]

See *Viner's Abridgment*; Title *Customs of London*, letter P. *placita* 2 & 4. concerning this manner of trying the customs of *London*: and how to *surmise* "that "they ought to be tried thus, and not by the country:" It is *Vol.* 7. *page* 246. Note—*without* such a *surmise*, they shall be tried by the country, as other issues in fact are.

REX *versus* STRONG.

Indictment for exercising a trade contrary to 5 Eliz. c. 4. may be found at a city or a borough sessions.

MR. Serjeant *Poole* shewed cause against quashing an indictment on 5 *Eliz. c.* 4. *sect.* 31. (for exercising a trade, not having served an apprenticeship therein,) found at the sessions for the city of *Carlisle*.

Mr. *Nerton* had (on 27th *November* 1756) moved to quash it, upon an objection, "that the *city* sessions had "no *jurisdiction*." And he had cited, in proof of it, the case of *Regina* v. *Taylor*, 2 Ld. *Raym.* 767, where such an indictment was quashed, "because the BOROUGH "sessions had *no jurisdiction* to take such indictments." He insisted that ONLY the *quarter*-sessions of the COUNTY have jurisdiction. The indictment in that case of *Taylor* was found at the sessions for the *corporation* of *Wells*; and moved hither by *certiorari*.

[252]

[The doubt whether the borough sessions had jurisdiction in this case arose on 31 Eliz. c. 5. s. 7. as appears in 8 Mod. 220. not on this stat. 5 Eliz. c. 4. Had the case rested only on that, there never was nor could have been a colour for any doubt, however the doubt was removed by the cases here referred to.]

Lord *Mansfield*, at the time of the original motion, looked into the act of 5 *Eliz. c.* 4. and said that this act (§ 39.) expressly gives the power to mayors or other head officers of *cities* or *towns corporate*, at THEIR sessions.

And now upon shewing cause,

The COURT was unanimously of that opinion.

The case of the *Queen* against *Taylor* was in *Easter* term, 1702, 1 *Annæ*; and is *contradicted* by that of

Regina v. *Franklyn*, in 2 *Ld. Raym.* 1038. which was determined in *Mich.* 3 *Ann.* 1704. though it is in 1 *Salk.* 370, by *mistake*, put under *Mich.* 3 *Will. & Mar.*

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Per Cur. RULE DISCHARGED.

MEMORANDUM.

The COURT was not up till near an hour after midnight; though many rules were enlarged, and many long motions adjourned over till next term.

As the regulation made by the court concerning VIEWS took its *rise* in *this* term, it may be proper *here* to state every thing relative to that subject; which, *at the time of this publication*, is a practice fully settled.

The granting of rules for VIEWS in * *civil* causes stands † now settled upon the following foot.

* N.B. 4, 5 Ann. c. 16. § 8. does not extend to criminal cases; so that in them there can be no rule for a view, without mutual consent.

GREAT INCONVENIENCE had arisen from the *abuse* of views and their being perverted into means of DELAY, to the intolerable hindrance of justice. Some late instances shewed the mischief in a glaring light: and the example being once set, there was no doubt it would be followed.

After the 4 & 5 *Ann. c.* 16. *sect.* 8. Views were granted, upon motion, *of course*. And upon this act and 3 *G.* 2. *c.* 25. *sect.* 14. a notion prevailed "that *six of the first* "*twelve* upon the pannel must view, and appear at the "trial; if they did not, there could be no trial, and the "cause must go off."

† In 1765, [253]

Where *either* party wished delay or vexation, he moved for a view. A thousand accidents might prevent a view, or six of the first twelve from attending the view, or their attending the trial. He who wished them not to attend, might by various ways bring it about. Where a defendant in possession was well liked, and the plaintiff a stranger or unpopular, gentlemen of themselves found excuses; especially, if the view was troublesome and at a distance. Causes in several counties had at a great expence been repeatedly carried down, and put off; either because there was no view, or because six of the first twelve did not attend the view or did not attend the trial. Though twelve viewers should appear at the trial, yet according to the notion which prevailed, if *six of the first twelve* upon the pannel were not among them, the cause could not be tried.

The tendency of this abuse, to delay, vexatious expence and the obstruction of justice, was so manifest, that

1757. the court thought it their duty to consider of a remedy: and in *Michaelmas* term 1757, and at other times, Lord *Mansfield* informed the bar to the following effect: "that "they had conferred together upon the abuse of views, "and considered of a remedy in the power of the court."

Before the 4 & 5 *Ann. c.* 16. *sect.* 8. there could be no view till *after* the cause had been brought on to trial. *If* the court saw the question involved in obscurity which might be cleared up by a view, the cause was put off, that the jurors might have a view before it came on to be tried again. The rule for a view proceeded upon the previous opinion of the court or judge, *at* the trial, "that the "nature of the question made a view not only proper "but *necessary*:" for, the judges at the assizes were not to give way to the delay and expence of a view, unless they saw that the cause could not be understood without one. However, it often happened in fact, that upon the desire of either party, causes were put off for want of a view, upon specious allegations from the nature of the question, "that a view was proper;" without going into the proof, so as to be able to judge whether the evidence might not be understood without it.

[254] This circuity occasioned delay and expence: to prevent which, the 4 & 5 *Ann. c.* 16. *sect.* 8. impowered the courts at *Westminster* to grant a view in the first instance, *previous* to the trial.

As a view *might* be of use, and in *this* shape was attended with *no delay* and but little expence, it became the practice to grant them *of course*, upon the motion of *either* party.

The 3 *G.* 2. *c.* 25. *sect.* 14. provides "that *where* a view "shall be *allowed*, the jurors who have had the view shall "be first sworn, (or such of them as shall appear,) before "any drawing:" which means, in opposition to such other jurors as are to be drawn by *ballot*; and *not* to establish "that six at least of the *first twelve* shall be "sworn."

Upon a strict construction of these two acts *in practice*, the *abuse* which is now grown into an intolerable grievance has arisen.

Nothing can be plainer than the 4 & 5 *Ann. c.* 16. *sect.* 8. The courts are *not bound* to grant a view of *course*; the act only says "they *may* order it, where it shall "*appear to them* that it will be *proper and necessary*."

It is infinitely better that a cause should be tried upon a view had by *any twelve*, than by *six* of the *first* twelve; or by *any six*; or by *fewer* than six; or even without any view at all: than that the trial should be DELAYED *from year to year*, perhaps for ever: it can never be *pro-*

proper necessary to grant a view which is asked and used for so *unjust* a purpose. 1757.

There have been instances of great causes put off for years; and though even nine, ten or eleven viewers have attended, yet upon objection "that they were not six of "the *first twelve*," the cause has been put off, and a view moved for, as of course, again by the party who had availed himself of so glaring a chicane.

We are all clearly of opinion, that the act of parliament meant a view should not be granted, *unless* the court was *satisfied* that it was PROPER AND NECESSARY.

The *abuse* to which they are now perverted makes this caution our indispensable duty: and therefore, upon every motion for a view, we will hear both parties, and examine (upon all the circumstances which shall be laid before us on both sides) into the *propriety and necessity* of the motion; unless the party who applies will consent to and move it upon *terms* which shall prevent an unfair use being made of it, to the prejudice of the other side and the obstruction of justice.

LORD MANSFIELD having made this declaration, his [255] lordship desired the gentlemen of the bar to think of it; and, if any objections should occur, to mention them.

The expedient proposed by the court was universally approved.

The first instance happened in *Hilary* term 1757, in a great cause between *Pierce* and the Earl of *Faulconberg* and others: which was an issue out of Chancery, often tried at *Durham* by special juries, and now ordered to be tried at bar by a special jury from *Yorkshire*. (See the rule at large, together with the *addition* of the consent-part, *infra, pa.* 256, 257.)

Subsequent to this, was the cause of the Earl of *Darlington* v. *George Bowes*, esq. which was an issue out of Chancery, and had been thrice carried down to be tried at *Durham* (where there are assizes only once a year) at a great expence, and every time put off by the defendant, upon objections on account of the view. Once, nine viewers appeared: but they were not six of the first twelve. Another time, only four viewers appeared at the assizes. In 1757, a view was granted by mutual consent, upon terms; but by an accident (of a fall from his horse) the judge of assize was prevented from trying it. The defendant *Bowes* moved, in *Trinity* term 1758, for a view; but refused to renew his former consent, or to come into any terms; insisting that by law he was entitled to a view of course. The plaintiff had likewise moved for a view; consenting to the terms. Both motions were adjourned to the last day of the same *Trinity* term 1758: when the court, upon all the circumstances, rejected the defend-

1757. ant's motion, unless he should consent within a week to the terms proposed. He would not consent. The cause came on to be tried at *Durham*, without a view, before Mr. Baron *Smythe*. It happened, many of the jurors had viewed upon some of the former occasions. A verdict was given, for the plaintiff, to the satisfaction of the judge. The defendant moved the court of Chancery for a new trial; because he had been refused a view; and because it might be fit to have another trial, before his inheritance was bound. Mr. Baron *Smythe* certified "that he was satisfied with the verdict;" and also, "that a view was totally unnecessary, there being no "dispute concerning the locality, discrimination or limits "of the premises, but merely a question to whom cer- "tain lands belonged." The court of Chancery thought proper to grant another trial; but approved the denying a view, *unless* he renewed his consent; and made it part of the order for a new trial, "that he *should* consent to "the terms." It was again tried, before Mr. Justice [256] *Bathurst*: and a verdict was found for the plaintiff, to his satisfaction. The defendant moved the court of Chancery for a new trial: which was refused.

Had not the court put a *check* to granting views, from time to time, as of *course*, a rich defendant, conscious that the merits were against him, might, from pique or humour or litigiousness, have kept off the cause as long as he lived, for want of a view, upon a question where a view could not be of the least utility.

The wisdom and fitness of what the court had done to regulate views was so fully manifested upon the occasion of this cause, and appeared to be so well justified by the authority given them by the act of parliament and by every principle of justice and convenience, that no party has ever since moved for a view, without consenting to the terms: and it is found in experience, that views are * now regularly had, and a competent number of viewers appear at the trial. A view is not asked † now, except in cases where it may probably be of use: and as the non-attendance of viewers can now gratify neither party, both concur in wishing the duty performed.

*At the time of this publication. (1765.)

† V. supra.

The rule that was made in the first instance, that happened after the expedient was proposed by the court, and was received with general approbation as is above-mentioned, was drawn up in the following words.

*29th January 1757.

"*Saturday* next after fifteen days of St. *Hilary* in the "30th year of King *George* the 2d."

"*Pierce*, esq. v. Earl *Faulconberg* and others.

"By consent of counsel on both sides, it is ordered,

" that there issue a writ of *distringas juratores*, to be di- 1757.
" rected to the sheriff of the county of *York*; in which
" shall be contained a clause commanding the said sheriff
" to have six or more of the first twelve of the jurors
" to be impannelled and returned to try the issue between
" the parties, at the place in question, before the time
" of the trial of the said issue, to wit, upon, &c.; and
" that *B. R.* on the part of the plaintiff, and *T. W.* on
" the part of the defendants, shall attend on the same
" day and shew the matters in question to the said six
" or more of the first twelve of the said jurors; and that
" the expences of taking the said view shall be equally
" borne by both parties; and no evidence shall be given,
" on either side, at the time of taking thereof."

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" † AND by the like consent, it is further ordered,
" that in case NO *view* shall be had; or if a view shall
" be had by ANY of the said jurors, (whether they shall
" happen to be any of the *twelve* jurors who shall be
" FIRST *named* in the said writ, or not:) yet the said trial
" shall proceed; and *no objection* shall be made on either
" side, either for *want* of a view, or that a view was not
" had by any of the *twelve jurors first* named, or for that it
" was not had by any *particular number* of the jurors
" named in the said writ, or for want of a *proper return*
" to the said writ."

" On the motion of Mr. *Norton*, of counsel for the
" plaintiff; and of Mr. *Gould*, of counsel for the de-
" fendants."

The cause was tried at the bar, on the 7th of *May* 1757: and a full jury of viewers appeared.

The above recited rule was for a view to be had by a *special* jury; and was made absolute at once, being consented to by both parties: but during the remainder of the same term (of *Hilary* 1757,) and also during the three following terms (of *Easter*, *Trinity* and *Michaelmas* 1757,) the court, upon proper affidavits, granted like rules (*mutatis mutandis*) in cases that were to be tried by *common* juries; making them only "to shew cause," not absolute in the first instance. The next term (*Hilary* 1758,) they made some of them, "to shew cause;" others, absolute in the first instance; but none without proper affidavits. Soon after, *viz.* in *Trinity* term 1758, they made all these rules absolute in the first instance; some, upon affidavit; others, as of course: since which time, they are become motions of course, without affidavit.

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† Note—the former clause of this rule was in the *usual* form of rules for views where the trial was to be by a special jury.

But this latter clause (" and by the like consent it is *further* ordered, &c.") was *now first added*.

1757. The form of them is as follows—

If the trial is to be by a *special* jury, the rule runs thus——

It is ordered that there issue a writ of *distringas juratores, &c. &c.*—" taking thereof:" (in the words of the *first* clause of the above recited rule between *Pierce* and Lord *Faulconberg* and others.*) The *additional* clause is expressed in these terms—" the plaintiff, (or the defendant, " *viz.* the party who prays the view) consenting that in " case *no* view shall be had; or if a view shall be had by " *any* of the said jurors, whether they shall happen to be " any of the *twelve* jurors who shall be *first* named in the " said writ, or not; yet the said trial shall proceed; and [258] " no objection shall be made, on either side, on account " *thereof*, or for *want of a proper return* to the said writ."

* See last page.

The rule for a view, where the cause is to be tried by a *common* jury could not continue the same, *since* the balloting act (3 *G.* 2. *c.* 25;) as it was *before;* nor could it be *exactly* like to that for views by *special* juries, (by reason of the particular directions given by the 14th section of the ballotting act:) but it used to run much like it, only *mutatis mutandis.* The *present* form (*since* that act,) is this—" it is ordered that there issue a writ of *distringas* " *juratores*, to be directed to the sheriff of the county of " *Y.*: in which, shall be contained a clause commanding " the said sheriff to have six or some greater number of " * *the jurors* to be impanelled and returned to try the " issue between the parties, † *who shall be mutually consented to by the said parties or their agents*, at the place " in question, before the time of the trial of the said " issue, to wit, upon, *&c.*; and that *R. R.* on the part of " the plaintiff, and *T. W.* on the part of the defendant, " shall attend on the same day, and shew the matters in " question to the said six or some greater number of the " ‡ *said jurors, who shall be mutually consented to as aforesaid;* and that the expences of taking the said view " shall be equally borne by both parties: and no evidence " shall be given, on either side, at the time of taking " thereof."

* N. B. This act (of 3 G. 2.) does not require them to be six of the first twelve.

† These words are taken from the same act of parliament, sect. 14.

‡ V. supra. note (*) (†)

The *additional* clause, now added to this rule, is in " these words—the plaintiff," or " the defendant," (the party at whose instance the rule is prayed) " CONSENTING that in case NO *view* shall be had, or if a view shall " be had by ANY of the jurors, whether they shall " happen to be six § *or any particular number of the* " *jurors* § *who shall be so mutually consented to as aforesaid;* " yet the said trial shall proceed; and no objection shall " be made, on either side, on account *thereof*, or for *want* " *of a proper return* to the said writ."

§ V. supra. notes (*) & (†)

The end of *Hilary* term, 30 *Geo.* 2. 1757.

30 *GEO. II. B. R.* 1757.

Three Judges present, *viz.*

Lord Mansfield;
Mr. Just. Denison, *and*
Mr. Just. Foster.

(Lord Commissioner WILMOT *absent, in Chancery.)*

COOPER *versus* MARSHALL.

Friday, 29th April 1757.

THIS case was the same point with a case of *Cope* v. *Marshall*, which had been formerly twice argued, (*viz.* on 28th *June* 1754, and 31st *January* 1755.) Both of them stood now in the paper for argument; the present case having been never argued at all, and the other having never been argued either before Lord *Mansfield* or Mr. Justice *Wilmot*.

This case of *Cooper* v. *Marshall* stood first in the paper, and came on first. It was an action of trespass for breaking, entering, and *digging up* the plaintiff's *close*, and *filling up and spoiling the coney-burrows* there, &c. And there was a 2d count for doing the like in the plaintiff's *free warren*.

Several pleas were pleaded, by leave of the court.

Plea—As to the 1st count, was a justification under a *right of common* in twenty acres, &c.; and that the coney-burrows were wrongfully, unlawfully, and injuriously newly erected and kept up there: by reason whereof the said common was *surcharged and spoiled*; so that the defendant could not enjoy *sufficient* common in the said twenty acres, as of right he ought. And therefore, he justifies the breaking, entering, and *digging up* the plaintiff's close, and *filling up and spoiling* the coney-burrows, as it was lawful for him to do, in order to abate the said *nuisance*.

There was also a second justification, much to the same effect.

To the 2d count—were two justifications not much different from the former.

[S. C. 2 Wils. 51.]

Plea in justification of a trespass, that it was done to abate a nuisance, from which he could not enjoy his common as of right he ought is bad. [S. P. ruled accordingly; and that a general declaration was sufficient. 3 Durn. 74. 1 Bosan. 15, 16. 6 Durn. 484. [260] See also 4 Bur. 2425.

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The plaintiff demurs to these pleas: and the defendant joins in the demurrer.

Mr. *Morton pro quer.*---The justification arises merely from the plaintiff's having *surcharged* the common: and the wording of the plea cannot alter the matter and substance of it. So that the defendant's *calling* it a NUISANCE will not *make* it so: but it really is a *mere surcharge of common.* Therefore the word "NUISANCE" is here misapplied.

He cited *Cro. Jac.* 446. the case of *Fowler* v. *Sanders:* where the prescription was treated as a prescription to make a nuisance, though not so expressed in *terms.*

But it is not an illegal act, for the lord to *place conies* upon his *own* land; though the land be liable to right of common. They are beasts of warren, and profitable to the lord: and the commoner *cannot chase and kill* them.

Bracton, lib. 4. 221. makes a difference between a nocumentum *justum,* and a nocumentum *injuriosum.*

Fleta, lib. 4. *c.* 26. *de Nocument' Servitutibus injuriosis,* makes the like distinction: "nocumentorum aliud, injuriosum *et* dampnosum; et aliud, dampnosum et *non* injuriosum."

These authorities shew that the injury arises *only* from the *excess.*

And the commoner has *no such* remedy, as the defendant here relies on.

The question therefore is, "whether the commoner has a right to DIG UP *the lord's soil;* in order to preserve his right of common."

[261] The lord cannot indeed *totally destroy* the commoner's qualified interest, contrary to his own grant. Yet the lord has rights *compatible* with the commoner's right: and these are legal in their *own nature:* though they may *become* injurious, by *excess.*

On which head, he cited *Fleta, lib.* 4. *pa.* 252. (*V. pa.* 252, 253, in *cap.* 18. *de pertinentiis.*)

But this justification puts the latter case upon the same foot with the former: whereas the commoner's remedy is, *really* adequate only to the injury done to him. Now a surcharge of common is of the latter kind of injury: and yet he here claims a right *to dig up* the soil and *destroy* the conies. So that the remedy claimed by the justification EXCEEDS *the injury done.* And indeed it would go further than a judgment upon a writ of admeasurement would carry it: for which, he referred to *Fitzh. Nat. Brev.* 295. (270) and *Westm.* 2. *c.* 8. (13 *E.* 1.) There, the tenant who is guilty of a second surcharge shall only pay damages, and forfeit the overcharge to the king: whereas what is here claimed, is a *total confiscation* of the lord's [illegible] injury done to the commoner.

Authorities in point, or nearly so, "that the commoner "cannot do this," are *Godbolt* 122. *Coney's case*, *H.* 29 *Eliz.* which is full in point: and the principal resolution is confirmed by 4 *Leon.* 7. *Ould* and *Coney's* case, S. C. In which case, it was adjudged "that the commoner cannot "kill or *destroy* the conies which destroy his common:" but it appears by *Godbolt*, that "he may have other "remedy. And *per Suit*, Justice, he may have an action "of the case or assize, against the lord, for putting in "the conies, if he has not sufficient common left." Indeed it is said in 1 *Leon.* 7. "that he hath *not* any *other* "remedy." But *Fleta*, *lib.* 4. *c.* 23. *de admensur. Pasturæ*, *pa.* 262, 263. justifies Mr. Just. *Suit's* opinion, "that he "*has* remedy;" *viz.* either admensuration, or assize of novel disseisin.

A commoner cannot even *distrain* the lord's beasts which surcharge a common. For which position he cited *Godbolt*, *ut supra*, *pa.* 124. as an authority. (*V.* what is there said *per Godfrey arguendo*; but not any part of the resolution of the case.) Much less, then, can he *destroy* them.

Cro. Eliz. 876, *p.* 43 *Eliz.* The case of *Bellew* v. *Langden*, the same point, and adjudged accordingly; "that the "keeping of conies by the owner of the soil is lawful; "and the killing them, unlawful." And *Owen* 114. S. C. (there called the case of *Pellin* v. *Langden*,) S. P. accordingly: which adds, that the owner of the soil may make a fish-pond upon the common; and that the commoner could not destroy it.

[262]

Yelv. 104. *Hoddesdon Mil.* v. *Gresil*, *M.* 5 *Jac. B. R.* and *Cro. Jac.* 195. *P.* 5 *Jac.* S. C. there called *Hadesden* v. *Grissel*; it was adjudged "that the commoner cannot "*kill* nor *chase* the lord's beasts off the common; but "his remedy is by assize, or action on the case."

Agreeable to this resolution—in a case in *Cro. Jac.* 229. *M.* 7 *Jac.* 1. there called Sir *Jerom Horsey* v. *Hagberton*, a plea very like the present, was over-ruled without defence. The case really was between Sir *Jerome Horsey* and *Mead and Havor and his wife.* The justification was, "of *levelling the coney-burrows*, and *laying them smooth* "*and even with the ground*;" and the reason given for doing it, was, "that *uti non potuit* his common, *prout* "*debuit.*" Adjudged, without argument, "that the com-"moner could *not* do this."

After this, the commoners tried their chance again, by altering their manner of pleading. This was in the case in 2 *Bulstr.* 116. *Carrill* v. *Pack and Baker*, *Tr.* 11 *Jac.*

Here, the coney-burrows were treated, by the justification, as *holes* made upon the common, by the plaintiff,

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into which the commoners sheep fell; and that the sheep of the commoners often *fell into* those holes, and were thereby *lost;* and *therefore* they justify the *chasing* the conies, and *digging and filling up* the burrows.

And agreeably to this case, the pleading in the present case is, that the plaintiff erected coney-burrows, "&c."

In that case, all the cases and arguments were urged: and yet it was adjudged against the defendant; who had justified the *chasing* the conies, and *digging down* the burrows and *filling up* the holes.

Since which time, the grand point has never come in question.

Mr. *Aston pro def.*

In the first place, it does *not appear* that the defendant *did* KILL any of the conies: though Mr. *Morton* would suppose that to be implied in his digging and filling up the burrows.

[263] The lord may feed or depasture the common, I agree: and the commoner cannot *kill* or *chase* his cattle.

But it does not follow, that where *necessity* obliges the commoner to *abate a* NUISANCE, he may not do it.

And surcharging a common with rabbits in a great degree, is a private NUISANCE.

1 *Hawk. Pl. Cor.* 197. *c.* 75. treats of common nusances, and how they may be removed; and he says "that any "one prejudiced by a private nuisance may destroy it." *Pa.* 199. § 12. is express.

2 *Rol. Abr. Tit. Indictment,* letter Q. *Nuisance Pl.* 7, 8. A presentment of a surcharge of common, is not good: because it concerns a private interest. The same, of an inclosure of common, in nuisance of the commoners.

Bracton, lib. 4. *c.* 21. *pa.* 221. shews that though the act was *legal at first,* the *excess makes it a nusance.*

But here the 2d plea is "that the lord has erected so "many coney-burrows that the commoner had *not* "*sufficient* common left." And this fact is *admitted* by the demurrer. Therefore the lord has broken through the bound of right between the lord and the commoner.

The lord cannot inclose or build upon the common.

And there are no *degrees* of insufficiency: the only question is "whether there be or be not sufficient com-"mon left;" as in the case in 2 *Mod.* 7. *Smith* v. *Feverel.*

And the commoner may in such case abate the nusance. 2 *Inst.* 88. is in point. 15 *H.* 7, 10 *b.* is also in point. He may ALSO, indeed, if he chooses it, bring an action of trespass or assize. But he *may* abate them, *without* suit. *Hale's Analysis* 110. (*V. pa.* 125. § 42.) *Robert Mary's* case, 9 *Co.* 112. *b.* affords the reason; *viz.* the preventing multiplicity of suits.

As to the doctrine of the commoner's not meddling with the *soil*—

The lord could approve *before* the statute of *Merton*. 1 *Ro. Rep.* The case of *Sir S. Proctor* v. *Sir J. Mallorie*; *per Coke*: and agreed to by the lord chancellor. *Fitzh.* Title *Approvement* (there cited.) [264]

And this appears too by the writ of *Quod permittat*. *Bracton, lib.* 4. *pa.* 227. *b.* (the writ there) shews that the commoner might pull down pales, &c. 2 *Inst.* 88. *ad idem.*

This is like all other cases of nuisance: a person *may abate* a nuisance to his property, though upon the land of another. 9 *E.* 4. 35. *a.* is so.

As to Mr. *Morton's* cases—there is no material difference between destroying a *hedge*, and destroying a *coney-burrow*. Now 2 *Mod.* 65, the case of *Cæsar* v. *Mason* is in point, "that the commoner may prostrate and abate "a *hedge*;" and surely that is meddling with the *soil*.

And there *may* be cases where the commoner may chase off the lord's beasts: as suppose they are infected.

As to *Coney's* case, it was very different from the present: for there the *killing and carrying away* was justified; whereas we do not justify killing, chasing, or taking away.

So the case of *Bellew* v. *Langden* was *killing*. There was no pretence of any surcharge of common. It is a justification of killing the conies as being damage-feasant: and it is only adjudged there "that the killing them was "unlawful."

So *Yelv.* 104. was *chasing* and *killing*.

And in those cases, there *might be sufficient* common left, for aught that appears to the contrary, in any one of them.

Sir *Jerome Horsey's* case is not like this. That is for breaking a *warren*: and the coney-burrows there are not said to be *newly* erected. And it was done *to prevent* the coney-burrows increasing, *so as to be* a nuisance: not averring "that they were *then* a nuisance."

Whereas here it is averred *to be* a nuisance, and a *new* erection.

As to the case of *Carril* v. *Pack and Baker*—it is for entering the plaintiff's free warren, and digging the land. And there, in the justification, it is alledged to be done for the BETTER *preservation* of the common. And the free warren is admitted: and therefore he could not justify the *killing*, &c.

As to a pond—if it was so large as not to leave sufficient common, it would be a nuisance, and *might* be abated. [265]

1 *Lutw.* 101. The case of *Hassard* v. *Cantrell* (which was mentioned on a former argument) was only "that the

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"commoner could not enjoy his common *in so beneficial* "*and ample* a manner as before." But it does not say, as here, "that there was *not sufficient* common left." Which is going a great deal further than that case does.

Mr. *Morton* in reply—

Mr. *Aston* agrees that the act of the lord is *legal*. Therefore it is not like acts which are against his own grant; or cases which become *manifesta disseisina*.

"*Ulterius* nocumentum" imports a *present* nuisance—

Lord MANSFIELD stopped Mr. *Morton* in his reply.

"Whether it be or be not *hurtful*:" or "how far it may "be so;" is not the question: the question turns upon the REMEDY; "whether it is *abatable*; whether the "commoner can do *himself* justice."

It may be *prejudicial* to the commoner, yet not *injurious*: it may be both *prejudicial and injurious*, yet not *abatable*.

The lord, by his grant of common, gives *every thing incident* to the enjoyment of it, (as ingress, egress, &c.;) and thereby *authorizes* the commoner to remove every obstruction to his cattle's grazing the grass which grows upon such a spot of ground: because every *such* obstruction is directly *contrary* to the terms of the grant. A *hedge*, a *gate*, or a *wall*, to keep the commoner's cattle *out*, is *inconsistent* with a grant which gives them a right *to come in*.

[1 Bofanq. 15, 16.]

But the lord still remains *owner of the soil*: and is not debarred from exercising any *act of ownership*.

[Qu? Cro. Eliz. 198, 199. pl. 19.]

The *commoner* has no right to meddle with the SOIL.

The *true distinction* is taken in the case of *Mason* v. *Cæsar* in 2 *Mod.* 66: where the court was of opinion "that the defendant, a commoner, *might* abate the *hedges*; "FOR thereby he did *not* meddle with the SOIL, but *only* "pulled down the *erection*."

[266]

The *hedge* stopped the commoner from entering, and putting in his beasts. The grant gave him leave to enter, and put in his beasts: therefore it *virtually authorized* him to remove any obstruction *directly repugnant* to that liberty.

But in the present case, the lord has done *nothing contrary* to the grant: he has *not obstructed* the commoner from entering and putting in his cattle.

[Cro. Jac. 195.]

The lord has a *right* to put *conies* upon the common: as appears from the case of *Carrill* v. *Pack* and *Baker*, in 2 *Bulstr.* 115, 116.

The conies themselves naturally make the *burrows*. So that they are *incident* to the right of putting on the conies.

If the lord surcharges, the commoner is *injured* in his

right of common, it is true: but what is the commoner's *remedy?* NOT to *abate*: *not* to be his *own judge*, in a complicated question, which may admit of nicety to determine.

There is a certain *line* to be drawn: the lord has a right *so far; but no farther.* Yet the commoner cannot *destroy* or *drive off* the conies: nor, consequently can he *destroy the* BURROWS; which is, in effect, destroying the *conies.*

This is founded upon reason, and upon many authorities.

Sir *Jerome Horsey's* case. (*V. ante*, 262.) 2 *Bulstr.* 115, 116. The case of *Carrill* v. *Pack* and *Baker* (*V. ante*, 262.)

And its being a *free warren* makes no difference.

So that the question is not, "whether this be an *injury*": [22 Vin. 429. (B) 2.] "but, whether it is ABATABLE."

I think it so clear a case, that I have no difficulty at all about it.

Mr. Just. *Denison* declared the same thing: and he said he saw no difference between this case, and the cases cited: but *merely* in the *expression, viz.* that in this case it is treated as a *nuisance*; which is not the expression, in them. But this *form of expression* makes no difference.

Upon this record, it must be taken, "that the plaintiff "was *owner of the soil*, and *had a free warren*; and that "there is *not sufficient common left*, (by the increase of "the conies) for the use of the commoner." [267]

The question then is, "whether the commoner shall "be intrusted to *destroy the* ESTATE of the lord, in order "to preserve his own *small right* of common."

1 *Rol. Abr.* 405. *pl.* 2. gives the *reason* why the commoner cannot* kill the conies, but ought to bring his assize or action; *viz.* "because he cannot be his *own* "*judge.*"

* Yet Roll says, "Dubitatur."

So here, this justification would make him a judge in his own cause. No: let him take his *proper remedy.*

This is plain reason; even if it was *not* supported by authorities: but the cases are also strong, to prove it.

The only point of this case turns upon these pleadings CALLING it a *nuisance.*

But this will *not* MAKE it a nuisance *abatable by the defendant himself*; nor can it alter the *law.*

In Sir *Jerome Horsey's* case, *Cro. Jac.* 229, it was adjudged "that the commoner has no other interest than "to take the common, by feeding his cattle there: and "*may not destroy* the conies nor coney-burrows."

A coney-burrow is *not*, of its *own nature*, a nuisance: on the contrary, it is essential to a free warren.

Therefore the *nuisance* depends upon the *number* of

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them: and you can, at the utmost, only abate *so much* of the thing as *is* a nuisance. You cannot destroy the *whole*, (which is the right here claimed;) but only *so much* of the thing as *makes* it a nuisance.

In 1 *Strange* 688, in the case of *Rex* v. *Papineau*, Lord Ch. Just. *Raymond* expressly declares so. Suppose a man builds his house up so high, as to be a nuisance to his neighbour, by obstructing his lights or in any other respect arising from its *excess*; you cannot destroy the *whole* house, but only *so much* of it as by *its excess* above what is allowable, constitutes the nuisance.

Mr. Justice *Foster* was of the same opinion.

This justification is clearly bad. It is founded on a claim of right which cannot be maintained.

[268] It is admitted "that a commoner cannot, in this case, "*destroy* the *conies*." Consequently, he cannot destroy the *burrows*: for the effect is destroying the conies.

If the lord has exceeded the bounds of his right, the *law* is to determine the *quantum* of such *excess*; and to the law the commoner must resort for his remedy, if he is aggrieved.

Per Cur. unanimously.

JUDGMENT for the PLAINTIFF.(*a*)

See the next case—the same point.

rs. C. 2 Wils. 61.]

COPE *versus* MARSHALL.

H. 27 *G.* 2. *Rot'lo.* 145.

THIS being the same point with the last preceding case of *Cooper* v. *Marshall:*

THE COURT without argument at this time, (but this

(*a*) This case was briefly as follows: "trespass for "breaking plaintiff's close and spoiling coney-burrows "there; and a second count for the like, in the plaintiff's "free warren: the defendant justified under a right of "common, and that the coney-burrows were wrongfully "newly made there, so that he could not enjoy as of "right he ought, and therefore he filled up the coney-"burrows: on demurrer there was judgment against the "defendant, for the lord has a right to put conies on "the common, provided he does not surcharge the com-"mon, which if he does, then and then only the com-"moner is injured, and may have remedy, but it must "be by action; for he cannot be his own judge, and kill "the conies, or fill up the burrows." And the judgment in this case is in effect the same, and grounded on the same reason as that in 2 *Bulst.* 115.

very case had been argued twice before,* though not before Lord *Mansfield* and Mr. Just. *Wilmot*,) gave the like judgment as last above, *viz.*

JUDGMENT for the PLAINTIFF.

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* Vide ante 259.

HOPE, ex dimiss. BROWN ET UX. *versus* TAYLOR.

THIS came on upon a case stated, upon the trial of an ejectment.

The case stated was this:

Robert Johnson, seised in fee (*inter alia*) of a *copyhold* of inheritance, and having first surrendered to the use of his will devised to *John Wedgeborough*, his sister's eldest son, his house in the brook with the out-buildings: and 30*l.* to be paid within twelve months after his decease; to his nephew *Robert Taylor*, 50*l.* to be paid within twelve months after his decease; to his nephews *Charles Taylor*, *Robert Taylor*, and *William Taylor*, his sister's three sons, twenty-nine acres of arable and meadow land bought of *B.*; not to be parted, but to part the rent equally between them; then to WILLIAM TAYLOR, his sister's son, the house in question, by the description of "his "house on the green: with the ground and outhouses "thereto belonging;" and gives him also 10*l.* and to his *brother-in-law Charles Taylor* 5*l.*: and he directs the said legacies to be paid *within twelve months* after his decease; and declares his will and meaning to be "that *if* "*either* of the persons before named *die without issue* law- "fully begotten, then the said LEGACY shall be divided "equally between *them that are left alive.*"

An ordinary man makes his own will without any assistance, and after disposing of his real estate, says, "*if either of the persons before named die without issue lawfully begotten, the said legacy shall be equally divided between them that are left alive;*" this creates an estate tail. [See 2 Durn. 724. 1 East. 97, n. 5 Durn. 71a. and qu. Fearne 357, 358.]

[269]

Note—It was stated that the testator had *five* houses in all; and that the will begun with this expression, "as to ALL *my worldly estate, &c.*" And it concludes thus, "and all the REST of my houses, goods, "land, and cattle, I give to my kinswoman *Eliza-* "*beth Wedgeborough;* and make her my sole exe- "cutrix."

The testator died seised of the said five houses and lands.

William Taylor entered, and was admitted, and enjoyed till the 13th of *June* 1755; when he died, leaving the defendant *William Taylor*, his only son, and heir at law.

The wife of *Brown*, the lessor of the plaintiff, is heir at law to the testator; and, as such, brought this ejectment, against the defendant *William Taylor* the son, who claims as tenant in tail.

In this case, there are made

TWO POINTS, which are (in substance)

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1st. What estate *William Taylor*, the devisee, took by the will; *viz.* whether an estate *tail*, or for *life* only.

2dly. If only an estate for life, then whether the residuary clause did not carry the *reversion in fee*, to the *residuary devisee*: (in which case, the heir at law could have no claim.)

Mr. *Clayton* for the lessor of the plaintiff, the heir at law.

To the 1st question, he argued that *William Taylor* the defendant's father, took only an estate for *life*; not an estate tail.

The devise is only to *William Taylor himself*; without any *further* limitation whatsoever.

The subsequent words are, "that if either of, *&c.* shall "die without issue, then the said LEGACIES to be di-"vided amongst the survivors."

[270] Now the word "LEGACIES" will be satisfied by the *money*-legacies: and there were *four* money-legacies before given, therefore this clause shall not be extended to the devise of *real* estate. For an heir at law shall *not* be disinherited, by *doubtful* words, or by *implication*.

2d Question, upon the *residuary* clause.

The residuary clause does *not* carry the *reversion in fee* in these premises in question, to *Elizabeth Wedgeborough*.

There were OTHER *lands* besides these, for the words to operate upon: and these words here are, "all the *rest* of "my houses, lands, *&c.*"

3 *Peere Wms.* 56. The case of *Chester* v. *Chester* was a case, (and many other cases might be mentioned,) where there were *no other* lands for the words to operate upon.

But here he had FIVE houses; and *only* three were devised: so that "*rest*" means his *other* houses.

But (what goes to both points—)

This was *copyhold*; and he had likewise *freehold* lands, distinct from the copyhold: and therefore the copyhold not being *particularly* named, the words of the devise shall only extend to the *freehold*. Which is fully proved by two resolutions in *Cases in Equity abridged*, *p.* 124. *pl.* 13. *& pl.* 14.

Mr. *Nares pro defend*'.

He made the same two points, with Mr. *Clayton*.

1st. The testator had no child, but several nephews; *viz. J. W.* his sister's son by a former husband, and three nephews *Taylors*, her sons by a latter husband; and he gives houses and legacies amongst them, in different proportions.

The word "LEGACY" relates, and the testator intended it to relate, to the houses, *as well as* to the money-legacies. He could never intend to give such a trifle as the *interest* of 5*l.* to his brother-in-law, for his life only. And it may be observed, that if this *Charles Taylor*, the

testator's brother-in-law, (one of the legatees above named,) shall happen to die *without issue*, the other three legatees (his three *sons*) must consequently be dead too: and then there would be *nobody* left alive, to divide it amongst. 1757. HOPE v. TAYLOR.

And if the word "LEGACY" relates to the *real* estate, it is a clear estate tail in *William Taylor*. (Which position Mr. *Clayton* agreed to.) [271]

2d Question—The will begins, "as to *all* my worldly "estate." Therefore he meant to pass *every* thing by this his will.

The cases of *Ibbetson* v. *Beckwith*, (*Forrester* 157.) *M.* 1735. *in Canc.* and of *Tanner* v. *Wise*, in 3 *Peere Wm.* 295. both of them prove this.

1 *Lev.* 212. The case of *Cooke* v. *Gerrard* is expressly in point—"that the word *land*" in a devise meant not only the thing itself; but the "*interest* of the thing."

As to *Cases in Equity abridged* 124, there was no surrender of the copyhold estate: but it is here stated "that the "testator had *surrendered* the copyhold estate, to the use "of his will." Which renders his intention clear, to *dispose* of it.

However, this reasoning only reaches the 2d question: for the *first* devise is *express*.

And the defendant is son and heir to *William Taylor*.

Therefore he prayed judgment of nonsuit against the plaintiff.

Mr. *Clayton* in reply—

All the money-legacies are to be paid within a *year*. Therefore the event must happen *within* that year; or else the eventual devise could not take effect.

The word "*rest*" clearly *excludes* what he had *before* devised.

Lord MANSFIELD—Mr. *Clayton* admits that *if* the word "LEGACY" is *applicable to lands*, *W. T.* has an estate tail.

This is plainly a will of a man's *own* drawing.

He professes to dispose of his *whole* estate. He means to make *one* of his relations his general heir; the *other* objects of his bounty are four nephews. And he gives them land; and also gives some pecuniary legacies, to be paid *within twelve months* after his death: (which indeed the *law* would have implied.)

Then he gives his brother-in-law *5l.*

And if either of these persons before named shall *die without issue* lawfully begotten, then he gives the "said "LEGACY" to those that shall be left alive, to be equally divided between them. [272]

The explanation of this word "LEGACY" must be governed by the *intention* of the testator: and to this purpose, some stress may be laid upon this introduction of the professed disposition of *all* his worldly estate. A *different* construction has been sometimes put upon the

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very *same* words, as applied to money and lands; in order to *support the intent* of the testator: as in the case of *Forth* v. *Chapman*, by Ld. *Macclesfield*.

It is *most agreeable to the intention* of the testator in this case, to construe this word "legacy," to extend to *land*.

It would *not* be a *legal* limitation, if confined to money.

The legacies may happen to be *spent*, soon after the twelve-month is expired.

And it could never be intended that so *small* a sum as the 5*l*. should be put out to interest, and keep liable to this limitation.

If the brother-in-law died *without* issue, there would be *no one left* to devide the legacies.

Common people do not make such distinction between money and land, as persons conversant in law matters do.

The testator meant this clause as a restraint upon his former bequest; and meant that the issue should have it.

The word "legacies" *does* extend to lands, as well as to monies. Common persons would not think of using the word "*devise*:" (which is the more usual *legal technical* term.)

Therefore upon the first question I think it is an estate *tail*.

But his lordship did not choose (it not being at all necessary) to declare any opinion upon the 2d question: because a third person not now before the court, might be affected by it.

Mr. Just. *Denison* concurred—he thought the word "LEGACIES" extended to *real* estate; and consequently that it was an estate *tail*.

[273] Mr. Just. *Foster* also held that the testator *intended* the land to go over; and that it was an estate *tail*.

If the word "LEGACY" was confined to *pecuniary* legacies, the devise over could not have taken effect; being *after* a dying without issue; (*V. ante p.* 272. Lord *Mansfield* accordingly.)

Besides, *Charles Taylor*, who was one of the persons before named, has *no pecuniary* legacy given *him*: so that it *must* mean land, as to HIM.

And these are *small* legacies, (one of them only of 5*l*.) and payable within a *twelvemonth*. Therefore the testator cannot be supposed to apply this limitation to *them*; but to the LAND which he had devised by his will.

Per Cur. unanimously
JUDGMENT for the DEFENDANT
(*viz.* of NONSUIT of the PLAINTIFF.)

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DENN
v.
CADOGAN.

DENN *versus* Lord CADOGAN et al'.

Saturday, 30th April, 1756.

THIS day having been appointed for a trial at bar, in this cause, ONLY *nine of the jury appeared.*

Sir *Richard Lloyd pro quer'* prayed a *decem tales.*

Decem tales granted upon a Saturday, returnable the Monday following; and is the first instance.

By the course of the court, this trial could not have come on again, *till Michaelmas* term; (the immediately next term being an *issuable* term, wherein there are *no trials at bar.*)

But the court observing the great expence and delay which would by this method of proceeding be occasioned to the parties, asked " whether there were gentlemen " of the county enough in town, to make a complete " jury."

And being told " that there *were*;" and the gentlemen of the jury who now attended, expressing a desire " not " to be *kept* in town."

The COURT ordered the return of the *decem tales* to be on the *Monday following*; (though there had never been before an instance of it.)

And by so doing, they saved vast expence, as well as some delay to the parties concerned. [274]

For now, on *Monday* 2d *May* 1757, a full jury appeared: and the trial proceeded.

The cause itself had no difficulty in it; and was soon over.

For the lessors of the plaintiff claimed as heirs at law of *George Smith*, esq. who died in 1607: and they drew down their descent through two sisters, who had married *Carlos* and *Underwood*. One of their other ancestors, as they pretended, was *Francis Smith*, third brother of the first Lord *Carrington*, (*Charles Smith*, alias *Carrington*:) but they could not by any means make this out.

Their claim was as heirs at law, under a family settlement of the Lord *Carrington*, in 1687. But they could not shew the least probability that *Francis* the third brother of the Lord *Carrington* (whose estate was prior to the plaintiff's claim) was *dead without issue.*

Whereupon the PLAINTIFF WAS NONSUITED.

The COURT, on the application of the gentlemen of the jury, *took off the fines* (of 20*l.* a-piece) which had been set, on *Saturday* last, upon the defaulters.

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HAWKINS v. COLCLOUGH.

HAWKINS *versus* COLCLOUGH.

Trin. 29, 30 *G.* 2. *Rot' lo* 962.

(*Lord Commissioner* WILMOT *absent, in Chancery.*)

Tuesday, 3d May 1757.

Award that each party shall pay their own charges at law, and that the defendant should pay the plaintiff 5*s.* for his making the first breach in law is certain and final.

IN an action of trespass for an assault, battery and false imprisonment: an AWARD (made pending the action) being pleaded to this action, and a *tender* of the sum awarded; the plaintiff demurred.

The award (which was made upon a submission of all disputes, &c.) was in these words—" whereas there has " been a suit at law between the parties, that hath run " to a great expence on both sides; and it being left to " me to make an end of it; I determine that they shall " each of them pay their own charges at law; and that " the defendant pay the plaintiff five shillings, for his " making the first breach in the law."

[275]

Mr. *Anguish pro quer'* objected to the *award*, as being

1st. *Uncertain;*

2dly. *Not final.*

First—it is *uncertain*. The submission is of *several* matters: and the award does not at all shew, *which* of them it means to determine. 1 *Ro. Abr.* 242. letter B. *pl.* 1. 252. *pl.* 10.

And an averment without a fact to support it is of no avail. 1 *Ld. Raym.* 246; in the case of *Bacon* v. *Dubarry*, the fourth resolution is expressly so.

This is an action of trespass. The submission is of *all* trespasses: and the award does not distinguish *what* trespasses it determines. 1 *Ro. Abr.* 251. letter I. *pl.* 1. and *pl.* 3. and the case of *Maw* v. *Samuel* in *Popham* 134. and 2 *Ro. Rep.* 1. the case of *Bacon* v. *Dubarry* (before cited.) The third resolution says " that the award was void for " the uncertainty, without releases."

Now *here* are *no* releases. Each is to pay their own charges. And the defendant is awarded to pay to the plaintiff 5*s.* for his (the defendant's) having been guilty of the first breach of the law.

The injury complained of was assault, battery and false imprisonment. And here is no satisfaction awarded for the injury. 1 *Ld. Raym.* 247. The case of *Freeman* v. *Bernard.*

Second point—it is *not final:* which it ought to be.

An award must be *final*. But this award was made pending the action: and it does not put any end to it at all.

Under this head, he cited 1 *Ro. Abr.* 252. *pl.* 16, 17. (But one of these is marked by the abridger, " *dubitatur*:" the other, " *Contra* 15 *H.* 7. 22.") Also 2 *Strange* 1024.

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the case of *Tipping* v. *Smith*, where the award was held ill, being uncertain and not final; and *Cro. Eliz.* 904. the case of *Colston* v. *Harris*: where the award was holden void; because nothing was awarded to the defendant, nor to be free from suits: so no advantage to him.

Mr. *Caldecot contra pro def.*

This award is pleaded by consent of the plaintiff, and by leave of the court. And though pleaded as being made pending the action, *viz.* between the action brought [276] and the plea pleaded; yet the court will determine upon the mere validity of it.

1st. It does appear upon what particular suit, the award was.

The generality of the submission is not inconsistent with the particularity of the award. 8 *Rep.* 98. *b. Baspole's* case. (Second resolution.)

This shall be taken to be the *whole* matter depending between the parties: and *no other* suit than this appears to have been depending between the parties.

The case of *Bacon* v. *Dubarry*, in 1 *Ld. Raym.* 246. is not like or similar to the present case.

After payment made or tendered, the action of trespass is *discharged.*

Hob. 49. the case of *Nicholls* v. *Grunnion* is expressly so. (The words are—" for a *satisfaction* implies a discharge.")

The present award (which was made by a *cobler*) recites that there was such a suit: and that it being left to him to make an end of the said suit, he determined as follows, *viz.* " that the said *J. H.* and *J. C.* should each " of them *pay their own costs and charges at law*; and " that the said *J. C.* should *pay the said J. H.* 5 *shillings* " *for his making the first breach in the law.*"

And this may be pleaded in bar, in another action.

The arbitrator certainly *intended* to make an end of this suit depending between the parties; and thought 5*s.* *adequate to the injury.*

Mr. *Anguish* in reply—notwithstanding the consent " to plead this award in bar." Yet all objections to the award itself are still open.

This is *not shewn* to be the *only* matter between them: and *non constat* that the award was made concerning this *particular* action.

I agree that *payment* discharges the trespass. But then it ought to appear that the payment was in satisfaction of the SAME *trespass*, which does not appear in this case.

LORD MANSFIELD— [277]

The question is whether this be a *good award.*

Awards are now considered with *greater latitude* and *less strictness*, than they were *formerly.* And it is right that they should be *liberally* construed; because they are

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made by judges of the parties *own choosing*. And this is often, (as it is here,) in cases of *small* consequence, where the play is not worth the candle.

Indeed they must have these two properties, to be *certain*, and *final*.

But the certainty may be judged of according to a *common* intent, and consistent with fair and *probable presumption*.

This submission is, in *general* terms, "of *all* actions, "controversies and suits between them." The arbitrator recites ONE; referring to the submission, as authorizing him to determine it: and it appears that *this* suit *was depending* between the parties. And the parties have *not desired to be heard* upon any more than *this one*. Therefore there is *no probable presumption* of any *other*.

2dly. As to its being *final*—it seems to be a reasonable and fair award.

The arbitrator, plainly, thought it a MERE TRIFLE; and seems to have thought *both* parties to have been in the wrong; and therefore awarded each to stand by his own costs.

And the 5*s*. awarded to be paid, is plainly *in satisfaction* of this *same* action; and therefore is a *discharge* of it, being paid or tendered.

And he declared against *critical niceties*, in scanning *awards* made by judges of the parties *own choosing*, in order to the determination of disputes between them.

Therefore he was clear that the judgment ought to be for the defendant.

Mr. Just. DENISON concurred—

The submission is *general*: the arbitration is alledged to be "de et super *præmissis*;" and it *does not appear* that *any thing else* was before the arbitrator. It is plain that *this* matter was *submitted*: and we have *no* reason to *presume* "that there was any *other*."

[278]

And it *is sufficiently final*: it is to pay 5*s*. FOR having been guilty of the first breach of the law. Therefore it is the *same* as if it said "*in satisfaction*." Therefore it is mutual and final.

And *awards* ought to be construed *liberally* and *favourably*.

Mr. Just. FOSTER concurred, for the reasons already given.

JUDGMENT for the DEFENDANT.

PERRY *versus* NICHOLSON.

In action of debt upon an award plaintiff need shew forth nothing more than is necessary to support his claim; but if brought on the arbitration bond, the plaintiff must set forth the whole demand.

AFTER an unsuccessful motion, made on the part of the defendant, "to set aside an award;" and an

equally unsuccessful one, made on the part of the plaintiff, "to enforce it by an attachment for non-performance;" the plaintiff found himself obliged to have recourse to his *action* against the defendant upon it. 1757. PERRY v. NICHOLSON.

And now, upon an action of debt brought by him on this award, reciting that in an action of *assumpsit*, the parties, at the trial, had submitted *the* matters in difference *in the* SAID CAUSE, to certain arbitrators, &c. so as they should publish their award IN WRITING concerning the premises, before, &c.; and that they accordingly did publish their award IN WRITING, &c. and awarded "that "the defendant *Nicholson* should pay to the plaintiff "*Perry* 48*l.* 11*s.* 10*d.* in full payment, discharge and satisfaction of all money whatsoever or any ways due or "owing unto *Perry* by *Nicholson*, at the time of commencing the said action; and that ALL actions depending between them for *any* matter, cause or thing "*whatsoever* arising before or at the time of referring "should *from thenceforth cease*; and that upon payment "of that sum, they should within two days after the "*taxation* of costs in the action and payment thereof to "*Perry*, seal and execute to each other, GENERAL releases of all matters in difference in the said cause."

Then the plaintiff avers that there was, at the commencement of the action, or at the time of reference, *no other money* whatsoever, any ways due to him the said plaintiff *Perry* from *Nicholson*, but the matter in difference in the said cause; and that *no other action* was depending between them; and that the costs were *taxed* at 28*l.*

The defendant pleads "that no such award was made." Replication—"that there was such an award, &c." And issue thereupon.

The plaintiff gave in evidence, an award in writing, [279] *indented*, under the hands and seals of the said arbitrators named in his declaration and replication, with the following *variations* from and additions to the award set forth in the declaration—*viz.* there was in the declaration,

1st. An *omission* (after the award "to pay, &c.") of these following words—"that *Nicholson* at the same time *de*"*liver up to* Perry *a promissory note* of *Perry's* payable to "*Nicholson* or order for 5*l.* 7*s. to be cancelled.*

2d. A *misrepresentation* of the release: which is "that "they should execute MUTUAL *and general* releases "of all actions, &c. debts, &c. for any matter, cause or "thing whatsoever from the beginning of the world *unto* "*the day of the date* hereof."

3dly. The award produced in evidence, is by deed *indented, under hand and seal:* whereas the award declared upon is only an award "*in writing*," merely.

Upon this evidence, there was a verdict for the plaintiff,

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subject to the opinion of the court, on this question,—"whether there be MATERIAL *variances* between the "award declared upon, and the award given in evidence."

Mr. Serjeant HEWITT—*pro quer*.

This action is an action of debt on *the* AWARD itself; not an action of debt *on* the arbitration BOND; and on *such* an action, no more needs be set out, than is material, and enough *to entitle the plaintiff* to his demand. 1 *Leon.* 72. the case of *Smith* v. *Kirfoot*. 1 *Salk.* 72. the case of *Portland* v. *Marygold*. Both which cases are expressly so.

Another rule concerning awards is, that the *generality of the words* of them may be *restrained*, so as to be construed to amount to no more than they ought to amount to. One way of doing this, is by *averment* connecting the award with the submission: as it is said in the case in *Aleyn* 51, 52. *Roose* v. *Spark* (first point.) "That the "words *de præmissis* have been newly used in pleading "awards; in order properly to apply the general words "proportionable to the things submitted."

Another way of doing this, is by pleading them according to their *legal operation*.

Another way of restraining the generality of words is by *intendment of law*: as was done in 1 *Salk.* 74. *Simon* v. *Gavil*.

[280] Another way is by *pleading the matter*; (which is the proper way for the defendant to take advantage of it:) as in *Moore* 885. No. 1242. The case of *Lea* v. *Paine*.

Another way is, that award may be *good in part*, and *bad in part*; if relative to distinct things.

To apply these positions—Here are four things awarded: which it is true, are not all particularly set forth.

But ALL *that is* NECESSARY *to* THIS *suit, is* set forth; the *other* things are not relative *to it*. And here is an *averment* "that *no* other thing was in dispute."

The question is, "whether this award produced in "evidence proves the declaration."

Now *all* that is *material* in the declaration, upon *this* action of debt upon the award, is the award of the 48*l.* and the 28*l.* costs. So that it is sufficient to prove the declaration.

Mr. ANGUISH *contra pro def*.

1st. Here is an *omission* of that part which obliges the defendant *Nicholson* to deliver up a note: which note composes part of the sum, and was in consideration to make up the 48*l.*

To suppose it otherwise, is inconsistent: because, otherwise, they would not have ordered it to be given up.

He cited 2 *Lev.* 235. The case of *Adams* v. *Statham*: where an omission vitiated the award.

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Lord Mansfield—after stating the case, said that nothing was clearer, than that in an action of debt *upon an* award, a man has *no* need to *state in his declaration any more* of the award, than supports his case.

If there be any thing by way of *condition precedent* to the payment of the money, the *defendant* may *set it out* in pleading.

This has been the law, so long ago as from the time of the Register; where there is a writ which sets forth only so much as is necessary, (*V. Register* 111.)

Then with regard to the *release*—the court will *intend* that the *release* shall *extend* only *to the matter under the submission*. Besides here they have averred "that there "was *no other* matter in variance."

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Therefore I think there is no *material variance* between the declaration and the evidence.

Mr. Just. Denison—was as clearly of the same opinion: which he declared to the following effect.

The question is "whether the award given in evidence "is sufficient to support the award set forth in the "declaration."

Now nothing is claimed by *this* action, *but* the *money*.

And the question is whether it was necessary, in *this* action, to set forth any thing more *than* supported his claim to recover, and *shewed his right to this money*.

It has been settled that in actions *upon* awards (which are no specialties,) there is *no* occasion to set forth the *whole* award: the plaintiff *needs not* shew any thing *more than* what is necessary to support that *particular* claim; and to intitle him to the *thing*; and if the *defendant* will *impeach* the award for any thing, that is to come on his part.

1 *Leon.* 72. *Smith* and *Kirfoot's* case, is expressly so resolved.

Littleton's Rep. 312, 313. *Leake* v. *Butler*, is a like resolution: where the form of declaring is said to be taken from a writ in the *Register*, 111.

And *this distinction* between debt upon the *award* itself, and debt upon the arbitration-*bond*, was admitted in

1 *Salk.* 72. the case of *Foreland* v. *Marygold*: which was an action of debt, upon *bond* to perform an award. and 1 Lord *Raym.* 715. *Foreland* v. *Hornigold* is the same case: where also it appears to have been an action of debt upon the *bond*.

Here, the award is "that *Nicholson* shall pay the "money, and deliver up the note." And this is an action of debt brought by *Perry*, upon *this* award, for the *money*. It would, as I have already said, have been a quite different case, if it had been an action *upon the arbitration*-bond. But it is *here* good, even though on the

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mere face of the declaration it should appear *as a bad* award, by appearing thereupon and as there set forth, as if it were only an award on one side. For the plaintiff, in *this* action upon the award itself, needed only to shew *such* part as he grounds his action upon.

Then as to the *releases*—the award "of *general* releases," was *void, as to* OTHER matters not submitted. Here nothing is submitted, but in *this* particular action. And in an action upon the bond, "a release as to *all matters* "*under submission*," would be a good plea; though the award be an award of "*general* releases."

But here it is *expressly averred*, "that there *were* NO "OTHER matters in dispute." However, there was no occasion for that averment; because we *would* NOT *have intended* "that there were any other."

Mr. Just. *Foster* was of the same opinion.

He said it was sufficient in an action of debt *upon the* AWARD ITSELF, to set forth *so much* only as is necessary to support the plaintiff's claim: the *other* part of the award may, perhaps, *be performed*.

He thought, therefore, that the evidence well proved the declaration.

Per Cur. unanimously (Mr. Just. *Wilmot* absent)

Let the POSTEA be delivered to the PLAINTIFF.

WRIGHT, ex dimiss. PLOWDEN, Arm. *versus* CARTWRIGHT.

Lease for years, if lessee so long lives; with remainder over: held that the remainder man shall enjoy during all the residue of the years to come.

ON a case stated, from the assizes.

Edmund Plowden, being seised in fee, demised on the 5th of *October* 1676, by deed, (*viz.* by indenture of lease between him and *Elizabeth Cartwright*, ONLY,) to the said *Eliz. Cartwright* for ninety-nine years, if she should so long live; and after her death, if she happen to die within the said TERM (*a*) or other end or determination of the said TERM, the remainder *thereof* to *Rowland Cartwright* her eldest son, (then under age,) *for and during the residue* of the said TERM, from thence ensuing and fully to be complete and ended: yielding and paying, &c. and doing suit at a mill, &c.; with a penalty for every time that she *or Rowland* shall grind at another mill; and *paying a heriot* on the death of *either*. And it is covenanted that BOTH of them shall repair, *&c.* and the lessor on his part covenants that BOTH shall quietly enjoy, *&c.*

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(*a*) *Term* may signify either *time* or the interest during the time in a demise, and shall be taken in that; which of the two senses will support the intention of the grantor. Same principle. *Comp.* 735. *Brownl.* 63.

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Eliz. Cartwright entered and was possessed; and died on the 4th of *September* 1694. Whereupon *Rowland Cartwright* entered and was possessed, till the said *Rowland* died; which happened on 5th *November* 1753.

The lessor of the plaintiff is heir at law to *Edmund Plowden*, the lessor. The defendant is the personal representative of *Rowland Cartwright*.

The question is, "whether the TERM *exists*:" i. e. whether it *continues* BEYOND *the life of Eliz. Cartwright*. For *if* the TERM does *not* continue beyond the life of *E. C.* then the lessor of the plaintiff has a title to recover: *if* it *does*, then the defendant hath a title, as representative of *Rowland Cartwright*.

Mr. *Aston pro quer'*.

Argued that the term was *expired*: it expired on the *death of Elizabeth*; the limitation over, being void. And he cited *Tr.* 8 *Eliz. Dyer* 253. *b. pl.* 102. which is exactly the same limitation; *viz.* "to *W. Cecil pro* termino 12 "*annorum, si tam diu vixerit; et si obierit infra prædictum* "terminum, *tunc, &c.* The remainders were holden void; "because the *term* is determinable upon the life of *W. C.*" And he also cited *Cro. Eliz.* 216. *Tr.* 32 *Eliz.* The case of *Green v. Edwards*. That was exactly this case. It was a lease to *J. S.* for ninety years, if he live so long; and if he die within the *term*, that then his wife shall have it, *durante toto resid'. termini prædict'*: it was held void to the wife; and that she took nothing. And he said that 1 *Co. Rep.* 153. *b.* rector of *Chedington's* case, is express and full to the same effect; and was agreed *per tot' cur'*. And that *Co. Litt.* 45. *b.* is express that "*term*" signifies the *estate* and *interest* that passes; and *differs* from a specification of the number of years: and says, "so note the diversity."

All which cases, he insisted, prove this limitation to be *void*.

He cited *Sheppard's Touchstone of Common Assurances*, 274. Where it is said, that if a man makes a lease to *A.* for eighty years, if he so long live; and if he die within the said term, or alien, that then his estate shall cease; and by the same deed the lessor farther lets to *B.* for so many years as shall then remain unexpired after, *&c.* for the residue of the said *term* of eighty years, if he shall so long live; in this case the lease to *B.* "during the residue "of the TERM," is void: for after the death of *A.* the TERM is at an *end*. But if he say, "for and during the "residue of the eighty YEARS," it is good.

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— Mr. *Nares contra pro def'.* was beginning to speak—

But LORD MANSFIELD stopped him; (as not being necessary:) and he himself proceeded thus—

LORD MANSFIELD—The distinction just cited from *Sheppard*, (which he takes from the rector of *Chedington's*

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case,) makes no difference; *if* the word "TERM" may signify the *time*, as well as the interest: for *then* it becomes merely a question of construction, "*which* sense the word "ought to be *understood* in."

So *Anderson* argued, in *Green* v. *Edwards*; he said "if the wife had been a party to the deed, *durante termino* "should *not* be taken for the *interest*, but for the *time*." He said, "the word *term* cannot be taken to mean the "*interest* which the husband had for ninety years." (For if it is so understood, by *his death* the whole would be determined; and the wife could have nothing: and therefore it could not be used in *this* sense. But the lessor, by the word "*term*," must mean the *time* of ninety years; and the word "*term*" signifies *as well the time or space* of ninety years, as the *interest*.) The other judges held the *limitation by way of remainder* to be *void*, from the *uncertainty of commencement*: and denied that the wife's being a party would have made any alteration.

The *old* cases held "that there could be *no remainder* "or substitution *of a* TERM *after an estate for life*, by "*deed or will*." It was a mere *possibility*. It was *void*, from the *uncertainty of commencement*. There was *no particular estate*. The gift of a term (like any other chattel) for an *hour*, was good *for ever*.

The objections were subtle and artificial.

When *long and beneficial terms* came in use, the *convenience of families* required that they might be settled upon a child *after the death* of a parent. Such limitations were soon allowed to be created by *will*: and the old objections were removed, by changing the name, from remainders, to EXECUTORY *devises*.

The *same reason* required that such limitations might be created by *deed*: as, for instance, marriage-settlements, to answer the agreement of parties, and exigencies of families. Therefore, to get out of the literal authority of
[285] old cases, an ingenious distinction was invented: a remainder might be limited for the residue of the *years*; but *not* for the *residue* of the *term*.

Now in *this* case, upon the true construction of the lease, I am clearly of opinion, "that the land is demised "to the son *for so many of ninety-nine years* as should be "unexpired at the death of his mother."

There are many maxims of law, that deeds, especially such "as execute mutual agreements for valuable consi"deration, should be construed *liberally*, *ut res magis* "*valeat*, according to the *intent*:" which ought always to prevail, unless it be contrary to law.

The passage from *Coke Littleton*, 45. cited by *Mr. Justice* defines the word "*term*" to signify, in understanding of

law, "*not only the limits and limitation of time*, but also "the estate and interest which passes for that time."

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If in *this* lease, the word be taken in the *latter* sense, the widow can only have it for so many of ninety-nine years as *she* should live; and the son have NOTHING afterwards.

But it is manifest that an interest was understood to *continue after her death*, to be *enjoyed by her son*.

From the course of nature, it could not be supposed that she would *outlive* the ninety-nine years. *Rowland* is to *pay a penalty* for grinding at another mill. *He* is to *pay a heriot* on the death of his mother. *He* is to *repair*. The lessor covenants "that *Rowland shall quietly enjoy*:" i. e. for so many years as should not be run, at the death of his mother.

The *first* sense of the word makes every thing consistent and effectual: the *second* sense destroys one half of the lease, as repugnant and contradictory to the other. There ought to be no doubt, therefore, in *which* sense the word should be understood.

Mr. *Aston* has laid no stress upon the only objection which weighed with *Anderson*, so long ago as the 33d of *Elizabeth*: *viz.* "that *Rowland* was *no party* to the lease:" and rightly. The reason *why* he was no party, appears from the lease: he was then an *infant*. (a) The mother contracts, and procures this limitation *for him*. A grant may be made to a person, by a deed to which he is no party. *Rowland accepted* and actually *enjoyed*, after his mother's death, from the 4th of *September*, 1694, to his own death, the 5th of *November*, 1753. The lease was so intelligible to every *unlearned* eye, that nobody doubted of his title for sixty years.

[And. 258. Cro. Eliz. 217.]

Limitations of terms are *now* of general use. Their bounds are settled. The rules concerning them are certain and established. When they came to be allowed by will, or by declaration of trust, the *substantial reason* was the same for allowing them by *deed*. A strained construction should not be made, to overturn the *lawful*

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(a) He might have been a party notwithstanding his infancy, for though he did not execute, that would be no objection, as it is not necessary that a grantee should execute.

It is a settled rule that none can take an estate of freehold in possession by a conveyance at common law, if he be not a party to the deed, *Hob.* 313.; though he may take by limitation over of an use: and by way of remainder a person not party to a deed may take, even though the conveyance be a conveyance at common law.

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intent of the parties. It was *lawful*, to secure this lease for the benefit of the mother during her life, and afterwards by way of provision for her son. *All* the parties undoubtedly *intended* it. The covenant here, "that *Rowland* should enjoy from the death of his mother, for "the residue of ninety-nine years," is sufficiently certain; and might, of itself, amount to a lease.

Mr. Justice DENISON.—This must be taken that she should hold it for so much of the term of *years* as she should live; and *Rowland*, during the remainder.

The *intention* of the deed is obvious: and it certainly shews, (upon the whole tenor of it,) that the *intention* of the parties was "that BOTH should enjoy during the "whole term and number of years." And if we *can* support the *intention*, by *any* construction, we will do it.

Mr. Justice FOSTER was clear that the INTENTION was that *both* should enjoy during the whole *term and number of years*; *viz. Elizabeth* for so long of it, as she should live: and *Rowland*, during the remainder. All the circumstances shew this: and the reserving a *heriot* upon the death of *Rowland* proves the *intention* to have been "that the *term* should *continue* to *Rowland*, *after* the "death of his mother." And the covenants all along run, "that *Rowland* shall quietly enjoy."

Therefore he concurred.

Per Cur'. unanimously (Mr. Just. *Wilmot* absent,)

RULE—That the PLAINTIFF be NONSUITED.

[287] Wednesday, 4th May, 1757.

[See 1 Hen. Bl. 36.]

LANT, Esq. *versus* NORRIS.

P. 29 *G.* 2. *Rot'lo.* 609.

The COURT *full.*

Covenant to leave demised premises with all new erections well repaired, extends to the new erections only.

THIS was an action of covenant, by *Robert Lant*, esq. son and heir of *Thomas Lant*, esq. against *William Norris*, administrator of *John Norris*, esq. his late father; which *John Norris* was assignee of *Thomas Wilson*: and it was upon an indenture of lease made on 23d *January*, 1707, by the said *Thomas Lant* deceased, who was seised of certain messuages, ground and premises (mentioned in the indenture,) of the one part, and the said *Thomas Wilson*, on the other part; whereby, in consideration of 200*l.* to be laid out in, upon or about rebuilding upon the ground and premises thereby demised, and other covenants, the said *Thomas Lant* did demise to the said *Thomas Wilson*, all that piece of *ground*, AND *all the messuages*, tenements, houses, *&c. thereon standing*, in *Suffolk Place*, in the parish of *St. George the Martyr*, *&c.* butted

and bounded, &c. from *Christmas* 1715 for forty-three years, at 17*l. per annum*, rent. 1757.

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Thomas Wilson, the lessee, covenants to lay out the said sum of 200*l.* within fifteen years, in ERECTING *and* REBUILDING of messuages or tenements or some other buildings, *upon the ground and premises*; and from time to time, and at all times, all and singular the said messuages or tenements *so* TO BE *erected*, with all such other houses, edifices, &c. as should at any time or times THEREAFTER *be erected*, &c. to repair, &c. And THE SAID DEMISED PREMISES, *with* all such *other* houses, &c. SO WELL REPAIRED, &c. at the end or other sooner determination of the said term, *to deliver* up, &c.

Wilson the lessee entered. *Tho. Lant* died 29th *May*, 1732, seised: and the reversion descended to *John Lant*, his son and heir.

On 24th March, 1736, *Wilson* assigned the term to *John Norris*: who entered.

On the 24th *March* 1738, *John Lant* died seised, and the reversion descended to the plaintiff his brother and heir.

The breaches assigned were, first, that after the term came to *J. Norris*, *and after* the plaintiff became seised of the reversion, and whilst the said *J. N.* was possessed, *viz.* on 1st *May* 1745, the said *J. N.* in his life-time permitted ALL *the said demised messuages* to be uncovered, &c.; by reason whereof the walls of the *same demised premises* were out of repair; and goes on to other damages, still calling them (all along) "*the said demised* "*premises.*" 2dly. That the said *J. N.* did permit six messuages, parcel of *the said* "*demised premises*," to be *prostrated*; and to remain so till his death. 3dly. That the said *J. N.* on 1st *March* 1747, did *pull down* six other messuages then erected and built on the said demised premises. [288]

Plea as to the 1st breach, that the said *T. Wilson* or his executors did not within fifteen years, or at any other time, lay out 200l. or any part thereof, *in erecting or rebuilding* of any messuages: and that the said messuages had *never* been rebuilt. As to the 2d breach, the same plea. As to the 3d breach, "*non infregit conven-*"*tionem*." To all the breaches, the same plea as above to the 1st and 2d over again, "that *T. W.* never laid "out 200*l.*" and "that the messuages never were re-"built;" and "that *J. N.* after he became assignee, "and after the plaintiff became seised of the reversion, "1st *March* 1753, died intestate, so possessed; and ad-"ministration was granted to the defendant: by virtue "of which, he entered: and being so possessed, before "exhibiting the plaintiff's bill, *viz.* 24th *June* 1754, as-"signed the demised premises to one *John Townsend*, for "the residue of the term; who entered, and is possessed."

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The plaintiff demurs generally to the 1st plea to the 1st breach, and also to the 1st plea to the 2d breach; especially (a) to the 1st plea to the 3d breach; generally to the 2d plea to the 3d breach; and generally, to the last plea to all the breaches. There was also a plea of *non prostravit*, and a demurrer to it.

The defendant joins in demurrer, to all the demurrers.

Mr. *Wynne*, for the plaintiff, urged that the pleas were no answer; and that they neither confessed and avoided the charge in the declaration, nor denied it.

Mr. *Gould contra*—for the defendant, gave up the pleas; but he objected to the declaration; *viz.* that the intention of the parties was to confine the repairs to the buildings *thereafter* to be erected: as it appears that there were *no* buildings (of any consideration) upon the land, *at the time* of the lease; nor is there any averment in the declaration "that the lessee" (*Wilson*) "*ever did* "*erect* any such." Which averment ought to have been made, in order to have maintained this action: for, [289] *without* such erection, the defendant *could not be obliged* to repair. And a plaintiff must shew every thing in his declaration, that is necessary to maintain his action.

[2 Vent. 126, 128.] The words "the *said demised premises*" must relate to those in the beginning of the covenant; and therefore only mean and intend "that he should leave them, *viz.* "the new erected and rebuilt edifices, in repair at the "*end* of the lease."

The covenant is *future*; and the lessor could not have any action upon it, *till* the *end* of the term.

It appears by 5 *Rep.* 21. *a.* Sir *Anthony's Muin's* case, that if a man lets a manor for years; and the lessee covenants to keep the houses of the manor and whatsoever was within the manor, in as good a state as he found them, during the term: and the lessee makes waste in the *houses*, and in cutting *oaks*; the lessor may bring an

(a) This plea was bad, if, as I suppose, the cause assigned for the demurrer was, that this plea was too general, though it would have been good if issue had been joined upon it, and there had been a verdict for the plaintiff, 1 *Lev.* 183. 1 *Siderf.* 289. *Gilb. Hist. of* C. P. *Ed.* 1761, p. 155, and it seems by the stat. 4 and 5 *Ann. c.* 16. *s.* 1. it would have been good on a general demurrer: however the other plea *non prostravit* was a good plea, and was admitted by the demurrer; and therefore that must have been the reason. Mr. *Wynne* in the next page gave up the 3d breach because issue was offered on it.

action of covenant, before the end of the term for the oaks; for, *for them*, it was impossible that the covenant could be performed: but it is otherwise, of the *houses*. 1757. LAND v. NORRIS.

And with this agrees *Fitz. Nat. Brev.* 8vo. edition, 324. Letter I. the same law. Though if he fells timber, &c. (if he do waste in wood) he may have an action of covenant DURING *the term*; "for *that* (says the book) "cannot be repaired."

He likewise cited 1 *Salk.* 199. The case of *Grescot* v. *Green*, where the lessee covenanted for him and his assigns, to rebuild and finish a house *within such a time*: and *after* the time expired, the lessee assigned over the premises, the house *not* being then built and finished according to the covenant: and *per Holt*, Ch. Just. This covenant shall not bind the assignee: because it was *broken before the assignment*. *Aliter*, if broken *after* the assignment: as if the lessee had assigned *before* the time had been expired. Which case was cited to prove "that "the action did not lie in the present case; *because* "the assignment was made *after* the fifteen years were "expired."

Mr. *Wynne*—The record is now to be considered as upon a general demurrer to the whole declaration: and I shall rely on the 1st and 2d breaches, and not on the 3d, (which has, I own, received a proper answer, by issue being offered.)

Covenants are to be construed for the benefit of the *covenantee*; not of the *covenanter*.

These are buildings demised; and 200l. is agreed to [290.] be laid out in repair of *them*, OR in erecting *new* ones: then there is a covenant "to repair the buildings *to be* "erected on the demised premises: and the SAID DE-"MISED PREMISES, *and others* so to be erected, *so* being "well and sufficiently repaired, &c. to leave, &c."

This intimates that the *demised* buildings, *as well* as the new erections, were to be kept in repair. Here is sufficient, from whence to collect the intention and meaning of the parties, to be so: which will amount to a covenant. And upon this general demurrer, the court will not intend that the 200l. were laid out only on the *other* buildings newly to be erected.

LORD MANSFIELD—

I choose to look into it, and consider it a little. No particular technical words are requisite towards making a *covenant*. 16 East 352, 353

Mr. Just. DENISON—the question only is whether the words "*demised premises*," are omitted, by mistake, in the former part of the covenant; or superadded, by mistake, in the latter: for there appears to be a mistake

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in either one or the other, in the deed itself. The lease is a building-lease.

Now the premises *then standing* were to be *pulled down*. Therefore it could scarce be intended to covenant to repair *them*. The covenant "to repair," is confined to the tenements *to be* erected: the covenant "to leave in repair" extends to the *demised premises, together with* all such other as shall be thereafter erected.

Mr. Just. FOSTER—It is a building *and* repairing lease.

In order to look into the lease, it stood over, with a CURIA ADVISARE VULT.

And now, (having considered it till the next day only,) LORD MANSFIELD said, WE are extremely clear, that not only the *words* of the covenant, but also the *intent* of the parties, manifestly shew that it was *not* meant that any of the money should be laid out on the *old* buildings: but that *they* were to be pulled down; and that whatever he SHOULD *erect*, with the 200l. or otherwise, for his own convenience, should be kept in repair.

The words "*demised premises*" are put in *opposition* (*a*) to the buildings that were TO BE *erected* thereupon with the 200l.

[291] And the covenant "to deliver up," is agreeable to this construction: that covenant being to leave "the "demised premises, together with all such other houses, "*&c.* as *should be afterwards erected, &c.* so well repaired."

It is therefore clear against the plaintiff, upon the 1st and 2d breach: and Mr. *Wilbraham* acknowledges it to be against him on the *third*.

Therefore the COURT gave JUDGMENT for the DEFENDANT.

Wednesday, 4th May 1757.

FRAZER's CASE.

The COURT *was full.*

Turnkey of a prison not to be articled as clerk to an attorney.

THIS *Frazer*, being an attorney of this court, had taken for his *article-clerk*, one *Smith*, a *turnkey* of the King's Bench Prison; a full-aged man, and who still continued to act as turnkey. It did not appear that any money was paid; or that the master fed, lodged or, entertained the clerk, (though the articles indeed covenanted "that he should:") nor did the clerk officiate for *Frazer*, but in matters relating to the prison. It appeared that *Frazer* had, since these articles, (which were dated only

(*a*) *Lege* reference instead of opposition—and see 3 Lev. 265. *Skin.* 121.

two years ago, in 1755) become concerned in sixty-three causes, on behalf of the prisoners in the gaol. 1757. FRAZER'S CASE.

This whole matter being disclosed to the court, upon the application of Mr. *Moss*, the clerk of the papers of the prison,

The COURT were *all* very clear that these articles were *merely collusive*; that the whole was a *contrivance* between *Frazer* and the turnkey, to secure the business arising from the prisoners; that the exercise of the office of a *turnkey in a prison* was, both in itself, and also according to the intent and spirit of the act for regulating attornies, a very improper education for the profession of an attorney; and that these articles ought to be *cancelled*.

And accordingly, they were, by the express order of the court,

CANCELLED in court (by master *Clerk*) and directed to be kept in court, and not delivered back.

PIERSE, Esq. *versus* Lord FAUCONBERG. Saturday, 7th May 1757.

(*Lord Commissioner* WILMOT *absent, in Chancery.*) [292]

THIS was a trial at bar, on the civil side of the court, by a special jury of the county of *York*.

A right to a track path on each side of the river Tees for towing. [See 3 Durn. 255. 260. 262. Ld. Raym. 725. Bull. 90. (89) and Qu? Et vide Harg. Tr. 86, 87.]

The question was concerning a right to track or tow vessels, upon the banks of the river *Tees* (which divides *Yorkshire* from the county-palatine of *Durham*) from *Yarum*-bridge up to *Low Worsall*.

There had been a former issue tried, "whether the "river *Tees* was a *navigable* river, from *Yarum*-bridge "to *Low Worsall*;" which issue had been found in the affirmative.

And the present trial was a new trial (a second new trial indeed) directed by the court of Chancery, upon an issue "whether the * plaintiff had a right to a track-path "on each side of the river (alternately according to "the course of its banks) for the convenience of towing; "without let or hindrance from or paying any acknowledgment to the respective owners of the soil."

The trial lasted till about two o'clock on *Sunday* morning; at which time the jury (after staying out about a quarter of an hour) brought in a verdict

For the PLAINTIFF.

* *N. B.* The plaintiff did not claim this, as a *distinct peculiar* right of his own; but as a *general* right claimable by *all* persons whose occasions led them to navigate this river.

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REX *versus* ROGER PHILIPS, Mayor of CARMARTHEN.

(*Lord Commissioner* WILMOT *absent, in Chancery.*)

Monday, 9th May, 1757. Verdict on an information *quo warranto* set aside, upon defendant's [293] payment of costs, with liberty to amend his plea. [See 4 Bur. 2132. 2137. 2145. 1 Durn. 708.]

THE defendant had pleaded to an information in nature of a *quo warranto* exhibited against him, "to shew by "what authority he acted as a mayor of this borough," a title of election and swearing *under a* MANDAMUS pursuant to 11 *G.* 1. *c.* 4.

But the *swearing* was (by mistake) set forth to have been in the same manner as it ought to have been in case the election had been upon the CHARTER-day.

Upon the replication, no less than fourteen issues were joined: which went down to be tried before Ld. Ch. Baron *Parker*, as judge of *nisi prius*. But one of the issues (the 9th) was taken upon the *swearing* thus (erroneously) alledged to be before such persons as were only proper to precide UPON *the* CHARTER-day; (*just as if it had in fact been an election under* THE CHARTER:) which was a mere *mistake* in the defendant's plea; for his REAL *swearing* in fact was *right, viz.* AGREEABLE TO *the directions of* 11 *G.* 1. concerning the manner of being sworn under and pursuant to a writ of *mandamus*. The plea was worded thus, as to his being sworn in; *viz.* "That "after the defendant had been so elected and chosen to "be mayor, &c. and before he took upon himself to exe- "cute the said office; to wit, *at that* SAME *meeting and* "*assembly* so *holden* upon the said *Friday* the said 30th "day of *May* in the 28th year aforesaid in manner afore- "said, he the said *Roger Philips*, IMMEDIATELY *after* "his said election, did *then and there* ACCORDING TO *the* "DIRECTIONS *of the* LETTERS PATENT *of the said late* "*King* Henry *the 8th* TAKE *his corporal oath*, upon the "holy evangelists of God, BEFORE *John Evans* mer- "chant, *George Jenkins, Daniel James, William Sears,* "*Lazarus Thomas, Samuel Morgan, John Evans* carpenter, "*John Evans* currier, *Richard Leigh, George Bayle,* "*Thomas Richard*, and *Lewis Philipp* then and there "being TWELVE *discreet and honest men of the* BURGESSES "of the said county-burrough, rightly well and faithfully "to execute the said office of mayor of the said county- "borough, in all things touching and concerning the "said office; they the said *John Evans* merchant, *G. J. "D. J. W. S. L. T. S. M. J. E. C. J. E. C. R. L. G. B. "T. R.* and *L. P. then being* TWELVE *discreet and honest* "*men of the* BURGESSES *of* the said county-borough *then* "*and there* APPOINTED ACCORDING *to the* DIRECTIONS "*of the said* LETTERS PATENT last before mentioned, "by the said then common council of the said county- "borough BEFORE WHOM the said *Roger Philips*, so

" elected and chosen mayor of the said county-borough 1757.
" as aforesaid, WAS *to* TAKE *his said* OATH: and that he REX
" the said *Roger Philips* was THEREUPON, then and V.
" there, *in due manner, admitted into the said office* of mayor PHILIPS.
" of the said county-borough. BY VIRTUE WHEREOF
" he the said *Roger Philips*, on the same *Friday* the said
" 30th day of *May* in the 28th year aforesaid and from
" thence continually afterwards, for, *&c.* was mayor, *&c.*
" *And by* THAT *warrant*, he the said *Roger Philips*, on,
" *&c.* and from, *&c.* until, *&c.* did there use and exer- [294]
" cise the said office of mayor, *&c.* and for and during all
" the said time, did there claim, *&c.*

The *Lord Chief Baron*, who tried the cause, reported that he was opinion, upon the trial, " that upon the 9th " issue, the defendant *could not give evidence* of a *different* " swearing from what he had *alledged upon the record*;" and " that upon the 10th issue" (taken upon the allegation of being *by virtue thereof* mayor, *&c.*) " he *could not vary* " from the *title before set out*, by virtue whereof he *claimed* " to be mayor." And he had directed the jury to find for the king: and they found a verdict accordingly. And he also reported " that no evidence was entered into upon " *any* of the issues; and that verdicts were found for the " *king* upon *all* of them: but that this was *agreed* to be " *without prejudice* in any *future trial*."

Mr. *Norton*, Mr. *Morton*, and Mr. *Price*—for the defendant had thereupon moved for and obtained a rule for the prosecutors (who had thus gotten a verdict,) to shew cause " why there should not be a *new trial*;" upon an " insinuation " that the judge who tried the cause, had " *misdirected* the jury:" which *misdirection* consisted, as they alledged, in this, *viz.* " That the judge had pre- " cluded the defendant from giving any evidence to prove " his swearing, AS *set forth* in the said 9th issue; the " judge apprehending and so directing the jury, that it " could be of *no kind of service to the defendant*, to be ad- " mitted to prove an issue which IF *proved or even ad-* " *mitted*, could NOT *at all tend to make out his right*; for " that if this swearing *as* UNDER *a* CHARTER election " were to be *admitted*, yet still it would not appear *in* " ANY *part of the record*, that he was *regularly sworn* " UNDER *a* MANDAMUS-election; which was the *spe-* " *cies of election* under which he *claimed*."

Sir *Richard Lloyd*, Mr. Serjeant *Poole*, and Mr. *Aston* were prepared, as they said, to shew cause, by convincing the court " that the direction of the *judge was* RIGHT; " and consequently, that the verdict *ought to stand*."

LORD MANSFIELD—The direction of the judge was certainly *right*. Therefore, if you should prevail in this application for a new trial, it could be of no service:

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for, AS *the record stands,* the *same* direction must be *given again.*

Yet I am very desirous to *cure* this slip, if possible: for the *merits* have *never been tried.*

Consider whether the verdict may not be set aside; and the parties admitted to *plead* AGAIN.

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The RULE was ENLARGED; with this *addition, viz.* to shew cause "why the verdict should not be set aside, "AND *a repleader awarded.*"

[4 Burr. 2192.]

Mr. Serjeant *Poole*, for the prosecutor, now shewed cause against setting aside the verdict and awarding a repleader. And he alledged that, though there should be a repleader awarded, yet the *whole record* must nevertheless *stand* as it is at present.

As to the repleaders in general—he cited 6 *Mod.* 1. The case of *Staple* v. *Haydon*—(1st resolution:) it can only be on such an impertinent issue, as the court can give *no* judgment upon.

Mr. *Norton*, Mr. *Morton*, and Mr. *Price—contra*—for the defendant—the issues are not all found against us, *absolutely;* but *without prejudice* to any future dispute, except as to the 10th issue.

Mr. *Norton*, Mr. *Morton*, and Mr. *Price* stated the mistake: which they said was thus: *viz.* The defence set up was "an *election of the defendant under a mandamus,* "issued pursuant to 11 *G.* 1." And in setting out his oath of office, he avers it to have *been* DULY *taken;* and shews it to be an oath, taken by him *upon this election,* and sets out the *right and proper oath of office;* but the plea, it is true, goes on, (following, by mistake, a precedent of a plea of an oath of office taken under an election upon the proper *charter*-day,) and alledges it to be a swearing *at the same meeting so holden, &c.* BEFORE *persons* who were only proper to preside upon the CHARTER-*day; viz.* (BEFORE 12 *burgesses, &c.*)

Which swearing *before* these *improper* persons, they urged to be totally *immaterial:* and that, for the sake of attaining justice, it ought to be *some* how or other, set right; the TRUE *question* having *never been tried, viz.* "Whether he took the oath of office, *agreeably to the* "DIRECTIONS OF 11 *G.* 1."

Therefore it shall either be *amended,* OR a *repleader awarded:* for upon the present record, there is *no* justification *at all;* and therefore the issue joined is *totally immaterial.* The case of *Staple* v. *Haydon*, 6 *Mod.* 1. is almost in point. 1 Ld. *Raym.* 707. S. C. (1 *Salk.* 173. 216. S. C.)

This is a good plea in *substance;* but ill pleaded in point of *form.*

They *ought to have* DEMURRED to this part of the plea; and *not* to have taken *issue* upon it: for it is a matter of

law, "whether the taking *this* oath would have justified "the defendant." And a verdict cannot make that good, which the court sees cannot be so in law. Therefore this verdict is utterly *void*: just like that in *Hobart* 112. *Tasker* v. *Salter*.

And such repleaders, in informations, are no novelties. For in 1 *Ventris* 122. the case of * *Reynel* v. *Heale*; a repleader was awarded, because the issue was mis-joined.

And they *offered to pay costs*, in order to have this matter set right: and insisted that this is but just and reasonable; especially, as many *other* persons' rights depend upon the right of this mayor.

They also cited *Cro. Eliz.* 245. the case of *Love* v. *Wotton*—where a repleader was awarded after verdict; the defendant having mispleaded the statute. The reason of awarding the repleader there, must be, "because the *true merits* had *never been tried*."

They even urged farther, that it might well be taken, upon the face of the record, "that he *was* sworn before "the *proper* persons:" it being alledged "that it was at "the SAME meeting then and there so holden."

But they insisted that, at most, this is *only form*.

As to repleaders in general—they cited 1 Sir *J. S.* 394. The case of *Rex* v. *Philips* Mayor of *Bodmyn*; where the defendant's title was *clearly defective*, and confessed an usurpation; and therefore, as the *merits appeared* to be against the defendant, the repleader was not indeed there granted: but the general position seems to be, "that it *might*, *otherwise*, have been granted."

Mr. Serjeant *Poole*, Sir *Richard Lloyd*, Mr. *Aston*, and Mr. *Nares pro rege*—argued that it is needless to grant a repleader, where there is *sufficient* appearing upon the record, whereupon to give judgment *against* the party, *exclusive* of the part which is pretended to be immaterial.

Nor shall a repleader be awarded, where the defendant has set forth a *defective title*.

Now, certainly, this is a *defective title*: he appears to be sworn before *improper* persons; and does *not at all* appear to *have been* ever sworn before the *proper* ones. [297]

This is *not* a mere *defective* MANNER OF PLEADING; like *Cro. Jac.* 434. the case of *Holms* v. *Broket*—where issue was joined on a plea of payment *before* the day; or *Hob.* 112. the case of *Tasker* v. *Salter*; where the issue (upon the *way*) was in effect no issue at all.

But this is absolutely a *defective* TITLE; a swearing

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* *N. B.* This is a *qui tam* information, at least; if not a *qui tam action*: the book is inconsistent with itself; but the title of the cause shews that it was an *action*.

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before improper persons; and is like 6 *Mod.* 1. the case of *Staple* v. *Haydon*. And they cited *Cro. Eliz.* 214. the case of *Lacy* v. *Reynolds;* where though the issue was immaterial, yet, the plea confessing the words, the court gave judgment as upon a confession. So, *Carthew* 371. The case of *Jones* v. *Bodinner;* and 1 *Salk.* 173. S. C. a like resolution. So, 1 Ld. *Raym.* 390. the case of *Pitts* v. *Polehampton*.

But if a repleader should be granted as to THIS issue, yet *enough* (besides this) will stand upon this record to entitle us to judgment for the king.

Repleaders are never awarded for the sake of the *parties;* but for the *sake of the* COURT.

And this is the reason why there are *no costs* upon repleaders: as appears by 2 *Salk.*—Title Repleader, p. 579. (which is an abridgment of the case of *Staple* v. *Haydon*, in 6 *Mod.* 1. and 1 Ld. *Raym.* 707.)

Nor shall repleaders ever be awarded, where *sufficient appears upon the record, whereupon* the court can *give judgment*. They shall not be awarded, ONLY *because* the party has MISTAKEN *his case:* they shall never be awarded, but where the issue is so *immaterial* that the *court* cannot tell how to give judgment. In the case of *Serjeant* v. *Fairfax* in 1 *Lev.* 32. it is laid down by *Twysden*, and agreed by the Ch. Justice and *Wyndham*, that "an immaterial issue is, where, upon the verdict, the court cannot know for whom to give judgment; whether for the plaintiff, or for the defendant."

It depends upon the plea pleaded; not upon the real merits: for though the issue be *improper*, yet judgment shall be given; as is expressly laid down in the same case of *Serjeant* v. *Fairfax*—1 *Lev.* 32. "If an IMPROPER issue is taken, and verdict given thereon: judgment shall be given thereupon; be it for the plaintiff, or for the defendant," *Cro. Jac.* 288, the case of *Tampion*

[298] v. *Newson, and Bridget his wife:* the plea of the feme, without the baron was no plea at all, nor confessed any thing. In *Bro. Repleader* 55. it did not appear how much the executors had; who pleaded "riens inter maines," which was found against them. *Cro. Eliz.* 245. the case of *Love* v. *Wotton*, (where the statute of usury was misrecited) was a case where *no judgment could be given;* for the court were *bound* to know the statute; and that there was no such statute as was pleaded, which was a statute made the *sixth* of *February*.

In the present case here is NO FAULT *in the pleadings*. Therefore where shall the repleader begin? This case is NOT *the subject-matter of a repleader:* This is *only* a DEFECTIVE TITLE.

It would be an ERROR, to grant a repleader, where the

court *can* give judgment *upon* the pleadings *already* before them. 1757.

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Now here, the defendant who claims to be mayor has NOT *shewn* "that he WAS *sworn* before the *proper* per- "sons:" and the court *cannot presume* it. He is asked "*quo warranto*" he acted as mayor: and his defence is *this* "by a proper election and (*improper*) swearing:" and that "EO *warranto*," he acted as mayor. But this plainly appears to the court to be no warrant at all. Therefore the court must give judgment *against* him.

And the chief baron certainly determined right: for a man cannot plead *one* case, and then prove *another*.

Hob. 112. The case of *Tasker* v. *Salter* is not like this case. *This* is a *fact*; on which the jury *have* judged.

And surely it does not follow, nor can it be taken upon the face of this record, that because he was sworn *at* THAT ASSEMBLY, he must therefore be sworn before the *proper* PERSONS.

On the contrary, it is most manifest that he has *not* set out a *complete title* to exercise the franchise: and therefore the court must give judgment against him.

The *other* issues were *never proved:* and even this bad title, set up by this issue, is found *false; viz.* "That he "was not so *sworn* in, as he has pleaded."

