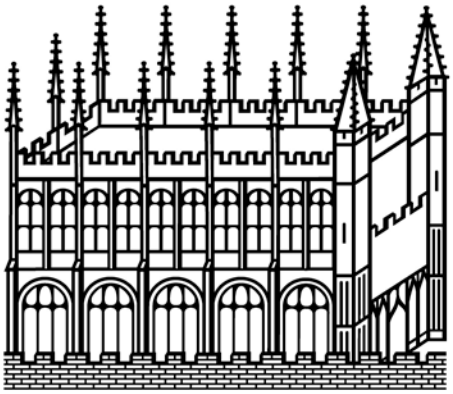


Bodleian Libraries

UNIVERSITY OF OXFORD

This book is part of the collection held by the Bodleian Libraries and scanned by Google, Inc. for the Google Books Library Project.

For more information see:

http://www.bodleian.ox.ac.uk/dbooks

This work is licensed under a Creative Commons Attribution-NonCommercial-ShareAlike 2.0 UK: England & Wales (CC BY-NC-SA 2.0) licence.

8 A 14 23

CW.U.K.
585
M848.4b

ESSAYS

UPON

I. The Law of Evidence.

II. New Trials.

III. Special Verdicts.

IV. Trials at Bar.

AND

V. Repleaders.

[IN THREE VOLUMES.

By JOHN MORGAN,
OF THE INNER TEMPLE, BARRISTER AT LAW.

VOL. III.

Containing The IXth Division of Essay II.
with Essays III. IV. and V.

LONDON:

PRINTED FOR J. JOHNSON, N°. 72, ST. PAUL'S CHURCH-YARD.

MDCCLXXXIX.

ESSAY II.

Continued.

IX. Of other Matters reſpecting new Trials, &c.

(1.) *Of Mis-trial.*

ACTION of *debt*, brought upon the ſtatute of *Ed.* VI. for *tithes*, and the plaintiff declared that one was ſeiſed of the rectory of *Elvely*, *alias Kirkley*, in *Kingſton* upon *Hull*, in his demeſne as of fee; and being ſo ſeiſed, on ſuch a day, at *Elvely*, *alias Kirkley*, did demiſe to the plaintiff the ſaid rectory, with the appurtenances, to have and to hold, *&c.* for years, and that by virtue thereof he had been and was thereof poſſeſſed, and that the defendant ſuch a day, and before, and always afterwards, hitherto held and occupied thirty acres of land in *Swandland*, in *Kingſton*, in a place called T. and that the tithes did belong to him. The defendant pleads, *Nil debet per patriam*; and after verdict it was alledged, in arreſt of judgment, that the iſſue was mis-tried, becauſe the *Venire facias* was of *Elvely alias Kirkley*, and it ſhould have been of *Swandland*, where the tithes grew.

Cooper v. Bacon, 1 Brownl. 75. The Venire facias miſawarded.

I cannot find this caſe in any other author: from the marginal note, I conceive the Court adjudged the *Venire facias* miſawarded.

Smith and Hancock, and others, M. 24. Car. Banc. Reg. Styles, 137.

For a new trial, becauſe of a mis-trial, the cauſe being tried before perſons intereſted.

Smith brought an action of treſpaſs againſt *Hancock*, and others, for taking away divers parcels of ribbon from him. The defendants pleaded, by way of juſtification, the cuſtom of *London* againſt hawkers; *videlicet*, to take away wares from any that ſold them up and down the ſtreets.

The plaintiff replied, that there was no ſuch cuſtom, and iſſue was taken upon it, and thereupon the cuſtom was certified by the mouth of the Recorder, and a trial upon it in *London*, and a verdict for the defendants. The plaintiff moved in arreſt of judgment, that it was a mis-trial, becauſe it was before thoſe who were intereſted in the cauſe, and therefore deſired there might be another trial. *Roll* Juſtice ſaid, it is againſt natural equity, for one to be judge in his own cauſe, although the other party admit it to be ſo, and therefore it is a mis-trial, though it were at the requeſt of the plaintiff, becauſe it is againſt natural reaſon. 8 *E. III. f.* 69. 5 *Ed. III.* 8. 9 *H. VII. f.* 21. *Hil.* 38 *Eliz.* in the Exchequer. The prayer of the plaintiff cannot help the trial, for the conſent of both parties cannot change the law, much leſs the prayer of one of the parties. *Hales*, of counſel with the defendants, argued, that it was not a mis-trial, and ſaid this concerns them in point of privilege of the city, and not merely in point of intereſt, before whom the judgment was given. 2dly. The conſent of the party hath barred him of the advantage which otherwiſe he

Trial.

he might have had. But *Roll* Juſtice anſwered, here is point of intereſt as well as point of privilege, for part of the goods taken come to the benefit of the city, and therefore they ought not to be their own judges, for this is againſt natural reaſon, and ſo it is a mis-trial. But it doth not appear here, whether the Mayor and Aldermen be another corporation or not, and diſtinct from the corporation alleged, which certified this cuſtom by the mouth of the *Recorder*, and this is the ſole doubt in the caſe. *The Court ordered that there ſhould be a new trial, except cauſe ſhewn to the contrary. Q. Whether there ſhall be a repleader, or a new Venire?*

This was *replevin:* Lord *Mountague* was ſeiſed of the *Honour of Glouceſter*, extending into *divers counties*, and conſiſting ſolely of ſervices without demeſnes; within which honour there is a cuſtom that each tenant dying ſeiſed of an inheritance, ſhall pay for each meſſuage and cottage 5 s. and for each acre of paſture .... and for each acre of meadow .... *&c.* for which ſums the bailiff of the lord or his deputies may diſtrain. *Sir Tho. Reed*, a tenant of the ſaid honour, died ſeiſed of an eſtate in fee-ſimple or tail, after whoſe deceaſe the bailiff diſtrained in an acre of which *Sir Tho.* died ſeiſed in *Denford*, in the county of *Northampton*, which acre is within the honour of *Glouceſter* aforeſaid; and note, that the cuſtom aforeſaid was for diſtraining any beaſts upon the land within the honour. And upon *replevin* brought, iſſue was taken upon the cuſtom, and *Venire facias* from *Den-*

Hill v. Bunning, H. 12 Car. II. C. B. Entr. T. 1659. Ro. 402. 1 Sid. 17. Vid. Br. Avowry, 46. 14. H. IV. 2.