Judgment shall be given against the defendant, even upon an issue misjoined, *if found* FOR *the plaintiff*. *Cro. Eliz.* 778. The case of *Dighton* v. *Bartholomew*. 5 *Co. Rep.* 43. *Nichol's* case. *Cro. Jac.* 377. The case of *Edward Maria Wingfield* v. *Bell.* 2 *H.* 7. 11. *b. Rex* v. *Herle.* Which case proves that if a man sets up a right, *different* from his title, it shall be against him; and he shall *not* set up *another* title, *afterwards*. [299]

The court may here give judgment as upon a confession, when the issue is immaterial, and the mistake not amendable: and there shall in such case, be no repleader, *Carthew* 371. The case of *Jones* v. *Bodinner*, expressly, 5 *Mod.* 226, 227. S. C. *Cro. Jac.* 678. The case of *Johns* v. *Ridler:* where though the issue was immaterial, yet being found *for the plaintiff*, it was adjudged for him, upon the defendant's confessing the ejecting.

In the case of *Love* v. *Wotton*, *Cro. Eliz.* 245. the court *could not* give a complete judgment.

Cro. Car. 25. The case of *Knight* v. *Harvey*, administrator of *Harvey*, *M.* 1 *C.* 1. (where the defendant pleaded an impossible judgment, and *riens en ses mains*, but only to satisfy it; and the plaintiff replying, the issue was found for the plaintiff, and he had judgment;) is a case parallel to the present: for as the judgment there pleaded was a bad judgment, so this is certainly a BAD *swearing in*. Therefore the court will here give judgment upon the *in-*

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formation; as they did upon the plaintiff's declaration there, notwithstanding that impossible issue being found, it being found for the plaintiff.

Here, *both* the election AND swearing in, ought to have been well pleaded: neither is a defence, of itself alone.

And the court cannot take notice of the *fact, otherwise than* AS it has been *pleaded.*

Therefore judgment may be given, as upon a confession, in the present case: for the defendant *shews no right at all,* to act as mayor.

So that, upon the whole, judgment ought to be entered for the king, *upon the face* of this record. To prove which, they cited 2 *Strange* 873. The case of *Broome* v. *Rice & al'* in *C. B.* as in point: where, though the justification confessed the cause of action, in effect, yet the plaintiff replying "de injuria suâ propriâ absq; tali causa," issue was thereon joined, and found for the defendant; but the verdict was set aside; and judgment ordered to be entered for the plaintiff, and a writ of inquiry of damages to issue.

Mr. *Norton* in reply.—

The SUBSTANTIAL part of this plea, is the "being "*sworn at this assembly, immediately after* the election;" [300] and the PERSONS "*before whom* the swearing is alledged "to have been," may be considered as *surplusage. If so,* we ought to have been let in, at *nisi prius,* to prove our plea: *if* it is *not* so to be taken, we ought now to be let in, either to *amend,* or to *replead.*

This would plainly be a *good bar,* IF *well pleaded.* Therefore the court will, for the sake of justice, grant a repleader.

The title set up by the defendant is an *election under a mandamus;* and the defendant has accordingly stated an election made pursuant to the directions of the 11 *G.* 1. and a swearing in, *pursuant to it:* but he goes on, and particularly shews a swearing in before twelve *burgesses,* the CHARTER-officers, (which should have been alledged to be before "the persons directed by the 11 *G.* 1. *viz.* the "then *presiding officer;*") and this upon issue taken thereon, is found *against* him. Now surely this has *not* tried the MERITS: this issue was *quite immaterial.* And therefore there shall be a repleader: and this must be a repleader of our *whole entire* title.

But they say that "this is a DEFECTIVE title; not a "mere *improper* title: and that therefore judgment shall "be given against the defendant."

Now this is *not* the rule of repleaders. Indeed if the bar be evidently NOT *a good justification,* it is idle to grant a repleader: but *otherwise,* a repleader *shall* be awarded. In *Cro. Jac.* 5. The case of *Coxe* v. *Croprell,* the hus-

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band pleaded "not guilty," when no tort was supposed in him; so that this was a case where the real question had not been tried: and *therefore* the court granted a repleader.

And the party who makes the first fault, may, notwithstanding that, pray a repleader.

Wherever the court see, upon the whole record, that the issue joined will not *try the true question*, the court will grant a *repleader*.

The case of *Serjeant* v. *Fairfax*, 1 *Lev.* 32. *P.* 13 *C.* 2. *B. R.* is strongly for us. It was a *bad plea*; it proceeded originally *from the defendant*; an immaterial issue was joined; and a verdict was * *against him*: and *yet* a repleader was awarded; BECAUSE *the merits* HAD NOT *been* determined, and the court could not therefore know *for whom* to give judgment.

But they say that "here IS *sufficient* for the court to "give judgment upon."

I answer, that these are not to be taken as *independent*, *unconnected* issues; but as one ENTIRE TITLE, though consisting indeed of various distinct *parts*. And he said he could see no reason for the crown's taking such a number of issues, upon these *quo warranto* informations: indeed perhaps the single issue of "not mayor," would take in the whole.

* No: the verdict was for the defendant; and the plaintiff [301] moved for a repleader. Indeed Twisden said "that it was the same thing, be the verdict for the plaintiff or the defendant."

LORD MANSFIELD—

General rules are wisely established, for attaining justice with ease, certainty, and dispatch.

But the great end of them being "*to do justice*," the court are to see that it be *really* attained.

In order to discover what was just upon the present occasion, he said he would consider this case in two views; *viz.*

1st. Upon the mere foot of the *swearing*, as it is here pleaded and put in issue; and

2dly. What alteration is made by the *other* issues, and the *verdicts* upon them, found in the manner as they have here been.

First—If *this* issue upon this swearing-in, had stood alone, this had been an *immaterial and void* issue; as it tends to *prove nothing*, *either* for the *crown*, or for the *defendant*; and from which, *no conclusion* can be drawn, *either* way.

It appears too, upon the record, that this MIGHT *have been* so pleaded, *as* to have shewn whether he had, or had not a right: (supposing the question to be *confined* to this single issue.)

What is the rule of law then, as to such an *immaterial* issue joined, and *verdict* upon it?

It is, "that when the finding upon it does NOT *deter-*

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" *mine the right*, the court *ought* to award a repleader: " *unless* it appears from the whole record, that NO *manner* " *of pleading* the matter, COULD *have availed*."

The principal cases to prove this are (amongst many others to the same effect.)

[302] 6 *Mod.* 2. The case of *Staple* v. *Haydon*, (first resolution;) where the court held " that a repleader is to be " awarded, when *such* an issue is joined, as the court, " after trial thereof, cannot give a judgment; as being " impertinent, and NOT *determining the right*:" (I lay the stress on these words, " and NOT *determining* the *right*.")

Moore 867. The case of *Tasker* v. *Salter*, (S. C. with *Hobart* 112.) The verdict passed upon a void issue: and the court awarded a repleader. It was as no issue at all, and impertinent, as pleaded.

Here, it MIGHT *have been* pleaded *right*: but *as* there pleaded, it did not conclude; and therefore the court could not determine the right.

So the case in *Cro. Eliz.* 245. *Love* v. *Wotton*, (a plea of the statute of usury, upon the usurious bond—) there, as the statute was pleaded, the conclusion " that the obli- " gation was taken by usury, *&c.*" was immaterial: but the statute *might* have been pleaded right; and then it would have been a good defence. And *therefore* the court awarded a repleader.

But there is a later case, (and the courts have been more liberal of late years, in their determinations, and have more endeavoured to attend to the *real justice* of the case than formerly;) and this is the case of *Tryon* v. *Carter*, *M.* 8 *G.* 2. which is reported in 2 *Strange* 994. and is a very material case. " A bond conditioned for payment " of money *on*, *or before* 5th *December*. Plea of pay- " ment *on* 5th *December*; replication, issue, and verdict " for the plaintiff." This was holden to be an immaterial issue; and a repleader was therefore awarded: though it would have been conclusive, if found for the defendant; but did not conclude, when found for the plaintiff. Therefore, (though that was a slip of the defendant) as it did not determine the question, a repleader was awarded.

The case that has been mentioned, of *Rex* v. *Philips*, *M.* 7 *G.* 1. in 1 *Strange* 394. is material, for the reason given by Ld. Ch. J. *Pratt*. For if the justification is such in point of matter and substance, as could not, if put into *any* form of words, be material with regard to the defendant by way of defence, it is in vain to grant a repleader; it being to no purpose to do so, where the *case itself cannot be amended*, or would be at all material, if put in *any* shape whatsoever: which was the case; for it amounted to a confession of the usurpation, as was there holden. And if it did, then he very rightly said " that *if*

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" the court should grant a repleader, the defendant *could* " *not mend* his case: for the plea would stand; and after " the formality of a demurrer, the court must give judg- " ment upon the goodness or badness of it." And Ld. Ch. Just. *Pratt* went on, and compared it to an ill justification in trespass, (where *no* form of words would have made it a defence;) and therefore was of opinion that as the plea was ill, and contained no title to the franchise, the court might give judgment upon it, as confessing an usurpation. (*V.* 1 *Strange* 398.)

Now *here*, supposing (as I said before) the swearing to be the *only* issue; it is not a question totally *inconclusive*, " whether he was, or was not sworn before THESE *per-* " *sons?*" Does it at all *conclude* to the real QUESTION? Is not this, manifestly, a *slip?* Does it not *appear* that this plea * COULD *have been mended?* Certainly, it COULD; *viz.* by pleading the swearing-in, to have been *agreeable to the statute* of 11 *G.* 1. (c. 4. § 4, which directs it to be before the † presiding officer.) Therefore, the REAL *justice* of the case is, that this *slip* should *not* be fatal *for ever*.

This is a franchise of great importance. It is so, in *itself:* and, besides, the rights and privileges of *many other* persons do depend upon it. And these writs of *mandamus* issuing pursuant to this act were intended for the *settling* and *preserving* of corporations.

IF this was the *single* issue, I think they would be *clearly intitled*, in this case, to a *repleader*. Yet

Secondly—it is objected " that here are *many other* " *issues, all found for the crown*, as well as this."

But the issue just now spoken of as immaterial and void is, an issue taken upon an essential part of an *entire* defence: for the defence here pleaded by the defendant is *one entire* defence; notwithstanding that the crown is at liberty to take distinct issues upon the distinct *parts* of it. And therefore it would be absurd and inconsistent, that the finding against the defendant upon the *other* issues, the other *parts* of *one entire* defence, should stand; in case we should grant a repleader upon, or an amendment of *this* part: for, if that should be permitted, the finding would still be *against* the title of the defendant, it being set up and pleaded as *one entire* title.

I agree that if it appeared upon the whole record, " that the defendant was NOT duly elected," it would be as Ld. Ch. Just. *Pratt* says, a vain and idle thing, to grant a repleader.

But if the rest of the issues are only *parts* of, and *dependant* upon the WHOLE TITLE; the same reason does not then hold. [304]

The way to do *complete* justice indeed, is to let in the *one* side, without prejudicing the *other*.

* N. B. This plea seems to have been good in form; but insufficient as to fact. See Fortescue's distinction in 1 Strange, 398.

† Vide Rex v. Charles Malden, E. R. 11th November, 1767. post p. 2190. [4 Burr. 2192.]

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If a *repleader* was to be granted, (upon the supposition of this being the *only* issue,) it must be * WITHOUT *costs*. But as this was a *mistake* of the *defendant*; (in which the *prosecutor* was *not* to blame,) we ought to do the most complete justice we can, between both.

* V. 8 Mod. 2. 5th point, accord.

My Ld. Ch. Baron was right in his opinion, "that he "could not admit proof *different* from the issue joined;" and also "that this issue was *connected* with the others."

If so, the verdicts were *without evidence*: and it was agreed "that they were to be *without* PREJUDICE." Therefore such verdicts ought to be set aside, *as* without evidence: and not to conclude against the defendant, which *would be* a *prejudice*.

[4 Bur. 2139.] Therefore he proposed to set aside these whole verdicts, on *payment of costs*; and to give the defendant leave to *amend* his plea.

If it had been upon a *demurrer* (which there might have been) the court *would have given leave to* AMEND.

[Vide Ch. Pr. 329. Ld. Raym. 956.] This seems to be the true way to come at justice; and what we therefore ought to do: for the true text is "*boni* "*judicis est ampliare* JUSTITIAM;" (not "*jurisdictionem*," as it has been often cited.)

This is what I would *wish* to do, if we *can* do it.

Mr. Just. DENISON—

Formerly, verdicts were not used to be set aside: and therefore, at that time, repleaders used very commonly to be granted. But they have been less usual of late, since the practice of setting aside verdicts has prevailed.

On repleaders, the issue was considered as void; and the verdict too; and consequently, the judgment was, "to *replead*."

An information in nature of a *quo warranto* does not differ from *other* cases.

[305] Here is an *entire plea*: the replication *separates* it, and takes issue on different *parts* of it. The replication *ought* to have *demurred* to this *immaterial* part of the plea: but *issue* is joined upon it; and there is a verdict upon it in the negative, *viz.* "that the defendant was *not* so "sworn as he has pleaded." What can the *court* do? The issue and verdict are *impertinent* and *void*. How then can the court give *judgment*, when it *does not appear* whether the defendant had a right, OR NOT? (I speak now upon this single issue *only*.)

Well then, if you set aside any *part* of the verdict, you must set aside the *whole*.

And this used, formerly, to be *one* issue.

I well remember that case of *Rex* v. *Philips*, *M.* 7 *G.* 1. It went upon an usage to hold over. The point was whether a repleader should be granted, when the case could not be varied: and it was holden, that that would

have been vain and idle. On the contrary, it was said that it would be a different thing; if the case could have been *mended* upon a repleader. I do not doubt but that there were great numbers of *other* issues in that case, as well as in this: and yet a repleader *would have been there granted* if the case could have been *mended*, on the usage. 1757. REX v. PHILIPS.

The *whole* must be set aside, *if part* is set aside.

It is said "that this is a DEFECTIVE *title*."

But it is NO *title at all:* it is *only one link* of the whole chain.

I think we may set aside the *whole* verdict upon *one* of the issues being void. And this is better than granting a *repleader* upon which a writ of error may be brought, and may long depend; which will be a much greater delay of justice.

Mr. Just. FOSTER—

This was an election under a *mandamus*, upon the statute of 11 *G.* 1. in order to settle the peace of the borough.

Here are twelve *issues* joined, *all* found for the king; and *without evidence*, or any of them: so that none of them have been yet *really* tried.

It is agreed "that in case of a *single* issue which doth "not determine the right, (which way soever found,) a "repleader may be granted."

The ninth issue, in this case, falls directly within this rule. It is totally immaterial to the question of right. [306]

If therefore the verdicts on the other issues, *upon which no evidence was given*, vary the case and stand in the way of a repleader, they ought to be *all* set aside: or otherwise complete justice can not be done.

And I think, as this case is circumstanced, the agreement mentioned by the Lord Chief Baron, *"that the ver- "dicts were to be without prejudice in any *future trial*," may without a strain be extended to any *future litigation* in the cause. * Vide ante, 294.

LORD MANSFIELD—

I am now fully satisfied, by what my brothers have said, that the *whole verdict* may be *set aside*, on *payment* of *costs*, and with *liberty to amend the plea*. [4 Burr. 2139.]

But that must be upon a particular motion.

And I have no doubt but that we may do this, WITHOUT *the consent* of the prosecutors.

Which motions (to set aside the verdict, on payment of costs; and, to amend the plea, on payment of costs;) were accordingly afterwards made by Mr. *Norton;* and granted, after a faint attempt by Mr. Serjeant *Poole* to shew cause, and then to get costs as between client and attorney; in both which attempts, he was unsuccessful:

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for the rules were both of them made absolute, upon payment of common costs; obliging the defendant, however, to take short notice of trial.

No. 193. Friday, 19th May, 1757.

REX *versus* INHABITANTS OF FREMINGTON.

(*Lord Commissioner* WILMOT *absent.*)

See this CASE abridged in the TABLE; and at large in the quarto-edition of my SETTLEMENT-CASES, No. 133. pa. 416.

[307] Saturday, 17th May 1757.

REX *versus* INHABITANTS OF ALTON,

(*Lord Commissioner* WILMOT *absent.*)

See this CASE abridged in the TABLE; and at large in the quarto-edition of my SETTLEMENT-CASES, No. 134. p. 418.

[314]

PAXTON *versus* KNIGHT.

Prohibition not to go after sentence, unless defect of jurisdiction be apparent in the libel.

MR. *Norton* shewed cause against a prohibition.

This was a question whether a prohibition should be granted, to stay proceedings in an ecclesiastical court, in a suit by a quaker, for a seat in a church; founding his title upon a *prescriptive* right: in which suit the ecclesiastical court *had determined* against him. And he now came, after sentence below, for a prohibition. Note ---an *immemorial prescription* was alledged on *both* sides.

Mr. *Norton*—against the prohibition, cited 2 Ld. *Raym.* 755. the case of *Jacob* v. *Dallow*. 2 *Salk.* 551. S. C. 5 *Mod.* 436. S. C. Cases in *B. R.* temp. *W.* 3. 233. S. C. *Farresley*, 8. S. C. (*a*)

[315] As to prohibitions *after sentence*—

Hetley 92. the case of *Eaton* v. *Ayliffe* (which had been

(*a*) See also 3 *East*, 478. 5 *East*, 348. 17 *Vin.* 570, 571. as to seats in a church. As to prohibition on account of a prescription, vide 17 *Vin.* 560. *pl.* 16 and 17. and the notes 561. *pl.* 18, 19.

A libel for an ecclesiastical duty may be founded on a prescription, and it is not any cause for a prohibition unless it be denied, and then it is. *Palm.* 449. *Noy*, 31.

cited on the other side,) is a case to which the court will not pay great attention: it was determined *temp.* C. J. and is a loose note; and even * Mr. *Watson* in his *Complete Incumbent* treats it as a case of no authority.

The court will not, *after sentence*, (*a*) grant a prohibition, unless the defect of jurisdiction appears upon the *face of the libel.* (*b*) *

1 *Strange* 187. the case of *Argyle* v. *Hunt*— is expressly so in point. And the case of *Stone* v. *Fowler*, *Mich.* 9 *Anne*— there cited (fo. 188.) is to the same effect. 1 Ld. *Raym.* 436. is also in point: the churchwardens of *Market Bosworth* v. the rector of *Market Bosworth*; where the spiritual court had adjudged *against* the custom set up; though their law allows a *less* time, than the common law, to make a custom: but the prohibition was denied. So here, if the spiritual court will admit *less* evidence of a prescription, than the temporal courts will; and the prescription is *nevertheless* found to be groundless; it is certain that the party *who sets it up*, can have no reason to come for a prohibition, *after sentence.** And his only reason for it can be, (as the court observed in the last cited case,) to *get clear* of those *costs*, which he has by his own *vexatious suit*, rendered himself liable to; and which (as was there adjudged) he ought to pay.

But the COURT seemed to think that *if* the SENTENCE of the ecclesiastical court was a *nullity*, their award of *costs* must be so too. And here are *reciprocal prescriptions* alledged: and the prescriptive right of the one is determined *for*; though that of the other is determined *against*. They have adjudged the adverse prescription to be a *good* one: which they could not try; and which they will establish upon less evidence than the common law requires.

* Mr. Just. Denison observed, that the Complete Incumbent was not written by Watson; but by Mr. Place of York.

* V. Full v. Hutchins, p. 176, post. pa.

(*a*) But that they will, if it appears on the face of the proceedings, see *Salk.* 548. 12 *Mod.* 132. *Godb.* 163. *Comb.* 356. *Mos.* 907. 4 *Bur.* 2037. 2 *Wils.* 195.

(*b*) This is a clear ground for granting the prohibition if the ecclesiastical court did adjudge the prescription insisted on by the defendant to be good; but no such thing is mentioned in the state of the case, and it is very strange if they did: for as the defendant was here respondent, there it was sufficient for them to determine against the plaintiff's prescription; and if that was so, all the cases cited by Mr. *Norton*, are in point against granting the prohibition; that in *Ld. Raym.* 755. goes further, for there the court refused a prohibition after sentence, notwithstanding the ecclesiastical court had determined in favour of a suit there founded on usage.

1757. PAXTON v. KNIGHT.

And LORD MANSFIELD said that though he was very sorry that the court were obliged to grant a prohibition, (because the party applied for it, only to get rid of paying the costs occasioned by his own vexatious suit;) yet he thought they could not avoid doing it.

Per cur. RULE for a prohibition made ABSOLUTE.

[316]

Monday, 16th May 1757.

REX *versus* JOSEPH CHAPLIN HANKEY, ESQ.

(*Lord Commissioner* Wilmot *absent.*)

Information for a challenge denied to the first sender.

ONE *Ralph Carr* an attorney, applied for an *information* against the defendant, for sending him a *challenge.*

Upon hearing the affidavits, and the letters that passed between these two gentlemen, the court thought that *Carr* himself appeared to have sent the *first* challenge to the other; at least, that his letters manifestly *imported* a challenge: which the other clearly so understood, and accordingly accepted, and proposed to fight with pistols.

[Comb. 10.] THE COURT held, that though the defendant had *behaved very improperly;* and though it would have been right for the court to have granted even CROSS-*informations,* in case each party had applied for an information against the other; yet they thought that when the *aggressor,* who gave the first challenge, came and applied for an information against the other who *only accepted* it, (however improperly and unlawfully;) it was a very different case; and that the court had no reason to give him this EXTRAORDINARY remedy, by way of information: but ought rather to leave him to his ORDINARY *remedy,* by action or by indictment.

[Ld. Raym. 1029.]

Therefore the RULE "to shew cause why an information "should not be granted," was DISCHARGED.

ROBINSON *versus* RALEY.

Tr. 25 *G.* 2. *Rot'lo.* 775.

Demurrer not to be withdrawn after trial of other issues. [S. C. Bath. 188. cited, and concisely but clearly reported, Bull. 93. See also 2 Black. 1022. 1 Durn. 782.]

THIS was an action of trespass. The declaration contained a great number of counts; amongst the rest, one in trespass for breaking and entering the plaintiff's close; and depasturing it with, *&c.*; and for breaking and entering his free-warren; a 2d count, to the like effect; (but in different years;) so a 3d, 4th, 5th and 6th; and six more, for breaking and entering another close called *Sands's Piece;* a 13th for taking and carrying away the plaintiff's trees; and a 14th for taking and carrying away his goods and chattels.

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ROBINSON
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RALEY.

The defendant had leave to plead several pleas: and accordingly he pleaded, 1st. the general issue, to the whole. 2d. Plea by leave, (*ut supra*,) that as to the close called *Rabbet-walks*, "that it is one rood of land, parcel of a "common field; and that Mr. *Finch*, in right of his "freehold estate, and all, *&c.* have right of common, *&c.* "in certain fields called Middle fields, whereof the Rabbet-"walks are parcel:" which rights he derives to himself; and so justifies under it. The like plea, to the other five next counts. He pleads, as to the six issues relating to *Sands's Piece*, the general issue. To the 13th count, he pleads tenancy of another close, under the plaintiff; and justifies under a *licence*, and avers that it was used for gates, *&c.* Another plea was a right of common, *&c. &c.*

The plaintiff, in his replication to the 2d plea to the 1st count, traverses the right of common: and in his replication to the like pleas as to the other five counts, traverses the Rabbet-walks, being parcel of the Middle fields. In his replication to the last mentioned plea, he traverses the right of common. All these issues were *found* for the defendant. To the plea to the 5th count, the replication traverses "that the cattle were the defen-"dant's *own* cattle; and that they were *levant et couchant* "upon the premises, *and commonable* cattle." To this there is a special demurrer for cause, (*viz.* "that the re-"plication is multifarious, and that several matters, "specifying them, are put in issue; whereas only *one* "*single* matter ought to be so;") and joinder in demurrer. To the plea to the 13th count, the replication traverses the *licence;* (after protesting "that the tree was not used "for gates, *&c.* as is alledged by the defendant's plea.") And to this replication also, the defendant demurs specially; and shews for cause, "that it concludes to "the country, whereas it ought to conclude with an "averment."

1st Demurrer.

Serjeant *Poole*, for the defendant, complained of the hardship the plaintiff put upon the defendant in the 5th count, by inforcing the defendant to prove the cattle to be his *own* cattle, *and commonable* cattle; *and levant and couchant* upon the land: which hardship had *obliged* him to demur.

He argued, that *some one* fact only ought to be put in issue; not *several*.

He cited *Co. Lit.* 126. *a.* (letters q, r.) It must be one SINGLE certain material point. And so also 8 *Rep.* 67. *b.* *Crogate's* case (the last resolution,) lays down the rule accordingly, "that an issue ought to be full and SINGLE." Now here are *three* DISTINCT *facts* put in issue, by this replication: any one of which was sufficient.

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For if the cattle were not his *own*, or were not *levant*

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and couchant, they were *not commonable* cattle. The plaintiff might as well have put twenty facts in issue.

This therefore is, at least, a fault in *form:* and we have demurred *specially*, and shewn this for cause; "that the "replication is multifarious, and that *several* matters are "put in issue (specifying them;) whereas *only one* SINGLE "matter *ought* to be so."

2d Demurrer. As to the *licence*—The replication (protesting that the tree was not used for gates, &c.) traverses the licence. To this replication, we have demurred, *out of necessity:* for though we really *have* a licence, yet the person who gave it to us (the plaintiff's steward) has *denied* it; and we apprehended, would do so again, on oath. Therefore we have demurred specially, and shewn for cause "that "the replication concludes to the country, whereas it "ought to conclude with an averment."

[5 New Abr. 210, 211. pl. 221, 223.] Now they ought to have traversed the licence specially, and to have concluded with an averment. *Crogate's* case, 3d resolution, (*fo.* 67. *a. b.*) shews that this licence ought to have been specially traversed, and concluded with an averment. And *Rast.* 660. *b. bis.* 661, 630, 651. and 1 *Brown.* 353. and *Thompson's Entr.* 365. and many other precedents, are so.

Indeed where the *whole* of the plea is traversed, the conclusion *may* be to the *country*. But this is *not* a traverse of the *whole*. So that this is a departure (by Mr. *Robinson*) from the common form of pleading.

Mr. *Yates contra* for the plaintiff.

1st Demurrer. One part of the duplicity (*viz.* the cattle not being *commonable*) is not pointed out by the special demurrer.

However, this traverse is *not double:* though I agree that it *numerally* contains several matters; all which TOGETHER make up the defendant's plea, and make *one* ENTIRE *defence*. And it is within the reason of *Crogate's* case, 8 *Co.* 67.

Whereas *duplicity* is, where distinct matters, NOT being part of *one entire defence*, are put in issue. For there are cases where *several matters may* be put in one traverse: as, for instance, a custom consisting of *several parts*.

[319] Now all *these* parts here traversed, make *one entire defence:* for the cattle must be *commonable, levant and couchant, and* his *own*: or else, it is no sufficient defence. To prove which, he cited 1 *Ro. Abr.* 398. letter G. *pl.* 2, 3. Letters H. and I, throughout. 1 *Saund.* 227. The case of *Stennell* v. *Hogg*, and 2 *Show.* 328. The case of *Manneton* v. *Trevilian*, in point.

2d Demurrer. As to the licence, the cause of demurrer shewn is, "that he ought to have maintained his declaration; and "that he ought to have concluded with a traverse and "*averment*."

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ROBINSON v. RALEY.

But precedents are *both* ways. 2 *Brown's Entr.* 283. concludes as the present does. And whoever has seen the *whole* of this record will not think that *either* of the parties has concluded *too hastily.* He cited the case of *Clarke* v. *Glass, Tr.* 28, 29 *G.* 2. *B. R.* to prove that where the WHOLE *contents* of the plea are denied, the conclusion must be to the *country*: but where only a *particular fact* is denied, the conclusion must be with an *averment.* He [Doug. 414.] also cited 2 *Lutw.* 1399, 1401. The case of *Hustler* v. *Raines.*

Serjeant *Poole*, in reply—

1st. As to the two matters making but one entire de- 1st Demurrer. fence—yet, being *variety of facts*, they ought not *both* to be put in issue. *Crogate's* case, 8 *Co.* 67.

And the common method is, to traverse "that the said "cattle were *levant and couchant.*"

As to the case of *Manneton* v. *Trevilian*, I agree that the cattle *ought* to be *levant and couchant.* My demurrer here is in point of FORM; and is special.

2dly. I do not know but the party may go to issue, 2d Demurrer. in *some* cases; but I say this is not the *common* form.

The case of *Hustler* v. *Raines*, 2 *Lutw.* 1399, 1401. proves nothing against me.

LORD MANSFIELD held both these demurrers to be frivolous.

The SUBSTANTIAL *rules* of pleading are founded in *strong sense*, and the *soundest and closest logic*; and so appear, when well understood and explained; though, by being *misunderstood* and *misapplied*, they are often made use of as instruments of chicane. (*a*)

[320]

As to the present case—It is true, you must take issue upon a *single* POINT: but it is not necessary that this single *point* should consist *only* of a single fact: here, the *point* is, the cattle being *intitled to common*; this is the single POINT of the defence. But in *fact*, they must be both his *own* cattle, and ALSO *levant and couchant*; which are *two different essential* circumstances, of their being entitled to common: and *both* of them absolutely requisite. 1st Demurrer. 1 Bosanq. 77.

So, as to the *licence*—The licence is the *point* in question. And this point in question, "whether the licence "was given, or not," is put in issue: the *whole* turns upon this *particular proposition.* Indeed it may be a different case, where the *whole* of the plea is NOT *denied*; but *only some parts* of it. But that is *not this* case. 2d Demurrer.

Mr. *Yates* has made right and reasonable and intel-

(*a*) This observation seems *mal-a-propos*, for there is neither sense nor logic in the above distinction, though approved as it seems in the next page, and also by *Buller*, in *Doug.* 414.

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1st Demurrer. [7 Vin. 509. it is clearly not good if it includes matter of record, 8 Co. 67. a.]

ligible distinctions: and he has cited an express authority.

Mr. Just. DENISON concurred.

1st. As to *Crogate's* case---The replication "*de injuriâ suâ propriâ absq'; tali causa,*" will do, in all cases where matter of title and other things of that kind, are not included in the "*absq. tali causa*:" and if you *admit them*, you may then plead *de injuria suâ propriâ absque* "RESIDUO *causæ*;" traversing that residue. But the rule in *Crogate's* case does not affect *this* case. For here the question is *one single proposition, viz.* the *measure* of the common; and the measure of the common is the levancy and couchancy jointly with the property.

Skinner, 137, is a more sensible report of the case of *Molliton* and *Trevilian*, than 2 *Show.* 328. And there the levancy and couchancy, *together with* the property, were esteemed to be the measure of the common; and *not* the levancy and couchancy *only*.

So that nothing more is here traversed, than the measure of the common. The case is in point.

Besides, I think it is *within Crogate's case.*

As to the *licence*---It is right, and avoids the prolixity of pleading. The *old* way indeed was otherwise: but it is altered, of late.

And he cited a case (of an alternate way of traversing a corrupt agreement,) which was in *M.*5 *G.*1. *B. R. Fen* v. *Alston*--where it was holden "that the plaintiff has a liberty
[321] "either to reply that the bond was given upon another "account," and to traverse the corrupt agreement with an *absque hoc; or* to deny the corrupt agreement *directly*, and conclude to the *country*. And the case of *Baynham* v. *Matthews*, 2 *Strange*, 871. goes upon the very same foundation; and mentions the same alternative. (*a*)

Mr. Just. FOSTER. I am of the same opinion.

Mr. *Norton*, who was also of counsel for the defendant, desired the court not to give judgment yet; but to give them an opportunity to move for leave to withdraw their demurrers, and amend: which the court agreed to. And in a few days afterwards, Mr. *Norton* moved for leave to *withdraw* the two demurrers, and plead to issue; (upon

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(*a*) The distinction was disallowed, *Per Cur.* on Mr. *Walker's* argument in support of a special demurrer founded on it, without hearing any counsel on the other side; *February* 8*th*, 1771. *Hil.* 11 *G.* 3. *B. R.* and in both cases the plaintiff may conclude his replication to the country, as he did in the case adjudged as above-mentioned.

payment of costs;) and a rule was thereupon granted, to SHEW CAUSE. 1757.

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And now Mr. *Yates* shewed cause, for the plaintiff, against the defendant's being at liberty to withdraw the two demurrers, and plead to issue. And he cited 6 *Mod.* 102. The case of *Cross* v. *Bilson*, 6 *Mod.* 1. The case of *Staple* v. *Haydon*. 1 *Ld. Raym.* 668. The case of *Fox* v. *Wilbraham*, and 2 *Strange*, 1002. *The Bank of England* v. *Morrice*. (*a*)

Serjeant *Poole* and Mr. *Norton contra*, for the defendant—

The merits have not been tried upon these demurrers. We move this at *common law*; not under any statute. And the court are not bound down by any certain rules. And they cited 2 *Saund.* 402. *Rex* v. *Ellames*, (2 *Strange*, 976.) *Duchess of Marlborough* v. *Widmore*, *Hil.* 4 *G.* 2. *B. R.* The case of *Cope* v. *Marshall*, *Tr.* 28 *G.* 2. *B. R.* (*V. ante* 259. S. C.)

The case of *Giddins* v. *Giddins*, (*Tr.* 29, 30 *G.* 2. *B. R.* was even after the court had given their opinion.*

And here is a declaration of twenty *counts*, manifestly intended to catch the defendant, and to save costs.

If our motion is granted, the *contingent* damages assessed, will be out of the case, and will be as none at all.

LORD MANSFIELD—It is admitted to have been done, *after a* DEMURRER *and argument:* but this is *after a* TRIAL; and *without any* favourable circumstances.

Now as no case of such an amendment *after a* TRIAL is cited, I take it for granted that *none* EXISTS.

These are frivolous demurrers: and the only view of this motion is *to get rid of the costs.* But the plaintiff would have had his costs, if the defendant had done right at first, and joined issue upon these facts; *if* they had been found *against* him.

So that here is neither precedent, nor reason for allowing this motion.

Mr. Just. DENISON concurred.

Where the demurrer is first argued, *before* any trial of the issues, the court will give leave to *amend*: as in the case of *Giddins* v. *Giddins*. But this is an attempt to amend an issue at *law*, AFTER *a verdict* has been found on the issues *upon* FACTS, and *contingent damages found* upon the demurrers: of which, there *never was an instance*. And we do not know where it would end; nor

* It was after a demurrer and argument only; but the court had given no opinion; and the rule was made absolute without defence. [16 Vin. 391.]

[322]

(*a*) The distinction prevailed formerly, 2 *Anders.* 6, as it did in the case in *Strange*, which is reported also in *Fitz.* 130, and in MS. notes agreeable to *Strange*.

1757. ROBINSON v. RALEY.

do I well know how the cause *could* be again carried down to trial.

If this had at first gone down to issue; and had been found *against* the defendant; it would have carried costs.

The court cannot help seeing that this is *upon* RECORD: here are *verdicts* and *contingent damages* found. Therefore we cannot help this: I wish we could: because the merits seem to be with the defendant.

The cases of amendment cited are where the whole is supposed to be *in* PAPER: or else the court COULD NOT *have done it*. We have no authority to do this, AFTER it is plainly *upon* RECORD.

Mr. Just. FOSTER concurred.

Per Cur' unanimously JUDGMENT for the PLAINTIFF upon the DEMURRERS.

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Tuesday, 17th May, 1757.

ROBERTS *versus* PEAKE.

M. 29 *G.* 2. *Rot'lo.* 625.

(*Lord Commissioner* WILMOT *absent, in Chancery.*)

Note of hand with a proviso, is not a negotiable note.

THIS was a special case reserved at *nisi prius* at *Guildhall*, on a trial there before the late Ld. Ch. J. *Ryder*.

It was an action upon a *promissory note*, brought by the indorsee, against *one* defendant only: though the note imported, *upon the face of it*, to have been made by *two* persons: and the declaration was upon the note, *as if* it had been an ABSOLUTE one, payable on the* death of a person named in it; whereas it appeared upon the face of it, to have been given *upon* two several CONDITIONS. For the note, when given in evidence, came out to be thus, "WE (naming the defendant *Peake* AND "*another person*) promise to pay to *A. B.* (*a*) 116*l.* 11*s.* "(value received) *on the death of George Hindshaw*; PRO-"VIDED *he leaves either of us sufficient to pay* the said "sum, OR *if we shall be* OTHERWISE *able to pay it.*"

Signed by PEAKE *only*.

And yet it was laid in the declaration, merely as a promissory note absolutely and in all events payable on the death of *G. H.*

Mr. *T. Clarke of Lincoln's Inn—pro quer.*

* V. ante 226. Goss v. Nelson, on a note payable when defendant should come to age; specifying when that was to be.

(*a*) It must have been payable to *A. B.* or *order*, though not so stated, otherwise this action by the indorsee could not have been maintained.

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ROBERTS v. DRAKE.

The two questions upon this case are—

1st. Whether *this* be a NEGOTIABLE *note*.

2d. Whether *this* note, given in evidence, *supports* the *declaration*; which is upon an ABSOLUTE note payable on the death of *G. H.*

First point—There can be no doubt but that *if* the note given in evidence had *not* had the proviso added to it; but had merely been made payable *on the death* of *George Henshaw*; it had been a good negotiable promissory note, within the statute of 3 & 4 *Ann. c.* 9. (§ 1.)

For the *contingency* of the *death* of *G. H.* is *not* such an uncertain contingency, as that the event may possibly or probably never happen: and *so* the note might perhaps *never* become payable: but it is an *event* CERTAIN *and* NECESSARY; and *no otherwise*, nor in any other respect uncertain, than merely as to the *particular* TIME *when* it will happen. So that it is no more than the *ordinary* case of a promissory note payable at a FUTURE day. [324]

And to prove this doctrine, and that this is a negotiable note, he cited 2 *Strange*, 1217. the case of *Cook* v. *Colcham*, full in point; being "to pay, &c. within six "weeks after the defendant's father's death." 1 *Strange*, 24. the case of *Andrews* v. *Franklin*, still stronger; being "to pay, &c. within two months after such a *ship* "*shall be paid off*."

Then as to the *proviso* or condition, it is made *absolutely* payable, on *George Henshaw's* death, an event which *will certainly happen*: therefore the proviso is repugnant to the body of the note. And he endeavoured to shew a resemblance between this case and that in 2 *Salk.* 463. the case of *Wells* v. *Tregusen*; and the case in 21 *E.* 4. 86. and *Brooke*, Obligation 58. (S. C. abridged.)

Second point—The note produced in evidence will support the declaration.

1st Objection is "that the note is only laid, as the "defendant's *several* note:" whereas it imports upon the face of it, to be made by *two* persons jointly.

Answer. Perhaps one only *signed* it: or if the other did also sign it, it was, nevertheless, equally the note of the defendant. It is laid, and must be pleaded according to its *legal* operation. 1 *Strange*, 76. the case of *Butler* v. *Maltsey* is most strictly in point.

2d Objection, "that this is laid AS *an* ABSOLUTE note, "*without* mentioning the two conditions," (of being payable) "IF he shall be able;" or "IF *Henshaw* shall "leave either of them sufficient to pay it."

Answer—But I say that this note produced in evi-

1757. ROBERTS v. PEAKE.

dence, which contains these two conditions, will sufficiently support the declaration.

In attempting to support this assertion, he mentioned 6 *Mod.* 228. the case of *Roberts* v. *Harnage*, 2 *Salk.* 659. S. C. 4 *E.* 4. 29, and 1 *Strange*, 76. the case of *Butler* v. *Mallissey*, before mentioned.

[325] Mr. *Norton*, for the defendant, was about to speak: but

LORD MANSFIELD stopped him, and said, I fancy you will hardly argue this: (meaning that it was sufficiently clear on Mr. *Norton's* side of the question.)

Mr. *Norton*—This was an action brought by the indorsee; and is under very particular circumstances.

I agree that a note in the name of two, and importing to be made by two persons, may be actually signed by one only and will be good: also that a note may be declared upon, according to its *legal* operation.

As to the rest---If the court was clear, he said he would not trouble them.

LORD MANSFIELD---I am very clear.

This note was payable *upon a contingency*; but it is NOT *an* ABSOLUTE note. What would it signify, to have put in all these contingencies, *if* the party was *absolutely* and *at* ALL *events* bound to pay it upon the death of *George Henshaw*; most manifestly, it was not intended that he should be bound to pay it upon *George Henshaw's* death, at *all events*.

[5 Durn. 484.] Therefore this is *not* a *negotiable* note: for a note payable *upon an uncertain contingency*, is *not* a *negotiable* note.

Mr. Just. DENISON concurred.

A note payable *eventually* upon an uncertain contingency can *never* be a *negotiable* note. And if it had been so, yet there ought to have been an averment "that "*George Henshaw did* leave one of them sufficient to "pay it;" or "that the defendant was otherwise able to "pay it."

And indeed this shews plainly that it is *not* a negotiable note within the meaning of the act of parliament; which means and intends an *absolute* note payable *at all events*.

And I think too, that it is a *variance* in the declaration, from the note itself, *for want of setting out* these conditions: it ought to have been set out, as it *really* was.

[326] But indeed one of these points depends upon the other: and I think this note is *only eventually* and *conditionally* payable, and by no means *absolutely* and *at all* events.

Mr. Just. FOSTER concurred, both as to the *variance*;

and also that it was NOT a *negotiable* note as being payable *eventually*, and *not absolutely*.

Per Cur. JUDGMENT for the DEFENDANT as upon a nonsuit.

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DENN ex dimis. BURGES. v. PURVIS.

DENN, ex dimiss. BURGES, Vid. *versus* PURVIS et a.

[See Cro.Car. 110.]

Plaintiff shall recover, according to his title, where he demands more than he has a title to, but not *e contra*.

THIS was a special case, upon an ejectment tried at *Maidstone* assizes, in *August* last.

Richard Burges, being seised in fee simple of divers *gavelkind* messuages, lands, tenements and hereditaments in the several parishes of *L. M.*, *B. M.* and *H.* made his will in writing, on 15th *Feb.* 1735: and thereby devised his said messuages, lands, *&c.* to his wife *Elizabeth* for her life; with remainder to his brother *Thomas Burges*, in tail male; with remainder to *William Burges* (son of his late brother *John Burges*) in tail male; with remainder to his own right heirs for ever. And the said *Richard Burges* died without issue, and without revoking or altering his said will.

And the said *Thomas Burges* and *William Burges* are since dead without issue.

On 8th *September* 1746, the said *Thomas Burges* made his will: whereby he devised all *his* real estate in the several parishes aforesaid, to his wife *Ann Burges*, for her life.

On 6th *March* 1755, the said *Elizabeth*, widow of *Richard Burges*, died.

In *Easter* term 29 *G.* 2. the said *Ann Burges*, the devisee of the said *Thomas B.* brought her action of ejectment, for a MOIETY of the above gavelkind lands and premises, UPON A SUPPOSITION "that her testator *Thomas*, (as the brother of the said *Richard*,) and *William B.* "(as the nephew of the said *Richard*,) *were the* ONLY, "*heirs* of the said *Richard*, at the time of his decease, "according to the custom of gavelkind; and, *as such*, "*entitled* to the real estate of the said *Richard in* MOIETIES."

On trial of this ejectment, it appeared, in the course of the evidence, "that the said *Richard Burges*, at the "time of his decease, left a *niece* (named *Mary*) the *only* "*child of* WILLIAM *Burges* one OTHER *brother* of the "testator, who, by the custom of gavelkind, was *enti-*

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(*a*) In ejectment for an undivided third part, if the lessor proves a title to a fourth part he shall recover the fourth part. *Ablett* v. *Skinner*, 1 *Sid.* 229, was cited as a case in point, and it is so as to the execution, 3 *Wils.* 49.

1757. DENN ex dimiss. BURGES v. PURVIS.

" *tled as* co-*heir* TOGETHER *with* the said *Thomas* (the " brother) and *William* (the nephew of the testator,) to " the premises in question."

Whereupon, by consent of parties, it was ordered by the court that a verdict should be given for the plaintiff, *as to one third* part of the premises in the plaintiff's declaration specified; subject nevertheless to the opinion of the court of *King's Bench*, upon a case to be stated upon *this point—viz.*

" Whether the plaintiff, *on her declaration* FOR *a* " MOIETY of the lands, tenements and hereditaments " therein mentioned, *can* RECOVER *one* THIRD *part* of " such premises."

Which order of *nisi prius* was afterwards regularly made a rule of this court.

And it came on now, in the special paper, to be argued.

Mr. *Knowler*, being counsel for the plaintiff, argued—

That the lessor of the plaintiff must recover ACCORDING *to his title.*

And this is so, whether the ejectment be brought for an undivided, or a several and divided part; for the *whole*, or for *part* of a thing; for an entirety, or for a moiety.

In *Plowd.* 420, 424. *b. Bracebridge's* case—the reporter blames himself for not having objected to the verdict. But 3 *Bulstr.* 184. The case of *Cowper* v. *Frankline*, and many other cases explode *Plowden's* notion " that the " verdict was liable to objection upon that account."

Here, the declaration is for *one* undivided part, and the verdict for another undivided part. Which is *not an immaterial variance* from the declaration, sufficient to prevent the plaintiff's having judgment.

For there is no necessity that the verdict should agree *precisely* with the declaration. All that is necessary is, that the thing for which the verdict is given, should be *comprized in*, and be *part of* the *thing demanded* by the declaration.

[328] And it could be upon *no other foundation*, that the case was determined, which is mentioned in 2 *Ro. Abr.* Tit. *Trial, fo.* 704. *pl.* 22: where an ejectment was brought of *a* messuage; and it appeared in evidence, and was so found by the verdict, " that only a *small part* of the " messuage was built by incroachment on the lessor's " land; *not* the residue; and yet the plaintiff had judg- " ment."

Here, the declaration is for a *moiety;* to which it was then supposed that the lessor of the plaintiff had a right, as devisee of one of *two* brothers of the testator. Indeed it came out upon evidence, that the testator really left *three* brothers and co-heirs: so that the lessor of the plain-

tiff had in fact a title to a *third* part only. And the verdict is accordingly, for a *third*. 1757.

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But the *moiety* INCLUDES the *one third*. So that what is recovered by the verdict, being *contained in*, and being *less than* what is demanded in the declaration, this case must be ruled by the ground I have already mentioned, "that the lessor shall recover ACCORDING TO *his title*." And in point to prove this, is the case in 1 *Siderf.* 229, of *Ablett, lessee of Glenham*, v. *Skinner*; where the *declaration* was of a *fourth part* of a fifth part; and the lessor's true *title* was only to one-third *of* one-fourth of a fifth part: (which was ONLY A THIRD *part of what was demanded*:) yet it was resolved "that the verdict should "be taken *according to* the title."

Mr. *Burrell*, for the defendant, premised that this was a hard case: and therefore deserved favour, and justified the defendant's insisting on all legal objections. Then he urged that the plaintiff must shew a clear title to make *such* a lease as is confessed by the defendant: and, as he *knows his own title*, he ought to set it forth AS *it is*.

In the case of *Berrington ex dimiss. Dormer* v. *Parkhurst*; 10 G. 2. *B. R.* and in *Dom. Proc. May* 1738. *H.* 11 G. 2. The court held that the plaintiff could not recover; because the demise was laid before the time of actual entry: and the lease was holden void in its creation.

And if the lease is laid *à die datûs*, it will not support an entry *upon* the day. [1 Wils. 176. 2 Wils. 165. 3 MSS. 383.]

Two tenants in common cannot declare upon a joint lease. So is *Cro. Jac.* 166. The case of *Mantle* v. *Wollington*.

Comberb. 190. in the case of *Moore* v. *Pardon*, one *indendure* to two demises, was indeed holden well enough, on error brought. [329]

3 *Lev.* 334, 335. The case of *Goodwin* v. *Blackman*, was an ejectment of the tenth part of a messuage described as being in *two* parishes; whereas the whole lay in *one* of them only: it was holden that the evidence did not maintain the declaration; which was precisely, of the tenth part of an entire thing. Ruled Trin 671

Hardres, 330. In the case of *Wheeler* v. *Toulson*, the court inclined that a demise *de herbagio et pannagio*, did not maintain a declaration for the *land*.

And he supposed there might be a difference between trespass and ejectment: and concluded with praying a rule for a nonsuit.

Mr. *Knowler* in reply—here, the plaintiff's title was not known to her: for she supposed *only two* brothers; and it comes out that there was a *third*.

And the question is whether she can recover under *this* title.

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The plaintiff here stands in the place of a coparcener: and therefore she may bring her action for *her part, by herself.*

The case of *Ablett* v. *Skinner*, in 1 *Sid.* 229. is in point: it is the very case, as to the recovery being *less* than the demand.

Therefore he prayed that the plaintiff might be at liberty to enter up judgment on this verdict.

LORD MANSFIELD—

[Cro. Car. 109, 110. Yelv. 228.]

This is an exceeding plain case. The rule is undoubtedly right, "that the plaintiff must recover *according* "*to the title.*" Here she has *demanded* HALF; and she appears *entitled to a* THIRD: and so much she ought to recover.

Mr. *Knowler's* principles, and his authorities, are both right: and the case of *Ablett* v. *Skinner*, which he cites from 1 *Siderf.* 229. is in point.

And so if you demand forty acres, you may certainly recover twenty: every day's experience proves this.

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And so it is, in an assise: *part* may be recovered, on a demand for the *whole*. And no possible objection can be made to this. For if MORE is laid, there is no reason, why she should not recover LESS: though the *reverse* indeed will not hold; *viz.* That if he *demands less*, he shall nevertheless be entitled to *recover more.*

Mr. Just. DENISON concurred—and said, he thought the case of *Goodwin* v. *Blackman*, cited by Mr. *Burrell* out of 3 *Lev.* 334, 335. was a strange case. And the case therein cited, (*p.* 355.) 44 *Assise* 27, of an assise of a mill, and a recovery of only *part* of it is a strong case *, against it. And that principal case reported in 3 *Lev.* 334. is contrary to all experience. And *Levinz* there cited several good cases, on behalf of the plaintiff; which the court did not deny.

* It is put as such, by the reporter, who makes a quære as to the authority of the principal case, and cites this old case in order to invalidate the court's determination.

Mr. Just. FOSTER concurred, and said the case in *Siderfin* was in point (1 *Siderf.* 229.)

Per Cur. unanimously

Let the *postea* be delivered to the plaintiff, in order to enter up JUDGMENT for the PLAINTIFF.

[See 5 East. 301.]

Declaration on a bail-bond needs not set forth that there was an affidavit of debt, or that the sum sworn to was indorsed on the writ.

WHISKARD, assignee, &c. *versus* WILDER.

A DEMURRER to a *declaration* on a *bail-bond.*

Mr. *Whitaker*, for the defendant, objected that the declaration ought to have particularly *set forth* "that the

Tidd 9th Ed. 224, 5.

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" debt was *sworn to* by the plaintiff; and that the sum " *sworn to* be due, and for which the defendant was hol- " den to bail, was *marked* on the writ." For he alledged that without shewing this, here was NO SUFFICIENT *authority to* ARREST the defendant: and consequently the bail-bond is *not good*, since the act of 12 *G.* 1. *c.* 29; but *void*. And he cited 1 *Strange* 399. the case of *Mills* v. *Bond*: where the original process was returnable at a day out of term: and it was therefore holden a *void* process.

Now here it is not shewn, " that the debt was to the " amount of 10*l.*;" nor is the sum due sworn to, or the writ marked: all which are *essentially* requisite, by the said act of 12 *G.* 1. *c.* 29. sections 1 & 2.

Serjeant *Poole*, for the plaintiff, argued *è contra*, that the declaration is good, in its present form. [331]

It is an action brought by an assignee of a bail-bond; which he *properly* sets forth; and then shews the bond to be forfeited: which is the *whole* that is necessary for the plaintiff to shew.

And if the *sheriff* has holden the defendant to bail, when he ought not, or improperly; the remedy of the defendant for that, is *against* the *sheriff*: but the *bond* itself is *good*, and not void; (however voidable it might possibly be by plea.)

And he said he would mention a very late case, in proof of his position: which case was, by name, *Nordon* v. *Horsley*, determined last week, in *C. B.* It was an action on a bail-bond, taken for *more* than the sum *sworn to*; and this statute of 12 *G.* 1. was pleaded: but the court held the statute to be *only directory*; and over-ruled the plea. [S. C. 2 Wils. 69. Barnes, 4to. 159.

Nor is it USUAL to insert this in the declaration.

Mr. Just. DENISON—It is *often* done, and *often* not: I have often seen declarations of BOTH SORTS; some, one way; some, the other.

Mr. *Whitaker*, in reply. My objection is, " that there " is *not a sufficient authority* set forth, for *the sheriff to* " ARREST the defendant." And there is no need to *plead* this: for it is a *void* bond.

3 *Lev.* 74. The case of *Graham* v. *Crawshaw*, proves the bond taken upon an impossible condition, to be contrary to the statute of *H.* 6. (23 *H.* 6. *c.* 10.) and to be *void* by it.

And so, *this* bond also appears, upon the face of the declaration, to be a *void* bond, as being contrary to the statute.

And 12 *G.* 1. makes this circumstance *essential* to constitute a *legal* process; and must have reference to the statute of the 23d of *Henry* 6th.

And this is not like the case of *Nordon* v. *Horsley* in

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C. B. where the bail-bond was only taken for a *greater* sum.

Here, the arrest was *void*; and consequently, the bail-bond was *void* too.

LORD MANSFIELD—This has not been thought necessary to be set forth, till this time, ever since the making of the act of 12 G. 1. *Nor* does it, upon reading the act, appear to be an ESSENTIAL requisite to *the validity of the* bail-bond, nor in the nature of a *condition precedent* to it: but on the contrary, the statute of 12 G. 1. appears to be *only* DIRECTORY to the sheriff. So that though the sheriff *may be himself answerable* for such an omission, yet the *bond* is NOT VOID.

And I think, it is *properly likened* to the case of taking bail for a *larger* sum.

In *both* these cases, the *sheriff*, (or perhaps the plaintiff,) may be answerable or punishable: but the *bond* is *not* VOID.

Mr. Just. DENISON concurred—he seemed to wonder that this point had never yet been determined.

He thought the plaintiff was *not*, in point of law, *obliged* to set this out, in order to entitle him to his action: though it certainly *has been often done, pro majori cautela.*

This original action appears to have been an *ac etiam* for 50*l.*; and a good precept is set out.(*a*) Therefore the defendant *was liable to be arrested.* And it is set out "that "*he was arrested.*" This act of 12 G. 1. does *not* make the proceedings *void*, in case the defendant be arrested *without* affidavit and *marking* the sum sworn to, upon the back of the writ: it *only* PROHIBITS the sheriff and plaintiff from doing it. And they may indeed be liable to an action *upon the case* for it; (though perhaps not to an action of *trespass*:) but it does *not* make the *bail-bond* VOID.

Therefore I think there *is enough* set out, in the declaration, to maintain this action of debt upon the bond.

Mr. Just. FOSTER concurred. The act of 12 G. 1. is *only directory*: it does *not* make the process *void*. And as this objection has never been taken *before*, from the time when the act of parliament was made; I think it ought to be discouraged *now*, (after upwards of thirty years.)

(*a*) Vide Sir T. *Jones* 76.; and Qu. whether the bond might not be avoided by plea of duress? In *Strange* 643. it was adjudged that the plaintiff, in debt on a bail-bond, need not shew an arrest. In *Str.* 444. and *Fortesc.* 364. it was adjudged that the defendant cannot plead there was no arrest; but in those cases there was a legal authority to arrest.

And *if* the fact was so, "that there *was no* affidavit," the defendant might have been relieved in a *much easier* method; by applying to the court, or to a judge to be discharged upon *common bail.*

1757. WHIRKARD v. WILDER.

Per Cur. unanimously,
JUDGMENT was given for the PLAINTIFF.

HENRY EARL OF CARLISLE *versus* ARMSTRONG et al'. [333]

Wednesday, 18th May 1757

(Lord Commissioner WILMOT *absent.)*

THIS was a trial at bar on the civil side of the court.

Fines payable to the lord of the barony of Gillesland.

Three questions were here to be tried.

1st. Whether, upon the death or alienation of the tenants of the barony of *Gillesland in Cumberland, a reasonable* ARBITRARY *fine at the* WILL *of the lord*, be payable to the lord, or not.

2d. Whether the tenants have liberty to let for three years, or mortgage, *without licence* of the lord, and *without paying* any fine at all.

3d. Whether they had liberty to *exchange, &c. without* licence or fine.

But the defendant's counsel said they did not intend to insist on the second question, so that the first and third only remained in dispute.

About six in the afternoon this trial ended in a VERDICT for the PLAINTIFF, upon all the three issues.

REX *versus* WHITE and WARD.

Friday, 20th May, 1757.

THE defendants had been convicted of a NUISANCE in erecting and continuing their works at *Twickenham*, for making acid spirit of sulphur, oil of vitriol, and oil of *aqua fortis*. The indictment run thus, *viz.* that "at "the PARISH of *Twickenham, &c. near* the king's common "highway there, and *near* the dwelling-houses, of several "of the inhabitants, the defendants erected twenty buildings for making noisome, stinking and offensive liquors; "and then and there made fires of sea-coal and other "things, which sent forth abundance of *noisome, offensive* "and *stinking* smoke; and made, &c. great quantities of *noisome, offensive, stinking* liquors, called, *&c.*; "whereby and by reason of which noisome, offensive and

It is a common nuisance to make acid spirit of sulphur, and thereby impregnate the the air with noisome stinks. [See 1 Hawk. P. C. 199. § 10.]

1757. REX v. WHITE and WARD. [334]

" stinking, &c. the *air was impregnated with noisome and* " *offensive stinks and smells*; to the common nuisance of " all the king's liege subjects *inhabiting, &c.* and travel- " ling and passing *the said* king's common highway; and " against the peace, &c."

Sir *Richard Lloyd* for the defendants—(on *Monday* 15th *November* 1756,) would have moved a *mixed* motion; *viz.* both for a *new trial* and *also* in *arrest of judgment*; or, at least, in arrest of judgment *first*, and for a new trial *afterwards*. But,

THE COURT held, that neither of these methods could consist with the GENERAL RULE *of the court*, or with a *particular rule*, made in this case, to give them leave to move *either* of these motions on this day, though the four days given upon the *postea* were expired. Whereupon Sir *Richard* was obliged to begin with the motion for a *new trial*. And he said that this indictment was laid for making a liquor, from whence the *air* was impregnated with *noxious, hurtful, unwholesome*, and stinking qualities: and the *English* word " *noxious*" answers to the *Latin* " *nocivus*." But it appeared, he said, *upon the evidence*, that the fumes, however offensive and disagreeable to many persons, were by no means in reality *noxious, hurtful* or *unwholesome*; but the *contrary*.

Rule to shew cause: with this addition,—" that the " defendants should have three days time to move " in arrest of judgment; *after* the court shall have " given their opinion upon the *present* motion for " a new trial, as upon a verdict AGAINST *evidence*.

On *Tuesday* the 23d of the same month, Mr. Just. DENISON reported the evidence; which was of great length, he said, there being about seventy-five witnesses on each side: however, he collected the *substance* of it together in his report. It appeared to be very strong on the part of the prosecution: and he declared himself *satisfied* with the verdict. And it appeared upon his report, that the smell was not only *intolerably* offensive, but also *noxious* and *hurtful*, and made many persons sick, and gave them *head-achs*.

Mr. Just. FOSTER said that " *noisome*" and " *noxious*," were synonymous terms; and that there was no other *Latin* word for " *noxious*" but " *nocivus*."

The *rule* was therefore DISCHARGED, as to *setting aside* the *verdict*.

On the *Saturday* following, Sir *Richard Lloyd*, Mr. *Norton*, Mr. Serjeant *Hewitt*, and Mr. *Nares*, moved in *arrest* of judgment; (which was not yet signed.) They objected to the *indictment*; it being laid *generally*, at the PARISH of *Twickenham*; and only said " *near* the com- " mon highway;" but not said to be IN the *town* or *vil-*

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large: it may be upon a heath or common, for aught that appears to the contrary. Though it appears by 2 *Ro. Abr.* 139. Title *Nuisance* letter *F. pl.* 2. *Rankett's* case, that making candles even *in* a vill, which caused a noisome scent to the inhabitants, has been holden to be *no* nuisance.

But here, NO OFFENCE is *precisely* laid. It charges "that by reason of the noisome, offensive and stinking "smoke, the air was impregnated with noisome, offen- "sive stinks and smells:" which are vague, uncertain terms. As to "*noisome*," V. *Minshew*, and *Skinner's Etymologicon*.

Tremain's Pl. Cor. 195. *Rex* v. *Brookes* (for keeping a glasshouse) uses the words "*unwholesome* and *dangerous*." *Ibid.* 198. *Rex* v. *Cole*, (for a nuisance in keeping a soap-boiler's furnace,) "*unwholesome*, turpibus, *periculosissimis*, "*contagious* and *infectious*." Here, it is only said to be "*noisome and offensive*." It ought to have been laid *precisely* and *particularly*. * 2 *Hawk. P. C.* 185, 18 , 186. "*Hurtful*" is also a vague term: it ought to have been laid to be *insalubrious*.

* This relates only to indictments for murder and manslaughter.

As to the vague term, "*near*," there was a case of *Wilkes* v. *Broadbent*, *Pasch.* 1745. *B. R.* where a custom "to lay rubbish *near* the eye of a coal-pit" was held bad: though that was a *civil* suit, and the custom found by a verdict. Much more, upon an *indictment*. And this a lawful trade; and can *become* a nuisance only by accident, *viz.* by being so to a *town* or *high-road*. It can be indictable only for being exercised in the *heart* of a town. For, according to 2 *Show.* 327. *Rex* v. *Pierce*, "such trades "ought not to be in the *principal* parts of the city; but "in the out-skirts." And the court will *not here presume* that this was in the town. Besides *hurtfulness* is the *gist* of this indictment. *Palm.* 198, 199.

[S. C. 1 Wils. 63. Strange, 1234.]

Serjeant *Davy*, Mr. *Morton*, Mr. *Aston*, Mr. *De Grey*, Mr. *Stow*, and Mr. *Thurlow*, *contra*, for the prosecution, answered, that "*noisome*" conveys indeed a complex idea; but still *includes* "hurtfulness." It stands in the place of the Latin word "*nocivus*," and certainly imports a nuisance, 2 *Ro. Abr.* 139. letter *F.* pl. 2. *Rankett's* case of a tallow-chandler is as it has been cited: but 1 *Hawk. P. C. P* 1. 199. *c.* 75. § 10. *wonders* at and disputes that determination.

"*Near*" is sufficiently certain; and was as particular as the *nature of the thing* would admit: for it was not *equally* near to *all* the houses. And *after a verdict*, it shall be *intended* to be *so* near as to be a nuisance.

As to the case of *Wilkes* v. *Broadbent*—a *prescription* must be certain: besides, that was laid too extensive and arbitrary. But here, its being laid "at the *parish* of

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"*Twickenham*" is sufficient. And in fact, it is a very populous place.

They cited *Jacob Hall's* case, 1 *Mod.* 76: who had erected a rope-dancer's stage at *Charing-cross*. *Per Hale*, Ch. J. "It becomes a nuisance to the *parish*." That was the foot he put it upon. And this indictment of ours is laid extensively enough to be a *common* nuisance; though not a *public* one: nor did it, in fact, affect *other* persons than those living and passing *near* it.

Their objections come too late, after verdict: for it is a mere matter of evidence, "whether it was noxious, or "not." And it is plain that the defendants *understood* the word "noxious" in the sense of "unwholesome;" because they defended themselves upon *that* foot, and examined many witnesses *about* the unwholesomeness of the stench. In *Cro. Car.* 510. *Tokayle's* case, (there cited in the case of *Morley* v. *Pragnell*,) erecting a tallow-furnace cross the street of *Denmark* house in the *Strand* was adjudged a nuisance, and to be removed. Nay, an *offensive* stench is of itself a nuisance; even though it should *not* be strictly hurtful. An indictment merely for a *stench* would have been good: even *without any* epithets. It depends upon *rendering the property of other persons incommodious and uncomfortable* to them: and this point is to be tried by a jury, "whether the thing be really *such* a "prejudice or incommodiousness to the neighbourhood, "as amounts to a nuisance." And here the jury have found it so.

And as to the *place*—that also is matter of evidence. The *court* can not take notice, *ex officio*, of the boundaries of the parish of *Twickenham*. It is the *concourse of people* that this point must depend upon. And "*near*" is the strongest word that we could use, agreeably to the circumstances of this case. And the jury, who have examined it, have found for us.

Sir *Richard Lloyd* in reply—asserted that the epithet "*offensive*," alone, would not be sufficient. And as to the word "*near*," he observed that the jury had not found *how* near it was. And the laying it generally "*in the* "*parish*" at large, does not shew that it is a fact indictable: for it might be at a vast distance from any house, or place of resort.

LORD MANSFIELD thought there was nothing in the objections: which, he said, are reducible to three heads; *viz.*

1st. That there is no sufficient charge of the *hurtfulness*;

2dly. That it is not precisely charged, "*to whom*" the hurt is done;

3dly. That it only laid *generally*, "*in the* PARISH of "*Twickenham.*" 1757.

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First—The jury have *found* "that *it is* to the *common* "*nuisance* of the king's subjects dwelling, &c. and travel- "ling, &c."

And the word "*noxious*" not only means "*hurtful and* "*offensive to the smell;*" but it is also the translation of the *very* TECHNICAL *term* "*nocivus;*" and has been always used for it, ever since the act for the proceedings being in *English.*

But it is NOT *necessary* that the smell should be *unwholesome:* it is enough, if it renders the *enjoyment* of life and property *uncomfortable.*

Secondly—The *persons* incommoded are *sufficiently* described: and the offence is charged to be to the *common* nuisance of persons inhabiting and travelling *near*, &c. And unless they had been so *near* as to be hurt by it, the indictment could *not* have been *proved.* Whereas in the case of *Wilkes* and *Broadbent*, it was *quite uncertain how near* the rubbish might be laid.

Thirdly—It is *sufficiently laid*, and in the accustomed manner. The very *existence* of the nuisance depends upon the number of houses and concourse of people: and this is a *matter of fact*, to be judged of by the jury. And in the very cases in *Tremaine* 195. of a glasshouse, and 298. of a soap-boiler's furnace,—they are laid in *parishes*, "*apud* "*parochi*' &c." Therefore there is no foundation for the objections.

Mr. Just. DENISON—There is a *sufficient legal certainty* 1st. in this indictment: so that the defendants had an opportunity of making a proper defence at the trial.

Upon a former trial, the indictment then before the 2dly. court charged the air to be corrupted. *This* present indictment is better expressed. The word "*noxious*" includes the complex idea, both of insalubrity and offensiveness. And there was no need to specify particular instances of the effects of it. There is nothing in this objection. And it is also sufficiently charged, *to whom* the nuisance is done.

As to the laying it in a *parish*—it is likewise sufficient. 3dly. In the case of the *King* v. *Blower*, *Hil.* 27 *G.* 2. *B. R.* The court declared they would take the vill and the parish to be too extensive: and they held that there were *only* two cases where it was necessary to *lay* a vill; which were upon the statute of additions (where you are tied up to the vill,) and in appeal of death, upon the statute of *Gloucester*, *cap.* 9. the description of being "PROPE *altam* "*viam regiam*," is the *common* method. And it is laid ad *commune* nocumentum: and the jury have *found it*, as it is laid. Therefore I think it is in legal form.

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Mr. Just. FOSTER—The only question is "whether "the fact laid *implies* a nuisance." I think it *does*. Otherwise, the mere *laying* it to be "*ad commune nocumentum*," would not perhaps help it. This is certainly a *common* nuisance. And "NEAR the highway and dwelling-houses," is properly alledged, in order to shew it to be so. *V.* 1 *Strange* 686, 687. *Rex* v, *Pappineau*, *H.* 12 *G.* 1. *B. R.* in point, accord. It never was objected that laying a robbery "*in* OR NEAR" a * highway, is bad: no; it is matter of *evidence*.

1st. [2 Lutw. 15, 19.] 2dly. * V. 1 E. 6. c. 12. § 10. 3dly.

(Note—Mr. Justice *Wilmot* was absent, in the court of Chancery.)

So that the COURT were unanimous in *denying the motion*.

Yet *N. B.* That (according to the usual course in like cases) *no rule* at all was here taken in the rule-book: only, the counsel for the defendants *took nothing by their motion* in arrest of judgment.

On *Thursday 5th May* 1757, on a motion for the judgment (or rather sentence) of the court upon the defendants, for the offence whereof they stood convicted,—it appearing that the nuisance was *absolutely* REMOVED; (the *works being demolished*, and the materials, utensils and instruments, *all sold and parted with*;) they were, upon entering (each for himself only, and for such as acted for or under him) into a *rule* "not to renew them," only *fined* 6*s.* 8*d.* each. But on a dispute afterwards arising, how the rule should be drawn up, it was on *Friday 20th May* settled by the court to be thus—"By consent of "counsel on both sides, it is ordered that, upon the "defendant *Ward's* undertaking that neither he nor any "other person by *his consent or direction* or for *his use or* "*benefit*, shall for the future make or cause to be made "in the works lately carried on by the defendant *White* "at *Twickenham*, mentioned in the indictment in this "cause, any acid spirit of sulphur, or preparations of "vitriol, or oil of *aqua fortis*; a fine of 6*s.* 8*d.* be set upon "the said defendant *Ward*, for the nuisance of which he "has been convicted." And

The defendant *White* entered into a like rule, *mutatis mutandis*.

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21st May 1757.

BOND *versus* ISAAC.

Person listed surrendered by his bail. [Vide post. 409.]

THE defendant being brought into court in obedience to a writ of *habeas corpus* applied for by his *bail*; and it being agreed that he was in custody of the keeper of the *Savoy*, as an *impressed man*; the counsel on behalf

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of the *bail*, insisted upon their *right* to SURRENDER *him*.

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The COURT (namely Lord *Mansfield*, Mr. Just. *Denison*, and Mr. Just. *Foster*) had no doubt of their right: but only hesitated as to the *disposition of him*, after he had been surrendered. Lord MANSFIELD mentioned the clause in the pressing act (*V.* 29 *G.* 2. *c.* 4. § 14. *p.* 175.) of not taking him out of the service. Mr. Just. DENISON cited two cases; *viz.* 1 *Strange* 641. The case of the bail of *Boise* and *Sellers*, in this court; where the defendants were returned to be charged with two civil suits and several *Exchequer informations* for frauds in the customs: and when the court was satisfied of the reality of the debts and priority of the actions here, the defendants were surrendered, and committed *to the marshal*. And a case in *Tr.* 22, 23 *G.* 2. *Rex* v. *Chitty*, *B. R.* where the defendant was returned to be charged with a *contempt in the Exchequer*: he was surrendered by his bail here; and committed to the marshal; who was immediately served with a new *habeas corpus*, to remove him to the *Fleet*.

This man is a soldier now; and by this act *cannot be taken out* of the king's service, but upon some CRIMINAL matter: (*V.* the act, as above.) So that it seems that he *may* be remanded to the *Savoy*, in the present case.

Mr. Just. FOSTER---In the cases cited by my brother *Denison*, the proceedings were grounded on 25 *E.* 3. *c.* 19. (which enacts "that the king's debtors shall not be protected from the proceedings of their other creditors "against them:") and it was a matter of *right*. This is an *indulgence* to the bail, to permit them to bring in the defendant and surrender him. But we cannot take him out of the king's *service*; this not being a *criminal* matter: (*V. ut supra*, 29 *G.* 2. *c.* 4. § 14.) so that we *may*, after we have entered an *exoneretur* upon the bail-piece, remand him to the legal custody at the *Savoy*.

Lord MANSFIELD---We may *first* commit him to the marshal; and *then* remand him, immediately, to the *Savoy*.

Suppose him to be a soldier *at large*, (not in custody;) and that his bail were to bring him in, and surrender him; he must be committed to the custody of the *marshal* upon such surrender; but *instantèr set at large*: and so we may do here. And accordingly,

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Per cur. He was, upon being surrendered by his bail, first committed to the custody of the marshal: but the marshal was ordered to deliver him *instantèr* to the keeper of the *Savoy*; and he did so, immediately, in court. And an *exoneretur* was ordered to be entered upon the bail-piece. *V. post*, 406.

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CAPRON *versus* ARCHER.

Bail shall have time to surrender principal after writ of error brought by him.

UPON a question concerning the TERMS upon which the *bail* should have *time to surrender the principal*, after a writ of *error* brought---

Mr. Just. DENISON and Mr. Just. FOSTER, the only two judges in court, held that it was the ALLOWANCE of the writ of error, that was a *supersedeas* to the proceedings below; and that the NOTICE of its being allowed was only to bring the party in possession of the judgment below, into *contempt*, in case he should persist in proceeding thereupon *subsequently to such notice*. And therefore, as in the present case, the defendant's writ of error WAS ALLOWED BEFORE the time was expired within which the bail had indulgence to surrender the principal, THOUGH NOTICE of such allowance was not given to the plaintiff's attorney *till* AFTER the expiration of that time; the COURT gave the bail the same *terms* as are usual where they apply WITHIN *the time* indulged to them (by the present course of the court) for surrendering the principal. And accordingly, the RULE to shew cause why the proceedings "upon the writs of *scire facias* issued "against the bail should not be stayed, until the writ of "error shall be determined; the bail undertaking to pay "the plaintiff the damages recovered by the said judg-"ment, OR *surrender the defendant* into the custody of "the marshal of the Marshalsea of this court within four "days next after the determination of the said writ of "error, in case the same shall be determined in favour of "the defendant in error," was MADE * ABSOLUTE.

* For the clearer understanding of the *different terms* granted to the bail, under *different circumstances*, see *Myer* v. *Arthur*, 1 *Strange* 415. *Hunter* v. *Sampson* & *al*, 2 *Strange* 781. *Everett* v. *Gery*, 1 *Strange* 343. *Richardson* v. *Jelly*, 2 *Strange* 1270. *Cole* v. *Buckland*, 2 *Strange* 872: (particularly the first and fourth of these cases; which shew *the distinction.*)

[341] Monday, 23d May 1757.

PELLY the YOUNGER *versus* GOVERNOR and COMPANY of the ROYAL-EXCHANGE ASSURANCE.

The sails and furniture of a ship taken thereout and lodged in a warehouse, if accidentally burnt by fire before the ship returns from the voyage, shall be made good by the underwriters. (See 4 Durn. 207. 2 Bosan. 491.)

THIS came before the court, upon a case reserved on a trial at *Guildhall*, before Lord *Mansfield*: where a verdict was found for the plaintiff, subject to the opinion of the court. It was an action of covenant upon a *policy of insurance*.

Case. The plaintiff being part-owner of the ship *Onslow*, an *East-India* ship, then lying in the *Thames*, and bound on a voyage to *China* and back again to *London*, insured it at and from *London*, to any ports and places

beyond the *Cape of Good Hope*, and back to *London*; free from average under ten *per cent.* upon the body, *tackle, apparel*, ordnance, munition, artillery, boat, and other *furniture* of and in the said ship: beginning the adventure upon the said ship, *&c.* from and immediately following the date of the policy; and so to continue and endure until the said ship, *with all* her ordnance, *tackle, apparel, &c.* shall be arrived as above, and hath there moored at anchor twenty-four hours in good safety. 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, without prejudice to this assurance. The perils mentioned in the policy, are the common perils; *viz.* of the seas, men of war, FIRE, enemies, pirates, &c. &c. and all other perils, losses and misfortunes, &c. The premium was seven guineas *per cent.* with the usual abatement of two *per cent.* in case of a loss.

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The ship sailed, &c.; arrived in the River *Canton* in *China*; where she was to stay, to *clean and refit*, and for other purposes. Upon her arrival there, the sails, yards, tackle, cables, rigging, apparel, and other *furniture* were, by the captain's order, *taken out* of her, and PUT INTO *a warehouse or storehouse* called a bank-saul, BUILT FOR THAT PURPOSE ON A SAND-BANK, *or small island*, lying in the said river, near one of the banks, called *Bank-Saul island*, about two hundred or two hundred and twenty yards in length, and forty or fifty yards in breadth; *in order* to be there *repaired, kept dry, and* PRESERVED *till* the ship should be heeled and cleaned, and refitted. Sometime after this, a *fire* accidentally broke out in the bank-saul belonging to a *Swedish* ship; and communicated itself to another bank-saul, and from thence to the bank-saul belonging to the *Onslow*; and consumed the same, with *all the sails, yards, tackle, cables, rigging, apparel*, and other *furniture* belonging to the *Onslow*, which were therein.

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It was stated, that it was the universal and *well known* USAGE, and has been so for a great number of years, for all *European* ships which go a *China* voyage, except *Dutch* ships, (who for some years past are denied this privilege by the *Chinese*, and look upon such denial as a great loss,) "when they arrive near this *Bank-Saul Island*, in the "River *Canton*, to *unrig* the ship, AND *to take out her* "*sails*, yards, *tackle*, cables, rigging, apparel, and other "furniture; and to put them on shore, in a bank-saul "built for that purpose on the said island (in the manner "that had been done on the present occasion by the "captain of the *Onslow*,) in order to be there repaired, "kept dry, and preserved until the ship should be heeled, "cleaned, and refitted." And the case further states that it appears that the so doing is *prudent*, and for the

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common and general *benefit* of the owners of the ship, the *insurers*, and insured, and ALL *persons concerned in the safety of the ship.*

The ship arrived from her said voyage, in the *Thames*, in *September* 1755; (having been unrigged, and put in the best condition the nature of the place and circumstances of affairs would permit.)

Question. Whether the insurers are *liable* to answer for *this* loss, (*so happening upon this bank-sand,*) within the intent and meaning of this policy.

Mr. *Williams*, for the plaintiff,—after premising, that this question arises upon the construction of a policy of insurance; that these policies of insurance are of ancient date; are beneficial, as they tend to divide the risque; and have been every where encouraged, in trading countries; made these three divisions of his argument.

1st. He undertook to prove that the plaintiff's demands are founded on strict *justice.*

2dly. That they are agreeable to both the words and *meaning* of the policy; and supported by legal determinations.—

3dly. He said he would mention the opinion of *foreign lawyers*, upon the subject.

Objection.

Indeed it has been objected "that this is *not* a loss AT "SEA;" but "a loss at *land.*"

Answers to it.

First, The policy is *general:* it is *not confined* to losses *at sea.*

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Secondly—This is *not* a loss *at land:* it is what happened upon a *sand bank in the river.*

Then he proceeded to his three heads or divisions of his argument.

First head of argument.

1st. As to the *justice* of the plaintiff's case—

The insurers have professedly and explicitly insured the ship and all her rigging, furniture, &c. from fire, &c. *from* her going out TO her RETURN: and they must be taken to be *apprised of the usage*; and to have *calculated* their premium *accordingly.* And what has here been done is stated to have been done "for the *benefit of the* "*insurers*, and of the *ship*, and of *all* persons concerned in "the *safety* of it;" and also "to have been *prudent.*"

If the *body* of the ship had been burnt in this interim; and these sails and furniture, had been *saved* BY BEING *in this warehouse;* the insurers would then have had the benefit of *this salvage.* Therefore they ought, in the *contrary event*, to be *answerable* for them, when *they* were by these means burnt, and the *ship not* burnt. It was the captain's duty, to perform the voyage in the usual and proper course. And this was so far from being a neglect or misbehaviour in the captain, that he is stated "to have "*acted* PRUDENTLY, and for the BENEFIT *of the insurers,* "*and of all concerned.*"

2dly. This is within the *words* of the policy—it is an insurance from "*London* to any ports or place beyond "the *Cape of Good Hope* and back; and DURING THE "VOYAGE:" and *fire* is expressly insured against. 1757. PELLY v. ROYAL EXCHANGE ASSURANCE COMPANY.

And it is also within the *meaning* and *intent* of the policy. For this loss has happened within the USUAL *course of the voyage*, and of this species of trade. And therefore the insurers are liable. And this is the true distinction. To prove which, he cited 2 *Salk.* 445. *Bond* v. *Gonsales:* "deviation or not, must be taken according "to the necessity and *usage*." *Clayton* v. *Simmons*, 11th *March* 1741, at *Guildhall*. *Per Lee*, Ch. J. "If the "master puts into a port not usual, or stays an unusual "time, it is a deviation and discharges the insurer: *not*, if "he does *as* USUAL." *Tierney* v. *Etherington*, 5 *March* 1743, *per Lee*, Ch. J. at *Guildhall*—the goods were unloaded and put into a *store-ship* at *Gibraltar*; and there lost. The question was, whether this was a loss at land; or a loss *in the voyage*. He held "that policies ought to be "construed largely, and for the benefit of the *insured;* "and according to the course of trade and the methods "USUAL *at the place*:" and as that was the known course of trade at *Gibraltar*, he held "the insurers to be respon- "sible." And in *Easter* term following (P. 1744. 17 *G.* 2.) there was a motion for a new trial: which was *refused*. Now that was not within the *words* of the policy: and yet holden to be within the *meaning* of it. Second head of argument. [344]

Where an insurance is for one entire voyage, the contract can *not* be *suspended*, and *revived* again: if it be suspended *at all*, it is *determined*. And yet they will hardly argue, that this contract was *absolutely determined* by this act that is stated.

3dly. As to the opinions of foreign writers they hold "that where the assurance is general, the insurer is "liable to all loss happening in the *usual* course of "the voyage." Third head of argument.

And to this purpose, he cited, *Loccenius, De Jure Maritimo, L.* 2. *c.* 5. *sect.* 10. *De Aversione Periculi*. Whose distinctions turn upon the master's pursuing the *usual* course of the voyage, *Marcarius, De Jure Mercator. L.* 2. *c.* 15. No. 148. *Roccus, De Assecurationibus*, No. 138. The insurer is liable for all losses *durante itinere*.

So that the principles of justice and equity, the strictness of law, and the opinions of foreign writers, all concur in favour of the plaintiff.

Sir *Richard Lloyd*, for the defendants (the insurers,) agreed to Mr. *Williams's* general principles; and that the insurers were liable for all losses during the *course of the voyage*. But he denied Mr. *Williams's* conclusions; and insisted that this policy was certainly confined to losses

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* Some of the breaches are so assigned.

at sea: whereas *this* loss was a loss *on* SHORE. This is a policy upon the body of a *ship*; and therefore is manifestly confined to losses *at sea* only. Besides, these goods are averred, by the very declaration itself, "to have been "carried * *on shore*." And its being an insurance "*out* "and *home*," does *not interfere* with this position. As to the supposition "that the *ship* had been burnt, and the "*sails*, &c. saved;" it is no argument at all: for if they had NOT *been lost*, the insurers could *not* certainly have been *liable* to pay for them. As to the *prudence* of the captain—it might be prudent with regard to the *owners*: but this care of *them* is not to affect the *insurers*. He is indeed to act his best, for both: but *diverso intuitu*; and not to serve the one, at the *risque* of the other. As to the *words* of the policy—he denied it to be *within* them; referring himself to the words themselves.

The *cases cited* do not affect the present case: and *foreign* writers have said no more than *English* ones. For, no doubt, the insurance must be understood to be in the *usual course of trade*, and *durante itinere*. But the question is, "WHAT IS the *iter* insured?"

[345] This is a *common* policy of insurance, in the old and ordinary form: and it must be understood, as these policies were understood, before the *East-India Company* had a being. And the *intent* of it must be collected from the instrument *itself*.

Now this is an insurance of the ship with its tackle and furniture, *&c. from port to port*. And policies must be construed upon the *words* of them, or from *necessary consequences*. If any thing *beyond* the natural import of the words was intended, it ought to have been *specified*: if not specified, it cannot be supposed.

The *court alone* are to judge of the *extent* of the contract. And these contracts have been construed *strictly*. A *deviation* from the particular voyage insured, shall discharge the insurer; unless a *necessity* intervenes; which does, and ought to alter the case. But even that must be *within the compass of the voyage described*; for if it happens AFTER *a deviation*, the insurer is discharged, even though the ship should have returned into the right road again, before the accident happened. Now this present accident did *not* happen WITHIN *the voyage insured*; for it happened AT LAND.

But Mr. *Williams* says "this happened in the *course* of "*trade*." My answer is, "that we have nothing to do "with the course of *trade*." We have nothing to do with any thing but the course of NAVIGATION; which is quite a different thing. The sails, tackle, *&c.* were insured IN *the ship*; and if the captain takes them *out* of the ship and puts them *any where* ELSE, the insurers are not answer-

able. And its being for the *benefit* of the ship, &c. makes no difference. It did not arise from necessity: much less from a necessity arising in the voyage. This act of mere prudence or convenience cannot affect the *insurers*. And their *knowing* this to be the course of the voyage, will not prove that they meant to insure any thing at *land*. They *cannot*, by their charter, do it; for that restrains them from insuring at land: and therefore they certainly *never intended* it. As to the case of *Tierney* v. *Etherington*, P. 17 G. 2. It was *not* a *common* policy. It was thereby agreed "that they might unload, &c. *and reship* into an "*English* ship." But no *English* ship being there, they unloaded upon a *store*-ship. And this was a peril *at* SEA; for the ship was lost at *sea*: so that it strictly and properly was WITHIN *the voyage*. And as to its being the mode of re-shipping, in case no other ship was there; here is no such agreement in the present case, as was there inserted in the policy: so that it was within the very *terms* of the policy, in that case. He cited the case of *Fitzgerald* v. *Pole*, in P. 23 G. 2. in *B. R.* and afterwards in *Dom' Proc.* in *May* 1752; which was an insurance of a privateer for four months: and there the *whole cruise* was by this court understood to be insured; and the insurers were holden here, to be bound, though the ship itself was safe; and accordingly they gave judgment for the plaintiff. But the House of Lords held them discharged; as the *ship* was safe; and affirmed the judgment of the Exchequer Chamber, who had reversed that of *B. R.* And there is no inconvenience in my doctrine: because whatever is by the parties particularly *meant* to be insured, *beyond* the general meaning of the words, may be *specially* inserted in the policy; and then all will be clear: and nothing left to uncertain construction.

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Mr. *Williams* in reply—

This fire happened *during the course of the voyage*. And this insurance is *not merely* upon the ship; but upon the rigging, sails, *tackle and furniture* likewise; which in their nature are capable of being carried on shore, and *usually* are so, upon these occasions, as is expressly stated.

And this is a loss happening in *port*. It is the proper, and the only port, where the *English* can clean and refit their ships. And being *upon a sand-bank* in the river, is a loss at *sea*, not at land. If the goods cannot be removed from on board one ship to another, the reason of that must be, that the insurer has had only that *particular ship* in contemplation, on *which* he insured; and perhaps the care and caution of the *master* of it too, *as well* as the *goodness* of the ship.

This taking out and depositing the rigging, sails, and furniture, was a *necessary act*; and is done by all the na-

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tions in *Europe*, except the *Dutch*; who are stated to consider it as a disadvantage that they are not permitted to do it. And it is stated to be for the benefit of the ship, and of the insurers, and all concerned. And this being the usual course of the voyage, it was unnecessary to particularize or specify this in the policy: it must necessarily have been in the contemplation of the insurers.

And as to the company's being *obliged by their charter* not to insure on land—the merchants insuring with them are *not obliged to know* this: nor do the company in fact *practise* it. Besides, if they *do it, notwithstanding* their charter, they are not the less bound to answer what they have undertaken. And indeed the charter only means to preclude them from insuring *houses and buildings* at land, (which is quite another thing;) *not ships* at land.

As to the case of *Fitzgerald* v. *Pole*, there was no loss of the *thing insured:* whereas here is a loss of the *very thing* insured.

[347] Lord Mansfield said it was very necessary that the determinations upon policies of insurance should be fixed and certain: and therefore they would consider this matter, and look into the cases; and then (within the term) give their opinion.

Cur. advisare vult.

Lord Mansfield now delivered the opinion of the court.

He stated the case minutely, and then the question; which was "whether *this* was a loss for which the insurers are *responsible*, within the *intent and meaning* of the above-mentioned policy of insurance."

By the express word of the policy, the defendants have insured the *tackle, apparel* and other *furniture of the ship Onslow*, from *fire*, during the *whole* time of her voyage, *until* her return in safety to *London without any restriction.*

Her tackle, apparel, and furniture were inevitably burnt in *China, during the voyage*, before her return to *London.*

The event then which has happened is a loss within the *general* words of the policy: and it is incumbent upon the *defendants*, to shew, from the manner in which this misfortune happened, or from other circumstances, "that it ought to be construed a peril which they did *not undertake* to bear."

From the nature, object, and utility of this kind of contract, consequences have been drawn; and a system of construction established, upon the ancient and inaccurate form of words in which the instrument is conceived.

The mercantile law, in this respect, is the same all

over the world. For, from the *same* premises, the sound conclusions of reason and justice must universally be the *same*.

Hence, among many other, the following rules have been settled.

If the *thence* is *varied* or the *voyage altered* by the *fault* of the owner or master of the ship, the insurer ceases to be liable: because he is understood to engage that the thing shall be done, safe from fortuitous dangers; *provided* due means are used by the trader to attain that end.

But the master is *not in fault*, if what he did was done [348] in the *usual course*, or *necessarily ex justâ causa*.

The insurer, in estimating the price at which he is willing to indemnify the trader against all risques, must have under his consideration the *nature* of the voyage to be performed, and the *usual course and manner* of doing it. *Every* thing done in the *usual course* must have been *foreseen* and in *contemplation*, at the time he engaged. He took the risque upon a supposition that what was usual or necessary, *would* be done.

It is absurd to suppose, when the *end* is insured, that the usual *means of attaining it* are meant to be *excluded*.

Therefore when goods are insured, "*till landed*;" without *express* words, the insurance extends to the *boat*, the *usual method* of landing goods out of a ship, upon the shore. [2 Bosanq. 491.]

If it is *usual* to stay so long at a port, or to go out of the way, the insurer is considered as *understanding that usage*. *Bond* v. *Gonsales*, 2 *Salk.* 445. was so ruled by Ld. Ch. J. *Holt*.

If goods are insured on board *one* ship, to a port; and from thence, on board *another* ship, the first that can be got; the insurance *extends* through *all the intermediate steps* of removing from one ship to the other, *as usual*. * For the *means* must be taken to be insured, as well as the *end*. * Ut supra.

All this has been determined in the case of *Tierney* v. *Etherington* at *Guildhall*, 5th *March* 1743. That was an insurance on goods in a *Dutch* ship, from *Malaga* to *Gibraltar*, and at and from thence to *England* and *Holland*, both or either; on goods as here under agreed; beginning the adventure from the loading, and to continue till the ship and goods be arrived at *England* or *Holland*; and there safely landed.

The agreement was, "That upon the arrival of the "ship at *Gibraltar*, the goods might be *unloaded* and "*reshipped* in one or more *British ship or ships*, for "*England* and *Holland*; and to return one *per cent.* if "discharged in *England*."

It appeared on evidence, that when the ship came to

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Gibraltar, the goods were unloaded and put into a *store-ship* (which it was proved was always *considered as a warehouse*;) and that there was then *no British* ship there. Two days after the goods were put into the *store ship*, they were lost in a storm.

For the defendant it was insisted that the insurance was only upon the *Dutch* and *British* ships: and that it did *not extend* to the *store-ship*; which is considered *as a warehouse at land, and so not a peril at sea.*

For the plaintiff, it was insisted, that this was a loss *in the voyage*: for the policy is, for all losses *at Gibraltar*, as well as to and from. If there had been a *British* ship there, and the goods had been put into a *lighter*, in order to go to the *British* ship, and lost in the way; that would have been a loss within the policy. We have liberty to unload and reship, and therefore have a liberty to use all the *means* in order to do that.

Lee, Ch. J. said—It is certain, that, in constructio of policies, the *strictum jus*, or *apex juris* is not to be laid hold on: but they are to be construed largely, for the benefit of trade, and *for the insured*. Now it seems to be a strict construction, to *confine* this insurance only to the unloading and reshipping, and the accidents attending that act. The construction should be *according to the course of trade in this place*. And this appears to be the *usual method* of unloading and reshipping in that place: *viz.* "That when there is no *British* ship there, then the "goods are kept in store ships."

He added, that where there is an insurance on goods on board such a ship; *that* insurance extends to the carrying the goods to shore in a *boat*. So if an insurance be of goods to such a *city*; and the goods are brought in safety to such a *port*, though distant from the city; that is a compliance with the policy, if that be the *usual* place to which the ships come.

Therefore as here is a liberty given of unloading and reshipping, it must be taken to be an insuring the goods under *such methods* as are *proper* for the unloading and reshipping. Here is no neglect on the part of the merchant, (the insured:) for the goods were brought into port the 19th and were lost the 22d *November*.

This manner of unloading and reshipping is to be considered as the *necessary means* of attaining that which was intended by the policy; and seems to be the same as if it had happened in the act of reshipping from one ship to the other. And *as this is the known course of trade, it seems extraordinary if it was not intended.*

This is *not* to be considered as a *suspension* of the policy, during the unloading and reshipping from one ship to another. For, as the policy would extend to a loss

happening in the unloading and reshipping from one ship to another, so any *means* to attain that *end* come within the meaning of the policy.

And accordingly, a verdict was given for the plaintiff.

In the *Easter* term following, a new trial was moved for: but it was refused, by Lord Ch. J. *Lee*, Mr. J. *Chapple*, and Mr. J. *Denison*; Mr. J. *Wright* indeed being of a different opinion; namely, "that it was a removal at "the peril of the *insured*."

So in the present case, the same reasoning will hold. And in general, what is *usually* done by such a ship, with such a cargo, and in such a voyage, is understood to be *referred* to by *every* policy; and to make a *part of it*, as much as it was *expressed*.

The *usage* being *foreseen*, is *more* strongly allowed to be done, than what is left to the master's discretion upon *unforeseen* events: yet if the master, *ex justâ causa*, goes out of the way, (as to refit, or to avoid enemies, pirates, &c.) the insurance *continues*.

Upon these principles, it is difficult to frame a question which can arise out of this case, as stated.

The only objection is, "that they were burnt in a "bank-saul and *not* IN *the ship*; upon *land* and *not at sea*, "or upon *water*; and being appertinent the *ship*, losses "and dangers *ashore* could not be included."

The answer is obvious. (1st) The *words* make no such distinction. (2dly) The *intent* makes no such distinction.

Many accidents might happen *at land* even to the *ship*. Suppose a hurricane to drive it a mile on shore. Or an earthquake may have a like effect. Suppose the ship to be burnt in a dry dock. Or suppose accidents to happen to the tackle upon land, taken from the ship, while accidentally and occasionally refitting; as on account of a hole in its bottom, or other mischance.

These are possible cases. But what might arise from an *accidental* occasion of refitting the ship, is not near so strong as a *certain necessary* consequence of the *ordinary* voyage, which the parties could not but have in their direct and immediate contemplation.

Here the defendants *knew* that the ship *must* be heeled, cleaned and refitted, in the river of *Canton*. They *knew* [351] that the tackle, *&c. would* then be put in the bank-saul. They *knew* it was for the *safety* of the ship, and *prudent* that they *should* be put there.

Had it been an *accidental necessity* of refitting, the master might have excused taking them out of the ship *ex justâ causa*. But describing the voyage is an *express reference* to the usual manner of making it, as much as if every circumstance was mentioned.

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Was the chance varied by the *fault* of the master? It is impossible to impute any *fault* in him.

Is this like a *deviation*? No: It is *ex justâ causa*; which always excuses.

And yet Sir *Richard Lloyd*, being pressed in this argument, was obliged to insist, "that it resembled a "deviation: which determines the insurance, and dis-"charges the insurer."

Answer. This supposes the parties to insure from *London* and back again, knowing that the policy would be determined in the river of *Canton*: which would be absurd. Besides it ought to make a difference in the præmium: yet the underwriters have all kept the præmium upon other *China* voyages.

One objection was formed by comparing this case to that of changing the ship or bottom, on board of which, goods are insured: which the insured have no right to do.

Answer. *There* the identical ship is essential: for *that* is the thing insured. But that case is not like the present.

Another objection was, "That policies ought to be "construed *strictly*, and not to be extended to *cases omit-"ted*:" (which latter position is true; and must be agreed.)

Answer—But that is not the present case: for this is not a *casus omissus*, but clearly within the view and *bona fide* intent of the policy.

The case of *Fitzgerald* v. *Pole* is no way applicable to the present. The question there was, "Whether it was "a partial or a total loss, within the meaning of the "policy." In that case, there was nothing fixed by usage, or by known and esstablished construction; (as there is in this case:) so that no inferenee can be drawn from that case, concluding to this.

Here the defendants *knew* that the tackle and furniture would be put in this bank saul, as the *usual, certain* consequence of the voyage at sea; which *always* made it *necessary* to heel, clean and refit the ship in the river
[352] of *Canton*. Had the insurers been asked, they must, for their *own* sakes, have insisted they should be put there as the best and safest method. They would have had reason to complain, if, from their *not* being put there, a misfortune had happened: in *that* case the master would have been to blame, and by his fault would have varied the usual chance.

They have taken a price for standing in the plaintiff's place, as to *any* losses he might sustain in performing the *several* parts of the voyage; of which *this* was *known* and *intended* to be *one*.

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Therefore we (all of us who * heard the argument) are very clearly of opinion, that in every light and in every view of this case, in reason and justice, and within the words, intent and meaning of the policy, and within the view and contemplation of the parties to the contract, the insurers ARE LIABLE to answer for this loss. Wherefore

Per Cur. Let the POSTEA be delivered to the PLAINTIFF.

* Mr. Just. Wilmot was not present; being engaged in Chancery, as one of the lords commissioners.

ANDERSON *versus* GEORGE.

Verdict obtained by stratagem, set aside without costs on either side.

UPON a rule for the plaintiff to shew cause "Why "a *verdict* obtained by him for 16l. should not be set "aside, and a new trial ordered, UPON *payment of costs*."

The case appeared to be, that the plaintiff had sold goods to the defendant: who paid for them by a promissory note of one *Hopley*, which the defendant indorsed. The plaintiff demanded the money of *Hopley*: but indulged him with further day of payment, several times, till *Hopley* broke.

The only dispute between the parties was, "*Which* of "them ought to bear the loss of this note." For the plaintiff was paid; if the loss ought to fall upon him, through his neglect or indulgence in giving further credit to *Hopley*.

There were *two counts* in the declaration: one, for *goods sold*; the other, against the defendant as indorser of the promissory *note*.

When the cause came on to be tried, though both parties came to try the *real merits* of the question between them, *viz.* "*which* should bear the loss of the *note* occasioned by "*Hopley's* failure;" and the plaintiff's agents had the *note in court*; yet finding upon their own evidence, "that the "plaintiff had given repeatedly further credit to *Hopley*," they resorted to a TRICK, and rested their case upon proving the sale and delivery of the *goods*, which never was disputed. The defendant could not produce the note: it was in the plaintiff's custody. Relying upon its being the only ground of the plaintiff's case, the defendant had not given him NOTICE "*to produce it*." The count stating it, could not be given in evidence: and the defendant had not entitled himself to prove the contents, for want of notice to produce it. LORD MASFIELD told them, at the trial, it was an improper artifice; that no verdict could stand, which was so obtained. But the plaintiff *refused to produce* the note; and had a verdict of course.

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It was now contended, for the plaintiff, that the verdict was *regular*, and the plaintiff in *no fault*: for, without

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notice, he was *not obliged to produce* the note. Therefore the verdict ought not to be set aside.

The COURT thought the plaintiff had taken an *unfair* advantage, *contrary to justice and good conscience*. That the rules of practice must be *general*: but he who abused them in a particular case, should not shelter a *trick*, by *regularity*. The plaintiff did not want notice to produce a note he *had in court*, and which he had laid in the declaration as his *ground of action*. Besides, he took a verdict for the price of the goods; *though* he had *received satisfaction*, the evidence of which was in his own custody and *suppressed*.

They not only set aside the verdict; but set it aside WITHOUT *payment of costs*: and declared, "the next time "that a party should obtain a verdict in like manner, by "an *unfair*, *unconscionable* advantage, without trying the "real question, they would set aside the verdict, and "make *him pay the costs*."

A new trial being ordered, this cause was tried at *Guildhall*; the sittings after this term: and the *defendant* had a verdict upon the *merits*, to the satisfaction of every body; the case being clear beyond a doubt.

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REX *versus* Inhabitants of BENTLEY.

See this CASE *abridged*, in the TABLE; and *at large*, in the quarto edition of my SETTLEMENT-CASES, No. 135. pa. 425.

The End of *Easter* Term 1757, 30 *Geo.* 2.

TRINITY TERM,

30 & 31 *GEO. II. B. R.* 1757.

REX *versus* Inhabitants of GREAT TORRINGTON. Monday, 13th June, 1757.

See this CASE *abridged* in the TABLE: and *at large*, in the quarto edition of my SETTLEMENT-CASES, No. 136. p. 428.

V. the next case, *Rex* vers. *Inhabitants of Keynsham*: which is the same point, and determined on the like concession of the adverse counsel. [358]

REX *versus* Inhabitants of KEYNSHAM. Tuesday, 14th June, 1757.

See the last case—S. P.

This CASE is also *abridged* in the TABLE; and may be seen *at large* in the abovementioned book, No. 137. p. 439.

WELLER *versus* GOYTON and WALKER. Wednesday, 15th June, 1757.

Action against two; judgment against one by default; rule for judgment for the other as in case of a nonsuit: yet this defendant cannot have his costs taxed as in such a case.

ACTION against *two*, upon a JOINT-promise: *judgment against Walker*, by default; issue joined by *Goyton*: and the plaintiff neglected to bring it on to trial: and the common rule was obtained, for judgment *as in case of a* NONSUIT.

This was a question on 14 *G.* 2. *c.* 17. § 1. concerning the court's giving judgment as in cases of nonsuit: and it arose upon a doubt of the master's, "whether he could "tax costs as in case of a *nonsuit*: as there was a judg- "ment by default, *for the plaintiff*, against the *other* de- "fendant."

Mr. *Lawson* moved for the direction of the court to the master, that he should tax the defendant *Goyton* his costs, *pursuant to the rule*. [359]

[S. C. Sayer's Law of Costs, 142. See also 3 Durn. 663.]

LORD MANSFIELD (though no counsel appeared on behalf of the plaintiff) had a doubt, "whether there

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" COULD *be judgment* AS *in case of a nonsuit*, in a case " where the plaintiff was NOT *liable* to a nonsuit." This act of 14 G. 2. *c.* 17. enacts, " that all judgments given " by virtue of it, shall be of the like force and effect, as " *judgment upon nonsuit*: and of no other;" (§ 2.) And provides " that the defendant or defendants shall, upon " such judgment, be awarded his, her, or their costs, in " any action or suit *where he, she or they* WOULD UPON " NONSUIT *be entitled to the same*; and in no other " action or suit whatsoever." (§ 3.) So that the point seems to be " whether the plaintiff *could*, in this case, " have been nonsuited at the trial." For if he could not, then the case of a nonsuit *does* NOT *here* EXIST; and consequently the court cannot give judgment and costs, AS *in case* of a nonsuit, when the case of a nonsuit does not at all exist. Now here was a *judgment* obtained *by* the plaintiff *against one* of the defendants, *already*; how then can the plaintiff be out of court *as to* HIM? but if *he is nonsuited* in this action, he will be out of court, as against *both* defendants.

Mr. Just. DENISON seemed to think, also, that the plaintiff would *not* have been liable to a *nonsuit* at the trial. And to that purpose, he recollected and mentioned the case of *Greeves* v. *Roll* and *Newell*; which is wrong in 2 *Salkeld*, title *Nonsuit*, *pl.* 5. pa. 456.*

NOTHING was taken by the motion.

* See S. C. also, at large, in cases in B. R. temp. W. 3. p. 651. (called 12th Mod.) and in 1 Ld. Raym. 716. (both better reported.

HALL et Ux' *versus* WOODCOCK.

Trin. 1756. 29, 30 *G.* 2. *Rot'lo.* 921.

(*Lord Commissioner* WILMOT *absent, in Chancery.*)

On error to reverse a common recovery there must be a scire facias against the terre-tenants.

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ERROR to *reverse a common recovery*. The error assigned was—" that the vouchee, before the render- " ing of the judgment, died without issue." Upon the *scire faciases* previously issued against the demandant in the writ of entry, and against the terre-tenants, *&c.* who were returned to have been summoned, *&c.* and thereupon errors assigned; *Lucas*, the demandant, comes in and pleads " that there is no error:" and one of the terre-tenants suffered judgment by default. But *Woodcock*, who was also one of the *terre-tenants*, prays *oyer* of the *scire facias*; and pleads " NON-TENURE, and that *Henry* " *Balguy* and his wife *are the terre-tenants*:" and *pray* JUDGMENT ON THE SCIRE FACIAS. To this plea there is a demurrer, by the plaintiffs in error; and a joinder in demurrer, by *Woodcock* the terre-tenant.

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Serjeant *Peale* for the demurrer, *viz.* for the plaintiffs in the *scire facias*, and in error.

The *scire facias* which issued against the *terre-tenants* is not *ex necessitate*, nor *ex debito justitiæ*; but only discretionary in the court, and only to see if the terre-tenant has a *release of errors*: but the terre-tenant cannot plead "non-tenure," and "that *another person* was tenant of the "freehold, at the time of the issuing of the *scire facias*." That *other* may as well plead (in like manner) to another *scire facias* to be issued against *him*, "that a THIRD person "is tenant of the freehold;" and so on. And the terre-tenant's *title* will not be affected by *this* judgment and recovery: for an *ejectment* must be brought. The terre-tenant cannot plead in *abatement* of the writ of error; but *only* in *bar* of it. 1 *Lev.* 72, 130, 146. *Winn* v. *Lloyd* is so. 1 *Siderf.* 213. S. C. 1 *Keb.* 54, 351, &c. S. C. Sir T. *Raym.* 15, 55. S. C. *Dyer*, 321. *a.* is also a strong intimation "that the terre-tenant can only plead in *bar* of the "writ of error." The case of *Winn* v. *Lloyd* is in point. And the present case must be taken to be a plea put in merely for *delay*, (as that was.)

Mr. *Luke Robinson contra* for the defendant *Woodcock*, whose plea was demurred to. It appears *upon the whole record*, that the plaintiffs in error have *no title*: and if so, there is an end of the matter.

As to *this plea of the terre-tenant*, "of non-tenure; and "that *Balguy* and his wife are the terre-tenants"—the fact is *admitted* by the demurrer: and the plaintiffs in error ought to have taken out a *new scire facias* against *Balguy* and his wife. The *scire facias* against the terre-tenant is of *necessity*, and NOT *discretionary*. For the tenant to the *præcipe* is merely *nominal*: but it is the terre-tenant who is the *true* tenant of the *freehold*. And the terre-tenant *may plead* MANY *other* pleas *besides a release*; he may plead "that the plaintiff has conveyed the land to another;" or he may plead "*non tenure*." That "a *scire* "*facias* against the terre-tenant *is strictly necessary*," is proved by 3 *Mod.* 119. * *Kingston* v. *Herbert*. 3 *Mod.* 274. *Anon.* says, "that there † should be a *scire facias* "*both* against the *heir* AND against the terre-tenants." (Now here is *none* against the *heir*, at all.) *Dyer* 321. *a. b.* proves expressly, "that there *ought* to be a *scire facias* "to the terre-tenants before the court proceeds to an examination of the errors." 5 *Mod.* 209. *Stokes* v. *Oliver*. A writ of error was brought to reverse a common recovery; and there *was* a *scire facias* against the terre-tenants. 6 *Mod.* 134. *Adams* v. *Terre-tenants of Savage*, was a *scire facias* by the administrator, to warn in *all* the terre-tenants of *Savage*, (*not naming* them:) and *fo.* 199, was a plea in

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*This case was was adjourned; and therefore is no authority.

† The court there held it *not* to be necessary, in point of *law*; but that it was necessary *by the course* of the court, and reasonable that it should be so.

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"*abatement*:" "that *J. S.* was a terre-tenant of *Savage*; "and was not summoned." †

But *supposing* the plea to be bad, yet there is neither *heir* nor terre-tenant *before* the court. And he said he had *other* objections too. But,

† This case stands also adjourned.

LORD MANSFIELD said he had better reserve them, till he should see whether this plea to the *scire facias* would hold. And he asked Mr. *Robinson* whether he had any *authority* to prove "that the terre-tenant could plead ANY *thing* "*else* BUT A RELEASE."

(Which Mr. *Robinson* could not produce.)

Serj. *Poole* in reply—The present question is upon *this* plea of the terre-tenant. I deny that a *scire facias* against terre-tenants is *ex debito justitiæ*. However, we *have issued* a *scire facias* against one of the terre-tenants; who has suffered judgment by default. *Dyer* 321. *a.* cites the case of *Leyghe* v. *Colyn & al*, 7 *H.* 8. Error to reverse a judgment in assize. * The cases in 5 *Mod.* 209. and 6 *Mod.* 134. are not applicable to the present case: that in 6 *Mod.* 134. was in order to bring all the co-terre-tenants in, to make contribution.

* V. Dyer, 65. 132, 375. All S. P. but not S. C.

If they have a *release* to plead, let them shew it: if not, it is plainly a plea only for *delay*.

† V. Carthew, 111, 112. accord.

LORD MANSFIELD—By the † *established method* of proceeding there must be a *scire facias* against the terre-tenants: otherwise, indeed, it i an *irregularity*; but *no more*.

The *terre-tenant* has *nothing to do with the matter*. All that he can do, is only what ANY *amicus curiæ* may do; *viz.* produce a *release of errors* but he has nothing to do, *in interest*. Therefore there ought to be a *respond. ouster*, in this case.

As to the *other* objections, it is not proper to meddle with them *yet*.

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‡ Which was the case in 6 Mod. 134. & 109.]

Mr. Just. DENISON concurred. This is *not* like a *scire facias* on the ‡ *death* of a party: it is only a *scire facias* against the terre-tenant, who is *no party to the record*, and has *nothing* to do with the matter, in *point of interest*.

In *Carthew* 111, 112. The Earl of *Pembroke's* case, these *scire faciases* against the terre-tenants are said, by Lord Ch. Justice *Holt*, to be discretionary, and "not to "be *stricti juris*; but yet to have been the constant and "usual *course of the court*; and therefore not to be de-"parted from." And the terre-tenant can only plead a *release of errors*; to defend his own possession, or for the sake of purchasers: but he cannot plead *in abatement to the writ*, when he is *no party to the suit*.

§ V. Raym. 55, 56. S. C.

In the case of *Winn* v. *Lloyd*, the three terre-tenants pleaded § three different pleas; which were rejected as frivolous. And so is this; and ought to be rejected.

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And it is premature to enter into the errors objected to in the record: for Mr. *Robinson* is only counsel *for Woodcock*, one of the *terre-tenants*.

Mr. Just. FOSTER was clearly of the same opinion.

Here *Woodcock* comes in, and says, "he has *no interest* "in the land." Therefore he certainly cannot be heard, in objection to the *judgment*, and to shew *that* to be *erroneous: this* was no part of the intention of the notice given him by the *scire facias*. His plea is insufficient: therefore he ought to answer over.

Per Cur. RESPOND. OUSTER.

FAR, (Spinster,) *versus* DENN.

ERROR to reverse a judgment in ejectment.

Mr. Serj. *Martin* for the plaintiff in error.

If one defendant in ejectment die after issue joined and before trial, the death must be suggested on the roll. [1 Vin. 52. pl. 15.]

This was an ejectment, wherein *Denn* was plaintiff, and *Elizabeth Far* and *Rebeccah Savil Far* were defendants: and issue had been joined between the plaintiff and *both* these defendants. And day was given to the parties, *&c.* At which day comes as well the plaintiff as the said *Elizabeth Far*: but the *other* defendant *Rebeccah Savil Far*, doth *not* come. And the sheriff doth not return his writ.

Then the *death of* REBECCAH SAVIL *Far* is SUGGESTED *upon the roll*, in the usual way. And a new *venire* is awarded to try the issue against the surviving defendant *Eliz. Far*: and it is further awarded, "that all further [363] "proceedings against *Rebeccah Savil Far* shall cease." Then it sets forth the record of the *postea* at the assizes; and the recovery against *Elizabeth Far*. And the judgment is "that the plaintiff recover his term against the "said *Elizabeth Far*."

Errors assigned—"That there is no record of *nisi* "*prius*:" (which Serjeant *Martin* said, was only done, in order to give them opportunity of objecting to the variances;) and "that judgment is given for the plaintiff "below, whereas it ought to have been given for the "defendant." Then a *certiorari* issued, to certify the record of *nisi prius*: which was certified accordingly. And "*in nullo est erratum*" was pleaded, by the defendant in error.

This writ of error was brought, he said, by the approbation of the court of *C. B.* on consent to wave a motion there in arrest of judgment. He cited *Bishop's* case, in 5 *Co.* 37 *b.*, to shew that he was at liberty to

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make exceptions *not assigned* for error. Also 1 *Salk.* 268. S. P. *Carlton* v. *Mortagh.*

And then he proceeded to make his objections: *viz.*

1st. The *nisi prius roll* is erroneous, in itself.

2dly. The *nisi prius* record *varies* materially from the *plea roll.*

3dly. This may be taken advantage of, AFTER *verdict.*

4thly. The *omission* of "*quod querens nil capiat per "breve,*" as to *Rebeccah Savil Far*, makes the judgment erroneous.

5thly. The *judgment* ought not to have been for more than a MOIETY of the lands demanded.

And first—the death of *Rebeccah Savil Far*, one of the defendants, ought to have been suggested *upon* the *nisi prius* record. It is NOT *sufficient* that this be mentioned in the *jurata*-part of it. *Barnes's Notes, Tr.* 7 & 8 *G.* 2. *C. B. fo.* 8. *Waldo* v. *Harrison:* where the *jurata* in the record of *nisi prius* was amended. Which was done upon the foundation that the *jurata*-part of the record is *not* an award of the *court*; but *only to annex* the proceedings. Indeed *Rebeccah Savil Far* is, in *that* part, said to be dead: but it is only in a *parenthesis*, and by way of recital. However, that is *not the* PLACE for a *suggestion* of the *death of parties.* And it ought to be a *full and positive* assertion: for there are to be proceedings upon it.

[364] If any special matter had been suggested, about awarding the *venire* out of the common course, a copy must have been given. 1 *Stranga*, 235. *Brycas* v. *City of London.*

This *recital* did *not authorize the judge* to try the cause between *one* of the parties only. There ought to be a *new venire* awarded; or it ought to have been awarded against *both* defendants. For here is no *proper suggestion* of the death of one of the defendants.

This *jurata* is *wrong.* 2 *Hawkins P. C.* 290.

The death must be *suggested.* 8, 9 *W.* 3. *c.* 11, § 7. But a *recital* is *no* suggestion. And this is *not* a discontinuance; but a MIS-*trial*, (which is not helped by the stat. of jeofails.)

Secondly—This *nisi prius* record *varies* materially from the plea-roll: for it is *not* between the *same parties.* And *small* variances are fatal. 1 *Ld. Raym.* 329. *Doberleen* v. *Chancellor, Palmer*, 378. *Young* v. *Englefield, Cro. Eliz.* 340. *Long* v. *Mitchell, Viner's Abridgment*, 553, *Pl.* 8. of title *Error.*

Mr. Just. FOSTER—brother, VINER *is* NOT *an authority.* Cite the cases that *Viner quotes*: *that* you may do.

Serj. *Martin* proceeded—

Thirdly—This may be taken advantage of, AFTER *verdict*. 1757.

Fourthly—The judgment is *imperfect*, without these words "*quod querens nil capiat, &c.*" BAR v. DENN.

LORD MANSFIELD—Would you have it, "that he "shall take nothing by the judgment, against a "*dead* person?" However, it *is* in the entry of the judgment, "that further proceedings shall stay "against this dead person."

Serj. *Martin*—

Fifthly—The judgment ought *only* to have been for a *moiety* of the premises. My argument arises on 11 *G.* 2.* And here *might* have been two *separate* records. *Both* are made defendants by the rule. It is said in 1 *Ventr.* 355., if every one do not appear, the plaintiff cannot proceed against the rest. And though ejectments be the creatures of the court, yet the records must preserve as *regular a form* as other records must: and so it is, even upon common recoveries.

* See c. 19.

Lord MANSFIELD—If it be wrong, to award the recovery of the term against the tenant in possession, how would you have *had* it awarded? for it might have been very inconvenient to award it in *moieties*. [365]

Serj. *Martin*—Perhaps the *proper* method may be, to apply to the court where the judgment is, "that the *execution* "should be taken out, of such part only as was the pos- "session of the *living* defendant."

Serj. *Hewit contra*—

First,—The *nisi prius* record is perfectly right. Even before the statute of 8, 9 *W.* 3. *c.* 11. the death of the party might be suggested upon the roll. And here it is done, upon the very next appearance day after the death.

My brother *Martin* says, "It is only done by way of "*recital* upon the *nisi prius* roll." But it is not necessary to enter it upon the *nisi prius* roll *at all; unless* to direct the judge, *between whom* he is to try the issues, and that he has *jurisdiction* to try it.

Secondly, Here is *no* material variance: whereas his cases are cases of *material* variances. Indeed here is no variance *at all*.

Thirdly—Here is nothing to take advantage of.

Fourthly—The judgment is perfect enough.

Fifthly—The *judgment* must be, "to recover the *term*." Indeed the plaintiff must take care to take out *execution* for no more than he has a right to, by the recovery. And many of his objections (even if they had any thing in them,) are *cured* by the statute.

Serj. *Martin*, in reply, to the same effect, as before.

Lord MANSFIELD thought there was no difficulty in

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the objections. They are reducible indeed to *three*. For the three first are no more than, whether the *judge* has jurisdiction to try the cause, between the plaintiff and the living defendant only.

Now the suggestion, and the award, and all the proceedings shew *one* of the defendants to be dead; and there is an award for the proceedings to *stay* as to *this* defendant; and to go on against the *other* ONLY, and the jury is awarded as against the living one, the other BEING dead. Both were alive when the issue was joined; and it is *properly* awarded upon the issue roll: and acknowledged. And the *nisi prius* roll is only for the *direction of the judge*, to try it: and it is not traversable on *this* roll. And the two last points are as plain.

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The *judgment* is right enough: and the *execution* must be taken out according to the right and justice of what is *really* recovered.

Mr. Just. DENISON held it not necessary to enter and transcribe the very WORDS of the suggestion, from the plea-roll, upon the *nisi prius* roll: and all the continuances; but *only enough* to shew and notify *to the judge*, what issues he was to try, and between whom. It is as properly put in here, in the *jurata*, as any where else: and it could *not* be *traversed* on the *nisi prius* roll. And here is *no variance*; but only an *omission* of what was *unnecessary* to be put in. And there was no need of the "*querens nil capiat per breve*:" there is *sufficient without* it.

And as to the 5th exception—they *might* be *joint-tenants*; and then it is strictly right. But if not, the plaintiff recovers *his term*; and he must take care not to take out *execution* for more than he had right to recover.

Mr. Just. FOSTER was very clear in concurring.

Per Cur. unanimously

JUDGMENT affirmed.

Saturday, 18th June, 1757.

An information for exercising a trade contrary to 5 Eliz. c. 4. without having served as an apprentice, needs not aver that the defendant did not then exercise the trade at the time of making the act.

BALL, qui tam, *versus* CODD.

MR. *Whitaker* shewed cause against quashing an information, *qui tam*, for exercising the trade of a baker at *the parish* of *Speldhurst* in *Kent*, not having served an apprenticeship: contrary to the 5 *Eliz.* c. 4.

The 1st objection taken to this information, by Mr. *Clayton*, on the original motion, was "that *Speldhurst* does not appear to be a city, market-*town*, or corporation: it may be a VILLAGE." For supporting which, he had cited 2 *Keble*, 583. *Rex* v. *French*, (1st exception,) which case is also reported in 1 *Mod.* 26. S. C. *Rex* v.

Turnith; and 1 *Vent.* 51. S. C. But though these are all reports of the same case (which was cited by Mr. *Clayton*, only out of *Keble*,) yet Mr. *Whitaker* alledged that they are inconsistent with each other.

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Mr. *Clayton contra*—The act was intended *merely* for the benefit of *corporations*: and it has always been taken, "that it does *not* extend to any *village*, or any "place *less* than a city, market-town, or corporation." And it would be extremely *inconvenient* to the inhabitants of all distant retired villages, if it did.

* Rainsford thought otherwise, in 1 Mod. 76.

Lord MANSFIELD—The question is *not* now upon the *evidence*; but upon the LAYING the offence. Have you any authority, that it may not be *laid* at a *parish*?

Mr. *Clayton*—None but that in *Keble*; (*viz.* 2 *Keb.* 183.)

Lord MANSFIELD—There is nothing in the act, that restrains it to be LAID in a city, market-town, or corporation; and this *laying* it in a *parish* will *not affect the* EVIDENCE.

Mr. Just. DENISON expressed himself in terms exactly to the same effect.

Mr. Just. FOSTER—*Many* trades are carried on in *villages*: most of the *cloth*-trade in *Yorkshire*, is carried on in the *villages*.

Mr. *Clayton* offered another objection; *viz.* that it was not averred "that he did not *then* exercise the trade," (namely, at the time of making the act.) But

2d Objection.

THE COURT (without any hesitation) over-ruled this objection. So that, (both objections being over-ruled,)

THE RULE "to shew cause why the information "should not be quashed," was DISCHARGED.

TARRANT *versus* HAXBY.

Prohibition to the spiritual court to stay proceedings for restoring a parish clerk, granted.

MR. *Norton* and Mr. *Wynne* moved for a *prohibition* to the consistory court of *York*, to stay their proceedings against *Tarrant*, the present parish-clerk of St. *Osith* in *York*; which proceedings were there instituted at the instance of *Haxby* the *deprived* PARISH-CLERK, for the *restoration* of the said *Haxby*.

The *office* of parish-clerk is of a TEMPORAL nature: and the *fees* are of TEMPORAL cognizance. There are two cases in Sir *J. Strange*'s Reports, to this purpose; *viz.* 2 *Strange*, 942, *Peak* v. *Bourne*; and 2 *Strange*, 1108. *Pitt* v. *Evans*, C. B. And there is an express case in 2 *Brownl.* 38. *Gaudye*'s case with Dr. *Newman*, C. B. P. 8 *Jac.* I. That the office of parish-clerk is *lay*: and the

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spiritual court have no jurisdiction concerning his deprivation.

This *Harby*, they said, was deprived by the parson and the whole parish, for drunkenness during divine service, and other misdemeanors; whereupon the parson appointed *Tarrant* in his room, against whom *Harby* libelled, in the consistory court of *York*; where there was a monition; and they were proceeding to readmit *Harby*. And all this was suggested. Upon which, a rule was granted, to shew cause. And now Mr. *Nares* was to have shewn cause: but, being satisfied that it was too strong against him, he would not trouble the court. Whereupon,

The RULE for the PROHIBITION was made ABSOLUTE.*

[* The office of parish-clerk is temporal, and therefore the right to it is not determinable in the ecclesiastical court. This is nothing but what has been often determined before. See also Cowp. 370.]

Monday, 20th June 1757.

REX *versus* INHABITANTS OF UFFCULME.

See this CASE *abridged*, in the TABLE; and *at large*, in the Quarto Edition of my SETTLEMENT-CASES, No. 138. p. 480.

Monday, 20th June, 1757.

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REX *versus* INHABITANTS OF MILWICH.

See this CASE *abridged*, in the TABLE; and *at large*, in the quarto edition of my SETTLEMENT-CASES, No. 139. pa. 433.

Tuesday, 21st June, 1757.

A note of hand acknowledging the receipt of money, and promising to be accountable for it, will support a count for money lent and advanced.

HARRIS *versus* HUNTBACH.

THIS was a cause in the civil paper; and came before the court, upon a case reserved for the opinion of the court, in an action upon a *general indebitatus assumpsit*, in which the plaintiff declared upon two counts; the first of which was for money *lent and advanced* by the plaintiff, at the defendant's request; the second was for money *laid out and expended* by the plaintiff, at the defendant's request: and the question, upon the case stated, was "whether the *evidence supported the declaration.*"

The case stated—1st. That a note of the defendant's was produced in evidence by the plaintiff in the following words: "3d *December* 1751. Then received of Mr. "*Harris* the sum of 19l. on the behalf of my grandson: "which I promise to be *accountable for*, on demand."

" Witness my hand *S. Huntbach*." This evidence was produced in support of the first count. 1757. HARRIS v. HUNTBACH

On the 2d count—the evidence was, that one *Davidson* coming to the plaintiff by the defendant's order, for money to pay the workmen, the plaintiff refused to pay the money, unless the defendant would sign a receipt. Whereupon the defendant wrote the following note, viz. " *Mr. Harris*, At the earnest request of the gardener, the " workmen wanting money greatly, for the work at the " woodhouses, this is to certify that it is *my request* that " you pay to Mr. *Davidson*, on the account of Master " *Hillier*, for the workmen's use, the sum of 15*l*. As " witness my hand *S. Huntbach*." And a receipt was given by the said *Davidson*, the gardener, to the plaintiff, on the plaintiff's paying him this 15*l*. Verdict for the plaintiff—case saved upon this question, viz. " whether " the evidence was *sufficient* to support the verdict."

Mr. *Aston* for the plaintiff—the first count is for money lent and advanced by the plaintiff, at the defendant's request. And here is a note under the defendant's hand produced, acknowledging the receipt of it, and promising to be *accountable* for it: which is tantamount to a promise to pay it. And its being added, " *on the behalf of* " *my grandson*," makes no difference: for there is *no remedy* against the *infant*. Therefore it is an *original*, not a *collateral* undertaking. In 2 *Ld. Raym.* 1085. *Bacmyr* v. *Darnall*, it is agreed " that where no action will lie " against the party himself, undertaken for, it is an *ori-* " *ginal* promise." In the case of *Reid* v. *Nash*, *M.* 24 *G.* 2. *B. R.* and *Tr.* 1751, 24 & 25 *G.* 2. it was settled accordingly. And here is *no remedy against the infant*, upon this note. [374]

2d Question. Whether the other evidence above stated was sufficient to maintain the second count.

Now the plaintiff could not have maintained an action against the infant, for *this* money, no more than for the former. The plaintiff refused to advance it, till the defendant wrote thus, " it is *my request* that you shall pay, " on the account of Master *Hillier*, to Mr. *Davidson*, to " the workmen's use, 15*l*." And this is an *original* undertaking " that the defendant will pay the money:" and it was advanced on the account and credit of the defendant.

Mr. *Nares contra* for the defendant—

The question is, how far a general *indebitatus assumpsit* will lie upon these facts, and this evidence brought to support them. This is a general *indebitatus assumpsit*, and *indebitatus assumpsit* does not lie, but when an action of *debt* will lie. 1 *Salkeld*, 23. *Hard's* case, is expressly so. 2 *Ld. Raym.* 1034, 1035. *Smith* v. *Agrey*; " *indebitatus* " *assumpsit* does not lie for money won at play." 1 *Str.* [Bull. 129.]

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630. *Welch* v. *Craig*: "it does not lie on a promissory "note." No more will it, upon a *collateral* undertaking. And therefore the present is *not a proper count*, if the evidence would support it. This cannot be considered as money *lent*. It cannot be more than evidence of a *collateral* promise. And why will not an action lie *against the infant*? I think it *will*. And then it is exactly within the cases of *Buckmyr* v. *Darnall*, in 2 *Ld. Raym.* 1085; and *Reid* v. *Nash*, where *Nash* promised to pay 50*l.* if the plaintiff would withdraw his record: (which was indeed an original promise.)

Secondly, on the 2d count—the note only imports a *certificate* "that the money is proper to be paid." No general *indebitatus assumpsit* will lie upon this. Here is no evidence of money lent.

Mr. *Aston*, in reply—

1st. A note of hand acknowledging the receipt, and promising to be accountable, is certainly evidence of money *lent*. And it is every day's experience, that notes of hand
[375] are *given in evidence* upon *general indebitatus assumpsits*. And as to inserting "on behalf of my grandson" it makes no sort of difference. 2 *Strange*, 955. *Thomas* v. *Bishop*—the addition of "cashier to the York Buildings Company," was holden to make no difference. And there is no privity between Mr. *Harris* and the infant: nor will any action lie against him.

This is *not* a promise *in aid*, or a *collateral* undertaking: but a *sole, absolute, original* promise. Therefore he prayed that the *postea* might be delivered to the plaintiff.

LORD MANSFIELD—

The question is whether there be *evidence* of a debt contracted by the defendant, payable to the plaintiff.

The declaration consists of two counts, for two different debts. And there cannot be clearer evidence, than the first note is, of the former debt. And as to the 2d—here is a mansion-house belonging to an infant: which mansion-house has a garden belonging to it. It might *not* be *necessary* (in regard to the infant's situation and circumstances) to support this garden, (which might be a *pleasure* garden:) and no action will lie against the infant *but* for *necessaries*. It does not appear at all, that there could be any remedy against the infant.

You can bring an *indebitatus assumpsit for the debt*: and *give the note in evidence*: and surely it supports the declaration.

This is said to be a *collateral* undertaking. But the argument about original or collateral undertakings, depends merely upon the want of sufficiently defining the *terms* "original" and "*collateral*:" otherwise, there can be no doubt about them. *This* is clearly an *original* undertaking. And the jury have *found* these notes to be

sufficient evidence of the debt: and it is indeed a matter of *fact*, rather than of *law*.

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Mr. Just. DENISON concurred.—

Surely, this note is *evidence* of money lent. And between the plaintiff and defendant, this is certainly an *original* undertaking: and the money was paid at the *defendant's request*. And there is no privity between the plaintiff and the *infant*. The case of *Reid* v. *Nash* is, in some measure, like this. "Here is nothing like a collateral request or promise: it is an *original* undertaking."

And that case was determined upon mature consideration. [S. C. 1 Wils. 305. Bull. 281.]

Mr. Just. FOSTER likewise concurred.—

The *infant* was *not liable*, and therefore it *could not* be a *collateral* undertaking. It was an *original* undertaking of the defendant, to pay the money.

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Per Cur. Let the POSTEA be delivered to the PLAINTIFF.

HAMMOND *versus* BREWER.

The town of Battel excluded out of the turnpike act, 26 Geo. 2. c. 54. [See 3 Durn. 514.]

THIS was a case for the opinion of the court, from the *Sussex* assizes, before Mr. Baron *Smythe*.

The case states that an act of parliament was made in 26 *G.* 2. (*c.* 54.) for repairing and widening the road from *Flimwell Vent* in the parish of *Ticehurst* in the county of *Sussex*, to the town and port of *Hasting* in the said county: and it states many other matters not worth noting; as the single question was "whether the TOWN *of Battel* "was meant to be *included* or *excluded*."

The question arose upon that part of this turnpike-act which gave directions for repairing the road *to* and *from* the town of *Battel*; which town was stated to be lately *paved* before the act of parliament, by the inhabitants; and that it was *kept in repair by them*, and *is now so*.

Note. In many other parts of the act, the roads are described as leading from, to *and* THROUGH such and such towns: but when it mentions the town of *Battel* it only says "TO and FROM it," but *omits* the word "THROUGH." And the only question was "whether the act intended to INCLUDE or EXCLUDE the town of *Battel* itself."

Mr. *Knowler* was for the plaintiff (of whom the toll had been taken:) and Mr. *Harvey*, for the commissioners, (the defendant having acted by their authority;) who had set up a turnpike in the *very heart* of the town.

The COURT was clear that the act of parliament intended to EXCLUDE the town of *Battel*; and that it was right and reasonable that it should be excluded.

And Lord MANSFIELD observed that it was neither

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usual nor convenient to erect toll-gates in the *middle* of great towns; (which these commissioners had done;) which might *obstruct* the necessary intercourse amongst the inhabitants; or even hinder an inhabitant from sending his *horses to water* without paying the toll. Therefore they ordered the

POSTEA to be delivered to the PLAINTIFF.

Wednesday, 23d June, 1757.

REX *versus* MANNING.

Sessions cannot order materials to be dug in a private soil under the turnpike act, 29 Geo. 2. c. 67.(a)

MR. *Aston* shewed cause against quashing an order of sessions made upon a road-act of 29 *G.* 2. *c.* 67. (for enlarging the terms and powers granted by former acts;) whereby the surveyor of the highways beyond *Sheppard Shord* and the *Devizes*, &c. is authorised and impowered to *dig gravel*, &c. or other materials, &c. in, upon or out of and from all and every the lands, fields or grounds in the *occupation* of *John Manning* in the parish of *All Cannings*, in the county of *Wilts*.

[19 Vin. 502.] The substance of the order was as follows—It begins with reciting the act of 29 *G.* 2. *c.* 67, impowering the surveyor or surveyors of the highways or roads therein specified, or any other person or persons appointed by him or them, (having first an order from the quarter-sessions; *six days notice in writing*, of the application for such order, being first given *by the surveyor* or surveyors, *to the* OWNER OR OWNERS, *occupier or occupiers* of the lands and grounds then intended or purposed to be cut, digged or gathered for materials for repairing and amending the highways or roads, or left at his or their places of abode;) to cut, dig, gather, take and carry away any furze, heath, gravel, sand, or other *materials proper and sufficient* for repairing of the said highways or roads, (*if* such materials cannot be had or found in or upon any waste or common grounds, in any parish, town, or place adjoining to or lying near the same highways or roads,) in, upon or out of, and from ANY *lands, fields or grounds, or either of them* (not being a yard) garden, orchard, park, paddock, wood, coppice, nursery, or inclosed ground

(a) There are in all turnpike acts some exceptions; and in general, all of them are with exceptions of horses going to pasture or for water, to any place in any direction through which the road lies.

As to the execution of powers in general given by acts of parliament, vide Irish Case of Fenures 1 Bl. 4 *Burr.* 2245.

planted with any walk or walks of trees, or avenue to any house;) paying such rates, for such materials, or for the damage done to the OWNERS AND *occupiers* of the ground where any and from whence the same shall be cut, digged, gathered, taken and carried away, or over which the same shall be carried, *as the* SURVEYOR *or* SURVEYORS, *or* OTHER *person* or persons by them appointed, or to be appointed by virtue of the said former acts, or the said recited act, for that purpose, shall *think reasonable*. 1757. REX v. MANNING.

Then the said order of sessions recites, that application had been made to that court, *by the surveyor* of the said highways or roads, for an order to cut, dig, gather, take, and carry away furze, heath, stones, gravel, sand, or other materials proper and sufficient for repairing of the said highways or roads, in, upon or out of and from ALL *and* EVERY the lands, fields *and* grounds *now in the occupation of John Manning* of the parish of *All Cannings*, in the said county of *Wilts*, yeoman, (not being a yard, garden, orchard, park, paddock, wood, coppice, nursery, or inclosed ground planted with any walk or walks of trees, or avenue to any house.) [378]

Then the order goes on thus—

And the said surveyor having made and given *full proof* to this court "that *six days notice in writing*, of his "intended application to this court for such order, hath "been given by him TO *the said* JOHN MANNING *or left* "at *his* place of abode;" *and the said* JOHN MANNING, in consequence thereof, having *offered to this court by* HIS *counsel*, reasons against such order being made; and endeavoured to support the same by proofs, (*which reasons and proofs this court* ADJUDGED *to be very insufficient*:) and the said surveyor also having made and given *full proof* to this court, "that PROPER *and* SUFFICIENT "*materials* for repairing of the said highways or roads "*cannot be had or found* in or upon any waste or common grounds in any parish, town or place adjoining to "or lying near the same highways or roads."

THIS COURT doth therefore, in pursuance and by virtue of the said recited act of parliament, unanimously order that the said surveyor of the said highways or roads, *or* ANY other person or persons by him appointed and employed, may, and he and they is and are (by virtue of the said act of parliament and by virtue hereof) authorized and impowered to cut, dig, gather, take and carry away any furze, heath, stones, gravel, sand, or other materials *proper* and sufficient for repairing of the said highways or roads, in, upon, or out of and from ALL *and* EVERY the lands, fields, or grounds *in the occupation of the said John Manning, in the said parish of All Cannings*, (not being a yard, garden, orchard, park, paddock, wood, coppice, [Co. Lit. 204.]

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nursery, or inclosed ground, planted with any walk of walks of trees, or avenue to any house, *paying* such rates for such materials, OR for the damage done to the *owners* OR *the said occupier* of the said lands, where any and from whence the same shall be cut, digged, gathered, taken and carried away, *As the said* ACT OF PARLIAMENT herein before in part recited BOTH DIRECT AND PRESCRIBE.

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Mr. *Norton's* objections to this order upon making the original motion, were only *two:*

1st, That there ought to have been *notice to the* OWNER, as well as to the occupier of the land wherein the gravel was to be dug: although he owned, that the strict *words* of the act had not the *copulative*, but only the *disjunctive; viz.* " upon notice, &c. to the owner *or* owners, occupier " *or* occupiers of the land, &c." Yet, he said, that justice required, that the OWNER *should have notice, as well* as the occupier; when *his property* is to be so *materially affected;* and he argued this to be the *intention* of the act. And it is frequent, in such cases, to understand *negative* conjunctions, AS *copulative.*

2dly. The *satisfaction* is directed by the act to be made *both* to owner AND occupier: whereas they have here awarded NONE at all to the *owner* of the land, who is the person principally injured. Upon this motion a rule was made to shew cause. After which, nine additional objections were given in, in writing.

Mr. *Aston* shewed cause why the order of sessions should not be quashed.

1st Objection (given in, in writing) is, that the *name* of the surveyor who applied for the order is not mentioned.

Answer—That is *not necessary.*

2d Objection. That the sessions have *not* adjudged " that six days *notice* in writing was *given to any* person, " of the intended application:" the words are only, " the surveyor *having* made and given full proof to this " court," that such notice was given.

Answer—That it *does appear;* but if not, yet it is *not necessary.*

3d Objection. That the fact of such notice being given, is *not sufficiently set forth;* it being only said " that " such notice was given to *Manning*, OR *left at his place* " *of abode.*"

Answer—That that *is* sufficient.

4th Objection: (which was Mr. *Norton's* first;) It is not set forth that six days notice in writing of this intended application was given to the OWNER of the lands.

Answer. Notice to the OCCUPIER is enough. So on

a distress—notice may be given *either* to the tenant *or* to the owner of the goods. 4 *Mod.* 390. *Walter* v. *Rumball*, so holden by the court. (*pa.* 395.) And here the owner may perhaps *not* be entitled: for the act says, "that the "damages, IF *any*, &c." Besides the owner may be at a vast distance from the land. And here the *tenant appeared*, and made what defence he thought proper. 1757. REX v. MANNING.

5th Objection. That the sessions have *not expressly* ADJUDGED "that proper and sufficient materials for "repairing the highways were NOT *to be found in any* "waste or common ground *in any place near* the said "highways:" for it is only said, "the surveyor *having* "made and given full proof to the court, that, &c."

Answer—The order is agreeable to the act of parliament: and it specifies "that *full proof* was made and "given to the court, of this fact."

6th Objection. That it is not set forth "that NO *proper* "*materials* AT ALL, for repairing the highways, are to be "found in any such waste or common ground:" But only (in loose and general words) "that PROPER and "SUFFICIENT materials for such purpose are not to "be found there." Notwithstanding which, it is ordered, "that the surveyor shall cut and carry away "ALL *sorts* of materials necessary for the repair of the "*whole* road." [Allowed post. 381.]

Answer—That it is exactly agreeable to the act.

7th Objection. *Non constat* that *any materials* proper for such purpose ARE TO BE FOUND *in any part* of these grounds. [Allowed post. 381.]

Answer—That must depend upon *trial*. The lands are to be "cut, digged, and gathered *for* materials."

8th Objection. It is not set forth *how far* these grounds *lie from the highway*; nor *to what distance* all *waste* grounds have been found barren of proper materials; nor that these grounds are *nearer* than any *waste* where such materials *may* be found.

Answer—The order is worded *agreeable to the act*; and these particularities *need not be inserted* in it.

9th Objection. That the *powers* here committed to the surveyor are *uncertain* in every branch thereof. For *only* that PARTICULAR *piece* of land which affords the materials is made liable by the act. But here ALL the grounds in the occupation of *Manning*, (being, as he alledged, a farm of 540*l. per annum*) are to be dug at the discretion of the surveyor. And they are also laid under a perpetual incumbrance, or at least one that is absolutely uncertain; for that *no time* is prefixed at which such grounds shall be emancipate. [Allowed post. 382.]

Answer—This also is sufficient; being agreeable to the act.

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10th Objection: (which was Mr. *Norton's* second) that *satisfaction* for such materials is, by this order, awarded to the owner OR occupier, but *not* to BOTH; nor is it certainly defined to *which* of them: whereas the act of parliament is express, "paying to the owners AND "occupiers."

Answer—It is sufficient: the act is disjunctive, in directing the notice; and must here be taken *disjunctively* and *respectively*.

11th Objection. That the RATE *of such satisfaction* is estimated in the order, only as for the *value of the materials* which shall be cut or carried out of these grounds; OR for the *damage done thereby;* but *not* as for BOTH, as it ought, in justice, to be: nor is it certainly defined, for WHICH of the two, the compensation is to be made.

Answer—It is in the *words* of the act.

Mr. *Norton* and Mr. *Thurlow*, in reply, supported the eleven objections; and urged that these summary authorities given to justices, to the detriment of the liberty or property of the subject, ought to be STRICTLY *pursued:* and they cited many cases, of what they apprehended to be similar instances, or at least proceeding upon the same principles. Whereas, in the present case, the justices have not (as they alledged) given themselves *jurisdiction*, by any ADJUDICATION of the necessary facts: but have *only recited the* EVIDENCE of them.

Lord MANSFIELD—said this order was very ill penned; and the justices ought undoubtedly to pursue their authority: but however, he did not agree to *all* the objections; and particularly to the * 2d, and † 5th. which are founded upon a supposed necessity that there must be *express adjudications;* where the recitals and allegations are sufficient, and where conclusions are actually drawn.

*† The 2d and 5th of those given in writing.

[S. P. Ld. Raym. 1275. post. 382. acc.]

As to the 4th objection—he did not think that the act could mean that it should *always* be necessary to give *notice to the* OWNER; which might be impossible.

But as to the 6th and 7th Objections—it IS *necessary to shew* that there were NO proper materials to be found in or upon the wastes or common grounds *near* the highway. Which is *not done* here. And they are not warranted to dig in the private soil, for ALL *the species* of materials; *because* SOME *of these species* are not to be found in or upon the said wastes or common grounds. They ought to SPECIFY what *can* NOT be found in or upon the *wastes* or common grounds; and what *may* be found *in the private* soil. And they can *not* dig, to TRY for it, in the *private* soil: they should previously *know* that it is to be found there; or *at least* have a reasonable prospect of finding it there.

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9th. And they cannot make this *general* order "to *dig*

"*over* ALL *the estate;*" and leave this to the *discretion of the surveyor:* they ought to *fix* upon the *particular* part; to determine this *themselves*, and not leave it to their surveyor. THIS objection is FATAL. 1757. REX v. MANNING.

10th. So also is that of the *satisfaction:* for the SATISFACTION *ought to be awarded* to the owner, or to the occupier, or to both; ACCORDING *to the* DAMAGES sustained by the one, *or* by the other; *or* by both.

Perhaps some *other* objections might hold: but however, here is *enough*, that I have *already* mentioned.

Mr. Just. DENISON—It is a very imperfect order, and liable to many objections.

As to the 2d, 3d, 5th, 6th, and 7th, objections--- an *express* and *direct* ADJUDICATION may *not* be necessary: but many of these foundations or their authority ought, *some how or other*, to APPEAR *upon the face* of the order. Particularly, it ought to appear that *notice* was given of the intention to dig in some *particular place;* for perhaps very good cause may be easy to be shewn against it. But [4 Burr. 2064]

9th. It can never be right to dig over ALL *the estate;*

6th. Nor to dig in the private soil for *such* materials as *may be found* in the waste.

As to the 4th—NOTICE is *not* universally necessary to be given to the *owner:* this may in some cases be *impracticable.* [S. P. Ld. Raym. 1275.]

But as to the 10th, SATISFACTION ought to be made *to the owner*, (if he be damaged,) undoubtedly.

Mr. Just. FOSTER concurred.

The person that drew this order, has kept to the WORDS, but *not to the* SPIRIT of the act. [383]

And as to the 9th objection in particular, undoubtedly, the justices have exceeded their power in ordering the *surveyor to dig* over the WHOLE *estate: this* can never be reasonable, nor within their jurisdiction.

Per Cur. unanimously,
RULE for quashing the ORDER
MADE ABSOLUTE.

COGAN *versus* EDDEN and Another. Thursday, 23d June, 1757.

A verdict wrongly delivered by the foreman may be amended. [See 2 Bl. Rep. 803.]

ON a motion (made the 18th instant,) to *set aside a verdict* as being given in by the *foreman*, CONTRARY to the opinion and intention of EIGHT *of the jury.* It appeared that the defendant justified under a right of a way, over the plaintiff's ground, to *two* closes of the defendant, *viz. Broadmoor*, and *Three-acres;* upon which, *two different issues* were joined; *viz.* one, upon the right of a way to *Broadmoor;* the other, upon the right of a

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way to the *Three-acres*. And the foreman gave in the verdict, as a *general* verdict for the defendant, upon *both* issues. But *eight* of the jury made *affidavit* "that it was "the MEANING AND INTENTION of the WHOLE *jury*, to "find the former issue for the defendant; and the LAT-"TER *for the* PLAINTIFF: and that this mistake was "discovered by them, *an hour afterwards*; but not till "the *judge was gone* to his lodgings." And upon the judge's report it appeared that, though there was indeed evidence on *both* sides, yet the *weight* of the evidence was (as it appeared to him) on the side of the plaintiff, as to this latter issue.

N. B. The foreman had declined making any affidavit; because, he said, he should make himself appear a fool, to the court of King's Bench.

This matter was much litigated by the counsel on both sides. And the counsel for the plaintiff mentioned the case of *Baker* v. *Miles*, in *C. B.* in *M.* 4 *G.* 2. *S. P.* where eleven of the jurymen swore "that the foreman "had mistaken their verdict;" and it was thereupon set aside*.

* V. Viner's Abr. Title Trial, p. 483. pl. 12.

THE COURT were all clear that this was a *mistake*, arising from the jury's being unacquainted with business of this nature; and from the associate's omission in not asking the jury particularly "how they found *each respec-"tive* issue," and in not making the jury fully *understand* their own finding; and that it was agreeable to right [384] and justice, that the *mistake should be* RECTIFIED. And they had no doubt about the *fact* of this mistake; from the affidavit of the eight jurymen, *confirmed* (as they held it in effect to be) by the foreman's declining to make any affidavit at all: especially, as the judge's notes shewed the weight of the *evidence* to have been for the plaintiff, as to this latter issue.

And LORD MANSFIELD and Mr. Just. DENISON thought that, as it was a *mere slip*, there might be *some* method of RECTIFYING *the verdict* according to the truth of the case; from the judge's notes, if they were sufficiently particular; WITHOUT *sending* the issue to be tried over again, at a great expence.

And the case of *Newcombe* v. *Green*, in 2 *Strange* 1197. was mentioned; where the *postea was* amended by the judge's notes. And Lord *Mansfield* said that, at least they could set aside the verdict *without* costs. But difficulties occurring, how the costs would be, in such case; as *one* issue was still found for, and was in truth clearly for the defendant. Therefore

CUR. ADVIS.

And now Lord MANSFIELD, seeing Mr. *Morton* in court, who was concerned for the plaintiff, and had (on

his behalf) moved to SET ASIDE the verdict, took occasion to mention this case; and said they had thought of it; and he had talked with his brother * *Wilmot* too, about it: but, however, he was not now going to give any opinion; but only to *purpose* what seemed to him the most *proper method* of coming at it. 1757. COGAN v. EBDEN.

* Whose ordinary engagements were now in the other court.

The case of *Newcombe* v. *Green*, itself, is not applicable to this case. But there is another case, of *Mayo* v. *Archer*, in 1 *Strange* 514, 515. where the question was "whether a farmer who bought and sold potatoes could be a "bankrupt:" and the special verdict did not set forth the *quantities* he had bought and sold; though they were *proved at the trial.* The court did not there award a *venire facias de novo*; but *amended* the special verdict, in that respect. Which case is more applicable to the present case, than that which was cited: for here they ordered the special verdict to be amended; though the plaintiff's motion was only "that a *venire facias de novo* "might be awarded."

But another case has been mentioned to me, which is applicable to the *principle* of this case; though not like the particular fact. It is that of *Dayrell* v. *Bridge*, *Tr.* 32 *G.* 2. *B. R.* Trespass for cutting down an oak-tree—the defendant pleaded several pleas; one of which was, "not guilty." At the trial, a *general* verdict was taken down, and so entered. And the court *rectified the verdict*, by expunging the finding on all but the "not guilty;" it appearing that nothing was in question (at the trial) "but whether the place where the tree stood, was parcel "of the manor, or not." In the case of *Newcomb* v. *Green*, several cases * were cited on the same subject: though the case *itself* is not the present case.

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* None are mentioned by Strange, p. 1197. But Cro. Car. 338. Eliot v. Skypp, 1 Salk. 53. Bold's case, and a case of Fry v. Horder, in Lord Raymond's time, were cited.

If the court sets the matter right they should proceed according to the *whole* truth of the case. The judge who tried the cause agrees to the fact disclosed in the affidavit of the *eight* jury-men: whereas your *first* affidavit, on which the rule was made, was an affidavit of only *four* of them.

Therefore what I would propose is that you should make your motion, and have a rule to shew cause, why, upon reading the affidavits of these *eight* jury-men, the verdict should not be AMENDED *and* SET RIGHT, *according to the truth of the finding.*

Note—Such a motion was afterwards made; and a "rule to shew cause" granted. But it never came before the court any more: it plainly appearing that the court, upon deliberation among themselves, had come to an opinion "that in this shape the verdict "*might* be set right."

1757. REX *versus* GODDARD WILLIAMS.

REX v. WILLIAMS. Tuesday, 28th June 1757.

Information to *the lord mayor*, and certiorari to *the sessions*. quashed [See 4 Durn. 111.]

MR. *Nares* shewed cause (on *Wednesday*, 9th *Feb.* last,) against quashing a *certiorari* to remove, from the quarter-sessions of the city of *London*, an information upon 1 *Ja.* 1. *c.* 22. entitled "the duty of tanners, currriers, shoemakers and of others cutting of leather."

Note. The information runs, throughout, "that the informers give the LORD MAYOR of *London* to understand, *&c.*" But the *certiorari* is directed to the SESSIONS of the city of *London*.

Three objections, he said, had been (upon the original motion) taken to this *certiorari*:

Obj. 1st. The *certiorari* does *not lie*, at all.

2d. It is *not well directed*. (*V. infra*, & 1 *Jac.* 1. *c.* 22. § 50.)

3d. It does *not lie*, BEFORE *conviction*. 1 *Salk.* 145. Dr. *Saud's* case. 1 *Siderf.* 290.

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Answers---

As to the 1st objection---1 *Ld. Raym.* 469. Dr. *Groenvelt's* case proves that a *certiorari* will lie: for this court, by *common law*, may issue it. 1 *Salk.* 148. *Cross* v. *Smith*. A *certiorari* lies to *all inferior* jurisdictions. 1 *Ventr.* 68. *Smith's* case is to the like effect. *Style* 351 & 356. in point. 8 *Mod.* 331. † *Arthur* v. *Commissioners of Sewers in Yorkshire*. 1 *Hawk. P. C.* 218. § 79, 80. is very strong in favour of *certioraris*, where the inferior jurisdiction exceeds its authority.

† A miserably bad book, intitled "Modern Cases in Law and

2dly. It is *directed* to the justices at sessions, *generally*. And it is right: for this is an *act of sessions*. 2 *Hawk. P. C.* 290. § 43. proves this method to be right.

3dly. As to 1 *Salk.* 145. *pl.* 5. Dr. *Saud's* case, *P.* 10 *W.* 3. The reason given for the opinion is answered by the very next case (*pl.* 6.) in the same book. The case in 1 *Siderf.* 296. (There are two cases there, in the same page, *pl.* 19. & *pl.* 20. *Tr.* 18 *C.* 2, which both seem applicable to this subject), stands upon its own bottom. And perhaps the method mentioned in 1 *Salk.* 145. *pl.* 6, was not then found out. However, notwithstanding what is there said, yet it will lie to every *quarter-sessions*: and this was at the quarter-sessions.

Mr. *Norton contra*, for the rule (to quash the *certiorari*) agreed to put it upon 1 *J.* 1. *c.* 22. § 50. which clause gives jurisdiction to the lord mayor of *London* for the time being, within the city, AND *within three miles compass of it*.

And this information is here given to the LORD MAYOR, *present* (it is true) *in court* of the aforesaid court of sessions: and the informers pray the judgment *of the* LORD

MAYOR; though it is indeed added "*so present in the* "*said court.*" Therefore this is NOT a proceeding AT *sessions:* but a proceeding *before the lord mayor* pursuant to the act. 1757. REX v. WILLIAMS.

Note—The caption is AS *at a court of sessions:* but the information is given TO the *lord mayor;* and they conclude with *praying judgment* OF *the* LORD MAYOR, *so present in that court* (of sessions.)

LORD MANSFIELD—The *certiorari* has manifestly issued, as *supposing* it to be a *proceeding* BEFORE *the* JUSTICES *at the sessions:* and *they return* it *as such.*

N. B. The return is by "*Stephen Theodore Janssen*, esq. [387] "*mayor* of the city of *London*, and ALSO *one of the* "*justices* within written."

The COURT thought, the PREVIOUS question to that of the regularity or direction of the *certiorari*, depended upon the propriety and validity of the *information; viz.* "whether the *mayor* ALONE had the jurisdiction, "under this act;" *or* "the *mayor* IN SESSIONS."

Mr. *Norton*—the jurisdiction is in the *mayor* ALONE: for he has it even for the space of three *miles out of the city;* where the sessions have NO *jurisdiction at all.* It is true that he has here *executed* this jurisdiction IN sessions.

Lord MANSFIELD and Mr. Just. DENISON were satisfied that the *propriety* of the DIRECTION *of the certiorari*, depends upon the *propriety* of the *conviction;* and they seemed to think that the *proper method* of bringing this question before the court, would be for Mr. *Nares* to move "to QUASH *the information.*"

Mr. *Nares* desired to take a day or two's time, to consider of this, and to be better prepared for it. Whereupon it was, at present, ADJOURNED.

And on *Monday* 23d *May*, the present rule was *enlarged;* and also Mr. *Nares* (by approbation of the court, and of the adverse party,) took a rule, agreeable to the above hint, "to SHEW CAUSE why the INFORMATION should not be *quashed.*"

And now Mr. *Norton* and Mr. *Williams* being ready to shew cause, *pro rege;*—

Mr. *Gould* and Mr. *Nares*, for the defendant, proposed their objections, to the *information*, thus; *viz.*

1st. That the jurisdiction is not in the LORD MAYOR; but in the *sessions.*

2dly. The remedy is NOT *by way of* INFORMATION; but ought to be by *indictment.*

First—they said that the question turned upon 1 *Jac.* 1. *c.* 22. § 29, 32, 33, 46, 50. They insisted "that "the lord mayor had no authority, by this act, to appoint "triers, where the leather is made and manufactured "*into wares.*" And consequently that as this leather

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appeared to have been manufactured into wares, *viz.* into saddles, the lord mayor had *no jurisdiction* to proceed in this summary way; but that,

Secondly—the proceeding ought to have been *by way of indictment*; and not by way of information, which is no common law proceeding. They added

Thirdly—

That it is uncertain before WHOM the information is taken.

If it be understood as taken before the lord mayor, *he* has *no jurisdiction*, for the reasons abovementioned: but *if* it be understood as taken before the sessions, it ought (as has been said) to have been by *indictment*. Whereas it is a rule, that informations ought to be at least as certain as indictments. So is 2 *Hawk. P. C. pa.* 261. *c.* 26. § 4.

Mr. *Norton*, Mr. *Williams* and Mr. *Lucas*, for the prosecution—answered, that this is an information brought by the warden of the Sadlers Company, under this act of parliament, of 1 *J.* 1. *c.* 22. And

Answer to the 3d objection. It is not at all uncertain: but is an information exhibited to the *mayor* ONLY; and prays the *judgment* of the *mayor only*.

Answer to the 1st objection. And the act gives him jurisdiction, *as well* where the leather is manufactured, as where not. And this is a proceeding like the informations in the Exchequer, *in rem*, for a condemnation.

Answer to the 2d objection. It is *not* before the *sessions*. So that this objection of its not being by way of indictment is out of the case.

Moreover, they urged that the court would NOT *quash* such an information, upon *motion*; especially, where a PRIVATE PERSON is *entitled to the penalty*; and none of it belongs to the crown.

Lord MANSFIELD—As to the court's NOT *quashing on* MOTION, but putting the party to *demur*—that reasoning does hold, *where the objection* is to the JURISDICTION of the court that has undertaken to proceed.

Now here the question is upon the *jurisdiction*.

[389] This is agreed, by Mr. *Williams* and Mr. *Norton*, to be a proceeding before the lord mayor PERSONALLY, though IN *sessions*. But the 50th section (which gives him the jurisdiction,) does *not* give it to him PERSONALLY; but in *the terms* of the common commission of *oyer and terminer*: and the *same* power is given to *him*, as to the *other* mayors, bailiffs, head-officers of boroughs, stewards of leets, &c. Now this must be exercised *according to the course* of the *common* law; i. e. *by* INDICTMENT.

But it is objected "that the *sessions* cannot have jurisdiction *beyond the limits of the city*:" whereas this is given to the mayor in any place within three *miles* of it.

The answer to this is, "that this jurisdiction of the "*sessions is therefore*, by this act, *extended* to three miles "beyond the city."

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The parallel does not hold, with regard to informations *in rem*, in the Exchequer: (to which it has been compared.) For that proceeding in the Exchequer depends upon the *course* of the court of Exchequer: and it is necessary there. For it is not there known, *who* will claim; nor does it affect the *party*: and the person who owns the goods may not perhaps be in court, or may be unknown, or may not have other opportunity to come in and claim. This is an ancient course there; as ancient as the *court* of Exchequer itself, and by *common* law.

But here is no sort of incongruity, in the present case, in the *goods being forfeited by* the *party's* being *convicted* of the offence upon an *indictment*. And here is no colour for the notion of a *summary jurisdiction* in the mayor, under the authority of this act of parliament. Therefore the information ought to be quashed, for *want of jurisdiction* in the mayor, to receive and proceed upon it.

Mr. Just. DENISON concurred. And he agreed with LORD MANSFIELD that there was *no need* to put them to *demur*, in a case where there is *defect of jurisdiction*: and cited a case of *Rex* v. *Wesley*, on his own motion, in perjury; where the sessions had no jurisdiction; and therefore the court quashed the indictment.

And as to the *jurisdiction*—he concurred with Lord *Mansfield*; and (at large) gave the same reasons, drawn from the 50th section of this act: which, he said, manifestly considered the mayor, merely as the *head* of his corporation, and did not intend to give him a *summary* jurisdiction, PERSONALLY. Consequently, they must proceed in the *ordinary* way, that is, by *indictment*.

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And this very act of parliament, *gives the sessions* the *extended jurisdiction* as far as within three miles compass of the city: for if it *gives the* END, it must be construed to give the *means* too.

And it is *not like* the proceedings *in rem*, in the Exchequer. For the justices here may give the forfeiture, undoubtedly, *upon an indictment*, (after conviction.)

[4 Burn. 112.]

This *information* therefore ought to be *quashed*; as it appears that the lord mayor, PERSONALLY, had *no such jurisdiction*.

Mr. Just. FOSTER concurred. He held that the 50th section did *not* give the jurisdiction to the mayor PERSONALLY, and in a *summary* way; but as the HEAD *of a court*: and he said that the whole clause (taken together) plainly shews this. Therefore the proceeding ought to be in the ordinary course, *viz.* by *indictment*. And if they have *proceeded* WITHOUT *jurisdiction*, they ought to be stop-

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ped; and the information may be *quashed upon motion*; for as there is *no jurisdiction*, the REASON *does not hold* for putting the defendant *to* DEMUR; but we may in *such* case very properly quash, *on motion*. Consequently, this information, being of this kind, ought to be quashed.

Per Cur. unanimously—RULE for quashing the information made absolute: and the former RULE (prayed for quashing the *certiorari*) DISCHARGED.

Wednesday 29th June, 1757.

BRIGHT, Executor of HANNAH CRISP, Widow, *versus* EYNON.

(*Mr. Justice* WILMOT *was absent; sitting in Chancery, as one of the Lords Commissioners of the Great Seal.*)

New trial granted where the jury had drawn a wrong conclusion, on facts admitted on both sides. [2 Ves. 440.]

THE plaintiff's counsel moved for a NEW TRIAL, upon payment of costs; and obtained a rule "to shew "cause why this *verdict* should not be SET ASIDE, upon "payment of costs."

Lord MANSFIELD said that he did not choose, in any cause tried before him, to conclude the matter by a short report, "that he was satisfied, or dissatisfied, with the "verdict." He would state the case particularly to the court; and reserve declaring his opinion of the verdict, (which he had not yet intimated, either at the trial or since,) till he had heard the counsel on both sides.

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This was an action upon the case, brought by the plaintiff as executor of *Hannah Crisp* widow, deceased, against the defendant, upon a promissory note in the following words (all of the defendant's own writing,) which was proved and read: "I acknowledge to have borrowed "of Mrs. *Hannah Crisp*, this 29th day of *September* 1753, "the sum of 60*l.* for which I promise to pay 5*l. per cent.* "*per annum*, and to be accountable for the whole, six "months after notice given for that purpose, *John Eynon*, "*September* 29*th*, 1753."

The defendant set up a *discharge* by a writing in the following words: "I promise unto *John Eynon*, that, *in* "*consideration* of his paying unto me, interest for sixty "pounds he has of mine, during my life, after the rate of "5*l. per cent. per annum*, that then the said sixty pounds, "at my decease, shall be *his*, and his note for the same "shall be *void* and of *none effect*. Witness my hand, this "10th of *October* 1753, *Hannah Crisp*." The *body* was all *his* own hand; but he called two witnesses who said they believed the *name* subscribed to be the hand of the testatrix: but their knowledge of her hand was very slight; one of them having only seen her sign a receipt.

He alledged that she gave this discharge, in consideration of a marriage between him and *Rebeccah Bright* his now wife, (sister to the plaintiff.)

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He produced a will, in his own custody, bearing date the 11th of *August* 1753; by which the testatrix had made the said *Rebecca Bright* her executrix and residuary legatee.

This marriage was not till *May* 1754: the testatrix died in *April* 1756.

It came out, upon his own evidence, that the testatrix was not worth 200*l.* and that she paid 5*s.* a week or at the rate of 13*l.* a year, for her board. He could make no proof of the consideration alledged: the farthest that any of his witnesses went, was to say "that the testatrix "seemed to approve the match."

The plaintiff, in reply, insisted "that the signature "was *forged*." *Josias Bright* swore, that the defendant's wife did not know the defendant had borrowed any money from the testatrix, till after she was married. After she was acquainted with it, she pressed him to pay the money, out of a legacy of 150*l.* from one *Sarah Hart*, which he received: for the testatrix might call it in. The defendant bid her not be uneasy: "for I must "have six months notice."

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Several witnesses proved, that *Hannah Crisp*, about *Michaelmas* 1754, talked of calling in the money upon this note, and lending it to other persons.

That in 1755 and 1756, she ordered letters to be wrote to the defendant, for the money. When she gave these orders, she produced the defendant's note, and said, "the "interest was not enough to maintain her."

It was proved, that the defendant entered a *caveat* at *Doctor's Commons* in *April* 1756: and when he found she had made a will in favour of the plaintiff, and consequently revoked that which was in favour of his wife, he was very warm, and mentioned a note from him to her; and declared he would not withdraw his *caveat*, unless it was given up.

The plaintiff examined no witness to say the signature was not her hand. By way of rejoinder, they called witnesses to the defendant's character: who gave him a good one.

The defendant instructed his counsel to say, that he always understood the gift to be revocable by *Hannah Crisp* during her life; but if she did not revoke or call in her money during her life, then the debt was to be discharged.

The principal question made at the trial was, "whether "this latter note was forged, or not." And, as to that, the two witnesses who believed it to be her hand, were

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not opposed by any witnesses to the contrary: the reason given was, that the plaintiff had no opportunity of getting it inspected.

His lordship said, he left two questions to the jury: (1st.) "Whether the name of the testatrix was *forged*;" (2d.) If they took it upon the evidence laid before them, to be her hand, then "whether it was not obtained by "*fraud*, and without her *knowing* the contents and effect "of the writing she signed."

The jury found for the defendant.

Lord *Mansfield* intimated nothing, then, as to his own opinion of the case; and professedly avoided doing it now, till he should have heard the counsel.

[393] They were accordingly heard. And they who shewed cause against the rule, went very much at large into the *propriety* and *rise* of granting *new trials*. They urged, that a verdict ought to be *conclusive*, where evidence of any sort was given on *both* sides. That the *forgery* here was the *only* question: if the plaintiff objected *fraud* and *imposition*, he must go to a court of *equity* for relief.

Lord Mansfield—Trials by jury, in civil causes, could not subsist now, without a power, *somewhere*, to grant new trials.

If an erroneous judgment be given in point of *law*, there are *many* ways to review and set it right.

Where a court judges of fact upon *depositions in writing*, their sentence or decree may, *many* ways, be reviewed and set right.

[Comb. 238.] But a general verdict can *only* be set right by a *new trial*: which is no more than having the cause more deliberately considered by *another jury*; when there is a reasonable doubt, or perhaps a certainty, that *justice has not been done*.

The writ of *attaint* is now a mere sound, in *every* case: in *many* it does not pretend to be a remedy.

There are numberless *causes* of false verdicts, *without* corruption or bad intention of the jurors. They may have heard too much of the matter, before the trial; and imbibed prejudices, without knowing it. The cause may be intricate: the examination may be so long as to distract and confound their attention.

Most general verdicts include *legal consequences*, as well as propositions of fact: in drawing these consequences, the jury may mistake, and infer directly contrary to law.

The parties may be *surprized*, by a case falsely made at the trial, which they had no reason to expect, and therefore could not come prepared to answer.

If *unjust* verdicts, obtained under these and a thousand like circumstances, were to be conclusive for ever, the determination of civil property, in this method of trial,

would be very precarious and unsatisfactory. It is absolutely *necessary to justice*, that there should, upon many occasions, be opportunities of *reconsidering* the cause by a new trial. And it is done in a way very favourable to the parties for whom the wrong verdict is given: it is, *upon* payment of *costs*.* Whereas in *other* cases where a wrong judgment is reversed, costs are paid as if the right judgment had been given in the first instance.

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It is NOT *true* "that no new trials were granted *before* "1655;" as has been said from *Style* 466.

In *Slade's* case, *M.* 24 *C.* 1. (which was in 1648,) in *B. R.* reported in *Style* 138, the court was moved for judgment, formerly stayed upon a certificate, made by Baron *Atkyns*, "that the verdict passed against his "opinion." *Bacon*, Justice said, "judgments HAVE BEEN "arrested in the *Common Pleas*, *upon such certificates*." *Hales*, of counsel with the defendant, prayed that the judgment in that case of *Slade* might be arrested, and that there might be a *new trial*; "for that it HAD BEEN "DONE THERETOFORE in like cases." Indeed that case, as there reported, represents *Rolle*, Justice, to hold "that "it ought not to be stayed, *though it have been done* in the "*Common Pleas*: for that it was too arbitrary for them to "do it." And he adds "you may have your attaint "against the jury; and there is no other remedy in law for "you: but it were good to advise the party to suffer a "new trial, for better satisfaction."

In the case of *Wood* v. *Gunston*, *Michaelmas* 1655, *Banc. Sup. Style* 466. (which was an action upon the case, for speaking scandalous words of the plaintiff, and a verdict for the plaintiff, with 1500*l.* damages,) the defendant moved for a new trial. And *Glynn*, chief justice, said "it was in the *discretion of the court*, in *some* cases, to "grant a new trial: but this must be a *judicial* and *not* "*an arbitrary* discretion. And it is FREQUENT IN OUR "BOOKS, for the court to take notice of the miscarriages "of juries and *to grant new trials* upon them. And it is "for the *people's benefit*, that it should be so: for a *jury* "may sometimes, by indirect dealings, be moved to side "with one party, and not to be indifferent betwixt them; "but it cannot be so intended of the court." And in that case, *a new trial was ordered*, upon the defendant's paying full costs; the judgment standing as a security to pay what might be recovered upon the next verdict.

The reason why this matter cannot be traced *further back*, is, "that the old report books do not give any "accounts of determinations made by the court upon "*motions*."

Indeed, for a good while after this time, the granting of new trials was holden to a degree of *strictness*, so intole- [4 Burn. 659.]

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rable, that it drove the parties into a *court of equity*, to have, in effect, a new trial at law, of a *mere legal* question; because the verdict, in justice, under all the circumstances, *ought not to conclude*: and many bills have been retained upon this ground; and the question tried over again at law, under the direction of a court of equity. And therefore of *late* years, the courts of law have gone more *liberally* into the granting of new trials, according to the circumstances of the respective cases. And the rule laid down by Lord *Parker*, in the case of the *Queen* against *the Corporation of Helston*, *H.* 12 *Ann. B. R.* * seems to be the *best general rule* that can be laid down upon this subject, *viz.* "doing *justice* to the party," or in other words "attaining the *justice* of the case."

* See *Lucas's* Reports, pa. 202.

The REASONS for granting a new trial must be collected from the *whole* evidence, and from the *nature* of the case considered under *all its circumstances*.

This power may be exercised at much less expence of time and money, therefore *more beneficially for the subject*, by the court of *common law* where the cause has been tried.

Of late years, new trials have been granted not only after trials at *nisi prius*, but also after trials *at bar*. And it is at least *equally reasonable* to do it after trials at bar, as after trials at *nisi prius*, (if the justice of the case demands it;) or, indeed, rather *more* so, as the latter must be done upon what could have actually and personally appeared to a *single* judge only, whereas the former is grounded upon what must have manifestly and fully appeared to the *whole* court.

I come now to the present verdict; and should be sorry that the question depended upon *my* being satisfied, or dissatisfied: and therefore I have stated the whole.

If the matter in dispute was of *great value*, I will not say that all the suspicious circumstances *might not* be a ground for a new trial; to give the plaintiff an opportunity of getting the instrument *inspected* by persons acquainted with her *hand*; though I think upon the evidence *laid before the jury*, the verdict, in *that* respect, was *right*.

What I go upon is the apparent manifest FRAUD *and* IMPOSITION in *obtaining* the discharge from the testatrix, if she *really* signed it.

[2 P. Wms. 206. Hard. 56, 57.]

FRAUD or COVIN may, in judgment of the law, *avoid* every kind of act: many instances are put in *Fermor's* case, 3 *Co.* 77.

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[See 2 Burr. 936, 937. post. 474. 2 P. Wms. 205, 206, 208. Hard. 57. 6 Vin. 485. pl. 4 & 5.]

"*What* circumstances and facts *amount* to such fraud "or covin," is always a question of *law*. Courts of equity, and courts of law, have a *concurrent* jurisdiction, to suppress and relieve against FRAUD. But the interposition

of the former is often necessary for the *better investigating* truth, and to give *more compleat* redress. (a)

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The writing, upon the *face* of it, speaks IMPOSITION. It purports being for *consideration*. She releases the principal, *in consideration of 5l. per cent.* during her life: which is only legal interest, and the precise rate he was obliged to pay by his note. The defendant has set up *another* consideration, *not* expressed: which is not only *not proved* by him, but *disproved* by the evidence on both sides.

He now contends, and his counsel have argued, "that "it was intended to be revocable by her during her life; "and therefore was only in the nature of a legacy." That power "to revoke" is *omitted:* the writing, all of his *own hand*, and kept in his *own custody;* and if it was in the nature of a legacy, it is *revoked* by the subsequent will.

The testatrix *never imagined* she had stripped herself of this money: in her *circumstances*, it would have been madness. The defendant, *during her life*, did not dare to say, even to his own wife, "that the testatrix *had given* "him this money."

He did not dare to claim it, *immediately*, after her death: but would have *compounded*, by withdrawing his caveat, to have got his note delivered up. *No answer* was attempted, by proof, to the *apparent imposition*. Upon his own case stated by himself, and the evidence on both sides, the transaction to get her hand to this writing must have been *fraudulent:* and if it be so, the law says "he shall *not* "*avail* himself of it."

The *attention* of the jury was artfully drawn to the [Hard. 56, 57.] heinous charge of forgery, *only*. And I left the question of FRAUD to them, without any *express* direction "that "the circumstances spoke fraud apparent." The *same* jury might, upon reconsideration, find a *different* verdict. I dare say, they *meant* to do right.

But the merits of the case appearing to me in this light, I am clearly of opinion that there *ought* to be a NEW TRIAL.

(a) A court of equity may in some cases give relief against the bar of the statute of limitations, where a court of *law* cannot. *Booth* v. *Lord Warrington*, 28th *April* 1714, in *Dom. Proc.* This seems to have been admitted by the case; but by the questions put to the judges, it seems as if, even in that case, an action of deceit or some other action might have been maintained at law; and if so, that is a case rather in confirmation of, than in contradiction of the generality of the extent of Lord *Mansfield's* opinion.

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These are my sentiments: my brothers will judge whether I am right, or not.

Mr. Just. DENISON concurred in them.

He added, that it would be difficult perhaps to fix an *absolutely general rule* about granting new trials; without making so many exceptions to it, as might rather tend to darken the matter, than to explain it: but the granting a new trial, or refusing it, must depend upon the LEGAL DISCRETION of the court; *guided by the nature and circumstances* of the particular case, and directed with a view to the *attainment of justice*.

In the present case, he said it appeared to him, "that "the testatrix, Mrs. *Crisp*, had been *imposed upon*." And he held "that FRAUD was sufficient to *invali-* "*date* this her defeazance (the subsequent note of dis- "charge signed by her,) even in a *court of* COMMON "*law*." For proof of which, he cited *Throughgood's* case, 2 *Co.* 9. where it was holden, "that the deed of "an unlettered layman, into the execution whereof he "is *deceived*, by its being wrong read to him, or falsely "explained to him, (though by a stranger to the party "to whom the deed is made,) shall *not bind* the unlet- "tered person who made it."

Mr. Just. FOSTER agreed to the propriety of what had been said; as to such cases in which the juries give verdicts *against* evidence; and even as to cases where there may be a contrariety of evidence, but the evidence, upon the whole, in point of probability, greatly *preponderates against* the verdict: (which, depending on a variety of circumstances, is matter of legal discretion, and cannot be brought under any general rule:) but in all cases where the evidence is *nearly in æquilibrio*, he declared that he should always think himself bound to have regard to the *finding of the jury*; for "ad quæstionem" "*facti* respondent *juratores*." In *such* a case, it is *not* the province of the *judge*, to determine: it ought to be left to the *jury*.

* See Trials per Pais, pa. 447, (the last paragraph of the book,) extremely strong on this subject, in favour of juries.

FRAUD will *invalidate*, in a court of *law*, as well as in a court of *equity*. We all remember the case of *Wyndham* v. *Chetwynd*, *P.* 1755, 28 *G.* 2. in this court: where the court directed the jury to find "*non devisavit*," though there was a *devise in fact*; but it was *obtained by fraud*, and therefore considered as *no devise* at all.

And he agreed with Lord *Mansfield* and Mr. Justice *Denison*, that, in the present case, the defeasance or discharge (the subsequent note) was obtained from Mrs. *Crisp by fraud*; and that it *appeared*, upon the whole of the evidence "that it was *so obtained*:" and that the jury have drawn a WRONG CONCLUSION from facts *admitted on both sides*.

Therefore he thought the verdict ought to be *set aside*. *Per Cur'.** unanimously,

The RULE for *setting aside* the verdict was made *absolute*.

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* Note, Mr. Justice *Wilmot* was absent (in Chancery.)

Mr. *Gould*, of counsel for the plaintiff, moved that it might be *without costs*: but he was answered by Mr. Justice *Denison* and Mr. Justice *Foster* (Lord *Mansfield* being now gone,) that this was directly contrary to the terms upon which he himself had moved it. And accordingly they only ordered the verdict to be set aside, *Upon* payment of costs by the plaintiff.

Memorandum—The cause never came on to be tried again. Probably, the defendant acquiesced in the opinion of the court, and paid the money.

A BLACK MERCHANT OF BOMBAY *versus* DORRELL.

An East-India merchant being bound at Bombay in a bond to appear in this court to answer the demands of another merchant there, permitted to appear here accordingly.

MR. *Dorrell*, who came from *Bombay*, and had a dispute with a black merchant there, of a civil nature (concerning property,) had, upon his leaving *Bombay*, entered into a bond conditioned for his *appearance in this court* at his arrival in *England*, TO ANSWER *to any demand*, that might be made against him by or on behalf of the said *black merchant* in that country: and also to abide by the determination of the mayor's court there, or else to appeal therefrom to the king in counsel.

Serj. *Hewitt* moved, on behalf of Mr. *Dorrell*, that he *might appear in this court, in such* METHOD *as the court should judge proper*, in order to *prevent the forfeiture* of his bond.

The COURT, after requiring notice to be given to the *East-India-Company* (who did not oppose it,) admitted his appearance; and directed that he should enter into a recognizance (with sureties) in the penalty of the bond, to answer the demands expressed in the condition of the said bond; which he was to do before one of the judges of this court; as his sureties were not now present.

Note—This rule was taken on the *civil* side of the court.)

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Order of sessions on the stat. of 11 Geo. 2. c. 19. for preventing frauds by tenants confirmed. [See Sayer, 304.]

REX *versus* MIDDLEHURST.

MR. *Norton* shewed cause against quashing an order of two justices, and an order of sessions confirming it, made in pursuance of the act of 11 *G.* 2. *c.* 19.

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§ 3. for the more effectual securing the payment of rents, and preventing frauds by tenants,) against one *Thomas Middlehurst*, for wilfully and knowingly aiding and assisting in fraudulently removing and conveying away five cows, &c. OR in concealing the same.

Mr. *Gould*, who had moved to quash these orders, founded his motion upon two objections; *viz.*

1st Objection. The whole adjudication refers to the complaint of one *Thomas Weston*; wherein there is *no charge upon Chesterton* the *tenant*, at all: nor upon the defendant *Middlehurst*, for aiding and assisting *him*; neither is it stated "that *Chesterton* the tenant DID *re-* "*move* the goods."

2d Objection. The act creates two offences, *viz.* assisting in *removing*, and assisting in *concealing* the goods. Now it is not specifically charged upon the defendant *Middlehurst*, that he wilfully and knowingly did *either one* of these two things: it is only alledged that he wilfully and knowingly did one OR the other. In 1 *Salk.* 371. *Rex* v. *Stocker*, an indictment for forging *or* causing to be forged, was holden ill; because the charge was in the *disjunctive*. 2 *Hawk. P. C.* 225. § 60. An indictment charging a man *disjunctively*, is VOID: for the offences are distinct: and it appears not, of *which of* them the defendant is accused. So here, it does not appear, WHICH of the *two* offences the justices have convicted him of.

And 2 *Ld. Raym.* 1265. *Queen* v. *Bains*, proves that the court will make no intendment against the defendant.

Upon which objections, he obtained a RULE TO SHEW CAUSE "why the orders should not be quashed."

And now Mr. *Norton* shewed the following cause against quashing them.

First. [S. C. Bull. Ed. 1780, p. 466. Sayer 304.]

As to the 1st objection—"That it is not described "sufficiently, *what* the *offence* is." He answered that this is an *order*; and the court will *not intend* it to be ill. To prove which he cited *Rex* v. *Bisser*, *Tr.* 29 *G.* 2. *B. R.*

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Secondly.

As to the 2d—The charge being in the *disjunctive*, "that he wilfully and knowingly aided and assisted the "tenant in removing the goods, OR in concealing the "same." He said, the crime and the punishment are the *same* upon *both*: and the defendant *was heard*.

Mr. *Gould* for the defendant, replied—

1st. It is not at all stated "that the *tenant* DID *remove* "the goods."

2dly, The aiding and assisting *in removing*, is a *different* offence from aiding and assisting *in concealing*: and here it is only charged in the ALTERNATIVE.

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LORD MANSFIELD—Upon INDICTMENTS, it has been so determined, "that an *alternative* charge is *not* good;" as "forged *or* caused to be forged:" though *one only* need be *proved*, if laid *conjunctively*, (as "forged *and* caused to "be forged.") But I do not see the reason of it: the substance is exactly the same; the defendant must come prepared against both. And it makes no difference to him, in any respect.

But this is an order: and, being *good in substance*, needs not be literally *so strict*.

Mr. Just. DENISON thought also, that the cases upon *indictments* are very nice. But this is *not* an indictment, but an ORDER: and therefore, being good in *substance*, needs not be so strict in *form*, as an indictment must be. And either aiding or assisting *in removing*, OR aiding or assisting *in concealing*, is equally an offence: and these are the very words of the act. It is *only form*; and does not at all vary the defence or punishment. I am not therefore inclined to the same strictness as was observed in the case of the *King* v. *Stocker*, 1 *Salk.* 371.

Per Cur.* RULE DISCHARGED:
And consequently BOTH ORDERS AFFIRMED.

* Mr. Justice *Foster* was out of court; and Ld. Commissioner *Wilmot*, in Chancery.

The end of *Trinity* Term 1757, 30 & 31 *Geo.* 2.

MICHAELMAS TERM,

31 *GEO. II. B. R.* 1757.

Monday, 7th November 1757.

Land-waiter at the customs not an ambassador's menial-servant. [See 3 Wils. 34. 3 Durn. 80.]

MASTERS *versus* MANBY.

MR. *Norton* moved that the defendant might be discharged upon common-bail, as being a *menial servant to a public minister*, (*viz.* messenger to Baron *Haslang*,) on 7 *Ann. c.* 12.

But the defendant was not able to make out a case sufficient to induce the court even to grant him a rule to shew cause. He not only had been formerly a trader, and a bankrupt; (upon which indeed no stress was laid, as it appeared that he had not traded at all, since he had obtained his certificate under the commission;) but was confessedly a *land-waiter* at the custom-house in *London*, and *officiated there* as such: though he swore to the hiring, and also to the having *sometimes* executed this service to the baron, as *his messenger*.

* V. post. pa. 1478, and pa. S. P.

Yet, upon the whole, Lord MANSFIELD was clear that this man could never be esteemed a **bonâ fide* domestic of a foreign minister: and the other judges concurring, the motion was DENIED.

Monday, 14th November 1757.

Non pros. obtained against a common informer not set aside.

BENNET, qui tam, *&c. versus* SMITH.

THE COURT refused to *set aside a non pros. regularly* obtained by the defendant, against the plaintiff, who was only a COMMON *informer*, (who sued for a penalty of 10,000*l.* upon the statute of usury;) though the plaintiff offered to pay the costs of setting it aside.

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For, though LORD MANSFIELD seemed to think that the case might perhaps have borne a different consideration, in case the plaintiff had been the *party* REALLY INJURED, and had sued in order to come at *justice and reparation* for such real injury; yet not only his lordship himself, but

* Mr. Just. *Foster* was not in court.

The whole COURT now* present were clear and unanimous that where a MERE *common informer*, who sued for PUNISHMENT *only*, had been guilty of a slip or mistake which put him *out of court* and intitled the defendant to enter a *non pros.* against him, they would not

exercise their *discretionary power*, in setting aside this *non pros.* thus regularly obtained, and restoring the *mere common informer* to an opportunity of proceeding for the sake of *punishment* only.

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And they distinguished the present case from cases of AMENDMENT: which indeed the court would not scruple to make, even in cases of *qui tam* actions, where there was any thing to *amend by;* and which they had frequently done, in some instances that were mentioned or at least hinted at; as, in particular, the giving leave to *change the county*, in a *qui tam* action, on Mr. *Norton's* motion, not many terms ago.

REX *versus* ROBERT CHAPPEL.

Tuesday, 15th November 1757.

Rule to shew cause granted for a criminal information upon producing copies of letters.

A MOTION was made by Mr. *Burland*, and supported by Mr. *Norton*, for an information for *sending a challenge*, by letter, to Mr. *Hamilton* of *Wells;* but they only produced *copies*, NOT the ORIGINALS of the letters wherein the challenge was contained.

THE COURT made a rule to shew cause, upon reading the COPIES *only* of the letters; (such copies being sufficiently verified.)

REX *versus* WILLIAMS.

Wednesday, 16th November 1757.

Information in nature of quo warranto will lie for holding a court of record, and presiding therein in the absence of the bailiffs, the defendant not being one of them. [1 Black. 92. S. C.]

THIS was a cause in the crown-paper, upon a writ of error directed to the justices of the great session in the county of *Denbigh*, upon a judgment given there for the king against the defendant after a verdict, upon an information brought against him in that court by the prothonotary and clerk of the crown there, *at the relation* of *John Mostyn*, esq. *according to the form of the* STATUTE in that case made and provided.

The information sets forth the incorporation of the town of *Denbigh*, by letters patent dated 14th *May* 15 *C.* 3. Which gave them power to have and *hold within the borough a court of record*, on every *Friday* in every second week throughout the year, to be held *before the bailiffs* of the said borough for the time being, or one of them.

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[S. C. Sayer's Law of Costs 242. Bull. 211. And see 5 Durn. 377.]

Then it alledges the acceptance of these letters patent by the corporation.

It further shews, that by virtue of these letters patent, the said court of record, from the time of making the said letters patent, to the time of exhibiting the information, ought to have been held within the said borough on every *Friday* in every second week through the year, *before*

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the bailiffs of the said borough for the time being, or one of them.

Then it charges that *Friday* the 13th day of *December* 25 *G.* 2. was a day on which the said court of record ought to have been so held within the said borough, by virtue of the said letters patent. That the defendant (well knowing the premises aforesaid) *on the said 13th day of December* 25 *G.* 2. at the borough of *Denbigh* aforesaid in the county of *Denbigh* aforesaid, *in the absence* of *John Hosier* gentleman and *David Williams* gentleman, who then and long before and afterwards were *the bailiffs* of the said borough, and of each of them, did wrongfully and unjustly PRESUME TO HOLD *and* DID *hold* THAT *court of record within the said borough*, WITHOUT *any* legal warrant, right or authority whatsoever; and did then and there *preside* therein; he the said *Thomas Williams* (the defendant) then NOT *being one of the bailiffs* of the said borough.

PLEA—that he *did* NOT *hold* the said court of record in the said information supposed to have been held by the said *Thomas* (the defendant) *nor did preside therein*, in manner and form as by the information is charged against him. (Upon which, issue is joined.)

And the defendant further saith, that at the time mentioned in the information, HE HAD NOT, NOR HATH *any warrant*, right, power, or authority; but *wholly* DISCLAIMS to have any warrant, right, power, or authority whatsoever to hold the said court of record, or to preside therein; and this he is ready to verify. Wherefore he prays judgment, and that he of the premises aforesaid may be discharged and dismissed by the court, and so forth.

Upon the issue joined, the jurors find that the defendant, on 13th *December*, 25 *G.* 2. at the said borough of *Denbigh*, in the absence of *John Hosier* gentleman, and *David Williams* gent. who then and long before and afterwards were the bailiffs of the said borough, and of each of them, *did* wrongfully and unjustly presume to hold, and
[404] *did hold* the said court of record in the said information mentioned, within the said borough, *without* any legal warrant, or right, or authority whatsoever; and *did* then and there *preside* therein; (he the said *Thomas Williams* then not being one of the bailiffs of the said borough;) as in the said information is alledged.

The judgment of the court is "that the defendant do "*not in any manner intermeddle with or concern himself* in "and about holding of the said court of record within "the said borough, in the said information specified; "but that he be absolutely *forejudged and excluded from* "*holding* the said court for the future; and that in order

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"to satisfy our sovereign lord the king, for and on account of the usurpation aforesaid, he be *taken*, and so forth; AND that the said *John Mostyn, the relator* above-mentioned in this behalf, *do recover* against the said *Thomas Williams* the sum of 141*l.* 12*s.* 11*d.* *for his* COSTS by him laid out and expended in carrying on his suit in this behalf, ACCORDING *to the form of* STATUTE *in such case made and provided.*"

The assignment of errors is—

1st. General—*viz.* That judgment is given for the king against the defendant: whereas by the law of this kingdom, it ought to have been given for the defendant.