Replevin. Cuſtom for having ſo much upon dying ſeiſed, &c. and for diſtraining all beaſts.

Queſtion from whence the Venire facias ought to have iſſued.

ford. And the cuſtom being found, it was moved in arreſt of judgment,

1. For the unreaſonableneſs of the cuſtom.

2. For the mis-trial.

With reſpect to the firſt point, a variety of arguments were uſed, *pro et con*; but as the Court did not give judgment upon that point, they are here omitted.

As to the ſecond point, If this was a mis-trial? it was argued by *Maynard* and *Barnard* for the defendant, that this is not a mis-trial, but that the *Venire facias* from *Denford* is good enough, for it ought to be from the county of N. or from the county of *Glouceſter*, or from the vill. of D. 1. It cannot be from the body of the county of N. inaſmuch as it does not appear that the honour is in this county only; for it doth not appear that the honour is extended out of D. yet in truth the honour is extended into ſeveral counties. 2. It cannot be from the honour of *Glouceſter*, for an honour is only an accumulation of ſervices; and although an honour may conſiſt of demeſnes and ſervices, yet this honour hath only ſervices, and it cannot be ſhewn that a *Venire facias* was ever yet from an honour, becauſe that *Littleton*'s argument may be uſed; *videlicet*, if ſuch thing could have been done, it would have been ſeen before this time, therefore they concluded that the venue could not be from an honour, any more than from a foreſt, 1 Rep. 127. 3. Therefore if it cannot be from the two places before-mentioned, of neceſſity it ought to be from the vill. of *Denford*, where the capture is ſuppoſed. And to prove this, they relied upon a caſe between *Row et Litchford*, 16 *Jac.* in B. R. where upon

2 Leon. 36. Pl. 47. Hob. 266. 2 Rob. Ab. 617 Pl. 2. Sid. 88. Pl. 4. Et. 326. Pl. 5. 3 Cro. 200.

upon iſſue joined upon a cuſtom of the *Stanaries*, a *Venire facias* was from the vill. where, *&c.* and not from the *Stanaries*, nor from the county. *Vide* 22 *H.* VI. 35. Where a *Venire facias* ſhall be from the vill. and not from the county. *Et vid. Cro.* 2. 8.

But, admitting that it was not a good trial by the common law, yet they ſaid, that this being after verdict is aided by the ſtat. 21 *Jac.* cap. 13; for, by this ſtatute, if a *Venire facias* be from one place, where it ſhould be from two, if it be after verdict, it is aided, *Cro.* 1. 480. and *vide* a caſe upon this point T. 1649, in B. R. *Simpſon* and *Golden*, *Entr.* 22. *Car.* I. *Ro.* 107.

1 Cro. 162, 170.

2 Ro. 617, 618.

But to this it was anſwered by the plaintiff's counſel, and ſo agreed *per Cur'*, that this is a mis-trial, and that not only by the common law, but alſo ſince the ſtatute.

For plaintiff Cur'.

1. By the common law: if land held of a manor be in another vill. the *venue* ſhall be from both; for if the iſſue is to be tried of a greater extent than the *venue*, as if the *venue* be of *King-Street*, where the iſſue is of *St. Margaret*, this is a mis-trial, for the *venue* ought to be as large as the thing to be tried. *Hob.* 76. And *Simonds et Burlowe*'s caſe, *Cro.* 2. *Arundell*'s caſe, *Co.* 6. And alſo on the other part it ſeems that the *venue* ought not to be larger than the iſſue, for if the *venue* be of a manor and vill, where it ſhould be of the manor only, this is not good, as was held T. 12 *Jac.* in B. R. Ro. 1979.

2 Cro. 405.

And it is not neceſſary for us to enquire if the *venue* here ought to be of the body of the county, or of the honour; (but it ſeemed to the Chief Juſtice that it could not

be of the honour, and he uſed the argument *of Littleton ſi parentes conquerantur, &c.* before, and of *Ld. Dyer*, 376. *Co. L.* 81. (*Sid.* 114.) that error does not lie upon a judgment in the *Cinque Ports*, becauſe no ſuch writ hath ever yet been brought) for it is ſufficient to prove, that it ought not to be from *Denford*, and from D. it may not be; for how can the *viſne* of D. try a cuſtom of the honour of *Glouceſter*, where it does not appear by all the pleadings that D. is within the ſaid honour? therefore, for the ſame reaſon that it might be from D. it might be from any other vill, in the county of *Northampton*.

1 Inſt. 81. b. Sid. 23. Dy. 376, 11, 23.

Vid. 16, 17. Car. II. cap. 8.

2. This is not aided by the ſtatute, for the ſtatute which aids this mis-trial, if any would, is the ſtatute 21 *Jac.* c. 13. And this ſtatute, as the Chief Juſtice ſaid, only aids mis-trial in two caſes.

1. This ſtatute only aids where the *venue* ought to be from ſeveral places.

2. This ſtatute only aids where one of the places is truly named; but in our caſe it is not ſo, for the ſtatute does not extend to it.

Judgment.

And ſo *per totam Cur'*, after ſeveral arguments at the bar, the judgment was arreſted, and a *Venire facias de novo* awarded, if the plaintiff choſe to take it; but they agreed that he might be nonſuited if he would.

Hob. 16. Sid. 9, 13, 15.

Nota, That the Court did not give their opinion as to the cuſtom, nor as to the place from whence the *Venire facias* ſhould iſſue.

The Chief Juſtice obſerved, that there was not any known place mentioned in the avowry as there ought to have been; but inaſmuch as

as it was after verdict, it was good enough, otherwiſe if there had been a demurrer before verdict, for the want of it upon ſuch demurrer would have made the avowry bad, and ſo he ſaid the books are reconciled. Sid. fo. 10.

By 4 *Ann*, *c.* 16. § 6. writs of *Venire* are to be *de corpore comitatus.*

Action of covenant was brought in *Hampſhire*, and breach aſſigned for not repairing a houſe in *Berkſhire*, and the iſſue joined was *non infregit conventionem*, and verdict in *Hampſhire* for plaintiff. Gilbert v. Martin, M. 15 Car. II. B. R. 1 Sid. 157. Covenant in H. and breach aſſigned in another county, and trial in H. this is a mis-trial.