2dly. Special—*viz.* And also in this, that it appears by the said record, that judgment in the plea aforesaid was given "that the said *John Mostyn*, in the said plea named *the relator therein, recover against the said Thomas Williams* 141*l.* 12*s.* 11*d.* *for his* COSTS laid out in that suit:" whereas, by the law of this realm, no *judgment ought to have been given, in the plea aforesaid, for* THOSE *or for any other* COSTS in that suit. And therefore in *that* respect also, there is manifest error.

To this assignment of errors there is a joinder in error, in the name of the king's coroner and attorney in this court.

Mr. *Madocks*, for the plaintiff in error—

Objected, that this was NOT *a case within* 9 *Ann. c.* 20: and that therefore there could not, nor ought to be any judgment for COSTS.

That act takes in only two cases; 1st, where an office is *usurped:* and 2dly, where he *has had* a title, but unlawfully *holds* and exercises the office: but the whole is *confined to* OFFICES *in corporations;* and the words "said offices and franchises" are tied up to OFFICES *in corporations*, or to the franchise of being a *freeman.* (See sections 4 & 5.) [405]

Whereas this information is only for *holding a court* in the borough, in the absence of the two bailiffs; he not being one of the bailiffs of the borough. So that this is *no direct charge* of usurping the OFFICE *of bailiff.* And an *indirect* charge is not sufficient: 2 *Hawk. P. C.* 261. "Whatsoever certainty is requisite in an indictment, the same, at least, is necessary also in an information." 1 *Salk.* 376. *Rex* v. *Knight*; and 1 *Ld. Raym.* 527. *Rex* v. *Knight and Burton*, S. C.; prove expressly "that *argumentative* informations are naught."

This is only a charge of doing *a single* act; which act belonged indeed to the office of bailiff: but it is no charge of his *claiming the* OFFICE *of bailiff*; nor could the right to the OFFICE *of bailiff* be tried *upon* THIS *information.* And

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this, he said, was a new case: for the common way is *to* charge the defendant *directly* with usurping an office; whereas this only charges him with facts that may indeed be *evidence* of such usurpation of the office of bailiff, but does not charge him with a direct usurpation.

Secondly. It cannot properly be called an information *in nature of a quo warranto* at *common* law: for it does not charge him with exercising the office at the TIME *of exhibiting the information.*

"*Non usurpavit*," generally and alone, is not a sufficient plea to an information in nature of *Q. W.* at common law. *Godbolt* 91. Sir *Jervis Clifton's* case; and 3 *Leon* 184. Sir *Gervase Clifton's* case; S. C.*

* This case was not determined; V. Godbolt, 93.

This information only charges him with holding the court upon a particular day.

On the whole, therefore, this information is not good at *common law:* no more is it, upon the act of parliament.

Mr. *Hall contra, pro rege.*

This STATUTE-*judgment*, "for the *costs*," is good: and so also is the *common-law* judgment, "of *ouster* of the "franchise."

1st. The act of 9 *Ann*, *c.* 20. ought to be *liberally* construed.

This information is an information for usurping the *office of one of the bailiffs* of the borough of *Denbigh*. The facts charged upon the defendant *amount* to an usurpation of the *office:* though the word "*usurp*," is not indeed made use of. It is not necessary to use this or any other *technical* term. Therefore this usurpation of the *office of bailiff*, is here sufficiently alledged.

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But, at least, it is a charge of an usurpation of or intruding into a *borough franchise:* which is a case within the act. The preamble and body of the act prove this.

This is for holding and presiding at a court *in* a corporation: which certainly is a *corporation-franchise*. And the defendant, by his manner of pleading, has considered this as an information on the act, for a borough-franchise: for he first pleads to the particular charge, and then disclaims.

But, at least, this case shall be taken to be within the *equity* of the statute: which was made for the benefit of the common-wealth. Which point he endeavoured to prove, from several instances of *extensive constructions* of statutes; and particularly of statutes giving costs. For the latter, he cited *Cro. Eliz.* 257. *pl.* 36. * *Haselip* v. *Chaplen*. And he said, that the court often ordered costs, even where the statutes had not given them.

* Adjournatur.

As to the case of *Rex* v. *Knight*, the facts there charged were not sufficient to support the conclusion: it was an imperfect defective information. But here, it is posi-

tively alledged "that he held this court without any legal "warrant, right, or authority whatsoever." 1757. REX v. WILLIAMS.

And this may be made good by intendment. *Raym.* 34, 35. *The King* v. *Read. Siderf.* 91. *Rex* v. *Cover. Cro. Jac.* 473.

Secondly—As to the not charging the defendant with exercising the office *at the time* of the information; *one single act* is sufficient.

Upon the whole, this case is either within the *words*, or at least within the *intent* of the act.

Mr. *Madocks* in reply—there is no *express*, but only a *circumstantial* charge, of exercising the *office* of bailiff.

The *equity* of every statute stands upon the foundation of the statute itself. Now this act is certainly confined to *offices* in corporations, affecting the rights of election of members to parliament; and was not intended to take in rights of holding *courts* or *fairs* in corporations; though the words of the *title* are indeed general, "the "rights of offices and franchises in corporations and "boroughs." But the *body* of the act confines the word "franchises" to the rights of being free: and the body of the act is the part to be regarded. [407]

And here is no charge of intruding into the *whole* office: which is an *entire* thing. The usurpation of *part* cannot be an usurpation of the *whole* of an office.

Secondly—The information ought to be good in itself and upon its own strength, independent of the plea. This is an information only for doing this *single* act *six years ago*.

LORD MANSFIELD—

1st. The act is meant to extend to *all officers* OF *corporations*, as such; and, as far as relates to all the corporate rights of the burgesses and freemen, it is very legally, clearly, and correctly drawn: but it is not within the reason or meaning of the act, that it should extend generally to ALL offices or franchises exercised WITHOUT *authority from the crown*, within a corporation. It was meant to be *confined* to such franchises as were claimed in instances affecting those rights between party and party.

The *title* cannot control the *body* of the act.

And the *equity* of an act can be carried no further than to what was within the *view and intention* of the legislature, and the *mischief* meant to be prevented. Whereas here is *no such* equity, to bring the present case within the act.

Here is no charge of usurping or exercising or claiming the *office* of *bailiff*. I do not say that any particular *technical* words are necessary. But here are none that are at all tantamount: it is not even said that he held the court, "*as* bailiff." There is no argument neither, or inference, "that he did so:" rather indeed, the con-

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trary; for it seems implied in the very charge, that if they had been there, he could *not* have held it.

No fruit is obtained of this trial, but as of an usurpation *upon the crown* and for an *offence* or misdemeanour: here is nothing relating to the interest of any PRIVATE *persons*. And the manner of pleading proves nothing: for he was obliged to plead so, in *either* case.

Therefore, as a *statute*-judgment it is wrong.

2dly. But as to the COMMON-*law* part of the judgment —Mr. *Madocks's* objection will not hold. For he may certainly be punished for *one single* offence; though he goes no further. So that *this part* of the judgment is right.

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Mr. Just. DENISON concurred, that the *statute*-part of the judgment, as to the *costs*, is wrong: but the *common*-law part, *viz.* the judgment of "*exclusion* from the future "exercise of the franchise," is right.

As to the former—the charge is not within the act of parliament of 9 *Ann. c.* 20.

The information sets out the charter; which gives power to the bailiffs to hold this court in the corporation, and it calls upon the defendant to know by what authority he held it in the absence of the bailiffs. But surely, this has no relation in the earth to the *office of* BAILIFF; nor will it be said that he could, upon *this* information, have been OUSTED *of the office of* BAILIFF. It was not, in the present information, necessary to set out as part of the charge upon the defendant "that the court "ought properly and regularly to have been holden *be*-"*fore the bailiffs*:" it had been enough, to have asked the defendant "by what authority *he claimed* to hold *this court* "*of record*;" (without mentioning the presence or absence of the bailiffs, at all.)

There are numbers of offices which a man may usurp, and be liable to an information for usurping; which are NOT *franchises in corporations*. But *these* "franchises" mentioned in the act, mean *corporate* rights or *rights* to *freedom* in corporations. The words of the act are plain, that this is *not* a case upon which the informer can recover *costs*.

The proceeding indeed may be, at *common*-law, for *punishment*. Therefore this *latter* part is right. But the judgment *as to* COSTS ought to be reversed.

[5 Durn. 378.] And the *mention of a* RELATOR is no more than *surplusage*, and may be rejected; and therefore *will not hurt* the common-law judgment.

Mr. Just. FOSTER was clear too—

1. That this case was not within the act: which never intended to give costs in cases of *this kind*. The word "franchises" in the act, means only freedoms and rights to be members of the corporation.

This act was drawn with great care and attention: (Judge *Powell* was the person who drew it.) And there is no reason to extend it beyond its intention. 1757. REX v. WILLIAMS.

2dly. The judgment at *common law* may be very right.

Mr. Just. WILMOT declared himself extremely clear in both points. [5 Burn. 379.]

Per Cur unanimously—

The *common-law* judgment, *viz.* as to the OUSTER, was affirmed: but the judgment for COSTS (which was founded upon the *statute*,) was REVERSED.

BOND *versus* ISAAC.

Monday, 21st November, 1757.

Scire facias against bail, after an exoneretur ordered, though not entered, irregular. [See 5 East, 462.]

THE *exoneretur* which had been ordered to be entered (*V. ante* 339, 340.) was *not actually* entered on the bail-piece, (by the omission of the proper officer who ought to have entered it:) but the PLAINTIFF himself was *apprised of the* surrender; though his attorney swore that *he* (the attorney) had no notice of it.

The plaintiff's attorney not being apprised of the surrender of the principal sued out *scire faciases* against the bail; who paid the money: but they were sued out into *London* (where the original cause of action was;) and *not into* MIDDLESEX, where the surrender was made, and where the bail-piece remained.

The bail had applied, upon both these irregularities, (*viz.* 1st. the PLAINTIFF'S *being apprised* of the surrender and order of the court; and 2dly, the *scire faciases* not being sued out into *Middlesex*;) that the *scire faciases* might be set aside for irregularity, with costs; and the money restored.

Mr. *Norton* was counsel for the bail, and had moved as above.

Sir *Richard Lloyd*, for the plaintiff, now shewed cause.

The COURT was clear, on *both* points, that the *scire faciases* were *irregularly* sued out; and granted Mr. *Norton's* motion, by making the rule absolute, as prayed: excepting only, that they omitted the *costs*; because it would have been to no purpose to have ordered them, as the plaintiff himself (who was apprised of the surrender) was gone abroad; and the attorney, (not being apprised of it) had not acted with any ill design or intention to oppress.

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SHEEPSHANKS et UXOR *versus* LUCAS.

P. 29 *G.* 2. *Rot'lo.* 622.

Tuesday, 22d November 1757.

Judgment in error, for the reversal of a common recovery. [Yelv. 57. 2 Lev. 38. Post. 413. 9 Vin. 550. pl. 3.]

ERROR from *C. B.* to *reverse a common recovery.* The wife of *Sheepshanks* claiming to be entitled (in common with others) to a remainder in fee (under the will of one *Broadbent*) after the death of one *Thomas Pierson*, tenant in tail, who was vouched in this recovery; her husband and she bring this writ of error; and the error assigned is "the *death of the* VOUCHEE, before "judgment:" concluding with an *averment.*

"*In nullo est erratum*"—is pleaded, (which *confesses* the error assigned, to be *true in fact.*)

Serjeant *Poole* for the plaintiff in error.

Without doubt, a person intitled to a remainder after an estate-tail, *may have a writ of error* to reverse a common recovery suffered by the tenant in tail. 3 *Co.* 3 *b.* The Marquis of *Winchester's* case, is express to this purpose; and gives the reason of it, at large. *Pigott, of Common Recoveries* 169. "If the vouchee die "before judgment, it is error." 1 *Ro. Abr.* 742. Title *Error*; letter A. *pl.* 3. 1 *Ro. Abr.* 747. Title *Error*, letter K. *pl.* 1. 1 *Ro. Rep.* 301. *Holland et al.* v. *Lee. Bridgman's Rep.* 71. S. C. *Holland et al.* v. *Jackson et al. Palmer* 224. *Darcy* v. *Jackson*, S. C. *Dyer* 90. *a.* 40, 188.

We claim under a devise by the will of one *Broadbent*, in remainder after an estate-tail given to *Pierson. Wynne* v. *Wynne, H.* 17 *G.* 2. *B. R.* is in point to this case—It was a writ of error by a remainder-man in tail: and the very same error was assigned, as is here. *There*, indeed, the *fact* (of the vouchee's dying before judgment) was *denied:* and it was, upon trial of the issue, found "that "she was alive at the beginning of the term; but *died* "*before the return* of the summons *ad warrantizandum.*" And the relation of law, (which was in that case insisted upon,) was not permitted to prevail. And the entry of her appearance *at* the said return (which was there entered on the record) was holden *not* to be contrary to the allegation of her death *before* such return: *because* such her appearance was only entered *as* BY ATTORNEY; whose authority ceased by her death. So that the error there assigned was *not* an assignment contrary to the record.

[411] Mr. *Luke Robinson, contra,* for the defendant in error. Common recoveries are *now* considered as common assurances; and are therefore to be favoured and supported.

Even *another* warrant of attorney shall be presumed though *one* already appears upon the record. 1757. SHEEP-SHANKS v. LUCAS.

1st Objection. *No one* can *maintain a writ of error* upon a judgment, but one who is either *party* or *privy*. But this plaintiff in error is neither *party* or *privy* to, nor *injured by the judgment* here complained of. It does not appear that *Broadbent*, under whose will she claims the reversion, was ever *seised* IN FEE of the estate: and therefore it does not appear how he had a *right* TO DEVISE the estate in the manner he has done. They *ought* to have *shewn* in their writ of error, "that he was seised in "FEE:" which the defendant *might have reversed*, if it had been so alledged.

2d Objection. No *scire facias* or *warning* has been given to *the* HEIR: who may be an *infant*, or may have many things to plead. *Bernard Lucas*, the recoveror, is the only defendant; who is *only* NOMINAL, but has *no real* interest. [1 Lev. 72.]

3d Objection. It appears upon this record, that *Bernard Lucas* has judgment to recover against THOMAS COWPER: but *Thomas Pierson* is no party at all to the writ. Therefore *Thomas Pierson* (who only came in as vouchee) had nothing to do with a judgment against ANOTHER *man*. Consequently *Pierson's* death before judgment is *no* ERROR: it can be only an *irregularity*. And NO JUDGMENT is given at all, against *Thomas Pierson;* the recovery is against *Thomas Cowper;* who is indeed to have recovery over, in value, against *Thomas Pierson*, &c. but this recovery over in value, against *Pierson*, is *not* the judgment *upon which* this writ of error is brought. *This* writ of error does *not tally with the judgment* of which it complains.

4th Objection. This error is *not well* ASSIGNED: for it is an error *in* FACT; and therefore ought to conclude *to the* country; which this *does not*. *Yelverton*, 58. *Rex* v. *Gosper and Shire*. "When a man assigns error in fact, "he ought to put himself *en paiis*." And the plea of "*in nullo est erratum*" *confesses nothing* but what is WELL *pleaded*. And that case is word for word the *same* with this, as to the conclusion of the assignment of errors: and there WAS a "*hoc paratus est verificare*," as well as here is. [1 Lev. 311. Com. 597, 600.]

Serj. *Poole*, in reply— [412]

1st. It is enough, if we suggest matter *sufficient to shew* that we are *privy to* and *affected by* the erroneous judgment. It is sufficient for us, to shew the devise of the remainder to us; without any necessity of shewing that the devisor was *seised in fee*.* And the precedents are so.—*Wynn* v. *Wynn* was so. Sir *John Dinely Goodyere's* case was so. *Darcy* v. *Jackson*, *Palmer* 224. is so deter- [*S. C. 1 Wils. 35, 42.]

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mined, "that *the title needs not* to be *set out*, as in a pro-"ceeding *to recover lands*." And all the entries are so.

2dly. The *scire facias* is brought against the *proper person*: which is the *recoveror*.

3dly. *Pierson* appears by his warrant and vouches: and there is judgment over, in value, *against him*.

4thly. There never was, nor properly can be, such a *conclusion to the* COUNTRY. Here is a *new* matter of fact introduced: which the other party *perhaps will not controvert*. We cannot conclude to the country TILL the other party *denies it*.

As to the case in *Yelverton*—*if* it be as cited, yet, it can never be supported. The assignment of an *error in fact* ALWAYS concludes with an *averment*.

LORD MANSFIELD was clear for the plaintiff in error, on *all* the points.

1st. The writ of error *needs not* to set forth a *complete* title: it is only required of the plaintiff in error, to shew the *connection and privity* between the person against whom the recovery is had, and the person who brings the writ of error. This is *not* like a proceeding to try the *right* of the land, or to recover the *land itself*. The precedents are so: and none are produced to the contrary.

2d Objection. No authority or reason is produced, for a *scire facias* to the *heir*.

3d Objection has no weight in it: and the case of *Wynn* v. *Wynn* is in point against it.

4th Objection. The conclusion with an averment, is right; and gives an opportunity to try the fact by the country, if the defendant in error chooses it: which is all that is requisite.

[413] So much as to the *form*. And

As to the *merits*—it is extremely clear, that a remainder-man *ought* to have this chance to the benefit of the entail; *viz.* to see that all the proper and requisite forms should be gone through, before he is barred of it.

It is plain that judgment ought not to be given against any man, *after* he is *dead*. And there could have been no judgment against the tenant to the præcipe in a common recovery, without a judgment likewise over, in value against the vouchee: they are *all* entered at one and the same time, and are part of the *same proceeding*.

Mr. Just. DENISON concurred—

1st. This GENERAL *allegation* is sufficient, surely, *in the* WRIT: he needs not shew a *complete title*. Nay, even in a *formedon*, I do not know that the title needs to be completely and fully set out in the WRIT. And *Wynn* v. *Wynn* is an authority, on this head.

[Carth. 111, 112.] 2dly. A *scire facias* to the *heir* was not necessary;

nor any *warning to* HIM: the *recoveror* has the *legal* right; and must be *taken* by the court, to have the real interest. 1757. SHEEP-SHANKS v. LUCAS.

3dly. The *death of the vouchee*, before judgment, is error in a common recovery; and *may be assigned* for such. *Wynn* v. *Wynn* was in point, as to this.

4thly. The case in *Yelv.* 58. is so far true, (and can mean no more than) that it ought to be put in a method of being tried by a *jury*. And here the plaintiff in error has done so: he says "he is READY *to verify it*." So that the defendant in error *might* have put it in issue, if he had pleased. But he has chosen to plead "*in nullo* "*est erratum*:" which *confesses the fact*, and puts the matter of law upon the judgment of the court.

As to the *merits*—the remainder-man has a right, both in law and justice, to reverse the recovery, if it be erroneously suffered.

Mr. Just. FOSTER and Mr. Just. WILMOT declared their clear concurrence in opinion with LORD MANSFIELD and Mr. Just. DENISON.

Per Cur. clearly and unanimously
JUDGMENT RESERVED.

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Friday, 25th November 1757.

WINDHAM, Esq. *versus* CHETWYND, Esq.

Pasch. 28 *G.* 2. *Rot'lo.* 53.

A will of land attested by three interested witnesses good. [S. C. 1 Black. 95. Bull. 265.]

A SPECIAL verdict upon a will of land, dated the 14th of *May*, 1750, and a codicil of the same date, made by *Walter Chetwynd* late of *Grendon*, Esq.

The special verdict—at which day, before our lord the king at *Westminster* come as well the said *William Wyndham*, *Malachi Lindon*, *Catherine Lindon*, *Thomas Stephens*, alias *Walter Paris*, alias *Walter Chetwynd*, *Susannah Blachnell*, *Henry Perrot*, *George Huddleston*, and *James Crofts* by their attorney, as the said *William Henry Chetwynd* by his attorney. And the jurors, &c. being summoned, &c. do come, &c. and being elected, &c. do find, as to the first issue joined between the said parties, that the said *Walter Chetwynd* was, at the time of making the said writings, importing to be his last will and codicil, of sound mind. As to the third issue, they find that the testator did not, by the said writing importing to be his last will, devise to the aforesaid *William Wyndham* and his heirs any lands or tenements in the county of *Warwick*, in trust or for the benefit of the said *Thomas Stephens*, alias *Walter Paris*, alias *Walter Chetwynd*. And as to the fourth issue, the jury find that the

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testator did not, by the said writing, importing to be his last will, devise to the said *Catherine*, now *Catherine Lindon* the wife of the said *Malachi Lindon*, an annuity of 200l. by the year, for the term of her natural life. And as to the second issue, the jury find that the testator was in his life-time seised in fee, of certain lands, tenements, &c. in the several counties of *Warwick* and *Stafford*, of the yearly value of 3100l. and being so thereof seised, he the said *Walter Chetwynd*, in his life-time, signed, sealed, and published a certain paper-writing bearing date the 14th of *May*, 1750, purporting to be his last will and testament, and likewise another paper-writing purporting to be a codicil indorsed on the said first-mentioned paper-writing, and of the same date; (which will and codicil it sets out *in hæc verba*;) and in the former, there is a *charge* upon the residue of his *real* and personal estates, for the payment of all his just *debts*, legacies, and incumbrances; and that the said paper-writings were so signed, &c. by the said *Walter Chetwynd*, in the presence of *Stafford Squire*, *Robert Baxter*, and *Josiah Higden*; who likewise attested the same at his request, in his presence, and in the presence of each other. And they further find that the said *Stafford Squire* and *Robert Baxter*, being attornies at law, were, in or about the year 1747, employed by the said *Walter Chetwynd* to solicit a private act of par-
[415] liament "for sale of the estates late of *Henry Fleetwood*, "esq. deceased, in the county of *Lancaster*, for raising "money to discharge incumbrances affecting the same, "&c." And that the said *Stafford Squire* and *Robert Baxter* charged the said *Walter Chetwynd debtor in their books*, for the fees and expences of passing the said act: and which charge *continued so, until and after the death* of the said *Walter Chetwynd*. And that at the same time of the said signing, sealing and publishing of the said several paper-writings, and also at the time of the death of the said *Walter Chetwynd*, there was *due and owing to the said S. S. and R. B.* for the said business done, the sum of 318*l.* and that some time after the death of the said *Walter Chetwynd*, the said *S. S.* and *R. B. delivered a bill* for passing the said act *to the trustees* nominated and appointed in and by the said act of parliament for the purposes therein mentioned: and afterwards and before the examination of the said *S. S.* and *R. B.* in this cause the said *S. S.* and *R. B.* received *from the said trustees*, at several different times, several sums, amounting in the whole to 302*l.* 4*s.* 8½*d.* and that the said *trustees were willing to have paid the remainder*, if it had not been for a miscalculation. And the jury further find that in the said private act of ment there is contained a certain *clause for payment*

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of the expences attending the said bill: (which clause they find *in hæc verba.*) They further find that at the time of the signing, sealing, publishing, and attesting the said paper-writings, there was a *current account* open and subsisting between the said *S. S.* and *R. B.* and the said *Walter Chetwynd*, for *other* business, exclusive of the expences of passing the said private act: on the balance of which account, if stated at that time, the said *S. S.* and *R. B.* were indebted to the said *Walter Chetwynd* in the sum of 138*l.* 14*s.* 10*d.* They further find that at the said time of the attesting of the said writings, and also at the time of the death of the said *Walter Chetwynd*, there was due and owing from him to the said *Josiah Higden*, his *apothecary*, the sum of 18*l.* 5*s.* 5*d.* on simple contract: eleven pounds whereof were so due on 25th *December* 1749, and *before the last sickness* of the said *Walter Chetwynd.* They also find that the said *Walter Chetwynd* died on the 17th of *May* 1750, without issue, and seised, *&c.*: and that the said *William Henry Chetwynd* is the only brother and heir at law of the said *Walter Chetwynd.* They further find that his real estate at the time of signing, *&c.* and also at the time of his death, was subject to certain mortgages made thereof, by the said *Walter Chetwynd* to the amount of 19,000*l.* And of 5000*l.* more, made by the said *Walter Chetwynd's* late father. And that the said *Walter Chetwynd* owed at the time of his death, by bonds, the sum of 1600*l.* and by simple contract 2874*l.*: and that his personal estate then amounted to 13,972*l.* and was sufficient to pay all the simple contract debts and bond debts of the said *Walter Chetwynd.* And that the several real estates so in mortgage were of value more than sufficient to satisfy the several incumbrances affecting the same. The jury further find that on the 2d of *August* 1750, the said *William Henry Chetwynd* filed his bill in Chancery against the said *William Windham, &c.* for the obtaining a decree and recovery of the said lands, *&c.* and thereby contested the validity and due execution of the said paper-writings. That answers were put in, and amendments made to the bill; and other answers put in: and the said *William Henry Chetwynd* prosecuted the said suit in Chancery with all due diligence. The jury further find that the said *William Windham*, as executor of the said *Walter Chetwynd, paid to the said Josiah Higden* the said sum of 18*l.* 5*s.* 5*d. after the death* of the said *Walter Chetwynd* and *before the examination* of the said *Josiah Higden* in this cause: and that the said *J. H.* had not, *at the time of his examination* in this cause, any demand upon the said *Walter Chetwynd.* But whether upon the whole matters aforesaid by the jurors in form aforesaid found, the said paper-writings or either of them were or was DULY EXE-

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CUTED by the said *Walter Chetwynd*, so as to pass lands or tenements, or not, the said jurors are wholly ignorant; and therefore pray the advice, &c. &c.

This case was argued twice: 1st, on *Friday* the sixth of *May* last, by Sir *Richard Lloyd* for the plaintiff, and Mr. *Clayton* for the defendant; and again, on *Friday* the 18th instant by Mr. Serjeant *Prime* for the plaintiff, and Mr. *Norton* for the defendant.

The principal objection insisted upon by the counsel for the defendant, was "that the subscribing witnesses "to the will were not, at the *time* of their ATTESTATION, "*credible* witnesses:" and consequently, this was not a good will of lands, within the statute of 29 C. 2. c. 3. for prevention of frauds and perjuries; as not being attested by three *credible* witnesses.

In proof of which, they urged many arguments, and reasoned from several cases: and, amongst others, they cited two cases as in point; *viz.* *Hilliard* v. *Jennings*, reported in 1 Ld. *Raym.* 505, *Comyns* 92, *Carthew* 514, and Cases in *B. R. temp. W.* 3. *page* 277; and *Holdfast ex dim' Austey et Ux'* v. *Dowsing*, in 2 *Strange* 1253.

* See a short summary of them, in Dr. Burn's Ecclesiastical Law, pa. 532.

But it would be unnecessary to prefix either the * arguments of the counsel, or the authorities upon which they relied; as Lord *Mansfield* entered into the case so very minutely, in delivering the opinion of the court upon it.

After the court had taken some time to consider of it, they all agreed that the will was *duly* attested by three *credible* witnesses. And now,

[417] LORD MANSFIELD delivered the opinion of the court, to the following effect.

The doubt made by this special verdict sprung, after the cause of *Anstey* v. *Dowsing*, out of the *general* question then much agitated, "whether a benefit given to a sub-"scribing witness by the will, either under a general or "particular description, should annul his attestation, AS "*at the time of his* SUBSCRIBING; and make the will "wholly and absolutely void, for want of form, as much "as if he had never attested at all; *though at or after the* "*testator's* DEATH, he might be *disinterested*, and *compe-*"*tent* to be examined in support of the will."

This *general* point is the basis of the objection to these subscribing witnesses. Unless the defendant can support it, he has no ground to stand upon. But though he should succeed in the *general* proposition, the application to *this* case may fail, from the *particular circumstances*, and the *kind* of benefit objected.

The question does *not* depend upon the construction of any words of the statute. The statute is silent as to the

capacity of the witnesses: it declares no incapacity; it requires no qualification. 1757.

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The epithet "*credible*" has a clear precise meaning. It is not a term of art appropriated only to legal notions; but has a signification universally received. It is never used as synonymous to *competent*. When applied to testimony, it presupposes the evidence *given*.

After the competence of a witness is allowed, the consideration of his credibility arises; and *not before*. Persons undoubtedly credible *cannot* be witnesses, *under particular circumstances*; persons manifestly incredible *may* be, and *often are* witnesses.

In acts of parliament which direct convictions upon the oaths of witnesses, the epithet "*credible*" is added: but by no means intended to signify "competent:" *that* is implied in the term *witness*." But it is intended, (from abundant caution,) to declare, that though competent witnesses swear positively, their *credibility is to be weighed*; and if the magistrate thinks the evidence *not credible*, he ought not to convict.

In *this* sense, it was very unnecessary to add the epithet, here, to subscribing witnesses. And yet to make the essential solemnity of the will depend upon the *credibility* of the subscribing witnesses, is so absurd; that their credibility has always been held to make *no part* of the necessary form.

If they all swear that the testator did not execute: if they had, at the time the worst characters, and had committed the most infamous actions; yet their attestation answers the necessary form; because the testator meant to comply with the law, and might not know them to be bad men. [418]

The 3d rule or caution in making wills, given at the end of *Butler* and *Baker's* case, * is—"at the time of the "publication of the will, call *credible* witnesses to subscribe their names to it." Lord *Coke* certainly meant "persons of credit and character." * 3 Co. 36. b.

From hence, and from the usage in penal acts directing convictions, I am persuaded that the epithet was inserted here, as a word of course, and misapplied. Had the operation or effect of the word, in this particular case, been attended to, it never could have been inserted; because, in the *natural* and *obvious* sense, the meaning must be rejected, from the consequences it would have: and in *any other*, it has no meaning at all; for, suppose it to signify *competent*, competence is *implied* in the term "*witnesses*."

This *whole* clause, which introduces a positive solemnity, to be observed, not by the learned only, but by the unlearned; at a time when they are supposed to be without legal advice in a matter which greatly interests every

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proprietor of land; where the direction should be plain to the *meanest* capacity; is so loose, that there is not a single branch of the solemnity defined or described with sufficient certainty to convey the same idea to the *greatest* capacity.

There have been litigations and contradictory opinions, upon *almost every part of* the form; as "what is *signing*" by the testator? whether the witnesses are to attest "*uno contextu, uno eodemq; tempore?* whether they are "to *see* the testator sign? whether they ought to know "that he signs it *as his will?* whether he ought to publish "it *as* his will?" A very little precision and a very few words, might have prevented all these questions.

In a clause not the most accurate, I can easily believe, that the usual epithet "*credible*" slipped in, as of course, without attention to the *impropriety* of using it on this occasion.

[5 East. 17.] It has been said "that this act of 29 C. 2. c. 3. was "drawn by Ld. Ch. J. *Hale*." But this is scarcely probable. It was not passed till after his death: and it was brought in, in the common way; and not upon any reference to the judges.

[419] But what sense soever is put upon this word "*credible*," the statute leaves the question just as it was: for it does not declare who *are*, or are *not* credible: or, (if it is supposed to mean *competent*,) who are competent, or who are *incompetent*.

Their competence could not be referred to any law then established: because there was, there could be, none applicable throughout to this new case. The necessity of subscribing witnesses to any instrument, never had existed before, in *this* country. There never could have arisen, in the law of *England*, a question, "concerning the competence of a witness, at the time of his "knowing the *fact*, he came to testify;" but only "whether he was competent at the time of his *examination*."

The time of *examination* could *not* possibly be the criterion upon which the validity of the will was to depend. The witnesses might *not live* to be examined; their incompetence to be examined, might arise *long after* their attestation.

"What objection therefore to the subscribing witnesses, should be sufficient to avoid a will, as *informal*," was left to be judged of as cases should arise; by general principles, by analogy to the law of witnesses in other instances, and by arguments drawn from the nature and fitness of the thing with regard to justice, convenience, and the intent of the statute.

When solemn determinations, acquiesced under, had settled precise cases, and become a rule of property,

they ought, for the sake of certainty, to be observed, as if they had originally made a part of the text of the statute. 1757. WINDHAM v. CHETWYND

I will therefore consider the *general question*, in two views:

1st. Supposing there had been *no judicial determinations* relative to the capacity of subscribing witnesses since the statute;

2dly. Upon the *foot of the judicial determinations* that have been since the statute. And

3dly. In the last place, I will consider the *particular case* now in judgment, under all its own circumstances.

First—Considering the matter *at large*; let me observe that the power of devising ought to be favoured.

It is a natural consequence of property, and the right a man has over his *own*. It was a right by the law of the land, before the conquest, and down to about the time of *Henry* the 2d—it ceased, consequentially only, by the introduction of feodal tenures: because, originally, every species of alienation was contrary to that system. [420]

As soon as the power of alienation *inter vivos* was indulged, testaments followed, indirectly, as declarations of uses.

The statute of *uses* accidentally *checked* this form of devising. Therefore the statute of *wills* was made.

The 29 *Car.* 2. *c.* 3. (which gives a rise to the present question,) did *not* mean to *restrain* testamentary dispositions of land: the reasons to encourage that power were *increased*.

The policy of tenures, from whence arose the impediment to wills, was abolished; but had left many consequences remaining, which made testamentary dispositions of *land*, more reasonable than they were among the *Greeks* and *Romans*, or here before the conquest.

The eldest son only is heir, *ab intestato*. Among collaterals, not all the next of kin, but one often is heir; to the exclusion of many in the same, and many in a nearer degree. Simple contract creditors had no right to be paid their debts. Money invested in land could not be traced. Much land was in trust: where the widow had no right to dower.

In *personal* estates, the succession *ab intestato* is subject to all debts, and governed by natural family equity.

In *real* estates, the succession is governed by political consequences of a positive system: which make the testamentary power often necessary, to enable a man to do justice to his family, and his creditors.

The legislature meant only to guard against fraud, by a solemn attestation; which they thought would soon be universally known, and might very easily be complied

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with. In theory, this attestation might seem a strong guard: it may be some guard in practice. But I am persuaded, many more fair wills have been overturned for want of the form, than fraudulent have been prevented by introducing it.

I have had a good deal of experience at the delegates; and hardly recollect a case of a forged or fraudulent will, where it has not been solemnly attested. I have heard eminent civilians who are dead, and some now living, make the same observation.

[421] Suppose the subscribing witnesses honest: how little need they know? They do not know the contents; they need not be together; they need not see the testator sign; (if he acknowledges his hand, it is sufficient;) they need not know it to be a will; (if he delivers it as a deed, it is sufficient.)

For these and many more reasons, it is clear that judges should lean *against* objections to the formality. They have always done so, in every construction upon the *words* of the statute: *a fortiori* ought they to do so, in raising a consequential system, *not* prescribed in words. And still more ought they to do so, if that system would spread a snare, in which many honest wills must unavoidably be entangled; and be no preservative against fraud.

At the time this act was made, the law rejected no witness to prove a will; unless at the *time of his examination*, his testimony tend to support his own title, and enable himself to hold or recover an interest under it.

In the ecclesiastical court, the probate is conclusive to every body as to every part. If a legatee came to prove it, he intitled himself to his legacy. But if the legacy was contingent, and at the testator's death could not take effect; if he had the same or a greater interest, though the will should be set aside: he was a witness: a release, payment, or tender, made him a witness.

In the courts of common law, where the witness had a charge upon land devised to another, he was just in the case of a personal legatee. If he had as great an interest the other way; if his interest at the testator's death could never take effect; if there was a release, (of which several authorities were cited;) and I will add, as by necessary consequence, if there was payment or tender, he was a witness.

Nice objections, of a remote interest which could not be paid or released, though they held in other cases, were not allowed to disqualify a witness in the case of a will: as* parishioners might prove a devise to the use of the poor of the parish for ever.

Before the statute, no man could, in a court of justice,

* V. 2 Sid. 109. M. 1658, Townsend v. Row.

intitle himself, by his own examination, to a devise. So, after the statute, no man should intitle himself, in a court of justice, to a devise, by virtue of his own subscription, which at the time of subscribing, he could not have proved by his examination. 1757. WINDHAM v. CHETWYND

The disability of a witness from *interest*, is very different from a *positive* incapacity. If a deed must be acknowledged before a judge or notary public, every other person is under a *positive* incapacity to authenticate it: but objections of *interest* are deductions from natural reason, and proceed upon a presumption of too great a bias in the mind of the witness, and the public utility of rejecting partial testimony. [422]

Presumptions stand no longer than till the contrary is proved.

The presumption of bias may be taken off, by shewing the witness has as great, or a greater interest the other way; or that he has given it up.

The presumption of public utility, may be answered, by shewing that it would be very inconvenient, under the particular circumstances, not to receive such testimony.

Therefore from necessity, the course of business, and other reasons of expedience, numberless *exceptions* are allowed to the *general* rule.

The presumption of bias arises as at the time of *subscribing*. But it may be answered.—If part is devised to a subscribing witness, the presumption is answered, by shewing he was heir at law: or that the devise is void; or that he has renounced it.

Where is the reason to say that a witness who does not know the contents of a will during the testator's life, and at his death takes no benefit, was biassed at the time he subscribed, or can be biassed at the time of his examination?

During the life of a testator, devises are mere possibilities: no interest can vest till his death. The presumption of bias from the *possibility*, is answered by the fact when it *becomes* an interest. His swearing when he is totally *disinterested*, is conclusive, that the possibility is *not* to be presumed the corrupt cause of his subscribing.

For the sake of third persons, it is wise and just, to allow the objections thus to be purged: otherwise, many settlements by will must be overturned, to the ruin of families.

It is natural and usual to give legacies to servants, and tokens to friends.—Persons under these descriptions are most like to be witnesses. Ought such trifles to overturn *unavoidably* the most deliberate dispositions of the greatest

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estates? Which may be attended often with this family distress, that a man may have given his money to one part of his family, and his land to another: in which case, the will would be good as to the money, and void as to the land.

If the legislature had *said* so, that would have been a *positive* rule: but it is contended for by *construction*, and to *guard against fraud*.

It is no guard, even in theory, in the case of *legatees*: because, they may, in another shape, attest the devise which charges the land with their legacies.

[2 Ves. jun. 213. 5 Durn. 94. 1 Peere Wms. 423. and Cox's notes there, 8 Ves. 495.]

It is settled, "that where the land is once charged, (and it always is an auxiliary fund,) with the payment of legacies, by a solemn devise, the legacies may be given, altered, or revoked by a subsequent will *unattested*. The fraudulent legatee might attest the charge, and get his legacy in a codicil unattested.

Let a will be ever so fair, a slip in form is fatal; which is a certain mischief. But if a will be fraudulent; though it is allowed to be formal, it may be set aside upon evidence and circumstances.

Neither reason nor policy require the objection to be carried farther than I have laid it down; agreeable to the law before the statute, and the universal maxim, "testis in *propriâ* causâ non est admittendus."

But *if* judicial determinations, acquiesced under, and become a rule of property, since the statute, have *extended the incapacity* further, they must be adhered to. Which brings me

Secondly, to consider the *judicial determinations* since the statute.

All the determinations *agree exactly* with these principles.

[1 Bl. Rep. 101, acc. 29 MSS. 93.]

In many instances, the presumption of bias *from a legacy*, at the time of subscribing, has been allowed to be *taken off* by a *release*. Authorities in print have been cited to shew "this was considered as a settled point:" and I verily believe it was so, from the authority of the oldest and most eminent practisers in *Westminster-hall*: and therefore I give credit to the dictum of *Powys* in *Lister*, "that it had been solemnly agreed by the judges, "that, where a person had a legacy given, and did release "to him, he was a *good* witness to prove the will."

[See Viner's Abridgment, Title Evidence, Pl. No. 24.]

I know that before the case of *Auntry* v. *Downing*, a will of a very great estate was liable to the objection; and the heir at law would have contested it; but as it was certain the witnesses would be paid, or release, no opinion that he took, encouraged him to think it worth his while.

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Mr. *Fazakerly* and Sir *Thomas Hooker* have told me, they took it to be settled; and indeed the number of wills where the objection by land never was taken, demonstrated it.

There is not a single determination which carries the incapacity farther than the rule I have laid down; viz. "that a person shall not, in a court of justice, entitle "himself to a devise, by virtue of his own subscription, "which at the time of subscribing he could not have "proved by his examination."

That is the case of *Hilliard* v. *Jennings*. That is the resolution and judgment of the court in the case of *Anstey* v. *Dowsing*. There, the defendant was a devisee; subject to an annuity of 20*l.* a year to *Eliz.* the wife of *John Hales*, for her life, for her separate use: and there did not appear to be any personal estate. Her interest was a charge, in the nature of legacy, to be paid by the defendant out of the estate devised to him: and being for her separate use, it was a trust: and the defendant was her trustee. Upon the validity of the devise to the defendant, her annuity depended. If he succeeded, her title followed of course; for he must take the land, *as* the testator gave it, subject to the charge and trust: and upon the devise to the defendant being found good at law, a court of equity must, of course, have decreed the trust. So that she was the *cestuy que trust* of the *party to the cause*; and *either* way, the judgment would immediately *affect her interest*.

In matter of evidence, *husband and wife* are considered as *one*; and cannot be witnesses, the *one* for the *other*. The husband cannot be witness *for his wife*, in a question touching her *separate* estate.

There was *no release*. There could be *no payment*, or *tender*, without the interposition of a court of justice; because the value depended upon incertain estimation: but no attempt had been there made towards paying or tendering the value of the annuity.

This brought it precisely to the case of *Hilliard* v. *Jennings*: the witness, in a court of justice, was to support a devise to himself, by virtue of his *own* subscription: (for the case is the same, as if the *wife* had been the *witness*, or the *husband* the *devisee* of the annuity.)

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It is true that Ld. Ch. *Lee*, in* delivering his opinion, argued as if the objection of benefit from the will to the witness, at the time of subscribing, could *not* be answered or taken off by any subsequent fact: which he grounded upon the authority of the *Roman* law, from the Digest and Code: where it is said, "conditionem testium tunc "inspicere debemus *cùm signarent*, non mortis tem-

*That opinion was delivered by Ld. Ch. J. Lee, on Tuesday 22d April 1746. P. 19 G. 2.

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"pone." But the sense of this passage was not enough considered.

"*Conditio testium*" here means the *positive capacity* of the witnesses; their rank, or quality, as freemen, citizens, adult.

There *never* was a time, in the *Roman* law, when *interest under the will* was any objection to subscribing witnesses.

To explain this a little farther—

The essence of the *Roman* testament was the appointment of an heir, to represent the testator.

Before the Twelve Tables, the testamentary heir might be made *two* ways; *in procinctu*, as *Plutarch* describes at the sige of *Corioli*; or in the form of a legislative act, in *comitiis calatis*.

[Just. Inst. L. 2. Tit. 10. Text 1.]

The Twelve Tables gave an absolute power to every man, to make the law of his own succession: but prescribed *no form*.

[This was a third kind of testament introduced after the two former. Inst. ubi supra.]

As a testament was an alienation of the testator's property and family after his death, the form of mancipation *per æs et libram*, used in *other* transfers of property or family, was followed in *this*: the heir was supposed to *buy*, and the testator to *sell* his succession and family, for and as representing their families. The ceremony was transacted with all the symbols of a *sale*; in the presence of the officer who held the balance, and of *five* freemen, citizens of *Rome*, fourteen years of age at least, solemnly required to bear witness.

These ceremonies and symbols were invented *before* instruments in *writing*: and this imaginary sale, *per æs et libram*, was used in alienations, adoptions, and almost every species of change of dominion, or property strictly so called, ("*proprium est quod quis librâ, mercatu et ære*,") and in many other contracts.

Subsequent laws and usages, especially *after* testaments came to be in *writing*, took away the ceremony of the *symbolical* sale, added *two* witnesses more, and prescribed *forms of attestation*; but left the *condition of the witnesses*, the same: they must be freemen, *Roman* citizens, adult, & *testabiles*. Yet, by an equitable construction, *general reputation* was sufficient: as where the witness, whom *everybody considered* as a freeman, really was a slave.

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[Justin. Inst. L. 2. Tit. 10. Text 7. Qu. Also et vide Legem de Potione, &c.]

This was the *conditio testium*, and must *exist at the time of subscribing*: as much as where there is a custom to surrender into the hands of two copyholders out of court, they must be copyholders *at the time*.

Though in *other* cases, the objection of *interest* to a witness, was allowed: it did not incapacitate witnesses to a WILL.

While the testament *per æs et libram* continued, neither

the testator, or heir, or any of the families of either, could be witnesses; because they were to be supposed the *parties* to the contract. 1757. WYNDHAM v. CHERWYND

When the symbolical salecreased, and testaments were *in writing* and *secret*, the *heir himself* was a sufficient subscribing witness. Afterwards, though the will was *open*, and he *knew* the contents, he was a sufficient subscribing witness: as appears from *Cicero* for *Milo*, speaking of *Cyrus**—" *Una fui; testamentum simul* obsignavi cum " Clodio; *testamentum autem* palam *fecerat, &* illum hære- " dem & me *scripserat.*"

* 6 Vol. 4to. Oliv. Edit. p. 253. Sect. 18.

Justinian Inst. Lib. 2. Tit. 10. § 10, recites the *heir having been allowed* to be a witness; but forbids it, (not upon the foot of his being interested, (*a*) but) " *ad imitu-* " *tionem pristini familiæ emptoris; quia hoc totum nego-* " *tium, testamenti ordinandi gratia, creditur hodie inter* " *testatorem & heredem agi.*" But in the next section (§ 11,) he expressly allows the *cestuy qui trust*, and *legatees*, to be subscribing witnesses: " *quia non juris* " *successores sunt.*" And yet the heir *might be* merely a trustee for the whole inheritance to be delivered to the *cestuy qui trust*; and the legatee *might* exhaust the whole estate.

This abundantly shews that the passage from the Code and Digest did *not* relate to witnesses being INTERESTED.

And the Code and Digest are consistent with the Institutes, on this head.

The Code, Digest, and Institutes are all one connected work.

The Code was first published in the third year of *Justinian*: the Digest was compiled before the Institutes; but published a month after, in the seventh year of *Justinian*.

The proposition, " that *any kind of interest* at the *time* [427] " *of subscribing*, could not afterwards be taken *off*;" and the application of this passage, in support of it, was

(*a*) This is not true; but directly the contrary, and would appear so, not only clearly from the comment, but even from the text of *Justinian*, if it were fairly cited; for several material words are omitted: and yet from this imperfect quotation, it appears that *Justinian* forbid the testimony of the heir, because even after the abolition of the testament, *per æs et libram*, and when he wrote *hodie*, the whole is *creditur inter testatorem et hæredum agi*: and therefore the known rule of justice that none shall be *testis en re propria et causa*, applied when *Justinian* wrote, as it did in the case of testaments, *per æs et libram*.

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much agitated in *Westminster hall*, and the whole kingdom.

A gentleman at the bar, pursuing the proposition through all its consequences, hit upon this point—that "a *charge upon land* for payment of *debts*, would defeat the will, if a subscribing witness was a *creditor* at the *time of subscribing*." As soon as it occurred to him, he mentioned it to me. There had been *many* such devises; but the question, "whether the witness was a *creditor*," *never had been asked*, at law, nor by interrogatories in Chancery, framed to establish or impeach a will.

If the general rule was right, the deduction seemed very plausible.

He put this point in issue, in Chancery; and examined to it, in behalf of the heir, in several cases. Lord *Hereford*'s will was one of the first. *This* was another.

A case soon happened which brought the general proposition flung out by Ld. Ch. J. *Lee*, under *judicial* examination. On the 10th of *February* 1746, the Earl of *Ailesbury* died; having made a will, 15th *May*, 1746,* of his whole estate, real and personal, charged with debts and *legacies*: the three subscribing witnesses, as being in his service at his death, had *legacies*; one, 30*l.* a year for life: the other two, pecuniary legacies. All three *released* the 12th of *February* 1746.

* I believe this is right; notwithstanding the correction of the editor of Ld. Camden's argument, in his p. 21. of his 1st part. N. B. May, 1746 was prior in time, to February, 1746.

He had made a former will, on the 20th of *December* 1744, attested by three disinterested persons; under which, the three subscribing witnesses to the last will would have had *the same* legacies.

A bill was brought in Chancery, to have the latter will established, notwithstanding this doubt; and stating the whole matter. Notwithstanding the will of 1744, which the testator had revoked, (as he thought effectually,) and might probably have cancelled; it was a benefit to the witness, *at the time of subscribing*, to have a legacy under *the last* will.

This cause came on to be heard, the 5th of *November* 1748; and I was of counsel, in it.

I had taken the liberty to ask Mr. Justice *Denison*, "whether the judgment of the court, in the case of "*Anstey* v. *Dowsing*, went upon the *general* proposition." He told me it did *not*; but upon the *particular circumstances*. As to himself, he was *not* of opinion, "that an "objection of benefit, at the time of subscribing, *might* "*not be taken off* by being disinterested, at, or after the "death."

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I mentioned this to the Lord Chancellor, who had got from Ld. Ch. J. *Lee*, a copy of the opinion he delivered,

and he was clear, "*they were good witnesses.*" (*a*) At the *death* of the testator, it was indifferent to them, *which* will prevailed besides, they had *released.* (*b*) He declared the last will, of the 15th of *May* 1746, to be *well proved; established it;* and *decreed the trusts.* 1757. WILLIAMSON v. CHETWYND

There is another matter touched in that opinion delivered by Ld. Ch. Just. *Lee*, which interferes with the rule I have laid down, in its *full* extent; *viz.* "that a "subscribing witness who is a *several devisee*, which "devise *as to him* must be void, shall not by his subscrip- "tion authenticate the *rest* of the will." But, for this, no authority is cited. In the case of *Hilliard* v. *Jennings*, the whole land was devised to *William Hilliard.* And I am satisfied that Ld. Ch. J. *Holt* took the distinction, "that the will might be only void, *quoad the* DEVISE *to* "*the witness*:" because *Carthew*, (*pa.* 514.) who was counsel in the case, and has reported it the most correctly, *hints* an expression of that kind, *viz.* "that it was void "*quoad* the devise of the lands to the plaintiff;" and Ld. *Raymond*, in the case of * *Baugh* v. *Holloway*, says *expressly*, "that Ld. Ch. J. *Holt* so determined."

* 1 Peere Wms. 557, 558.

The validity of the will, as to the *personal* estate, was not before the court; and never could come before the court, because *that* question belonged to another jurisdiction. The case in judgment was of a devise to the witness *only.* Ld. Ch. J. *Holt* might, very properly, throw out something to guard against inferences from their present determination, to the case of a devise to a *third* person.

I have looked into the Register-book, for that case of *Baugh* and *Holloway*; and find the state of it to be this—*Richard Baugh* died, leaving *Elizabeth* his wife, and two sons, named *John* and *George*, having first made his will, dated 11th *June* 1707, whereby he devised certain premises to his youngest son *George*, his heirs and assigns, charged with the payment of 200*l.* which was due on bond to *Lancelot Baugh*, the testator's younger brother. And the said testator also devised certain other lands, to the said *George*, with a proviso, that on the said *George's*

(*a*) The heir or executor named in a testament, cannot be a witness to it, for it is his own affair. *Strahan's* Domat, vol. 2 page 21. This is warranted by reference to the Digest, and the Institute, De Testamen. Ordinan. par. 10, 11. though the last part only is referred to by Domat.

(*b*) This made them good witnesses, if they had not released: consequently this is no authority that the release would have taken off the objection.

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attaining twenty-one, and having 1000l. paid him, then all the said premises should return to his eldest son *John*. And in case both his said sons should die under twenty-one and unmarried, then the said testator devised the said first-mentioned premises to his *wife Elizabeth*, her heirs and assigns, charged with the payment of the said 200l. to the said *Lancelot Baugh*, and also with the payment of 150l. to the said *Lancelot Baugh's* children; and devised the said last-mentioned premises to his brother *Edward Baugh*, his heirs and assigns. Both the testator's said sons died without issue, under age: and *Elizabeth Baugh* possessed and enjoyed the said premises under the said will, and afterwards died, 20th *October* 1714; having first made her will, and devised the said first-mentioned premises to *Catherine Rawlins*, charged with the payment of her debts, and also subject to the said charge made by her husband's will. *Catherine Rawlins* entered, and enjoyed the said premises, and died; having made her will, dated 26th *May* 1716, and devised the said premises to *Anne Oxenden* and *Elizabeth Holloway* as tenants in common, charged with the payment of the debts and legacies appointed to be paid thereout by the said *Richard Baugh*, and also of the debts, &c. of the said *Elizabeth* unsatisfied by the said *Catherine Rawlins*. The said *Anne Oxenden* and *Eliz. Holloway* claimed the said premises, as only children of *John Holloway* by *Anne* his wife, and as co-heirs at law of the said *Eliz. Baugh* and *Cath. Rawlins*. *Lancelot Baugh* filed his bill, and claimed as uncle and heir at law of *John Baugh* the surviving son of his brother *Richard Baugh*; thereby impeaching his said brother's will.

The order is stated right in 1 *Peere Wms.* 558: and on searching the register's book, it could not be found to have come on again. Therefore it is reasonable to think the heir must have been advised to drop it.

Devises of lands differ extremely from *wills*. They are no appointment of an heir; they create no representation; the devisee does not stand in the place of the devisor, as to simple-contract debts: and till the * statute of King *William*, the devisee was not liable to specialty debts, (because he was considered as an alienee, and not as the heir.) They are conveyances or dispositions *mortis causâ*: and that is the reason why a man cannot devise lands which he shall afterwards acquire.

* 3, 4 W. & M. c. 14.

One devise may be void, (as in the case of this very will;) and the devise of another estate, good. There is no probate of the whole instrument: every several devisee must make out his title, in a distinct cause, and *de novo*, against every new party.

Upon legal principles, there is great weight in the dis-

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tinction said to have been made by Ld. Ch. J. *Holt*: and the authors referred to by *Swinburne* are strong, upon the reason and fitness of the thing.

The danger of fraud from the imagination "that four "witnesses might * divide the estate among them," seems very chimerical. That very *connivance* would overturn the will. If it would not, they might as well execute their scheme, by four devises in four paragraphs, severally attested.

* By contriving to attest, each for the three others, as to the lands devised to those others; though none of them could be a good witness as to the devise to himself.

Thirdly—In the third and last place, I proposed to consider the present case under its *own* circumstances.

These witnesses are in the nature of *legatees*; not several *devisees*.

The presumption of "interest at the time of *subscrip*- "*tion*" is not *taken off*, at the *death*, by the principal funds being more than sufficient: it is taken off, *before the trial*, by the debts being *paid*.

But the benefit at the time of subscribing was *nothing*. It does not appear the principal funds *then* were deficient. The legacy is a *bare possibility*, upon a contingency; which contingency *never happened*.

But I will go farther, I think a *charge* "*to pay debts*" ought *not* to incapacitate subscribing witnesses; *although* they wanted and claimed the benefit of it. Every honest man should make that charge in his will: he who omits it, is said to sin in his grave.

Fraud can not be presumed, from inserting a clause which it would be iniquitous *not* to put in.

No man would resort to wicked and fraudulent practices, to get his debt charged upon land by the *will* of his debtor: if he suspected the debtor's circumstances, he would not stay till his death or trust to a *revocable* security.

The presumption of fraud in this case would be against justice and truth: and the public inconvenience so great, that hardly a will could stand.

This charge ought to be in every will.

The persons attendant upon a dying testator, and therefore most common witnesses, are generally in some degree *creditors*; such as servants, parson, attorney, apothecary, &c.: and the disallowing such persons to be witnesses can not answer ends of public utility.

Upon the whole we are all of opinion that this will is *duly* attested by three witnesses.

JUDGMENT for the PLAINTIFF.

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REX v. STRONG.

REX *versus* STRONG.

[S. C. Sayer's L. C. 211.]

Penalty for exercising a trade, contrary to the statute, paid into court without costs.

MR. *Clayton* had moved (on the 19th instant) that the defendant might be at liberty (without paying any costs) *to pay into court* 40*s.* being the *penalty* for his *exercising the trade* of a grocer, for the space of one month, contrary to 5 *Eliz. c.* 4.; whereof he had been convicted upon an indictment found at the last *Cumberland* assizes; (which proceedings the defendant had removed hither by *certiorari*) and that thereupon the *recognizance* might be *discharged*: and he founded his motion upon the authority of *Rex* v. *French*, *Pasch.* 24 *G.* 2. *B. R. Rex* v. *Fisher*, *Tr.* 21 *G.* 2. *B. R.* (both, on the motion of Mr. *Ford*,) in which cases this was done; because by 5, 6 *W. & M. c.* 11. § 8. no costs are payable, *but* upon indictments brought by the *party grieved*, or upon prosecutions by justices, &c. or other civil officers prosecuting *as such*. And so it was also, in a former case, of *Rex* v. *Mary Inkedon*, *M.* 20 *G.* 2. *B. R.* A rule was made to shew cause. And now, Mr. *Norton* not objecting to this motion, (being satisfied with the cases cited—)

The said RULE was made ABSOLUTE.

JENKIN *versus* WHITEHOUSE and ANOTHER.

Prohibition to the spiritual court, to stay proceedings on the will of a married woman, executed under a power contained in her marriage settlement.

MR. *Madocks* moved for a *prohibition* to the consistory court of the Bishop of *Coventry* and *Lichfield*, to stay proceedings in a cause there, relating to the WILL *of a* MARRIED WOMAN; who was a midwife by profession, and had, by her marriage settlement, a power given her *to make a will* for the disposition of her personal gains in that profession. He said this was *not a* WILL, properly speaking: a *feme-covert* can *not* make a will; and cited 1 *Mod.* 211. Anonymous, as in point. Also in a case of *Rex* v. Dr. *Betteworth*, upon the application of *Miles Barnes*, Esq. against *Diana Robson*, daughter of *Diana Elwick* formerly *Diana Robson* and late wife of Governor *Elwick*, on 27th *November* 1751. *M.* 25 *G.* 2. *B. R.* this court agreed "that the spiritual court could *not* treat it "as a will, by granting *probate* of it;" though it is true, in that case, the court did not even make a rule, "to "shew cause why a prohibition should not go;" because

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they thought the spiritual court had taken the right method, *viz. annexing* the paper or instrument purporting to be Mrs. *Elwick*'s will, to an administration granted to her said daughter Mrs. *Diana Robson*, upon the renunciation of the executors. And so 1 *Salk.* 313. *Shambden* v. *Naylor*, and *Farresley* 147. S. C. shews "that this is not a "will, nor properable by the ordinary."

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And the case of *Burnet* v. *Holgrave*, in *Equity Cases Abr. p.* 296. shews that this is not in its own nature *testamentary*.

And he said that the *administration* granted to the husband had been brought into the *spiritual court, pendente lite* there, which he prayed might be DETERMINED to him; and that this last clause might be added to the rule.

LORD MANSFIELD—That is going too far; we will not add *that*.

In a cause of *Ross* v. *Ewer*, in Chancery, * there was a power to a feme covert, "to appoint *by will*." Lord Chancellor held clearly, "though such will operates as "an appointment, it *must be proved* in the spiritual court:" and he would not proceed, *till* the will was so *proved*. It was not material for him to consider of the *precise form* in which it was to be *proved*; whether by a *strict probate*, or by granting administration with the appointment in nature of a will *annexed*: and therefore *that* point was not entered into. But the *fact*, "that the paper *was* her will, "in case she had a power to make one," must be *established by the ecclesiastical* court: for such an appointment is in the *nature* of a will, and attended with all the *consequences* of a will.

* See July 1744. [3 Atk. 156. 2 Vez. 69, 64. 7 Mod. 147.]

As to the determination in the case of *Burnet* v. *Holgrave*, "that money appointed, under the execution "of a power, by such a will should not lapse;" it was very fully considered, and contradicted in the cause of the Duke of *Marlborough* against the Earl of *Carlisle*, Earl *Godolphin*, and others, in † Chancery.

[2 Vez. 65, 80. Vin. Devise, fo. 376.]

† 26th Nov. 1730.

The cases cited or referred to by Mr. *Maddocks*, shew that *administration may be granted*, with the appointment *annexed*: which proves it to *be testamentary*. For nothing can be *annexed* to an administration, but a *testamentary* disposition; which is proved and established by the ecclesiastical court in *that* form.

But if the question be, "whether the wife *had a power* "to make an appointment in the nature of a will, and "thereby to deprive the husband of any benefit which by "law would devolve upon him in consequence of her "death," *that* is a question proper to be considered here: and if she had *no* such power, this court will grant a prohibition. And *so for*, the case in 1 *Mod.* 211, cited by Mr. *Maddocks*, goes expressly.

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It seems right, therefore, to grant a rule "to shew "cause why there should not be a prohibition:" and then the case will be better understood, under all its circumstances.

The court granted a rule to shew cause.

But it never came on again.

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REX v. STEPHENS.

Saturday, 26th November 1757.

REX *versus* STEPHENS.

MR. *Cox* moved for an information in nature of a *quo warranto* against the defendant *John Stephens*, esq. to shew by what authority he acted as one of the aldermen of the corporation of St. *Ives* in *Cornwall*.

Quo warranto not to be granted after great lapse of time. [See 4 Durn. 283.]

The fact upon which the information was prayed, was the defect of the defendant's title: which stood as follows:

John Noall was elected alderman in *June* 1728, WITHOUT *being then a burgess or assistant*; (which was a necessary *previous* qualification:) and the said *John Noall* was, the next year, elected mayor. And all the succeeding mayors and aldermen were elected UNDER *Noall and his successors* in the mayoralty, (each, *under* his respective predecessor;) and likewise *by* aldermen claiming under *Noall's* said *defective* election; till in *September* 1741, the DEFENDANT *was elected alderman*, BY such DEFECTIVE *electors* as aforesaid; and in *November* 1742, he was, by the like and no better authority, elected *mayor*. And it was sworn that by the constitution of the said borough, there CAN *be no* DUE *election*, of a mayor or alderman, without a *legal* mayor presiding at such election.

Note.—*Noall* died, a year ago, in *quiet possession* of his office of *alderman*.

The COURT were clear and unanimous in REFUSING *to grant* this information; by reason of the STALENESS of the defect of title, assigned as the foundation for it; which was of no less than twenty-nine years standing. For they thought it would be of very ill consequence to corporations, if the court should, AFTER *so many* years acquiescence, QUIETA *movere*, and call corporators to account for acting under such elections, depending upon the prior rights of others, whose rights had *never* been before objected to: which must occasion infinite confusion in corporations.

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And they said that though there was indeed no statute nor even * *fixed rule* of limitation, as to the length of time which should suffice to quiet the possessors of these offices; yet the court, in their discretion, ought to refuse granting these motions, after a great length of time. (*a*)

* V. post pa. 1962. 17th November, 1766, the Winchelsea causes, it was fixed to twenty years.

(*a*) There is no statute of limitations that bars an action upon a bond; but a jury may presume the debt to be discharged, where no interest appears to have been paid for sixteen years: but shewing the party not in circumstances to pay, or a recent acknowledgment, the jury must say the contrary. *Comp.* 109.

sed vide 1 Camp. 27.

sed vide 1 Camp. 27.

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[1 Burr. 272.]

And LORD MANSFIELD observed that there was no direct and express limitation of time, when a *bond* should be supposed to have been satisfied: the general time indeed was commonly taken to be about twenty years; but he had known Lord *Raymond* leave it to a jury upon eighteen years. *Sed vide Beaufil 2 J—*

Mr. Just. FOSTER mentioned a case of *Malmesbury*, not so strong as this case: where an information was denied. *

* In a case of Rex v. Mayor of Bridgwater, M. 6. G. 1. B. R. An information was refused, after thirty-five years acquiescence under the new charter.

And Mr. Just. DENISON mentioned a like case in † *Leominster*: in which he himself was counsel. †

† But the Leominster case (which was Rex v. Spencer, 1st June 1741. Tr. 14, 15 G. 2. B. R.) was not determined upon this point; (far from it, indeed:) It was refused for the insufficiency of the affidavit, and not properly proving the bye-law on which the motion was grounded.

Per Cur. unanimously,
The motion was DENIED. (*a*)

(*a*) *Michaelmas* 1766. A rule was made that no information in the nature of a *quo warranto* shall be granted on a cause arising above the distance of twenty years; cited on a rule to shew cause, &c. *Rex* v. *Hawes*, may or of *Winchelsea*, *Hil.* 1763. And that length of time alone, less than twenty years, would not be sufficient to refuse granting an information; but the objection to *Dawes* being, that he was not a resident, nor paid *scot* and *lot* in *September* 1747, when he was made a freeman, which by the usage of the borough, was necessary to entitle him to be admitted to his freedom, the court at the distance of nineteen years, as this was, would not grant the information to try these facts.

The rule was to shew cause why an information should not be granted against him, for usurping the franchise of a freeman, which the court said was a fairer way of applying, than it would have been to have applied for an information for usurping the office of mayor: though the court were of opinion, that as the freedom of the city was a necessary qualification to entitle him to be chosen mayor, in an information against him for usurping the office of mayor, the want of this qualification, to be made free at the time he was made so, might be given in evidence; and in that they were very clear, though in this case, it would make no difference if it were not so. But the cause was argued again the next day, and stood over to *Trinity term*, and then the rule was discharged.

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REX v. INHABITANTS of LOWER SWELL.

REX *versus* INHABITANTS of LOWER SWELL.

See this case *abridged*, in the TABLE; and *at large* in the quarto edition of my SETTLEMENT-cases, No. 140. pa. 436.

COCKERILL, ASSIGNEE, *versus* OWSTON.

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Monday, 28th November, 1757.

Bankrupt liable to judgment on a bail-bond.

[See 1 Bosan. 450. Str. 1043, 1160.]

THE question was whether a *bankrupt's certificate*, obtained after judgment in an action *upon a bail-bond*, against the BANKRUPT HIMSELF, (for the bail were *not at all* concerned in this motion,) should *discharge the bankrupt* FROM THIS *judgment upon the* BAIL-BOND, as well as from the *original* debt: (which the plaintiff's counsel agreed that it *did* discharge him from.)

Note—The defendant had paid the money into the sheriff's hands, upon being taken up by a *ca. sa.* in order to procure his liberty. So that the motion was "that the money might be restored to the defendant, with costs." And the court had granted a rule "to shew cause," upon Mr. *Luke Robinson's* motion: against which rule, Mr. *Clayton* now shewed cause.

The court held, that the certificate *obtained subsequent* to the bringing of this action upon the bail-bond, (though such certificate was founded upon an act of bankruptcy *prior* to the bringing this action upon the bail-bond,) did NOT *discharge the bail-bond*; although it discharged the *original* debt: for that this was a *new* and *distinct cause of action*.

Indeed such certificate shall discharge the proceedings depending *against bail* in an action upon the old debt, *who are* NOT *already* FIXED: so it has been lately determined. *V. ante, pa.* 244. *Woolley* v. *Cabbe & al.* (which is the case they hinted at.)

RULE DISCHARGED: and ordered that the sheriff pay the money to the PLAINTIFF.

The End of *Michaelmas* Term 1757, 31 *Geo.* 2.

31 *GEO. II. B. R.* 1758.

ROSE *versus* GREEN.

Thursday, 26th January, 1758.

Prisoner being carried through another county with permission of the sheriff, and calling upon his attorney, is not escaping within stat. 21 Jac. 1. c. 19. s. 2. so as to make the party a bankrupt. [S.C. Bull. *Ne.*]

THIS case came before the court upon a reservation by Lord *Mansfield* at *nisi prius* at *Guildhall*, for the opinion of the court "whether the defendant became a bankrupt, on the 31st of *March*, or on the 6th of *May*;" which particular day was to be indorsed upon the *postea*, agreeably to such opinion.

This Mr. *Green* having been *arrested for debt in* KENT, on the 31st of *March*, was afterwards, on the 6th of *May* following, brought up by an *habeas corpus*, in order to be turned over: and, on the road to the judge's chamber, was permitted (at the desire of himself and his father) to call at his attorney's house (Mr. *Penfold's*) upon *Garlick Hill* in the city of *London*, which was OUT *of the* COUNTY *of Kent*; and was carried thence (by a *habeas corpus*) directly to a judge's chamber, to be bailed; and accordingly was bailed, but was INSTANTLY *there surrendered* by his bail, in discharge of themselves, (who had just before bailed him:) and thereupon *committed*, EO INSTANTE, *to the King's Bench prison*; where he lay above two months, *viz.* from the said 6th of *May* till the 15th of *July* next following.

Sir *Richard Lloyd*, Mr. *Caldecott*, and Mr. *Bainham* argued that this was an act of bankruptcy *from the time* of the *first* arrest; taking it either of these two ways; *viz.* either 1st, AS *a* LYING IN PRISON *two months* after having been arrested for debt; (under 21 *J.* 1. *c.* 19. § 2.) Or 2dly, AS *on* ESCAPE out of prison, (under the same clause,) this arrest being for above the sum of 100*l.*

[See 2 Durn 142.]

1st. If a trader surrenders himself in *discharge* of his bail, and *then* lies two months, it is a bankruptcy from the first arrest. *Smith* v. *Stracy*, 2 *Ann.* 1 *Salk.* 110. at *nisi prius* at *Guildhall*—Ld. Ch. J. *Holt* so inclined, and gave his reason for it: which case was subsequent to the case of *Cane* v. *Coleman* in 1 *Salk.* 109. (where indeed the

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court held otherwise.) *Tribe* v. *Webber*, *P.* 17 *G.* 2. *C. B.* was a distance of more than *nine months between* the putting in bail, and the surrender.

2dly. His being *in London* was an ESCAPE; and the debt being *above* 100*l.* this *escape* is an act of bankruptcy *from the first arrest.*

Mr. *Norton* and Mr. *Burrell*, *contra.*—The question upon the case stated at the trial, and reserved for the opinion of the court, is, "whether he shall be a bankrupt, "*from* the 31st *of March*, when he was *first arrested*: or "from the 6th *of May*, when he was *surrendered* and com- "mitted to the marshal; (in whose custody he lay from "the 6th of *May* till the 15th of *July*.")

As to the 2d point—this was NOT a WILFUL escape in the prisoner: but he was *carried* out of the county by the sheriff. And surely *this act of a third person* shall not make a man a bankrupt. Nor indeed can a *permissive* escape suffered by the sheriff, or any *act of the sheriff*, make a man a bankrupt; who is, in many respects, considered as a *criminal.*

As to the 1st point—when a person is *once admitted to bail*, his lying in prison *subsequent* thereto, *viz.* the *first day of his* DOING so *after being surrendered*, shall be the time to which his bankruptcy *shall relate*: and *not* the time of the first *arrest*, upon which he put in bail.

The case of *Duncomb* v. *Walter* in 1 *Ventr.* 370. is ill reported there. So, in 3 *Lev.* 57. it is ill reported. It is also reported in Sir *Tho. Raymond* 479. and in *Skinner*, twice; *viz. fo.* 22 & 87, 88. In which last, it appears to be solemnly settled, "that the relation to make a man "a bankrupt ought to be upon an *actual* lying in prison, "and *not* upon putting in *bail* only." †

† N. B. None of these reports of this case are well drawn up, except Sir Tho. Raymond's; and that is only an argument with an adjournatur.

Came v. *Coleman*, 1 *Salk.* 109. is S.P. *viz.* "that the bank- "ruptcy shall only be from the time of *such* first arrest, "*upon which* he lies in prison: *not* where he puts in suf- "ficient *bail.*" And in 17 *G.* 2. *Tribe* v. *Webber*, *C. B. per tot. cur.* the same point was resolved unanimously. The case of *Smith* v. *Stracy* in 1 *Salk.* 110, 111. is only an opinion of Ld. Ch. J. *Holt*, at *nisi prius.*

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And it is admitted that the present defendant was *at large*, at a time intervening between the arrest and the surrender. But even allowing him to have *remained* in custody of the sheriff of *Kent*, yet the two months can only run from his first LYING in prison. There must be *some* time (more or less) between his being bailed, and his being committed to the marshal. Therefore he was only a bankrupt *from* the 6th of May.

Sir *Richard Lloyd* was beginning to reply: but the court thought it unnecessary.

LORD MANSFIELD observed that where positive laws

fixed and described what should be looked upon as acts of bankruptcy, they ought to be construed according to their *intention*, and so as to *answer the ends* of public benefit, which the legislature had in view. 1758. ROSE v. GREEN.

In thus construing this act of parliament, he held this case not to be SUCH *an escape* as that the man should be thereby rendered a bankrupt and a *criminal*. For the act clearly intended SUCH *an escape* made by a prisoner, as shews that he means to RUN AWAY, *and thereby defeat his creditors*. But this is *not* SUCH an escape; and certainly, a man shall not be made a *criminal*, where he had not the least criminal intention to disobey any law whatsoever. There is *no escape at all*, in the *sense* of this act of parliament: *he remained* SUBSTANTIALLY *in custody*, notwithstanding his being *thus carried* into another county. Second point.

Where *bail is really* put in, the bankruptcy *only relates* to the time of the SURRENDER. The *most substantial* trader is liable to be *arrested*; and the MERE *being* ARRESTED is *no* presumption of insolvency; the presumption from his LYING *in prison* two months, WITHOUT *being able to get* bail, is a *very strong* one. But THIS *sort* of bailing is a *mere* FORM, to turn the defendant over from one custody to another: the bail *never justify*. First point.

And upon cases of superseding actions by reason of the plaintiff's not proceeding upon them within two terms, being *merely turned over* from one custody *to another*, is always considered as a *continuance* of the *same* imprisonment. And so I think it is, in the present case, upon the *present circumstances*: notwithstanding what I have declared as my opinion, upon the *general* principle, and upon a *fair* and *substantial* bailing. Therefore in the *present* case, I think, the bankruptcy *has* a relation to the *first arrest*.

Mr. Just. DENISON concurred, clearly, in both points. Can it ever be called an *escape* within the *meaning* of this act; when the man *by permission* of the sheriff *passes through* another county, in being carried to a judge or to the court? Can this be esteemed a *criminal act* of the man himself? Most certainly not. Second point. [440]

Nor can this *formal bail* put in *without justification*, and ONLY in ORDER *to be surrendered*, (which is a *mere matter of form*,) be considered as being OUT *of custody*, within the *intent and meaning* of this act. No: it is a *continuation of the same* imprisonment: and has relation to the *first* arrest and imprisonment. First point.

Mr. Just. FOSTER was clear on both points: and expressed himself to the same effect, as LORD MANSFIELD and Mr. Justice DENISON had done.

Mr. Just. WILMOT also most clearly concurred. And

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he laid it down, "that these *bankruptcy-acts* were to be "*construed according to their real intention.*"

1st Point. The *general principle* of the cases cited is right: but the *reason* of them is strongly *against* the present one, as it stands circumstanced. Here is *not a single moment*, in which the man is *out of custody*: it is a mere form of *changing his prison.*

*The words of it are, "or procure his enlargement by putting in common or hired bail." V. § 2.

And the very * act itself *distinguishes* between *common* bail (or no bail at all,) and *sufficient* bail. Now *this* bail, in the present case is, in effect, NO *bail* at all.

2d Point. The acts which render a bankrupt a *criminal*, must mean an escape AGAINST *the consent* of the sheriff; a *running away*, and *breaking* his prison: certainly *not such* as this was, UNDER *the consent* of the sheriff.

Cur. ORDERED the *postea* to be indorsed, "that *Green* "became a bankrupt on *the* 31st *of March.*"

Friday, 27th January, 1758.

WARING *versus* GRIFFITHS, et al.

A right of burial in the chancel may be prescribed for as belonging to an ancient messuage.

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[See 5 Vin. 29. pl. 8. 17 Vin. 280. pl. 4. 3 Durn. 767.]

THIS was a case reserved upon a trial at *nisi prius.*

The plaintiff's action was founded upon a prescriptive right of burial of any person dying in his house at *Oswestree*, in the chancel of the church of *Oswestree*: in the exercise of which the defendants had disturbed him. And they themselves acknowledged that they had disturbed him in it.

The case stated was, in short, this: that the plaintiff was seised of a messuage, &c. in *Oswestree*, &c. and had such a prescriptive right of burial belonging to it; and that the defendants *did disturb* him in burying, &c. and *were wrong-doers*: but (it was also stated) that 2*s.* WAS DUE *to the parish* of *Oswestree*, for *every-person* buried in the chancel of that church.

Mr. *Aston*, on behalf of the plaintiff, argued that here were two cross prescriptions; and that the *two* prescriptions were *distinct* and *collateral*: one, for the plaintiff to bury, &c. the other, for the parish to receive a payment of 2*s.* &c. for it: and therefore it was NOT *necessary to alledge* the latter, in the declaration, it being only a *collateral* recompence. And he cited *Cro. Eliz.* 346. & 563. *Lovelace* v. *Reynolds*, a prescription for common; and found that he had common, *paying* for it, &c. So that that was *part* of the prescription; a *condition precedent*; it was *paying for it*, every year, a penny to the plaintiff. But it was holden to be otherwise, where there are *two* prescriptions; one, for the commoner: the other, for the lord: as in the case in *Cro. Eliz.* 405. *Gray* v. *Fletcher*, where the prescription was found; and "that he and all those, &c. *had* "USED to pay for it, every year a hen and five eggs."

5 Co. 78. S. C. *Gray's* case—and there, the terre-tenant was adjudged to have a remedy for the recompence. And therefore this was holden to be *only collateral*, and as *two* prescriptions; and therefore need not be alledged, the prescription being perfect without it. So here, it need not be alledged: but they may have their *collateral remedy*; as, in the *ecclesiastical* court, they may have. In proof whereof, he cited 1 *Ventr.* 371. *Anonymous.* Where it is said "that the remedy for a duty of this kind is in the "ecclesiastical court."

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And this fee is not to be paid *till* after the burial: and therefore the non-payment of it cannot defend the wrong-doer, who is a *stranger*. So, in an action against a *stranger*, for disturbing his seat, or sepulture in a church, it is *not* necessary to shew any *title in the plaintiff*. 3 *Lev.* 73. *Ashley* v *Freckleton*: though in such an action against the *ordinary* himself, it *is* necessary to shew some cause; as building, repairing, &c.

Kenrick v. *Taylor*, *Pasch.* 25 *G.* 2. *B. R.* It was solemnly determined "that in the case of a stranger and wrong-"doer, it was *not* necessary to alledge more than his own "right and a disturbance."

He mentioned the two following cases, *viz.* 2 *Lutw.* 1517. *Bennington* v. *Taylor*; and 3 *Lev.* 92. *Chafin* v. *Betsworth*, which (as he said) are like this case. They were disturbances, by strangers, in erecting stalls in a market-place: and no title is shewn. So, in case of a free fishery. [442]

And the finding is quite immaterial. For this collateral claim is no part of the plaintiff's prescriptive right. *Palmer* 82.* the case of the corporation of *Maidenhead*, in a claim of a market, &c. *Mayor of Northampton* v. *Ward. Mich.* 19 *G.* 2. *B. R.*

*Fourth point.

Mr. *Hall contra* for the defendant argued that it was PART *of the prescription*; and that it *ought to have been alledged*, even *against a* WRONG-*doer*, "that this 2*s.* was "payable to the parish, for every person so buried." This is a prescription upon a *condition precedent*. It is an *entire* prescription: the payment of the 2*s.* is *parcel* of the prescription; and it ought to have been so laid and alledged. Prescriptions are against common right, and ought to be proved, as laid: and the plaintiff must prove it as laid; even *against a wrong*-doer. And if the evidence fall short of the prescription pleaded, it will be against the person who pleaded it. In proof of which position, he cited these cases—*Carthew* 241. *Rex* v. *the Inhabitants of Hermitage et al.* The prescription was not proved as laid, because there was an exception. *Palm.* 226. *Countee de Devon* v. *Eyre.* Which was a prescription *pro avibus generally* (instead of *avibus suis*:) the proof failed. *Ho-*

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bart 209. *Michell* v. *Mortimer.* The prescription failed, because it was laid too large. *Cro. Eliz.* 415. *Boraston* v. *Hay:* a custom pleaded generally; but found with an exception: it is against the pleader. *Carthew*, 117. *Murgatroid* v. *Law.* The case of *Potwater* mentioned by *Popham* in *Gray's* case, 5 *Co.* 78. *b.* and *Cro. Eliz.* 405. laid *generally*, found "*paying* 6d. by the year" was ill laid. *Lovelace* v. *Reynolds*, *Cro. Eliz.* 546, 563, allows *Gray's* case, and the case of *Potwater*, 2 *Ro. Abr.* 720. *Title Trial, pl.* 30, in prohibition—the plaintiff declared upon a prescription about lambs; and the jury found farther, *&c.* it was holden that the plaintiff *ought to have rehearsed the* WHOLE of it; and that for not doing so, he had failed in his prescription.

Now here, the payment of 2*s. is* PART *of the prescription* and must be *as ancient* as the right; which is "to bury in "the chancel, any person dying in his house; * *paying* 2*s.* "for each person." Which is a condition PRECEDENT, and therefore ought to have been alledged. *Forrester*, 166. Sir *John Robinson* v. *Comyns*, "there are no techni-"cal words to distinguish conditions precedent, and "conditions subsequent." *Acherley* v. *Vernon—per* Ld. Ch. J. *Willes.* (See this in *Lucas* 518.) *Watson* 709.

* Note. He does not here state the present prescription truly, according to the case stated. V. ante 441.

[443] The churchwardens had no remedy, but by interruption; and being stated as *a fee for* burial, it ought to be paid *before* burial.

The COURT will not direct a person to be turned over on *ha. cor. till* the goaler's fees be paid. *Hawk. P. C.* 151. §. 31. is so. So, in cases of the fee of *gloves* on pleading pardons. 1 *Siderfin* 452. *Rex* v. *Webster.* "The pardon is *not* to be *allowed*, till the "fees be paid, *viz.* the gloves to the court and offi-"cers." Sir *T. Jones* 56. *B. G.* presented gloves to all the judges according to custom. *Kely.* 25. Gloves are a *fee due, on* pleading a pardon.

—*We* are *not* the churchwardens, I agree; but *wrong-doers.* (And then he disclosed their provocation: which, he said, was in defence of the bones of one Mr. *Griffiths*, a former possessor of this messuage; which Mr. *Waring* was turning out, in order to make room for a *servant* of his own.) But the plaintiff had *no right to the* SOIL: and therefore he ought to have *set out* his title. And here, he ought to have *proved* his case; AS *he has laid it.* 3 *Mod.* 48. 52. *Hebblethwaite* v. *Palmes; Per* Ch. Justice, (at the end of the case,) "the plaintiff ought to *prove* "his prescription: or else he must be nonsuit." And the *same* prescription ought to be given in *evidence*, as is laid.

Gray's case is *best* reported by Lord *Coke*, in 5 *Co.* 78. *b.* 79. *a.* And that case turns upon the remedy, which

the terre-tenant has for the recompence. And according to the case of *Potwater* there mentioned, (paying 6*d.* yearly,) here could have been NO *remedy* for the 2*s.* fee, *but* by a *subsequent* disturbance upon a *future* burial. 1758. WARING v. GRIFFITHS.

Mr. *Aston's* cases are not applicable to the present case: because in them there was a *collateral* remedy: but here we have none. Therefore the plaintiff ought to be in the present case nonsuited; and we are intitled to the *postea*.

Mr. *Aston* was going to reply: but

The COURT prevented him: being extremely clear for the plaintiff: and LORD MANSFIELD said—that the DISTINCTION is between the case of the OWNER *of the soil*, and the case of a STRANGER, disturbing the person who has a right of this sort.

Where a person claims a servitude upon another's property, he *must lay* and prove *the* WHOLE, against the OWNER of such property. There is a great difference too between granting a servitude, *absolutely*; and granting it, *sub modo*: the latter is a condition precedent. And there are many reasons why in case of a condition precedent, where the grantee brings his action against the *owner*, the *whole* ought to be *set out*: (which reasons he specified.) [444]

But in an action against a *stranger* and *wrong-doer*, it is *not* necessary to *set out* the *whole*. Here, (which is agreed to be in the case of a WRONG-DOER,) the plaintiff has *stated enough*, and has *proved* it. He claims a right to bury in the chancel; and is disturbed by a stranger and a *wrong-doer*. What is the defence? "That IF *he had* "buried the corpse in the chancel; (which the defendants "hindered him from doing,) the *churchwardens* WOULD "HAVE *had* a right to 2*s.* for a burial-fee." But he was *disturbed*, by the defendants, FROM *burying the corpse there:* and *then* the churchwardens had *no* right to the 2*s.* for their right arose upon the corpse *being buried there*. [3 Burn. 767.]

For this purpose, the payment of the 2*s.* is *no material* and *essential* part of the prescription; but *collateral* to it. It is *not* an entire prescription, as in the case of *Lovelace* v. *Reynolds*; whereof the payment of the penny was *parcel*.

Mr. Just. DENISON concurred entirely. And he distinguished this case (as Ld. *Mansfield* had also done) from that of *Lovelace* and *Reynolds*; which was "*paying* FOR "*it*, every year a penny."

But whatever may be the right that the *churchwardens* might in the present case have, the plaintiff had *no* need to *set out* this right, in an action against a *wrong-doer*, a *stranger*. I do not know that in *this* case, he needed even to have set out any prescription, in this action against a

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stranger and wrong-doer. And this matter seems settled in the case of *Kendrick* v. *Taylor*.

Mr. Just. FOSTER concurred for the same general reasons. And he thought the payment of the 2*s.* to be rather a *customary* payment than a prescription: being "for "EVERY person buried in the isle, or chancel." To which, Ld. *Mansfield* agreed.

Mr. Just. WILMOT was also clear in the general position laid down by the rest, as before. And he observed also, "that the duty could *never arise till* AFTER *the sepul-*"*ture*." And therefore he thought that if the action had *even* been brought *against* the churchwardens, it had yet been within the distinction of *Gray's* case, and to be come at by a *collateral* remedy; and *not parcel* of the prescription, or a qualification of it. But against a *wrong-doer*, [445] POSSESSION *alone* is certainly sufficient. Therefore he was clear, upon both points.

Per Cur. unanimously,
Let the POSTEA be delivered to the PLAINTIFF.

REX *versus* LOXDALE and four others.

Appointment of more than four overseers bad. [See 4 Durn. 272. 2 East, 171. 4 New Abr. 646.]

MR. *Morton* had sometime ago, (*viz.* on *Monday* 17th *November* 1755,) moved to quash an order of two justices appointing FIVE *overseers* for the parish of St. *Chad*, in *Shrewsbury*.

His objection was that the justices have no power to *exceed* the number of FOUR. Which objection was founded upon the words of 43 *Eliz. c.* 2. § 1. "That the "churchwardens of every parish; and FOUR, *three*, or "*two* substantial householders there, as shall be thought "meet, having respect to the proportion and greatness "of the same parish and parishes, to be nominated yearly "in *Easter* week or within one month after *Easter*, under "the hand and seal of two or more justices of the peace "in the same county, (whereof one to be of the *quorum*,) "dwelling in or near the same parish or division where "the same parish doth lie, shall be called overseers of the "poor of the same parish: and they, *or the greater part* "*of them, &c.*" And he mentioned a former case of *Rex* v. *Harman*, upon the very same point, which depended in this court from *P.* 12 *G.* 2. to *M.* 15 *G.* 2. and at last was never determined; and also *Rex* v. *Besland*, *Hil.* 19 *G.* 2. *B. R.* which was the *reverse* of an EXCESS of their jurisdiction, where the order, (being to appoint ONE overseer) was confirmed.

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A rule was thereupon made, " to shew cause." And after the point had been several times argued in Ld. Ch. J. *Ryder's* time, it came on to be argued once more, on the 27th of *January* 1757, before Lord *Mansfield*, he having never heard the former arguments. When the same things which had been so often said were again repeated.

On the side of the extension of the number of overseers, *usage* was alledged and greatly relied upon.

Note—The court misled by assertions " that there had " been a usage to appoint more overseers than four;" for fear of inconvenience, had avoided determining the question in the case of the *King* v. *Harman*, after it had depended six years, in hopes that the legislature would make some provision for what was past, as well as for the future.(a) And upon the same apprehension, the court had hitherto postponed the determination of this.

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Lord Mansfield said he had seen full notes of the former arguments of the present case; and also of the case of *Rex* v. *Harman*. He observed particularly what was said as to the usage in large parishes. And he therefore had directed inquiry to be made in many large parishes, as to the fact, " whether there had been such usage, or " not." And he ordered the return which had been made to him upon such inquiry, by the agents on both sides, to be read. From which, it appeared thus—In St. *James's Clerkenwell*, 4. In St. *Bridgett's*, 3. In St. *Dunstan's*, 2. In St. *Clement's Danes*, 4. In St. *Paul's Covent-Garden*, 2. In St. *George's, Hanover-square*, 4. In St. *James's, Westminster*, 4. In St. *Margaret's, Westminster*, 2. In St. *Andrew, Holborn*, 8: (but that parish contains three separate divisions.) In St. *Giles's in the fields*, 8: (though *now* only four are appointed by the justices, and act as assistants, unless eight voluntarily serve: but there were never less than eight *before* the case of *Rex* v. *Harman*.) In St. *Martin's in the fields*, five (since the act of parliament lately made, which impowers them to appoint nine, if in the discretion of the justices it should be thought proper.) In *Shrewsbury*, (which contains five parishes;) in St. *Alsemond's*, 3. In *Holy-cross and St. Giles's*, 4. In St. *Mary's*, 4. St. *Julian's*, 4.

[6 Mod. 77. T. Raym. 477.]

(a) The resolution in this case occasioned the act of parliament 26 *Geo.* 3. *c.* 23, for the appointment of an additional overseer of the poor of the parish of *Westbury* in the county of *Wilts*.

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St. *Chap.* 5, for *one* year only; and never exceeding 4, *but once, viz.* this *present* year.

After reading the report, Lord *Mansfield* proceeded,—The USAGE is, as it were, out of the case; or rather, it supposes "that they can *not* legally exceed 4."

Therefore, consequently, but *little* INCONVENIENCE can arise from determining the construction of the statute, *according* to its natural import.

As to *legal* constructions—the case of *Rex* v. *Harman* was never determined *as* to the * order for the APPOINTMENT *of overseers.*

* There was another order adjudging Harman "to have neglected the execution of his office;" which was quashed in Mich. 13 G. 2.

In the case of *Rex* v. *Besland*, where *only one* overseer was appointed, *no* opinion was given *judicially*, upon the point of law; nor was the appointment † quashed(*a*): so that the present case is a NEW ORIGINAL case: and it must be determined upon the 43 *Eliz.* c. 2; which is the foundation of the system of law concerning the poor.

† It was confirmed, as not necessarily appearing to be a bad order: for it might be "that others were appointed by other orders." [See 1 Wils. 128. Bott, 2, 199. 1 Burr. Set. Cas. 37. Salk. 501. 527. pl. 9. 2 East. 171.]

[447] [2. H. H. P. C. 49, 50. 19 Vin. 511, 512.]

There is a known distinction between circumstances which are of the *essence* of a thing required to be done by an act of parliament, and clauses *merely directory*. The *precise time*, in many cases, is NOT of the *essence*.

In the case of *Rex* v. *Sparrow*, 2 *Strange* 1123, the justices had been guilty of a *neglect*, in not appointing overseers within *due time*; and this court issued a *mandamus*, to compel them to do it afterwards, for the *sake of the poor*. The poor could not have had *a* SPECIFIC *remedy*, in that case; *unless* the justices might do it *after* the precise time, in obedience to the *mandamus*.

So, as to the justices "*in or near* the parish or division"—it is *only directory*.

[4 Burn. 551 3 Burn. 529.]

Justices of peace have *no other* power to appoint overseers but under the special authority given them by act of parliament. Therefore this special authority must be strictly pursued, and can *not* be *exceeded* by them. The question here is upon the meaning and intention of the

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(*a*) Qu. this reason; for in a MS. note I have seen of that case, it was stated that there was but one house in the parish; and the same appears, or at least is necessarily to be inferred from the quotation of the case in 3 *Burr.* 273.

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legislature, in this power given the justices to appoint overseers.

Where there are different statutes *in pari materia* though made at different times, or even expired, and not referring to each other, they shall be taken and *construed together*, as one system, and as explanatory of each other.(a) So, in the laws concerning church-leases; and those concerning bankrupts. And so also I consider all the statutes providing for the poor, as *one system* relative to that subject. Now 39 *Eliz.* c. 3, is the first of these, and when first mentioned by my brother *Foster*, struck me strongly, with regard to the determination of the present question. That act says, "that the church-"wardens and FOUR substantial householders, &c." (*without any latitude* whatsoever, for a greater number.) And *more* than four could *not* have been appointed under it: for the number the *legislature* had named, could *not* be altered.

[Callis, 95. 3 Burr. 1686.]

[1 Vent. 246.]

That act of parliament of the 39 *Eliz.* was *continued* by the very act of 43 *Eliz.* c. 2. § 18, till the following *Easter*, when that of 43 *Eliz.* c. 2, was to take place: so that the legislature had it before them, and even under *particular* consideration. And that act of 39 *Eliz.* is expressly fixed to *four*. Parishes were not then, so populous as they are now. And this act of 43 *Eliz.* c. 2, gives power to *lessen* the number to three or two according to the size of the parish: but they had no notion of *extending* it to a *greater* number. And there is *some* weight in the circumstance of the numbers *descending* from four downwards, and *not ascending* upwards.

As to the argument which was drawn from 13, 14 C. 2. c. 12. § 21. I think that statute *ought* to be taken into consideration in construing this of 43 *Eliz.* c. 2: but I do *not* see that this will help the case. For it is begging the question, to suppose "that the justices MAY appoint "*more* than four overseers of the poor, in townships and "villages in those large parishes." It is expressly directed by that statute of 13, 14 C. 2. c. 12. § 21. that such choice and appointment shall be, (and the construction of it must be guided according to its *own* reference,) "ACCORDING to the rules and directions mentioned in "the statute of 43 *Eliz.*" And neither any judicial determination, nor usage, support this conceit "that they *can*

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[Qu. 2 Ses Cas. 208, 209. Ca. 148.]

(a) Vid, several cases in support of this general rule, that all statutes on the same subject must be taken into consideration on the construction of any one of them, 4 *New Abr.* 646.

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"appoint *more* than four in these townships and villages "in the large parishes,"

The act of 13, 14 *C.* 2. was indeed rightly and reasonably extended to *Wales*.(*a*) But no argument can be drawn from *that* latitude of construction: as both the words of it, (which *name Wales*,) and also the general intention of it, (*viz.* the *care of the poor*,) well justified *such* an extension.