And it was moved, in arreſt of judgment, that this was a mis-trial; and of this opinion was the Court upon conſideration (except *Windham*) for they ſaid, that this was a ſpecial iſſue, upon which nothing could be given in evidence but the not repairing of the houſe, which is in *Berkſhire*; and although the privity remains, this action being proper, between thoſe who are parties to the deed and not aſſignees, *&c.* yet not any election could be given to the plaintiff in this caſe, for which reaſon it ſeemed to them that it was a mis-trial. 1 Lev. 114. 7 Co. 2, 3. Ray. 85. 1 Keb. 575. 1 Cro. 101, 132, 142. 2 Cro. 446.

Action upon the caſe for an eſcape, upon *meſne* proceſs, was brought in *Exeter* againſt the Sheriff of the county of *Devon*, and the declaration was of a taking at *Topſham*, which is in *Devonſhire*, and that the defendant ſuffered him to eſcape at *Exeter*. And after verdict for the plaintiff it was moved, in arreſt of judgment, becauſe the plaintiff had declared againſt the Sheriff of *Devonſhire* for an eſcape at *Exeter*, which is a city and county Hopping v. Holmy, E. 20. Car. II. B. R. 1 Sid. 364. Eſcape ſuppoſed in another county, yet good after verdict, and it ſhall be intended that he was there by Habeas Corpus, &c. 2 Keb. 350.

of itſelf, and not part of the county of *Devon*; and for this it was at firſt ſtayed.

7 Co. 2. a. 2 Brownl. 165, 166. 2 And. 35. Pl. 22.

But, at another day, judgment was given for the plaintiff, by all but *Twiſden* Juſtice; for being after verdict, it ſhall be intended that the defendant had the cuſtody of his priſoner in *Exeter*, either upon *Habeas Corpus*, or upon freſh purſuit. But per *Twiſden* this is too foreign an intendment.

1 And. 291. 2 And. 35. The judge ſat in one county, and the jury were in another, upon the trial of this cauſe.

Nota, In this caſe it was ſaid, that in *Nottingham*, which is a city and county, the judge ſits in the city, and tries the cauſes of the county at large.

The jury were, and gave their verdict, in the county at large, but the clerk took and recorded their verdict in the city.

And judgment was given for the plaintiff, *Niſi*, &c.

Lander and Elliot. H. 3 & 4 Jac. II. in B. R. Comb. 75. Declaration in Middleſex, plea in Hertford.

Debt for rent brought in *Middleſex*. The defendant pleaded an entry before the rent became due, and that he was held out, &c. at ſuch a place in *Hertfordſhire*, where the land lay; and iſſue was taken thereon, and tried in Middleſex.

Mis-trial.

Pemberton moved, in arreſt of judgment, that this was a mis-trial.

Tremain contra. It is aided by the ſtatute of *Jeofailes*, *Croft*, and *Waters*'s caſe, in *Saunders*, adjudged (I believe he meant *Craft* and *Boit*. 1 *Saund*. 247) *Wiſe* and *Adderly*'s caſe in *C. B.* in *Saunders*.

Locality.

Pemberton. A local juſtification will alter the caſe, and the locality was neceſſary in our caſe; otherwiſe in the caſe in *Saunders*, (which was agreed by the Court) the later judgments are contrary to *Wiſe* and *Adderly*'s caſe; ſo *per Pollexfen* in *Jennings* and *Hankey*'s caſe.

Curia.

Curia. This is a mis-trial, and a *Venire facias de novo* was awarded.

Edgborough v. Stephenſon. P. 4 Jac. II. B. R. Comb. 34. Fact in Staffordſhire, tried in Middleſex, no mis-trial.

The plaintiff declares, that he was the firſt inventor of the horizontal mill, for which he had letters patent for fourteen years, and that notwithſtanding which, the defendant made another mill, like, *&c.* and damages, *&c.* Verdict *pro quer'.*

Holt moved, in arreſt of judgment, that it was a mis-trial in *Middleſex*, the mill being made in *Staffordſhire*, where only the cauſe of action ariſeth.

Obj. Bulwer's caſe. *Anſw.* In that caſe there are two tortious acts there; *ſecus* in our caſe.

Here the letters patent are only an inducement to the action. 1 *Cro.* 143, 183.

He is the offender who uſeth the art, and not he that makes the mill, which the Court denied.

Pollexfen pro judicio.

The cauſe of action ariſeth in both counties. *Vide* 7 *Co. Bulwer*'s caſe; but admitted, that before *Bulwer*'s caſe, the opinion was, that the action ſhould be brought where the original fact was done.

Obj. That it is not averred, that no other uſed this art before the plaintiff, at the time of granting the patent.

Anſw. It appears by the record *quod primus inveniſſet, &c.*

Obj. Notwithſtanding that, it might be uſed beyond ſea.

Anſw. Admitting that, yet it ſhall be good, and within the ſtatute, for that ſpeaks only of new manufactures within this realm, which *Holloway* agreed.

The Court over-ruled the exceptions, and gave judgment *pro quer'.*

Debt

Smith v. Sephton. In B. R. Comb. 115.

Bond at Chester tried here.

Debt on bond made at *Cheſter*, on *plene adminiſtravit* pleaded, it was tried here by *mittimus* to *Cheſter*, and a verdict for the plaintiff: it was now moved in arreſt of judgment, that the bond being made at *Cheſter*, ought to be tried there; but it was adjudged, becauſe it was not pleaded, that the party dwelt there, or had whereby to be attached there, that there would be a failure of juſtice, if it could not be tried here; and *Minſhew* and *Ireton (per Dolben)* was adjudged accordingly.

Judgment for the plaintiff. Vide *Fitz Juriſdiction*, 29, 57.; and *Jennings* and *Hankey*'s caſe. *Vide poſt*, *IX.* (2.)

Comb. 30, 48.

Heath v. Walker, in Middleſex, T. 12 Geo. II. B. R. 2 Stra. 1117.

If it appears no iſſue is joined, the jury muſt be diſmiſſed.

Upon looking into the record there was no iſſue joined, for it was *et praed'* the defendant, inſtead of the plaintiff, *ſimiliter:* it was therefore objected, that the Chief Juſtice had no commiſſion to try any iſſue. And the doubt was, what to do, for the Jury had been ſworn. And upon adviſing with the Bar, the Chief Juſtice diſmiſſed the Jury, for he could not call the plaintiff, or ſuffer the defendant to take a verdict.