Then the act of parliament in 1740, relating to St. *Martin's*, and the overseers of that parish, and which extends their number, shews the construction put *by the legislature* themselves upon the 43 *Eliz.* on this head; and excepts this very large parish of St. *Martin* out of it. And yet even this very act *restrains* the number to *nine*; which shews that the justices had no power under the 43 *Eliz.* to appoint *what number* THEY PLEASED. For it would be a strange thing, to *limit* the number, in a *very large* parish; and leave it *at large*, in *smaller* ones.

There are two other acts of parliament, which have not been mentioned; and both of them passed after the case of *Rex* v. *Harman*, and after the case of St. *Clement Danes*: *viz.* 17 *G.* 2. *c.* 3, and 17 *G.* 2. *c.* 38, both relating to overseers: and yet no extension of number, nor any variation therein.

The PRECISE NUMBER is *not* an *immaterial* thing; either to the officers of the parish, or to the persons for whom they are trustees. Upon themselves, it is a burden: which, by this practice, would come round the sooner. And in respect to the parish for whom they are trustees, a great number may not do business better than a smaller; and it would be attended with more expence.

Also with regard to the *churchwardens* who are joined in authority with them—they are *only two*, or (by custom) four churchwardens in each parish. Therefore a greater
[449] number of *overseers* being appointed, necessarily alters the balance of the *majority* amongst them, and makes an essential difference in the proportion between the one and the other. And there is no number to *stop* at, if the justices *exceed* four: they may go on, without *any* boundary, unless the specified number of four be the limit.

Therefore I think this appointment of *more* than four,

(*a*) Qu. Whether the appointment of five overseers was good? The Ch. J. said the 13, 14 *Car.* 2. allows the appointment of two or more in towns and villages: that has been construed to extend to all *England*; and therefore by that statute more than four may be applied: to which *Chapple*, J. and *Wright*, J. seemed to agree, and were clear that it was void by 43 *El.* 2 *Sess. Cases*, 208.

is NOT *warranted* by the 43 *Eliz.* upon the *true* construction of that statute. 1758.

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Mr. Just. DENISON concurred in opinion, "that this "appointment ought to be quashed:" and he did not think that this court *ever had had* any doubt about the *legal* determination of this question.

He then stated and expatiated upon the case of *Rex v. Harman;* and said the reason why the court did not quash that appointment was *merely* for the *sake* of the *poor;* and not from any doubt of the *law*.

Besland's case was quite a different case from that of appointing a *greater* number than four. The point of the validity of an order appointing more than four, is a *new* case; but *not* a *difficult* one, at all.

This act of 43 *Eliz.* is, as one may call it, the *magna charta* of the poor. And it can never be called *directory* as to the *number of the overseers* appointed by it.

By 1 *Inst.* 13. *b.* it appears that there were *only two escheators*, in *England*, in ancient time: though more were made indeed by act of parliament, (14 *E.* 3. *c.* 8.) So there can be but *one chief justice*, or *chief* prothonotary *Jenkins* 142. *Case* 93. So, in the constitution of the court of *wards;* where 32 *H.* 8. *c.* 46. enacts "that there "shall be *two* auditors of the court of *wards*," the king can not make *four*. So is 11 *Co.* 4. *a. Auditor Curle's* case.

Certainly, the legislature had the number which stood fixed by 39 *Eliz.* in their *view*, and under their *consideration*, when they made the 43 *Eliz.* And can it be imagined that the justices have a jurisdiction to appoint *more?* clearly, they have *not*.

In the case of *Rex* v. *Sparrow*, (mentioned in 2 *Strange* 1123,) the court took great care in their determination. And 13, 14 *C.* 2. was there considered by Ld. Ch. Just. *Lee*, as tied up to the rules and directions of 43 *Eliz.* and that *mandamus* was issued for the *sake* of the *poor:* And [450] the court equitably and rightly held, "that when the "justices had elapsed the time for appointing overseers, "the court might oblige them to do it afterwards, *as* to "the *time;* THAT being discretionary."

But no body ever thought it discretionary *as* to the NUMBER: and there is no reason in the earth, for us to break the boundary, which is fixed. Therefore he was clear, to quash the present order for the appointment of *five*.

Mr. Just. FOSTER declared the very same thing; and that he never had any doubt in point of *law:* his only doubt was in point of *discretion;* as he *then* supposed the *usage* to be otherwise than as it *now* appeared to be.

When the statute of 43 *Eliz.* was made, there were very [4 Durn. 551.]

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few large parishes in towns and cities: therefore at *that time*, the parliament thought four overseers sufficient. Under 39 *Eliz.* I take it, the justices *could not have gone* BELOW *four*. For, it being a *special power* given by statute, must be *strictly pursued*. And therefore, in the 43 *Eliz.* the legislature, though they took the act of the 39th for their plan, and followed it in almost every instance; yet, seeing the inconvenience in small parishes, departed from it with regard to the NUMBER of overseers: which they *reduced*, at the discretion of the justices; but did *not increase*, in any event; probably because they thought *four* overseers, *with* the churchwardens, sufficient for the largest parish (as they certainly are,) though too many for the small ones.

If it be *now* become inconvenient, the application must be to *parliament*. However, he declared that he did not think that business *is* best done by a multitude of hands: and in fact, where the number that are to do it is large, they always delegate the actual transaction of it to a *few*.

It is NOT *true*, (what some people imagine) "that the "*common* law of *England* made NO *provision* for the *poor*:" the Mirror shews the *contrary*. How, indeed, it was *done*, does not appear.

As to the case of *Rex* v. *Sparrow*,—43 *Eliz.* fixes a *time* to appoint overseers, with a penalty: but did not mean that the *poor should lose* the equity and benefit of the act, if the justices did not appoint *within* that time.

No parish ever applied for a *mandamus* commanding the justices to appoint *more* than four. The general sense of mankind was against it. This is an *authority founded* upon a *positive* law; and *therefore must* be pursued.

[451] Mr. Just. WILMOT declared (as his brethren Mr. Just. DENISON, and Mr. Just. FOSTER had done) that he never had had the least doubt, but upon the apprehension of an *usage* of the large parishes, for many years back, *to appoint* MORE than four. But this apprehension is now vanished: and therefore the *usage* (as it *now* comes out) confirms the *true* construction of the act.

The instances of greater numbers appear to be *only three:* and one of them (*St. Andrew's Holborn,*) is considered as three vills, under 13, 14 *C.* 2. And *St. Martin's* (another of them) is under a new act of parliament made on purpose. I think this order *cannot* be supported.

There *were* provisions for the poor, as my brother FOSTER has observed, at *common* law: though it does not fully appear *what* they were. The first *regular* provision, however, is by 39 *Eliz.* By this statute, and by 43 *Eliz.*

the legislature add *four* OVERSEERS to the *former parochial administration.* And no one can doubt that the *number* is *essential;* and *cannot,* by the rule of law be *exceeded.* For powers given by a positive law, or even by deed, to CERTAIN *numbers* of persons can never be exceeded, in the article of number. On the other hand, if it had rested singly upon 39 *Eliz.* the number four could not have been *lessened.* But then indeed the 43 *Eliz.* relaxes this precise number of *four,* as to *small* parishes; but still *continues it,* as to all *greater.* And where the makers of the act *intend* an *indefinite* number, they EXPRESSLY *say so.* For the 19th section relating to the island of *Foulness* converts the whole district into one parish, for this purpose; and *directs* an *indefinite* number of overseers for *that* place. Which clause *alone* would satisfy me, as to the *sense* of the *legislature.* And they might as easily have said "*so many* as should seem "necessary," as precisely fix it to *four;* if they had meant it so.

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And it is (as has been observed) an office which is burdensome upon the persons appointed: and business is *not* better done by great numbers of men, than by a few. And the *parish* have as great security from four, as from more. Upon the whole, he entirely concurred, "that the order could not be supported."

Mr. *Norton* moved that the order might not be immediately quashed; because the overseers had laid out 500l. or 600l. *under* it: and therefore he proposed that the other side should consent to have one of the overseers *left out* of the order.

The court thought it might be reasonable; and for this reason ONLY, did not directly and immediately *pronounce* the rule "to quash the order."

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But now at a day so long subsequent, on Mr. *Morton's* motion for the judgment of the court; and Mr. *Norton,* not urging any thing further against it, (and acknowledging that he had spoken to his client,)

LORD MANSFIELD said there must be an end of it, some time or other: therefore let the RULE be made absolute, to

QUASH the APPOINTMENT.

ORDER QUASHED.

MILLER *versus* RACE.

Tuesday, 31st Jan. 1758.

IT was an action of TROVER against the defendant, upon a BANK NOTE, for the payment of twenty-one

Bank notes, though stolen, the property of the person to whom they are paid, without knowledge of the larceny.

1758. MILLER v. RACE. [See 1 Bos. 649. 4 Durn. 30, 325. 1 Hen. Bl. 318. 3 Durn. 554. and S. C. cited and S. P. adjudged on a bill of exchange, payable to A. or bearer. 2 Burr. 1519.]

pounds ten shillings to one *William Finney* or *bearer*, on demand.

The cause came on to be tried before Lord *Mansfield* at the sittings in *Trinity* term last at *Guildhall, London*; and upon the trial it appeared that *William Finney*, being possessed of this bank note on the 11th of *December* 1756, sent it by the general post, under cover, directed to one *Bernard Odenharty*, at *Clipping Norton* in *Oxfordshire*; that on the same night the *mail was robbed*, and the bank note in question (amongst other notes) taken and carried away by the robber; that this bank note, on the 12th of the same *December*, came into the hands and possession of the plaintiff, for a *full and valuable consideration*, and *in the* USUAL *course and way of his business*, and *without any notice or knowledge* of this bank note being taken out of the mail.

It was admitted and agreed, that, in the common and known course of trade, bank notes are paid by and received of the holder or possessor of them, *as cash*; and that in the usual way of negotiating bank notes, they pass from one person to another as cash, by *delivery only* and *without* any further inquiry or evidence of *title*, than what arises from the *possession*. It appeared that Mr. *Finney*, having notice of this robbery, on the 13th *December*, applied to the bank of *England*, "*to stop the payment* "of this note:" which was ordered accordingly, upon Mr. *Finney's* entering into proper security "to indemnify "the bank."

[453] Some little time after this, the plaintiff applied to the bank for the payment of this note; and for *that* purpose delivered the note to the defendant, who is a clerk in the bank: but the defendant refused either to pay the note, or to *re-deliver* it to the plaintiff. Upon which this action was brought against the defendant.

The jury found a verdict for the plaintiff, and the sum of 21*l.* 10*s.* damages, subject nevertheless to the opinion of this court upon this question—"Whether under the "circumstances of this case, the plaintiff had a *sufficient* "*property* in this bank note, to entitle him to recover in "the *present action?*"

Mr. *Williams* was beginning on behalf of the plaintiff.—

But LORD MANSFIELD said, "that as the objection "came from the side of the defendant, it was "rather more proper for the defendant's counsel "to state and urge their objection."

Sir *Richard Lloyd*, for the defendant.

The present action is brought, *not* for the *money* due upon the note; but for the NOTE *itself*, the *paper*, the *evidence* of the debt. So that the *right to the* MONEY is

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not the present question: the note is only an *evidence* of the money's being due *to him* AS BEARER.

The note must either come to the plaintiff *by assignment*; or must be considered as if the bank gave a *fresh, separate, and distinct note to each* bearer. Now the plaintiff can have no right by the *assignment of a* ROBBER. And the bank cannot be considered as giving a *new* note to each bearer: though each bearer may be considered as having obtained from the bank a *new* PROMISE.

I do not say whether the bank *can*, or *cannot stop payment*; *that* is *another* question. But the *note* is only an *instrument* of recovery.

Now this note, or these goods (as I may call it,) was the *property* of Mr. *Finney*, who paid in the money: *he* is the real owner. It is like a medal which might entitle a man to payment of money, or to any other advantage. And it is by Mr. *Finney's* authority and request that Mr. *Race* detained it.

It may be objected, that this note is to be considered *as cash* "in the *usual course of trade.*" But still, the course of trade is not at all affected by the *present* question, about the right to the *note*. A *different species of action* must be brought for the *note*, from what must be brought against the bank for the *money*. And this man has elected to bring trover *for the* NOTE itself, *as owner of the* NOTE; and not to bring his action against the bank for the *money*. In which action of *trover*, property can not be proved in the plaintiff: for a *special* proprietor can have no right against the TRUE *owner*.

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The cases that may affect the present are; 1 *Salk.* 126. *M.* 10 *W.* 3. *Anonymous, coram Holt*, Ch. J. at *nisi prius* at *Guildhall*. There Ld. Ch. J. *Holt* held, that the right "owner of a bank bill, who lost it, might have trover "against a stranger who found it: but not against the "person to whom the finder transferred it for a valuable "consideration, by reason of the *course of trade* which "*creates a property* in the assignee or bearer." 1 Ld. *Raym.* 738. * S. C. In which case the note was *paid away* in the course of trade: but this remains in the man's hands, and is not † come into the course of trade. *H.* 12 *W.* 3. *B. R.* 1 *Salk.* 283, 284. *Ford* v. *Hopkins, per Holt*, Ch. J. at *nisi prius* at *Guildhall*, "If bank notes, exchequer notes, "or million lottery tickets, or the like are stolen or lost, "the owner has such an interest or property in them, "as to bring an action, *into* WHATSOEVER *hands* they are "come. Money or cash is not to be distinguished but "these notes or bills are distinguishable, and *can* NOT *be* "*reckoned as* CASH; and they have distinct marks and "numbers on them." Therefore the true owner may seize,

* N. B. in this case, the transferee went to the bank; and got a new bill in his own name. However, the case turned upon his having the note for a valuable consideration.

† The fact seems to be quite otherwise.

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these notes wherever he finds them, if not passed away in the course of trade.

1 *Strange*, 505. *H.* 8 *G.* 1. In *Middlesex*, *coram Pratt*, Ch. J. *Armory* v. *Delamirie*. A chimney sweeper's boy found a jewel. It was ruled "that the *finder* "has such a property as will enable him to keep it *against* "ALL *but* the *rightful* owner, and, consequently, may "maintain trover."

This note is just like *any other* piece of property UNTIL *passed away in the course of trade.* And *here* the defendant *acted as* AGENT to the TRUE *owner.*

Mr. *Williams contra* for the plaintiff.

The holder of this bank note, upon a *valuable* consideration has a right to it, even *against* the *true* owner.

1st, The circulation of these notes vests a *property* in the holder, who comes to the possession of it, upon a *valuable consideration.*

[455] 2dly, This is of vast *consequence to trade and commerce*; and they would be greatly incommoded if it were otherwise.

3dly, This falls *within the reason* of a sale in *market-overt*; and ought to be determined upon the same *principle.*

First—He put several cases, where the usage, course, and convenience of trade, *made* the law: and sometimes, even against *an act of parliament.* 3 *Keb.* 444. *Stanley* v. *Ayles.* *Per Hale* Ch. J. at *Guildhall.* 2 *Strange* 1000. *Lumley* v. *Palmer:* where a parol acceptance of a bill of exchange was holden sufficient against the acceptor. 1 *Salk.* 23.

Secondly—This paper credit has been always, and with great reason, favoured and encouraged. 2 *Strange*, 946. *Jenys* v. *Fawler et al'.*

The *usage* of these notes is, "That they *pass* by *delivery* "*only*; and are *considered as current cash*; and the POS-"SESSION always *carries* with it the property." 1 *Salk.* 126. *pl.* 5. is in point.

A particular mischief is rather to be permitted, than a general inconvenience incurred. And Mr. *Finney*, who was robbed of this note, was guilty of *some* laches in not preventing it.

Upon Sir *Richard Lloyd's* argument, a holder of a note might suffer the loss of it, for want of title against a true owner; even if there was a chasm in the transfer of it through one only out of five hundred hands.

Thirdly—This is to be considered upon the *same foot* as a *sale in market overt.*

2 *Inst.* 713. "A sale in *market overt binds* those that "had right."

But it is objected by Sir *Richard*, "that there is a sub-"stantial *difference* between a right to the *note*, and a

"right to the *money*." But I say the right to the money will *attract* to it a right to the paper. Our right is not by *assignment*, but by *law*, by the usage and custom of trade. I do not contend that the *robber*, or even the *finder* of a note, has a *right to the note*: but AFTER *circulation*, the holder upon a valuable consideration *has* a right. 1758. MILLER v. RACE.

We *have a property* in this note: and have recovered the value against the WITH-HOLDER of it. It is not material, *what* action we could have brought against the *bank*.

Then he answered Sir *Richard Lloyd's* cases; and agreed that the true owner might pursue his property, where it came into the hands of another, WITHOUT *a valuable consideration*, or NOT IN *the course of trade*: which is all that Ld. Ch. J. *Holt* said in 1 *Salk.* 284. [456]

As to 1 *Strange*, 505. He agreed that the finder has the property against all but the rightful owner: NOT *against* HIM.

Sir *Richard Lloyd* in reply---

I agree that the holder of the note has a *special* property: but it does not follow that he can maintain *trover* for it, *against the true owner*.

This is not only *without*, but AGAINST *the consent* of the owner.

Supposing this note to be a sort of *mercantile* cash; yet it has an ear-mark by which it may be distinguished; therefore trover will lie for it. And so is the case of *Ford* v. *Hopkins*.

And you may recover a thing stolen from a merchant, as well as a thing stolen from another man. And this note is a mere piece of paper; it may be as well stopped, as any other sort of mercantile cash, (as, for instance, a *policy* which has been stolen.) And this has NOT *been passed away* in trade; but remains in the hands of the true owner. And therefore it does not signify in *what manner* they are *passed away*, when they *are* passed away: for this was NOT *passed* away. Here the true owner, or his *servant* (which is the same thing) detains it. And, surely, *robbery* does *not devest the property*.

This is not like goods sold in *market overt*: nor does it pass in the way of a market overt; nor is it within the reason of a market overt. Suppose it was a *watch* stolen: the owner may seize it, (though he finds it in a market overt,) before it sold there. But there is no market overt FOR *bank notes*.

I deny the holder's (merely as holder) having a right to the note, *against the* TRUE *owner*: and I deny that the *possession* gives a right to the note.

Upon this argument on *Friday* last, Ld. *Mansfield* then said that Sir *Richard Lloyd* had argued it so ingeniously,

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that (though he had no doubt about the matter,) it might be proper to look into the cases he had cited, in order to give a proper answer to them; and therefore the court deferred giving their opinion, to this day. But at the same time, Ld. *Mansfield* said, he would not wish to have it understood in the city, that the court had any doubt about the point.

Lord MANSFIELD now delivered the resolution of the court.

After stating the case at large, he declared that at the trial, he had no sort of doubt, but this action was well brought, and *would lie* against the defendant in the present case; upon the *general course of business*, and from the *consequences* to trade and commerce: which would be much incommoded by a contrary determination.

It has been very ingeniously argued by Sir *Richard Lloyd* for the defendant. But the whole fallacy of the argument turns upon comparing bank notes to what they do not resemble, and what they *ought not* to be compared to, *viz.* to goods, or to securities, or documents for debts.

Now they are *not* goods, not securities, nor documents for debts, nor are so esteemed: but are treated as *money*, as *cash*, in the ordinary course and transaction of business, by the general consent of mankind; which gives them the credit and currency of *money*, to ALL intents and purposes. They are as much *money*, as guineas themselves are; or any other current coin, that is used in common payments, *as* money or cash.

They pass *by a will*, which bequeaths all the testator's money or cash; and are *never* considered as *securities* for money, but as *money itself*. Upon Ld. *Ailesbury's* * will, 900*l.* in bank-notes was considered as *cash*. On *payment* of them, whenever a receipt is required, the receipts are always given *as* for *money*; NOT as for *securities* or *notes*.

* Popham et al. v. Bathurst et al. in Chancery, 5th November, 1748.

So on bankruptcies, they cannot be followed as identical and distinguishable from money: but are always considered as *money* or *cash*.

It is pity that reporters sometimes catch at quaint expressions that may happen to be dropped at the bar or bench; and mistake their meaning. It has been quaintly said, "that the *reason why* money can not be followed is "BECAUSE it has *no ear-mark*:" but this is NOT *true*. The *true* reason is, upon account of the *currency* of it: it can not be recovered after it has passed in *currency*. So, in case of *money stolen*, the true owner can not recover it, *after* it has been paid away fairly and honestly upon a valuable and *bonâ fide* consideration: but *before* money has passed in currency, an action may be brought for the *money itself*. There was a case in 1 *G.* 1. at the sittings,

[2 Vez. 19. Cowp. 800. 2 Vern. 441.]

Thomas v. *Whip*, before Ld. *Macclesfield*: which was an action upon *assumpsit*, by an administrator against the defendant, for money had and received to his use. The defendant was nurse to the intestate during his sickness; and, being alone, conveyed away the *money*. And Ld. *Macclesfield* held that the action lay. Now this must be esteemed a *finding* at least. 1758. MILLER v. BACK.

Apply this to the case of a *bank-note*. An action may lie against the *finder*, it is true; (and it is not at all denied:) but NOT *after* it has been PAID AWAY IN CURRENCY. And this point has been determined, even in the infancy of bank-notes; for 1 *Salk.* 126. *M.* 10 *W.* 3. at *nisi prius*, is in * point. And Ld. Ch. J. *Holt* there says that it is "by *reason of the course of trade*; which "creates a property in the assignee or bearer." (And "the bearer" is a *more proper* expression than *assignee*.)

* V. ante 451.

Here, an inn-keeper took it, *bonâ fide*, in his business from a person who made an appearance of a gentleman. Here is no pretence or suspicion of COLLUSION *with the robber*: for this matter was strictly inquired and examined into at the trial; and is so stated in the case, "that he took it for a *full and valuable consideration*, in the *usual* "*course of business*." Indeed if there had been any *collusion*, or any circumstances of *unfair dealing*, the case had been much otherwise. If it had been a note for 1000*l.* it might have been suspicious: but this was a *small* note, for 21*l.* 10*s.* only: and *money given in exchange* for it.

Another case cited was a loose note † in 1 Ld. *Raym.* 738, ruled by Ld. Ch. *J. Holt* at *Guildhall*, in 1698; which proves nothing for the defendant's side of the question: but it is exactly agreeable to what is laid down by my Ld. Ch. J. *Holt*, in the case I have just mentioned. The action did not lie against the assignee of the bank-bill; BECAUSE he had it for *valuable* consideration.

† Ex relatione of another person.

In that case, he had it from the person who found it: but the action did not lie against him, *because* he took it in the *course of currency*; and *therefore* it could not be followed in his hands. It *never* shall be followed into the hands of a person who *bonâ fide* took it in the *course of currency*, and in the *way of his business*.

The case of *Ford* v. *Hopkins*, was also * cited: which was in *Hil.* 12 *W.* 3. *coram Holt* Ch. J. at *nisi prius*, at *Guildhall*; and was an action of trover for million-lottery tickets. But this must be a very *incorrect* report of that case: it is *impossible* that it can be a true representation of what Ld. Ch. J. *Holt* said. It represents him as speaking of *bank-notes*, exchequer-notes, and *million lottery tickets*, as LIKE *to each other*. Now no two things can be more

* V. ante 451.

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UNLIKE to each other, than a *lottery-ticket*, and a bank-note. Lottery tickets are *identical* and *specific*: *specific actions* lie for them. They may prove extremely unequal in value: one may be a prize; another, a blank. *Land* is not more specific, than *lottery-tickets* are. It is there said, "that the delivery of the plaintiff's tickets to the "defendant, as that case was, was *no change of property*." And most clearly it was NO *change of the property*; so far, the case is right. But it is here urged as a proof "that the "true owner may follow a *stolen bank-note*, into what "hands soever it shall come."

Now the whole of that case turns upon the throwing in *bank-notes*, as being LIKE to *lottery tickets*.

But Ld. Ch. J. *Holt* could never say "that an action "would lie against the person who, *for a valuable consi-* "*deration*, had received a *bank note* which had been sto-"len or lost, and *bonâ fide paid to him*:" even though the action was brought *by the true owner*: because he had determined *otherwise*, but two years before; and because bank notes are not like lottery-tickets, but *money*.

The person who took down this case, certainly misunderstood Lord Ch. J. *Holt*, or mistook his reasons. For this reasoning would prove, (if it was true, as the reporter represents it,) that if a man paid to a goldsmith 500*l.* in bank notes, the goldsmith could never pay them away.

A bank-note is constantly and universally, both at home and abroad, treated *as money*, as *cash*; and paid and received, as *cash*: and it is necessary, for the purposes of commerce, that their *currency* should be *established* and *secured*.

* Walmsley against Child, 11th December, 1749. [1 Vez. 341. 3 Burr. 1524. 3 Durn. 454.]

There was a case in the court of Chancery, * on some of Mr. *Child's* notes, payable to the person to whom they were given, or bearer. The notes had been lost or destroyed many years. Mr. *Child* was ready to pay them to the widow and administratrix of the person to whom they were made payable; upon her giving bond, with two responsible sureties, (as is the custom in such cases,) to indemnify him against the bearer, if the notes should ever be demanded. The administratrix brought a bill; which was dismissed because she either could not or would not give the security required. No dispute ought to be made with the bearer of a *cash-note*; in regard to *commerce*, and for the sake of *the credit of these notes*; [460] though it may be both reasonable and customary, to *stay* the payment, *till* inquiry can be made, whether the bearer of the note came by it *fairly*, or not.

LORD MANSFIELD declared that the court were all of the same opinion, for the plaintiff; and that Mr. Just. WILMOT concurred.

RULE—That the *notes* be delivered to the PLAINTIFF.

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REX v. SHEBBEARE. Wednesday, 1st February 1758.

REX *versus* Dr. SHEBBEARE.

THE doctor was brought up to be bailed: but had not bail ready.

Note—He was now brought up by virtue of a *habeas corpus* ISSUED by the Ld. Ch. Justice in the *vacation*, returnable *immediate*, before himself *at his chambers*.

Habeas corpus issued in vacation, returnable *immediate* before a judge, does not expire by the commencement of the term.

Upon Dr. *Shebbeare's* mentioning that he had been informed that, as the term was begun, it was necessary to take out a *new* writ of *habeas corpus*, to bring him into court;" and the officers on the crown-side having said that *their* notion of the *practice* was, "that, the *term* "*being begun*, the *old* writ was *expired*, and it was necessary to take out a *new* one.

LORD MANSFIELD declared the court to be unanimously of opinion that such notion was *ill founded*; that a person *might* be brought into court upon a *habeas corpus* issued in the *vacation*: and that to require a new writ would be attended with delay and expence, without the least reason or utility.

LORD MANSFIELD—If you have not bail, we cannot commit you to the same custody you come hither in, (which was that of Mr. *Carrington*, one of the king's messengers;) but must commit you to our marshal: and you will not then be obliged to sue out your *habeas corpus* again; but may be brought up from the prison of this court, by a *rule* of court, whenever you shall be prepared to give bail.

Accordingly, the doctor, being charged with two warrants under the hand and seal of the secretary of state, which appeared upon the return to the *habeas corpus*, was

COMMITTED to the custody of the *Marshal* of this COURT.

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Saturday, 4th Feb. 1758.

REX *versus* INHABITANTS of FLECKNOW.

H. 30 *G.* 2. No. 6.

One who inclosed an allotment of lands adjoining to an open road across common fields is not bound to repair.

THIS was a cause in the crown paper, upon a special case from the assizes in *Warwickshire*; upon an indictment against the inhabitants of the hamlet of *Flecknow*, for *not repairing a highway*, which the indictment lays, "that THEY ought to repair."

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The inhabitants pleaded "that *one George Watson ought* "to repair it, by reason of his tenure: (*a*) so LONG, *as* "the same should *remain inclosed, &c.*" And traverse that the defendants, the inhabitants, ought to repair it.

The replication sets out an act of parliament of 15 *G.* 2. *c.* (a private act) "for inclosing and dividing the com- "mon fields called *Flecknow*, in the county of *Warwick*, "into just allotments and proportions;" and also the several proceedings under it; and then traverses "that "the said *George Watson*, by reason of his inclosing the "said highway, ought to repair and amend it, as often "as there should be occasion, whilst it should remain "so inclosed by him," *modo et forma prout* is alledged by the plea: *et hoc paratus est verificare.*

[See 2 Durn. 106, 232, 234.]

The rejoinder admits the act, and the proceedings under it, and *George Watson's* acceptance, *&c.* under them; and alledges that *George Watson*, by reason of his inclosing, ought to repair, *&c.* And of this they put themselves upon their country.—Issue is taken thereon; and a verdict *pro rege*, subject to the opinion of this court.

The case stated, by consent of counsel, was (in substance) thus—the *inhabitants* of the hamlet of *Flecknow*, BEFORE *the making the inclosure* by virtue of the act of parliament in the record mentioned, *were bound to repair* the highway in question.

The *road* in the pleadings mentioned, was, *before* the making the said act of parliament, an ANCIENT OPEN *road*, lying *uninclosed*, without hedge, ditch, or fence; and continued to lie so uninclosed *at the time* of making the said act of parliament, and *until* the inclosure thereof as hereafter mentioned. (*b*)

The commissioners appointed by the said act of parliament did, *in pursuance of the said act*, by their award in writing, *duly award, ascertain, set out, direct* and *appoint* "that there should be at all times, for ever, after the new "inclosure by the said act directed to be made, *a public*

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(*a*) This is wrong in point of form; for as in 2 *Saund.* 160. it was resolved that if a defendant be chargeable by reason of incroachment, he ought not to be charged *ratione tenure*, but by reason of the incroachment only: so in the case of an inclosure of land contiguous, the same reasoning will hold as in the case of incroachment.

(*b*) If the inhabitants of a township bound by prescription to repair the roads within the township be expressly exempted by the provisions of a road-act from the charge of repairing new roads to be made within the township, that charge must necessarily fall on the rest of the parish. The *King* v. *Inhabitants* of *Sheffield*, 2 *Durnf.* 106.

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"*way or road*, leading from the hamlet of *Flecknow* aforesaid, to *Southam* in the said county of *Warwick*, and also from *Southam* aforesaid to *Flecknow* aforesaid (being the road in question,) for persons to pass, either on foot, horseback, or with cattle and carriages, into, over and through the ALLOTMENT *of the said George Watson*; and that the same should be and remain at all times for ever thereafter, *full forty feet broad*, as the same was then admeasured and set out." And the case states that within one year after making the said award, (that is to say, in *January* 1745,) the said *George Watson inclosed his allotment*, pursuant to the said act of parliament: and the highway in question *lay open and uninclosed* on each side thereof as aforesaid over the lands, part of the allotment of the said *George Watson*, for the space of THREE *years* next after the inclosure of his said allotment so by him made as aforesaid.

The said *George Watson*, *at the end of* the said THREE *years*, INCLOSED *with hedges, ditches, and fences*, the said highway, on both sides thereof, leaving the same full forty feet broad between the ditches: and the said road or highway *remained so inclosed by* the said *George Watson*, during the whole time mentioned in the indictment.

The said *George Watson* made *no* inclosure of the said highway in question, *other* than as aforesaid.

A verdict by consent was found by the jury; whereby the defendants were found guilty: but such verdict was to be subject to the opinion of this court, upon the whole case, as it appears on the pleadings and on what appeared to be and was the case as is before mentioned. And the

QUESTION submitted is whether the *inhabitants* of the said hamlet of *Flecknow* CONTINUED *bound* to repair the highway in the said indictment mentioned, NOTWITHSTANDING *the said* INCLOSURE *by the said George Watson in manner before stated:* or whether, *by reason of* SUCH INCLOSURE, they were DISCHARGED therefrom, DURING *the time* in the indictment specified.

Serj. *Hewitt pro rege*, argued that the inhabitants *remained* STILL *bound*.

It is admitted that this hamlet of *Flecknow was bound* to repair *before the act* of parliament. And it does *not appear* that *George Watson* is bound by having inclosed, under this act of parliament: for this is *no incroachment*, *no injury to* the *public*, *no act* done *without consent*. [463]

And the cases turn upon WANT *of lawful authority*. 1 *Ro. Abr.* 390. Letter A. *pl.* 1. Sir *Edward Duncombe's* case: outlets are parcel of the highway, in an open field. *Ibid.* Letter B. *pl.* 1. "The subject may go out of the "beaten track, when the way is founderous in an open

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"field." (a) *Sheppard's Epitome of the Law*, 116. "If a man "inclose the highway, and put it within his own ground, "the parish is not to repair it, but he must repair it "himself." 2 *Saund.* 160. *Rex* vs Sir *Nicholas Stoughton* an encroacher upon the highway, is obliged to repair, so long as the encroachment continues. *Style*, 264. "Who-"ever inclores, &c. takes upon him to repair."

But *this* inclosure and allotment, is *under an act of parliament*; to which *every body* consents. And this act directs public and private highways to be laid out; and it provides "that *no-body* shall go upon *any other* high-"way." Therefore the old right to the old way is at an end, is annihilated: and so is the way itself, being exchanged for the new one. And this, of course, *warrants* the inclosure.

But the act lays no charge upon the owner: therefore *George Watson* cannot be said to have inclosed any part of the *highway*: for this land is allotted to him, as his *private property*; and he is warranted in making this inclosure.

This is just like the case of a writ of *ad quod damnum*; it *is* indeed a *parliamentary ad quod damnum*. It may be even worth the inheritance of the land, to repair the adjoining highway. So that this is *not within the* PRINCIPLES which oblige persons inclosing, to repair. And if *George Watson* be *not* obliged to repair this highway, the inhabitants of *Flecknow are* obliged.

Mr. *Caldecott contra* for the defendants. This is an indictment against the inhabitants for not repairing; and "it only charges that they are bound."

The plea sets out by way of inducement, "that one "*George Watson, by reason of his inclosure*, ought to re-"pair;" and then tenders a traverse "*that the inhabitants* "OUGHT NOT *to repair*."

(a) So the subject might before the inclosure have done, if this road had been founderous; for there was nothing to distinguish this road from others; for when highways are appointed by commissioners authorized by parliament to appoint the same, they become highways for all purposes; and the rights and privileges of the subjects relating to highways in general attach upon and are incident to the highways so appointed; and there can be no distinction between the right of the public to such new appointed highways and the old highways in lieu of which such new highways are generally appointed; and there is at least as little reason for any such distinction, where the commissioner appointed the old highway instead of stopping it up, and appointing another in its stead.

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The replication (instead of taking issue upon this traverse,) sets out the act of parliament, and then sets out all the proceedings under it, and the allotment to *George Watson* and * his acceptance thereof, and his inclosing his allotment, first, and the road afterwards; and then takes quite another traverse, *viz.* "That he the said *George Watson*, "is not, by his inclosing the road, bound to repair it."

Cur'—We cannot meddle with the *pleadings*, now; we are upon the *special case*. If you have any objection to the *pleadings*, you must move in arrest of judgment.

[The pleadings were right as appears by 2 Lev. 112.]

Mr. *Caldecott* then proceeded on the *case*. This was a road, which was always an open and uninclosed road, and went over *George Watson*'s own lands.

1st. This is no inclosure, WITHIN *this act*.

2d. If it was, yet the act does *not take away the legal consequence* of inclosure.

First—This was an old open uninclosed road, over this *George Watson's own* lands. And the act does not give any authority to inclose it; nor could intend any such thing. And it is much better for the public, that it should be open and uninclosed, than that it should be inclosed. If he will inclose it, he ought to repair it.

It is here stated that he did inclose his *allotment* within two years (the time limited for so doing:) but that he did not inclose this *road*, *till* THREE *years* after the commissioner's award. Therefore it is *not* an inclosure *under* this act: consequently, he *is liable* to repair.

[He inclosed his allotment within one year after the award, ante 462.]

I agree that if a man incloses on both sides of a road, he shall repair the whole: and if, *&c.* (See *Hawkins*, as below.) There is a great deal on this subject in 1 *Hawk. P. C.* 202. *Lib.* 1. *c.* 76. § 6, 7. And I agree that a man is bound to repair, *no longer* than WHILST *he continues his inclosure*; so that if he opens his inclosure, he will be discharged.

As to an *ad quod damnum*—It makes the old road to become private property: and there ought to be a grant from the crown.

But this act of parliament has *not directed an inclosure* of the road in question: *neither* does the *award of the commissioners* direct it. Therefore *George Watson* is in this obliged to repair; and the inhabitants are not obliged.

Lord MANSFIELD stopped Mr. Serj. *Hewitt* from replying: for this case was too plain, he said, to need a reply.

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An owner of land over which there is an open road, may *inclose* it, by his *own* authority; or *alter* it, under a *proper* authority, and by a legal course. 1st. He may *inclose* it, by his own *authority*: but then it must be upon *two conditions*—One, "that he *is obliged to repair* it, TILL "he throws up the inclosure;" the other "that he leave

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"sufficient space and room for the road." 2dly. The other act, *viz. altering* or *changing* the road *by a right course*, is by a writ of *ad quod damnum*: where the application is to be made by the owner of the lands; and a licence given by the king, upon a finding by a jury. But in this *latter* case, the owner of the land, is *not* obliged to repair the new road; *unless* the jury impose such a condition upon him: for if they do not, the repair of the road stands just *as it did before*; even though it was at first open, and should be directed by the jury to be inclosed. (*a*)

And this case is *like* a writ of *ad quod damnum*; and not only so, but even *more* than a writ of *ad quod damnum*. [15 MSS. b.] For here, the act vests a power in the commissioners, to set out *new* roads, by their award. Therefore there is an *end* of the old road, *as* an old road. And the commissioners here made their award: in which they describe the future road, and direct it to be forty feet broad, as it was then admeasured.

(*a*) The very name and nature of the proceedings prove that no person ought to be damaged by them; but if the jury had such a power as asserted by Lord *Mansfield*, all the inhabitants of the parish would be damaged, if the old road was open and uninclosed; and the jury had a power of directing the new road to be inclosed, without throwing the burthen of the repairs of the new road upon the prosecutor of the writ *ad quod damnum*; for then the inhabitants would be obliged to repair the new road though inclosed, instead of the old road which was uninclosed, and could not have been inclosed by the prosecutor, the owner of it, without making himself liable to the repairs: the consequence is, either that the jury have no power to direct the new road to be inclosed, or if they have, the law must throw the repairs of it not upon the parish, but upon the prosecutor, as the person making or causing the inclosure.

This if law, (*as to which query,*) is the best, if not the only good reason for the judgment; for there seems to be little or no weight in the other reasons, that the road was inclosed, not voluntarily, but by authority of the act. In respect of repairs, the parish stood before liable to repair the road only so long as it remained uninclosed; and it appears, *ante* 461. that before the act, the road was an ancient open road, and so continued at the time of passing the act; and that it lay open, as appears, *ante* 462. for three years, after the inclosure made by *Watson* of his allotment: so that the inclosure was not made by authority of the act, but was a subdivision.

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And these common fields were not designed to continue open fields, as they were before: but the intent of the act of parliament was that they might be inclosed. And the act says nothing about the expence of repairing the road. Therefore the repair clearly *stands as it did before*; and was *certainly meant so to do*.

And every man had a right to inclose, whose lands adjoin to the road. But if the person to whom the allotment was made near the highway, was to be obliged to repair, (*a*) it might have made a vast *difference in the value* of the lands respectively allotted to each person: for one person's allotment might perhaps run along very far, by the *side* of the highway; and another person's allotment *not lie at all near it*. And yet there is no provision for any such case.

Therefore this *George Watson* is not, upon the facts here stated to us, obliged to repair, *by reason* of his having *inclosed an open road*: nor indeed *is it an open road*, under the circumstances of this case. (*b*)

The parish were bound to repair, before the act: and this road happens to be the same identical road, that was the road before the act. And the act of parliament *never designed* to alter the charge and obligation of repairing the roads over these fields which were intended to be inclosed by virtue of it: nor is this inclosure thus made under this act, *such* an inclosure as comes within the meaning of the law, which obliges the person inclosing a road *voluntarily* and of his own head, to repair the road which he has so *voluntarily* inclosed. [466]

Mr. Just. DENISON concurred: and he thought this case was very *properly* compared to the case of an *ad quod damnum*; and that it might be very properly called a *parliamentary ad quod damnum*.

And he was very clear that the *hamlet were bound* to

(*a*) He need not have inclosed the road, and then he would not have been liable to repairs; and no doubt the commissioners allowed for this inconvenience, as well as others.

(*b*) It appears in page 462, to have been stated by the case, that the road in question was over and through the allotment of *George Watson*.

Query, Whether it be an objection to this determination, that in consequence thereof, such proprietors of estates in the parish or town, as are not benefited by the inclosure, will be injured by the increase of the expence of repairing highways, which will be much heavier after they are made into lanes, than when they were uninclosed?

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repair, *just as they were before*: and that *this* inclosure was *not* such an inclosure as the cases cited intend.

Mr. Just. FOSTER likewise concurred. And he thought the act *intended to give* the person, to whom an allotment adjoining to the road should be made, *power to inclose*: or otherwise he might be a very great sufferer by such allotment. And he was extremely clear that the *hamlet remained bound* to repair the road, just as much as they were bound to repair before the act.

Mr. Just. WILMOT concurred too, clearly: and the rather, for that, if it was not so, the allotment might prove what the civil law terms a *damnosa hæreditas*. And the allotments to the different persons might be of extreme different values, according as they lay near to, or far from the road.

Upon all the circumstances of the case, he was clear that the *hamlet remained liable*, in the same manner as they were before the act.

Per Cur. unanimously

RULE for the *postea* to be delivered to the *prosecutor*.

TURNER *versus* TURNER.

Volunteer soldier not privileged from arrests.

THE COURT (Mr. Just. FOSTER being gone) were unanimous, that a person VOLUNTARILY *inlisting* HIMSELF, was NOT *privileged from arrests*, within the *act* of last sessions (30 *G.* 2. *c.* 8.) "for the speedy and "effectual recruiting of his majesty's land-forces, and "marines:" for that the act was only meant to privilege SUCH persons from arrests, as were, under that act,* COMPELLED *against* their wills, to serve as soldiers.

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Tuesday, 7th February 1758.

SIR EDWARD WORSELEY *et al.* Assignees of RICHARD SLADER, a Bankrupt, *versus* DEMATOS and SLADER.

Conveyance by a trader of his whole substance to a particular creditor an act of bankruptcy.

THE present question came before this court, after a trial at law before Lord *Mansfield*, upon a feigned issue out of the court of Chancery, to try, whether one *Richard Slader*, a trader, was a bankrupt; And (2dly.) if he was a bankrupt, then *upon* WHAT PARTICULAR *day* he became so: and *that* particular day on which he should be found to have become a bankrupt was to be *indorsed* upon the *postea*.

[See 2 Ves. jun. 251. Doug. 87. Cowp. 629, and S. C. cited 1 Brown. 99.]

It was soon agreed, as to the first point, "that he "certainly *did become* a bankrupt," by an undoubted

* *V.* Section 20th, pa. 117, 218.

clear act of bankruptcy committed on the 13th of *November* 1756.

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But, upon the second point, as to the *time when* he FIRST became a bankrupt, it was insisted, on behalf of the plaintiffs, that he became a bankrupt *anterior* to that 13th of *November*, *viz.* *upon* the 23d of *October*; namely, by the very *executing* the deed in question, which bore the latter date. For they alledged this deed to be *fraudulent*: and the executing it, to be *ipso facto an act of bankruptcy*, within the statute of 1 *Jac.* 1. *c.* 15.; * which statute expressly makes any fraudulent grant or conveyance of the trader's lands or goods, whereby his creditors may be defeated or delayed of their just debts, a *specific act of bankruptcy*.

* V. § 2. of that act.

If the deed *was* fraudulent, within the true intent and meaning of the statute, he certainly committed an act of bankruptcy on the 23d of *October*: if it was *not*, he did not commit any act of bankruptcy till the 13th of *November*.

The jury found him a bankrupt.

And, by consent, the following order was made at *nisi prius*, *viz.* that either party be at liberty to move the court. And if the court shall, upon such motion, be of opinion "that the deed of the 23d of *October* 1756, is, "under all the circumstances *fraudulent*, and the execu-"tion of it by *Richard Slader*, *an act of bankruptcy*,"—then the *postea* shall be marked on the back thereof, "that the said *R. S.* became a bankrupt on the said 23d "of *October* 1756:" But, if the said court shall be of opinion "that the execution of the said deed, under all "the circumstances by the said *R. S.* be *not* an act of "bankruptcy," then the said *postea* shall be marked on the back, "that the said *R. S.* became a bankrupt on the "13th day of *November*."

The form of the *rule*, under which it came before the court was thus—"it is ordered that the plaintiffs shew "cause why the *postea* in this cause should not be "indorsed, that *Richard Slader* became a bankrupt on "the 13th day of *November* 1756."

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LORD MANSFIELD first repeated the whole evidence very particularly and minutely: which, after the counsel had done, was resolved, by the opinion of the whole court, into the following case; *viz.*

James Davis, an agent of *Isaac De Mattos*, *knowing Slader* to be indebted, and that he could not carry on his trade, unless somebody in *London*, in the nature of a banker, would pay his draughts, negotiated (in the month of *July* 1756,) an agreement between the said *Isaac De Mattos* and *Richard Slader*, "that *De Mattos* should pay "*Slader's* draughts, upon having security."

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The nature of the security, and the terms of the agreement, appear only by the deed of the 23d of *October*; prepared, and procured to be executed, by *James Davis* and *James Whitehead*, both of them agents of *Isaac De Mattos*.

The DEED in question bears date the 23d of *October* 1756; and recites *Slader's* title to the mill and premises; and also his being concerned in and carrying on divers branches of merchandize and other business; and his having frequent occasion to draw and remit sums of money from and to *London*: and his having requested *Isaac De Mattos* to be his agent or banker there; and that, in order to indemnify him for so doing, *Slader* had agreed to transfer and assign all his estate and interest in the premises afore-mentioned in the said indentures, *and also* ALL *his stock* used and employed in the trades of brewing and making malt, and in the business of a corn-factor and miller, to the said *Isaac De Mattos*, his executors, administrators and assigns, for that purpose: and then the deed imports that for the purposes aforesaid, and in part performance of the said agreement, and in consideration of 5*s*. he the said *Slader* grants, assigns, *&c.* his said messuage, corn, water mill, and divers other things (subject to a mortgage then subsisting, on part thereof.) And further, in full performance of the said agreement, and for the considerations aforesaid, he grants, *&c.* ALL *his stock, utensils, and other things*, used in his trades of brewing and malting, and of a corn-factor and miller; consisting of coppers, tuns, backs, coolers, pumps, cisterns, screens, and *other* implements; and ALSO ALL his *changeable stock*, consisting of debts, horses, carts, casks, hops, beer, ale, wheat, barley, malt, coals, wood,
[469] and ALL OTHER *goods and commodities* belonging, employed, or made use of, *in the said several trades*, or any of them; and all his estate, right, title, interest, property, claim, and demand whatsoever thereto, and to every or any party thereof; to the said *Isaac De Mattos*, his executors, *&c. defeazanced* however, on his the said *Slader's* paying and making good to the said *Isaac De Mattos* all the sums of money which he should advance and pay on any note, draught, bill, or writing of the said *Slader*; and on his indemnifying *De Mattos* against the same and all matters any ways touching or concerning the said agency.

This deed further contains the common covenants: and there is a receipt indorsed for the 5*s*. consideration-money.

In it is also a covenant that in case of breach of or failure in the conditions, *&c.* or any part thereof, *then* and *from thenceforth*, it should be lawful for the said *Isaac De*

Mattos, his executors, &c. to ENTER, POSSESS *and* ENJOY the said land and premises, &c. and ALSO *to take to his and* their own use and uses, absolutely, all and singular the premises *last* before-mentioned, *viz. the* STOCK, &c.

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Upon the 8th of *October*, *Richard Slader* drew a bill upon *Isaac de Mattos*, by authority from him for 200*l.* but, to give it credit, it was made payable to the said *James Davis*, and indorsed by him.

Upon the 23d of *October*, *Richard Slader* drew another bill upon *Isaac De Mattos*, by authority from him: but, to give it credit, it was made payable to the said *James Whitehead*, and indorsed by him.

Isaac De Mattos himself *personally knew* that the affairs of *Richard Slader* were in confusion: and *hired Samuel Sills*, whom he *sent* down in the month of *October*, to be *book-keeper* to this *Richard Slader*. *Sills* accordingly went, and had examined all *Slader's* accounts and affairs, by the 20th of *October*.

The deed, (which had been a considerable time preparing,) was executed on the 23d of *October*; and is *witnessed* by the said *James Whitehead*, *James Davis*, and *Samuel Sills*.

The bankrupt *continued in possession* of every thing conveyed by the said deed. And *James Davis* took occasion to tell the creditors of *Richard Slader*, "that the said "*Slader* would *do very well*;" "that he had recommended "him to two good men;" and "that *Slader* had given "a mortgage of the *mill*, and *other leasehold* premises:" but *James Davis concealed* and did *not* mention *Slader's* having assigned his GENERAL effects.

Upon the 11th of *November*, *Slader told Davis and Sills*, both together, "that he *could not stand*;" and consulted them what to do: the result of which consultation was, —that *Sills*, by order of *Slader*, the same day, gave *possession to Davis*, as agent of *De Mattos*, who immediately set out for *London*. The next day, (the 12th of *November*,) *Slader* ordered *Sills* to deny him: on the 13th *Sills* did deny him accordingly; and told the reason, "that it "was *to commit* an act of bankruptcy." [470]

Slader had nothing of value, *but* what was comprized in the deed of the 23d of *October*: and he traded as a brewer, maltster, corn-factor, and miller; but carried on *no other* trade.

After the 13th of *November*, *Isaac De Mattos* paid the said two draughts indorsed by *Davis* and *Whitehead*.

After Ld. *Mansfield* had reported the evidence, the counsel for the plaintiffs proceeded to shew cause: and they urged the deed to be *merely colourable*, and so *fraudulent* as to constitute, in itself, an act of bankruptcy;

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being to the *intent to defeat and delay* his creditors, or *whereby they* MIGHT *be* DEFEATED *or* DELAYED.

They cited 3 *Co.* 80. *Twine's* case, and the rules and resolutions contained in it, and urged that the present case was fully within it.

They also cited 13 *Eliz. c.* 7. and 1 *Jac.* 1. *c.* 15. § 2. which goes further than 13 *Eliz.* Likewise 2 *Inst.* 110. on the statute of *Marlebridge.* 6 *Rep.* 76. *Curson's* case S. P. *Moore* 193. Ld. *Pazet's* case, upon the statutes of fugitives beyond seas made *anno* 13 *Eliz.* (In which, they observed that 13 *Eliz. c.* 3. is in *Rastal*, and not elsewhere.) *Style*, 288. *Tucker* v. *Cash.* 2 *Peere Wms.* 427. *Small* v. *Oudley et al.* Where a goldsmith assigned two-thirds of his stock in the *wine* trade; and it was holden good: but *contra*, if it had been of ALL his goods, *&c.*

Also *Lucas's Rep.* 489. Dr. *Goodfellow's* case: and *Ryal* v. *Rowls* in *Canc.* 27th *January* 1749.

And they observed that here was no *possession* altered; no *estimate or account* taken of the stock, *&c.* nor any *consideration* paid.

The counsel for the defendant insisted, that even IF *it was granted* that this deed was fraudulent, AS *against* creditors or purchasers, yet it would NOT be an ACT OF BANKRUPTCY: for the * act has a proviso to except deeds made *bonâ fide* and upon *good* consideration.

* V. 13 Eliz. c. 7. § ult.

[471] This deed was made *bonâ fide*, and *upon good consideration.* It was made by Mr. *Slader*, a trader in the country, to secure Mr. *De Mattos*, who agreed to become his banker or agent in *London*; and to permit *Slader* from the country, to draw upon him in town; and the *only* INTENT *of it* was to indemnify *De Mattos* against *Slader's* OVER-*drawing* *Unwin* v. *Oliver, in Canc. Tr.* 12 *G.* 2. was a like case, determined by the lord chancellor. And this transaction tended to enable the country trader the better to carry on his trade; and was far from being intended to deceive his creditors.

It must be agreed, that this deed of assignment *includes goods and utensils*, as well as the house and mill, *&c.* And that there was NO *previous appraisement.* But *that* was quite unnecessary: because it could not be *then* known *how much* money was to be secured.

As to the owner's *continuing in possession.*—The case of *Meggot* v. *Mills*, 1 *Ld. Raym.* 286. *B. R.* 1697. was so; and yet not fraudulent. *Precedents in Chancery* 285. *Bucknall et al'* v. *Roiston* was the like. And in the nature of the thing, possession could not be delivered in the present case; because the debt to be secured was future and uncertain. So that *this continuing in possession* was *no mala fides, no badge or evidence of fraud:* because it did not give the owner *a false and fallacious credit.* Neither

was it *secret*; but notorious: and it was NOT *with intent to defeat and delay* his creditors; but to their benefit, and calculated to support *Slader's* credit, and to enable him to pay his creditors. 1758. WORSLEY et al' v. DEMATTOS and SLADER.

The GENERALITY of a deed is *not always* and *necessarily* an *evidence of fraud*: for unless there be a *trust*, either expressed or implied, there is no fraud: and here is no trust, either expressed or implied: nor could *De Mattos* recover more than was fairly owing to him.

The case of *Ryal* v. *Rowls* was rightly determined, "that a security may be lost, by suffering a continuance "in possession." But it does not follow that our continuance in possession *constituted an act of* BANKRUPTCY. Here was neither imposition nor collusion: it is only a mortgage of his personal property, and for a fair consideration.

To prove it NOT to be an *act of bankruptcy*, they cited several cases. In the case of *De Gols* v. *Ward*, in 1739, the *quo animo* was indeed clear and plain. The next case where a deed was considered as an act of bankruptcy, was *Ashley's* case: but that was also quite clear: so again, in *Mackrell's* case, lately: where it was indeed given up. But there is *nothing* INTENTIONALLY *ill* in the present case. [472]

If this mere giving security to indemnify his banker was an act of bankruptcy, it could NEVER *afterwards* BE PURGED: which would be a great inconvenience to trade; because it is a common case. And this man gave it to his *former* banker, as well as to *De Mattos*.

It is no act of bankruptcy, unless the deed be FRAUDULENT, as well as intended to give *unjust preference to one creditor* before another. And there is no pretence, in the present case, that any bad use has been made of this deed.

The 5th clause in 1 *Jac.* 1. *c.* 15. would be nugatory, if the second was to be understood to make the executing such a deed as this, an *ipso facto* act of bankruptcy. It was only a *contingent* and *collateral* security, depending upon *future* events and circumstances: and therefore there could not, in the nature of the thing, be either *delivery of immediate possession*, or *any particular consideration-money*, expressed. And *De Mattos's* being *liable* to be damnified was, of itself alone, a *good consideration*.

The case of *Unwin* v. *Oliver*, *P.* 12 *G.* 2. *in Canc.* was this: *Unwin*, being appointed receiver by that court, and thereupon obliged to give security, assigns his debts, as a security (amongst other things) to the persons who were bound for him in a recognizance upon that occasion: and afterwards he became bankrupt. *This assignment* of his debts was holden good.

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Bankruptcy is considered by the acts of parliament, as a CRIME. The description of an act of bankruptcy, or of a person's becoming bankrupt, must be therefore taken *strictly*: and the acts that constitute bankruptcy must be done *with intent* to defraud, or delay creditors.

Put the case of an officer in the revenue appointing *a trader* his *deputy*; and, for his indemnity, *taking* from such deputy, *such a deed as this* is: would the *executing* it make the trader a bankrupt?

The act of 21 *Jac.* 1. *c.* 19. § 10, 11. takes care of an inconvenience to the creditors, arising from the trader's continuing in possession. But such assignments have *never* been considered as constituting an *act of bankruptcy*, *Small* v. *Oudley*, 2 *Peere Wms.* 427. *Jacob* v. *Shepherd*, there cited. *Ryal* v. *Rowls, in Cane.* 27 *January* 1749: [473] which was an assignment by *Harvest* the bankrupt, of *all* his goods, utensils, *&c.* and was made liable to *future* monies to be advanced.

The counsel for the plaintiffs in reply, urged the inconvenience that must arise to trade, from such *general* assignments of *all* a trader's effects in trade, *un*-valued and *un*-appraised; in order to secure *eventual debts, not* existing at the time of executing the deed: and insisted that 1 *Jac.* 1. *c.* 15. § 2. *expressly makes* such conveyances *acts of bankruptcy.*

Here is *no consideration* of any money paid, or any debt really contracted. Nor was any money *afterwards advanced* upon this deed. And for what was *then owing* to Mr. *De Mattos*, he had at *that* time a *warrant of attorney*, to confess and enter up a *judgment:* though it was afterwards destroyed, when he actually took possession under the deed now in question.

And indeed, IF *there* HAD *been a real* debt subsisting, yet *this* had been an *undue preference*, within the act. But as it was *not* so, nor any thing done in consequence of this deed, it is merely *fraudulent.*

None of the cases, on either side, are in point.

In *Unwin's* case, there was a consideration: for an *indemnity* is a *good consideration.* And the case goes no further than to prove "that it is so."

But of moveable chattles, *possession* ought to be instantly and *actually* given: and of immoveable or remote chattles, possession of every *title* to it, and every thing that can, in the nature of the thing, be done *towards it.*

Whereas here is no *attempt* to take possession; *till* the man was determinately going to become bankrupt, by a plain indisputable act, on the 11th of *November.*

Therefore this *general* provision for *one* particular creditor, *implied a secret trust* or conciliating favour: which is a badge of *fraud and collusion.* And no argument can

be drawn for mortgages of *land*, (where it is the *usual* method for the mortgagor to remain in possession,) to the keeping possession of *goods* assigned over. And if this had been an honest transaction, there would have been an *appraisement* and a *schedule*; and it would not have been left *thus at large*.

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As to its not being to be afterwards *purged*;—that does not alter the case at all: for no act of bankruptcy can be purged, but by obtaining a certificate. [474]

As to [21 *Jac.* 1. *c.* 19. § 11. continuing in possession was always looked upon as an *evidence* of fraud: that law is only *declarative* of what was the law before.

The cases cited of *Ward*, *Ashley*, and *Macrell*, prove nothing against us, at all.

LORD MANSFIELD said the court would consider it, both upon the particular circumstances, and upon the general principles: and it would be proper to consider the subject, with regard to *traders in general*, under 13 *Eliz. c.* 7. as well as to traders *becoming bankrupts*. And they would give notice when they were ready to declare their opinion.

LORD MANSFIELD now delivered the opinion of the court. [1 East. 51.]

The question is, whether, upon *all the above circumstances*, *Slader* became a bankrupt on the 23d of *October*, or on the 13th of *November*.—And the *postea* is to be indorsed, as to the *time* of *Slader's* becoming bankrupt, according to the opinion of the court.

All the acts concerning bankrupts are to be taken together, as making *one system* of law: they are all to be construed *favourably for creditors*, and to *suppress fraud*.

"Whether a transaction be fair or fraudulent," is often a question of * *law*; it is the *judgment of law*, upon facts and intents.

* Vide ante 397. accord. [Qu. If not *contra*? See 2 Burr. 936, 937.]

The *indemnity*, which is the consideration of the deed in question, I allow to be a good, valuable, and true consideration: and I allow this deed to be a valid transaction, AS between the *parties*.

But valid transactions, as between the *parties*, may be fraudulent by reason of covin, collusion, or confederacy to injure a *third* person: for instance—*A.* buys an estate from *B.* and forgets to register his purchase deeds: if *C* with express or implied notice of this, buys the estate for a full price, and gets his deeds registered; this is fraudulent, because he assists *B.* to injure *A.* Or, if a man knowing that a creditor has obtained a judgment against his debtor, buys the debtor's goods, for a full price, to enable him to defeat the creditor's execution: it is fraudulent. Again, if a man knowing "that an executor is [475]

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"wasting and turning the testator's estate into money; "the more easily to run away with it," buys from the executor, with that view, though for a full price; it is fraudulent.

Marriage-brocage bonds, secret agreements, different from the open treaty of marriage, and many other cases that might be put, though for a true and valuable consideration, as between the *parties*, are fraudulent, by reason of deceit or injury consequentially brought upon *third* persons.

* 3 Co. 80. b. 81. a.

* *Twyne's* case, even in the criminal prosecution, was of this sort: the consideration of the sale was more than sufficient, and undoubtedly true.

Whether *this* deed be of that sort, will depend upon the whole purpose of it.

As to all, except the leasehold, it could not have the effect of a conveyance, if *De Mattos* permitted *Slader* to *continue in possession.*

By the express tenor of the deed, *Slader* was to have the absolute order and disposition as before. In fact he was permitted to continue in possession, and *act as owner.* They who dealt with him, trusted to his visible trade and stock. They trusted to the bankrupt-law that he could neither have sold or mortgaged; and in case of a misfortune, that his effects must be equally distributed. They were imposed upon by *false appearances.*

To deceive the more, under a fictitious shew of credit, the bills drawn upon *De Mattos* were made payable to and indorsed by his *own agents.* *Davis*, one of his agents, expressly told the creditors, "that *Slader* would be very well; "that two good men, upon security of the leasehold, "would pay his draughts;" but *concealed* that he had mortgaged any thing else.

A false shew, by collusion, to deceive third persons, is generally connected with a *secret confidence.* So here, the trust put in *Slader* manifestly was, that when he could stand no longer, he should give notice to *De Mattos* or his agents, deliver possession, and then commit a positive act of bankruptcy.

From the nature of the fund, possession never could be meant to be taken, but as the immediate fore-runner of a commission of bankruptcy. He could not stand a moment, after his whole trade, fixed and fluctuating stock, and credits were taken from him.

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To watch *Slader*, *De Mattos* put *Sills* about him, as his book-keeper. Agreeable to the confidence put in him, when *Slader* saw he could stand no longer, he acquainted *Sills* and *Davis* the agents of *De Mattos*, with it: and *by their advice*, first gave an order to deliver possession, and then to be denied. This shews, to a demon-

stration, that they were all aware that *possession was necessary*; and intended from the first, by a formal delivery of possession, when he was determined to break, to evade the* clause in 21 *Jac.* 1. *c.* 19. For the measure was instantly taken, without any *new* advice.

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I will consider this transaction more particularly, in two great views:

1st. In respect of the *end*;

2dly. In respect of the *means*.

* § 11.

As to the first—The *end* proposed by the secret trust was, that in case *Slader* should become bankrupt, his whole estate should first be vested in *De Mattos*, for payment of what was justly due to him. The *preference* aimed at was *fraudulent* and *unlawful*.

Suppose, *after* the consultation on the 11th of *November*, this deed had been prepared and executed accompanied with such formal delivery of possession: we are of opinion, that it would have been *fraudulent*, and an *act of bankruptcy*.

Such *preference* is a fraud upon the whole bankrupt law, and would defeat the two main objects it has in view; to wit, the *management* of the bankrupt's estate; and an *equal distribution* among his creditors.

The law gives the *management*, to persons chosen by the *creditors*, under the direction of commissioners, and the control of the great seal.

But, if a bankrupt may convey all to a favourite and friendly creditor, just before he orders himself to be denied: the whole power of selling his effects, calling in his debts, and settling his accounts, must be in *such* single and particular creditor: *he* must have a right even to the custody of the books and papers.

An equal *distribution* among creditors who equally gave a general personal credit to the bankrupt, is anxiously provided for, ever since the act of 21 *Jac.* 1. *c.* 19. [477]

It was thought mischievous, to suffer priorities to be gained by *secret liens*; as* by judgment, statute, recognizance, bond, specialties, attachments by custom in *London* or elsewhere, assignment of debt to the† king's debtor. Unless they took out execution, these all equally gave a personal credit to the bankrupt, and trusted *him* to manage his effects.

* § 9.

† § 10.

Conveyances of personal chattels by way of security, where *possession* was left‡ *with the bankrupt*, fell within the same reason.

‡ § 11.

Land is held, *without* perception of the profits, by the title; but there is *no* hold of goods, which the mortgagor is allowed to possess and dispose of. Therefore by a clause‖ in the same act, any priority by such

‖ § 11.

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secret lien is also taken away; and as such mortgagee equally gives a general credit, he is levelled with the *other* creditors.

But, if a bankrupt may, just before he orders himself to be denied, convey *all*, to pay the debts of *favourites*; the worst and the most dangerous priority would prevail, depending merely upon the unjust or corrupt *partiality* of the bankrupt.

* Gayner, bankrupt, ex parte Foord and others.
† 31st July 1755.

A* case lately happened where a conveyance, calculated to *postpone* one creditor to the rest, was held an act of bankruptcy. It came on before Ld. *Hardwicke*, the late lord chancellor, at *Lincoln's Inn Hall*,† one *Gayner*, a trader, had made an assignment on the 7th of *June*, 1755, of all his effects, goods, stock in trade, and
[4 Burr. 2240.] book-debts, (except household goods, watches, plate, bills of exchange, inland bills, promissory notes, and cash then by him,) to trustees, in trust to pay themselves and all the rest of his creditors, *except Foord the petitioner*. But the trustees declining to act under *this* assignment: he executed *another*, on the 9th of *June*, 1755; wherein the trustees were to pay themselves, and all the creditors mentioned in a *schedule*: (in which schedule, the petitioner was not included;) and in this second assignment a large parcel of *ginger* as well as the things above mentioned were excepted.

The petitioner insisted that he *alone* could choose assignees; since the *other* creditors claimed under the *assignment*.

[5 Durn. 424.] Ld. *Hardwicke* was clear, "that the *executing* the deed "of the 9th of *June* was an *act* of bankruptcy." And
[478] all that heard his determination, were of the same opinion: and every body concerned acquiesced in it. Whereupon the creditors mentioned in the schedule, consented to wave all benefit or advantage under that assignment, and all proved their debts, in order to receive an equal dividend with the petitioner: and the creditors proceeded to a choice of new assignees.

The framers of this deed executed by *Gayner*, took for granted, "that if it had been a conveyance of *all* his "effects, it must be bad:" and therefore they *colourably excepted parts*. But the contrivance did not prevail, even so far as to bear an argument; or to be thought, by any body worthy of a trial.

There is a great difference between the conveyance of *all*, and of a *part*. A conveyance of a *part* may be public, fair and honest: as a trader may *sell*; so he may *openly transfer* many kinds of property, by way of *security*; but a conveyance of ALL, must either be fraudulently kept secret: or produce an immediate absolute bankruptcy.

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It has been argued, "that *after a resolution* taken by a trader, "to commit an act of bankruptcy, the trader, "so resolving to become bankrupt, might lawfully pre-"fer a just creditor by conveying *part* of his effects, to "satisfy that creditor's debt."

It is not necessary to determine that question, in *this* cause; for here the conveyance is of ALL; and therefore I will only say, that no such proposition is yet *established:* much less, in the *extent* whereto it has been urged.

The cases mentioned were,* *Cock* v. *Goodfellow*;† *Jacob* v. *Shepherd*;‡ *Small* v. *Oudley;* and *Unwin* v. *Oliver.*

* V. Lucas 489.
† Cited in 2 Peere Williams, 490, 491.
‡ 2 Peere Williams, 427.

In the case of *Cock* v. *Goodfellow*, the fact did not give rise to any question. An immediate prospect of a certain bankruptcy was *not the motive* to what Mrs. *Cock* did. She was *solvent* at the time; and, that very day, lent 40,000*l.* Besides her children, to whom she was guardian and trustee, were not upon the foot of *common* creditors: the court of Chancery would have decreed her to place their fortunes out upon government or real securities.

As to the case of *Jacob* v. *Sheppard*, I have looked into the register's book, upon this occasion; and I have a note of it, as stated by Ld. *Hardwicke*, in the cause of *Bourne* v. *Dodson*. And it was this—

Mr. *Thomas Leigh*, (the bankrupt,) who was a *Turkey*-merchant, by deed dated the 18th of *June* 1709, sold and conveyed *particular goods* in the hands of his factors, to Mr. *William Snelling;* upon trust to apply the money arising thereby, in satisfaction, in the first place, of a debt of 1500*l.* due to *Snelling* himself; and then of a debt of 1551*l.* and interest, due to *George Morley;* and out of the residue to pay *such* of the bankrupt's creditors, as he, with *Morley's* consent, *should direct:* and if there should be any surplus after the said *Snelling's* and *Morley's* debts were paid, and such sums for which they were bail or security for the said bankrupt, the same was to be paid to the said bankrupt, his executors, administrators and assigns. [479]

Afterwards, by deed dated 16th *December* 1709, and by deed dated 20th *January* 1709, other debts were appointed to be paid, *agreeable to the power* reserved by the former deed.

On the 11th of *February* 1709, *Thomas Leigh* failed, and committed an acknowledged act of bankruptcy: and a commission was taken out, and his estate and effects assigned.

The trusts of the deed of the 8th of *June* 1709, were *immediately* and *openly* carried into execution: so that

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no question ever did or could arise upon the* clause of 21 *Jac.* 1. *c.* 19. But the assignees brought a bill against the parties claiming under the deed of the 8th of *June* 1709, and the subsequent deeds; "to have them set "aside; and to have an account of the money which "they had received;" upon two grounds; 1st. That the deeds were obtained by fraud and imposition on *Leigh* the *bankrupt*: 2dly. That they were an imposition upon the *other creditors*.

* §11.

The cause came on to be heard at the *Rolls*, upon the 16th of *June* 1725. Sir *J. Jekyll* took time to consider of it; and ordered all the pleadings and proofs to be left with him: and upon the 17th of *December*, Sir *Joseph* gave judgment. He thought these deeds could not be looked upon, or set aside, (upon the former ground, viz.) as a fraud upon the *bankrupt*; but he declared the said deeds to be FRAUDULENT, and an imposition upon the *creditors* of the bankrupt; and decreed them to be *set aside*, with costs.

In making this decree, he went upon right principles; but did not attend to its being a *bankruptcy*, if it was *really* fraudulent; and that a court of equity could not decree it to be fraudulent, unless it was fraudulent *at law*; in which case it would constitute an *act* of bankruptcy, of itself.

On the 6th of *August* 1726, Ld. *King*, upon an appeal, directed an issue at law, to try, "whether by the exe-
[480] "cution of the deed of the 8th of *June* 1709, *Thomas* "*Leigh* became a bankrupt; or at any other, and what "time." The jury found he became bankrupt on 11th *February* 1709.

Upon the equity reserved, Ld. *King established* the deeds: held the plaintiffs to be only intitled to the surplus, *after* the trusts in the deeds were performed; and decreed the proper accounts against the defendants, of the money they had received, in order to find out that surplus.

Many very obvious observations occur upon this case. Sir *Joseph Jekyll* was so struck with the objections of fraud from preference, that he set aside the deeds, with costs.

Ld. *King* reversed his decree: because no deed made by a trader can be fraudulent in *Chancery*, which is not fraudulent in a court of *law*, and an *act of* bankruptcy. Therefore he directed an *issue*.

There might be many reasons, *why* it was *not found fraudulent*, upon the trial. The deed was executed the 8th of *June*, of *specific* goods: and was *immediately carried into execution*. The act of bankruptcy was not till the 11th of *February* following: and I see no suggestion,

that *in June, Leigh thought* of committing an act of bankruptcy. Besides, one ground upon which the assignee brought his bill, was "fraud and imposition upon "the *bankrupt himself*, in obtaining the deeds:" therefore, most probably, he was frightened into giving this security, by threats of *legal* diligence against him.

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The case of *Small* v. *Oudley*, was determined very soon after; *viz.* upon the 4th of *December* 1727. The best report of it, is in 2d *P. Wms.* 427: but it is no where fully stated. I have a copy of the decree from the register's book: as follows—

On the 21st *September* 1720, *Small*, (to accommodate *Daniel* and *Joseph Nercott*, brothers, goldsmiths, and partners, upon a pressing occasion,) transferred to them 500*l.* S. S. stock; upon their engaging "to transfer to "him the like sum in the S. S. stock in a week or ten "days at farthest," and giving a note for that purpose.

They sold the S. S. stock for 1800*l.*

On the 29th *September* 1720, they made the assignment of *their share in a wine partnership*, which *Oudley* carried on solely in *his* name, (in which, they had two thirds, and *Oudley* one third:) as a *security for transferring* 500*l.* S. S. stock; and reciting the truth of the case.

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They, at the *same time*, assigned two *leasehold* estates to *Small* for the same purpose.

Their interest in the wine trade was *but* 300*l.* And *Oudley* had a right to carry on the trade till *Christmas* 1723. The bill, (which was against *Oudley*, and against the assignee under a commission issued against the *Nercotts*,) was not brought by *Small*, till after that time; but an issue had been directed in another cause, to try, "whether the said *Nercotts* were bankrupt at the time "they executed an assignment to *Small* of a lease of "certain houses, on the *said* 29th of *September* 1720."

The above facts are admitted by the answers; *no fraud* is suggested: and they do not mention any desire to have the *time* of the bankruptcy tried over again.

Sir *Joseph Jekyll*, in 2 *Peere Wms.** gives strong reasons against the decree he thought himself *bound* to make, because Ld. *King* had just established, "that a deed by "a bankrupt could not be set aside, as fraudulent in "Chancery."

* Pa. 429, to 431.

This case too was *very particular*. The fraud was upon *Small*: and not upon the creditors: his stock was to be replaced, in a week, or ten days *at farthest*, by the original agreement. 1800*l.* of *Small's money* went to the creditors: and this security amounted *but* to about 300*l.* so that the whole transaction was *beneficial* to the bankrupt's creditors. The S. S. stock was got from *Small*, with a view to *save* the *Nercotts* from breaking. The security was given at the *very time* they were *obliged to*

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replace the 500*l.* S. S. stock; and there was no pretence that *Small* afterwards permitted them to *continue* one moment in *possession.*

The case of *Unwin* v. *Oliver,** *T.* 12 *G.* 2. is not entered in the register's book: but I have seen a fuller note of it, than was cited at the bar.

It was an assignment of several debts mentioned in a schedule; to indemnify his sureties in a recognizance. *Martin Unwin* had been appointed receiver of a lunatic's estate: and the plaintiffs became his securities, by recognizance, "that he should account for what he should "receive under the orders of the court." Two years after, *Martin Unwin*, by deed reciting "that 604*l.* were "due from him to the lunatic's estate," assigned to the plaintiffs several debts mentioned in a schedule annexed to the assignment; to discharge 604*l.* and to indemnify them against this security which they had entered into for him. A month after this assignment, *Martin Unwin* became a bankrupt.

* Stephen and Morley Unwin, against Oliver et al' assignees of Martin Unwin, a bankrupt, Easter term 1799. [See 1 Durn. 621.]

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The act of bankruptcy was admitted to be a *month* after the assignment. *No* question was made upon the clause in the 21 *Jac.* 1. *c.* 19. And there was *no* suggestion "that the immediate prospect of a certain bank-"ruptcy was the cause of the assignment."

Lord HARDWICKE held that it could not be set aside as fraudulent *in Chancery;* unless it was fraudulent in a *court of law*, and an act of bankruptcy. And he held "that *indemnity* was a *good* consideration:" of which, there can be no doubt.

But 2dly, (to consider this transaction, in respect of the *means.*) Suppose a bankrupt could, after a resolution to commit an act of bankruptcy, prefer one of his creditors, by an assignment of *all;* (which we think he cannot;) yet in *this* case, the MEANS to attain such preference were *fraudulent.* A *false credit* is industriously given the bankrupt, upon a *secret trust* "to deliver "possession *so as to avoid* the clause in the 21 *Ja.* 1. *c.* 19."

*3 Co. 81. a. The second argument of fraud in *Twyne's* case, * is—"the donor *continued in possession,* and used them *as his* "*own;* and by *means thereof,* traded with others, and "deceived and defrauded them."

BUT, three cases have been cited to shew, "that upon "a mortgage of goods by a trader, the leaving pos-"session does *not* infer fraud; though it may upon "an *absolute sale.*" These are the cases of *Meggott* v. *Mills et al'*, 1 *Ld. Raym.* 286; *Bucknal et al'* v. *Roiston*, in *Precedents in Chancery*, 285: and *Ryal* v. *Rowls*, in Chancery, 27th *January* 1749.

The first is a direct authority to the *contrary.* For Ld. Ch. J. *Holt* says, "If these goods of *Wilson's* had been "assigned to any *other* creditor, the keeping of the posses-

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"sion of them had made the bill of sale fraudulent, as to "the other creditors." But he very justly distinguished that case; and seems to have considered the landlord (who lent his tenant money to buy the goods, to furnish his house,) as the original owner of the goods.

Bucknal et al' v. *Roiston* was *not* a case of *bankruptcy*, but upon the course of *administration of assets*, (where secret liens give priority:) and is *expressly* * *distinguished*, by my lord chancellor, from the case of a *bankrupt*. Besides, the possession was there a trust under an authority to negotiate and sell; and could not be meant to give any *false credit*.

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* V. Precedents in Chancery, p. 287. Where lord chancellor admits "that in case of a bankrupt, such keeping possession would make the sale void, against his creditors."

In the case of *Ryal* v. *Rowls*, the act of bankruptcy upon which the commission proceeded, was *long after* the mortgages; the assignees *did not wish* to carry it farther back; and therefore *never objected* "that the bank-"rupt's keeping possession made the mortgages fraudulent:" but if they had, in *that* case the presumption of fraud would have been *disproved*. The same fund was mortgaged six times over: they all trusted to their conveyances, (like mortgages of land,) as a *title*, without possession; though a bankruptcy should happen. They *mistook* the law; but did not *evade* it.

Whereas here, the parties manifestly were *aware* "that "possession was *necessary*:" the solemn determination in the case of *Ryal* v. *Rowls* had made that point *notorious*. Possession was here left, upon a *secret trust* "to deliver it "*so as to avoid* the clause in 21 *Jac.* 1. *c.* 19." Which, *in fact*, was accordingly *done*.

Two general objections, from inconvenience, have been urged; which deserve an answer. Objections—

1st. That it will *hurt credit*, if traders may not raise money by mortgaging their goods without quitting possession. 1st Objection.

The policy of the bankrupt law introduced by 21 *Jac.* 1. *c.* 19. and followed ever since, is to *level* all creditors, who have not actually recovered satisfaction, or got hold of a pledge which the bankrupt could not defeat. Answer.

A trader is trusted upon his character, and *visible* commerce: that *credit* enables him to acquire wealth. If by *secret liens*, a few might swallow up all, it would greatly *damp that credit*.

If he mortgages and *parts with the possession* of goods, the world has *notice*: but, to give priority from mortgaging goods, of which the trader is allowed to act and appear *as the owner*, would be enabling him to *impose* upon mankind; and draw them in by *false appearances*.

No injustice is done to such mortgagee; because he really trusts only to the *general* credit of the trader: the

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[2 Bro. 650.]
2d Objection.

conveyance is not a fraud against *him*, but against his *other creditors.*

Mortgages of *land* are checked by the *title:* but where possession is not delivered, *goods* may be mortgaged a hundred times over, and open a plentiful source of *deceit.*

The other general objection from inconvenience was, "that a fraudulent deed is an act of bankruptcy, upon "the face of it; and *can never be purged.*"

I am sorry the phrase has crept into use: because it *confounds* the idea which ought to be annexed to it.

Every equivocal fact may be *explained by circumstances.* If a trader orders himself to be *denied*, circumstances may shew, that he did not do it *to avoid payment;* but on account of sickness, or particular business. So if he *leaves his house*, circumstances may shew, it was not *to abscond.*

Of all the equivocal facts which can amount to acts of bankruptcy, *deeds* are the most open to be explained by a variety of circumstances. Hardly any deed is fraudulent upon the mere *face* of it. It is a *good* sale, if the consideration be true: *fraudulent*, if false; *good*, if possession immediately follows: *bad*, if it do not: nay, the *not taking possession*, being *only evidence* of fraud, may be *explained.*

The *use* to which a deed is applied, shews *quo animo* that it was made. Leaving possession till after the act of bankruptcy, in the case of *Ryal* v. *Rowls*, shewed there was *no* fraud; and that they trusted to the conveyance.

In *this* case, the consultation and delivery of possession upon the 11th of *November proves the secret trust*, in confidence of which, the false credit was given the bankrupt before: it shews that evading the clause in 21 *Jac.* 1. *c.* 19. was in the *view* and *contemplation* of the parties. There was *no other reason* for delivering possession on the 11th of *November:* because no default had happened, which gave *De Mattos* more pretence to enter *then*, than *before.*

Under all the circumstances, WE are of opinion that this conveyance of the bankrupt's *whole* substance to *De Mattos, though* by way of security, and for valuable consideration, is *fraudulent* and an *act of bankruptcy.*

The determination *here*, is upon the assignment *of* ALL.

Per Cur. The *postea* must be indorsed, "that "*Richard Slader* became bankrupt on *the* 23*d* "OF OCTOBER."

REX *versus* WAKEFIELD et al'. 1758.

REX v. WAKEFIELD. Wednesday, 8th February 1758.

Order of justices on quakers for payment of tithes confirmed at sessions, good. [S. C. 4 Burn. J. P. Tit. Tithes.]

MR. *Harrison* had obtained a rule, in *Michaelmas* term 1755, to shew cause why an order of two justices, made upon *several quakers*, (for payment of tithes under the value of ten pounds to the curate of a chapel) and confirmed at the sessions, upon an appeal from it, should not be quashed, together with the order of sessions confirming it. See 7, 8 *W.* 3. *c.* 34. and 1 *G.* 1. *St.* 2. *c.* 6. § 2.

Mr. *Norton*, in *Michaelmas* term last (*viz.* on 26th *November* 1757,) shewed cause. He gave up the order of sessions, as not maintainable; but defended the *original* order.

To this original order, Mr. *Harrison* had taken four exceptions: which were now supported by him and Mr. *Clayton*. These exceptions were as follow.

1st. It is a *joint* order made on DIFFERENT *persons*, for *distinct* non-payments of *different tithes*: whereas there ought to have been a *distinct* order on EACH. In 1 *Str.* 471, *Between the parishes of Chewton* and *Compton-Martin*, the removal of different families of paupers by one order, was holden bad; though the parishes were the same.

2d. The TITLE *is in question*: therefore the justices have *no jurisdiction*. The exception in the act of 1 *G.* 1. *Stat.* 2. *c.* 6. § 2. is "*unless* the *titles* of such dues, tithes "or payments shall be in question." And these words "unless, &c." extend to this *whole* clause; and are not confined to the granting a *certiorari* only. And this fact, of the title being in question appeared, as Mr. *Harrison* alledged, upon the granting the *certiorari*, in the present case.

3d. *Non constat* that the two justices who made this original order, are "*neither* PATRONS *nor* INTERESTED "in the tithes." But 1 *G.* 1. *c.* 6. § 2. requires that they shall be neither one nor the other. Now they ought *expressly to* AVER and *shew* (negatively) "that they *are* "*not*:" or else they have no jurisdiction, by the very words of the act; the jurisdiction being given to "any two or more justices, &c. OTHER *than* such "as, &c."

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4th. It does *not sufficiently ascertain and state* WHAT is due and payable by the defendants; or at least, * FOR *what*, the respective sums are due. † One sum is "1s. 6d. "being *due to the curate*:" not saying FOR *what*. Another is, "being the value of their ancient customary payments." Another is—"4*s. being ancient customary* payments."

* V. 7, 8 W. 3. c. 34. § 4. N. B. The act does not require the latter.

† This objection is not supported by the act.

This order was made on the act of 1 *G.* 1. *Stat.* 2. *c.* 6. § 2. which extends the 7, 8 *W.* 3. *c.* 34. § 4, to ALL *pay-*

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ments to ministers or curates officiating in churches or chapels. (*V.* that statute of 7, 8 *W.* 3. *c.* 34. § 4: which extends *only* to *tithes* and *church-rents*.

Mr. *Norton, contra* answered these objections. The substance of his defence against them was fully sufficient, if true; for he denied the first, to be *material;* and denied the three last, to be well founded.

The matter was adjourned to *Monday*, 28th *November*.

Then, this motion being mentioned again,—

The COURT inquired "whether the return of the "*certiorari* was filed."

And Lord MANSFIELD said he had called for, and read the affidavits made for obtaining the *certiorari*, and upon the shewing cause.

Mr. Just. DENISON mentioned a case of *Rex* v. *Furnes*, *B. R. H.* 6 *Geo.* 1, upon a *certiorari* to remove an order made upon the act of 7, 8 *W.* 3. *c.* 6, for payment of small tithes; where Ld. Ch. J. PRATT thought that where the RIGHT *was in question*, such cases were *never intended to be* the subject of that act of parliament. He said, this was only spoken from a note, which he had seen: but it should seem to be right * and true; and the rather, from a case of *Rex* v. *Furness* being mentioned in 1 *Strange* 264. where an order for non-payment of small tithes made on 7, 8 *W.* 3. *c.* 6, was quashed.

Adjourned to the present term.

Lord MANSFIELD now delivered the opinion of the court.

He begun with stating the two acts of 7, 8 *W.* 3. *c.* 34. (§ 4,) and 1 *G.* 1. *Stat.* 2. *c.* 6, (§ 2,) the former relates only to great and small *tithes* and *church*-rates; and is temporary. The latter makes it perpetual and extends it to "*any* tithes or rates, or *any* customary or other "*rights, dues* or *payments* belonging to any church *or* "*chapel*, which, of right, by law and custom ought to be "paid, for the stipend or maintenance of any minister or "curate officiating in any church or chapel." And both acts direct "that the proceedings shall not be "removed into any other court, *unless the title* shall be in "question."

It is upon the *last* act, that the present order was made.

A *certiorari* has issued, to remove the order into this court; and it came on, upon exceptions to the order. Both sides made very material objections,—one side, to the order; for that the justices had no jurisdiction, *because* the title *was* in question: the other, to the *certiorari*; for that no *certiorari* could issue, by the express provision of the act, to remove the proceedings from before the

* It is right and true; at least I have a MS. Note of the same case to the same effect, or stronger; (for mine says "*Per cur.* The design of the statute was only to [487] give a speedy remedy for small tithes where the right is agreed.")

justices into any other court, because the title was not in question. 1758. REX v. WAKEFIELD.

The act was made in *favour* to, and for the *ease* and *benefit* of QUAKERS; and to save them from troublesome and expensive prosecutions: but it *never meant*, that a *mere scruple* of theirs, or an OBSTINATE *with-holding* of the tithes should be any hindrance to the matter's being determined by the justices of peace. *This* would have frustrated the very intention of the act: which meant to give this jurisdiction to the justices in *that very case;* where the *real right and title* to them should not be in dispute between the parties.

Then his lordship directed the affidavits on which the *certiorari* was granted to be read.

It was therein sworn on the part of the defendants, "that the defendants CONTROVERTED *the title* to the tithes, before the justices;" and also, "that the title to the tithes *was then* and *at the time* of making the said "affidavit, REALLY *in question.*"

The justices had notice to shew cause against the *certiorari.*

On shewing such cause, five old inhabitants of the chapelry, swear by their affidavit "that such customary "stipends or payments *have always been paid* to the "curate by the land-holders, *without* any sort of scruple "or objection *except* LATELY *by the quakers:*" and *no other* persons dispute it. And these five persons also swear "that they believe them *to be due;* and that the "*former owners* of *these very lands* (which had been pur-"chased about four years ago, by these quakers,) DID "PAY *for them*, as other persons did, in the said chapel-[488] "ry;" and these quakers purchased the lands *as subject* to such payments.

——These are the affidavits *upon which* the *certiorari* was granted.

Now if this GENERAL *allegation* "of the quakers *con-"troverting the title*," and the *consequential assertion* "that "the title *was in* QUESTION," (without any further particulars, or shewing at all *upon what* POOT they controverted the payment) should be esteemed a sufficient ground for removing the orders, it would put a *total end* to these acts of parliament, and *evade* the very design and intention of making them.

For the quakers might pretend that they are obliged in conscience to refuse or controvert the payment of these demands; and consequently, to question and deny the right to receive them. Now that is the *very thing* the acts mean to provide a summary remedy for. The intention was, that in *such* case, the justices should make an order to *compel* them to pay.

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Their affidavits are general, "that they contr oted "the title: and that it was really in question."

Whereas by the affidavits made by the five old inhabitants, it is very plain that the *former owners* of these very lands have *always paid:* and that these quakers, who are the subject of this order, have *no pretence* to dispute it, upon any other foot than their own *general scruple* to pay any demands of this nature: which these acts are, for their *own ease and advantage*, calculated to *compel* them to do, in a method the most *gentle* and *convenient for themselves* (who scruple to pay *without* compulsion.)

We are all of opinion, as to the merits of the case, that the title is *not so* controverted, or *so* in question, as that the justices can be precluded from jurisdiction, or their order be regularly and properly removed into any other court.

[4 Burr. 2522.] And we are all of opinion that the rule for the *certiorari* having been made absolute, and the return thereto having been filed, ought not now to stand in the way and prevent our coming at the real justice and merits of the case. For if the *certiorari* issued *improvide*, we can order it to be *superseded;* and the *return to be taken off the file.*

[1 Salk. 144. pl. 2.]

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There have been * several instances of this— (*a*) one was where an order of two justices was appealed from; and before the time when the appeal should in course have come on at the sessions, a *certiorari* was brought to remove the order: and, because the *certiorari* was brought before the time of hearing the appeal was come, the *certiorari* was quashed, and the return taken off the file.

* I suppose he meant the cases of (*a*) Rex v. Eliz. Nichols, Pas. 18 G. 2. B. R. And (*b*) Rex v. Govers, Pas. 28 G. 2. B. R.

The (*b*) other was a *certiorari* to remove an indictment from the *Old Bailey:* and it appearing to this court, that *they* could not give judgment, but that the *sessions* of *oyer* and *terminer* at the *Old Bailey* ought to do it; the like method was taken, and it was sent back to the court below, for *them* to pronounce the judgment.

Therefore, upon this case, we are all of opinion that the writ of *certiorari* be superseded (*quia improvide emanavit;*) the return taken off the file; and the order remanded.

His lordship added this hint, to be observed in future cases of this sort: *viz.* That upon all orders of this kind, the great and material point must be "whether "the TITLE TO *the tithes was* REALLY *in question*, or "not:" and ought to be determined, before the *certiorari* issues.

GODIN et al' *versus* LONDON ASSURANCE COMPANY.

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COMPANY.
Thursday 9th February, 1758.

Insurance made by a factor who has a lien, does not pass by a consignment of the [490] goods insured to a third person by the principal.
[1 Bl. 103. S. C.]
[See also 3 Burr. 1397. 1 Durn. 348. 3 Durn. 120.]

THIS was a point reserved at *nisi prius*, before Lord *Mansfield* at *Guildhall*.

The question, strongly litigated there, was "whether "the plaintiff ought to recover his WHOLE loss, or only "HALF:" it being objected "that there was a DOUBLE "insurance."

A verdict was found for the *whole*, subject to the opinion of the court: and if the court should think, upon his lordship's report, "that the plaintiff, by law, ought to "recover for *half* his loss *only*," then the verdict to be entered up as for *half*.

It was argued, yesterday, by several counsel on each side: and this day,

LORD MANSFIELD delivered the opinion of the court.

He begun with stating the facts, as they appeared to him at the trial; which were these—

Mr. *Meybohm*, of St. *Petersburgh*, had dealings with Mr. *Amyand* and company, of *London*; who often sent ships from *London*, to Mr. *Meybohm* at St. *Petersburgh*.

Meybohm, as appeared by the evidence, was *indebted*, on the *balance* of their accounts, to *Amyand* and company.

Amyand and company sent a ship, called the *Galloway*, *Stephen Baker* master, to Mr. *Meybohm* at St. *Petersburgh*, to fetch certain goods.

Meybohm sent the goods; and promised to send the bill of lading by the next post, but never did.

Afterwards, *viz.* in *August* 1756, *Amyand* and company got a policy of insurance from private insurers, for 1100*l.* on the *ship, tackle and goods*, at and *from London to* St. *Petersburgh*, and at and from thence *back again* to *London*; which policy was signed by several private underwriters, quite different persons from the present defendants; and of this sum of 1100*l.* thus underwritten, 500*l.* were declared to be on eleven sixtieth parts of the *ship*: and the remaining 600*l.* to be on *goods*.

Between the 26th *August* and 28th *September* 1756, (both included,) Mr. *Amyand* insured 800*l.* more, with other private insurers: and this latter insurance was upon *goods only*: and was *only* at and *from* St. *Petersburgh to London*.

On 28th, 29th and 30th of *October* 1756, Mr. *Amyand* insured 900*l.* more, with other private insurers: which *last* insurance was on *goods only*, at and *from the* SOUND to *London*.

So that the whole sum thus insured by *Amyand* and company, was 2800*l.* Of which 2800*l.* the sum of 2300*l.* was on *goods*, the remaining 500*l.* was on the *ship*.

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Several *letters* being given in evidence, it appeared that *Meybohm* wrote from *Petersburgh*, on 7th *September* 1756, (the date of his first letter on this subject,) to *Amyand* and company; and mentioned what goods he should send to them, referring to the "invoice for the particulars: and directed *them* to get *insurance thereon*, and to place the goods and the insurance to a particular account, which he named in his letter; in which, he also specified some iron, which was for Mr. *Amyand's* own account.

This letter Mr. *Amyand* afterwards received, (probably, about the 27th of *October*:) and, *in consequence* of it, made the insurance accordingly, upon the 28th, 29th and 30th of the same *October*, as before mentioned.

Meybohm, having shipped the goods, *indorsed the bills of lading* to one Mr. *John Tamesz* in *Moscow*, (the plaintiff, in effect, in the present action:) who on the 7th *October* 1756, wrote to his correspondent Mr. *Uhthoff*, here in *London*, "*to insure* these goods." In this letter, he desres Mr. *Uhthoff* to *insure the whole*, "that he (*Tamesz*) might "be *safe in all events*; for he suspected that these goods "were intended to be consigned by *Meybohm* to some "body else, and perhaps *might be insured by some other* "*persons*:" and he says, they were transferred to him, in consideration of his being in advance to *Meybohm* more than their amount. This letter from Mr. *Tamesz*, with these directions "to insure," was received by Mr. *Uhthoff*, on the 15th of *November* 1756.

Mr. *Uhthoff* accordingly applied to the defendants, the *London* Assurance Company; and *disclosed* to them, at the same time, all these particulars: and they, upon the 16th of *November* 1756, AFTER *being thus* APPRISED "*that there might be* ANOTHER *insurance*," made the insurance now in question, for 231*l.* on the *goods*, at and *from the* SOUND to *London*. The goods were *lost*, in the voyage.

Mr. *Uhthoff's* insurance was made by the plaintiffs *Godin*, *Guion* and company who are insurance brokers: and they declare that this insurance (which is expressed to be made by them, "as well in their own names, as "for and in the name and names of all and every *other* "person or persons to whom the same doth, may or shall "*appertain*, in part or in all,") was made by order of *Henry Uhthoff*, esq. This declaration is indorsed upon the policy; and is dated 18th *November* 1756.