V. 1 Stra. 267.

IX. Of other Matters reſpecting new Trials, &c.

(2.) *Of Locality of Trial.*

Vide ante IX. (1.) *Lander v. Elliot.*

Lady Calverley v. Sir Richard Leving, P. 10. W. III. B. R. Comb. 472. Covenant, and ſeveral breaches aſſigned; one being local, tried out of the county, yet aided after verdict.

COVENANT laid at *Tarvin*, in the county of *Cheſter*, upon a demiſe of an houſe ſituate at *Cheſter:* and ſeveral breaches were aſſigned; *videlicet*, for non-payment of rent, and for not keeping the houſe in repair. The defendant pleaded *riens arrear*; and that he had kept the houſe in good repair, *&c.* whereupon ſeveral iſſues were joined, and the cauſe was tried by *mittimus* before the Chief Juſtice of *Cheſter* at the laſt Aſſizes, where the plaintiff obtained a verdict, and ſeveral damages upon the ſeveral iſſues: And now it was moved by Sir *Barth. Shower*, that this was a *mis-trial* as to the *repairs*, for it appears the houſe is ſituate in the city of *Cheſter*, which is a diſtinct county, and the iſſue being local, could not be tried by a jury *de vicineto de Tarvin in com. Ceſtr'*, and to that opinion the Chief Juſtice at firſt inclined; but afterwards, the whole Court held, that it was aided after verdict by the *ſtat.* 16 *and* 17 *Car. II.* being tried by a jury of the county where the action was laid.

Leeds v. Power. H. 7. Geo. B. R. 1 Stra. 417.

Error *tam in redditione judicii* in an ejectment in C. B. in *Ireland, quam in affirmatione ejuſdem in B. R.* there.

How to compel an aſſignment of errors on writs from Ireland.

The beginning of the term I moved for the common rule, that the plaintiff ſhould aſſign his errors, it not being uſual to take out a *ſcire facias*, as we do on writs of error from *C. B.* When that rule was out, I moved again, upon an affidavit, that we could find nobody concerned for the plaintiff in error, and had fixed it up in the office; that therefore we might be at liberty to ſign a *non pros*, elſe if we ſhould be put to ſend the rule over to *Ireland* to be ſerved, the delay would be as great as in the caſe of a *ſcire facias*, and it being a writ of the plaintiff's own ſuing out, he muſt be appriſed when was the due time to come in and proſecute it. Whereupon the Court made a new rule, that unleſs errors were aſſigned within four days after fixing a new note up in the office, the defendant in error ſhould be at liberty to ſign a *non pros.*

Per Strange: Hill. 8 Geo. Huxley v. Burton. In an Iriſh writ of error I had the ſame rule.

Hill. 11 Geo. Waters v. Ballantine, I had the ſame rules on my motion.

Within the time errors were aſſigned; and on the arguing, *Reeve* objected, that it is an ejectment for lands in the county of *Dublin*, and yet the trial is at the King's court in the county of the city of *Dublin.*

Strange contra. This Court will not take notice that they are diſtinct counties, but rather intend the city to be part of the county, that the county of the city of *Dublin* is the county in which the city of *Dublin* lies. Or if they ſhould, yet the trial may be right, for it runs *poſtea die et loco infra content'*, which *locus infra contentus* may be as well the place within the county of *Dublin* where the demiſe is laid to be made, as any other.

Or

Or admitting it a trial out of the proper county, yet it is helped by the 16 *and* 17 *Car. II. c.* 8. which is enacted in *Ireland* by 17 *and* 18 *Car. II. c.* 12. being a trial by a jury of the proper county, for the award of the *venire* is previous to any mention of the county of the city, and commands the ſheriff of the county to ſummon twelve men of his county, and then the trial is had by the *juratores unde infra fit mentio.*

If this be not right, there never was a proper trial of any cauſe ariſing in the county of *Dublin*; for the King's courts ſitting in the city of *Dublin*, it is there all the trials of thoſe cauſes are had: juſt as here, where cauſes of *Middleſex* are tried in the ſame place where the King's Bench ſits. We have inſtances in *England* of county cauſes being tried in cities which are counties alſo, as at *Worceſter*, where both are tried in the ſame place.

The Court ſaid, they muſt intend them diſtinct counties; but as to the other points, they went over to be inquired into. And afterwards,

In anſwer to the objection made the laſt term, that the lands lay in the county of *Dublin*, and the trial was in the county of the city of Dublin, *Strange* now cited an act of parliament made in *Ireland* 17 *and* 18 *Car. II. c.* 20, which appoints the trial of cauſes ariſing in the county of *Dublin* to be at *Niſi prius* in the ſame place where the King's courts ſit, in the county of the city of *Dublin.* So the judgment was affirmed.

N. B. There being ſuch an expreſs act of parliament, I thought it not neceſſary to put it on the former foot of being a trial by a jury

Vide ante.

jury of the proper county, which would have been a ſufficient anſwer: for *Paſch.* 10 *W. III. B. R. Lady Calverley v. Sir Richard Leving*, in covenant, the caſe was ſent into the county palatine of *Cheſter*, on a local plea of a matter ariſing in the county of the city of *Cheſter*: the *mittimus* to the *C. J.* was to award a *venire* to the ſheriff of the county of *Cheſter*, which was done accordingly; and after verdict *pro quer'*, moved by Sir *Barth. Shower*, in arreſt of judgment, that this is a mis-trial, not aided by the ſtatute of *Jeofails*; being a trial in a wrong county: but the Court held it was aided: and that is a ſtronger caſe than this, where it appears the trial was by a jury of the proper county, as it was not in that caſe; and in delivering the reſolution of the Court, *Holt C. J.* cited *Chew.* v. *Brigs* in *B. R.* where he ſaid it had been ſo held likewiſe, and ſo in 1 *Saund.* 246. *Craft v. Boite.*

Carth. 448.

At Guildhall *coram Eyre, C. J. de C. B.*

Shelling v. Farmer. M. 12 Geo. C. B.
1 Stra. 646.
Seiſing an houſe in the Eaſt Indies is not triable here.

In an action of treſpaſs and impriſonment for facts done in the *Eaſt Indies*, the plaintiff laid them all (being tranſitory) in *London*, and *inter alia* declared for ſeiſing the plaintiff's houſe, ſituate *apud London praed' in parochia et warda praed'*. It was objected *pro def'* that the treſpaſs as to the houſe was local, and they could not give evidence of ſeiſing a houſe in the *Eaſt Indies*. And *Eyre, C. J.* refuſed to let the plaintiff give evidence as to the houſe, comparing it to the caſe of rent for a houſe at *Barbadoes*, where it has been held you may bring covenant for the rent in *England*, but an action of debt, which is local, cannot be brought here.

Vide Poſt. Moſtyn and Fabrigas.

On

Moſtyn v. Fabrigas. M. 15 Geo. III. B.R. Cowp. 161.

1774, Tueſ. Nov. 14.

Treſpaſs and falſe impriſonment lies in England by a native Minorquin againſt a governor of Minorca, for ſuch injury committed by him in Minorca.

On the 8th of June, in laſt term, *Mr. Juſtice Gould* came perſonally into Court, to acknowledge his ſeal affixed to a bill of exceptions in this caſe; and errors having been aſſigned thereupon, they were now argued.

This was an action of treſpaſs, brought in the court of Common Pleas, by *Anthony Fabrigas* againſt *John Moſtyn*, for an aſſault and falſe impriſonment; in which the plaintiff declared, that the defendant on the 1ſt of *September*, in the year 1771, with force and arms, *&c.* made an aſſault on the ſaid *Anthony*, at *Minorca*, (to wit) at *London* aforeſaid, in the pariſh of *St. Mary-le-Bow*, in the ward of *Cheap*, and beat, wounded, and ill-treated him, and then and there impriſoned him, and kept and detained him in priſon there for a long time, (to wit, for the ſpace of ten months) without any reaſonable or probable cauſe, contrary to the laws and cuſtoms of this realm, and againſt the will of the ſaid *Anthony*, and compelled him to depart from *Minorca* aforeſaid, where he was then dwelling and reſident, and carried, and cauſed to be carried, the ſaid *Anthony* from *Minorca* aforeſaid to *Carthagena*, in the dominions of the King of *Spain*, *&c.* to the plaintiff's damage of £. 10,000.

The defendant pleaded, 1ſt, Not Guilty; upon which iſſue was joined. 2dly, A ſpecial juſtification, that the defendant at the time when, *&c.* and long before, was governor of the ſame iſland of *Minorca*, and during all that time was inveſted with, and did exerciſe, all the powers, privileges, and authorities, civil and military, belonging to the government of the ſaid iſland of *Minorca*, in parts beyond the ſeas; and the ſaid *Anthony*, before the

ſaid

ſaid time when, &c. (to wit) on the ſaid 1ſt of *September*, in the year aforeſaid, at the iſland of *Minorca* aforeſaid, was guilty of a riot, and was endeavouring to raiſe a mutiny among the inhabitants of the ſaid iſland, in breach of the peace: whereupon the ſaid *John*, ſo being governor of the ſaid iſland of *Minorca* as aforeſaid, at the ſaid time, when, *&c.* in order to preſerve the peace and government of the ſaid iſland, was obliged to, and did then and there order the ſaid *Anthony* to be baniſhed from the ſaid iſland of *Minorca*; and in order to baniſh the ſaid *Anthony*, did then and there gently lay hands upon the ſaid *Anthony*, and did then and there ſeiſe and arreſt him, and did keep and detain the ſaid *Anthony*, before he could be baniſhed from the ſaid iſland, for a ſhort ſpace of time, (to wit) for the ſpace of ſix days then next following; and afterwards (to wit) on the 7th of September, in the year aforeſaid, at *Minorca* aforeſaid, did carry, and cauſe to be carried, the ſaid *Anthony*, on board a certain veſſel, from the iſland of *Minorca* aforeſaid to *Carthagena* aforeſaid, as it was lawful for him to do, for the cauſe aforeſaid; which are the ſame making the ſaid aſſault upon the ſaid *Anthony*, in the firſt count of the ſaid declaration mentioned, and beating and ill-treating him, and impriſoning him, and keeping and detaining him in priſon for the ſaid ſpace of time, in the ſaid firſt count of the ſaid declaration mentioned, and compelling the ſaid *Anthony* to depart from *Minorca* aforeſaid, and carrying, and cauſing to be carried, the ſaid *Anthony* from *Minorca* to *Carthagena*, in the dominions of the King of *Spain*, whereof the ſaid *Anthony* has above complained againſt

againſt him, and this he is ready to verify; wherefore he prays judgment, *&c.* without this, that the ſaid *John* was guilty of the ſaid treſpaſs, aſſault, and impriſonment, at the pariſh of *St. Mary le Bow*, in the ward of *Cheap*, or elſewhere, out of the ſaid iſland of *Minorca* aforeſaid. Replication *de injuria ſuâ propriâ abſq. tali cauſâ.* At the trial the jury gave a verdict for the plaintiff, upon both iſſues, with £. 3000 damages, and £. 90 coſts.

The ſubſtance of the evidence, as ſtated by the bill of exceptions, was as follows:—On behalf of the plaintiff, that the defendant, at the iſland of *Minorca*, on the 17th of *September* 1771, ſeiſed the plaintiff, and, without any trial, impriſoned him for the ſpace of ſix days againſt his will, and baniſhed him for the ſpace of twelve months from the ſaid iſland of *Minorca* to *Carthagena* in *Spain*. On behalf of the defendant; that the plaintiff was a native of *Minorca*, and at the time of ſeiſing, impriſoning, and baniſhing him as aforeſaid, was an inhabitant of and reſiding in the *Arraval* of *St. Phillip*'s, in the ſaid iſland; that *Minorca* was ceded to the crown of *Great Britain*, by the treaty of *Utrecht*, in the year 1713. That the *Minorquins* are in general governed by the *Spaniſh* laws, but when it ſerves their purpoſe plead the *Engliſh* laws; that there are certain magiſtrates, called the chief juſtice criminal, and the chief juſtice civil, in the ſaid iſland; that the ſaid iſland is divided into four diſtricts, excluſive of the *Arraval of St. Phillip*'s; which the witneſs always underſtood to be ſeparate and diſtinct from the others, and under the immediate order of the governor; ſo that no magiſtrate of *Mahon* could go there

to exercise any function, without leave first had from the governor: that the *Arraval* of *St. Phillip*'s is surrounded by a line wall on one side, and on the other by the sea, and is called the Royalty, where the governor has greater power than any where else in the island; and where the judges cannot interfere but by the governor's consent; that nothing can be executed in the *Arraval* but by the governor's leave, and the judges have applied to him, the witness, for the governor's leave to execute process there. That for the trial of murder and other great offences committed within the said *Arraval*, upon application to the governor, he generally appoints the *assessour* criminal of *Mahon*, and for lesser offences, the *Mustastaph*; and that the said *John Mostyn*, at the time of the seising, imprisoning, and banishing the said *Anthony*, was the governor of the said island of *Minorca*, by virtue of certain letters patent of his present Majesty. Being so governor of the said island, he caused the said *Anthony* to be seised, imprisoned, and banished as aforesaid, without any reasonable or probable cause, or any other matter alledged in his plea, or any act tending thereto.