There is no doubt, as to the value of the goods, or as to the loss of them. And it is admitted by the defendants, "that the plaintiff ought to recover *half* the loss, from "*them*:" but they say, they ought to pay *only half*, not the *whole* of the loss. So that the only question is,

"Whether the plaintiff is entitled, upon the circum-"stances of this case, and upon the facts I have been

" stating, to recover the * WHOLE loss *from the present* 1758.
" *defendants*; or *only* the HALF of his loss from *them*, and GODIN
" the remainder from the underwriters of Mr. *Amyand's* v.
" policy." LONDON

The verdict is found for the plaintiff, for the *whole*: ASSURANCE
but it is agreed to be subject to the opinion of this court, COMPANY.
upon the question I have just mentioned.

First—to consider it, *as between* the *insurer* and *insured*.

As between *them*, and upon the foot of commutative justice merely, there is no colour why the insurers should not pay the insured the *whole*: for they have received a *premium* for the *whole* risque.

Before the introduction of *wagering* policies, it was, upon principles of convenience, very wisely established, " that a man should *not* recover *more* than he had lost. Insurance was considered as an *indemnity only*, in case of a loss: and therefore the satisfaction *ought not to exceed* the loss. This rule was calculated to prevent fraud; lest the temptation of gain should occasion unfair and wilful losses.

If the insured is to receive *but one* satisfaction, natural justice says that the several insurers shall all of them *contribute pro rata*, to satisfy that loss against which they have *all* insured.

No particular cases are to be found, upon this head: or, at least, none have been cited by the counsel on either side.

Where a man makes a *double* insurance of the *same* thing, in such a manner that he can clearly recover, against several insurers in distinct policies, a *double* satisfaction, " the law certainly says that he *ought not* to recover " doubly for the *same loss*, but be content with *one single* " *satisfaction* for it." And if the same man really and for his own proper account, insures the same goods doubly, though both insurances be not made in his own name, but one or both of them in the *name* of *another person*, yet that is just the same thing: for the *same person* is to have the *benefit of both* policies. And if the *whole* should be recovered from *one*, he ought to stand in the place of the insured, to receive *contribution* from the other, who was equally liable to pay the whole.

The act of 19 *G.* 2. *c.* 37. (made to regulate insurances, and for prevention of wagering policies,) expressly *prohibits* the *reassuring*, (after having already insured the same thing;) *unless*, the former assurer shall be insolvent, or become a bankrupt, or die; and it provides * that even * Vide § 4.
in *those* cases, it shall be *expressed* in the policy " *to be a* [493]
" *re-assurance*." So that, here, if Mr. *Tamesz* had himself made a second assurance upon the same goods, and was

1758. to have had the *benefit of both* assurances himself, it had been within the act.

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But if *Tamesz* was *not* to have the benefit of both policies *in all events*, then it can never be considered as a *double* policy.

Objection. It has been said, "that the *indorsement* of the bills of "lading *transferred* MEYBOHM's *interest* in all policies "by which the cargo assigned was insured; and there- "fore *Tamesz* has a *right* to Mr. *Amyand's policy*;" and "that *Tamesz*, being the assignee of *Meybohm*, is the *cestuy* "*qui trust* of it, and may recover the money insured;" and even "that he may bring *trover*, or *detinue*, for "the very policy itself:" and it is urged from hence, "that he either will or *may* have a *double* satisfaction "for the *same* loss."

Answer.— But, allowing "that by the indorsement of the bills "of lading and assigning the cargo to *Tamesz*, he stands in "the *place of* MEYBOHM in respect of *his* insurances;" yet Mr. *Amyand* has an interest of his *own*, and had actually insured the ship and goods, and the sum of 1900*l.* (upon both together,) *prior* to any directions or intimation received from Mr. *Meybohm*, "to insure for "HIM." *Various people* may insure VARIOUS INTERESTS on the same bottom: (as one person, for goods; another, for bottomree, &c.) And here, Mr. *Amyand* had an interest of *his own*, distinct from the interest of *Meybohm*; he had a *lien upon these very goods*, as a factor to whom a balance was due. And he had the *sole* interest in the *ship*; which was a part of the things insured by him. It is far from appearing, "that even his *last* insurance (in *October*) "was made on the account of *Meybohm*, or as agent "for *him*." So far from it Mr. *Amyand* insists upon it for his *own benefit*, (as he expressly declared at the trial,) and absolutely *refuses to give it up* or to suffer his *name* to be used by the plaintiff; though he was a witness for the defendants, and was produced by them, and inclined to serve them. So that the *foundation* of this argument, urged by the defendant's counsel, *fails* them; and there is, in reality, *nothing to support it*.

[2 East. 526.] But even supposing "that Mr. *Amyand* had made his "insurance, not upon his own account, but *as agent or* "*factor* for Mr. *Meybohm*, and upon the *account of Mey-* "*bohm*:" yet, *even then Tamesz* can *never* come against *Amyand's* underwriters, or come at *Amyand's* policy, to his own use. For Mr. *Amyand*, the factor for *Meybohm*, has *possession* of the policy, and appears to have been a *creditor* of *Meybohm's* upon the balance of accounts between them at the time when he made the insurance: and I take it to be now a settled point, "that A FACTOR, "*to whom a balance is due*, has a LIEN *upon all goods of*

" *his principal, so long* as they remain in his *possession.*" *Kruzer et al.* v. *Wilcox et al.* was a case in Chancery upon this head. It came on first, * before Sir *John Strange* then master of the rolls: who decreed an account; and directed allowances to be made for what the factor had expended on account of the ship or cargo; and reserved all further directions, till after the master's report. It came on again, afterwards for further directions, after the master's report, before the lord chancellor: who was attended by four eminent merchants, who were interrogated by him publicly. After which, he took time to consider of it; and on 1st *February* 1755, decreed " that " the factor has a *lien* on goods consigned to him; not " only for incident charges, but as an item of mutual " account for the *general balance* due to him, *so long* as " he retains the *possession.* But if he *parts with the possession* of the goods, he *parts with his lien;* because it " can not then be retained as an item for the general " account." And there was another case, in the same court, of *Gardiner* v. *Coleman*, a few † months after; in which, the former case, determined as I have mentioned, was considered as a point settled: and this latter case, of *Gardiner* v. *Coleman*, was decreed agreeably to it. So that Mr. *Amyand*, *even* considered as *factor or agent* to *Meybohm*, and as making the insurance upon *Meybohm's* account is yet entitled to *retain* the policy: *Meybohm* being *indebted to him* upon the *balance* of the account between them: and he has a *lien* upon the policy, *whilst* it continues in *his possession.* Therefore, even in *this* view of the case, Mr. *Tamesz* must first have paid to Mr. *Amyand* the balance of his (*Amyand's*) account, before he could have gotten that policy out of Mr. *Amyand's* hands: and consequently, Mr. *Tamesz* was very far from being entitled to the benefit of it, as a *cestuy qui trust*, absolutely and entirely.

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* 12th March 1754. [See also 4 Burr. 2219. 5 New Abr. 270. S. C. Amb. 252.

† 2d June 1755.

But *if* the question " whether *Tamesz* could take " benefit of Mr. *Amyand's* policy," were *doubtful*; yet, here, *Tamesz* insured the goods with the defendants, *expressly under the declaration* of his suspicion " that there " might have been a former consignation, and some *former* " *insurance* made upon the goods by some *other* person;" but he desired to insure the *whole*, for his *own* security; and to this, the defendants *agreed*; and took the *whole premium.* Mr. *Amyand* insisted upon his right to the *whole* benefit of his *own* policy, when he was examined as a witness; and is now litigating it in Chancery. It would neither be just nor reasonable, that *Tamesz* should only recover *half* of his loss from the defendants, and be turned round for the *other half*, to the uncertain event of a long and expensive litigation. I do not believe there

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ever will or can be any recovery by *Tamesz* or those who shall stand in his place, against *Amyand's* underwriters. However, *if* those underwriters are liable to contribute at all, the contribution ought to be amongst the *several insurers* themselves: but *Tamesz*, the *insured*, has a right to recover his WHOLE loss *from the defendants*, upon the policy now in question, by which *they* are bound to pay the *whole*. For though here be *two* insurances, yet it is *not* a DOUBLE insurance: to call it so, is only confounding terms. IF *Tamesz* could recover against *both* sets of insurers, yet he certainly could not recover against the underwriters of *Amyand's* policy, *without* some *expence*; nor *without* also first paying and reimbursing to Mr. *Amyand* the *premium* he paid, and also his *charges*. This is by no means within the *idea* of a DOUBLE insurance. Two persons may insure two *different interests*, each, to the whole value: as the master, for wages; the owner, for freight, *&c.* But a DOUBLE insurance is where the *same* man is to receive *two sums instead of one*, or the same sum *twice over*, for the *same loss*, by reason of his having made two insurances upon the same goods or the same ship. Mr. *Tamesz* is intitled to receive the whole from the defendants upon *their* policy; whatever shall become of Mr. *Amyand's* policy: and *they* will have a right, in case he *can* claim any thing under Mr. *Amyand's* policy, to *stand in his place*, for a *contribution* to be paid by the other underwriters *to* THEM. But still *they* are certainly obliged to pay the *whole* to HIM.

Therefore, upon these grounds and principles, in *every light* in which the case can be put, we are all of us clearly of opinion, "that the verdict is right, as it now stands, "for the WHOLE: and that the

"POSTEA be delivered to the PLAINTIFF."
RULE accord.

REX *versus* INHABITANTS of BISHOP'S *Hatfield.*

See this CASE *abridged*, in the TABLE; and *at large*, in the quarto-edition of my SETTLEMENT-CASES, No. 141. pa. 439.

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Saturday, 11th Feb. 1758.

Qui tam action on the stat. 1 Jac. 1. c. 22. relating to leather cutters.

ROSSEL, qui tam, &c. *versus* KITCHEN.

ON *Thursday* 26th *January* last, Mr. *Whitaker* moved in arrest of judgment, after a verdict for the plaintiff in a *qui tam* action upon the statute of 1 *Jac.* 1. c. 22. "the duty of tanners, curriers, shoemakers, *and of* "OTHERS *cutting of leather.*") A rule was then made "to bring in the *postea*." And the *postea* being now brought in Mr. *Whitaker* and Mr. *Nares* objected—

1st. That the defendant is *not an object* of this act.

It is not alledged in the declaration "that the *defendant was a tanner*, currier, shoemaker, *or other person* "occupied in the cutting of leather;" which the *preamble* shews that *he ought* to be. *Cro. Car.* 587, *Lodge v. Hollowell*, is an action brought upon another clause of this act: and there *it is* alledged, "that the defendant was a "currier, &c." * *Brown's Entries*, , on the act against buying and selling live cattle—the defendant is here alledged to be a butcher.†

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[See 4 Durn. 111, 417.]

* The words there are—"that the defendant, being a currier, &c."

† But N. B. here the words of § 38. are "that every person."

They relied upon the *preamble* of the act, rather than the enacting part; and argued that *both* must be taken together.

2d Objection—This action is brought upon a supposition, and under an allegation, "that a *third* part of the "*penalty belongs to the dean and chapter of Westminster, "as lords of the liberty where the* OFFENCE *was committed.*" Whereas by the act of parliament this third part of the penalty must belong to the city of *London*, when the offence was committed WITHIN THREE MILES *of the city*: although the *place where* the offence was committed, be NOT, in any *other* respect, *situated within* the said city or its liberties.

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For the 50th section of this act gives to the *mayor of London, a* JURISDICTION *extending to* ALL *places** *within three miles* of that city: and at the same time, EXCLUDES all others in general, and all the other jurisdictions thereby established in particular, *from having* ANY *jurisdiction at all, within* three miles of the said city. So that if the city of *London*, have not jurisdiction *in* ALL *places within three miles* of the city, they have *none* AT ALL given them under this act of parliament.

* V. ante pa. 398, 390. Rex v. Goddard Williams.

Now *Drury-lane* appears and was proved to be the *place* WHERE the present *offence was committed*; which is clearly within three miles of the city of *London*; and therefore is within the *jurisdiction* given to the city by this clause, although it is indeed *actually* situated within the *liberty* of the church of *Westminster*. And consequently, the penalty belongs to the *city of London*; and not to the church of *Westminster*.

(*Vide* § 46, which gives the penalty, *viz.* one-third to the king; one-third to the prosecutor; and one-third to the city, borough, town, or lord or lords of liberties *where* the offence shall be committed or done.) They cited 1 *Lutw.* 138. under this second objection.

3d Objection. It follows, "that the *venue* is wrong," it being *laid in Middlesex*.

Mr. *Norton contra* for the plaintiff, was going to answer the objections, but was prevented by

Lord MANSFIELD.

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1st. The act is *not confined* to particular sorts of leather, nor to particular persons: it *extends to* ALL *red* leather; and to EVERY person. The *preamble is general*, and does *not* mean or intend to specify and enumerate every *particular* case. But what the legislature had in view, in the making of this act, was "*to secure the* STAPLE of leather, by this search, &c."

[499] And all the *other* clauses of this act are general, and are not *confined to* "persons occupied in the trade or "business of *cutting leather*." *This* would not have remedied the evil; or answered the *end* of the act; for the evil is just the same, if any *other* persons commit this offence.

2dly. The EXTENSION *of the* JURISDICTION of the city of *London*, undoubtedly, CANNOT ALTER *the* LOCALITY of the place *where* the offence is committed. All that the act does, is enlarging the *jurisdiction* of the city of *London*. Besides, the act gives *particular* penalties for particular offences: and this penalty, in the 46th section, is given "one-third to the king, one-third to "him or them that shall first sue, &c. and one-third "to the city, borough, town, or lord or lords of liberties, WHERE the offence shall be *committed or done*."

He concluded with saying that it was an excessively plain case.

In which opinion

The three JUDGES concurring, a RULE was made, "that the *postea* be delivered to the "PLAINTIFF."

Monday, 13th Feb. 1758.

REX *versus* INHABITANTS OF AUSTREY.

See this CASE *abridged*, in the TABLE: and *at large*, in the quarto-edition of my SETTLEMENT-CASES, No. 142. p. 441.

REX *versus* INHABITANTS OF COLD ASHTON.

See this CASE *abridged*, in the TABLE: and *at large*, in the quarto-edition of my SETTLEMENT-CASES, No. 143. p. 444.

[510] REX *versus* MARTHA GRAY.

Trial put off upon account of a libel published to influence the jury.

THE defendant stood indicted of a nuisance in stopping up a foot way leading through *Richmond-Park*.

The present question was only, whether the trial (for which a notice had been regularly given by the prose-

cutors, "to try it at the next *Surry*-assizes,") should be put off, or not.

The cause alledged for putting it off, by the counsel for the defendant, (who professed themselves to be counsel, in this particular case, for the crown,) was, that there had been a LIBEL *published* relative to the question in issue, *with intention to influence* the public and the *jury* who should try the cause. [See 4 Durn. 289. 6 Durn. 629.]

The fact was, that when the cause came on be tried at the *last* summer assizes, before Lord *Mansfield*, this libel (just then published and distributed,) was produced in court, and complained of in court, as calculated to instruct the witnesses and influence the jury.

Two of the *principal prosecutors*, then in court, were by affidavit charged with having *procured* the said libel to be written, published and distributed. It purported, in the title-page, to be printed for and published by *Shepheard*, the brother of a principal prosecutor: and an affidavit was read, proving him the publisher, and that the copy produced was bought from him in his shop, and that he said, "great numbers had been sent to the "*Surry*-assizes."

The next day *one* of the said prosecutors *only* made an affidavit to deny the charge; but in *such a manner* that it rather fixed it, as much as the silence of the other did.

The counsel for the prosecution, as it did not appear to *what* witnesses or jurors the pamphlet had been conveyed, apprehending that such practices were not only a contempt of the court and high misdemeanor, but might invalidate any verdict obtained before a proper inquiry could be made into the matter, desired that the trial might be postponed.

Which was consented to, by the counsel for the defendant: and an order was accordingly made, upon the motion of one side, consented to by the order.

Informations were afterwards moved for, and granted, against some of the persons concerned in printing and publishing the said pamphlet; and were ready for trial at the sittings after this term, in *Middlesex* and *London*.

Mr. Attorney-General and the other counsel for the crown, moved, a few days ago, to put off the intended trial of the *indictment against* the defendant GRAY, TILL AFTER *the trial of this* information which had been filed *against the publishers of this libel*; or at least to the next following assizes to these now approaching *Lent*-assizes; to the end that the publishers of this libel might be tried in the *interim*, and receive judgment, (if convicted;)

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which, they said, would *take off* the improper influence which the publication of it had occasioned.

Which motion being strongly opposed by the counsel for the prosecution: the court took time, till this day, to advise.

And now Lord MANSFIELD delivered his own and Mr. Just. DENISON's and Mr. Just. WILMOT's opinions, (for he said he did not know Mr. Just. FOSTER's, who had just sent him a letter to inform him "that he could "not be here to-day;") which opinion was, in short, (though he gave it very much at large,) that the trial of these informations for publishing the libel, was NOT *so connected with* the merits of the question to be tried upon the indictment, (which was a mere question of *civil right*, though in the form of a criminal prosecution,) as that the trial of the civil *right* ought to be stayed till the determination of the information against these publishers of the libel.

At the assizes, the counsel for the prosecution desired the trial might be put off; which was consented to, on the part of the defendant. If they had not, I should have adjourned it myself. But there is not the same reason now. For at *that* time, it appeared that one, if not two of the principal prosecutors attending the assizes, had been industrious in dispersing and sending it about, to the witnesses and jury, for very unjustifiable purposes. But now one* of the principal prosecutors chiefly concerned in it, is dead, and was so even before the motion for the information; the other† is NOT *now under the charge* of being concerned, (whatever *suspicion* may remain upon him:) and the *only* persons fixed upon by the affidavits, now actually under the charge, are *mere pamphlet-sellers and publishers*, of whom they were bought. And he could not, he said, upon the best consideration that he could give it, at all discover or conceive how the conviction or acquittal of *them* of the mere FACT *of publication of this libel*, could ANY WAY *affect* the merits of the question concerning the *civil* right: or how the trial of the point upon the civil right could be at all altered, by being brought on before, or after the event of the criminal trial for publishing the libel.

* Shepheard.

† Lewis.

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Indeed, *if that had been* the case, as suppose there had been an information against the principal prosecutors of this indictment for the nuisance, for instructing and suborning witnesses, or for undue endeavours to influence jurors, *that* might have been a reason for postponing the cause till these charges relative to the conduct of the parties were tried. But *that* is not this case: and whether the defendants to the informations were or were not guilty of publishing this libel, can no

way effect the merits of the cause, or can any how be given in evidence.

Therefore the RULE must be DISCHARGED.

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REX *versus* INHABITANTS OF MAYFIELD.

See this case *abridged*, in the TABLE; and *at large* in the quarto edition of my SETTLEMENT-CASES, No. 144. pa. 513.

FAIRLEY *versus* M'CONNELL.

MR. *Aston* shewed cause "why a *procedendo* should "not go, to the *borough-court* of *Portsmouth*:" who insisted on a right to proceed there, AFTER *a habeas corpus cum causa*.

Procedendo denied to a borough court that had tried a cause without the presence of a barrister of three years standing.

He, on the contrary, insisted that by the proviso in § 6. of the 21 *Jac.* 1. *c.* 23. ("to prevent suits commenced "in inferior courts, from being removed into superior, "unless, &c.") There ought to have been an *utter-barrister* of three years standing PRESENT at the trial of the cause; whereas no such person was present at this trial. For *want of which*, the trial, he said, was void; and the *habeas corpus* to remove the cause, was well brought. In proof of this he cited *Cro. Car.* 79. *Clapham's* case—2d resolution) in point—"That it is essential that an utter-barrister "of three yars standing, be present, either as judge, "or deputy judge." 3 *Mod.* 85. *Anonymous*. A like resolution proving the necessity of an utter-barrister's being present; or else, that this act, by virtue of this proviso, does *not extend* to the case.

Mr. *Yates contra* for the *procedendo*. This qualification, of being utter barrister of three years standing, *&c.* ONLY *extends* to the case of the judge or the steward *himself*; NOT to his *assistant*. And Mr. *Serj. Stanniford* who *is* such a barrister as is described in the proviso, is the *judge* of the court. So that the *proviso does not extend* to the present case. [515]

Mr. *Aston* in reply—But *he* was NOT *present*; the cause was tried by Mr. *White*, an *attorney*; who is his deputy, and is not a barrister at all. And the defendant relied upon the *habeas corpus* to remove the cause out of this inferior court: and therefore did not attempt to try the merits, or make any defence *there*.

N. B. The PROVISO is, that this act (of 21 *Jac.* 1. *c.* 23.) shall *extend* ONLY *to* such courts of record "in cities, liberties, towns corporate, and elsewhere, "and for so long time only, as there is or shall "be an utter barrister of three years standing at

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" the bar, of one of the four inns of court, that s
" or shall be *steward, under steward* or *deputy steward*,
" *town-clerk*, or *judge* or *recorder* of the same infe-
" rior court; or that is, or shall be from time to
" time *assistant* to such judge or judges of such
" inferior courts *as shall not be* utter barristers of
" such standing, as is aforesaid; AND THERE PRE-
" SENT; in which, such actions, bill, plaints, suits,
" or causes, is or shall be brought, commenced,
" or depending; and *not of counsel* in any action,
" suit or cause then depending in the same inferior
" court."

LORD MANSFIELD—The judge, though he be such a barrister, can be of no use to the court, unless *he* HIMSELF *be* THERE. The meaning of the act is, that such an utter-barrister ought, in all events, *to be* PRESENT *at the trial.*

Mr. Just. DENISON and Mr. Just. WILMOT—Certainly *that* was the meaning of the act beyond doubt. And *for* WANT *of this*, the trial now in question is void.

The RULE (to shew cause " why there should not
" issue a writ of *procedendo*, to be directed to the
" mayor, aldermen, and burgesses of the borough of
" *Portsmouth*;" and " why the defendant should not
" pay to the plaintiff the costs of this application;")
was

DISCHARGED.

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REX *versus* ELIZABETH SARMON.

Indictment for setting a person on the footway to distribute hand bills quashed.

THE court made no sort of difficulty to *quash an indictment*, (though attempted, by two or three counsel, to be supported) " for that the defendant *for the space*
" *of* FOUR *hours and* MORE TOGETHER, on *every* of the
" several days specified, (which were the first day of
" *January* 29 *G.* 2. and *divers other* days and times be-
" tween that day and the day of taking the inquisition,)
" *with force and arms, &c.* at *London*, at the parish of *St.*
" *Martin within Ludgate*, in the ward of *Farringdon*
" *Without*, in *London* aforesaid, unlawfully, injuriously
" and wilfully did SET, PLACE *and* KEEP *a certain* person
" (whose name was yet unknown to the jurors,) *in and*
" *upon the common and ancient foot-way* on the north side
" of the *public street* there situate, called *Ludgate-hill*; TO
" DELIVER *out certain* PRINTED BILLS OF HER OCCU-
" PATION, to persons passing that way; *which said per-*
" *son* so set, placed and kept there, by her the said
" *Elizabeth*, did, on the said days and times, REMAIN IN
" AND UPON *the said common foot-way* DURING *the several*

" *spaces of time aforesaid*, DELIVERING AND DISTRIBUT- 1758.
" ING *printed bills*, as aforesaid; whereby *the same* REX
" *foot-way*, at *those several days and times, was greatly* v.
" IMPEDED *and* OBSTRUCTED; SO THAT *the liege subjects* SAMUEL.
" of our said lord the king, *there passing and repassing*,
" *could* NOT SO FREELY *go, pass and repass in, by or through*
" *the* SAME WAY, *as they ought and were used to do*: to
" the great damage and *common* NUISANCE of all the
" said subjects, and against the peace of our said lord the
" king his crown and dignity."

The court held this to be a matter NOT *indictable*; and *quashed the* INDICTMENT.

The end of *Hilary* Term 1758, 31 *Geo.* 2.

EASTER TERM,

31 GEO. II. B. R. 1758.

Wednesday 19th April, 1758.

A bye-law to give power of amotion for just cause is a good bye-law.

REX *versus* RICHARDSON.

THIS was a *general* demurrer, by the king's coroner and attorney, to the defendant's plea to an information in nature of a *quo warranto* exhibited against *Thomas Richardson*, to shew by what authority he claimed to be one of the portmen of the town or borough of *Ipswich*.

The plea (in substance) is, that *Ipswich* is an ancient borough by prescription, prior to the charter: that at the time of granting it, there were, and long before had been twelve burgesses called portmen. Then it sets forth the letters patent of incorporation, dated 11th *Feb.* 17 *Car.* 2. which, after reciting that this town or borough had been, for many ages, a corporation, &c. first confirms the said incorporation and all their liberties, free customs, franchises, &c. Then the said letters patent name, constitute and confirm the several officers, and (amongst the rest) twelve portmen. Then they go on to grant and confirm, "that all *elections* of the *portmen* and of every of "them, by the death OR REMOVAL of any of them or "otherwise in whatsoever manner happening, should "from thenceforth for ever be made and ought to be made "*by the* OTHERS OR RESIDUE of the portmen for the time "being, *or the greater part of* THEM."

Then the plea sets forth the acceptance of the letters patent by the corporation, and their conforming thereto, to the time of the plea.

The plea goes on, and alledges a custom then and still subsisting, "that the bailiffs, burgesses, and commonalty "for the time being, or *so many of them as should be pre-*
"*sent*, have met and assembled, and of right ought to
[518] "meet and assemble together in the *Moot-hall* yearly
"and every year, at divers times in the year, viz. *on*
"*the 8th of September* in every year, for the election of
"bailiffs, and for the consulting about and transacting of
"other lawful and necessary affairs concerning the
"borough and the good rule and government thereof; and
"*again at Michaelmas* in every year, for the transacting
"of divers lawful and necessary business, &c. and also

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" *at such* OTHER *time and times* in the year, as to the " bailiffs of the said town or borough for the time being, " hath seemed meet and necessary, *upon due notice* being " previously given thereof, for the better ordering, regu- " lation and government of the said town or borough: " at which said assembly, from time to time had and " held as aforesaid, the bailiffs of the said town or " borough for the time being, during all the time afore- " said, have of right presided, and have used and been " accustomed and ought to preside; and *which said* " *assembly*, during all the time last aforesaid, hath been " and hath been called the GREAT *court* of the said town " or borough."

Then the plea further sets forth another then and still subsisting custom and method of *electing*, swearing and admitting the *portmen, whenever* any vacancy or vacancies hath or have happened by the death, resignation, *discharge* or *removal* of any portman or portmen of the same town, or in any wise whatsoever; *viz.* " that *the* RESIDUE " of the portmen, or the *greater part of* THEM, have " *within a* REASONABLE AND CONVENIENT *time* after " the happening of such vacancy or vacancies, *assembled* " in the council-chamber, for the *election of another port-* " *men* or other portmen: and, in the said room there, " have elected and named, and of right ought to elect and " name, out of the then burgesses of the said town or " borough, then resident and inhabiting within it, such " other person or persons as the *said then* RESIDUE *of* " the portmen aforesaid, *or the greatest part of* THEM, " have thought fit and proper to be a portman or port- " men of the said town, to fill up such vacancy or vacan- " cies; and such person or persons *so* elected and named " to be a portman or portmen of the said town or " borough, and being resident and inhabiting in the same " town, hath and have, for all the time aforesaid, been " sworn and admitted, and during all that time ought " of right to be sworn and admitted into the same office " or offices; and every person *so* elected, sworn and " admitted, &c. and being resident and inhabiting, &c. " during all the time aforesaid, hath of right enjoyed, " had, used and exercised, and during all that time ought " of right to have, use, and exercise and still of right ought " to enjoy, use, have, and exercise, the said office of a port- " man of the said town or borough, and all the liberties, " privileges, rights and franchises to that office belong- " ing and appertaining, from the time of his admission " thereto, until the death, resignation, *discharge* or *removal* " of such portman."

The plea further shews, that every portman of the said town or borough, during the time of his being in that

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office, ought, according to the custom of the said town or borough, to be resident and inhabiting within the same town or borough, or the liberties thereof; and according to the custom of the said town or borough, and BY THE DUTY *of his office of portman, ought to* ATTEND *and be* PRESENT *at every* GREAT *court* of the said town or borough held or to be held in the *Moot-hall* aforesaid, within the said town or borough, *to* ADVISE *and* ASSIST *the bailiffs* of the said town or borough for the time being, in the good rule and government of the same town or borough.

It then alledges that on the 8th of *September* 1755, and for six months and more next preceding that day, he the said *Thomas Richardson* and one *John Gravenor* were bailiffs of the said town or borough.

That on the same day and year, and for the space of one whole year then last past, and upwards, Sir *Richard Lloyd*, knight, *John Sparrowe*, *Samuel Kent*, *Humphrey Rant*, *Ellis Brand*, *Michael Thirkle* the younger, *Goodchild Clarke*, *William Hammond*, *George Foster Tuffnell*, and *James Wilder* were the then portmen of the said town or borough.

That within the said space of that year during which the said Sir *Richard Lloyd*, &c. were portmen as aforesaid, *divers great courts* of the same town or borough, were holden, &c. that is to say, *one great court* of the said town or borough, was duly holden at the said *Moot-hall* of the said town, in and for the said borough, on the 13th of *January*, 1755; *one other great court* of the said town or borough was duly holden at the said *Moot-hall*, &c. on the 15th of *April*, 1755: *one other*, on the 9th of *June*, 1755; and *one other*, on the 19th of *June*, 1755; before the holding of which said several courts respectively, DUE NOTICE *had been* GIVEN *of the holding thereof respectively*.

That on the said 8th of *September* 1755, they the said *Thomas Richardson* and *John Gravenor*, being then bailiffs, and the above-named *James Wilder*, then one of the portmen of the said town or borough as aforesaid, and a great number of the then burgesses and commonalty of the said town or borough, in due manner, according to the custom of the said borough, met and assembled together in the *Moot-hall* aforesaid, within the said town or borough; and then and there held a *great court* of the same town or borough, *(due notice of the holding thereof* having there been previously given,) *for the election of*
[520] *bailiffs* of the said town or borough, and for the transaction of divers other lawful and necessary matters and businesses concerning the good rule and government of the same town or borough.

That the said Sir *Richard Lloyd*, *John Sparrowe*,

Samuel Kent, Humphrey Rant, Ellis Brand, Michael Thirkle, Goodchild Clarke, William Hammond, and *George Foster Tuffnell*, did *not, nor did* ANY *of them* ATTEND *or* APPEAR *at the same great court* of the said town or borough, but WILFULLY ABSENTED *themselves therefrom*; and that they and every and each of them WILFULLY *had absented themselves from the said other great courts* of the said town or borough, which had been so duly holden in the same town or borough, within the said space of one year then last past as aforesaid, and from *every* of those great courts; and had *voluntarily neglected*, and every and each of them *had voluntarily* NEGLECTED *to attend* at the said great courts, so holden as aforesaid, *or at any of them*: and *thereby*, each of them the said Sir *Richard Lloyd*, &c. and *G. F. Tuffnell neglected and omitted the duty and execution of his said office* of one of the portmen of the said town or borough, and *thereby* DEPRIVED *the then bailiffs, burgesses*, and commonalty of the said town or borough, *assembled at the said several great courts*, of that *counsel, aid, assistance* and *advice* which *by the* DUTY *of his office of portman* of the said town or borough, and *according to the* OBLIGATION *of the* OATH *of office by him taken* in that behalf, he *ought* to have given; *to the great hindrance and delay of the* PUBLIC *business of the said borough*, to the *great damage, disappointment, and prejudice* of the bailiffs, burgesses, and commonalty of the said borough, and to the great hindrance, and in open subversion of the good rule, government, and constitution of the said borough.

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That *thereupon at the same great court* of the said town or borough holden on the said 8th day of *September* 1735, for the purposes aforesaid, (the said great court having notice of the premises,) it was in due manner ordered, by the said then bailiffs, burgesses, and commonalty of the said town or borough then met and assembled at that great court as aforesaid, "that the said Sir *Richard* "*Lloyd, John Sparrowe, Samuel Kent, Humphrey Rant,* "*Ellis Brand, Michael Thirkle, Goodchild Clarke, Wil-* "*liam Hammond*, and *George Foster Tuffnell*, and each of "them respectively, should severally and respectively "HAVE NOTICE *of the neglect of duty charged upon each of* "*them*, and *be summoned to appear* at the then next great "court of the said town or borough, that is to say, in the "Moothall aforesaid, on *Monday* the 29th day of the same "*September*; severally and respectively to *shew cause*, "(if they or any of them could,) why each of them "respectively *should not be* DISCHARGED *from his said* "OFFICE *of* PORTMAN, FOR *his respective* NEGLECTS "*aforesaid*."

That afterwards, and before the holding of the said then next great court of the same town or borough, to wit,

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on the 17th day of the same *September* 1755, each of them the said Sir *Richard Lloyd*, *J. S. S. K. H. R. E. B. M. T. G. C. W. H.* and *G. F. T.* HAD NOTICE *of the said order* so made by the same great court, and of the *charge alledged* against *each* of them respectively, of his aforesaid neglects; and were then and there *severally and respectively* SUMMONED, and *every and each* of them was then and there *in due manner summoned* to attend and appear at the said then next great court of the said town or borough to be holden in the Moot-hall aforesaid in the said town or borough, on *Monday* the 29th day of the same *September* by the bailiffs, burgesses and commonalty of the said town or borough, and to shew cause (if any of them could) why each of them the said portmen respectively should not be discharged from his said office of portman, for his respective neglects aforesaid.

That afterwards, that is to say, on the same *Monday*, the 29th day of *September* in the said year of our Lord 1755, they the said *Thomas Richardson* and *John Gravenor*, being then and there bailiffs of the said town or borough, and the said *James Wilder*, being then *one* of the portmen of the said town or borough, and a great number of the then burgesses and commonalty of the same town or borough, (due notice having there been previously given in that behalf,) did, in due manner according to the custom of the said borough, meet and assemble in the Moot-hall aforesaid, within the said town or borough, and then and there *held a great court* of the same town or borough, in and for the said town or borough; and the said Sir *Richard Lloyd*, *J. S. S. K. H. R. E. B. M. T. G. C. W. H.* and *G. F. T.* although they were then and there solemnly and severally called for that purpose, *did* NOT *nor did any of them* APPEAR *or* ATTEND *at that court, or* SHEW ANY CAUSE why they and each of them should not be discharged from the said office of portman of the said town or borough: but they and each of them did then and there *wholly make* DEFAULT *therein*.

That at the *same* great court, &c. so holden as aforesaid on the said *Monday* the 29th of *September* 1755, a FURTHER *day was given* by the same great court, to the said Sir *Richard Lloyd*, &c. respectively, *until the then next* great court of the said town or borough, to be holden in and for the said town or borough, at the Moot-hall of the said town or borough, on *Tuesday* the 14th day of *October* then next ensuing, to shew cause as aforesaid: and it was then and there in due manner ordered by the same great court, That the said Sir *Richard Lloyd*, &c. and every of them *should have notice*, and be severally and respectively *summoned to appear* at the said then next great court, &c. to be holden, &c. on the said *Tuesday*, the

" 14th day of *October* then next ensuing, severally and 1758.
" respectively to shew cause, (if any of them could,) why REX
" they and each of them respectively should not, *for the* V.
" *cause aforesaid* alledged against each of them respec- RICHARD-
" tively, be discharged from his office of portman of the SON.
" said town or borough, *for his neglects* aforesaid."

That afterwards, and before the holding of the said then next great court of the same town or borough, to wit, on the 10th day of the same *October*, in the said year of our Lord 1756, they the said Sir *Richard Lloyd*, &c. and each of them respectively, *had due notice* of that order, and of the charge alledged against each of them respectively, of his aforesaid neglects; and were then and there severally and respectively *summoned*, and every and each of them was then and there *in due manner summoned to appear and attend* at the said then next great court of the said town or borough, to be holden in and for the said town or borough, on *Tuesday*, the 14th day of *October* then next ensuing, to shew cause, if any of them could, why they and each of them respectively should not, *for the cause aforesaid* alledged against each of them respectively, be discharged from his office of a portman of the said town or borough, *for his neglects aforesaid*.

That on the said *Tuesday*, the 14th of *October* aforesaid, in the said year of our Lord 1755, *Lark Tarver* and *Thomas Bowell* were bailiffs of the said town or borough; and that the aforesaid Sir *Richard Lloyd*, &c. *and James Wilder*, were the then *only* portmen of the said town or borough.

That on the said *Tuesday*, the 14th day of *October* aforesaid, they the said *Lark Tarver* and *Thomas Bowell*, then being bailiffs of the said town or borough, and *the said James* WILDER *then* ONE of *the portmen* of the same town or borough, and a great number of the then burgesses and commonalty of the said town or borough, (*due notice* in that behalf having there been previously given,) did, in due manner according to the custom of the said borough, meet and assemble in the Moot-hall aforesaid, in the said town or borough, and then and there held a great court of the same town or borough, for the transaction of divers lawful affairs concerning the good rule and government of the said town or borough.

That at the same great court, &c. so holden as aforesaid on *Tuesday* the 14th of *October* 1755, the aforesaid Sir *Richard Lloyd*, &c. were severally and solemnly called, and every and each of them was severally and solemnly called to appear and shew cause at that court, (if any of them could,) why each of them respectively should not, for his [523]
neglect of duty aforesaid charged and alledged against each of them respectively, be discharged and removed from

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his said office of portman of the said town or borough. That they the said Sir *Richard Lloyd*, &c. being so respectively and solemnly called as last aforesaid, DID NOT nor *did any of* THEM ATTEND or appear or shew any cause whatsoever, at that court, why they or any of them should not be discharged and removed from his said office of portman of the said town or borough: but they every and each of them did then and there *wholly make default* therein; and *neither* they nor any of them, nor any person on the behalf of them or any of them, did then require any future day or time to be allowed to them or any of them, to shew cause as aforesaid. WHEREUPON, the said *Mark Tarver* and *Thomas Bowell*, then being bailiffs of the said town or borough, and the rest of the said burgesses and commonalty of the said town or borough then so met and assembled and holding the said great court of the said town or borough as aforesaid on the said 14th day of *October* in the year last mentioned, having taken the premises into their consideration, and having fully and deliberately weighed the same, the said court did then and there ORDER "that each of them the said Sir *Richard* "*Lloyd*, *J. S. S. K. H. R. E. B. M. T. G. C. W. H.* "and *G. F. T. should be* DISMISSED, DISCHARGED *and* "REMOVED from his *office of a portman* of the said town "or borough: and each of them respectively *was* then and "there, by the said court, FOR *his said neglect of duty*, "DULY *discharged and removed* from his place and office "of portman of the said town or borough; and, each of "them hath ever since remained and been, and yet is dis-"charged and removed therefrom."

That the aforesaid Sir *R. L. J. S. S. K. H. R. E. B. M. T. G. C. W. H.* and *G. F. T.* being so respectively discharged and removed from their said respective offices as aforesaid, he the said *James Wilder*, afterwards on the same day and year, and from the time of their said respective discharges and removal UNTIL AND AT *the time of the election of* OTHER *portmen* of the said town or borough herein after mentioned, remained and was a portman of the said town or borough; and then and during all that time, was *the* ONLY *portman* of the same town or borough.

That afterwards, on the said *Tuesday* the 14th day of *October* aforesaid in the year last mentioned, the said *James Wilder*, *being* THEN *the* ONLY *portman* of the said town or borough, *retired* and went into the room called the council-chamber, in the Moot-hall aforesaid in the said town or borough, *in order to elect other* burgesses of the same town or borough, resident and inhabiting within the said town or borough, to be *portmen* of the said town or borough *in the places* of portmen of the said

town or borough VACANT *as aforesaid*; and *did* then, in the said room * there, *in due manner* ELECT HIM *the said* THOMAS RICHARDSON (being then and there a burgess of the same town or borough, inhabiting and resident within the same town or borough, and a fit and proper person to be a portman thereof,) to be *one of the portmen* of the said town or borough *in the place of* one of the portmen of the said town or borough THEN VACANT *as aforesaid*. 1755. REX v. RICHARDSON.

That he the said *Thomas Richardson*, being *so elected* to be a *portman* of the said town or borough, afterwards and before he was admitted to or took upon him the execution of that office, that is to say, at the same great court of the said town or borough, in the Moot-hall aforesaid, on the same *Tuesday* the 14th day of *October* in the year last aforesaid, at the same great court of the said town or borough, in the town-hall aforesaid, did then and there, BEFORE *the* said *Lark Tarver* and *Thomas Bowell* then BAILIFFS of the said town or borough, in *due manner* and *according to the usage and custom* of the said borough, *take his corporal oath for the faithful and due execution of the said office* of a portman of the said town or borough in all things concerning the same, *and* ALL OTHER *oaths then required by law in that behalf*: and thereupon, he the said *Thomas Richardson* was then and there, at the same great court, in due manner admitted into the said office of a portman of the said town or borough. And thereupon, and by virtue thereof, he the said *Thomas Richardson*, afterwards, that is to say, on the said 14th day of *October* 1755, and continually from thence until and at the time of exhibiting the information, was and still is a *portman* of the said town or borough.

And by that warrant, *&c. &c.*

The king's coroner and attorney demurs *generally*: and the defendant joins in demurrer.

This case was three times argued.

The *general* question was, "whether the defendant "has shewn a *sufficient title* to the office." Which general question was divided into two *subordinate* ones; *viz.*

1st. Whether the nine portmen had been *well and duly* REMOVED: and (admitting that they were so,)

2dly, Whether the *defendant was well* CHOSEN.

First.—The counsel for the crown urged, that the persons removing had *no* POWER *to remove*. For, a corporation have no such power inherently or *incidentally*: and none is, in the present case, either given to this corporation by charter, or claimed by prescription. 1st Objection to the removal.

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They cited *Magna Charta*, c. 29. "*Nullus liber homo* "*disseisiatur de libero tenemento suo, nisi per legale judicium* "*parium suorum, vel per legem terræ.*" *James Bagg's*

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case, 11 Co. 93 to 99. 1 Ro. Rep. 224, 225. S. C. and S. P. The crown may, by writ, discharge some officers, after conviction. See Sir *Robert Sawyer's* argument on the *quo warranto* against *London*, *fo.* 22. *State Trials*, *vol.* 4. *fo.* 810. S. C. where Sir *Robert* mentions the case of a coroner. *F. N. B. new edit.* 381. *old edit.* 163. *Writ de Coronatore eligendo vel exonerando. Register* 177, 178. *Writ de Coronatore eligendo; & de Viridario eligendo. F. N. B. new edit.* 383. *old edit.* 164. *Writ de Electione Viridariorum Forestæ. Dyer* 333. *Pasch.* 16 *Eliz. pl.* 28. which was a restoration by writ, of a citizen of *London*, who had been disfranchised.

These authorities they cited, to illustrate and reduce the position "that, in consequence of a *conviction*, writs "shall issue out of the *king's* courts, where the convic-"tion is;" and to shew "that the power is originally in "the *crown*."

In *Yates's* case, *Style* 477, 480. it is said "there must "be a custom or a statute to warrant a disfranchise-"ment." 1 *Ld. Raym.* 391. *Rex* v. *Mayor of Coventry*, *M.* 10 *W.* 3. (2d point,) the court held that the corporation ought to shew a power, either by custom or under their letters patent. 2 *Ld. Raym.* 1564, 1565, 1566. *M.* 3 *G.* 2. *Rex* v. *Mayor, &c. of Doncaster*, recognizes the authorities of *Bagg's* case, and *Yates's* case, "that a free-"man shall not be removed, but by charter or prescrip-"tion." That return was quashed; and a peremptory *mandamus* issued. And *M.* 29 *G.* 2. *B. R. Rex* v. *Ponsonby* was agreeable to this.

The only *dictum* to the contrary of this doctrine, is in 2 *Strange* 819, 820. Lord *Bruce's* case: where it is said "that the *modern* opinion has been, that a power of amo-"tion is *incident* to the corporation." But this report ought to carry but little weight: for *other* accounts of that case *differ* from it; and NO such *modern opinion* as there hinted at, does any where appear.

2d Objection to the removal.

Second objection (under the first point.)

Here was NO *sufficient* CAUSE of removal of these nine portmen.

Their NON-ATTENDANCE was *no breach* of their duty so as to occasion a *forfeiture*. 1 *Hawk. P. C.* 168. says that the notion of forfeiture by bare non-user is not well warranted by the authority cited in maintenance of it.

[526] This duty, "of attending to advise and assist the bai-"liff at the great courts," is NOT *constant and continual*; but OCCASIONAL *only*, and when they receive *notice* to do so: they are not obliged to attend the *ordinary* and *common* business of these great courts. And it is not here alledged, "that any counsel, aid, assistance, or advice was

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"*wanting*." Indeed, the plea "concludes that this was "to the damage and prejudice of the corporation, and "their hindrance, *&c.*" But there is no *special damage* laid: and the stating a *general* damage to the corporation is not enough; without shewing *particular* prejudice to them. 1 *Inst.* 233 *b.* is expressly so. *

A burgess's non-attendance at sessions, is no cause sufficient for a removal of him. *Regina* v. *Mayor and burgesses of Pomfret, M.* 11 *Ann*, in *Lucas's Report* 107. is expressly so resolved.

But even admitting they had this power of removal; yet, it ought to be for *such* an offence as was *against their oath of office*: and consequently, *this oath of office* ought to be *set forth*. *Style* 477, 478. 2 Ld. *Raym.* 1233. in Serjeant *Whitaker's* case—*Regina* v. *Ballivos, Burgenses, &c. de Gippo*: there the oath *is set forth*: here, it is not.

* As to *private* offices; not as to *public*, which concern the administration of justice or the commonwealth.

Third objection (under the first point)—This is not a removal *by the* WHOLE *body*, at a *corporate assembly*; but by a particular *court*. In *Carthew* 172. Sir *Peter Rich* v. *Pilkington*, the court of mayor and aldermen was holden *not* to be a corporate assembly; but a *court*. So here, this *great court* was only a *mixed* assembly; and *not* the mayor, burgesses and commonalty.

3d Objection to the removal.

Fourth objection (under the first point) The removal is not *under their common seal*. 1 *Salk.* 192, the mayor of *Thetford's* case, is in point, "that a corporation can not "do an act in *pais*, without their common seal." 13 *H.* 8. 12. *Plowd.* 91. *b.* 92. *a.* 2 *Saund.* 305. * 3 *Lev.* 107. *Manby* v. *Long et al.* † 1 *Ventr.* 47. *Horn* v. *Ivy.* 1 *Mod.* 18. S. C. ‡ In 1 *Ventr.* 355. *Haddock's* case, the words are, if "the power to remove be at their will and pleasure, this "will *must* be expressed *under their common seal*: but in a "*return to a mandamus, debito modo amotus* may suffice." There is a note, at the bottom of the *Colchester* case in 1 *Peere Wms.* 596, "that the method of disfranchising a corporator, (in order to examine him as a witness,) is by "an information, in the nature of a *quo warranto* against "the member; who confesses the information: on which, "there is a *judgment* to disfranchise him." The present case is NOT *like* to a *return* to a *mandamus*; where the mere return of his being "*debito modo amotus*" is sufficient: *here*, it ought to be *so pleaded*; this being a *plea* to an information: which plea ought to be taken against the pleader.

4th Objection to the removal.

* (On the 1st exception to the plea.)
† (2d exception to the avowry.)
‡ All these last cases do not authoritatively prove the position; not being the point resolved.

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Fifth objection (under the first point) was to the want of PERSONAL *notice* being given to the nine removed portmen, "to attend these five great courts first mentioned "in the plea;" (for the non-attending whereof, they were afterwards removed), *viz.*

5th Objection to the removal.

This objection was first started by Lord *Mansfield*;

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who observed that for the meetings assembled for doing corporate acts, a *summons* (of *some sort or other*) is necessary; and that *here*, the offence itself turns upon absences from several courts, *not* holden (except one of them) *upon* STATED *days*, during the period of about a year; yet *no* PERSONAL *notice* to these portmen is alledged by the plea; but only, in general, "that DUE *notice* "was given of the holding thereof respectively:" so that it does *not appear* that they had *any reason to think of any* PARTICULAR *or* SPECIAL *business*. And *if so*, the particular notice afterwards given them, "to shew cause "why they should not be disfranchised," will not affect them: for *that* is quite a subsequent distinct transaction.

Therefore he offered to hear a further argument on this single head if the parties desired it. Which they did: and this objection was argued by itself.

The counsel for the crown *also* objected to the notice given to these portmen, of the courts at which they were to have attended *to shew cause* why they should not be disfranchised.

1st. They argued that it was not their duty to have attended *at* ALL *great courts*, upon GENERAL *notice* of them, WITHOUT PARTICULAR *and* PERSONAL *summons*. For without such *personal* notice, they could not be guilty of such a lachesse as would be a ground for a forfeiture of their office.

2dly. They insisted also that PARTICULAR *and* PERSONAL *notice* ought to have been given them, of the *charge*, and of the *intention to disfranchise*. 1 *Salk.* 214, *Nurse* v. *Frampton*. 8 *Rep.* 93, *Frances's* case, (3d resolution.) And although it is alledged, "that EACH of them *respectively* "HAD *notice*;" * yet this was *not enough*: but a *particular* and *specific* summons ought to be set forth. And they cited *Style* 440, 452. The *protector* and the town of *Colchester*, *Bernardiston* the recorder's case. 4 *Mod.* 37. *Glide's* case. Cases *temp. W.* 3. *fo.* 29. S. C. *Bagg's* case, 11 *Rep.* 99. *a.* And it is likewise so in *actions*. *Fletcher* v. *Ingram*, last cited book, *fo.* 87, 88, (v. Cases *temp. W.* 3.) was a replevin: and "*notitiam habuit*" was holden too general, 1 Ld. *Raym.* 225, 226. *Rex* v. *Chalke* upon a *mandamus* to restore an alderman, *per Holt*, "a summons is necessary, "that the person charged may be *prepared* to make his "defence." And this ought to be *personal*, and it must be given by the proper person. 6 *Rep.* 29. *a. b.* *Colam's* case: where no lapse incurred for want of rits, being given in certainty and explicit particularity, and by the proper person too.

The 1st point.

Now the words in the *present allegation* "that each of "them *had* notice," may *also* be thought they had no *proper*, *regular* and *personal* notice.

Second point (*viz.* second subordinate question.)

* V post. 540.

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The defendant has NOT *been* DULY ELECTED, and *sworn*.

1st Objection to defendant's election.

1st, For the election ought to be by the *residue*: and "*residue*" is a *plural* term, and imports "*the others*;" whereas here was only ONE SINGLE portman left, and he *alone* elected the defendant into this office.

The custom requires "the *portmen to assemble*:" which expression necessarily imports some *number* of them, at least more than *one*; for one alone can never be said to *assemble*. And all charters ought to be taken according to the custom subsisting at the time of granting them. 2 *Inst.* 282. And here they have been reduced to one, not by the act of providence, but by the voluntary act of the corporation themselves.

2d Objection to defendant's election.

2dly. The custom also requires a *reasonable and convenient time*, "between the happening of the vacancy, "and the election of a new portman." Whereas this election, admission and swearing of the defendant to be one of the portmen in the place of one of those removed, were all *immediate*.

3d Objection to defendant's election.

3dly. Besides he ought to have been elected into the *place* of some *particular* portman; not in *general*, "into "the place of *one* of them then vacant."

4th Objection to defendant's election and swearing.

4thly. The plea does not sufficiently particularize the oath of office, (vide *Style* 478;) nor alledge that the persons who *administered* the oaths to the defendant, (viz. the bailiffs,) "*had such* POWER *to administer them*." It is only averred, "that he took them before them in due "manner and according to the custom." 1 *Strange* 539. *Rex* v. *Decan. et capitul. Dublin. Per Eyre* justice, "in "the case of corporations, where the *charter doth not im-*"*power* any body to give the oath, they are forced to get "a *dedimus* out of Chancery." *M.* 8 *G.* 2. *B. R. Rex* v. *Gibbon*, a freeman of *New Romney*, on a motion for a new trial: per *Ld. Hardwicke*, "the defendant, when he comes "to make a title against the crown, upon an information "in nature of a *quo warranto*, must make a *complete* title "to the office; and must shew a RIGHT of swearing:" and his lordship expressly added, "shewing that he was "SWORN in the manner and form, *alone* is *not* sufficient." Now here, he has *not* shewn "that the *bailiffs* had a *right* "to administer the oath."

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Ex parte defence.

The counsel for the DEFENDANT first observed that a PLEA is to be taken to a common intent: it is *not* like a *mandamus to restore*; which must be taken *more strictly*.

It appears, they said, upon this plea, that there was *in fact* a *removal* of former portmen; a *vacancy* occasioned thereby; and an *election* of the defendant into the office upon *that* vacancy. The POWER *to remove*, is to be tried in *another* method; at least, more properly than by *this*

1758. method: however, the defendant is content to have the merits determined in *this* or *any* method.

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Having premised thus much in general:

Answer to 1st Objection to the removal.

They urged that this power of removal is *implied* and *inherent* and INCIDENTAL *to the constitution* of a corporation.

The *law* gives *whatever is necessary* to the enjoyment of a grant. Upon this principle is founded the *power of making bye-laws* by corporations: much more, must they have power inherent in them to exercise *acts* ESSENTIAL *to their existence and preservation.*

The power of *amotion* is one of these; and is NOT *limited* to cases where the party has been *previously* CONVICTED. Their power of amotion is the *same, after* conviction, as *before;* neither greater, nor less: the *conviction working* no CHANGE, either upon the charter or prescription.

Conviction is not a true criterion of guilt. For atrocious crimes are not purged, with respect to the corporation, by a *pardon before conviction*; (which the crown may grant, if they please:) or the offender may run away; and *thereby avoid being convicted* at all.

Such amotion can not be contrary to *Magna Charta.* For a man *may* certainly be removed from his *freehold: if* he can be so by the *law of the land.* So that there is no argument to be drawn from *Magna Charta* as to this question.

If a corporation have no inherent power to disfranchise, how can they do it even *upon request* of the corporator himself? Yet that was *Tidderley's* * case.

*V. 1 Siderf. 14.

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But *this* is NOT *a disfranchisement* of a *freeman:* but only a displacing an *officer* from an OFFICE, leaving him STILL *a freeman.* And surely, *this mere* DISPLACING *from an office* can *never demand a previous conviction.*

Suppose an officer becomes, by the visitation of Providence, *insane, blind,* or otherwise *incapable to execute his office;* may not he be removed from such office? Ours is not an arbitrary removal *ad libitum;* but a removal for *good cause.*

The case of the corporation of *Doncaster,* in 2 Ld. *Raym.* 1564. (on a *mandamus* to restore *Scott* to be a capital burgess,) makes the *distinction* between * turning out from an *office,* and *disfranchising.*

* At pa. 1566 indeed the court observe "that the "charge did "not affect "him as a "capital "burgess; "but only as chamberlain."

Lord *Bruce's* case in 2 *Strange* 819. is an authority for us: for it says expressly, "that the *modern opinion* has "been that a power of amotion is incident to a corporation; though *Bagg's* case seems contrary." So in the case of *Rex* v. *Plimpton, temp.* Ld. *Hardwicke.* And

Qu. What case, or what p. ante, 525. or 528.

from the nature of the thing, it *must be inherent* in the corporation.

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Besides, here *is* an IMPLIED POWER to remove, *by the custom*. For it is "to go to election, &c. whenever any "vacancy happens by *removal*, &c. of any portman or "portmen:" which implies that the corporation must have a *power to remove*.

In the case of Mr. *Fetherston-haugh*, *Rex v. Mayor* of *Newcastle upon Tyne*, *Mich.* 1747. 21 *G.* 2. *B. R.* the court would not grant a peremptory *mandamus* to restore him; though the *common council*, who removed him, had no power in *them* to remove, but that power must have been in *the body at large*, if it existed at all. However, here the removal is by the body at large.

In the case of *Rex v. Tilderley*, 1 *Siderf.* 14. It appears that the Ld. Ch. Baron *Hale* thought that corporations *had* this power, "to remove for good cause;" as corporations, and *incidentally*.

It has been said, "that, after conviction, the corpora- "tion may have a *writ from the crown* to remove the "offender." But this is a *dangerous doctrine*, "that cor- "porators may be removed *by writ from the crown*."

As to the cases cited—some of them relate to coroners, verderors, &c. which are not applicable to corporators.

Bagg's case was upon a *mandamus* to restore: and there was NO *sufficient cause* of removing him from his *franchise*. All the rest of the case is *extrajudicial:* and the latter part of it does not appear in Ld. *Rolle's* report of it. So that, probably, it was *only* the *reporter's* own opinion; and *not* said by the *court*. [531]

And if a corporation has inherent power to remove, the citation from *Magna Charta* does not oppugn it: because, in such case it is "*per legem terræ*."

Style 478. was the case of a *freeman disfranchised; not* an *officer only removed* from his particular *office*.

As to 1 Ld. *Raym.* 391, *Rex* v. *Mayor of Coventry*, it was a *mandamus to restore*: and the *cause* returned was holden,* insufficient.

* Yet still it seems to be an authority: for the court held "that they ought to have shewn either custom "or grant to remove."

As to 2 Ld. *Raym.* 1564, the distinction abovementioned is expressly taken: and the cause returned was holden † insufficient.

† Yet it is an authority in point, in express terms, "that a freeman shall not be removed by a corporation, unless by vir- "tue of a charter or prescription."

As to the 2d objection (under the first point), concerning the misuse of election of the nine portmen.

Answer to 2d objection to the removal.

It appears to be a cause fully sufficient for they had

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neglected the duty of their office, *even after notice.* 1 *Inst.* 233. *a.* proves this to be a forfeiture of office: for lord *Coke* there expressly says, "that *non-user* of public offices "is, of it *self a cause of forfeiture." And in the *nature of the thing*, it was so in the present case. The corporation have a RIGHT *to their attendance:* and the *right* and the *obligation* ought to be *reciprocal.*

* V. ante, pa. 525. in margine.

And how is it possible to assign a *special* damage, where several officers are *equally* obliged and *equally* negligent? However it *is* charged to be "*to the damage* "*and prejudice* of the corporation."

It is a tacit condition, that *neglect of duty* is a *sufficient cause* of disfranchisement. *Bagg's* case, 98. *a.* in 2 Ld. *Raym.* 1275. *Regina* v. *Truebody*, who left the borough and lived out of it several years, and *neglected attendance* at the public assemblies, &c. This was holden a good cause of disfranchisement. In 4 *Mod.* 38. *Glide's* case, the whole court agreed in this opinion, "that an alderman's "deserting his office was a good cause of disfranchise-"ment." And *Holt* said "so was absenting himself from "the council, in the very nature of the thing." In *Carthew* 227. *Vaughan* v. *Lewis*, Ld. Ch. J. *Holt* was of opinion, "that the not inhabiting *infra* the borough, &c. was a "good cause to remove a member."

[532] In the case of *Rex* v. *Ponsonby*, it did not appear "that "there *was* any *non*-attendance:" it only appeared "that "they lived out of the borough."

And this wilful absence and neglect of the nine removed portmen could not but be contrary to their oath of office too; though their *oath of office* is only mentioned *consequentially*, in setting forth their offence in the plea.

Answer to 3d objection to the removal.

As to the 3d objection under the first point—it is objected, "that this was *not a corporate* meeting." But it clearly was so: the meeting consisted of *all the integral parts* of the corporation; and the portmen must be freemen. It was not necessary to *specify the names* of the corporators who were present. These portmen were removed at a corporate assembly, met to do corporate acts; and upon a *contumacious refusal to attend and shew cause* why they should not be amoved.

Answer to 4th objection to the removal.

4thly, It is objected, "that it was *not under the common* "*seal.*"

As to which, 1st. that was *not necessary:* and 2dly, it is done *upon record;* which is of *as high* a nature.

And members are, in every day's experience, amoved without any *judgment.*

Answer to 5th objection to the removal.

As to the want of *personal* notice, *viz.* "whether the "absence of these portmen, whose *presence was not* "*particularly necessary*, and who had *no particular* notice "of any *special* business, or any *reason to suspect* any

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"particular and special business to be done at these "courts, made a forfeiture, or was a sufficient ground of "amotion."

They cited 9 *Co.* 50. *a.* in the Earl of *Salop's* case. Non-user or non-attendance is a forfeiture of such offices as ought to be attended without demand or request.

2 Ld. *Raym.* 1237. Serj. *Whitaker's* case, it was holden "that non-attendance was a cause of forfeiture: and he "was bound to attend, *at his peril*, being a *public* office "concerning the administration of justice."

It is their duty, as much as if they had actually covenanted to do it. And it appears by *Palmer* 332. *Bishop of Rochester* v. *Young*, "that a covenantor shall *take* notice; "and there is *no need of* personal notice." And this notice is EQUIVALENT *to personal notice.*

For it is reasonable to *presume* that they were *resident* in the corporation. *Carthew* 227, 229. *Vaughan* v. *Lewis*, (the last point) Ld. Ch. J. *Holt* held "that the not inhabiting within the borough, ought to have been returned "as special matter." 5 *Mod.* 438, 442. *Vanacker's* case * *Per Holt* Ch. J. "every member of a corporation, "though absent, is *supposed* in law to be there." 2 *Ro.* 136. title *Notice*—Commoners are obliged to TAKE notice of ordinances made by the homage under a custom. *Cro. Car.* 497. S. C. *James* v. *Tutney.* There, it was, by the custom, the duty of all the commoners, to appear at the court. So here, it is stated to be the duty of these portmen, to be resident. And *non-residence* ALONE is a cause of forfeiture.

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* 4th objection.

And the frequency of corruption of the original institution is a good reason for reforming.

Their contumacious disobedience to the summons to shew cause why they should not be disfranchised, shews their former neglects to be wilful. They absented themselves five successive courts; though *only one other* portman was left.

An officer *refusing to come when demanded*, forfeits his office. *Bro. Forfeiture de Terre, pl.* 61, 115.

And "*due notice*" is alledged; which is *confessed* by the demurrer.

Second point—the defendant was *duly and legally* ELECTED, and sworn.

Indeed, *if* he was not, the *corporation is gone*: and therefore the court will *endeavour to save it*, rather than let it be destroyed. And so they did, in the late case of the corporation of *Carmarthen. P.* 1755. 29 *G.* 2. *B. R.*

1st. The word "*residue*" only imports *what is left*; and does *not* necessarily imply plurality. *Wilder* was "*the* "RESIDUE." Consequently, he could continue the corporation.

Answer to 1st objection to defendant's election.

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The court will construe these words favourably, *Regina* v. *J. S. Burgess of the Devizes*, 7 *Ann.* in *Hilary* term, was such a construction. And so here, death or amotion might reduce the number to two or even to one: in either of which cases, there might be a want of majority amongst them. So that the court will make such a construction as to support the charter.

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Answer to 2d objection to defendant's election.

2dly. As to the *time*.—The sooner it was done, the better: and especially as there was only one portman left. If he had died, the corporation had been dissolved. They had a right to fill up the vacancy *immediately*.

Answer to 3d objection to defendant's election.

3dly. The election into *one* of the vacancies is enough: it was not necessary to specify *which*.

Answer to 4th objection to defendant's election.

4thly. As to the *swearing in* of *Richardson*—It is alledged "that he was sworn in before *L. T.* and *T. B.* then "bailiffs of the borough, *in* DUE *manner*, and ACCORD-"ING *to the usage and custom* of the said borough;" and "that he had taken all the requisite oaths:" And they might have traversed this, and taken issue upon it. But they have demurred generally: and this is good on *general* demurrer. However, these slips may be amended, on motion.

Reply.

The counsel for the crown replied that powers do *not always* arise to corporations, upon *every* case of necessity.

1st. Objection to removal.

A pardon will have the same effect in this case, as in all others.

Where the corporation is *not* possessed of the power, the amotion is NOT *per legem terræ*.

An ACCEPTANCE *of a corporator's surrender* does *not operate* AS *a disfranchisement*.

As to the IMPLIED *power* given by the charter—such a power is NOT ALLEDGED: and the court will *not presume* such a power against the crown.

As to the case of the corporation of *Newcastle*—nothing was done in it: Mr. *Fetherston* had for very many years *deserted* the corporation; and *therefore* the court suspended granting the peremptory *mandamus*.

As to Lord *Bruce's* case in 2 *Strange* 819. It is only a loose and mistaken report of it.

As to the case of *Rex* v. *Plimpton*—it is not stated, nor can the counsel on the other side give any account of it.

We do not contend "that *the crown* can disfranchise a "corporator by writ:" but we say that the crown may give notice of the determinations of the law; which its ministers are to execute.

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Lord *Coke* reports what we have cited out of *Bagg's* case, AS *the determination of the court*; not as his own extra-judicial opinion.

As to the *Dontruster* case—we have cited it from Lord

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Raymond: we do not know what the man was. (*V.* 2 Ld. *Raym.* 1564.)

As to the *cause* of removal, we do not say "that a port-"man was *not obliged* to attend the great court;" but "that it was not necessary to the *existence* of that court;" nor is it *shewn* to be contrary to the obligation of their oath of office. *Non-attendance* might indeed be a *misdemeanor*, but is NOT *a cause of* FORFEITURE; especially, without SPECIAL *damage* shewn. And it is *such* a misdemeanor, that an indictment or information will lie against a corporator for it: so that there MIGHT *have been a previous conviction*, in the present case. 2d Objection to the removal.

And though this is an *information*, not a mandamus; yet this man has here set out his own *title*; which appears upon his own plea to be a *bad* one: and therefore the *court must give judgment* AGAINST *him*. And this seems a very *adequate* remedy. If a person be improperly elected, he is to be *removed* by a judgment of *ouster*. *Afterwards*, indeed, those who have right may be *admitted*, upon a mandamus.

It does not appear that this court was a CORPORATE *assembly* of the *mayor, bailiffs and burgesses*. And, as to a CONTUMACIOUS *refusal* to attend—there is no pretence to suppose it: they are only said "not to have attended "upon *due notice* given of the great courts." There was *no* PARTICULAR *summons* to attend them; *nor any* PARTICULAR *call*, for their advice and assistance. 3d Objection to the removal.

A corporation can do no *important* act without their *seal*. And this great court was NO *court of record*. 4th Objection to the removal.

As to the want of *personal* notice—this is not like the case of a bond: which obliges the obligor to *take* notice. *Palm.* 532. is similar to the case of a bond: there, *Young* covenanted to find provisions for the steward, &c. 5th Objection to the removal.

Vanacker's case too is quite of another tendency and consideration: there, the notice was proper notice to the whole body; and was taken to include every member.

The "DUE *notice* given" is † *not alledged* to be given *personally* TO *them*: and therefore is not confessed by the demurrer. † V. ante pa. 519. "Due notice had been given, of the holding, &c."

*As to Lord *Shrewsbury's* case—the clerk of the market is certainly an office that must of necessity be constantly attended: and the other offices there specified and hinted at, are such as are of necessity, for the administration of justice; and where the public must suffer by the officers not attending. [*536]

Non-inhabitancy is NO *part of the charge* against these port-men: it is *non-attendance* at five successive courts. But there was NO *reason* for them to think of any SPECIAL *occasion* for their attendance; *nor* any *particular notice* to any such purport.

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2d *Point*—the court will not support an usurpation against law.

The words are "*residue of* THEM;" "major part *of* THEM;" and they are *to* "ASSEMBLE, *&c.*" All which expressions import a *number* of persons; at least, more than one individual.

1st Objection to defendant's election.

The case of the burgess of the *Devizes* was considered as the act of the *nineteen:* and that corporation was a fluctuating body; and any majority of their number *for the time being*, might do the corporate acts.

Two may elect, in the present case; provided they agree; and two are certainly the major part of two. And these words are *not* merely *directory*. No *power* of election is given to ONE only.

And this cannot be *presumed*. They ought to have *alledged* and *shewn* such a power.

4th objection to defendant's election.

The *bailiffs* had no power *to administer* the oaths. So that the defendant did NOT take them duly and effectually.

It was impossible for us to *traverse* what they never alledged.

Resolution of the court.

LORD MANSFIELD now delivered the resolution of the court.

The *general* question upon the plea is, "whether the defendant has set out a *good title* to the office of a portman of the town or borough of *Ipswich*."

The title he sets out is, that upon a vacancy made by removal, he was duly elected, sworn, and admitted into the said office, to fill up such vacancy.

His right therefore must depend upon two general points:

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1st. Whether the *vacancy* was *duly made*;

2dly. If it was, whether the defendant was *duly elected, admitted* and *sworn*.

Upon the first point, the principal and material objections are two.

1st. That the corporation of *Ipswich* has *no power to amove:*

2dly. Suppose they have power, the *cause* of amotion is not sufficient.

Upon the second point; one objection is chiefly relied upon; *viz.* That, after the amotion, *James Wilder* being the ONLY *remaining portman*, the election under which the defendant claims, was SINGLY *by him*; but *one* can not elect.

Then his lordship stated the record: which see before *pa.* 517, *&c.*

Upon the first point.

1st Objection as to the power of removal.

1st Objection—that they had *no power* to amove.

This objection depends upon the authority of the second resolution in *Bagg's* case, 11 *Co.* 99: where it was

resolved, "that no freeman of any corporation can be "disfranchised by the corporation; *unless* they have "authority to do it either by the *express words of the charter*, or by *prescription*: but if they have *not* authority "either by *charter* or *prescription*, then he ought to be "*convicted* by course of law, before he can be removed. "And this appears by *Magna Charta*, c. 29. Nullus "liber homo capiatur, vel imprisonetur, aut *disseisietur de libero tenemento suo*, vel libertatibus, vel liberis consuetudinibus suis, &c. *nisi* per *legale judicium parium suorum*, vel per *legem terræ*. And if the corporation *have* power by *charter* or *prescription* to remove him "for a reasonable cause, that *will* be *per legem terræ*: "but if they have no such power, he ought to be *convicted* "*per judicium parium suorum*, &c. As if a citizen or "freeman, be *attainted* of forgery, or perjury, or conspiracy, at the king's suit, &c. or of any other crime whereby "he is become infamous, *upon such attainder*, they may "remove him: so if he be *convicted* of any such offence which is against the *duty* and *trust* of his freedom, "and to the *public prejudice* of the city or borough whereof "he is free, and against his *oath*; (as if he burnt or defaced the charters or evidences of the city or borough, "or erased or corrupted them and is thereof *convicted* "*and attainted*:) these and the like are good causes to [538] "remove him. And *although they have* lawful authority "either by *charter* or *prescription*, to remove any one "from the freedom, and that they *have just cause* to remove him; yet if it appears by the return, that they "have proceeded against him, *without hearing* him answer "to what was objected, or that he was not *reasonably* "*warned*, such removal is void, and shall not bind the "party; *quia quicunque, aliquid statuerit parte inaudita altera, æquum licèt statuerit, haud æquus fuerit*; and such "removal is against justice and right."

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PREVIOUS CONVICTION was not a circumstance at all necessary to the judgment in that case: for there was *no sufficient cause* of amoval at all. There too, the actual removal was by the *select body*, (the mayor and nine of the masters;) which cannot be, except by charter, bye-law, or prescription.

There are three sorts of offences for which an officer or corporator may be discharged.

1st. Such as have *no immediate relation to his office*; but are in themselves of so *infamous* a nature, as to render the offender unfit to execute any public franchise.

2d. Such as are *only* against his *oath*, and the *duty of his office* as a corporator; and amount to breaches of the tacit condition annexed to his franchise or office.

3d. The third sort of offence for which an officer or [For the 3d last he may be removed without a previous conviction.]

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corporator may be displaced, is of a *mixed nature*; as being an offence *not only against the duty* of his office, but *also* a matter *indictable at common law.*

The distinction here taken, by my Lord *Coke's* report of this second resolution, seems to go to the power of TRIAL, and *not* the power of *amotion*: and he seems to lay down, "that where the corporation *has* power by "charter or prescription, they may *try*, as well as re-"move; but where they have *no* such power, there must "be a *previous conviction* upon an *indictment.*" So that *after* an indictment and conviction at common law, *this* authority admits, "that the power of amotion *is incident* "*to* EVERY corporation."

[8 Durn. 354.] [Doug. 78.] But it is now established, "that *though* a corporation "*has express power* of amotion, yet, for the *first* sort of "offences, there *must* be a *previous indictment and con-*"*viction.*" And there is no authority since *Bagg's* case, which says that the power of TRIAL as well as amotion, for the *second* sort of offences, is not incident to *every* corporation.

[2 Durn. 775.] [539] In Lord *Bruce's* case, 2 *Strange* 819. The court says, "the modern opinion has been, that a power of amotion "*is incident* to the corporation."

[*Vide Bull. 205, 206. Doug. 144. 6 Vin. 295.] †11 Co. 98. a.

We all think this modern opinion is *right.* *It is *necessary* to the good order and government of corporate bodies, that there should be *such a power*, as much as the power to make *bye-laws.* Lord *Coke* says, †"there "is a tacit condition annexed to the franchise, which if "he breaks, he may be disfranchised."

But where the offence is *merely against his duty as a corporator*, he can only be *tried* for it *by the corporation.* Unless the power is *incident*, franchises or offices might be forfeited for offences; and yet there would be *no means* to carry the law into execution.

Suppose a *bye-law* made "to *give power of amotion for* "*just cause*," such *bye-law* would be *good.* If so, a corporation, by *virtue of an incident power*, may *raise* to themselves authority to remove for just cause, *though not expressly given* by charter or prescription.

The law of corporations was not so well understood, and settled, at the time of *Bagg's* case, as it has been *since.* And whether a power of amotion was incident to "the corporation," could be *no part* of the question in judgment in that case, or necessary to the determination of it. The power of amotion was there exercised by the *select body*; and the *cause was insufficient*; the offence not being any of the three kinds for which a corporator could be disfranchised. And the *distinction* *there taken, as to the *mode of trial*, is certainly *not law.* For *though* the corporation *has* a power of amotion by *charter* or

*11 Co. 99. a.

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prescription, yet, as to the *first* kind of misbehaviours, which have *no* immediate relation to the duty of an office, but *only* make the party infamous and unfit to execute *any* public franchise: THESE ought to be established by a *previous conviction* by a jury, according to the law of the land; (as in cases of general perjury, forgery, or libelling, &c.)

We therefore think the court was well warranted in Lord *Bruce's* case, to *controvert* the authority of the proposition, *collected* from what is said in *Bagg's* case, "that "there can be *no* power of amotion, *unless* given by charter "or prescription;" and we think that from the reason of the thing, from the nature of corporations, and for the sake of order and government, this power IS INCIDENT, as much as the power of making bye-laws.

The second objection upon this point was, that the CAUSE is not sufficient.

2d Objection as to the cause of removal.

The plea sets forth two *stated* days in the year, *viz.* the 8th day of *September* and *Michaelmas* day for holding great courts at the *Moot-hall*; and "that the bailiffs may "call a great court at any *other* time." Great courts were called on the 13th of *January*, the 15th of *April*, the 9th of *June*, and the 19th of *June* 1755. *Before the holding of the said several courts respectively* DUE *notice had been given of the holding thereof respectively.* The plea states likewise another great court on the 8th of *September* 1755; *due notice* of the holding thereof having there been previously given. And the portmen removed did not attend these courts; but *wilfully absented* themselves.

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It is *not* stated "that the removed portmen had PER-"SONAL notice." And the fact certainly is "that they "had *not*:" for where personal notice *was* given to answer the charge, the plea alledges it precisely, and in a different manner. Besides, if truth would have warranted them, they might have * amended.

The notice then of holding these great courts must have been by some customary signal, (as sounding a horn, or tolling a bell;) which the removed portmen, in fact, might know nothing of.

* The defendant's counsel had once proposed to move to amend: but gave it up on finding their facts sufficient to support it.

It is *not* alledged that the portmen's presence was *necessary* to the holding the great court: on the contrary, the prescription is alledged to be, "that the bailiffs, "burgesses and commonalty, or *so many* of them as "WOULD *be present*, have met, or assembled in the *Moot-*"*hall.*"

It is *not* alledged particularly, that any *particular* business was obstructed or defeated by the portmen's absence. The plea alledges, "that they *wilfully* absented:" but that is a *consequence of law.* In pleading, they must alledge *facts*, from which the *court* may judge "whether

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"the absence was wilful:" upon which facts, *issues* may be taken, and tried by a jury.

It is clear from the plea, that the portmen had *full notice* of the CHARGE against them, and full opportunity to have been heard: and therefore I lay all the objections upon *that* head, out of the case. But if the CHARGE was *insufficient*, they had no occasion to defend themselves.

This brings the whole to the question, "whether an absence from *four occasional* great courts, and *one upon a stated day*, so circumstanced, is a *sufficient* CAUSE of *amotion*."

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There is *no authority* which says it is. Though the *usual signal* is given for holding a great court, a member may *not know* of it; though he should know of it, he may be innocently absent, where he *thinks* his presence not at all necessary, and where he does not *imagine* that any business of consequence is to be proposed.

* Trin. 1730. 6 G. 1. B. R. V. 1 Strange 885, 886.

In the case of *Rex* v. *Mayor and Aldermen of Carlisle*,* the court argued in this manner, that where an alderman receives a summons to appear at the *common council*, he might consider that his presence was of no consequence, and so stay away; and because he might innocently stay away from the common council, it was holden, that he should have had a *particular* summons to meet the *mayor and aldermen*: and for want of *such* summons, an amotion by the mayor and aldermen *at that common council*, was holden to be void.

There is not an officer or freeman in the kingdom, (who is a member of an assembly,) that might not be removed or disfranchised, if this doctrine was given way to. At times, *every* alderman, *every* common councilman, not necessary to the constitution of the assembly, *knowingly omits attending*.

It is not necessary, and would be highly improper at present, to say *what kind* of absence, or under *what circumstances*, non-attendance may be a cause of forfeiture. It is sufficient that the absence, with all the circumstances alledged by *this* plea, is *not* a cause.

And we are all of opinion that it is *not*.

2d Point, (viz. the validity of the defendant's election.)

The second general point is, "whether the defendant "was *duly elected*, by the *one* remaining portman." But that is now become unnecessary. If it had been material, we are inclined to *support* the election.

However, it is not *now* necessary to enter into *that* point; because we are, upon the *former* point, very clear "that the cause of amotion alledged and relied upon in "the plea, is not *a sufficient cause* of amotion."

Judgment for the King.

REX *versus* MARY MEAD. 1758.

REX v. MEAD.

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Party may be brought up in term time upon an habeas corpus issued in vacation. [See 2 East 288. 1 Hen. Bl. 338. 3 Bro. 619. 2 Bos. 107. Prec. in Ch. 496. 5 Dura. 90, 359. Str. 478.]

A *HABEAS corpus* having issued in the last vacation, at the instance of *John Wilkes*, esq. to bring up the body of *Mary Wilkes*, wife of the said *John Wilkes*, and daughter of the said *Mary Mead* before Mr. Just. *Denison*; Mrs. *Mead* now brought her *into court*.

The substance of the return was, that her husband, (having used her very ill,) *in consideration* of a great sum which she gave him out of her separate estate, *consented* to her living alone, executed *articles of separation*, and *covenanted* (under a large penalty) "never to disturb her "or any person with whom she should live." That she lived with her mother, at her *own* earnest desire; and that this writ of *habeas corpus* was taken out with a view of seizing her by force, or some other *bad purpose*.

The COURT held this agreement to be a formal *renunciation* by the husband, of his marital right to seize her, or force her back to live with him. (*a*)

And they said that *any attempt* of the husband to seize her by force and violence, would be a *breach of the peace*. They also declared that any attempt made by the husband, to molest her *in her present return from Westminster-hall*, would be a *contempt* of the court. And they told the lady, she was at full liberty to go where, and to whom she pleased. (*b*)

Vide Rex v. *Clarkson et al.* 1 *Strange*, 444, 445. where the court only took care that the young lady should be under no illegal restraint; and ordered a tip-staff to see her safe home, to her guardian's, as had been formerly done in Lady *Harriot Berkley's* case.

Rex v. *Captain Lister, husband of Lady Rawlinson*, 1 *Strange*, 478.

Lady *Vane's* case, *M. & H.* 17 *G.* 2. *B. R.* [S. C. 2 Str. 1091]

Rex v. *Johnson*, 1 *Strange*, 579. *H.* 19 *G.* 2. 2 Ld. *Raym.* 1334. S. C. a child was *delivered* to its proper *guardian*, by the court.

Rex v. *Smith*, 2 *Strange*, 982. where indeed the boy

(*a*) Vide 3 *Atk.* 550. And qu. 1 *Bl. Rep.* 18. and 3 *Atk.* 550. if there had not been great ill usage? See also 3 *Atk.* 296, 559. 1 *Ves.* 19. 2 Ch. Cas. 250. that equity will not decree separation after an offer by husband to cohabit, where the separation was only occasioned by differences without cruelty.

(*b*) S.P. where there had been ill usage, though no separation. 4 *Burr.* 1991.

1758. REX v. MEAD.

was *only set at liberty*; and *Johnson's* case was said to be carried *too far*.

Rex v. *Griffith*, *H.* 8 *W.* 3. *B. R.* And Lady *Catherine Annesley's* case.

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REX *versus* WRIGHT, CLERK. (*a*)

Where an act of parliament prescribes a particular remedy for an offence, an indictment will not lie.

MR. *De Grey* shewed cause against quashing the indictment.

Mr. Serjeant *Hewitt* had moved to quash this indictment charging the defendant, that he, being a *spiritual* person, did TAKE *to farm* several lands, *&c.* against the statute of the 21 *H.* 8. *c.* 13. § 1. For that *no indictment* will lie, where a statute *creates a new* offence, and gives a *particular* remedy. On *Monday*, 12th *February* 1758, (upon Mr. *De Grey's* then coming to shew cause) the serjeant proposed *three* objections: *viz.*

1st. An *indictment* will *not lie:* it ought to be a proceeding *by action*, or by *information;* (which are the two particular methods of proceeding, specified and prescribed by the statute.)

[Vide 2 Burr. 749.]

2d. *No offence* is here charged. For OCCUPATION is the offence for which the act gives the forfeiture: and here, *no occupation* is *charged:* it is only "that he did "TAKE *to farm.*"

3d. It *cannot* be prosecuted at the SESSIONS: for the words of the act are "in any of the KING's *courts.*"

First—AN *indictment* will *not* lie: because the statute *creates* the offence, and has prescribed a *particular method* of proceeding: and has *no* general words. It enacts, "that no spiritual person shall take to farm, *&c. upon* "*pain* to forfeit 10l. for every month that he *&c.* the "one half of which forfeiture to be to the king: the "other half to every such person that will sue for the "same *by* original writ, bill, or plaint of debt, or by "any information in any of the KING's *courts.*" 2 *Hawkins, P. C. c.* 25. § 4. *p.* 211. is in point "that where a "statute makes a *new* offence, and appoints a *particular* "manner of proceeding, an indictment will *not* lie." *Cro. Jac.* 643, 644. *Castle's* case (1st exception) is also most express in point. 4 *Mod.* 144. *Rex & Regina* v. *Marriott*, S. P. *Rex* v. *Gluff*, *Cases temp. Will.* 3*tij. B. R.* 104. S. P.*

[19 Vin. 518. pl. 76. Hard. 116.]

* But this was only quashed nisi, (or a rule to shew cause,) on a motion heard ex parte, only.

LORD MANSFIELD—Let us hear an answer to this objection first: for it seems a strong one; this being NO OFFENCE *at* COMMON-*law.*

(*a*) Nothing at all in this case but what was fully settled long before in 2 *Hawk. P. C.* 211. *c.* 25. *s.* 4. cited in this page, and in 2 *H. H. P.* 171. cited in page 544.

Mr. *De Grey, contra,* proceeded to shew cause on behalf of the prosecutor. 1758. REX v. WRIGHT.

As to the 1st objection—

2 *Hale's Hist. P. C. fo.* 171. is express, that if the act does also contain a *prohibitory* clause, the offender may be indicted upon the prohibitory clause, notwithstanding the penalty. [544] First.

Castle's case, *Cro. Jac.* 643. *M.* 20 *J.* 1. is incorrectly reported: as appears by 2 *Ro. Rep.* 247. S. C. which says "that the indictment was quashed for *some* of the "exceptions." Therefore *Castle's* case is not an authority in the present one: as it is only a partial report, upon memory; and has mistakes in it (as 40l. instead of 20l. for one instance.) 1 *Mod.* 24. *Croston's* case on 17 *C.* 2. *c.* 2. "to restrain non-conformist ministers from "inhabiting in corporations," is most full and clear in point to the contrary. 1 *Ventr.* 63. S. C. this very objection was disallowed. 3 *Keb.* 75. *Rex* v. *Baker*, *Raym.* 219. S. C.*

As to the 2d objection. The *occupation* is only to ascertain the quantum of the penalty; *viz.* 10l. for every month that he shall occupy: but the TAKING *to farm*, is the offence prohibited. Second.

As to the 3d objection. The indictment may be brought at the sessions, and prosecuted there. Third.

In answer to the cases cited in support of the 1st objection of *Rex et Regina* v. *Marriott*, according to 4 *Mod.* 144. Ld. Ch. J. *Holt* held *against* the other two judges, *Dolben* and *Eyre;* and thought an indictment the proper and reasonable method. *Carthew*, 263. S. C. *Rex* v. *Marriott*, refers to 4 *Mod.* 144, and observes that it was *against the opinion* of Ld. Ch. J. *Holt*. 1 *Shower* 398 is S. C. *Dominus Rex* v. *Marriott;* and the reporter, (who himself took the objection,) says "that the rule was pronounced "by Ld. Ch. J. *Holt, consentientibus aliis*, thus—"*Let it* "*stay.*"†

* The two last are loose notes; and adjourned.

† But *Eyre* added, "it "cannot be maintained, I doubt." Note also, that Shower's Report of this case, is of *Tr.* 4 *W.* & *M.* (as likewise indeed is 4 *Mod.* 144;) But what passed in Carthew's is of *Hil.* 4 *W.* and *M.* which is two terms later.

LORD MANSFIELD—I always took it, that where *new created* offences are only prohibited by the *general prohibitory* clause of an act of parliament, an indictment will lie: but where there is a prohibitory *particular clause* specifying only *particular remedies*, there *such particular remedy* must be *pursued.* For, otherwise, the defendant would be liable to a double prosecution: one upon the general prohibition, and the other upon the particular specific remedy.

Therefore, if there be any doubt or difficulty about

1758. REX v. WRIGHT. [5Durn. 546.]

this matter, it will be better to enlarge the rule, till next term.

Mr. Just. DENISON laid down the distinction thus; *viz.* That where an offence is *not so at common law*, but *made an offence* by act of parliament; yet an indictment *will* lie, where there is a *substantive* prohibitory clause in such act of parliament; (though there be afterwards a particular provision, and a particular remedy given:) but it is * otherwise, where the act is *not prohibitory*; but *only* inflicts the forfeiture, and specifies the remedy.†

* V. 2 H. H. P. C. 171.

† V. post. 803, 804, 805.

Mr. Just. WILMOT also took it so; and that this point had been settled later than any of the cases cited. (In *Hil.* 2 *G.* 2. *B. R. Rex* v. *Pensacks*, and also in *Rex* v. *Malard*, the same term, it was settled "that an indict-"ment will *not* lie, where an act of parliament *makes a* "*new* offence, and *prescribes a particular method* of pro-"ceeding.")

He said he had always understood it to be a settled distinction between a substantive independent clause, and a prohibition *sub modo*.

And, it would be hard to punish a man *twice* for the same *new* offence.

Mr. Just. DENISON—*This act* does not, seem to me to give *the king* ALONE, a power to prosecute *at all*, for this new offence. However I shall give no opinion now, as the rule is enlarged.

On this day, Serjeant *Hewitt* informed the court that Mr. *De Grey gave up* this matter.

[It was denied Fitzg. 47.]

LORD MANSFIELD—I do not at all wonder at it. I thought he would do so. I have looked into it: and there is nothing in it. That case of *Croston* has been denied many times. Besides, Mr. *Clayton* has informed me of a case that was determined upon the 3d objection, "of its "being *at sessions*."

RULE "to quash the indictment," MADE ABSOLUTE.

Thursday, 13th April, 1758.

REX *versus* INHABITANTS of BANK-NEWTON.

See this CASE *abridged*, in the TABLE; and *at large*, in the quarto-edition of my SETTLEMENT-CASES, No. 145. pa. 455.

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Saturday, 15th April 1758.

REX *versus* PEACH et al.

Information refused to one cheat against another.

CAUSE was now shewn against an information which had been moved for, at the *application* of some persons who now appeared to be a parcel of infamous cheats and gamblers, against several others of the SAME *profession and character*; for a *conspiracy to cheat* them out of about 900*l.* at a foot-race, by a most shameful transaction of fraud, collusion, and bribery to induce the racers to run booty.

But it appearing most clearly to the court, and it being too plain to be disputed by the counsel for the prosecutors themselves, that the parties *complaining* and those *complained* of, were (*all of them* alike) a parcel of infamous cheats;—

1758. REX v. PEACH.

The COURT unanimously refused to give the complainants the EXTRAORDINARY *assistance* of this court to enable them to attack their brethren in iniquity, (who had probably, as the court not without reason suspected, quarrelled with them about the division of their ill-gotten spoils;) they referred the complainants to the *ordinary remedy* of action or indictment; especially as the facts alledged seemed to be within the acts of parliament made to prevent excessive gaming. And, accordingly,

The RULE to shew cause "why there should not be an information against them," was DISCHARGED.

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Tuesday 18th April, 1758.

CARLETON ex dimiss. GRIFFIN *versus* GRIFFYN. (*a*)

A will drawn up by an illiterate man if duly attested will be good. [See 8 Vin. 126.]

THIS was a special case in ejectment, brought upon the demise of *John Griffin*, the testator's heir at law. A verdict had been given for the plaintiff, subject to the opinion of this court, on the following case. *John Griffin* (the testator) being seised, &c. and being, &c. on the 2d of *May* 1752, wrote upon a *sheet of paper*, with his own hand, as follows; *viz.* "Know all men, by these present, "that I *John Griffin, &c.* make the aftermentioned, my "last will and testament: and when it please God to "call me, I pray God direct my relict. I make my "present wife, my whole and sole executrix of what it "hath pleased God to bless me with. I order my son "*John Griffin*, my son by my first wife, 600*l.* I have "600*l.* in the three *per cent.* annuities: which I order "not to be sold; but I order my wife to leave the interest "thereof to help to bring up my daughter *Laviner*. I "likewise have two *freehold* houses in, &c. (which are "the premises in question;) which are to be for the same "use, to help to bring up my daughter *Laviner* and *her* "*heirs for ever*. My daughter to take possession of the "annuities at her *age of* twenty-five. And if it please "God my daughter die before her mother, and unmar-"ried and without a lawful heir, then the said two houses "to go to my son *John* and his heirs for ever."

It concludes—"I pray God to bless and direct my wife "and daughter and son. And I die in peace with all "mankind, and I hope the Lord Jesus Christ will

(*a*) There is nothing worth reporting, in this case; for the reasons mentioned by LORD MANSFIELD post. 554. make it clear beyond a possibility of doubt, and are obvious on reading the state of the case.

1758. CARLETON ex dimiss. GRIFFIN v. GRIFFIN.

" receive my soul. And this is my last will; and not any " other. 2d day of *May*, 1752."

And he *subscribed* it, at the same time when he wrote it: but there was *no seal, nor witness* to it.

And it was further stated, that on the 5th of *January* 1754, he wrote on the *same sheet of paper*, the following words, *viz.* " Memorandum—*Blackman-street*, *5th Janu-* " *ary* 1754: whereas I have laid out, *&c.* on a lighter " called, *&c.* and the barge called the *Lemon*, *&c.* All these, " and also all, *&c.* at my death, all shall be at my present " wife *Mary's* disposal. And this not to disannul any of " the former part made by me, the 2d of *May* 1752: " except that my wife shall not be liable to pay to my " son *John*, *&c.* Witness my hand, *J. Griffin*, sen."

N. B. The will was written on the first and second sides of a sheet of paper: and the codicil (*a*) was begun either upon the end of the second or the beginning of the third, and written upon the third side. (Which circumstance Lord *Mansfield* thought material, though not decisive.)

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And all this codicil (or whatever it may be called,) related *only* to the PERSONAL estate; and *not at all* to the REAL.

The testator subscribed this in the presence of three witnesses. And then he took the said *sheet of paper* in his hand, and declared IT to be his last will and testament, in the presence of the said three witnesses; and then delivered it to them, and desired they would attest and subscribe it in his presence, and in the presence of each other: which they accordingly did.

Upon this special case, two questions are reserved for the opinion of this court: *viz.*

1st. Whether the republication of the said first will, (made in 1752,) upon the 5th of *January* 1754, be a *publication* or *republication* of his first will, *within the statute of frauds.*

2d Question. Whether any estate passed by the first will, either to the *daughter*, or to the *mother*.

Mr. *Barnard* argued on behalf of the plaintiff, *John Griffin*, heir at law to the testator.

This was no good will, to pass lands, beyond all doubt, *till* the 5th of *January* 1754. And what happened then was *neither a publication* nor a *republication* sufficient to make it a good will within the statute of frauds. Here

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(*a*) Here the reporter is inaccurate in calling the instrument a codicil, so early at least in the report; if there be any weight in Ld. *Mansfield's* observations, in the beginning of page 554.

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are *two distinct instruments*, at *two different times*: the first, UNATTESTED, relating to the *real* estate; the second, *signed, published*, and *attested* according to the statute of frauds, relating to the *personal*. But the first was *originally bad*; and could *not* be made good, by the subsequent transaction. In support of which assertion, he mentioned the case upon Serjeant *Maynard's* will, cited in *Comyns* 384. in the case of *Acherley* v. *Vernon et al'*.

He likewise cited *Penphrase* v. *Ld. Lansdown et al'*, *H.* 11 *Ann. Rot'lo.* 620. (on the Earl of *Bath's* will,) which is also cited in the case of *Acherley* v. *Vernon*, in *Comyns* 384. where the first will was only executed, not attested; and on making a codicil to it, the testator took the codicil in one hand, and the will in the other, and said "this is my "will, &c. and I publish this codicil as part thereof;" and signed the codicil in the presence of the witnesses, who subscribed it in his presence: it was holden to be no republication of the will. And this case also proves that there can be no republication *by implication*, (as it was there expressly determined:) but the will ought to be re-executed; or otherwise a devise of lands shall not be good. [S.C. Lucas 96. Gilb. Rep. in Eq. 115.]