This case was argued this term, by Mr. *Buller*, for the plaintiff in error, and Mr. *Peckham*, for the defendant. Afterwards, in Hilary term 1775, by Mr. Serjeant *Walker*, for the plaintiff, and Mr. Serjeant *Glynn*, for the defendant.

For the plaintiff in error. There are two questions, 1st. Whether in any case an action can be maintained in this country for an imprisonment at *Minorca*, upon a native of that place?

2dly.

2dly. Suppoſing an action will lie againſt any other perſon, whether it can be maintained againſt the Governor, acting as ſuch in the peculiar diſtrict of the *Arraval* of *St. Phillip*'s?

In the diſcuſſion of both theſe queſtions, the conſtitution of the iſland of *Minorca*, and of the *Arraval* of *St. Phillip*'s, are material. Upon the record it appears, that by the treaty of *Utrecht*, the inhabitants had their own property and laws preſerved to them. The record further ſtates, that the *Arraval* of *St. Phillip*'s, where the preſent cauſe of action aroſe, is *ſubject* to the immediate *controul* and order of the *governor only*, and that no judge of the iſland can execute any function there, without the particular leave of the governor for that purpoſe. 1ſt. If that be ſo, and the *lex loci* differs from the law of this country; the *lex loci* muſt decide, and not the law of this country. The caſe of *Robinſon verſus Bland*, 2 *Bur.* 1078, does not interfere with this poſition; for the doctrine laid down in that caſe is, that where a tranſaction is entered into between *Britiſh* ſubjects with a view to the *law of England*, the law of the *place* can never be the rule which is to govern. But where an act is done, as in this caſe, which by the law of *England* would be a crime, but in the country where it is committed is no crime at all; the *lex loci* cannot be the rule. It was ſo held by Lord *C. J. Pratt*, in the caſe of *Pons verſus Johnſon*, ſittings after Trinity term 1765.

2d. In criminal caſes, an offence committed in foreign parts, cannot, except by particular ſtatutes, be tried in this country. 1*ſt Vezey*, 246. The *Eaſt India Company verſus Campbell.* If crimes committed abroad cannot be tried here, much leſs ought civil injuries, be-

cauſe the latter depend upon the police and conſtitution of the country where they occur, and the ſame conduct may be actionable in one country which is juſtifiable in another. But in crimes, as murder, perjury, and many other offences, the laws of moſt countries take for their baſis, the law of God and the law of nature; and therefore, though the trial be in a different country from that in which the offence was committed, there is a greater probability of diſtributing equal juſtice in ſuch caſes than in civil actions. In *Keilway* 202. it was held that the court of *Chancery* cannot entertain a ſuit for dower, in the *Iſle of Man*, though it is part of the territorial dominions of the crown of *England*.

3d. The caſes where the courts of *Weſtminſter* have taken cognizance of tranſactions ariſing abroad, ſeem to be wholly on contracts, where the laws of the foreign country have agreed with the laws of *England*, and between *Engliſh* ſubjects; and even there it is done by a legal fiction; namely, by ſuppoſing under a *videlicet*, that the cauſe of action did ariſe within this country, and that the place abroad lay either in *London* or *Iſlington*. But where it appears upon the face of the record, that the cauſe of action did ariſe in foreign parts, there it has been held that the Court has no juriſdiction, 2 *Lutw*. 946. Aſſault and falſe impriſonment of the plaintiff, at *Fort St. George*, in the *Eaſt Indies*, in parts beyond the ſeas; *videlicet*, at *London*, in the pariſh of *St. Mary le Bow*, in the ward of *Cheap*—It was reſolved, by the whole Court, that the declaration was ill, becauſe the treſpaſs is ſuppoſed to be committed at *Fort St. George*, in parts beyond the ſeas, *videlicet*, in *London*; which

is

is repugnant and abſurd: and it was ſaid, by the Chief Juſtice, that if a bond *bore date* at *Paris*, in the kingdom of *France*; it is not triable here. In the preſent caſe, it does appear upon the record, that the offence complained of was committed in parts beyond the ſeas, and the defendant has concluded his plea with a traverſe, that he was not guilty in *London*, in the *pariſh of St. Mary le Bow*, or elſewhere, *out* of the iſland of *Minorca*. Beſides, it ſtands admitted by the plaintiff; becauſe if he had thought fit to have denied it, he ſhould have made a new aſſignment, or have taken iſſue on the place. Therefore, as Juſtice *Dodderidge* ſays, in *Latch*. 4. the Court muſt take notice, that the cauſe of action aroſe out of their juriſdiction.

Before the ſtatute of *Jeofails*, even in caſes the moſt tranſitory, if the cauſe of action was laid in *London*, and there was a local juſtification, as at *Oxford*, the cauſe muſt have been tried at *Oxford*, and not in *London*. But the ſtatute of *Jeofails* does not extend to *Minorca*: therefore this caſe ſtands entirely upon the common law; by which the trial is bad, and the verdict void.

The inconveniences of entertaining ſuch an action in this country are many, but none can attend the rejecting it. For it muſt be determined by the law of this country, or by the law of the place where the act was done. If by our law, it would be the higheſt injuſtice, by making a man who has regulated his conduct by one law, amenable to another totally oppoſite. If by the law of *Minorca*, how is it to be proved? There is no legal mode of certifying it, no proceſs to compel the attendance of witneſſes, nor means to make them anſwer.

The conſequence would be, to encourage every diſaffected or mutinous ſoldier to bring actions againſt his officer, and to put him upon his defence, without the power of proving either the law or the facts of his caſe.

II. Point. If an action would lie againſt any other perſon, yet it cannot be maintained againſt the Governor of *Minorca*, acting as ſuch, within the *Arraval of St. Phillip*'s.

The governor of *Minorca*, at leaſt within the diſtrict of *St. Phillip*'s, is abſolute: both the civil and criminal juriſdiction veſt in him as the *ſupreme power*, and as ſuch he is accountable to none but God. But ſuppoſing he were not abſolute, in this caſe, the act complained of was done by him in a judicial capacity as criminal judge; for which no man is anſwerable. 1 *Salk.* 396. *Groenvelt verſus Burwell.* 2 *Mod.* 218. *Show. Parl.* caſes 24. *Dutton verſus Howell*, are in point to this poſition; but more particularly the laſt caſe; where in treſpaſs, aſſault, and falſe impriſonment, the defendant juſtified as governor of *Barbadoes*, under an order of the council of ſtate in *Barbadoes*, made by himſelf and the council, againſt the plaintiff (who was the deputy governor) for mal-adminiſtration in his office; and the Houſe of Lords determined, that the action would not lie here. All the grounds and reaſons urged in that caſe, and all the inconveniences pointed out againſt that action hold ſtrongly in the preſent. This is an action brought againſt the defendant for what he did as Judge; all the records and evidence which relate to the tranſaction are in *Minorca*, and cannot be brought here; the laws there are different from what they are in this country; and as it is ſaid in the concluſion of that argument,

ment, government muſt be very weak indeed, and the perſons entruſted with it very uneaſy, if they are ſubject to be charged with actions here, for what they do in that character in thoſe countries. Therefore, unleſs that caſe can be materially diſtinguiſhed from the preſent, it will be an authority, and the higheſt authority that can be adduced, to ſhew that this action cannot be maintained; and that the plaintiff in error is entitled to the judgment of the Court.

Mr. *Peckham*, for the defendant in error.

Firſt. The objection to the juriſdiction is now too late; for wherever a party has once ſubmitted to the juriſdiction of the Court, he is for ever after precluded from making any objection to it. *Year Book* 22. *H. VI. fol.* 7. *Co. Litt.* 127. *b. T. Raym.* 34. 1 *Mod.* 81. 2 *Mod.* 273. 2 Lord *Raym.* 884. 2 *Vern.* 483.

Secondly, An action of treſpaſs can be brought in *England* for an injury done abroad. It is a tranſitory action, and may be brought any where. *Co. Litt.* 282. 12 *Co.* 114. *Co. Litt.* 261. *b.* where Lord *Coke* ſays, that an obligation made beyond ſeas, at *Bourdeaux* in *France*, may be ſued here in *England*, in what place the plaintiff will. Captain *Parker* brought an action of treſpaſs and falſe impriſonment againſt Lord *Clive* for injuries received in *India*, and it was never doubted but that the action did lie. And at this time there is an action depending between *Gregory Cojimaul*, an *Armenian* merchant, and Governor *Verelſt*, in which the cauſe of action aroſe in *Bengal*. A bill was filed by the Governor in the *Exchequer* for an injunction, which was granted; but on appeal to the Houſe of Lords, the injunction was diſſolved; therefore the ſupreme court of

judicature, by diſſolving the injunction, acknowledged that an action of treſpaſs could be maintained in *England*, though the cauſe of action aroſe in *India*.

Thirdly, There is no diſability in the plaintiff which incapacitates him from bringing this action. Every perſon born within the ligeance of the king, though without the realm, is a natural born ſubject; and as ſuch, is entitled to ſue in the king's courts. *Co. Litt.* 129. The plaintiff, though born in a conquered country, is a ſubject, and within the ligeance of the king. 2 *Burr.* 858.

In 1 *Salk.* 404. Upon a bill to foreclоſe a mortgage in the iſland of *Sarke*, the defendants pleaded to the juriſdiction, *viz.* that the iſland was governed by the laws of *Normandy*, and that the party ought to ſue in the courts of the iſland, and appeal. But Lord Keeper *Wright* over-ruled the plea; "otherwiſe there might be a failure of juſtice if the Chancery could not hold plea in ſuch caſe, the party being here." In this caſe both the parties are upon the ſpot. In the caſe of *Ramkiſſenſeat verſus Barker*, upon a bill filed againſt the repreſentatives of the governor of *Patna*, for money due to him as his *Banyan*; the defendant pleaded, that the plaintiff was an alien born, and an alien infidel, and therefore could have no ſuit here. But Lord *Hardwicke* ſaid, "as the plaintiff's was a mere perſonal demand, it was extremely clear that he might bring a bill in this Court;" and he over-ruled the defendant's plea without hearing one counſel of the other ſide.

The caſe of the Counteſs of *Derby*, *Keilway* 202. does not affect the preſent queſtion; for that was a claim of dower; which is a *local* action, and cannot, as a tranſitory action, be tried

tried any where. The other caſes from *Latch* and *Lutwyche*, were either local actions, or queſtions upon demurrer; therefore not applicable to the caſe before the Court; for a party may avail himſelf of many things upon a demurrer, which he cannot by a writ of error. The true *diſtinction* between *tranſitory* and *local* actions is, the former may be tried any where; the latter cannot, and this is a tranſitory action. But there is one caſe which more particularly points out the diſtinction, which is the caſe of Mr. *Skinner*, referred to the twelve Judges from the Council-board. In the year 1657, when trade was open to the *Eaſt Indies*, he poſſeſſed himſelf of a houſe and warehouſe, which he filled with goods at *Jamby*; and he purchaſed of the king at *Great Jamby* the iſlands of *Baretha*. The agents of the *Eaſt India Company aſſaulted his perſon*, ſeiſed his warehouſe, carried away his *goods*, and took and *poſſeſſed* themſelves of the *iſlands of Baretha*. Upon this caſe it was propounded to the Judges, by an order from the King in council, dated the 12th *April*, 1665, "Whether Mr. *Skinner* could have a full re-"lief in any ordinary court of law?" Their opinion was, "That his Majeſty's ordinary "courts of juſtice at *Weſtminſter* can give re-"lief for taking away and ſpoiling his ſhip, "goods and papers, and aſſaulting and wound-"ing his perſon, notwithſtanding the ſame "was done beyond the ſeas. But that as to "the detaining and *poſſeſſing* the *houſe* and "*iſlands* in the caſe mentioned, he is not re-"lievable in any ordinary court of juſtice." It is manifeſt from this caſe, that the twelve Judges held, that an action might be maintained here for ſpoiling his goods, and ſeiſing his perſon, becauſe an action of treſpaſs is a

tranſitory

tranſitory action; but an action could not be maintained for poſſeſſing the houſe and land, becauſe it is a *local* action.