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Second question. No estate passes by this will, *either* to the *mother* or to the *daughter*: but it descends to the plaintiff *John Griffin*, as heir at law to the testator.

The statute of uses does not operate; because there is no transmutation of estate: without which, no use can arise. Now here the estate never passed out of the heir at law.

He made three subdivisions, under this second question.

1st Subdivision. No estate passes to the *mother*. The words of the will must square with the intent of the testator. And here the words do not extend to the real estate; because they are accompanied with the word "*executor*." *Precedents in Chancery* 471. *Piggot* v. *Penrice*. "I make my niece *Gore, executrix* of all my goods, *lands*, "and chattels." Her lands of inheritance did *not* pass: *though* she had no term, or interest for years, in any lands whatsoever.

2d Subdivision (of the 2d question.) Nor does any estate pass by this will to the *daughter*. The heir at law shall not be disinherited by a strained construction.

3d Subdivision (of the 2d question.) The statute of uses cannot operate for want of a transmutation of estate: for, here, it never passed out of the heir at law; and therefore no use could arise. For, no use can arise without a transmutation of possession. To prove which position, he cited 1 *Inst.* 271. *b.* 6 *Rep.* 17. *b.* 18. *a.* Sir *Edward Cleve's*. 1 *Rep.* 176. *a. b.* 1 *Leon. Moore* 569. So, that no

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...ere could have arise. And no estate or interest passed either to the mother or daughter under this will.

Therefore he prayed judgment for the plaintiff.

Mr. Burrell contra for the defendant.

1st Question. Whether the publication of this ... instrument in the manner as stated, is a ... or *republication* of the *former*, within the statute.

2d Question. Whether ANY *estate passed*, either to the *mother* or *daughter*.

First. The first will indeed has not the ... appointed and required by the statute of frauds (29 C. 2. c. 3.) as essential to a will of lands. But that statute has been always *liberally construed*, in favour of wills. 3 *Peere Wms. fo.* 252, 254. *Stonehouse et Ux'* v. *Sir John* ... (the last point,) is a proof of this: where it was held "that the testatrix's *owning* her hand was sufficient, "though the witness did not actually see her ... This was a liberal construction as to the ... *signing*. So has been the construction also as to the *witnesses* attesting. 2 *Chancery Cases* 109. *Anonymous*. If will attested by three witnesses, who were *not present together*, but subscribed *at several times*, was decreed to be good. 2 *Salk.* 688. *Shirs* v. *Glascock*. The attestation was adjudged good, because the testator might have seen the witnesses subscribe, through a broken window. So, 3 *Lev.* 1. *Lemayne* v. *Stanley*; as to the *testator's signing* his name.

The will was dated the 2d of *May* 1752, and was subscribed by the testator; but was not then indeed either witnessed or sealed. But it may be considered as intended to be afterwards executed.

Then in *January* 1754, he added a codicil, on the same sheet of paper; took the said sheet of paper in his hand; declared IT to be his will; and desired the witnesses to attest *it*. This must be either a *publication*, or a republication. The very case reported in *Comyns* 381. of *Goodright* v. *Vernon*, *M.* 10 *G.* 1. in Chancery, was a determination, "that what Mr. *Vernon* there did was a *republication*: "and that the will and codicil made *but one will*." And this determination was affirmed in the House of Lords.

2d Question. Whether ANY *estate passed* to either the *mother* or the *daughter* by this will: (for if ANY estate passed to *either*, the plaintiff in ejectment cannot recover.) 2 *Siderf.* 75. *Marret* v. *Sly*, is a proof of great allowance and indulgence to the testator's manner of expression. (See the third point of that case; where the words were very false *English*.)

In the present case, they took, (respectively,) a ... interest to the *wife*; and an estate in ... or at least they took *such* an estate as is sufficient to pre-

clude the plaintiff; (whatever their estate may in nicety of law, be.) 1758. CARLETON ex dim. GRIFFIN v. GRIFFIN. [553]

As to the words of the will—the first clause relates only to the wife, *as executrix*. "I order *John Griffin* 600*l*. I have "600*l*. in, &c. I leave the *interest*, &c. to help to bring up "my daughter, &c. I have two houses, &c. which are "to the *same uses, viz.* to help to bring up my daughter, "&c."—He meant a *chattel*-interest to the *mother*, for the *benefit* of the daughter, *till* she came to twenty-five years of age; and so *the daughter from* her age of twenty-five.

The remainder is devised to the heir at law, *after* the death of the daughter, unmarried and without lawful heir, in the lifetime of her mother. Therefore he shall *not* have it BEFORE that event. *Carter* 26, 27. 3 *Rep.* 19. 6 *Rep.* 95. *Cro. Jac.* 75. *Equity Cases abridged* 179. Title *Devises*, pl. 6. 2 *Peere Wms.* 194. *Newland* v. *Shephard*, (a strong case;) where a devise of the produce and interest, in trust for the grand-children, *till* twenty-one, was decreed to pass the absolute right and property of both real and personal estate, to the grand children *after* that age: for, the heir at law was to have no concern in it. So here, *John* the son of the testator, was to have no concern in this estate, *till* the death of the daughter. [Vide 2 Saund. 388.]

Boreaston's case, 3 *Rep.* 19, was holden to be a *vested* remainder. So here, it is a *vested* remainder in the *daughter*. Therefore the plaintiff can have no demand. Wherefore he prayed that the *postea* might be delivered to the defendant.

Mr. *Barnard* in reply—

1st. The testator taking up the paper in his hand, said "this is my last will and testament," or "IT is my last "will and testament." Which act and manner of expression can only mean the *instrument* that he had *then* signed in their presence.

The present codicil has NO *words of confirmation*: nor does it at all relate to *land*; but *only* to *personal* estate.

2d Point, Neither the mother or daughter took *any* estate. The words are, "I likewise have two freehold "houses, which are to be, &c. to help to bring up my "daughter *Laviner*, and her heirs for ever, &c. And if "my daughter dies unmarried and without lawful heir, "in the life-time of her mother, then to go to my son "*John* and his heirs for ever." As to the mother the words are, "I make my wife *Mary Griffin* sole *executrix* of "all that it hath pleased God to bless me with." And there is no other disposition, to the mother.

An estate shall never be taken by implication, but from necessity. And here is no necessity.

Lord MANSFIELD. The case is accurately stated: for it

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is *not* stated to be either *a will*, or a *codicil*; but a SHEET OF PAPER written, &c.

First. This is a will of an illiterate man, drawn by himself.

At first, in 1752, the testator did not know that any witnesses were necessary. In 1754, he had found that they were necessary. Then he makes a subsequent disposition; which is a *memorandum* to be *added* to it. But he does not *call* this a *codicil*; nor does the case *state* it to be *so*. He plainly considers the whole as *one entire* disposition: and he expressly declares in the latter, "that he "does not thereby mean to disannul any part of his *former* "devise or dispositions."

There is not a tittle in the latter, that relates to the *real* estate. Therefore the only intent of having the three *witnesses*, was and must be to *authenticate the* FORMER.

The *signing* the former, does *no harm*; it makes it more solemn; but does *not hurt* it.

Then the publication of it is AS *of a will*—he takes up the sheet of paper, and holding up the *said sheet* of paper, says "*it* is my will." And certainly, he did not mean a *part* of it *only*; but the *whole* of it. And he desires them to attest it. All this must relate to the whole that was written on this paper.

The second point is as plain *upon the bare reading*, as any argument can make it.

There can be no doubt of the devise to the *daughter*: whatever may be the doubt of the interest bequeathed to the *mother*, till the daughter comes of age, for her maintenance. But it is sufficient to bar the plaintiff, that an interest is given to *one* of them.

Therefore it is clear for the defendant on both points.

Mr. Just. DENISON concurred.—A man may make his will at different times: and the witnesses may attest at different times. Here, an illiterate man makes and signs his will; in which there is a devise of lands. To be sure, if he had died before attestation, the devise of the land had not been valid. But afterwards, he adds more to it, on the *same* sheet of paper, and declares "that he does "not thereby mean to disannul any part of his former [555] "devise and disposition:" and signs it; and then takes the sheet of paper in his hand, and declares it to be his last will and testament, in the presence of three witnesses; and desires the witnesses to attest it; which they do in his presence, &c.

This must be considered as one ENTIRE *will*, made at different times; and attested agreeable to the statute of frauds.

As to the second POINT—It is not at all material, *what* SORT of interest the wife and daughter, or either of them,

take under this will: it is sufficient, that they take *some* sort of interest sufficient to preclude the plaintiff's demand. And *this* they certainly do.

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Mr. Just. WILMOT concurred with Lord *Mansfield* and Mr. Just. *Denison*. *He* also considered this as an *entire* instrument, and as a *continuation* of the former act. The testator himself calls it a "*memorandum*," (*not* a codicil; and declares "that he did not mean thereby to "disannul any part of his *former* devise or dispositions." He only takes up the consideration of something further, that had occurred to him since his writing the former: and it is not material, whether he does this, at *two days*, or at two YEARS distance from writing the former part. A man is not obliged to make his *whole* will, *all at the same* time.

And the testator's having originally *signed* the former part, is out of the case, and makes no difference: for, it was not at all necessary or material to it, as a will of *personal* estate; and the signing *alone*, unattended with the other requisites, was not sufficient to render it effectual as a will of *land*. Therefore it was *totally immaterial*. And in *January* 1754, having written the memorandum with his own hand, on the *same* sheet of paper, he takes the said sheet of paper in his hand, and declares "*it* is his last "will and testament:" and desires them to *attest it as such*, in his presence, and in the presence of each other:—which they do. So that there can be no sort of doubt that this was a good *publication* of this *as his will*, within the statute of frauds.

As to the second POINT—it is not all material, *what species* of interest the testator's wife and daughter or either of them may have in these houses; provided that they or either of them have *such* an interest as is sufficient to entitle them to the possession of the estate: for *if* they have *such an interest* in them or in either of them, the plaintiff cannot recover in ejectment against them.

Now I should think that there is a CHATTEL-*interest* in the *mother*. But be that as it may, here is a devise "to the daughter *and her heirs*," expressly; (however inaccurately this illiterate testator has worded what accompanies it:) and therefore she seems to have a *fee* (though liable to be controlled by certain events that may happen.) But thus much, at least, is clear; *viz.* that his *son John Griffin* (the plaintiff's lessor) was not to take, TILL the testator's daughter should be *dead without issue*. [2 Saund. 388.]

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So that it is extremely clear and plain, that *either* the mother *or* the daughter have *such* an interest as intitles them to the *possession* of the estate.

Per Cur. unanimously,

* Mr. Just. Foster was absent.

Let the POSTEA be delivered to the DEFENDANT.

1758.

REX *versus* YOUNG and PITTS, ESQUIRES.

YOUNG and PITTS.

Thursday, 20th April 1758.

Information for refusing an ale licence refused. [See 2 Burr. 653. 3 Burr. 1317, 1318. 1 Durn. 692.]

A MOTION was made on the 10th of *May* 1757, for an information against these two justices of the peace, for *arbitrarily, obstinately,* and *unreasonably* REFUSING TO GRANT A LICENCE to one *Henry Day, to keep an inn* at *Eversley*; where it was alledged and sworn to be fit and proper, and even necessary that there should be an *additional one*, (there being *one* there already;) and for which occupation of keeping an inn) this man was (as these two justices themselves had allowed on a former occasion) a *proper* person, they having before licensed him to do so *at another place.*

Upon this original motion—

LORD MANSFIELD and Mr. Just. DENISON were of opinion, that notwithstanding this was a matter left in a great measure to the *discretion* of the justices, yet if it appeared to the court, from sufficient circumstances laid before them, that their conduct was influenced by *partial, oppressive, corrupt,* or *arbitrary views*, instead of exercising a fair and candid discretion, the court might call upon them to *shew the* REASONS whereby they *guided their discretion*: and therefore they were for granting the rule to shew cause, *as prayed.* But,

Mr. Just. FOSTER (who happened to know the place, and said there was *another* house of good entertainment there already,) thought it sufficient to make a rule upon the two justices "to shew cause why they should not "GRANT *this licence.*" And

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LORD MANSFIELD and Mr. Just. DENISON concurred with him, to express the rule in that manner, though the substance was the same: because, if they did not shew sufficient cause, the consequence must be granting an information.

THE COURT therefore unanimously (Mr. Just. *Wilmot* being absent in Chancery) made a RULE upon these two justices to shew cause, "why they did NOT "GRANT *this licence* to this *Henry Day.*"

On *Monday*, 27th of *June* 1757, upon shewing cause, the justices, by their affidavits, made no *personal* objections to *Day*; but considered the certificate as insufficient because not signed by the parson, vicar or curate.

The court was of opinion that the certificate, "being signed by three or four reputable and substantial house-keepers, was sufficient." But though the justices had mistaken the act, this court cleared them from any wrong motive to these justices.

But it being suggested that the present parson and "church-wardens were ready to sign a certificate in his

" favour." The court enlarged the rule to the first day of next term; with a view that he might be licensed at *Michaelmas*, *if* there should be *no other* objection than what arose from the certificate's not being signed by the parson and churchwardens; and the matter, which seemed to have raised great heats, and was strongly supported by Sir *John Astley*, on the part of *Day*, be accommodated. 1758.

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The RULE was accordingly enlarged in these terms, *viz.* " that the first day of the next term be farther given " them, to shew cause *why they have not granted*, &c."

N. B. By 26 *G.* 2. *c.* 31. § 1. It is enacted, that, upon granting licences by justices of peace, to any person, to keep an ale-house, inn, &c. every such person *shall enter into a* RECOGNIZANCE in 10*l.* with two sufficient sureties, each in 5*l.* or one sufficient surety in 10*l.* under the usual condition, " *for maintaining of* GOOD ORDER AND " RULE within the same."

By § 2. It is enacted, that *no licence* to keep the same shall be granted *to any person* NOT LICENCED *the year preceding*; unless such person produce, at the general meeting of the justices in *September*, a CERTIFICATE under the hands of the *parson, vicar or curate, and the major part of the churchwardens and overseers*, OR ELSE *of three or four reputable and substantial house-keepers and inhabitants* of the parish or place where such ale-house is *to* be; setting forth " that such person is of " good fame, and of sober life and conversation." And it shall be *mentioned in such licence*, " that *such certificate* " *was produced*:" otherwise such licence shall be null and void.

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By § 3. No licence shall intitle any person to keep an ale-house *in any* OTHER *place*, than that *in which it was* FIRST *kept*, by virtue of such licence: and such licence, *with regard to* ALL OTHER *places*, shall be null and void.

On *Friday* 18th of *November* 1757, Mr. *Norton* again moved (and moved it as a *new original* motion) for *an* INFORMATION against these two justices of peace; who, he said, had at their last general *September* meeting for granting licences, still PERSISTED *in refusing to grant this licence*, notwithstanding what had already passed in this court upon the same subject and occasion. Of this fact he had affidavits: and he also produced *fresh* and *circumstantial affidavits*, as to the merits; *viz.* the necessity of such a licence, and the conduct of the justices in their opposition to it.

Lord *Mansfield*. What passed before was, " that " the court did not think any thing CRIMINALLY " *imputable* to these justices." The court then gave no opinion as to *obliging* them to grant the licence.

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but, on the contrary, expressly adjourned the consideration of the reasons of their refusal.

This former rule was only kept on foot, *in order to obtain the* MATERIAL END *of it:* but as to the behaviour of the justices, with regard to the criminal complaint against them, the court discharged them from any imputation of *crime* or *arbitrary intention to oppress* the man.

The COURT therefore now made the *like rule*, upon these FRESH *affidavits*, as they had made upon the former; and ordered that both rules should come on *together*.

Sir *Richard Lloyd* (on *Saturday* 11th of *February* 1758,) accordingly shewed cause upon both rules.

He observed that it was a sort of rule never before granted; and which he had known refused twenty-five years ago. He said he never knew a rule made upon justices, to shew cause "WHY *they did not grant a licence*," or *to enforce* them to do so; unless there was some charge of corruption, partiality, bias, or other imputation upon the justices.

Lord MANSFIELD answered that the affidavits upon which the *original* motion was made *did support such a charge*;—and the motion was *originally* made *upon that foot*: and that the rule was put into its present form, *out of* TENDERNESS *to these gentlemen*, and *regard* to the fairness of their character.

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And they did indeed, upon the former cause shewn, appear to be *free* from blame, as to any *criminal* imputation.

But yet *if* they have *no reasonable objection* to the man, they OUGHT *to licence* him: and *if* they *have any reason*, they OUGHT *to* GIVE *it*.(*a*) For *though* they have, it is true, a *discretion* in these cases, yet, it must NOT *be permitted* to them to exercise an ARBITRARY *and* UNCONTROLLED *power* over the *rights* of other people, and in cases where their *livelihoods* are so essentially concerned.

Sir *Richard Lloyd* argued and insisted that the legislature has made them the SOLE *judges*, as being such who, from their residence on the spot, must *best know* the persons and their characters, and also the circumstances of time and place: and the legislature has even excluded justices of peace, *of other* divisions. And the justices

(*a*) It seems that though the man was unexceptionable, yet, if there was a sufficient number without the same one, that was a sufficient reason for refusing the licence, for the reason given *post* 563. Per *Foster*, J. clearly; and as it seems *Per Lord Mansfield*, *post* 563 and 564.

thus intrusted have a right to *judge* FOR THEMSELVES: no man can judge for another. And *this power* is trusted to them, by the *constitution*, by the *legislature*. 1758. REX v. YOUNG and PITTS.

It may be very *dangerous* to them, to be obliged to *give their reasons publicly*: though they may have *very sufficient* ones to satisfy their *own* minds, and to direct their *own* judgment.

And if they are thus intrusted, why are they liable to be called to an account by *any other* jurisdiction: *unless* they act faultily and wilfully wrong? Indeed, if they do *wilfully* wrong, let them be punished: but where they act quite conscientiously, they are *not accountable to any body*.

Now these gentlemen say, and they SWEAR too, "that "they *really* judge *this house* to be an IMPROPER HOUSE; "and *this person* to be an IMPROPER PERSON; and that "this is their *real and sincere opinion*."

This question *affects* ALL *the justices in England*: (I mean, *setting aside the* IMPUTATION of *wilful* misbehaviour.)

Lord MANSFIELD—Most certainly. *No body doubts* of the thing: *setting aside every degree of imputation*: it will not bear an argument.

Sir *Richard* repeated the *justices reasons* for their refusal; and concluded with INSISTING on their RIGHT to *judge for* THEMSELVES.

Mr. *Young* being in court, spoke (very handsomely) in exculpation of himself from any ill intention; and declared very solemnly, "that he had acted accord- "ing to his *real sentiments*, and the *best of his* "*judgment*." [560]

Lord MANSFIELD—It is a matter of too much consequence, and too much length too (as I am obliged to go away,) to be determined now immediately; and it may as well stand over till next term, as so little time of this term is left.

ADJOURNED.

On *Thursday* 13th of *April* 1758. This case being mentioned again—Lord MANSFIELD proposed *altering the rule*, by making it "to shew cause why there should "not be an INFORMATION against them:" for so, he said, it was *originally moved*, and this was the *true* and *proper* foot to argue it upon; (and Mr. *Norton* declared that he proposed to argue it *upon that* foot:)—Though in *tenderness* to the justices, and lest the country should run away with a notion of their being under a *criminal* charge, it had been put into the form that it at present stands in. (*V. ante p.* 557.) And Mr. *Nares*, counsel for the two justices, not opposing or objecting to this alteration—the rule was *altered accordingly*.

1758. And now this affair coming on again, for the last time,

Lord Mansfield again declared that the argument ought to be taken up upon the foot of *criminality* in the justices: for, it was so *originally moved*; it was the *proper nature* of the question; it was so understood by every body, and so *meant by the court*. For, (as he again explicitly declared,) there was no pretence, upon any *other* foot, to make a rule upon the justices, who have a *discretionary* jurisdiction given them by the law. But though * DISCRETION does mean, and can mean nothing else but) *exercising the best of their judgment* upon the occasion that calls for it; yet if this discretion be *wilfully abused*, it is *criminal*, and ought to be under the control of this court.

*V. post. 578. a fourth definition of discretion.

Mr. *Nares* and Mr. *Thurlow*, for the defendants, thereupon argued strongly and very largely, that the justices had been so far from acting *criminally*, that they had acted *rightly*, *properly*, and *honestly*: and they hinted that the court had *already* exculpated them from any *criminality* of behaviour.

[561] The legislature have left this jurisdiction *so absolutely* to the justices of the *particular division*, that *no appeal* will lie from their determination; as appears by 1 *Salk.* 45. which is expressly so, and is cited in 2 *Strange* 881, as a proof of this position.

Neither will any *mandamus* lie to the justices, to oblige them to grant the licence; even though they should appear to have refused it upon reasons which may be looked upon as very suspicious at least, if not very improper. 2 *Strange* 881. (*Rex* v. *Justices of Worcester*) *Giles's* case.

Nor will the court grant an *information*, for refusing to grant a licence. *Rex* v. *Justices of Nottingham*: where, *they said*, an information was *denied*.

But *Per Cur.* that case was an *abuse*, a *gross abuse*, of their discretion: and the information was therefore *granted*. And so it was in the case of *Bridgewater*, upon the same foot, of *abuse* of the discretion entrusted to them.

The counsel for the two justices next observed that *Day's* having for many years had a licence to keep a public house *in another* parish, was quite an *immaterial* circumstance: for, by 26 G. 2. c. 31. § 2. such licence was *absolutely null and void*, with regard to any place (*V. ante 558.*)

The affidavits on both sides being then all distinctly read, it appeared upon the whole matter that these two justices had acted in this instance with fairness, impartiality, candor, and justice; that they really

and sincerely thought both the *man* and the *house* IMPROPER *to be licenced*: and that they had *very good and sufficient reasons* for so thinking and determining.

Whereupon their counsel concluded with praying that the rules made upon them might be discharged with *full costs*.

Contra, for the prosecutors, Mr. *Norton*, &c. urged their reasons for making the rules absolute.

The main tendency of the arguments of the counsel *in support* of these rules, was, to shew that the refusal to grant this licence to *Day* arose from PARTIALITY to Mr. *Barker* the lord of the manor, who was the proprietor (the landlord) of the *other* public house already established in the parish.

LORD MANSFIELD once more declared, that this "court had NO *power* or claim, to *review the reasons* of "justices of peace, upon which they form their judg"ments in granting licences; by way of APPEAL from "their JUDGMENTS, or OVERRULING *the* DISCRETION "*intrusted to them*."

But if it CLEARLY *appears* that the justices have been *partially*, *maliciously*, or *corruptly* influenced in the EXERCISE of this discretion, and have (consequently) ABUSED *the trust* reposed in them, they are liable to prosecution, by *indictment* or *information*; or even, possibly, by *action*, if the malice be very gross and injurious. [562]

If their JUDGMENT *is wrong*, yet their HEART *and* INTENTION *pure*, God forbid that they should be punished; and he declared that he should always lean towards *favouring* them; unless partiality, corruption, or malice shall *clearly* appear.

The present question therefore only is, "whether these "gentlemen have been guilty of any *partiality* or *malice*, "(for corruption is not pretended,) in the refusal of this "licence."

Then he went minutely and accurately through all the particulars both of the charge and of the defence. And he thought that upon the first original motion, the justices appeared to have been *mistaken* in the *grounds* of their refusal; in that they fixed it upon the want of the ministers and churchwardens signing; which *they judged to be requisite* by the 26 *G.* 2. *c.* 31. (when it was *not*.) However, in this they were *not criminal*; though they were *mistaken*. And at *that* time they had *no* personal objection to *Day*. And therefore it was (from all that *then* appeared) reasonable to expect that, upon enlarging the rule, they *would* at their next meeting *grant* the licence which they had before refused, *upon a mistake*, of which they were subsequently informed.

But since the, and antecedent to such next meeting,

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there are come out *several strong* PERSONAL *objections to* DAY *himself*; (which these justices were the PROPER *judges* of;) namely, his keeping and having long kept a house for publicly retailing ale, wine and spirituous liquors, without being licensed thereto; his having been twice convicted of selling spirituous liquors without a licence; his suffering a day-labourer to drink a whole day in his house, in harvest-time, and afterwards vindicating it; his having been charged with a fraud, upon oath; besides an allegation in one of the affidavits, "that "two notorious highway-men and robbers appeared at "least to have used his house as a public house, if they "enjoyed no other and more particular kind of har-"bour and protection in it."

And in respect to the *house*, the justices now swear that they are clearly of *opinion* "that *one* house is sufficient." And they likewise clear themselves, by the most solemn assertions in their affidavits, of all *criminal* imputation.

[563] Therefore he concluded with declaring it as his opinion that there was no *sufficient foundation* for a CRIMINAL charge against these justices.

Mr. Just. DENISON concurred.

He also expressly *allowed the discretionary* power of the justices in granting licences; *without appeal* from their judgments, or having their *just* and *honest* reasons *received* by *any* body. But yet an *improper and unjust exercise* of the discretion, he said, *ought* to be under control.

But it must be a CLEAR *and* APPARENT *partiality*, or *wilful misbehaviour*, to induce the court to grant an information: *not* a mere error in *judgment*. And here is certainly NO *clear and apparent* partiality, or *wilful* misbehaviour, in these justices.

Therefore the rules ought to be discharged.

Mr. Just. FOSTER concurred in the *general principles* before laid down: and he thought that there was no evidence of partiality, malice or corruption, in the present case.

[Post. 564.] He declared *against increasing* the number of public houses; and gave several strong reasons against it: and therefore he thought the justices far from being to blame, in having come to a resolution "*not* to increase them." And he was satisfied that the justices had reason sufficient to refuse this *particular* licence; both with regard to the *house*, and also with regard to the *man* refused.

Mr. Just. WILMOT concurred.

He was very explicit, that the SOLE *discretion* of granting licences, is in the JUSTICES *of the division*: and he moreover gave very good reasons why it should be so.

And this point (he observed,) is admitted at the bar.

Then, the *sole discretion being in them*, the RULE is invariable, "that this court will *never* interpose to punish "a justice of peace for a mere *error in* JUDGMENT." 1758. REX v. YOUNG and PITTS.

Therefore, even supposing them to have been *mistaken* from beginning to end, yet there is no ground, from any of the affidavits, to infer any *partiality*, *malice*, or *corruption*: there is not the least *fact*, whereupon sufficiently *to* FOUND any such apprehension and belief, even in the complainants; and the justices themselves do most *solemnly* DENY it in *their* affidavits. [564]

Per Cur. Both RULES DISCHARGED, with *costs*.

LORD MANSFIELD—There are *two* distinct reasons why we should *give* COSTS: one, with regard to the person *complaining*; the other, with regard to the persons *complained of*. For, it appears, upon the affidavits, that *Day* (the person complaining) has *never severed* in keeping this house WITHOUT *a licence*: and it now appears that the justices who are complained of, have acted both *honestly* and *legally* in *refusing* to grant it, in a place where there was *already* a sufficiency. [Ante 568.]

V. post, pa. 653. *Rex* v. *Athay*, Esq. *M.* 1758. 32 *G.* 2. *B. R.* a like point: and *Rex* v. *Williams*, *Rex* v. *Davis*, and *Rex* v. *Baylis et al'*; all three in *P.* 1762, 2. *G.* 3. *post*, *pa.* 1317, & 1318.

REX *versus* INHABITANTS OF MACCLESFIELD. Saturday, 22d. April, 1758.

See this CASE *abridged*, in the TABLE; and *at large*, in the quarto-edition of my SETTLEMENT-CASES, No. 146. pa. 456.

[567]

REX *versus* EPISCOPUM DUNELMENSEM. Monday, 24th April, 1758.

Mandamus to a visitor to exercise his power during a vacancy denied.

MR. *Willes*, on behalf of Dr. *Sterne*, prebendary of the second stall in the cathedral church of *Durham*, moved for a MANDAMUS to the bishop, commanding him to exercise his VISITATORIAL *power* over the *temporalties* of that church, in the instance herein after mentioned: (in which Dr. *Sterne* had applied to the bishop to exercise it; who refused to do so, unless under the authority of this court,)

And he alledged that such visitatorial power is given to the bishop, by the 40th of their statutes.

And there is no other method of trying this question, but before the bishop as visitor.

Mr. *Norton*, for the bishop, said that the bishop was not satisfied that he HAD *such a power*; and therefore he proposed that the dean and chapter should be called in, to litigate it.

1758. REX v. EPISCOPUM DUNELMENSEM.

N. B. The merits of the question were "whether the *successor*-prebendary (*Dr. Sterne*) had a right to two years and a half profits accruing during the *vacancy of the stall*, from the death of Dr. *Benson*, Bishop of *Gloucester*, (the last preceding prebendary:) which intermediate profits the *other* prebendaries had received, and *divided* amongst them."

[S. C. Sayer's Reports, 84.]

Lord Mansfield thought that an *action at law* was the *proper method*, and instanced the case of Dr. *Kemp* v. Dr. *Lynch*, *P.* 26 *G.* 2. 1753. *B. R.*, and mentioned likewise canon *Seagar's* case (who was a canon of the church of *Salisbury*) in Chancery.

"Whether the *bishop* can have a *jurisdiction* to determine *this point*; or whether *matters of property* in cathedrals can be determined otherwise than according to the course of the *law of the land*, is a great question." And certainly, the dean and chapter must have an opportunity to shew cause against a *mandamus* being issued to the bishop, to exercise such a jurisdiction.

[568]

But in this particular case, the question must be litigated, not only with members of the body, but with *executors and administrators* of deceased prebendaries: over *whom*, the bishop (*supposing* him visitor, and as visitor to have conuzance of such a case,) can have no power. Which *alone* is decisive against his jurisdiction in this question.

Mr. *Willes*, perceiving the court so strongly against him, agreed to take nothing by his motion.

Rex *versus* Peters, et al'.

or

Cavil *versus* Burnaford et al'.

Inferior court may set aside an interlocutory judgment to try the merits; but cannot set aside a verdict, except for irregularity. [See 7 Mod. 84. Salk. 201. 650. 7 Vin. 24. pl. 10. Sayer, 302.]

Mr. *Hussey* shewed cause against the issuing of a *mandamus*.

A motion had been made by Mr. *Whitaker* (on 13th *February* 1758) for a *mandamus* to be directed to the defendant *John Peters*, the county-clerk, (who was the steward of the court,) and also to the free suitors of the *county-court* of the county of *Cornwall*, commanding them to *proceed to final judgment* in a certain cause, by plaint in replevin, commenced in the said county-court, between *John Cavil* plaintiff, and *John Burnaford*, *Anthony Pomery*, and *Nicholas Pelyne*, defendants; in which cause the said *John Cavil* obtained an *interlocutory judgment* in the said county-court.

The case in short, was that *Burnaford* distrained *Cavil*, for rent; *Cavil* brought a replevin; in the county-

made the two following questions—

1758. REX v. PETERS et al', & CAVIL v. BURNAFORD.

court of *Cornwall*, an INTERLOCUTORY JUDGMENT was *regularly entered*, and a writ of inquiry of damages executed thereupon; and 2*d*. assessed for damages, and 5*s*. for costs, and so much more costs as the court should allow. This *inquisition* was set aside for *irregularity*, (*viz*. want of notice of executing the writ of inquiry.)

The defendant's advocate there then moved "to *set* "*aside* the said (regular) INTERLOCUTORY JUDGMENT" "itself, UPON the *defendant's paying the costs of entering* "it, (to be taxed by *the* steward,) *and on avowing issuably*:" and afterwards, on a subsequent motion "to make such "rule absolute," it being urged by the other side, "that "that court had no power to set aside a *regular* judg-"ment," the judge took time to advise. At a future court, after inquiry from ancient practisers in the said court, and being informed that it had been the *constant custom and usage of it* "TO SET ASIDE *interlocutory judg-* "*ments, any time before executing writs of inquiry therein*, "ON *the defendant's paying the costs of entering the same* "*judgments, and pleading issuably to such actions instan-* "*ter*;" and after having fully considered the affair in all its circumstances, and apprehending it to be agreeable to the practice of *this* court; he declared his opinion "that it ought to be *set aside*, and the defendant's avowry "received, they having paid the costs, at the time of "filing it *de bene esse*," (which had been done in the interim:) and accordingly, he made a rule, thus—"*Cavil* "v. *Burnaford et al'*. It is *ordered*, &c. that the inter-"locutory judgment entered in this cause *be* SET ASIDE, "on payment of costs taxed; and that the avowry filed "in this cause *de bene esse*, last court-day, be now, on "consideration of the court, made absolute: and there-"fore rule for the plaintiff in replevin to plead in bar "to the avowry."

[569]

And the judge of this inferior court swears "that he "acted with the utmost impartiality in the affair, and "according to the best of his judgment and under-"standing; and, he apprehends and believes, according "to the CONSTANT USAGE AND PRACTICE *established and* "*observed in the said court*."

Mr. *Whitaker's* motion was grounded upon the *inferior judge's* having *exceeded his authority*. And he had cited 2 *Strange* 822. *Fox* v. *Ellis*, *Hil*. 1728. 2 *G*. 2. as the *first* time that even *this court* had set aside such judgments; and 1 *Strange* 394. *Bailey* v. *Bowers*, *M*. 7 *G*. 2. where they doubted of an inferior judge's having such a power.

On *Friday* 21st *April* 1758, Mr. *Hussey* shewed cause why this *mandamus* should not issue. And he made the two following questions—

1758. REX v. PETERS et al', of CAVIL v. BURNAFORD.

1st. Whether the judge or steward of an *inferior court* has a right to SET ASIDE *interlocutory judgments* REGULARLY obtained:

2d. Whether in *this particular case*, the steward of *this* inferior court had a right to do as he had done, and as is the practice of *that* inferior court.

As to the 1st question—he agreed they *cannot* grant *new trials*, 1 *Salk.* 201. *Regina* v. *Hill et al'*, and 2 *Salk.* 650. the case of *Bristol* (which is S. C.) *Brooke* v. *Evers et al'*, 1 *Strange* 113. S. P. a *mandamus* issued to a judge of an inferior court, "to give judgment;" *though* he had granted a new trial. Therefore he would not contend that an inferior court has a right to set aside a *regular* judgment, unless it be to let in the *merits*.

[570] But they *may* do it *in order* to try the merits. 2 *Salk.* 650. In the case of the mayor and aldermen of *Bristol*, it was holden, "that an *inferior* court could not grant a "*new trial*." However, it was long since done by *this* court: and they would also *formerly* set aside *regular judgments*, on putting the plaintiff in as good condition as before. And it does not appear how the court came to leave it off; as Sir *John Strange* says (in the case of *Fox* v. *Gluss*) that they had done.

And it seems right in itself, and agreeable to natural justice, to permit inferior courts to set aside regular *interlocutory* judgments, in order *to let in a trial of the* merits. Indeed it is reasonable, *not* to permit them to set aside the *verdicts of* juries; which is an exceedingly different case from a judgment by default.

As to the 2d question—in the *present* case, the steward acted rightly and reasonably, upon the circumstances attending it.

Mr. *Whitaker contra*, for the *mandamus*.

The *letting in the trial of the* merits, makes *no difference*. I say that an inferior court can *not* set aside a *regular* judgment after they have *once exercised their authority*. In 1 *Strange* 392. *Baily* v. *Boorne*, *M.* 7 *G.* 2. *B. R.* The court thought it a question that deserved consideration, "whether the judge of an inferior court *could* do it." And there is no more reason why they should have *this* power, than that of setting aside *verdicts*. They have no such *discretion*. "*Discretion*' is *another word for* "*arbi-*"*trary will*."

LORD MANSFIELD denied this interpretation of the term *discretion*; and referred to what was said a few days ago in the case of *Rex* v. *Young* and *Pitts*, *P.* *ante pa.* 560, 561, and 562.) And he said that discretion is, as Lord *Coke* says, *discernere per legem, quid sit justum*.

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To which observation, Mr. Just. WILLMOT desired to add another, from 5 *Co.* 100. *a. Rooke's* case; "discretion is a science and understanding of distinguishing and discerning between falsehood and truth, &c. &c. and not to do according to *arbitrary* "*will* and *private affection.*"

Mr. WHITAKER—But these inferior judges have *no sort* of discretionary power of *any kind.*

LORD MANSFIELD—That case of *Baily* v. *Boorne*, in 1 *Strange* 392. only says "that it was a question that deserved *consideration.*" But there is *no precedent or authority* to the contrary of their having such a power.

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And it seems a power *necessary to the exercise of judicature*; and is very different from the case of setting aside verdicts.—*This* power to set aside *interlocutory* judgments, seems *incident to justice.*

However, both Lord *Mansfield* and the other * two judges, thought it might not be amiss to look into it. And—

* Mr. Just. Foster was absent.

Mr. Just. DENTSON intimated as if there was something of this sort before the court, in † *P.* 28 *G.* 2. *B. R.*

† It was in Hil. 1754. 27, and P. 1755. 28 G. 2. Eastwell v. Livermore: V. post. 572.

CUR' advisare vult.

And now Lord *Mansfield* delivered the opinion of the court; having first desired Mr. *Hussey* to state the case, for the sake of the students: and he took this opportunity of observing and declaring "that nothing *misleads* so much "as reporting the determination of courts of justice, "without having a sufficient and *correct state* of *the case*:" which, he said, was only an *ignis fatuus*, leading people into *error* and *mistake.*

Here, the *question*, upon the *true* state of the case, (which *V. ante pa.* 568.) appears to be "whether an "INFERIOR *court* has POWER *to* SET ASIDE *a* REGULAR "INTERLOCUTORY *judgment in* ORDER *to let in the trial* "*of the* MERITS."

And we are all of us of opinion, "that they HAVE such "a power." There is no *authority* nor *even dictum*, to the *contrary*; nor is there any *reason* why they should not have such a power: which is *incident* to the doing of *justice.*

Indeed there *are* authorities which say, "that an inferior court can *not grant a* NEW TRIAL, or *set aside the* "VERDICT *of a* JURY, but for irregularity."

But there may be many reasons why they may be permitted to set aside an *interlocutory* judgment, *in order* to let in the *merits*; which reasons will not hold so far as to make it allowable for them to set aside the *verdict* "*of a jury*; (one of which reasons may be that *no attaint* "lies upon a verdict given in an *inferior* court.") And indeed the setting aside a *verdict of a* JURY, is too great

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a power to be intrusted to an *inferior* jurisdiction. Yet, we are, all of us, clearly of opinion "that they *may* "set aside *regular* INTERLOCUTORY judgments, *in order* "to let *in the *merits:*" both upon the *reason* of the thing, and for the *convenience* attending it.

That case in 1 *Strange* 392. of *Bailey* v. *Boorne* (*V. ante p.* 570.) proves nothing at all against this. And in 1 *Strange* 499. *Jewell* v. *Hill*, *H.* 8 *G.* 1. An inferior judge set aside *even a verdict*, for *irregularity*, (or rather for *surprize*:) which this court allowed he might do.

[*572] Mr. Just. DENISON added, that in the case of *Eastwell* v. *Livermore*, (*V. ante*, *p.* 571. *in margine*) it seemed to be understood and agreed at the bar, "that an inferior "court could not set aside a verdict, * AT ALL:" but he finds that he has written a note at the bottom of that case, importing that *he himself* thought that it ought not to be taken for granted, *so generally* as this is laid down, "that they cannot do it * *at all*;" for that he thought that an inferior court *may* set aside *even a verdict*, *for* IRREGULARITY; though they are not to be trusted with a power of setting aside *verdicts*, *upon the* MERITS.

And *this*, he said, was certainly the RIGHT *distinction*: *viz.* That they *may* set aside even verdicts, *for irregularity*; but *not* upon the merits.

Wherefore *Per Cur.* unanimously,

Let the RULE made "that *John Peters* the county-"clerk and the free suitors of the county-court, "shew cause why a *mandamus* should not issue, "directed to them commanding them to proceed to "final judgment in a certain cause by plaint in replevin commenced in the said county-court, between "*John Cavil*, plaintiff, and *John Burnaford*, *Anthony Pomery*, and *Nicholas Pelyne*, defendants, in "which said cause the said *John Cavil* obtained an "interlocutory judgment in the said county-court "on the 12th day of *October* last;"—*be* DISCHARGED.

RULE DISCHARGED.

* It is true that there was no distinction expressed, in the discussion of that case. But no irregularity was there pretended, or any other reason attempted to be given for setting aside that verdict, but because it was a hard one, and such as ought to be set aside.

[573] REX *versus* COLLINGWOOD FOSTER, EDWARD GALLON, GEORGE SELBY, and THOMAS MILLS.

Several informations in quo warranto, consolidated into one.

FOUR rules having been made absolute, (last *Tuesday*,) for four informations in nature of *quo warranto*, against these four defendants, respectively, "to shew by "what authority they claimed to be chamberlains of "*Alnwick* in the county of *Northumberland*"—

Sir *Richard Lloyd*, on behalf of the defendants, moved (on *Saturday* last,) that there should be ONLY *one* infor-

mation against all the four defendants, instead of FOUR *distinct and separate* informations. (*a*)

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Which the COURT thought very *reasonable*, upon the 4th section of 9 *Ann. c.* 20. which runs thus—" and if it " shall appear to the said respective courts, that the " *several rights* of *divers* persons, to the said offices or " franchises, *may properly* be determined on ONE infor- " mation, it shall and may be lawful for the said respec- " tive courts to give *leave* to exhibit ONE such informa- " tion against SEVERAL persons, in order to try their " *respective* rights to such offices or franchises."

Mr. *Norton contra*, for the prosecution, urged that though the court *might* indeed *give leave* for this joining several persons rights in one information, yet they *would not do so*, if the prosecutor judged that it might be *inconvenient* to him.

Sir *Richard* replied that the court *would* direct it, unless it was *shewn* to be attended with inconvenience.

It ended in Mr. *Norton's* taking time to consult his client.

Which having done, he (this day) said his client had no objection to it; provided no exception should be afterwards taken to such union of the several causes.

CUR. The defendants cannot object to it, when the court judge it to be proper.

[574]

Tuesday, 28th April, 1758.

CHALLONER *versus* WALKER.

The obligee in an indemnity-bond, on being damnified, has an immediate right to be reimbursed.

AN action of debt on a bond, conditioned as follows; after first reciting that whereas *G. Needham* being seised in fee, *&c.* died intestate, *&c.* leaving a son *James*, *&c.* and *Anne Needham his widow*, then living; and whereas *James*, &c. were about to sell the estate; and also reciting the said *Anne's* being married to a second husband *David Kinneir*; and reciting a *doubt* having arisen concerning *her right to dower*; and whereas it was agreed that 30l. part of the purchase-money of the estate, should be left in the defendant's hands, in order to indemnify, &c. from the said claim, &c. And all costs, charges, &c. Then the condition is, that if the defendant and one *Coulson*, or their heirs, executors and administrators, should indemnify the plaintiff from all and all manner of claim of dower that might be made BY *the said Anne Needham*, as widow of the said *G. Needham*, out of the said

(*a*) There is nothing in this case: it being as clear on the words of 9 *Ann. c.* 20. cited below as possible, as no reason appeared or was so much as offered against joining the informations. See *Cowp.* 494, 495, 496, 500.

1758. CHALLONER v. WALKER.

premises; and of and from all costs, charges, damages, demands, &c. that may arise or happen by or from such claim, &c. then, &c.

Plea. That he has indemnified the plaintiff.

Replication—that *David Kinneir* married the widow; and exhibited a bill in Chancery for arrears of dower—he answered the bill; and expended 8*l.* 10*s.* for costs in the said suit.

To this replication, the defendant demurs specially, and shews several causes of demurrer; *viz.*

1st. The replication is *not a direct answer* to the plea.

2d. *No issue can be taken* upon this replication.

3d. *No breach* of condition is *sufficiently alledged* in this replication.

Mr. *Altham* for the defendant, made two points:

1st Point. The condition only extends to a claim of dower to be made by *Anne Needham in her life time*.

2d. The plaintiff has *brought his action too soon*: he ought to have stayed *till* the suit in Chancery had *been determined*.

First point—conditions shall be construed *favourably* for *obligors*. 1 *Saund.* 66. *Butler* v. *Wigge*—it is so declared by the court. *Cro. Eliz.* 396. *Cunningham* v. *Baker* [574] —There the same rule was laid down. 2 *Saund.* 411. *Ld. Arlington* v. *Merricke*.

And a condition shall *not be extended* further than the *words* of it. 1 *Ro. Abr.* 489. 1 *Ro. Abr.* 426. *pl.* 6. 1 *Strange* 227. *Stibbs* v. *Clough*. 1 *Lutw.* 336. *Wilson* v. *Constable*.

Second point—his expences will be *repaid him*, if the bill should be dismissed with costs. It is not like the payment of a debt admitted to be due: *this* condition is only to indemnify against a *claim*.

Mr. *Ashhurst* for the plaintiff.

1st Point. 1st. This breach is within the *words* and *letter* of the condition.

2d. It is clearly within the *meaning of it*.

First—*Ashhurst* and *Walker* purchased the estate. The widow had *claimed* dower. The indemnification is against any *claim* of dower that should be made by her. And the suit is brought upon that *claim*.

Secondly—But it is clearly within the *intent* of the condition. And Mr. *Altham's* cases will not hold now: because courts of equity will now relieve against the penalty. And courts of law therefore are less strict than formerly. *M.* 29 *G.* 2. *B. R. Drummond et Ux' administratrix of Ash, esq.* v. *Duke of Bolton*.

In the present case, there was a treaty for the sale of the estate: and a bond (instead of incumbering the deed with a covenant) to indemnify against all *claim* of dower, and all *expences, costs* and *damages* arising *from any such claim*.

Mr. *Altham's* cases of 1 *Ro. Abr.* 326, &c. are not applicable to the present case. 1758.

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2d Point—The plaintiff is certainly *already* damnified: and he is *not* obliged to *wait* for reimbursement, *till* a Chancery-suit shall be determined. Nor can he have *interest* for his money, if he was to wait till then. 1 *Ventr.* 33, 36, & 78. *King* v. *Atkins*.

Mr. *Altham* in reply—

1st Point. The condition is "to save him harmless from "the dower or thirds that are or shall be claimed BY "*Anne Needham*, and from all costs, charges, damages, "&c. arising, &c. *therefrom*:" that is, from *her* claim.

2d Point—in 1 *Ventr.* 35, 36, 78. The shilling was an absolute damnification: for, there no costs were recoverable, upon the *scire facias* issued against *King*, to which he was obliged to appear. [576]

LORD MANSFIELD—This is the plainest case that can come before a court. He stated the pleadings: and he treated the objections, and the cases cited in support of them (and thus applied to them) as quite frivolous and nugatory; and, without the least doubt or difficulty, overruled them. For the case is most clearly *within* the words and meaning of the condition; and the obligee has been *already* damnified, and therefore has a right to be *immediately* reimbursed.

Mr. Just. DENISON concurred in both. And he added that here was 30*l.* left in the purchaser's hands, to indemnify the plaintiff: and the indemnification is against the *claim*, and all consequences of it. The obligee has nothing to do with the *claimant's right*: it is enough, that he is damnified by the *claim*. And he is not to stay *till* the determination of the suit: he has an *immediate* right to be reimbursed.

Mr. Just. FOSTER and Mr. Just. WILMOT were clearly of the same opinion: and both of them explicitly declared themselves to the above effect.

JUDGMENT for the PLAINTIFF.

REX *versus* INHABITANTS of the TITHING of MILLAND.

Assessing one parish to the poor rates in aid of another affirmed.

ON shewing cause against quashing two orders, *viz.* An original order of two justices, made for *taxing, rating and assessing* the inhabitants of the TITHING of *Milland*, in AID of the parish of *St. Peters, Cheesehill* in the *same county*; and the order of sessions confirming it;

The question was, whether it was sufficiently stated "that both these places (*viz. Milland* and *St. Peter's*) lie "WITHIN *the* SAME HUNDRED:" which is a circumstance essentially necessary to be ascertained, in order to give the two justices any *jurisdiction* in the case.

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For, by 43 *Eliz. c.* 2. § 3. Power is given to two justices, in cases where they perceive a parish not to be able to maintain its own poor, "to tax any other parish "*within* the HUNDRED where the parish is:" (which is all the authority given to two justices.) Then the act goes on, further, "and if the said hundred is not able, "then the SESSIONS shall assess any other parish within "the county."

Now it is here only stated "that the tything of *Milland* "and the parish of *St. Peter's Cheesehill* both lie in the "*same* LIBERTY *of the soke*, where the said parish lies."

It was therefore objected that *non constat* that they are within the same HUNDRED: for "*liberty*" *and* "*soke*" are words of vague, indeterminate meaning, not equivalent to the known legal term "hundred," nor co-extensive with it; and perhaps the liberty may extend into *several* hundreds. However, it is plain that the *two* justices have *not shewn* that they have jurisdiction: and the court cannot *intend* that they have any.

In support of the objection, were cited the following cases; *viz. Foley's Laws relating to the Poor* 31. (or 42 in 3d edition,) *St. Benedict Parish* v. *St. Stephen's and St. Mary Magdalen's in Norwich. Reports temp. Qu. Ann.* 269. S. C. *Viner*, title *Poor, pa.* 416. S. C. with *Foley* 31.

The COURT thought it best, to send it back to the sessions, in order to have the matter better explained and more particularly stated.

[A hundred and wapentake are all one, 2 Rol. Abr. 73. or 14 Vin. 324. pl. 1.]

But they did not think themselves bound down by the *particular word* "HUNDRED," which is the term used in the act, so as to be confined to this single *species of division* of counties. For if such division be called by any *other* term or name synonymous or *equivalent* to that of "*hundred*," it must be equally within the intention of the act, and the court may adjudge according to such *intention*.

And now, the case having been newly and particularly stated.

Mr. *Gould*, who was for the orders, prayed the opinion of the court.

And Mr. *Norton*, who was against them, candidly owning that, as the facts are now stated, he could not contend but that it does appear (*substantially*) to be a hundred, though the division was called by another name;

The COURT discharged the rule, and affirmed the orders.

BOTH ORDERS AFFIRMED.

JOHNSON *versus* HOULDITCH. 1758.

JOHNSON v. HOULDITCH Wednesday, 26th April 1758. [S. C. Sayer's La. C. 118.]

Rule to pay money into court, and have it struck out of the declaration on payment of costs discharged as to the costs, the action having been vexatiously brought.

IN an action upon the case for the use and occupation of a house, the defendant had, in *Hilary* term last, obtained the common rule, for liberty "to pay 2l. 5s. "into court, and to have it struck out of the declaration, "ON *payment of costs.*" The plaintiff's attorney applied to get these costs taxed, and take the money out of court. Upon and after which application,

Mr. *Whitaker*, for the defendant, had moved (in the beginning of this term) to discharge this rule so far as it related to the *costs;* and also that the PLAINTIFF should pay the costs of the suit itself, and also the *costs* of that application: for that the plaintiff had the very same offer of the very same sum, before the judge.

The case he went upon, (and from whence he argued the plaintiff's conduct to be oppressive,) was as follows— A quarter's rent, (amounting to 2l. 5s. and nothing more, was due from the defendant to the plaintiff. The defendant was *always ready to have paid it;* but the plaintiff kept out of the way in order to *prevent* a tender: and yet brought this action as above stated, by bill returnable last term. The defendant summoned the plaintiff before a judge to shew cause "why, upon pay-"ment of the DEBT *and costs*, proceedings should not "be stayed." The plaintiff's attorney pretended that the plaintiff had *other* demands, and therefore refused to take the 2l. 5s. and costs. And so the judge was precluded by this allegation, from interfering: and could make no order. This *obliged* the defendant to apply to the court, for the common rule "to pay the 2l. 5s. "into court, with the costs then incurred;" (*after which*, if the plaintiff proceeds, it is at his peril.)

But as this common rule is always made upon the terms of the *defendant's paying* COSTS *to the plaintiff*, Mr. *Whitaker's* motion made as above mentioned, was "to set aside *so much* of the said rule as put upon the "defendant those terms of PAYING *costs* to the plaintiff:" and he had even added to this motion, "that, on the "contrary, the *plaintiff* should pay the costs of the suit "itself, and also of that application, TO *the* DEFEND-"ANT;" it being most manifest that the plaintiff was determined to *oppress* the defendant, as it now appeared that only this 2l. 5s. was really due to him.

Mr. *Norton*, on behalf of the plaintiff, now shewed cause against Mr. *Whitaker's* rule. And

He insisted, that *however oppressive* this action might [679] appear, yet the plaintiff had, *by law*, a RIGHT *to bring it:* and consequently he was INTITLED *to his costs of*

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suit, to be taxed and paid to him, upon the defendant's obtaining this rule under the* statute, which gives liberty to pay "the rent due into the court:" for, those are the *terms* PRESCRIBED *by* that act.

But

The COURT, upon full consideration of the matter, looked upon these proceedings thus carried on by the plaintiff, to be *oppressive:* and therefore they did DISCHARGE *so much* of the above mentioned rule as directed the *payment of costs* by the defendant to the plaintiff.

The rule now made was this; *viz.*

"It is ORDERED that the said rule (made in this "cause on *Wednesday* next after three weeks from "*Easter* day in this same term) be DISCHARGED: "and also that *so much* of the rule made in this "cause in the last *Hilary* term, for the payment of "21. 5s. into court, *as relates to the payment of* "*costs to be taxed* by Mr. *Clarke*, be DISCHARGED." (*a*)

* I take these rules to be discretionary, and founded upon the course and practice of the court, not upon any particular statute.

Friday, 20th April 1758.

HUTCHINS *versus* CHAMBERS et al'.

[8. C. Bull. 82. cited. See also 7 Durn. 658. 3 Salk. 136.]

THIS was a special case from *Surry* assizes, before Ld. Ch. J. *Willes.*

Beasts of the plough are distrainable for the poor rates.

It was an action of *trespass* against the *justices of peace*, the *parish officers*, the *constables*, and their *assistants:* for executing a *warrant of* DISTRESS made by the two justices, *upon a poor-rate* amounting to 13l. 2s. And a verdict was found for the plaintiff against ALL the defendants, subject to the opinion of the court upon the whole matter.

The distress at first taken, was five geldings, stated to be *beasts of the plough and cart;* with their halters: which first distress not being sufficient, they distrained a *second time*, under the SAME *warrant;* and took three *other geldings*, which were and are stated to have been *also beasts of the plough and cart*, of the value of 36l. 17s. with their halters. It is expressly stated, "that upon the "*former* distress, *there* WERE OTHER *goods, &c.* more "than sufficient to answer the value of the demand, be"sides these beasts of the plough and cart."

[As to this see 2 Inst. 133. contra; sed Saunders 39.]

(*a*) The case was stronger than it appears on this report, if what is stated in *Sayer's Law of Costs, Ed.* 1767, p. 146, be true, *viz.* "that it appeared that there had "been a tender of the rent before it was due, that the "plaintiff had kept out of the way all the day on "which it became due, in order to deprive the de"fendant of an opportunity of tendering the rent that "day."

This case was first argued on *Tuesday* 31st of *January* 1758, by Mr. *Knowler* for the plaintiff, and Mr. *Gould* for the defendants; and again, on *Friday* the 14th of *April* 1758, by Mr. *Stowe* for the plaintiff, and Mr. *Williams* for the defendants. (*a*)

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There were five questions stated for the opinion of the court, *viz.*

1st. Whether the *rate and assessment* was a *good and sufficient rate and assessment*, in point of law; and if not, then whether the plaintiff *can avail himself* of any objection to it.

2d Question, whether the *warrant ought to have fixed and* LIMITED *the* TIME* WITHIN WHICH *the geldings* and goods distrained were to be *sold:* and whether, *for want thereof*, the *warrant is* VOID, and the *defendants*, or *any*, and *which* of them, are *trespassers.*

* V. 21 G. 2. c. 20. and 17 G. 2. c. 38. [And note that this distress was not for a penalty, if it had then it seems this would have been a material objection, as appears by the above statute 27 Geo. 2. c. 20. s. 1. Salk. 609.]

3d Question, whether the SECOND *distress* is at all *justifiable.* (*b*)

4th Question, whether the geldings, being *beasts of the* PLOUGH, and used by the plaintiff, BOTH *for the plough* AND *cart*, were LIABLE to be taken and *distrained* FOR *the said* RATE *and* ASSESSMENT.

5th Question, whether upon the whole state of the case, the plaintiff's *action is maintainable against the defendants*, or *any*, and *which* of them.

And a 6th question, ("whether the second distress "was not *excessive*,") arose upon the argument.

After the first argument, (in which the distress was treated as a *common-law* distress; and Mr. *Knowler* expressly denied it to be an execution, because it was repleviable; and insisted that the statute *de districtione scaccarij* is general, is declaratory of the common law, and extends to *all* distresses for any cause whatsoever.)

Lord MANSFIELD finding that the parties proposed speaking to it again, took notice that all about the *rates* is clearly out of the present case; for, *if* THEY *are bad* the parties who thought themselves aggrieved, *should have* APPEALED. [6 Durn. 581.]

So all about the *warrants* may be laid out of the case.

(*a*) If in pleading a custom to distrain, it be alledged generally, it shall not be intended that the custom is to distrain things not distrainable by law. 1 *Sid.* 18.

"It seems to be a rule, that the construction of sta-"tutes must be accommodated to the rules of common "law in like cases." *Foster*, 109.

(*b*) This distress was not for a penalty; if it had, then it seems this would have been a material objection, as appears by the above stat. 27 *Geo.* 2. c. 20. s. 1. *Salk.* 609.

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For, the warrant is not void, so as to make it a trespass *ab initio*.

Therefore the future argument may be confined to the other objections.

ULTERIUS CONCILIUM.

[581] Mr. *Stowe*, who argued for the plaintiff, on *Friday* the 14th of *April* 1758, passed over first and second questions, upon what the court had intimated after the former argument; and proceeded directly to the third question."

3d Question. 3d Question. It is stated that here was sufficient distress, the first time; and therefore the *second* was NOT *justifiable*, *Co. Lit.* 272. *b. Cro. Eliz.* 13. *Moore* 7. 2 *Lutw.* 1532. *Wallis* v. *Savill. Fitz. H. N. B.* Title *Recaption*. 8 *Co.* 50. *Jehu Webb's* case. And this is a duty of a *less* nature than rent: and yet even in *that* case, a double distress is unlawful.

A second reason why the SECOND *distress* was not good nor justifiable, is because the warrant is NOT *an* AUTHORITY to take it: for, the warrant *having been* ONCE *executed*, had PERFORMED *its office*: and consequently was no more than a piece of waste paper, at the *time of taking* the second distress.

[Co Lit. 47. a. Qu. post. 584. Willes, 512.] 4th Question, beasts of the *plough* (though used both for plough *and cart*) cannot be distrained for a *rate*, when there are other goods sufficient. 51 *H.* 3. *stat.* 4. De districtione scaccarij. "None shall be distrained by "his *beasts that gaigne his land*, nor by his *sheep*, *&c.*" 2 *Inst.* 133. is large and express, "that this was so by "the common and civil law; and that this statute "*extends to* ALL *sorts of distresses* whatsoever; also to "all manner of *executions*, as well at the suit of the "king, as of the subject."

The words "*levy the debt*," cannot be applicable *merely* to lord and tenant; but are *general*, and extend to *all* distresses whatsoever. 1 *Inst.* 289. *b.* 2 *Inst.* 133.

6th Question. 6th Question. "Whether the second distress is not "EXCESSIVE."

He argued that this distress was EXCESSIVE; being a distress taken of three geldings, of *triple* the value: for, the value was 36l. 17s. and the sum distrained for, only one-third (or very little more of that sum, *viz.* 13l. 2s. which is excessive upon the face of it. And he cited 1 *Roll. Abr.* 674: where instances are given of distresses excessive upon the face of them. 1 *Inst.* 107.

And this distress is NOT *an entire distress*; but a distress of three *distinct* things. And an excessive distress of *several distinct* things is not maintainable: and an action of *trespass will lie* for it. *H.* 28 *G.* 2. *Moir* v. *Munday et al'* which was a distress of a great quantity of pedlar's goods (of the value of 100l.) which might have

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been severed; for only 6s. 8d. Therefore both the first and the second distress are illegal. 1758.

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Wherefore he prayed judgment for the plaintiff.

Mr. *Williams—contra*, for the defendants.

He confined himself to these three questions; *viz.* first, whether under the statute of 43 *Eliz. aperia carucæ* can be distrained for the *poor's rate*, where there is other sufficient distress. 2dly, Whether under the warrant for levying the sum assessed, a *second* distress can be made, where the first is deficient, and a sufficient distress might have been taken in the first instance. 3dly, If a second distress *can* be made: whether the second distress is not *excessive*: and whether, on *that* account, *this* action can be maintained.

And he observed that the *two justices* are *not concerned* in these present questions, now remaining before the court. He observed, likewise that the first distress's being a trespass or not, depended entirely upon the first of his three questions; and the second distress's being a trespass or not, depended entirely upon the two last of them: and all the three questions depended principally upon the statute of 43 *Eliz.*

He begun with his own first question, (which was the 4th original question:) and he first considered the nature of the *duty* created by the 43d of *Elizabeth*, and then the nature of the *remedy* thereby given for the recovery of that duty. 4th Original question; (Mr. *Williams's* 1st.)

The *duty* is *not* a tax upon the *land*, nor payable out of it: but a charge upon the *person*: and it is a tax throughout the kingdom, and for *public benefit*. This is *not* to be considered upon the foot of a COMMON LAW *distress*: the nature, design, and end of this public duty required the most effectual and speedy remedy that could be devised.

The reason why beasts of the plough could not be distrained at *common law* will not hold in the present case.

This is similar to an *execution*, and essentially different from a distress at common law.

At *common law* the distress *could not be sold*; it was only taken *nomine pœnæ*; not as a *satisfaction*, (which this is,) for the duty.

The REASONS of the privilege *do not now hold*. Agriculture *then* wanted and required encouragement, and must have been impeded by a common-law distress. *Now*, it does not. *Then*, the thing distrained could not be sold; and remained useless: *Now*, it may be sold. The debt there, was of a *private* nature: this, here, is of a *public* nature. [583]

This distress is *not* taken as a pledge, or as a *mean* to

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compel: but for a *satisfaction* for the duty itself, a personal duty, and of a public nature.

1 *Lord Raym.* 386, *Vinkensterne* v. *Ebden*. *Sir T. Raym.* 332. *Prideaux* v. *Warne*. 2 *Lev.* 96. S. C. *Cro. Eliz.* 710. *Smith* v. *Shepheard*, prove that the rule is not applicable to distresses for *such* duties. They are prescriptions for toll-through; and the first and last are instances of *sheep, &c.* taken for *tolls*.

As to the statute de districtione scaccarij—Comparing that statute with the statute of articuli super chartas, 28 *Ed.* 1. *c.* 12. (which refers to the statute de districtione scaccarij,) and attending to the words of it, it can never be taken to *extend* to such cases as the present; to parliamentary remedies, at that time unknown. It is confined to such distresses as should be *sold*: to cases of the grantees of the crown, or where the *prerogative of the crown* was concerned.* The mischief, at that time, was the unbounded power of the prerogative in distresses, and the great abuse and oppression exercised by the king's bailiffs and by lords of liberties.

* Vide 51 H. 3. Stat. 4. A. D. 1266.

The king, by his prerogative at the common law, might take the land, as well as the goods and chattels, in execution; (Sir *Wm. Harbert's* case, 3 *Co.* 12.) consequently the beasts of the plough.

And though *sheep* are expressly mentioned in that act, yet *sheep may* be distrained for toll. Which proves "that this act does *not* extend to *all* distresses." *Cro. Eliz.* 710. is so: *Smith* v. *Shepheard*—where sheep were taken for a toll of 2d. for every twenty *sheep*; and no sort of objection, "that sheep were not distrain-"able."(*a*)

Besides the act of 43 *Eliz. c.* 2. is an *implied repeal* of the stat. de districtione scaccarij.

Another answer to this act is—that if they would have availed themselves of it, a *special* action ought to have been brought *upon* this particular statute. *Register* 97. *b.* & *F. N. B.* 89. & 90. are particular forms of writs upon it.

So, upon the stat. of *Marlbridge, c.* 4. (which prohibits unreasonable distresses,) *trespass* will not lie for an unreasonable distress: but the remedy must be by a *special*

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(*a*) Sheep are never privileged in any case except where there be no other distress not privileged to be had; as is notorious to all who are the least acquainted with the subject; and the sheep which were distrained in this case, were for toll in passing over a bridge, and therefore there could be no other distress.

Vide also this subject best explained by the case of *Simpson* v. *Hartop*, *Wills* 512.

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action founded on the statute. In 2 *Strange* 851. *Lynne* v. *Moody*, it was adjudged "that *trespass* will *not* lie for "taking an excessive distress: but the remedy ought to "be by *special* action founded on the statute of *Marl-* "*bridge*." And on the same statute, "that distresses "taken in one county, shall not be driven into another," there are writs formed. *Register* 97. *F. N. B.* 82. But *trespass* will not lie: it must be a *special* action. 3 *Lev.* 48. *Woodcroft* v. *Thompson*—the three judges held, (against *North*,) "that he that would take advantage of the statute "of *Marlbridge*, *c.* 4, and 1, 2 *P. & M. c.* 12. ought to do "it by way of action, &c."

Their argument would prove too much. For, *sheep* were privileged by the common law; and by the stat. de districtione scaccarij, expressly "no man shall be dis- "trained by, &c.—*nor by his sheep*." But *sheep* are *now* allowed to be distrainable for a *poor's rate*. So are the *other* things mentioned by Lord *Coke* (from the Mirrour) in his 2d *Inst.* 133. * as not distrainable at common law, if there were other goods sufficient. All these are surely distrainable for this rate. 1 *Ld. Raym.* 386. *Raym.* 232. & 2 *Lev.* 96. S. C. *Cro. Eliz.* 710.

* V. Comment on c. 15. sub- finem: which mentions beasts and living things; and also mort- goods as ar- mour, appa- rel, vessels, jewels, &c. and even saddle horses.

Therefore the 43 of *Eliz.* is *not confined* to COMMON LAW distresses.

But these beasts are stated to be "beasts of the plough "AND *cart*." Therefore they *are* distrainable; for, beasts of the *cart* are not privileged.(*a*) 1 *Sid.* 422, 440. *Welch* v. *Bell.* 2 *Keb.* 595. S. C. *Bract. Lib.* 4. 217. *b.* speaks of *oxen*, as beasts of the plough.

However, *this* is an EXECUTION: and therefore none of the arguments relative to the distresses can be applied to *this* case.

When goods are seised in *execution* on a *fieri facias*, the debt is discharged. So is 2 *Ld. Raym.* 1072. *Clerk* v. *Withers*.

[See 2 Inst. 193. where Lord Coke held that the privilege of beasts of the plough, &c. given by W. 2. c. 18. extends to all manner of executions.]

This is a distress for a *satisfaction* of the demand; *not* for a pain, or penalty, or pledge. Consequently, it is an *execution*. This is the *essential difference* between an execution and a distress at common law.

In the case of *Rex* v. *Speed*—*Cases temp. W.* 3. 328. A *levari facias* out of *B. R.* after affirmance of a conviction for deer-stealing was holden regular: and it was considered as an *execution*; for, *per Holt*, "when a statute "says *money shall be levied by distress*, this is an *execution*." Therefore, it being an *execution*, beasts of the plough might have been taken.

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(*a*) Beasts of the cart are expressly mentioned in the writ in the Register, 97. prohibiting their distress as long as there are other cattle.

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And so they may here, *this* being an EXECUTION.

What has been urged on the other side, from 2 *Inst.* 133. " that the statute de districtione scaccarij extends " to *all* distresses whatsoever, and likewise to execu- " tione," is one of the very few mistakes of that excellent writer. And this opinion of Lord *Coke* is not only contrary to common experience; but also to the opinion of Ld. Ch. J. *Holt*, in *Comberb.* 356, *Hardisty* v. *Barney*—where *Holt* said, " that upon a *fieri facias* the " sheriff may take *any thing* but wearing clothes: " nay, if the party has two gowns, he may take one of " them."

And *sheep* are notoriously distrainable now: and yet they are expressly and by name, within the statute de districtione scaccarij.

The stat. *Westm.* 2. *c.* 18. which gives the elegit, expressly excepts beasts of the plough. At that time the legislature thought such exception necessary. And *Dyer* 7. *b. pl.* 10. says that a man shall not have execution of the profits of a filacer's office; because he cannot grant and assign it. So that the rule seems, from that case, to be, " that whatever may be assigned by the party, may " be taken in execution, *et è contra.*"

The doctrine on which these gentlemen build their arguments, is now *obsolete*, and unknown to the generality of mankind: and it would be very inconvenient to re-establish it. And this distress is for the benefit of the debtor, as these things are most saleable; and of no prejudice to any body. And no case is cited on the part of the plaintiff.

In 3 *Salk.* 136. it is said to have been adjudged " that " the rule of common law, to exempt, *&c.* extends to " cases where a distress is given in the nature of an execu- " tion, by any particular statute, as for poor-rates, &c." But perhaps this is no authority to be relied on.

As to the next question. I agree to 2 *Lutw.* 1532. " that a second distress can not be taken for the remain- " der of the same rent, where the first distress was only " for *parcel* of the whole rent due." But in this present case, if the officer is *deceived in the value* of the first distress, he *may* take a second: So, if the first *dies in the pound.*(a) *Dyer* 280. *b. pl.* 14.) or is by accident *became*

(a) If the distress be put into the common pound, the owner is bound to provide sustenance, and if it die in the pound it is at the peril of the owner, and not of the distrainer; and therefore (*donques*) he may take a new distress for the first cause, because he is not yet satisfied, *Dy.* 280. *b. pl.* 14.; but this authority and *Salk.* 248. *pl.* 3.

ineffectual; or if the officer did *not know* that there were such other goods; (which last might be the present case.) These cannot be looked upon as two distinct distresses for one entire demand. 1758. HUTCHINS v. CHAMBERS.

But if this be considered AS *an* EXECUTION, then there can be no doubt about it. For, the sheriff may, in *such* case, re-enter before the return of his writ, to complete his execution. And this last reason equally answers the objection to the *warrant:* for, that is *not completed* and *finished,* TILL the *whole* demand is levied. 3d Original question; (Mr. Williams's 2d.)

6th Question. As to the *excessiveness* of the second distress— 6th Original question; (Mr. Williams's 3d.)

He did not much contend that it was not so, but he insisted that an action of *trespass will not* lie for taking an excessive distress. For proof of which, he relied on the case of *Lynne* v. *Moody,* 2 *Str.* 851, and the case in 3 *Lev.* 48. *Woodcroft* v. *Thompson.*

The declaration contains two counts: one for each trespass: and the damages are given jointly for both. Therefore it is incumbent upon the plaintiff, to shew that *both* these distresses are illegal.

Mr *Stowe* in reply— Reply.

The cases of *tolls* are not applicable to the present case. 4th Question.

Agriculture deserves encouragement *now,* as well as formerly.

I suppose the king's distress might be sold at *common law.* Therefore the act *de districtione scaccarij* does extend to *executions.* And the 43 of *Eliz.* has not repealed it.

These beasts are privileged, if there be sufficient besides: and here was sufficient besides. Beasts of cart are within the same reason, as beasts of plough: They *gaignont son terre,* as the statute of 51 *H.* 3. says.

The arguments of *obsoleteness* and *ignorance* will not hold: for the *former* is not true; and the *latter* will not excuse. It is no part of the case, "that they did *not at* "*first know* the value." And it is begging the question to say "that he may take a second distress, when the first 3d Question.

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seem to proceed on this reason, that there was no default in the distrainor; and it was holden by the three judges in *Salk.* who gave judgment there, that if a distress was put into the common pound, and escaped without the distrainor's assent, unless it appeared that it was without his default, the action should not revive, for his own default ought not to entitle him to another action. Qu. If the reasons of these cases do not make against the resolution in the principal case?

1778. "was not sufficient." That is the very thing that wants to be proved.

BUTTERIDGE v. HAMBER'S 6th Question.

As to the case of *Lynne* v. *Moody*—the entry there was at first *lawful*; and there was nothing *subsequent* to make that lawful entry a trespass. But here the second entry to take the second distress, was *tortious*: and therefore they are liable to an action. So that that determination does not affect the present case.

COX' ANNUAL

This cause now standing in the paper, for the resolution of the court,

LORD MANSFIELD delivered their opinion.

The rule of *nisi prius* is so conceived as to submit the case to the opinion of the court, be that whatever it may; and so as to obviate all objections to the form of the pleadings and finding of the verdict.

In stating the case, he observed that there *were other* things which might have been taken upon the *first* distress, besides those which were actually distrained: but *not* upon the *second*, (from any thing that appears.)

[4 Burn. 369.] Upon the first argument, the two first objections were laid out of the question: especially since the 17 *G.* 2. *c.* 38. So that the *justices* were out of the case. For, a defect in the rate (*unappealed from*) could not avoid the warrant; nor is the warrant *void*, so as to make it a trespass *ab initio*. And the *justices* could not be trespassers, by what the officers afterwards did.

So that it was reduced to three questions: *viz.*

1st. Whether (upon the first distress) AVERIA CARUCÆ could be taken and distrained for a *poor's rate and assessment*; when there were *other things* that might have been distrained, and which were *more than sufficient* to answer the value of the demand.

The second question turned upon two objections to the second distress: *viz.* 1st. Whether the *second distress*, under the *same* warrant, was at all justifiable, when there was enough that might have been taken upon the *first*; and 2dly. Whether this second distress, being *excessive*, *that* circumstance alone was not a sufficient ground to maintain THIS *action of* TRESPASS, independent of any other consideration.

On the second argument, Mr. *Williams* not only argued very well as counsel for his client; but he explained the whole learning of *distresses at common law*; which were a *nomine pœnæ*, not a satisfaction: and as I adopt the reasoning of his argument throughout, to avoid repetition now, I will in a great measure refer to it for the grounds of the opinion which the court is of.

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The 1st question is, whether *averia carucæ* may be

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"taken for a *distress upon the poor's rate*, where there are "*other* distrainable goods sufficient."

As to this, the *solid distinction* is, "that the seizing "under the 43 of *Eliz.* and such like acts of parliament, is "*but partly* analogous to the *common law* DISTRESS, (as "being replevisable, &c.) but is *much more* analogous to "the common EXECUTION;" (like a *fieri facias*, where the surplus, after sale, shall be returned.)

In the old common law distresses, which were in nature of (*a*) *nomine pœnæ* to compel payments, it would have been absurd to have suffered the implements by which a man gains his livelihood to be holden as a pledge; because that would have been taking from the man, the only means he had, of being able to pay the debt. But this reason does not hold, where the things distrained may immediately be sold by way of satisfaction: which, though called a distress, yet really is, in this respect, an *execution*.

The adjudication said to have been made in *M.* 8 *W.* 3. *C. B.* in 3 *Salk.* 196, was very properly cited by Mr. *Williams*, as no sufficient authority, and not (of itself) to be relied upon: but I take it, that the same reason was gone upon, in the case in 1 *Ld. Raym.* 386. *Vinkenstone* v. *Ebden*, *M.* 10 *W.* 3. *B. R.* Where Ld. Ch. J. *Holt* says, "it is true, a horse cannot be distrained in a smith's "shop, &c.: *but* there is *no such* restriction, where the "distress is for a PERSONAL *duty*." And he observed that the duty, in that case arose out of the goods laden to be exported: so that by their being laden, the duty commenced, and the ship became chargeable; and, *à fortiori*, any part of her. I take the meaning of what he there says of *personal* duties, to be applicable to the case of *parliamentary duties* alluded to in 3 *Salkeld*, and consequently to be agreeable to 3 *Salk.* 136. which says, it was adjudged "that this common law exemption of "utensils, tools, instruments of husbandry, &c. from "distress, holds only in distresses for *rent*-arrear, *amer-* "*ciaments*, *&c.* but doth NOT *extend* to cases where a dis- "tress is given in the *nature of an execution*, by any parti- "cular *statute*; (as for poor rates, &c.

Therefore it more analogous to an *execution*, than to a distress at common law: and *there*, (in cases of execution) "*averia carucæ may* be distrained; although there be other sufficient distress." [* Contra 2 Inst. 133. and the writ in the Register.]

(*a*) How can this be when the distress in this case is repleviable, but certainly not so in the case of an execution.

(*b*) The writ in the Register 97, founded on this stat. expressly recites *quod nullus distringat p. averia carucarum*

1740. HUTCHINS v. CHAMBERS. ...And on *this* ground, we are all of opinion, that there is no objection to the *first* distress, from the *averia carucæ* being taken: for that they *are distrained under* the 43 *Eliz.* and *such like acts of parliament.*

Thus far, you see, relates only to the *first* distress.

As to the SECOND distress—

The 1st question relating to *that*, is "whether this "*second* distress can be AT ALL justified: as it was a "SECOND distress taken under the *same* warrant; when "enough *might* have been taken *at first*, if the distrainer "had then thought proper."

Now a man who has an ENTIRE duty, shall not split the *entire* sum; and distrain for *part of it* at one time, and for *other part* of it at another time; and so *toties quoties*, for several times: for, *that* is great oppression; And that is the case of *Wallis* v. *Savill et al'* in 2 *Lutw.* 1532: where the second distress was holden unjustifiable, because both distresses were taken for *one and the same* rent; and it was the lessor's folly, that he had not taken a sufficient distress at first.

But if a man seises *for the* whole sum that is due to him, and *only* mistakes the *value* of the goods seised, (which may be of very uncertain, or even imaginary value, as pictures, jewels, race-horses, &c.) there is no reason why he should not afterwards *complete* his execution by making a further seizure. And how can the officer who seizes, judge of the real or perhaps imaginary value of the horses or goods seized? The value of them may be quite unknown to him; or may even depend upon whim and fancy.

It is to the *advantage* of the owner of the goods, that this should be so: it is better for him that the officer should be at liberty to seize a second time, in case he makes an insufficient seizure the first time. Or else, it might induce him to a necessity of taking effects of a very great value, at first: for, if he is to be precluded from

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suaru vel poves suas pro debito nro aut alieno seu alia quacunque occasione per ballivos seu ministros nros aut aliorum quamdiu alia habeat averia per quæ rationabilis districtio super ipsum fieri possit pro debitis illis levandis exceptis dumtaxit averiis illis quæ in damno alicujus inventa secundum, legem et cons regni Angl' imparcari contigerit.

Note also that it is a rule that wherever a new right or property is created by act of parliament, the same is to be construed according to the rules of the common law, respecting other rights of the same nature. 3 *Co.* 18. *b.* 85. *b.* 1 *Wms.* 252.

thus making up the deficiency, he will certainly take care not to take too little at first. 1758.

HUTCHINS v. CHAMBERS.

Now pictures, horses, jewels, books, and some other such effects, may be of so uncertain and even imaginary or fanciful value, that it may be exceedingly uncertain how much money they may fetch, when they come to be sold: so that the person seizing may not be at all able to judge how much they may produce upon sale. (*a*)

And if he does not take the value of the whole at first, [590] (out of tenderness and moderation perhaps,) there is no reason why he should not complete it by a second seizure; provided it be for the SAME *sum due*.

Therefore this *first* objection to the second distress, fails.

3d Question. The *second* objection to this second distress, is the third remaining question; *viz.* its being *excessive*, and as such being a sufficient ground for an action of trespass. [1 East. 142.]

Now as to this third question, "whether the taking an "excessive distress, is a sufficient ground to maintain an "action of trespass;" several authorities have been cited,* to shew "that an action of *trespass* will NOT *lie* for taking "an excessive distress;" but "that it ought to be a *par*-"*ticular* action grounded upon the statute;" and particularly, one case, which is in 2 *Strange* 851. *Lynne* v. *Moody, M.* 3 *G.* 2. *B. R.* where it had been adjudged for the plaintiff in *C. B.* But the judgment of *C. B.* was reversed.

* Vide ante pa. 582, 583, 584, 585, 586.

And it was said "that the remedy ought to be by "*special* action *founded on the statute* of *Marlbridge*."

So that it has been sufficiently established "that a *general* "action of *trespass* can *not* be maintained for taking an "excessive distress."

One case indeed was cited to the *contrary*: which was the case of *Moir* v. *Munday, H.* 28 *G.* 2. *B. R.* And that was an action of *trespass*; where six ounces of *gold*, and one hundred ounces of *silver* were taken for 6*s.* 8*d.* which was holden to be an excessive distress: and judgment was given for the plaintiff.

But that *appeared* upon the *face* of it, and upon the *pleadings*, to be excessive: and so the court expressly declared. And it was a distress of *gold* and *silver*; which are of a *certain known* value; and even the *measure of the*

(*a*) *Vide Hargrave's Co. Lit.* 49. *b.* Where the opinion here given is cited with the following addition to it, *viz. Sec. ac Saund.* on 13 *Car.* 2. against *conventicles* 39. which is referred to in *Comyns's Dig. Distress, b.* but not cited in the case in 4 *Burr.*

1758. HUTCHINS v. CHAMBERS.

value of other things. But it was there holden, "that in "all OTHER cases of goods or other things of *arbitrary* "and uncertain value, it MUST be an action upon the "*statute*. And this (as I am told) was the distinction there taken and that is therefore an *exception* (and was there considered as being so) from the general rule, and serves to *confirm* the rule itself.

We are therefore all of us of opinion that there is a cause of action maintainable by the plaintiff in the present case; nor has he any right to recover against any of the defendants: and that the defendants be at liberty to enter a non-suit.

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The RULE taken was,

"That the *postea* be delivered to, and judgment "entered for the DEFENDANTS." (a)

Monday, 1st May 1758.

REX *versus* INHABITANTS OF CAERSWALL.

See this case *abridged*, in the TABLE: and *at large* in the quarto edition of my SETTLEMENT-CASES, No. 147, pa. 461.

Tuesday, 2d May 1758.

BALDWIN et ux' *versus* BLACKMORE, ESQUIRE.

Pauper returning to the parish from whence removed without a certificate, may be committed to the house of correction. [See 3 Durn. 725. 6 Durn. 581.]

THIS was a case reserved at the assizes for the county of *Lancaster* in an action for an assault upon, and *false imprisonment* of the plaintiff's *wife*.

CASE—That the plaintiffs *William Baldwin* and *Susannah* his wife, being *paupers*, legally settled in the township of *Banknewton* in *Yorkshire*, had been regularly and properly *removed by an order* of two justices of the county of *Lancaster* from *Marsden* in *Lancashire*, to the said township of *Banknewton* in the said county of *York*, as the place of their last legal settlement; which order was not appealed from. That afterwards, they (*both* of them) RETURNED of their *own accord*, *and without* bringing any certificate with them from *Banknewton* (to which they belonged) to

(a) By the first point adjudged in this case a different rule, or law is introduced with respect to distresses given by act of parliament, from which is, and always was the case, as to distresses at common law.

By the second resolution, the authority of 2 *Lutw.* 1532, is overruled, though clearly law before; and this second resolution is also contrary to what the legislature took to be law, when they passed the *Stat. 17 Car. 2*, as appears by *s.* 4.

1758. BALDWIN et ux' v. BLACK-MORE.

Marsden aforesaid, from whence they had been so removed by the said order of two justices. Of which, complaint being made in writing, and upon oath, to the defendant, who was a justice of peace of the said county of *Lancaster*, wherein the said parish of *Marsden* lay, by the overseer of the said parish (from which the paupers had been lawfully removed, and to which they unlawfully returned), he issued his warrant to bring the two paupers (the man and his wife) before him: who being accordingly brought before him, and the facts being fully proved, upon oath, made by *Thomas Murgatroyd*, one of the churchwardens of *Marsden* aforesaid, he committed BOTH of them, the man AND *his* WIFE, to the *house of correction*, "there to remain UNTIL they should be DIS-"CHARGED BY DUE COURSE OF LAW." The warrant was directed to the constable of *Marsden*, to convey, and to the master of the house of correction in *Preston*, to receive; and was in these words, "Whereas *Thomas* "*Murgatroyd*, one of the churchwardens of the township "of *Marsden* in the said county, hath made oath before "me, one of his majesty's justices of the peace in and "for the said county, that *William Baldwin* and *Susan his* "*wife*, poor persons having been lately removed by an "order under the hands and seals of *Roger Hesketh* and "*Righy Molineux*, esquires, two of his majesty's justices "of the peace and *quorum* in and for the said county, "from the said township of *Marsden* unto *Bankwell* "in the west riding of the county of *York*, as to their "last lawful settlement, are now returned back, to "inhabit in the said township of *Marsden*, *contrary to* "THE *statute* in this behalf made; these are therefore, in "his majesty's name, to command you forthwith to "convey THEM the said *William Baldwin* and *Susan his* "*wife* to the *house of correction* abovesaid, and deliver "THEM to the master thereof; hereby requiring him to "receive THEM into his custody, and THEM safely to "keep UNTIL they shall thence be discharged by *due* "*course of law*. Hereof fail not, at your peril—Given, &c. "this 8th day of *February*, &c."

That under this warrant of commitment, the plaintiff and his wife were kept in prison in custody of the keeper of the house of correction at *Preston*, from 12th *February* to 17th *March* following.

Notice was proved to be given to the defendant of bringing the action, one month before it was brought.

Upon the trial of this cause, there was a verdict for the plaintiff, and 1*s.* damages, subject to the opinion of the court upon the two following questions: *viz.*

1st. Whether there ought not to have been a *previous conviction* of *vagrancy*.

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2dly. Whether the WIFE could be convicted of *vagrancy*, or be liable to be sent to the house of *correction* for returning without a certificate; as she only accompanied and resided with her *own husband*.

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N. B. By 13, 14 *C.* 2. *c.* 12. § 3. It is provided that any person or persons *may go* TO WORK in any parish or place, *carrying* with them a *certificate* of their being inhabitants of their proper parish: and, in such case, if they shall not return when their work is finished; or shall fall sick or impotent, whilst they are in the said work; it shall not be accounted a settlement; but two justices of the peace may convey *the said* person or persons to the place of his or their habitation as aforesaid. And if *such* person or persons shall refuse to go, or shall not remain in such parish, but *shall* RETURN *of* HIS *own accord*, to the parish from whence he was removed; it shall and may be lawful for any justice of the peace of the city, county, or town-corporate where the said offence shall be committed, to *send* SUCH *person or persons* offending, to the *house of correction*, there to be *punished as a* VAGABOND; or to a *public workhouse* (in the act after-mentioned) there to be employed in work or labour.

By 17 *G.* 2. *c.* 5. § 1. It is enacted, that whereas the number of rogues, vagabonds, beggars, and other idle and disorderly persons, daily increases, *&c.* all persons who threaten to run away, *and* LEAVE *their* WIVES *or children* to the parish; and ALL *persons who shall* UNLAWFULLY *return* to such parish or place from whence they have been legally removed by order of two justices of the peace, WITHOUT *bringing a certificate* from the parish or place whereunto they belong; and also all persons who, &c. &c. *shall be deemed* IDLE AND DISORDERLY *persons*: and *it shall and may be lawful* for any *justice of peace* TO COMMIT *such offenders* (*being thereof* CONVICTED before him, by his own view, or by their own confession, or by the oath of one or more credible witness or witnesses,) to the *house of correction*; there to be kept to hard labour, for any time NOT *exceeding one month*.

As to the two points, it was insisted on behalf of the plaintiff—

1st. That there ought to have been a *previous* CONVICTION of vagrancy, before the justice could commit to the house of correction at all.

2dly. That *Susannah* the wife, following and residing WITH *her own* HUSBAND to and at *Marsden*, could not be convicted of VAGRANCY for returning thither without a certificate.

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1758.

BALDWIN et ux v. BLACKMORE.

This cause was first argued on *Tuesday* the 21st of *June* 1757, by Mr. *Yates* for the plaintiff, and Mr. *Clayton* for the defendant; and again on *Friday* the 11th of *November* following, by Serjeant *Poole* for the plaintiff, and Mr. *Norton* for the defendant.

For the plaintiff it was argued to the following effect.

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For the plaintiff.

1st Point—On 17 *G.* 2. a *previous conviction* is expressly made necessary; the words of it are, "being thereof *convicted, &c.*" And three methods of conviction are specified; *viz.* view, confession, and proof by one or more witnesses.

Now here was nothing but the mere complaint and information of the parish officer; without any *adjudication* by the justice, "that it was true."

Therefore the justice proceeded without any authority.

On 13, 14 *C.* 2. c. 12. § 3. No previous conviction is indeed necessary, by any express words of the act of parliament. But such an arbitrary and extraordinary power ought to be very narrowly watched. However, this cannot be a proceeding under the statute of 13, 14 *C.* 2. for the foundation of this warrant is the information of the churchwarden on oath; which plainly goes upon an offence created since that statute of *C.* 2. *viz.* "returning "*without bringing a certificate* from the parish to which "they belonged."

2d Point—This return of the woman cannot be considered as an *unlawful* return. A feme covert is *obliged* to follow her husband. If she commits theft, in company with her husband, it shall be taken to be done by the coercion of her husband. 1 *Hawk. P. C. fo.* 2, 3. *sect.* 9, 10, 13. *Bro. Coran.* 108. *Kelynge* 31, 37. *Hale's H. P. C. Vol.* 1. *pa.* 47. and *pa.* 516. 3 *Inst.* 108.

Indeed there are cases where the wife is the PRINCIPAL *actress*, (as keeping bawdy-houses,) where she is punishable with her husband. But here SHE is guilty of *no* offence at all.

As to its being a hard action—our's is a very hard case.

Contra for the defendant, (the justice of peace, who had committed the woman,) it was argued to this effect:

For the defendant.

1st Point—If this proceeding should be taken to be on 17 *G.* 2. and even supposing a conviction to be previously necessary, yet it is not necessary that such a conviction should be *expressly* STATED upon this case; but the justice may, *at any time*, draw up a conviction in form, upon the facts here stated, which conviction he was not obliged to draw up *in form*, till called upon.

But this proceeding is upon 13, 14 *C.* 2. *c.* 12. § 3. And the case is within the words of that act, *viz.* "returning

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1758. of her own accord, to the parish from whence she was removed.

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And these two acts (of 13, 14 C. 2, and 17 C. 2.) are consistent; and the latter does *not repeal or vacate* the former: it operates as a *saving*, under that act: and upon this former act, no conviction is necessary.

* 1 Hob. 96. and 2 Co. 73. Dr. Hussey's case; where whatever may be to the purpose in the present case (if any part of it is at all so,) will be found.

2d Point. A wife may be guilty and liable in committing a crime *with* her husband, from trespass * up to murther and treason. In Dr. *Hussey's* case in *Hob.* and in Lord *Coke*, a general rule is laid down, as to married women, "that where they offend voluntarily and knowingly, they are liable to punishment."

This is a new law; and the wife was intended to be included in it: and if wives are within the mischief of a statute, they shall be included in it. The matrimonial vow must be understood as restrained to *lawful* acts: the wife ought not to obey her husband in unlawful acts.

In trespass *vi et armis*, the wife might be seized for the fine. The coercion of the husband *only excuses* her from suffering for the crime: it does not make the act *lawful*. She ought not to commit theft; although the supposed coercion of the husband excuses her from punishment.

This act expressly includes *all* persons whatsoever. The words are general; and so also was the intention.

And the husband's act (of returning) is *unlawful:* and therefore she ought not to follow him, and thereby commit an unlawful act herself. Nor is she obliged to follow him *for maintenance:* for, the parish to which they were removed, is obliged to maintain her, in the same manner as if her husband had run away.

If it were otherwise, here would be an innocent parish, who must be at a continual expence of removing the wife back, *toties quoties*, without being reimbursed for their charges: and if she was *obliged* to return with her husband once, she would *always* be obliged equally so to do, whenever he should return himself.

All their reasoning would hold just as strongly in obliging the wife *to assist* her husband and *obey him* in *keeping a bawdy-house*, as in *any other* ILLEGAL act. Yet for keeping a bawdy-house, she is certainly pu[illegible] with her husband.†

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† 1 Salk. 384. Regina v. Williams, M. 10 Ann. B. R. and Rex v. Hayward, a later case.

This is not a commitment in *execution*, and by way of *judgment* for an offence: it is a commitment on 13, 14 C. 2. and not on 17 C. 2. nor for any definite time. They might have been *bailed* on this commitment: for it is only "*till* discharged by due course of law." And though the words of the act of 13, 14 C. 2. are "*There to be punished as a vagabond*;" yet this is only in order to be amenable for justice upon a *future* indictment. And so the

sending them " to a *public* † *workhouse*, there to be " employed in work and labour," is no punishment to a poor person, who is *used* to work and labour. 1768. BALDWIN ex parte BLACKMORE.

It would be highly *unreasonable* that the husband (who could not bring an action in his *own* name and on his *own* account) should be permitted to bring it on account of his *wife*, and in her name, against a magistrate who has acted for the public good: and HIMSELF *receive the benefit* of what has been originally occasioned by and taken its rise from his OWN *unlawful act*.

† But this commitment is " to the house of correction."

The counsel for the plaintiff replied to the following effect.

As to the conviction being still in the *power of the justice* to draw up in form.—It does not appear that there *ever will* or *can* be such a conviction: but it is plain that there is *none*. Reply.

It does not any how explicitly *appear*, *upon* WHAT *act*, this commitment is founded. But however, it *must* be on 17 *G.* 2. because the information is for an offence expressly within that statute; and the warrant of commitment is founded upon the information. Therefore there ought to have been a *previous conviction*.

The certificate could not be in the *wife's* power to produce: her husband must have it, if there was any.

We do not deny that the wife was so far *within the intent* of this act of parliament, that she was *capable* of being a vagrant; she might have gone about begging; she might have returned to this parish without her husband. But we say that here is no act of vagrancy stated; and for the particular fact that *is* stated her being *sub potestate viri*, was an *excuse* to her: she is within all the excuses mentioned in Dr. *Hussey's* case, for persons guilty against the *letter* of a law.

The hardship of the parish to which these persons returned cannot destroy the general law of the land.

A married woman's keeping a *bawdy-house* jointly with her husband, varies from the general principle: because there she is the PRINCIPAL *actor*, and *chief manager* and *conductor*. [601]

The present commitment is, " *till* discharged *by due* " *course of law*." But still it may be a commitment on 17 *G.* 2: as it does NOT EXCEED a month; though it does *not indeed fix* it to a month.

It is a quite new doctrine, " that imprisonment in a " house of correction is no punishment:" certainly it is a punishment, and no small one.

As to the husband's becoming intitled to the damages, when recovered; that arises from the *law* itself: but it is properly the *wife's* action, and will *survive to her*; though she (being covert) cannot by law bring it in her *own*

1760. BALDWIN et ux. v. BLACKMORE.

name. This therefore is the *act of the law*; and ought not to be objected to the *husband*; much less, to the *wife* whose action this properly is.

Lord MANSFIELD desired to be informed how the USAGE was: (though it would not indeed, as he observed, alter the *law*.)

The counsel had not made this inquiry. But both the counsel, and also Mr. Just. FOSTER and Mr. Just. WILMOT said, that the act of 13, 14 C. 2. had been ALWAYS *considered* as GENERAL, and NOT *as tied up* by the particular words of reference to that *particular* case of *going to work, only*. And

Lord MANSFIELD said that perhaps that might have been practised for the sake of general good.

He strongly intimated that it would be a right thing to *compromise* this cause: and if it should not be so, he desired to know the *practice and usage*, about sending the *wife* to the house of correction, with the husband.

As to 13, 14 C. 2. He said he was now satisfied by his brother *Foster*, "that it had always been *taken* as a "GENERAL law;" notwithstanding the words of reference; (which had struck him on the reading.)

Mr. Just. FOSTER desired to know also how the practice had been as to *children*.

Mr. *Clayton* (who was counsel for the defendant in the former argument) said he had known the *children* also committed.

[602] CUR' ADVIS', (i. e. *eventually* if not compromised.)

On *Tuesday*, 25th *April* 1758, this case being mentioned at the bar, as standing for the opinion of the court.

Mr. *Norton* (for the defendant) then said he had several certificates of its being the PRACTICE, for justices to commit the WIFE, as well as the husband, for returning to the parish from whence they had been removed: *although* she so returned, WITH *her husband*.

Lord MANSFIELD now (on *Tuesday* 2d *May* 1758,) delivered the resolution of the court.

He first stated the whole case very fully. And he prefaced, that it was manifest that the justice had *not* acted *intentionally* wrong: and it is plain that the jury were of that opinion, as appears by their giving *only* 1*s.* damages. The court would gladly therefore have leaned towards excusing this gentleman from suffering for what he had honestly and without any bad intention done; if they could have found him justifiable by any legal excuse.

But there is one FATAL *objection* to his proceeding, which we cannot get over; and which puts all the other

points, out of the case: and that is, that the WARRANT OF COMMITMENT IS ILLEGAL. 1758. BALDWIN et ux. v. BLACK-WORK.

The *legality of the warrant* depends upon two acts of parliament, or at least upon *one* of them; for, there are two acts of parliament, upon *one* of which two this warrant must be founded; though it does not appear upon *which* of the two the justice proceeded.

These two * acts are, 13, 14 *C.* 2. *c.* 12. (a law made *before* certificates under the † late acts existed,) and 17 *G.* 2. *c.* 5. (which relates to persons returning, &c. without bringing such a certificate.)

* Vide ante, p. 597.

† 8, 9 W. 3. c. 30. first introduced them.

Now this warrant is *not* within this *former* act, of 13, 14 *C.* 2. nor is the case itself within it (*a*). These persons did not go to any parish, *carrying with them* a certificate of their being inhabitants of their proper parish; nor is the commitment made "to the house of correction, *there* "*to be punished as a vagabond;*" nor to a *public workhouse*, "*there to be employed in work or labour;*" as that statute directs. So that the warrant is not at all agreeable to the *directions* of THAT act, which specifies the *particular manner* of sending the offender to the house of correction, or to a public work-house: for, it is, only, "to remain TILL "*discharged by due course of law.*"

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Neither can this warrant be good upon the *latter* act, of 17 *G.* 2. *c.* 5. Because though this is indeed a commitment to the house of correction, (which the latter act

(*a*) In the preceding page the counsel, and also *Foster* and *Wilmot* Justices, said the act had always been considered as general, and not tied up by the particular words of reference to that particular case of going to work; and afterwards Lord *Mansfield* said, he was satisfied by his brothers that it had always been taken as a general law, notwithstanding the words of reference which had struck him on the reading. Now if it be a general law, the pauper's going without a certificate could not be a reason why the case might not be considered within that act; and it would be strange that a pauper going without a certificate should make his case better than if he went with one. The power to commit by the act is not for any particular time, and the warrant of commitment being so, gave the defendant a right to apply it to that act; for where there are two acts of parliament a prosecutor as a magistrate has a right to apply his proceeding to that which best suits his case, and as to the omission in the text, lines printed in italics, they were in favour of the pauper: and it would be odd to allow an action against a magistrate because he had omitted a circumstance of severity in the punishment, and only confined instead of confining and punishing.

1758.
DEARDEN, assignee, v. MOLDEN.

" go, for ease and favour," it would have brought all matters suggested in the plea, to issue.

The judge's order does *not confine* the defendant to plead the GENERAL *issue*. The present plea is within his order: and, the plaintiff might here have taken issue (as above) " that the sheriff did *not* let the defendant go, " for ease and favour:" which would have let in all the matters in issue.

RULE " for setting aside the judgment, with costs,"

MADE ABSOLUTE.

But it being suggested by the plaintiff's counsel, " that " the plea was, in truth and reality, only a *sham* plea, put " in merely to gain time;"—

Mr. *Norton*, on behalf of the plaintiff, moved that the defendant might *plead as he would stand by*.

Which being consented to on behalf of the defendant, *This* also was made part of the RULE.

The end of *Easter* Term 1758. 31 *Geo.* II.

TRINITY TERM,

31 GEO. II. B. R. 1758.

REX *versus* JAMES CLARKE, Esquire.

Friday, 26th May, 1758.

Lady brought up on an hab. corp. issued in vacation.

A *HABEAS Corpus* had been issued during the last vacation, by Lord *Mansfield*, bearing teste the 8th instant, being the last day of the preceding term, directed to *James Clarke*, esquire, commanding him to have *before his lordship* AT HIS CHAMBERS in *Serjeant's inn*, immediately, the body of *Lydia Henrietta Clarke*, his daughter, then detained in his custody, together with the day and cause of her taking and detainer; then and there to undergo and receive what his majesty's said chief justice should then and there consider of, concerning her in this behalf.

The writ was now returned *here in court*: and the said *Lydia Henrietta Clarke* produced.

Mr. *Clarke* the young lady's father, *returned* that she was *his* DAUGHTER; and that on the 22d of *March* last, she, without any leave or notice to him or to his wife (her mother,) secretly went away from his house in *Great Ormond-street*, and took with her a box or bundle containing several sorts of wearing apparel and about 27*l.* in money.

[She was twenty-two years of age.]

That, in about twelve or fouteen days time, he being credibly informed "that his said daughter had been "INVEIGLED *away* from him *by the instigation* of one "*James Mervin*, a person of NO *visible occupation or* "*substance*, nor keeping any house; *with* DESIGN *to* "MARRY *her to one Joseph Isgrave*, who is under age, "and who about two years ago *served* the said *James* "*Clarke as a* FOOT-BOY, and *is yet in no better condition*: "and that they were all gone together into the isle of "*Thanet*, where they were *to get a* LICENCE *for such* "*marriage*;" he being under great concern for the welfare of his said daughter, and in order to *prevent the said marriage*, (she being *intitled to a considerable fortune*, after her said mother's death, and being likewise *his* ONLY *child*,) took a journey to find them out, and (if in his power) *to prevent the said intended marriage*; and gave directions to his nephew Mr. *Peter Starkie Floyer*, to go

1758. Rex v. Clarke. in quest of them, and if he found them, to endeavour to prevent the marriage and to bring his said daughter to him.

That his said nephew found them out at a place called *Broad Stairs*, in the isle of *Thanet:* where the said *James Mervin* represented himself as, and *passed for*, the uncle of his said daughter.

That the said *Lydia Henrietta Clarke* came home with his said nephew to his (the said *James Clarke's*) house in *Great Ormond-street;* where she arrived the 7th of *April* last: and the said *James Mervin* came with her as far as *Canterbury*. But the said *Joseph Isgrave* run away: and the said *James Mervin* pretends he is gone to *Holland*.

That on her being thus brought home to him, he did, in the *tenderest manner*, represent to her the ruin she was inevitably falling into, if she pursued a design to marry a person so much inferior to herself; and who having no visible way of livelihood, must reduce her to the utmost necessity and want, as well as disgrace and shame. Whereupon, she assuring her said father "that she was "*not* married," he, through his duty as a parent, and from the affection he bore towards her, did receive her into his house; and the *mildest and best endeavours* have been used, *to dissuade her from such marriage; such endeavours extending no further* than what he humbly conceives to be consistent with that parental care which may be used *by a father* towards his child: and NO SEVERITY *whatsoever* hath been used to her.

That she hath, ever since the said 7th day of *April* last (when she came home to his house as aforesaid) hitherto, OF HER OWN ACCORD, continued to live and reside with him (her father) and still doth live and reside with him, at his said house, *of* HER OWN ACCORD *and under* NO *restraint whatsoever*.

And there is no other cause of detaining the said *L. H. C. &c.*

Note—This *habeas corpus* was issued upon an affidavit made by the above named *James Mervin*; who made out a very *plausible* case, fully sufficient (if true) to obtain the writ; but which was now alledged by Mr *Norton* (of counsel with Mr *Clarke*) to be absolutely and utterly FALSE *in fact*.

[608] In it, the young lady was sworn to be of *full age*, viz. about 22 (which was true) but it also alledged "that she had been *hardly used*, and *confined*, by her "father," and *other circumstances* which were false.

Note also—That although this *habeas corpus* directed her to be brought before *Lord Mansfield* AT HIS CHAMBERS, and although she was *actually brought* before *him* whilst he was sitting at *Guildhall*, on

Wednesday last; yet the father desiring to have an opportunity to take the advice of counsel in settling the return; and the young lady declaring publicly, "she had no objection to continue with her father, "who had always used her with great tenderness, "and much better than she deserved;" his lordship judged it proper to *adjourn* it, and direct her to be brought *into court* the first day of term; the rather too, that she might have a chance of being better advised: for, if she had been then taken from her father, it was plain she would have pursued her improvident design; and *Mervin* appeared at *Guildhall*, ready to have carried her off. She was *now brought into* COURT by *virtue of the* SAME *writ*, which was returnable *before his lordship, at his chambers immediate*.

1758. REX v CLARKE.

Lord MANSFIELD now only asked her, "whether she "desired to continue with her father, or to go elsewhere." She answered, "To *continue* with her father."

Upon which, the court told her, she was at liberty to go. Which she accordingly did. [Strange, 982.]

Then Mr. *Norton* moved that *Mervin's affidavit* might be FILED, (together with the return of the writ;) as Mr. *Clarke* was determined to prosecute him for *perjury*.

The court ordered it to be so; and recommended the prosecution very strongly to Mr. *Clarke*.

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Saturday, 27th May, 1758.

Verdict in crim. con. not to be set aside for excessive damages.

[S. C. Law of Damn. 217. See also 4 Doug. 653.] 6 Mod. 244. Rambert v Caulfield

WILFORD *versus* BERKELEY.

MR. *Morton*, on behalf of the defendant, moved for a *new trial*, for EXCESSIVENESS *of damages*. It was an action for CRIMINAL CONVERSATION with the plaintiff's wife: and the jury (a special one) had given 500*l.* damages. The defendant was a clerk in the exchequer, during pleasure, at a salary of 50*l.* a year, only: which was his *whole subsistence*.

* Mr. Just. Foster was absent.

THE COURT were, all * three, clear and unanimous, that although there was no doubt of the power of the court to exercise a proper discretion in setting aside verdicts for excessiveness of damages, *in cases where* the quantum of the damage really suffered by the plaintiff could be *apparent*, or they were of such a nature that the court could *properly judge of the degree* of the injury, and could *see manifestly* that the jury had been outrageous in giving such damages as greatly exceeded the injury; yet the case was very different, where it depended *upon circumstances which* are PROPER and NECESSARY *for the cognizance of the jury*, and were fit to be submitted to their decision and estimation. And they held the case of criminal conversation with another man's wife to be of

1758. WILFORD v. BERKELEY.

this latter kind. For, the injury suffered by the husband, and the estimate of the damages to be assessed, must, in their nature, depend entirely upon CIRCUMSTANCES, which it was strictly and properly the province of the jury to judge of: and in the present case, the court could not say that 500*l.* was too much; or that 50*l.* would have been too little.

Note—The case of *Chem* v. *Brigg*, *M.* 6 *G.* 1. *B. R.* before Ld. Ch. *J. Pratt*, was exactly similar to this; and the very same sum of 500*l.* was given: and the like motion was rejected then, upon the same principles as the court have now rejected the present case.

MOTION DENIED.

Saturday, 3d June, 1758.

REX *versus* LITTLE.

In the Crown Paper.

See 4 East 346. 29 Geo 3 ch 26 50 G 3 c 41

Single act of selling does not constitute a man a hawker as that he ought to take out a licence. [See 1 Durn. 251.]

THIS was a *conviction*, returned to a *certiorari* directed to *William Bailye*, esq. a justice of peace for the city and county of *Litchfield*, for offering to sell goods, &c. as a *hawker and pedlar*, without *licence*, contrary to the statute in that case made and provided.

It was dated 24*th October*, 31 *G.* 2. and set forth, that one *Thomas Preston*, gentleman, came before the said justice (*William Bailye*, esq.) and gave him information, that one *Thomas Little* (in the writ named) after the 24th of *June* 1698: that is to say upon the said 24th day of *October* 1757, in the parish of St. *Mary* in the said city and county of the said city of *Litchfield*, was *found offering to sale silk handkerchiefs*, AND *trading* AS A *hawker, pedlar or petty chapman*; AND *that the said Thomas Little* DID *then and there* OFFER *to sell a parcel of silk handkerchiefs*; and that he the said *Thomas Little did* NOT, although required so to do, PRODUCE *any licence*, as the law in that case made and provided directs, to qualify him for his *said trading*: and the said *Thomas Preston* then and there prayed that he the said *Thomas Little* might be thereof convicted according to the form of the statute in such case made and provided. Whereupon, the said *Thomas Little* being brought before me, and being then and there present, and having heard the said information read, and being charged thereupon, he the said *Thomas Little* is then and there coram me the said *William Bailye*, "if he hath any thing to "say, or can say any thing, why he the said *Thomas Lit-* "*tle* should not be convicted of the said *offence so* "*charged upon him in form aforesaid*, according to the "form of the statute in such case made and provided." Whereupon the said *Thomas Little* voluntarily and freely and voluntarily CONFESS, before me the said *William*

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Bailye the justice aforesaid, " that he the said *Thomas* " *Little* DID *offer to sell silk handkerchiefs to the said* " *Thomas Preston*, IN SUCH MANNER *as is mentioned in* " *the aforesaid information*;" and " *that he hath* NO *licence* " for selling thereof." And the said *Thomas Little* is now here required by me the said *William Bailye* the justice aforesaid, *to* PRODUCE *a licence* granted to him to impower or qualify him *to travel or trade*, pursuant to the statute in that behalf made and provided. And he the said *Thomas Little* doth NOT *produce* before me any *such licence* or *any licence* granted to him in *that* behalf. And the said *Thomas Little* doth not pretend or alledge that he is the real worker or maker of the said goods, or the child, apprentice, agent, or servant of or to any such worker or maker; *nor doth alledge any other matter* in his defence.

Whereupon, and upon due and full consideration by me had, of and upon the said matters and premises, I do adjudge that the said *Tho. Little* is *a hawker*, within the true intent and meaning of the statute in such case made and provided: and it manifestly appeareth to me the said justice " that the said *Tho. Little is* GUILTY *of* " *the* OFFENCE *in the said information above laid to his* " *charge, in manner and form* as by the said information [611] " is above alledged;"

Therefore it is considered and adjudged by me the said justice that the said *Tho. Little* be, and he is convicted by ME OF THE SAID PREMISES *in the said information specified* above laid to his charge, according to the form of the statute in that case made and provided; and that the said *Tho. Little* forfeit the sum of 12*l. for his said offence*; to be levied and paid according to the form of the statute in that case made and provided. In Witness, *&c.*

William Bailye (L. S.)

V. 8, 9 *W.* 3. *c.* 25. § 1, 2, 3. and 9, 10 *W.* 3. *c.* 27. § 1, 2, 3. and 12 *W.* 3. *c.* 11. *V.* also 3, 4 *Ann. c.* 4. § 1, 4. for continuing these duties: which refers to the description in the former acts. 29 Geo. 3 ch 26

Mr. *Yates*, on behalf of the defendant, took two exceptions—

1st. That the defendant is not brought within the description of the acts, as *going from town to town*, *&c.* and *travelling*, *&c.* but he is only *generally* described to be a person that *traded* AS *a hawker and pedlar*, and offered to sell a parcel of silk handkerchiefs to the informer.

2d Exception. That there is no evidence at all of his guilt. For, it is a conviction upon a confession, and the

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confession *extends no further* than barely to the simple fact of offering to sell silk handkerchiefs to the said *T. Preston* in *such manner* as is charged upon him: but that charge is an *insufficient* one.

First, he cited 1 *Strange* 497, 498. *Rex* v. *Sparling*. A conviction for profane cursing and swearing was held bad, for not specifying the oaths and curses: for, the *court*, *not the witness*, were to judge of their being profane. So here, the *court*, not the witness, are to be the judges whether he was a hawker, pedlar or petty chapman, within the description of the acts of parliament.

So in the case of *Colebourne* v. *Stockdale* there cited and reported in 1 *Strange* 493; civil action of debt on bond: and plea "that part of the money was won by "gaming, contrary to the statute;"—it was adjudged that the *game played at*, ought to be mentioned in the plea: for, it is *matter of law*, and *not* barely evidence. So, in convictions for killing game, not being qualified, the want of the due qualifications must be *negatively* specified. And he cited the case of *Rex* v. *Chapman*, 30th *April* 1755; a conviction on 43 *Eliz. c. 7.* for robbing an orchard; "the said robbing *not being* felony, by the laws [612] "of this realm:" this was holden not to be a sufficient charge for the court to judge upon. *Rex* v. *Burnaby*, 2 *Ld. Raym.* 900, 901. was a conviction on the same act of parliament of 43 *Eliz. c. 7.* for cutting down trees without mentioning the number: and it was holden insufficient; and laid down as a rule, "that convictions "ought to be *certain* and are always taken *strictly*."

Second exception. All the evidence to support this conviction is the confession of the party: and that is only "that he did offer to sell silk handkerchiefs to the said "*Thomas Preston in the manner charged* upon him in "the information." But it does not appear by the preceding charge, "that he was a hawker, pedlar, or petty "chapman," such *as is described* by the acts of parliament: and if not, he cannot be liable to this penalty.

Mr. *Luke Robinson* for the conviction.

This question depends, and the conviction is founded, upon the following acts of parliament; 8, 9 *W. 3. c. 25.* 9, 10 *W. 3. c. 27* (which is in the very same words, and is now in force,) and 3, 4 *Ann. c. 4. § 2. pa. 116.*

And 1st. The defendant is sufficiently brought *within the description* of these acts. The selling silk handkerchiefs is only *one overt act* of his trading, which is specified by the conviction. And the *justice* of peace is to judge whether the person is or is not a hawker or pedlar or petty chapman. And he has adjudged him to be a hawker *within* the true intent and meaning of the act of parliament.

2dly. The defendant has confessed the charge, *as laid*; and that he had no licence, *&c.* If he had any defence, he ought to have made it, before the justices. 1758. REX v. LITTLE.

And these convictions upon the *revenue* laws ought *not* to be taken *so strictly* as others. For which, he cited what is laid down in 1 *Ld. Raym.* 581. *Rex* v. *Chandler*, *Per Holt* Ch. J. "that the justices are not confined to "legal forms, in these cases: it is enough to pursue the "*intent* of the act."

And the court will *presume* the conviction to be right, unless the contrary appears upon the face of it. And so is 1 *Str.* 608. *Rex* v. *Theed*: where the court *presumed* that the officer came *by day*, and not by night; because no such thing as coming in the night was apparent upon the face of the conviction.

He said that Mr. *Yates's* cases are not *ad idem.* [613] In game-convictions it is not necessary to set out negatively, "That he had *not* such and such qualities;" nor is it necessary to set out the particular oaths and curses, in convictions for profane cursing and swearing; nor in *Chapman's* case, was it necessary to set out that it was not felony by law.

Mr. *Yates*, in reply.

1st. Urged the necessity and reasonableness of specifying the act of trading, &c. in the conviction. But this man was *not*, in fact, *within the definition of going from town to town, and travelling*; for he resided at a *fixed place*.

In game-convictions, it *is* necessary to *specify negatively* and *particularly*, "that the defendant was not so and "so qualified."

Mr. Just. Denison—That has been so settled.

Mr. *Yates* proceeded in his reply.

2dly. The confession is only "that he did offer to "sell handkerchiefs, &c." *Not* "that he TRADED *as a* "*hawker, pedlar or petty chapman.*"

Lord Mansfield. The act of 3, 4 *Ann.* refers to the descriptions in those of *W.* 3.

A SINGLE *act* of selling a parcel of silk handkerchiefs *to a particular person*, is not a proof that he was SUCH a hawker, pedlar or petty chapman, as ought to take out a licence by virtue of these acts of parliament.

Now it is certainly of the ESSENCE *of the crime* "of "NOT PRODUCING a licence," that he must be SUCH a person as OUGHT *to take out* a licence.

And the *confession* is only of the *fact*, "that he sold "the handkerchiefs to *Thomas Preston*," not "that he "TRADED as a hawker, &c."

Convictions ought to be taken *strictly*: and it is reasonable that they should be so; *because* they must be

[a V. post. 2279. Rex v. Uriah Corden, Hil. 1769. accord. 4 Burr. 2231.]

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taken to be true, against the defendant; and therefore ought to be construed with *strictness*. I do not say that it is necessary to *define exactly, what* a hawker, pedlar, or petty chapman *is*; but it is necessary to allege and shew that he sold the goods, or traded, *as one*.

Mr. Just. DENISON concurred, for the same reasons; and thought the *material* averment to be here *wanting*; it not being averred "that he was *such* a hawker, pedlar, or petty chapman, as ought to take out a licence."

And he mentioned a case of *Rex* v. *Gardiner, Tr.* 1738, 11, 12 *G.* 2. *B. R.* Where the justice convicted a man of keeping a gun, BEING an instrument to destroy game. And so it certainly was: but, in fact, the man had never used it *as* such; but only to keep pigeons off from his grounds. And the conviction was quashed.

Mr. Just. WILMOT concurred clearly, for the same reasons. For, certainly a man may sell goods *as* a hawker, pedlar, or petty chapman, without being *such* a person as is *obliged* to take out *a licence*. And *if* he is not obliged to *take out* a licence, most undoubtedly he ought not to be convicted in a penalty for *not* PRODUCING one.

Now, here, it appears, that the justice has convicted the man of an offence, of which he has not proved him to be guilty.

*Per Cur.** unanimously,
CONVICTION QUASHED.

* Mr. Justice Foster was not present.

Tuesday, 6th June 1751.

DOE, on the Demise of HITCHINS and another, *versus* —— LEWIS, Esq.

Ejectment brought by a tenant against his landlord near twenty years after the latter had obtained judgment against the tenant in a former ejectment, and executed a writ of possession, the landlord is not obliged to shew that he obtained the judgment on the usual affidavit of the service of the declaration.

THIS was a special case from the assizes, upon an ejectment brought by a tenant against his landlord, who had formerly obtained a judgment by default, in a former ejectment brought by him against this same tenant.

The special case stated for the opinion of the court was as follows.

Thomas Lewis, being seised in fee, demised to *John Hitchins* (in consideration of a fine, &c. of 49l. 10s. 6d. to hold for 99 years, if three persons should so long live: at 11l. 5s. payable at *Michaelmas* yearly: subject to a proviso that if the rent should be in arrear, &c. for the space of one month, being lawfully demanded:

and no sufficient distress upon the premises, &c. &c. that then it should be lawful to the said *Thomas Lewis* his heirs and assigns, to re-enter, &c.

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That *John Hitchins*, the lessee, entered and was possessed, &c. and then died: having first made his last will and testament, &c. whereby he devised the said term to his son *Edward Hitchins* (the lessor of the plaintiff,) and made his wife executrix. The testator's wife, his executrix, duly proved the said will, and duly assented to the legacy: and the said devisee, *Edward Hitchins*, the lessor of the plaintiff, entered into the premises, and became possessed of the said term, being then and still unexpired; and continued in possession, till the 15th of *April* 1737. [*615]

Thomas Lewis, the original lessor, by his will, &c. devised to several trustees, &c. in trust for *Morgan Lewis*, an infant, &c. The said *Thomas Lewis* died seised, &c. and the said devisees in trust became seised, &c. And there being three years *rent due and in arrear* from the said *Edward Hitchins* for and upon the premises, a declaration in ejectment was *served upon the said Edward Hitchins*, UNDER *and* BY VIRTUE *of* the statute of 4 *G.* 2. *c.* 28. (*a*) for the said premises, on the demise of the trustees and devisees aforesaid; and judgment was obtained thereupon, *by default*, against the CASUAL *ejector*: and a writ of possession issued thereupon: and possession was delivered according to the said writ, to the said trustees, on the said 15th of *April* 1737: which said trustees have been in possession of the premises *ever since*. And the said *Edward Hitchins* (the now lessor of the plaintiff) has not since paid nor

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(*a*) Quæry. How does it appear that it might not be brought under the clause for re-entry in the lease independent of the act? for it seems it might, if there was a lawful demand of the rent; for then if the rent was one month in arrear, and there was no sufficient distress, and both these last facts appeared at the trial, there was no need of the act to support the ejectment, consequently there was no ground for presuming the ejectment to be brought pursuant to the act.

Quæry also, whether that part of the act which dispenses with the necessity of a demand, could operate in this case contrary to the stipulation of the parties? for every one may waive the benefit of a law introduced for him; and therefore the landlord seems to have waived the benefit of that part of the act which hath dispensed with a demand.

1758. tendered the rent in arrear or any part thereof, nor the costs; nor filed any bill for relief in equity.

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On this trial of the *second* ejectment now brought by *Edward Hitchins* against the said *Lewis*, an affidavit was produced, "that half a year's rent was due before the *first* declaration in ejectment was served upon the said *Edward Hitchins*; and that no sufficient distress was to be found on the demised premises, countervailing the arrears then due: and that the lessors in that first ejectment had power to re-enter."

On this trial of the said second ejectment, (*viz.* the ejectment brought by the said *Edward Hitchins*,) a verdict was found for the plaintiff, but subject to the opinion of this court, "whether or no the plaintiff therein ought to recover."

This general question "whether *Edward Hitchins* "the lessor of the plaintiff in the present ejectment "ought to recover, or not;" depended upon the following Question, *viz.* "whether it was necessary for the de-

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"fendant Mr. *Lewis* to produce an affidavit, that "half a year's rent was due, &c. *ut supra*; and that the "lessors in that former ejectment had power to re-"enter."

Mr. *Nares*, who argued for the plaintiff, made two questions: *viz.*

1st. How far this case is within the second section of 4 *G.* 2. *c.* 28. "for the more effectual preventing frauds "committed by tenants, and for the more easy recovery of rents, &c."

2d Question, if it is within it; then how far the plaintiff has proved his title under that statute, upon the particular circumstances of this case.

The first point may be rendered the more clear, by considering how it stood before the statute, and how since.

1st. *Before* that statute, the plaintiff in ejectment must have proved "that there was rent in arrear;" and "that there was no sufficient distress to be found "upon the premises:" (*a*) and thirdly, "that he had "made a lawful demand of the rent in arrear."

This condition here annexed to the lease in the present case, is in derogation of the party's own fault, and tends to defeat the estate: and therefore Mr. *Lewis*

(*a*) This is a mistake, for it was not before the statute necessary to prove it, unless it was made part of the condition of re-entry as it was in this case; and therefore what is here said is to be understood as spoken in relation to this case only.

would have been kept strictly to prove all these previous facts. And if it had been a judgment against the *casual* ejector: the judgment would have been no bar against the *real* tenant, in an action for the *mesne profits*. Indeed if the judgment had been obtained against the *real* tenant, or against the *owner* of the estate, the person who obtained such a judgment needed not prove any thing over again, in an action for the mesne profits. And so the Ld. Ch. J. at *nisi prius* at *Guildhall*, in 2 *Strange*, 960. *Jefferies* v. *Dyson*,* expressly lays down this distinction. And here the *real* tenant did not enter into the rule: but it is *res inter* ALIOS *acta*.

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* See this case stated at large, by Mr. Justice *Denison*, post. 619.

This judgment in ejectment had therefore (before the statute) no relation to the *real* tenant: and consequently, Mr. *Lewis* must have *shewn his title* to re-enter.

Then, to consider the case as *subsequent* to the statute, here is *not* an acquiescence of twenty years. And what seeming acquiescence there was, arose from the poverty of the party.

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2dly, The next point in question is, "Whether, according to the state and circumstances of this case, it "can be considered as a case *within* the statute; and "that the plaintiff has proved a title *under* the statute."

The court will not presume any thing in support of a judgment obtained by confession or default, or in any other way than upon a *trial of the merits*. *Skinner*, 586. *Sanders's* case is a proof of this: where *Holt*, Ch. J. makes the like distinction.

An inconvenience would arise from too great a latitude in construing this statute. As in case of *fraud and connivance*, in recovering the judgment against the casual ejector: it would be very hard, if, in *such* case, the real tenant could not bring an ejectment.

Mr. Nares was now departing from the facts stated in the case; in which he said it was omitted to be inserted, "that there was sufficient distress."

LORD MANSFIELD.—We must judge upon the case AS *stated*; if it is mistated, you must apply to amend it. However, I do not see that this would be very material.

He observed that it was also stated, only, "That no "affidavit was PRODUCED:" not, "that there was "no affidavit *at all*." Also, that presumptions are not dependant upon certain fixed rules; but must be guided by circumstances: and such circumstances are proper for the consideration of a jury.

Here was an acquiescence of twenty years within a few months. And it is stated to be a case, "*within* the act of parliament;" which is a material

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part of the case. The ejectment is stated to have been served "*under and by virtue* of this act.")

Mr. *Morton* was beginning to speak on behalf of the defendant; but

Lord MANSFIELD told him that the case was so clear on his side of the question, that it was not necessary for him, to give himself any trouble.

Then his lordship repeated the case exactly as it was stated; (which see *ante* p. 614, 615.)

[618] The *general* question, "whether the plaintiff, in his "last ejectment ought to recover," depends upon this particular question, *viz.* "whether the first ejectment "was *regularly* brought and proceeded upon by the trus- "tees under *Thomas Lewis's* will, pursuant to the direc- "tions specified in the act of 4 G. 2. c. 28. § 2". This last ejectment is brought near twenty years after the former.

Now, besides the general *presumption*, "that the pro- "ceedings were regular, and *omnia solemniter acta, nisi*- "something had appeared to the contrary;" and the rule, "That *stabitur præsumptioni, donec probatur in contra- "rium;*" here is, in this case, a NEGATIVE *fact* stated: which fact is "that the proceeding under the first "ejectment *was* UNDER *and* BY VIRTUE *of this act* of "parliament."

Indeed *Edward Hitchins was in possession*, as appears by the case stated, till the 15th *April*, 1737, the time when possession was delivered (by virtue of the writ of possession) to the trustees. So that, being the tenant in possession, he must have been served with the declaration in ejectment, whether it was a common law proceeding, or a proceeding upon this act of 24 G. 2.

But the case itself states it to have been a proceeding UNDER *this act:* and if it was so, the judgment *must have been founded* upon such an affidavit as that act expressly directs and requires, *viz.* an affidavit "that half a year's "rent was due, before the declaration in ejectment was "served; and that no sufficient distress was be to found "upon the demised premises, countervailing the arrears "then due; and that the lessors in that ejectment had "power to re-enter."

And the case does not state, affirmatively, "that the "judgment was IRregular; or, expressly and implicitly, "That there was no affidavit at all;" or indeed any thing whatsoever, *to* TAKE OFF *a presumption* which is immensely strong the other way. For, *Edward Hitchins* acquiesced under this judgment, execution and possession, for *almost twenty years*, and never tendered the rent and arrears, together with costs (pursuant to the act), nor filed any bill for relief in equity, within

[Qu. If presumption ought not by law to be found by the jury?]

six months after the execution executed, nor indeed at any subsequent time. So that he is barred by the statute, and foreclosed from all relief or remedy in law or equity, other than by writ of error;) and the landlord is by virtue of the act of parliament to hold the premises discharged from the lease; upon supposition that his former proceedings were regular.

The affidavit may be *lost* after this length of time; or the landlord may be unable to come at it; although there were, in fact, a proper one made, to support his judgment and execution: and it would be too hard to put the labouring oar upon the landlord, of PROVING *the regularity* of all the circumstances upon which his judgment and execution were founded.

As to what has been suggested (*v. ante*, 617,) "That "there may be *fraud, connivance or collusion* with the "under-tenant, in the manner of recovering judgment "against the casual ejector;" it is merely imaginary, in the *present* case. Besides, *fraud will infect every thing*: And upon the principles of *Fermor's* case, 3 *Co.* 77, it would not stand.

There can be no suspicion of any such thing here. For, this *Edward Hitchins*, the present lessor of the plaintiff, the person who has thus long acquiesced under this judgment and execution, and never attempted to be relieved from it either at law or in equity, is himself the VERY MAN *upon whom* the declaration in the first ejectment was served.

The true end and professed *intention of this act* of parliament was to *take off* from the landlord the inconvenience of his continuing always liable to an uncertainty of possession, (from its remaining in the power of the tenant to offer him a compensation at *any* time, in order to found an application for relief in equity,) and to *limit and confine* the tenant to six calendar months after execution executed, for his doing this; or else, that the landlord should from thenceforth hold the demised premises discharged from the lease.

His lordship was therefore clearly of opinion "that, in "this case, the plaintiff ought *not* to recover."

Mr. Just. DENISON concurred in opinion "that the "plaintiff had *no* title to recover."

The former ejectment brought by the landlord against *Edward Hitchins* the tenant, who is now become lessor of the plaintiff in the present ejectment, is stated to have been served upon *Hitchins* "*under and by virtue* "*of* this act of 4 *G.* 2. c. 28." Now this act (*v.* § 2.) expressly recites "that great inconveniences frequently "happen to landlords, in cases of re-entry for non-pay-"ment of rent, from the many niceties attending re-

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DOE dem.
HITCHINS
et al.
v.
LEWIS.

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1758.
DOE dem. HITCHINS et al. v. LEWIS.
[2 MSS. 211. 6 MSS. 89.]

" entries at *common* law; and that expence and delay " often happen from injunctions out of equity, after judg- " ment in ejectment:" and the * act is professedly made an order to prevent these inconveniences. It prescribes a method of proceeding, in *two* cases or manners of recovering upon the proceeding in ejectment which it directs; *viz.* one, in case of judgment against the *casual* ejector; the other in case of its coming to a *trial*. In the *former* case of judgment against the *casual* ejector, (and so also upon nonsuit on not confessing lease, entry and ouster,) it directs " that it shall be *made to appear* " to the court where the suit is depending, *by* AFFIDA- " VIT, that half a year's rent was due before the declara- " tion was served; and that no sufficient distress was " to be made upon the premises, countervailing the " arrears then due; and that the lessor or lessors in eject- " ment had power to re-enter:" in the *latter* case, (of its coming to a trial,) the same thing must be *proved upon the trial*.

The present question is upon a judgment of the *former* kind, *viz.* against the *casual* ejector, by default; and upon an ejectment brought UNDER *and* BY VIRTUE *of this act*. And we must *take and presume it to be a right, regular, and good* one; as nothing appears to the contrary.

This case is not at all like the cited case of *Jefferies* v. *Dyson*, 2 *Strange* 900. Where, " in an action *for mesne profits*, the plaintiff offered a recovery in ejectment " against the *casual* ejector; upon which no writ of pos- " session had issued: and when the defendant would " have gone into the *title*, the plaintiff insisted that he was " *estopped* from doing so, by the judgment against the *casual* ejector." But the Ch. Justice held " that though " it would have been an estoppel, if the then defendant " had been made a defendant in the ejectment, and the " verdict *against* HIM; yet that *that* judgment to which he " was no *party* could be no estoppel to *him*:" and therefore the Ch. Just. admitted the defendant to controvert the title. And that distinction is right, *there*: but it is not like the present case.

I am of opinion, the plaintiff here has no title.

Mr. Just. FOSTER was of the same opinion.

[He might have proved it by producing and proving a copy of it.]

The judgment is certainly good, *till* set aside. The present objection, " of the not producing such an affida- " vit," is grounded upon the act of 4 *G.* 2. *c.* 29. And that act *does require* such an affidavit: and *for that very reason*, we must *presume* " that there was such a one made; " and that the judgment was founded upon it." But the *plaintiff* in that ejectment has it not: it remains in *Mr. Cooper's* office.

Clearly, the plaintiff has no title.

Mr. Just. WILLES also concurred.

He said it would be unreasonable that the now plaintiff should recover from the landlord, after almost twenty years acquiescence; and after the landlord may have improved the estate.

He also agreed to the case of *Jefferies v. Dyson*; but denied it to hold in *this* case.

1758. MOSS dem. WITHERS et al; v. LEWIS.

This act was made to compel lessees to bring their ejectment, or their bill in equity, WITHIN A LIMITED *time*. And this is stated to be a proceeding "*under and* "*by virtue of* that act." Therefore there *must have been* such an affidavit, though the present defendant did not produce it.

Per Cur. unanimously,
JUDGMENT for the DEFENDANT.

REX *versus* INHABITANTS OF PAINSWICK.

Wednesday, 7th June, 1758.

See this CASE *abridged*, in the TABLE; and *at large*, in the quarto-edition of my SETTLEMENT-CASES, No. 148. pa. 465.

COTTINGHAM *versus* KING.

Friday, 9th June, 1758.

Pasch. 31 *G.* 2. *Rot'lo.* 179.

Ejectment. in Ireland affirmed upon a writ of error here.

THIS was a writ of error brought upon a judgment of the court of King's Bench in *Ireland*; who had affirmed a judgment in ejectment given for the plaintiff by the court of Common Pleas there, after a general verdict for the plaintiff.

In this ejectment, the parcels are described to be (amongst others therein mentioned and included) 5000 messuages, 5000 cottages, 10,000 acres of land, &c. in all those the lordships, manors, and late dissolved abbey or monastery of *Boyle* and *Inismacsaint*; and QUARTER of land of *Tallagh*, with the TOWN and TENEMENT of *Boyle*, and *fairs* and *markets* thereunto belonging, in the COUNTY *of Roscommon*; and all those the lands and hereditaments called *Grangemore*, (with many other parcels, described by the name of QUARTERS, some containing so many, others so many acres) and *part of Sumternas*, &c. a large *deer-park*, &c. and the parsonage of *Longford*, &c. in the COUNTY *of Roscommon*; and a small park or field, in the *possession of*, &c.

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On this ejectment, there had been (as in above mentioned) a general verdict for the lessee of the plaintiff: and judgment for him in *C. B.* in *Ireland*. And afterwards, a writ of error was brought upon it, in *B. R.* in *Ireland*: and general errors were assigned. The court of *B. R.* in *Ireland* affirmed the judgment of the court of

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C. B. there. And upon this judgment of affirmance, the present writ of error was brought.

Many exceptions had been taken in *Ireland*, on the part of the plaintiff in error, upon the writ of error brought in the King's Bench there. But

Mr. *Ashurst*, who argued for the plaintiff in error here, said he would *now* only take exception to the UNCERTAINTY *of the description* of the premises specified in the declaration; whereas, in ejectment there ought to be a *sufficient certainty*; that the sheriff may know how to deliver possession. 1 *Brownlow* 142. *Challener* v. *Thomas*: "an *ejectment* will not lie, De *Aquæ Cursu*." 1 *Ld. Raym.* 277. *Shalmer* v. *Pulteney*, seems to concede that an ejectment will not lie "de *quodam ædificio*;" for the uncertainty of the term *ædificium*. In *Style* 30, it was doubted whether an ejectment lies "de uno *croste*." *Dyer* 84. *b.* in assize "de *quadam portione* decimarum, "&c." It was objected that the plaint was uncertain.

This is an entire judgment, and *entire damages*: and it is particularly liable to exception, in the following instances; *viz.*

1st Exception. 1st. *No vill* at all is mentioned throughout the whole declaration: the lands, &c. are only described to lie (generally) "in the *county* of *Roscommon*:" this defect runs through the whole declaration.—*Cro. Eliz.* 822. *Gray* v. *Chapman*, is in point; and by the whole court: "the declaration in ejectment was holden ill, for not "alledging in what vill the tenements were." *Heb.* 89. *Rich* v. *Shere*, is most expressly in point: and the judgment was, for this very cause, reversed in *Cam. Scacc.* 2 *Barnes*, 150. *Goodright, on the demise of Griffin* v. *Fawson*: the judgment was arrested for the same uncertainty, [625] "in which of two parishes the messuage stood."

2d Exception. 2d. The words are—"with the town and *tenement* of "*Boyle* and *fairs* and *markets* thereunto belonging." Now ejectment will not lie for a *town*; nor for a *tenement* generally. 1 *Sid.* 295. *Birbury* v. *Yeomans*: ejectment "*de 7 messuagiis sive tenementis*," was holden ill, after a general verdict. *Cro. Eliz.* 186. *Wood* v. *Payne* was the same determination, in an ejectment "*de uno messuagio*, "*sive tenemento*." 1 *Lord Raym.* 191. *Copleston* v. *Piner* the two *Powells* justices said, and *Treby* Ch. J. agreed that ejectment "*de uno tenemento*" is ill, for the uncertainty. 2 *Strange* 834. *Goodtitle* v. *Walton*:—after verdict for the plaintiff in ejectment, judgment was arrested; and it was holden that an ejectment "*de uno tenemento*" will not lie. 1 *Barnes* 117. *Makepeace* v. *Hopwood*: judgment in ejectment was arrested for the uncertainty of the words "one messuage *or tenement*."

3d Exception. 3d. "*A quarter*" is another term used in the declara-

tion: which term is totally *uncertain*; and even appears to consist of different numbers of acres; some, more; some, less. *Yelv.* 117. St. *John* v. *Commyn*: ejectment "*de castro villa et terris de Kilbrough in com' &c.*" was holden insufficient for want of expressing the number and certainty of acres. And that case is like the present; which is "the lands called, &c.:" but they are described by the name of "one *quarter, &c.*;" which term does not convey an idea of any determinate number of acres. 1758. COTTINGHAM v. KING. [1 East, 442.]

4th. It is of "*part* of *S. M. & D.*:" which is absolutely uncertain and vague. 4th Exception.

5th. And of "*a large deer-park in the county of Roscommon*:" which is vastly too uncertain and indeterminate. 5th Exception.

6th. "Of a *small park or field*, in the possession of, &c. *not specifying* WHERE. 11 Co. 55. *Edward Savel's* case: ejectment of "a close called *Dove-cote close*, containing "three acres." The judgment was arrested, for not specifying what nature and quality the three acres were of. 1 *Shower* 338. *Knight* v. *Simmes*: ejectment of "five "closes of pastures and meadow, called *Faldowne*, containing ten acres:" But did not distinguish how many of one and how many of the other. Judgment was arrested, after a verdict for the plaintiff; for want of sufficient certainty. 1 *Salk.* 254. S. C. And *Holt* Ch. J. is there said to have affirmed *Savel's* case for law. 6th Exception.

7th. The *quantity* and *quality* of the lands is not sufficiently shewn. 7th Exception.

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Therefore for these exceptions, he prayed to reverse the judgment of the court of King's Bench in *Ireland*.

Mr. *Williams*, who argued for Sir *Edward King*, the defendant in error, said that the merits of the title to this estate (an estate of 8000*l. per ann.*) came in question in *C. B.* in *Ireland*; where Lord *Kingsborough's* pretended will was found to be a forgery: and the court of King's Bench there affirmed the judgment of *C. B.* there. And being *after a verdict* upon the *merits*, the court here will *presume* what they can in *favour* of the judgment.

And as to the exceptions—

1st. "5000 messuages, 5000 cottages, &c. &c. in the "*lordships and manors* of, &c. late belonging to the "dissolved abbey or monastery of, &c. in the county of "*R.*" is sufficient without naming any vill. For a *manor* is as notorious in its boundaries, as a parish: so also is a lordship.

The parish of *A.* or *B.* has been holden sufficient. For proof of which, he cited a case (which does not perhaps quite prove it); *viz.* 5 *Leo.* 334. *Goodfellow* v. *Blackman*; which was an ejectment of lands in *K.* & *G.* whereas the whole lay in *K.*

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And, after a verdict, this manor shall be intended to be a vill. ? Parish" shall be intended to be a vill, primâ facie, 2 Salkeld 501. Rudd v. Moreton.—It is said to have been so adjudged in the case of Wilson v. Lane, in M. 6 W. 3.

And if a place be named generally, that place shall be taken to be and intended a vill.—This was adjudged (as is also said in 2 Salk. 501.) in the case of Finchliston v. Ebden, M. 10 W. 3. B. R.

2dly, As to ejectment not lying for a town, or for a tenement.

After a verdict, the court will intend the lands to be parcel of the township, and they shall pass with it. And to support this position, he cited Cro. Car. 168. Genning v. Lake: where the court conceived that the land might be said to be appendant to the house. 3 Keble 44. Smith v. Martyn; where a garden was allowed to be demisable, as parcel of a messuage. Doe, ex dim' Savile v. Benton et al' determined in the House of Lords (on a judgment in the Exchequer) 11 March 1735: (which he cited from the respondent's case, upon the 4th exception,) "that "the advowson and common should be intended to have "been appendant to the manor." So here, the lands

[697] may pass as appendant or belonging to the township; though not alledged to be part of it. So, "communia "pasturæ" generally, shall, after verdict, be intended to be such common, for which an ejectment will lie; as common appendant or appurtenant. 1 Strange 54. Newman v. Holdmyfast is expressly so determined. And an ejectment will lie for a town; and also for a tenement, where it is reduced to a certainty.

Most of Mr. Ashhurst's cases are in the disjunctive: "messuages or tenements." However, here the word "vocato" renders it certain enough. 1 Lev. 65. Lady Dacre's case: Twysden said that though an ejectment will not lie of a croft; yet it will lie of a croft called "Black Acre." 1 Siderf. 295. Burbury v. Yeomans; he repeats the same assertion. And in both places, he gives the reason: viz. "that this renders it certain." And here, "it is the town and tenement of Boyle;" which appellation of it by its name, ascertains it sufficiently. And this is agreeable to what is said in 3 Mod. 238. Hetum v. Coniers: "that the adding VOCAT. the Black Swan, to "the words messuagium sive tenementum, makes it certain "that the tenement intended is a house."

And the old rule about the sheriff's being necessarily to be informed so exactly upon the RECORD, "what he is "to deliver possession of," is now out of use, and is not to be regarded. For the plaintiff in ejectment is to take possession, at his peril, without calling for the sheriff. Savile 28. case 67. [illegible], cited

1758. CONNOR [illegible] v. KING.

baron, expressly declares this; and says "it was the opinion "of the chief justices in the Star-chamber." 1 Strange 695. Sullivane v. Seagrave: an ejectment "de [illegible] parte "[illegible]," was holden sufficient, upon the same principle. 2 Ld. Raym. 1470. Bindover v. Sindercombe: an ejectment of "part of a mote, parcella arad, parvella [illegible]," was holden good, upon error, after verdict. 2 Ld. Raym. 789. Camell v. Clavering: an ejectment was brought in the Exchequer, "de minutis decimis;" and, after verdict and motion in arrest of judgment, judgment was given for the plaintiff, by all the barons. 1 Salk. 255. Whittingham v. Andrews: ejectment "de mineris carbonum," (generally,) without shewing the number of mines, was holden good, in Durham, where the course was so, and of which the court took notice. And so the court will take notice of the kingdom where this ejectment was brought: and * eight of the judges there have determined this to be a sufficient description, in that country; and this court will give credit to them. 2 Keb. 745. † Jane v. Polyphen: the court conceived an ejectment brought in Ireland, of "twenty villis et terris," to be good. Cro. Car. 511. Mulcarry et al' v. Eyres et al'; an ejectment in Ireland, "of 100 acres of bogge, in villis et territoriis de D. S. & V." was holden good. 1 Strange 71. Ld. Kildare "v. Fisher. An ejectment of 100 acres of mountain," was held good in Ireland. And this last mentioned case was a solemn and unanimous judgment, after consulting the lord chancellor and judges of Ireland. [628]

* So he said, but they could not, in Ireland, be so many as eight. [It should be six.]

† This case was adjourned.

3dly, As to the term "quarter"—The case cited from * Yelv. 117. is not the determination of the court: nor was that the point before them. And "a quarter" is a known description in Ireland: every child knows them. That country was divided into quarters, when Ld. Strafford was lord lieutenant there.

* It is reported to be per curiam; and with a nota bene, too.

As to the 4th, 5th and 6th objections, his answer was, that they all belong to the township: and besides, they may be the names of the closes.

7thly, And as to the last objection—he insisted that that quantity and quality of the lands are sufficiently set forth: and then answered the cases cited on the other side. As to Savel's case—that case was doubted in Ld. Raymond's time; and has been since disallowed, or at least called in question. K. 2 Ld. Raym. 1472. Bindover v. Sindercombe. Comberb. 198, 199, Knight and Symms; Per Eyres Just.—The latter opinions are against Savel's case; though the chief justice indeed there says "that "an ejectment ought to be as certain as a præcipe quod "reddat."

Mr. Ashhurst, in reply—I know nothing of the merits of this case: I am only to argue upon the record.

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2d Exception. These premises cannot possibly be intended to lie within the *township* of *Boyle*; they are only described generally to be within the *county* of *Roscommon*. I say that an ejectment will *not* lie of the *town* and *tenement itself*: therefore, consequently, neither will it, of these premises *as belonging* thereto.

Possession must be delivered at the *peril* of the *sheriff*, *as well* as of the plaintiff. "*De parte domûs*" is much less uncertain, than an undefined part *of a great estate*. I agree that if the description be *known* in *Ireland* it is enough. But I say that *this* description is *every where* uncertain.

3d Exception. In *Yelv.* 117, the point for which it is cited, is taken † also into consideration, as well as the principal objection.

† Not directly and principally, indeed; but positively and explicitly.

LORD MANSFIELD—This is *after a trial and verdict* in *C. B.* in *Ireland*: and the objection is, the *uncertainty* of the claim or description of the premises in the declaration.

[629] In a *præcipe* in a real action, which is a *formed* writ, precision is requisite: because it was necessary to follow the form prescribed by the Register.

Whilst ejectments were compared to real actions, and arguments were drawn from analogy with them, they must be, of course, *fettered*; and this was so, till after the reign of King *James* the first. But of *later* times, an ejectment has been considered with more latitude; as a fictitious action to try titles with more ease and dispatch, and less expence.

Even in a *præcipe*, I do not know whether the sheriff could always be quite certain, *which* were the particular acres, &c. of which he was to deliver possession. But in this *fictitious* action, the plaintiff is to *shew* the sheriff; and is to take possession *at his peril*, of *only* what he has title to: if he takes more than he has recovered and shews title to, the court will, in a summary way, set it right. So that such a very exact description is not equally necessary in *this* action, as in a *præcipe*. [5 Burr. 2678.]

However, there are in this case, (as it is particularly circumstanced,) two things, which carry it much farther than the general case of ejectments, and are decisive: for it is *after verdict* * and it is *from Ireland*. The title has been *tried* by a *jury* of *Ireland*, where the lands lie; evidence has been given to them, upon which they have found for the plaintiff; and *two courts there* have given judgment for the plaintiff, without difficulty.

[*This is nothing, for the judge at nisi prius if the objection were taken would answer it is on the record.]

The denominations of land may be certain and known *there*; though unknown *here*: for words and names are arbitrary. Ejectments have been brought *there*, of *mountain*,

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of *bogg*; nay of mountain *in* a bogg: and a certificate has been given by judges of *Ireland*, that the term "*mountain*" does not necessarily include situation, but describes *quality*; that fines, recoveries, writs of dower, and settlements of it, are frequent there; and ejectments *usually* brought of it.

And *there*, it is frequent to describe the lands of great estates, even in their settlements, by "*Towns*:" I know this, of my own knowledge.

Ireland was planted and settled by degrees, both formerly and lately; and *towns* came, by degrees, to be known and certain descriptions: and so, "*quarters*" might be, after *Cromwell's* settlements there, and the division of it into quarters. "*town*" and "*tenement*," are here used as synonymous terms.

However, the jury of *that* country understood it; and the two courts of *that* country understood it, and have made no difficulty about it: and therefore I am sure I will not, *after* this, say "that it is not to be understood."

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Mr. Just. DENISON was of the same opinion "that the "judgment ought to be affirmed:" and he held the descriptions to be sufficient.

In a *præcipe quod reddat*, it was necessary to describe the lands formally, once: but it is *not* so, in an *ejectment*.

I take this present ejectment to contain, first, a general description, which takes in the whole: and afterwards, the estate demanded in it, is described particularly and in parcels, "*what*" it consists of." This was settled in the case that has been mentioned, *Doe ex dimiss. Savill* v. *Borlace*, *Tr.* 9 *G.* 2. *in Cam' Scacc*; (which I argued,) It was after a verdict; and was an ejectment for tithes of various kinds: and two things were there holden: 1st. That being after verdict, it was to be *intended* as brought of *such* tithes *only* for which an ejectment would lie; and 2dly, that there was no objection to a *bis petitum* in an ejectment. And so here, I take it that this manner of describing the premises is a *bis petitum*, a second description of the same thing.

[Qu. 32 Hen. 8. c. 7. by which it seems as if an ejectment will lie for all tithes, in lay hands.]

And as to the cases that have been urged in support of the objections—there has been a greater latitude of *late* years, than *formerly*: whatever strictness was used at first, it is certain that ejectments are *now* considered upon a more *liberal* foot. "*Town*" appears, by what has been said, to be a common and known description in *Ireland*. "*Mountain*" also appears to be a known description *there*; and fines, recoveries, writs of dower, ejectments and settlements use it as such. In the case of *Ld. Kildare* v. *Fisher*, the case of *Holbourn* v. *Babbington in Dom' Proc'* is said to have been reversed upon another point:

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and they gave credit, in that case of *Ld. Kildare* v. *Fisher*, to the certificate of the *Irish* chancellor and judges.

And "*quarter*" may be a term as well known in *Ireland* "as mountain" is: and in this case, I shall *intend* it to be so.

Mr. Just. FOSTER concurred, for the same reasons.

So also did Mr. Just. WILMOT. And he added that he never could understand that manner of reasoning, so often urged upon arguments of this sort, *viz.* "That the "description must necessarily be *so certain* that the sheriff [631] "may be able exactly to know, without any information "from the plaintiff, of *what* to give possession:" which is not true; for such precision is *not necessary* in an ejectment.

After verdict, this description must be *intended* to be sufficient.

Per Cur. unanimously,

JUDGMENT AFFIRMED.

Saturday, 10th June 1758.

Peers must yield obedience to writs of habeas corpus.

REX *versus* EARL FERRERS.

ON *Wednesday* 26th *January* 1757, Mr. *Norton* moved, *either* for an attachment against the earl, for not returning a *habeas corpus* already issued, and returnable *immediate*, commanding him to bring up the body of his countess (sister to Sir *William Meredith*;) *or* for a new *habeas corpus*, ACCOMPANIED *with an attachment*.

He said that the latter had been done in the case of *Rex* v. *Dr. Wright*, *M.* 5 *G.* 2. *B. R.* and that the reason of issuing the attachment at the same time with the *habeas corpus*, was for prevention of a delay, which might, in certain cases, render the remedy ineffectual.*

Lord MANSFIELD asked Mr. *Norton*, whether he knew any instance of an *attachment* ACCOMPANYING a writ. He said he understood an attachment going, for *not having* obeyed a writ: but did not know any instance of an attachment going out *together with* the writ.

Mr. *Norton* stated *Wright's* case, from a note taken by a gentleman who has now left the bar; † where *Lee*, then a puisne judge, held it *might* be done: though, in that case, *Wright* did afterwards return the writ in court.

Note—In the present case, Mr. Justice *Foster* had granted a *habeas corpus*, which was served on the earl, by Sir *William Meredith*. But Sir *William* at length agreed not to prosecute it, on condition that his lordship should carry Lady *Ferrers* to *Bath*; which the earl promised, but did not perform.

Mr. Norton said he would take nothing by his motion.

And it was

* The case was not at all ascited. See it in 2 Strange 915. [See also Chand. Deb. in H. of C. 1 Vol. 94. 12 Som. Tr. 274. Fitz. N. B. 275. 16 Vin. 290.]

† The note here relied upon was erroneous.

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REX, v., EARL FERRERS.

Mr. *Clayton* moved for a *new* writ, returnable in court *immediate*, which was GRANTED.

Lord *Ferrers* neglecting likewise to obey this *second* writ of *habeas corpus*, the counsel for Sir *William Meredith*, (on behalf of his sister) intended on *Tuesday* the 8th of *February* 1757, to have moved for an attachment against Lord *Ferrers*, for this his disobedience: but some doubts and difficulties having been started by members of both houses, concerning the *privilege of* PEERAGE; and "whether the court of King's Bench could issue an "ATTACHMENT *against a peer* during the sitting of parliament, and execute it upon him, ONLY *for a* * CONTEMPT *to their court.*". Sir *William Meredith* judged it prudent to petition the House of Lords, for their *leave* to proceed against the earl; and accordingly, did yesterday, (by the hands of the Earl of *Westmoreland*,) deliver such a petition, stating the facts. Lord *Delaware* opposed it; and said, it was too summary and hasty a method of determining upon their privileges; and proposed referring the matter to a committee, and summoning Lord *Ferrers* to answer it in his place: and to obviate the objections which might be made to this method on account of the delay, he offered some schemes for the intermediate safety of the countess. But Lord *Mansfield* answered him, and spoke in support of the jurisdiction of his court, and the unreasonableness, injustice, and inconvenience of allowing such a privilege in *criminal* cases and *breaches of the peace.* The Duke of *Argyle* then spoke to the like effect, and expressed a surprise that there should be any doubt about it; the reason of the thing being so clear and plain. Lastly, the Earl of *Hardwicke* spoke strongly and particularly in support of the same doctrine, and adduced many instances and precedents in proof of his positions; and concluded with proposing, that, to put an end to all doubt about it for the future, the lords should come to a resolution; and accordingly they did come to the following resolution or declaration, and ordered it to be entered on their journal; *viz.* "7 *Februarij* 1757. It is ordered and declared, that no peer or lord "of parliament hath privilege against being compelled "by process of the courts of *Westminster-hall*, to pay "obedience to a writ of *habeas corpus* directed to "him."

* See Bacon's New Abridgment of the law. Vol. 3. fo. 5. title Habeas Corpus Lord Leigh's case, in point; and fo. 6. express, "that an attachment may be granted, if the peer refuses obedience to the writ; for, his being a peer to tempt, a peer has no privilege."

[Sayer's Rep. 50. acc.]

[And it was afterwards, *viz.* "*Die Mercurij* 8 *Junij* 1757, ordered and declared by the lords spiritual and temporal in parliament assembled, that no peer or lord of parliament hath privilege of *peerage* or of *parliament*, against "being compelled by process of the courts in *Westminster-hall*, to pay obedience to a writ of *habeas corpus* directed to him." And it was then and thereby further

[An attachment was issued against a bishop for not returning a *fi. fa. de bonis &c.* Brownl. R. 2. Jud. 1. Qu. 1 Wils. 332. Strange 486.]

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ordered, "that this order and declaration be entered "upon the roll of the *standing orders* of this house.") [a]

On the 8th of *February* 1757, Mr. *Norton* renewed his motion for an *attachment* against the earl: and he produced affidavits of his lordship's disobedience to the writ, and continuing his ill usage of his lady.

[*633]

All the affidavits (quite from the beginning of this affair) were read.

Lord MANSFIELD—This is a *habeas corpus* at *common law*; which is a prerogative writ, for the liberty of the subject. The court *may* inforce *speedy* obedience to it: and the *circumstances* of *this* case (where delay may be very dangerous) require it. It is reasonable that the lady should have opportunity of laying her case before the court; and swearing the peace, if she thinks proper, in order to obtain the protection of the court. The *end* of this course that we now take, in issuing an attachment to inforce obedience to the writ, is to have this lady produced for this purpose.

And therefore we think, *under the* * EXTRAORDINARY *circumstances* of this case, *an attachment* should issue; *to inforce obedience* to this writ of *habeas corpus*, which so much affects the preservation and security of this lady.

*One of these was detaining Sir William Meredith (who himself served the first writ upon the earl,) and drawing a pistol upon him, and challenging him.

But at the same time, his lordship intimated to them, NOT *to* EXECUTE *it* AT ALL, if it was possible to *obtain the end* of their application by any *gentler* or *other means*: the end and intention of granting it, being only to have the lady immediately brought up.

Mr. Just. DENISON (the only other judge in court) only said "that an attachment *ought to go*."

ORDERED that a writ of attachment issue against the right honourable *Laurence* Earl FERRERS.

In consequence whereof, the earl having been served with the writ (or at least having had it notified to him) by the under-sheriff of *Leicestershire*, accompanied by a brother of the countess;—on the *Saturday* following he appeared in *Westminster-hall*; and about one o'clock, sent a message into court, to Lord *Mansfield*, "desiring to speak "with him."

Lord MANSFIELD bid the messenger tell his lordship, "that when an affair was depending before the court, he "could not speak with any body about it, *but* IN *court*."

[634] Soon after, the earl came upon the bench, and spoke to Lord *Mansfield*. It was not easy to understand what he

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(a) Note: There was an *habeas corpus* to the Bishop of Durham, who returned he was a count palatine and not bound to answer: and for this he was fined 4000*l*. 3 *New Abr.* 12 S. C. 3 *Keb.* 279.

said, as he spoke pretty low: but I imagine, he proposed putting some certain questions to his lady; for Lord *Mansfield's* answer was, "that when she came into court, "all *proper* questions would be asked her."

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Some time afterwards, on the same day—

Lady *Ferrers* came into court, and had articles of the peace ready to exhibit against the earl.

Note—Nothing more was said concerning the *habeas corpus* or the *return of it*; the real end of it being sufficiently answered, by her being left at liberty to come to this court, in order to obtain its protection.

Sir *Richard Lloyd* and Mr. *Gould*, for the earl, desired leave to ask Lady *Ferrers* one or two questions, previous to her swearing to the articles which she had prayed leave to exhibit.

But Lord *Mansfield* told her ladyship, that she was *not obliged* to answer any question previous to her swearing the peace.

And he told Sir *Richard* that the present business was only to obtain security of the peace.

Just at this time, the earl came into the body of the court, (upon the floor, not upon the bench;) and desired to ask Lady *Ferrers* "whether an affidavit which she had "lately made, in the country, before a commissioner "authorized by this court to take affidavits, was made "by her *voluntarily* or *involuntarily*."

Note—This was an affidavit (in which she had joined, during her being in his power in the country, after issuing of the *habeas corpus*;) wherein she was made to swear "that she was content to remain with her "husband; that she had no complaint against him; "and that the application made by her relations for "the *habeas corpus* was without her desire and against "her will." Which affidavit *her friends* said was so far from being voluntary, that it was *extorted* from her *under duresse*; and was the mere effect of fear, force, and compulsion, or at least of very *undue influence*.

Lord MANSFIELD persevered in permitting her ladyship, [635] without answering any questions, to proceed in exhibiting her articles; and then asked the earl, "if he had security "ready."

The earl first, and Sir *Richard*, afterwards, pressed that Lady *Ferrers* might answer their questions: and Sir *Richard* dropped an intimation that the earl's regard or disregard for her would depend upon her answers.

But Lord *Mansfield* said he had before told her, that she *need not* answer them; and now he would *not suffer* her, he said, to answer them.

Lord *Ferrers* went in and out of court once or twice;

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but did not, at *this* time, give the security of the peace; nor did Mr. *Norton* press that he should give it immediately.

On *Wednesday* the 27th of *April* following, the earl appeared, and gave security; himself in 5000*l.* and each manucaptor in 2500*l.*

Monday (13th *February* 1758) the earl having broken this recognizance in the month of *August* 1757, by drawing a pistol upon Lady *Ferrers*, at the Earl of *Westmoreland's* at *Mereworth Castle* in *Kent*; he was taken up some time after, upon a fresh warrant from Lord *Mansfield*: and having given bail on the same 13th day of *February* 1758, before my Ld. Ch. Justice, (whilst his lordship was gone out to dinner,) he presently afterwards came into court, to appear. And upon the return of the Ld. Ch. Justice—

The countess also came into court; and *swore* FRESH *articles* of the peace against the said earl, grounded upon the above-mentioned fact. After which, he (being still present) was called upon to give bail to these recent articles of the peace.

He had previously given notice of two persons to be his bail before the lord chief justice: with one of which, the prosecutors were not satisfied.

[1 Durn. 698.] After several proposals; and after several hints which came from Lord *Mansfield*, as well as from Mr. *Norton*, "that it was necessary for the earl to give bail *at present*, "and not to pray *time* to do so, as the giving it *now* was "the only method he could take, if he expected to remain "at liberty;" it ended in a compromise to take both these persons as bail now, and to give a few days time for the justifying the doubtful one, (a peruke-maker,) or for finding a better.

[636] Accordingly, he himself became bound in 5000*l.* Mrs. *Shirley* (his mother,) in 2500*l.* and Mr. *John Bennifold*, peruke-maker, in 2500*l.*

The earl's counsel *now* moved to discharge the former recognizance: to which the lady's counsel afterwards consented.

REX *versus* THOMAS DAWES.

Tuesday, 13th June 1758.

Impressed soldier not discharged: [3 New Abr. 6. n.]

* 30 G. 2. c. 8.

ON *Thursday* last, the 8th of *June*, Mr. *Morton* and Mr. *Burrell*, on behalf of the commissioners, shewed cause against making absolute a rule of last term, made upon the commissioners in and for the county of *Sussex*, for putting in execution the late act * for the speedy and "effectual recruiting his majesty's land-forces and "marines," for them to shew cause why *Thomas Dawes*

should not be discharged out of the regiment of foot commanded by Colonel *Thomas Brudenell*. 1758. REX v. THOMAS DAWES.

They produced a number of affidavits; and rested entirely upon the facts contained in them: which fully proved (as they alledged) that he was a proper object of the act of parliament; and that the commissioners had done right; and that he ought not therefore to be discharged from the condition of a soldier.

Mr. *Harvey* and Mr. *Norton*, on behalf of the defendant *Dawes* (the impressed man) on the contrary, argued for making the rule absolute, "for discharging him.

They urged that this was a high and unconstitutional authority lodged in these commissioners, and without requiring from them any oath of duty: and they endeavoured to shew, from their affidavits, that the man was not a proper object of the commissioners jurisdiction. They argued therefore that he ought to be discharged; especially, as the crown did not at all interpose.

Note—The regiment was gone abroad: but the man himself had *deserted* from it.

The court did not come to any determination, then; but took time, in order to consider the affidavits on both sides.

Now, Lord MANSFIELD delivered the opinion of the [637] court, in which, he said, they were all agreed: and all of them, he said, had separately read over the affidavits.

Then he went minutely through the affidavits on both sides; and made the proper remarks upon the different representations of the case.

The result was, that they clearly thought him *to be* a proper object; and that the commissioners had done right.

Whereupon, they DISCHARGED THE RULE.

(See the case next following this.)

REX *versus* ANDREW KESSEL.

Another case of an impressed soldier.

THIS point was exactly similar to the last; being the case of a pressed man, who applied to be discharged out of Captain *Temple's* company in Colonel *Duroure's* regiment, upon the foot of injustice done to him by the commissioners, to whom he was obliged by force to submit: and the question turned, in like manner, upon the man's being a *proper object* of the *commissioners jurisdiction*, or not; which depended upon the particular circumstances of the case, sworn to, on both sides.

It was argued on the 10th of *June*, by Mr. *Norton* and

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Mr. *Bishop* for *Kessel*, and by Mr. *Hussey* for the commissioners, upon the *fiat* only.

No objection was made, on behalf of his majesty, or of Colonel *Duroure*.

The court had taken time, (as in the former case,) to look into the affidavits. And now,

Lord MANSFIELD declared the opinion of himself and his brethren, "that upon the circumstances appearing in "*this* case, the man was *not* a proper object of the commissioners jurisdiction; and that he was, by an undue "exercise of the power trusted to them, compelled to "serve as a soldier."

And therefore they ordered that he should be forthwith discharged. (But they would not give costs; though asked for, by the man's counsel.)

[638]

Note—In both these cases (of *Davis* and *Kessel*,) neither of them could have brought a *habeas corpus*: neither of them was in custody. *Davis* had deserted and absconded: *Kessel* was made a corporal. Both prayed to be discharged from the condition of soldiers, upon the ground of the commissioners having misbehaved in the exercise of a parliamentary authority; (for which misbehaviour, they might be liable to an information.) In neither case, did the counsel object to the propriety of this method: and the benefit to the subject is manifest.

[6 Durn. 498.]

REX *versus* DAVIS.

Writ of error for reversing outlawry in treason for diminishing the coin. V. Rex v. Roger Johnson, 2 Strange, 824, S. P.

THE defendant having been apprehended upon an outlawry for high-treason in diminishing the coin of this kingdom (*viz.* filing guineas,) was brought up by *habeas corpus* from the place where he was taken: and afterwards committed to *Newgate*: from whence he was brought up by rule, on *Tuesday* 6th *June* 1758.

Mr. *Norton* for the crown, immediately prayed that he might be asked "what he had to say why judgment "should not pass upon him."

And the outlawry was then ordered to be read; and was accordingly begun to be read. But

The COURT not having had any previous notice of this, nor having even seen the outlawry, adjourned it to the *Saturday* then next following (the 10th); and ordered that copies of the outlawry should be sent to them, in the mean time.

The defendant intimated "that he was out of the "realm at the time of the outlawry pronounced:" And he also intimated his desire to have the assistance of counsel.

But *per* Lord MANSFIELD—The court can *not* assign

him counsel, *till* he has pleaded: and then he may have counsel, upon that *collateral* matter. However, the court do not restrain counsel from advising him in *private*. 1758. REX v. DAVIS.

N. B. The sheriff of *Middlesex* was ready with a jury, *in case* he had now pleaded "that he was not *the* "*same person*."

On the said *Saturday* (10th *June*) the defendant being [639] brought to the bar, was called upon to hold up his hand; and then arraigned (by Mr. *Athorpe* secondary of the crown-office,) upon an outlawry upon an indictment in *London*, for high treason in diminishing the coin of this kingdom; and asked what he had to say for himself "why this court "should not proceed to give judgment and award "execution against him according to law."

Note—The sheriff of *Middlesex* was again ready with a jury, (as before,) in case he had denied his being the identical person.

Mr. *Whitaker*, who was counsel for the prisoner, prayed that the outlawry might be read. Which being done—

Mr. *Whitaker* said, that if the outlawry is bad, the defendant, or even any *amicus curiæ*, may assign errors upon it; and the court will either give him time to apply for a writ of error, or give him leave to plead to the indictment.

Now this *outlawry is bad*, (he said) upon the face of it.

1st Exception—The second *capias* ought to have had three *or* four MONTHS between the teste and return; whereas this has *only fifteen days*. 8 *H.* 6. *c.* 10. is express "that it shall be returnable three months after, where "the counties are holden from month to month; and "four months after, where the counties are holden from "six weeks to six weeks." 10 *H.* 6. *c.* 6. confirms the former act; and extends it to indictments removed by *certiorari*. And for want of this, the outlawry is *void*.

2d Exception. Here is a *discontinuance* of process for a whole year: there being a chasm of a whole year, in which it does not appear that any writs were *issued out*; (though the sheriff's returns to such writs are indeed set out.)

3d Exception (to the *exigent.*) This exigent is in *London*: and the outlawry is returned to be pronounced BY *Mr. King*, the *coroner*. Whereas the *lord mayor* of *London* is *perpetual coroner* in *London*; and the *recorder* is to *pronounce* it. *Cro. Jac.* 531. *Garrard* v. *Rayem*, proves that the mayor for the time being is perpetual coroner. 2 *Ro. Abr.* Title *Outlagarie*, *Fo.* 805, 806. prove both positions: *pa.* 806. "that the mayor is coroner;"

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and *pa.* 805. *per quer, pl.* 1. "that the judgment is given "by the recorder; and *not* by the coroners."

4th Exception. He is not said to be outlawed, "*secundum legem et consuetudinem regni*;" which the writ requires. And *Dalton* gives the return in that manner.

5th Exception. The *name of office* of the sheriffs is not set to the return of the second exigent; it is only "the return of *W. A.* and *A. C. esquires.* 2 *Hale's Hist. P. C.* 204. is express that it must be so;" "the sheriff's "name *and office* also must be subscribed to the return of "the exigent: e. g. *A. B. arm' vicecomes.*"

N. B. The record appeared to be right. But Mr. *Whitaker* said it was not so in the return upon the writ itself.

6th Exception was to the *writ of proclamation.* Which he alledged to be faulty, both in its *teste* and in its *return.* This writ is founded upon the statute of 31 *Eliz.* c. 3. Which gives it in personal actions, and directs the particular manner, &c.; and to be of the SAME teste and return with the exigent. 4, 5 *W. M.* c. 22. § 4. extends this writ of proclamation to criminal cases as well as civil; and directs it to be delivered to the sheriff, three months before the return.

Now this writ of proclamation is *tested* and *returned* upon the SAME DAY. And the return of the sheriff is only "that he caused him to be proclaimed accord-"ing to the form of *the* statute." But *non constat, what* statute he means: there is none mentioned in the writ.

The return ought to be particular; and to *specify* the respective proclamations, and to shew that they were a month before the *quinto exactus* by virtue of the exigent. And so *Dalton* says.

7th Exception. The man was *abroad, out of the kingdom,* at the time when the outlawry was pronounced against him.

This, indeed, is an error in *fact;* and must be verified.

8th Exception. The hustings (where it was pronounced) are *not* said to be "holden *in and for the* city "of *London.*"

Mr. *Norton contra, pro rege,* said he would be under the direction of the court, whether to defend it now, or take time.

The COURT seemed to think that Mr. *Attorney General* should have been present.

[641] But Mr. *Norton* said that Mr. *Attorney* had desired to be excused.

LORD MANSFIELD.—*Some* of the exceptions seem to have weight: and some of the errors alledged are errors

in fact; and it is a matter of discretion in the *attorney general*, "whether he will think proper to confess *them*, "or not."

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Mr. Just. FOSTER—Some of the exceptions go to shew the outlawry to be a *nullity*, and to avoid it *without* a writ of error.

Which Lord MANSFIELD agreed to.

Mr. Just. DENISON—The custom of the city of *London* is a matter of fact.

Lord MANSFIELD—Mr. *Attorney General* will consider whether to confess the errors in fact, and let the party in, to plead to the indictment; or take the longer course of a writ of error: this is a matter of prudence.

Mr. *Whitaker* prayed that the prisoner might be sent to the prison of *this court*; and not to *Newgate*.

Per Cur'. *Newgate* is as much the *prison of this court*, as the King's Bench prison is: EVERY *prison in the kingdom* is the *prison of this court*.

The prisoner was remanded; and ordered to be brought up again on *Tuesday*, the 13th.

And now, the defendant being brought up accordingly, Mr. *Attorney General* allowed that one or two of the exceptions were fatal; as for instance the first and the sixth.

But though the act of 31 *Eliz. c.* 3. declares the outlawry to be *void*, if had otherwise than that act directs; yet he said, he was afraid this making it void could not be done by the court upon *motion;* but it must be avoided by *writ of error*, in the *legal* way. For so is *Plowd. Com.* 137. *b.* and *Hob.* 166. and 2 *Hawk. P. C.* 306. *c.* 27. § 127.

Lord MANSFIELD—What do you say to the errors in *fact?*

Mr. *Attorney General*—If there are any that I *can* confess, I would do it: because I am satisfied it *must be reversed* upon a writ of error. As to the 7th, if I was to confess it, it would not signify; because his time is elapsed: the year is expired.

Cur'. There is no getting at it, without a writ of error. [642]

Lord MANSFIELD—If the attorney general has an authority from the crown, he may confess an error in *fact*, which is not true: but the *court* will not permit the confessing an error in *law*, which is not true.

Mr. Just. FOSTER mentioned a case of one Mr. *Slafford*, who was called "esquire;" and he said he was only a yeoman, and not an esquire: and the attorney general came in and confessed it.*

* Vide Lucas's Reports, 188.

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The present defendant was remanded n *order to*† *purchase his writ of error.*

N. B. Per Cur' and counsel—there are a great many *other errors* upon this record.

† "Purchasing" his writ of error is a technical term; which does not here convey any pecuniary idea, as if he was to pay a price for it.

Wednesday, 14th June, 1758.

CHESTERTON *versus* MIDDLEHURST.

Action on a bail-bond in a court below, must be brought there and not here, unless special circumstances warrant it.

A *BAIL-bond* was given in a court of a *county-palatine* (*Chester,*) in an action brought there. Which bail-bond being assigned by the sheriff, an action was brought upon it in *this* court.

The defendant filed special bail, below; and then moved to stay proceedings here. And

The COURT all held this bringing the action here, to be an *unfair practice;* unless there had been some *special circumstance* to warrant it, (as the defendant's living out of the jurisdiction, or the like:) which was not even pretended, in the present case. Therefore the court held that the plaintiff ought to have proceeded in the * *court* below; and accordingly *set aside* his proceedings in *this* court.

* V. Walton assignee v. Bent, Tr. 1766. 6 G. 3. B. R. that "an action was given." upon a bail-bond must be brought in the same court when the bail [See also 3 Wils. 948. 3 Burr. 1923. 8 Durn. 153.]

REX *versus* FLORENCE HENSEY, M. D.

Trial for high treason in adhering to the king's enemies. [See 6 Durn. 629.]

[643]

ON *Monday* 8th of *May* 1758, the defendant was brought into court by the keeper of *Newgate*, upon a *habeas corpus* directed to him, commanding him "to bring "up his body." He appeared (upon the reading of the return) to have been committed by warrant under the hand and seal of the Earl of *Holderness* one of his majesty's principal secretaries of state, for *high-treason* in ADHERING TO, and aiding and corresponding with the king's enemies; and to be detained in his custody, by virtue of a second warrant of the like kind.

Mr. *Attorney General* prayed that the return might be filed.

Cur. Let it be filed.

Mr. *Attorney General* then informed the court and the defendant, "that there was an indictment of high-treason "found against the defendant:" (which indictment was so found by the grand jury by itself singly, and brought into court, singly by them on *Tuesday* last.) With which indictment, the defendant being now charged, and being called upon by the secondary of the crown-office to hold

up his hand, the court ordered the indictment to be read to him. 1758.

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But the COURT, (*before* it was read to him,) asked him "whether he desired counsel to be assigned to him;" and if he did desire to have counsel, then "*whom*, "by name, he desired to have assigned to him."

He named, and accordingly,

The COURT assigned to him, Mr. *John* Morton*, and the Honourable Mr. *Thomas Howard*; and Mr. *John Pierce* for his attorney.

* N. B. Mr. M. is not one of his majesty's counsel; (though he has a patent of precedency.]

The indictment was then READ *verbatim* to him, by the *express* direction of the court: (although he *had a* COPY of it five days ago; agreeable to 7 *W.* 3. *c.* 3, "for regu- "lating of trials in cases of treason and misprision of trea- "son.") Upon which indictment being thus read to him by Mr. *Barlow*, he was immediately asked (by Mr. *Athorpe*, secondary of the crown-office,) "Whether he "was guilty or not guilty of the high treason therein "charged upon him." To which he pleaded

NOT GUILTY.

The defendant, after he had pleaded "not guilty," intimated to the court "that he had received hard and "severe usage, during his confinement."

Mr. *Attorney General* absolutely disavowed his having received any severe treatment at all; and assured him that he would be treated with all possible humanity, so far as was consistent with his being safely secured from escaping.

Then a day was fixed for his trial; *viz. Monday* 12th *June* 1758. [644]

Which being settled, without any sort of objection on any part, the defendant was

REMANDED (*to Newgate.*)

On which *Monday* 12th *June* 1758, at the trial, the defendant's counsel took exception to the reading of two papers—(No. 1, 2.) being the rough draughts of letters written by himself, and found in a bureau where he kept his linen and papers; and which were only *introductory* evidence; not any part of the *overt-acts*, which were to support the species of the treason charged upon him. It was objected to them, that they were not sufficiently proved to be *found in his custody*; nor sufficiently proved to be his *hand-writing*: for *mere comparison of hands* is not sufficient to support their being read against the defendant.

The counsel for the crown answered, that, the papers being *found in his custody*, and his hand having been *sufficiently proved by persons who had seen him write*, it was sufficient to entitle the crown *to read* them; though the jury are to judge of them. And they mentioned *Layer's*

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case; and Lord *Preston's* case; and *Francis's* case; and *Sidney's* case; and *Buchanan's* case in the north, in 1746; and *Crosby's* case, *Skinner* 578, 579. and 1 *Ld. Raym.* 39. S. C. *Rex* v. *Crosby alias Phillips:* where comparison of hands was allowed to be good evidence, if the papers are found in the custody of the person himself. Sir *John Wedderburn's* case. Sir *Cholmeley Dering's* case for murder; *(i. e. Rex* v. *Thornhill.)*

The COURT unanimously over-ruled the objection. These papers *were found in his custody*; and they have been sufficiently proved by persons who have *seen him write*, to entitle the crown to *read* them.

Then the evidence for the crown being opened, and given; (which consisted chiefly of letters to and from the prisoner;) and being alledged to be a proof of overt-acts of *two* different sorts of treason, *viz. of compassing and imagining* the death of the king and also of *adhering* to the king's enemies;

Mr. Solicitor General declined summing up the evidence; choosing to reserve himself for the reply.

Which the COURT held to be within rule, if he so thought proper.

[645]

So the counsel for the crown rested it here.

Then the counsel for the prisoner (Mr. *Morton* and Mr. *Howard*) began upon his defence. They declined giving any *evidence* on the part of their client: but they insisted upon these two topics, in his defence; *viz.*

1st. That *no* one act was proved upon him in *Middlesex*; where the indictment is laid.

2dly. That the evidence, if it had been brought home to the defendant so as to affect him, yet it would by no means have *amounted to a proof* of any overt-acts of *either* of the two before named species of treason.

For they were only letters of *correspondence*. And if a correspondence of this nature, either within or out of the realm, had been treason in *general* and in *all* the king's subjects, within 25 *Edw.* 3. it would never have been *particularly enacted to be capital* in a SOLDIER, by the mutiny acts of 3, 4 *Ann. c.* 16. § 35. fo. 266. and 30 *G.* 2. *c.* 6. § 1.

N. B. The former makes it treason, to do it either "upon land, *out of England*, or at sea:" the latter makes it capital, or such other punishment as a court martial shall inflict, to do it "upon land *within* "OR *out* of *Great Britain*, or upon the sea."

Mr. YORKE, his majesty's solicitor general, then proceeded to reply: in doing which, he made only some general observations upon the evidence that had been given on the part of the crown, but did not sum it up particularly, (as the *prisoner* had given *no evidence* at all;)

but confined himself to what the defendant's counsel had urged in his favour, in point of *law and reason*.

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He answered thus, to the objections which they had insisted upon.

1st. That the fifth letter given in evidence bears date "from *Twickenham*," which *is in Middlesex*. Which alone, is a full answer to the objection.

2dly. That the correspondence proved *was*, in point of law, an *evidence of an overt-act*, of EACH of the before-mentioned species of treason.

First—Of *compassing and imagining* the death of the king. [646] To prove which, he cited 1 *H. H. P. C.* 107. Cardinal *Pool's* case, 3 *Inst.* 14. S. C. And so Ld. Ch. J. *Holt* also held, in *Gregg's* case: (which he cited from a manuscript report of Judge *Tracy's*:) and Baron *Smyth* and Mr. Just. *Dormer* seemed to agree to it. And in Lord *Preston's* case, also, Ld. Ch. J. *Holt* so held.

Secondly—It is also an overt-act of *adhering* to the king's enemies. In *Gregg's* case, it was agreed by all the judges, "that such letters, *though intercepted* before they "arrived, were so."

Lord MANSFIELD—We have seen three reports of *Gregg's* case; *viz.* one, by Ld. Ch. Baron *Dodd*; another, by Mr. Just. *Price*; and this, by Mr. Just. *Tracy*: and they all three agree "that such letters "*though intercepted*, were overt-acts of *each* species "of treason before mentioned; and that *all* the "judges *agreed* in this."

Mr. Solicitor General—And as to the statutes of Queen *Ann* and the present king, the statutes of 7 *Ann. c.* 4. and the late mutiny act of 30 *G.* 2. *c.* 6. go *further* than the act 25 *Ed.* 3. does.

LORD MANSFIELD summed up the evidence.

As to the law—*levying war* is an *overt-act* of *compassing* the death of the king: an *overt-act* of the *intention* of levying war, or of bringing war upon the kingdom, is settled to be an *overt-act of compassing* the king's death. *Soliciting a foreign prince, even in amity* with this crown, to *invade* the realm, *is* such an *overt*-act: and so was Cardinal *Pool's* case. And *one* of these letters is such a solicitation of a foreign prince, to invade the realm.

Letters of advice and correspondence, and intelligence to the enemy, to enable them to annoy us or defend themselves, written and sent, in order *to be delivered* to the enemy, are, *though intercepted*, overt-acts of *both* these species of treason that have been mentioned. And this was determined by all the judges of *England*, in *Gregg's* case: where the indictment (which I have seen) is much like the present indictment. The only doubt, there, arose from the letters of intelligence being *inter-*

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cepted and *never delivered*: but they held "that *that* cir-"cumstance did *not* alter the case."

"As to the FACT, in the present case—the jury are to consider whether they were written by the prisoner at the bar, *in order to be delivered to the enemy*, and *with intent* to convey to the enemy such intelligence as might serve and assist them in carrying on war against this crown, or in avoiding the destinations of our enterprizes and armaments against them.

Then his lordship went through the evidence particularly, and having finished his summing it up, he proposed to the counsel, and they agreed to it on both sides, "that the jury should take the letters out with them."

As to the *locality* of the facts—he said, it is certain that *some one* overt-act must be proved IN *the county* where the indictment is laid: indeed if *any one* be so proved in *that* county, it will let in the proof of others in *other* counties.

Now here, *one* of the letters is *dated at Twickenham*, which is in *Middlesex*.

The jury went out, a little after eight, taking the letters, &c. with them; and soon sent to desire leave to have candles; which the officer who brought in their message, said he was sworn "not to let them have;" unless it should be so *ordered*.

Lord MANSFIELD asked the counsel, if either side objected to it.

And the counsel on both sides agreeing to it—

Leave was given accordingly: and they had them.

In half an hour, the jury returned, and brought in their verdict, "GUILTY."

Lord MANSFIELD observed, as to the two acts of parliament of 7 *Ann.* c. 4, and 30 *G.* 2. c. 6.—that they carried the matter *further* than the law extended to before: and, besides that, they were both of them *declaratory*, as well as enacting; which was calculated on purpose to avoid the very objection that had been now taken: (*V. ante*, 645.)

The defendant was remanded to *Newgate*; and a rule made "to bring him up again on *Wednesday*."

[648] And the prisoner being accordingly brought to the bar, on this day about four o'clock in the afternoon, by the keeper of *Newgate*,—

Mr. Attorney General prayed the judgment of the court upon him.

Mr. *Athorpe*, secondary of the crown office, called upon him to hold up his hand; and reminded him, "that he "had been indicted of high treason, and thereto had "pleaded *not guilty*; and for his trial had put himself "upon God and the country, which country had found

" him guilty;" and then asked him " if he had any thing " to say for himself, why the court should not proceed to " give judgment against him according to law." 1758. REX v. HENSEY.

The prisoner thereupon took out a written paper; and rather read, than spoke it. It consisted partly of an *apology*, and partly of a sort of *defence* against the charge: together with some objections to the *proof* of it upon him.

The substance of it was—that the correspondence with which he had been charged, as treasonable and giving intelligence to an *enemy* of his liege sovereign, was nothing more than writing letters to his *own brother*, who so far from being an enemy, that he was in the service of the king's *good brother and faithful ally*, as his majesty himself had stiled the King of *Spain*, in his speech to his parliament; and that these letters contained *only coffee-house news and idle speculations*; but gave no such intelligence as could be *useful* or even unknown to an enemy; nor did betray any of the *secrets* of this government to their enemies.

That he had no malignity in his heart, against the king or his government; nor had ever been guilty of an improper behaviour; but always conducted himself with decency and duty towards his king and country: for the truth of which, he appealed to his character and conversation.

And as to the *papers* which were seized by the messenger, at the house where he lodged—they might just as well be the *woman's* of the house, as *his*: for *both* of them had *access* to the bureau, in which the messenger found them.

That the statute of 7 *W.* 3. *c.* 3. § 2 & 4. directs that there shall be *two* witnesses to each overt-act of the same treason whereas his *hand-writing had been proved only by one* witness, who could pretend to *know* any thing of his hand-writing, for that the other *three* knew little or nothing of his hand, and could *scarcely* be said even to have ever seen him write. [649]

(Note. The act directs " that *either* both the witnesses " must be to the same overt-act, OR one of them to " one, and the other of them to another overt-act of " the same treason.")

And there was no witness at all, he said, to prove any act of treason committed by him *in the county* of *Middlesex*, where the indictment lays the offence to have been done.

He alledged, that this case of his was the *first instance*, since the statute of *Edw.* 3. where *giving intelligence* has been holden to be *high treason*. And he said, that, as he

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had not had four days between his trial and his sentence, (as was usual,) his counsel had not had sufficient time to prepare themselves in arrest of judgment.

Therefore, upon the whole, he prayed that the court would either be so kind to him as to *respite* his sentence; or, if that might not be obtained, that they would be graciously pleased to recommend him to *his Majesty's mercy*.

He was then asked "if he had any *point of law* to move "in *arrest* of judgment."

To which his answer was, "that he had not."

LORD MANSFIELD then observed, that the prisoner had been convicted upon a very full trial, and upon very cogent proof; and that he appeared upon the evidence to have committed *many* overt-acts of treason.

He took notice, that the prisoner had even *solicited* this employment, *from inclination*: as well as undertaken for *hire*, to act as a spy against his own native country, and to reveal the secrets of the king and government to the open enemies of both; and to give them information and intelligence of the enterprises and designs of this kingdom against them; and all this, with intent and in order to aid and assist them in defending themselves against his king and country.

He observed that the enemy had manifestly shewn "that *they themselves looked upon* this correspondence to "*be* an aid and assistance to them;" by their giving him a stipend, and paying him a stipulated monthly price, as the purchase and reward of it, under a penalty of his forfeiting 20*s.* for every omission of a weekly letter from him.

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He also observed, that the prisoner appeared to have procured his information of the state of our navy and army and finances, and the other matters contained in his papers and memorandums seized in his bureau, with that very VIEW *and intention* of communicating them to the enemy: and by his letter of the 22d of *July* last, he had even *advised and invited the enemy* TO INVADE *his native country*; and to *bring war and destruction into the heart of it*. The guilt of this offence arises from the *nature* of the correspondence, which is calculated to betray the *secrets* of his king and country to the enemy, *as a* SPY; a treason of a very dangerous kind, and which gives an enemy much more aid and assistance, than a person publicly and professedly declaring himself an *open* enemy to his own country could give them.

He laid it down as a point which was never doubted, "that this offence of SENDING INTELLIGENCE to the "enemy of the destinations and designs of this kingdom

" and government, *in order to* assist them in their opera-
" tions against us or in their defence of themselves, is
" high-treason; *even* ALTHOUGH such a correspondence
" should be *intercepted*, without ever coming to the
" enemy's hands. And so was the resolution of all the
" judges, in *Gregg's* case."

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And as to the witnesses to the prisoner's *hand-writing*—there are *four* of them that have *seen* him write, and swear to his hand, of their *own knowledge*: and these four witnesses are *not contradicted* by any evidence to his part; but on the contrary, are *confirmed* by a variety of circumstances.

As to the point of *locality*—he said that IF there had been *no* evidence at all, of that particular letter which bears date at *Twickenham* (which is *in Middlesex*,) yet nevertheless the *presumption* was strong and stood uncontradicted too, "that they were *written in Middlesex*, where
" the prisoner resided, and where his papers were
" seized."

As to *mercy*—he told the prisoner, that *that* was in the KING's breast; but was no part of *their* province: and therefore his application, on *that* head, must be *elsewhere*.

The *Lord* CHIEF *Justice* (it being a case of *high-treason*) pronounced the sentence.

Mr. *Attorney General* then moved, that the court would appoint a *day* for the *execution*.

Lord MANSFIELD desired him to name a day.

Mr. *Peirce*, the defendant's solicitor, said he hoped it would not be an early day. [651]

Mr. *Attorney General* said, he was willing to give as long a day as might be proper.

Mr. Just. FOSTER mentioned, that Dr. *Cameron* had three weeks.

(*N. B.* Mr. *Charles Radcliffe* had only a fortnight.)

Mr. *Peirce* desired that this might be a *month*.

The COURT and Mr. *Attorney General* very readily agreed to a *month*. Accordingly, it was ordered to be upon *Wednesday*, the 12th of *July*.

The prisoner was remanded to *Newgate*; and bowed respectfully to the court, and courteously to the bar and audience, on retiring.

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Note.

On the *last* day of a term §

An *attachment* may be moved for, in the two cases following; *viz.*

For * non-payment of *costs:* and

against a sheriff, for *not returning* a writ.

This was alleged by Mr. *Clayton*, and conceded by the court to be the practice.

§ V. post. 28th Nov. 1769. Jacob's case.

* This former case confirmed by the court, expressly and particularly on a motion of Mr. Windmore's, the last day of Michaelmas Term 1770.

Note also

The rule is, that counsel may move, on the last day of term to *quash* an INDICTMENT; but not to quash an *order*.

The court was not up, till near midnight.

The End of *Trinity* Term, 1758. 31 Geo. 2.

AND OF THE FIRST VOLUME.

W. Flint, St. Sepulchre's London.