Fourth Point. It is contended that General *Moſtyn* governs as all abſolute ſovereigns do, and that *ſtet pro ratione voluntas* is the only rule of his conduct. From whom does the governor derive this deſpotiſm? Not from the king, for the king has no ſuch power, and therefore cannot delegate it to another. Many caſes have been cited, and much argument has been adduced to prove that a man is not reſponſible in an action for what he has done as a Judge; and the caſe of *Dutton verſus Howell* has been much dwelt upon; but that caſe has not the leaſt reſemblance to the preſent. The ground of that deciſion was, that Sir *John Dutton* was acting with his council in a judicial capacity, in a matter of public accuſation, and agreeable to the laws of *Barbadoes*, and only let the law take its courſe againſt a criminal. But Governor *Moſtyn* neither ſat as a military or as a civil judge; he heard no accuſation, he entered into no proof; he did not even ſee the priſoner; but in direct oppoſition to all laws, and in violation of the firſt principles of juſtice, followed no rule but his own arbitrary will, and went out of his way to perſecute the innocent. If that be ſo, he is reſponſible for the injury he has done: and ſo was the opinion of the court of *C. B.* as delivered by Lord Chief Juſtice *De Grey* on the motion for a new trial. If the governor had ſecured him, ſaid his Lordſhip, nay, if he had barely committed him, that he might have been amenable to juſtice; and if he had immediately ordered a proſecution upon any part of his conduct, it would have been another queſtion; but the governor knew he could no more impriſon him for a twelve-

twelvemonth (and the baniſhment for a year is a continuation of the original impriſonment) than that he could inflict the torture. Lord *Bellamont*'s caſe, 2 *Salk.* 625. *Paſ.* 12. *W.* 3. Vide Poſt XI. is a caſe in point to ſhew that a governor abroad is reſponſible here: and the ſtat. 12 *W.* 3. paſſed the ſame year, for making governors abroad amenable here in *criminal* caſes, affords a ſtrong inference that they were already anſwerable for *civil* injuries, or the legiſlature would at the ſame time have provided againſt that miſchief. But there is a late deciſion not diſtinguiſhable from the caſe in queſtion, *Comyn verſus Sabine*, governor of *Gibraltar*, *Mich.* 11. *Geo.* 2. The declaration ſtated, that the plaintiff was a maſter carpenter of the office of ordnance at *Gibraltar*; that Governor *Sabine* tried him by a court-martial to which he was not ſubject, that he underwent a ſentence of 500 laſhes; and that he was compelled to depart from *Gibraltar*, which he laid to his damage of £. 10,000. The defendant pleaded not guilty, and juſtified under the ſentence of the court-martial. There was a verdict for the plaintiff, with £. 700. damages. A writ of error was brought, but the judgment affirmed.

With reſpect to the *Arraval of St. Phillip*'s being a peculiar diſtrict under the immediate authority of the governor alone, the opinion of Lord Chief Juſtice *De Grey* upon the motion for a new trial, is a complete anſwer: "One of "the witneſſes in the cauſe (ſaid his Lordſhip) "repreſented to the jury, that in ſome particu- "lar caſes, eſpecially in criminal matters, "the governor reſident upon the iſland, does "exerciſe a legiſlative power. It was groſs "ignorance in that perſon to imagine ſuch a "thing;

" thing; I may ſay it was impoſſible, that a " man who lived upon the iſland in the ſtation " he had done, ſhould not know better, than " to think that the governor had a civil and " criminal power in him. The governor is " the king's ſervant; his commiſſion is from " him, and he is to execute the power he is " inveſted with under that commiſſion; which " is, to execute the laws of *Minorca*, under " ſuch regulations as the king ſhall make in " council. It was a vain imagination in the " witneſſes to ſay, that there were five *terminos* " in the iſland of *Minorca*; I have, at various " times, ſeen a multitude of authentic docu- " ments and papers relative to that iſland, and " I do not believe that in any one of them, " the idea of the *Arraval of St. Phillip*'s being " a diſtinct juriſdiction, was ever ſtarted. " *Mahon* is one of the four *terminos*, and *St.* " *Phillip*'s, and all the diſtrict about it, is " comprehended within that *termino*; but to " ſuppoſe that there is a diſtinct juriſdiction, " ſeparate from the government of the iſland, " is ridiculous and abſurd." Therefore as the defendant, by pleading in chief, and ſubmitting his cauſe to the deciſion of an *Engliſh* jury, is too late in his objection to the juriſdiction of the Court; as no diſability incapacitates the plaintiff from ſeeking redreſs here; and as the action which is a tranſitory one is clearly maintainable in this country, though the cauſe of action aroſe abroad, the judgment ought to be affirmed. Should it be reverſed, I fear the public, with too much truth, will apply the lines of the Roman ſatiriſt on the drunken *Marius* to the preſent occaſion; and they will ſay of Governor *Moſtyn*, as was formerly ſaid of him,

Hic

Hic eſt damnatus inani judicio;

and to the *Minorquins*, if Mr. *Fabrigas* ſhould be deprived of that ſatisfaction in damages which the jury gave him,

At tu victrix provinciâ ploras.

Lord MANSFIELD. Let it ſtand for another argument. It has been extremely well argued on both ſides.

On *Friday* 27th *January*, 1755, it was very ably argued by Mr. Serjeant *Glynn*, for the plaintiff, and by Mr. Serjeant *Walker* for the defendant.

Lord MANSFIELD. This is an action brought by the plaintiff againſt the defendant, for an aſſault and falſe impriſonment; and part of the complaint made, being for baniſhing him from the iſland of *Minorca* to *Carthagena* in *Spain*, it was neceſſary for the plaintiff, in his declaration, to take notice of the real place where the cauſe of action aroſe; therefore he has ſtated it to be in *Minorca*; with *a videlicet*, at *London*, in the pariſh of *St. Mary le Bow*, in the ward of *Cheap*. Had it not been for that particular requiſite, he might have ſtated it to have been in the county of *Middleſex*. To this declaration the defendant put in two pleas. *Firſt*, "not guilty;" ſecondly, that he was Governor of *Minorca* by letters patent from the Crown; that the plaintiff was raiſing a ſedition and mutiny; and that in conſequence of ſuch ſedition and mutiny, he did impriſon him, and ſend him out of the iſland; which as Governor, being inveſted with all the privileges, rights, *&c.* of governor, he alledges he had a right to do. To this plea the plaintiff does not demur, nor does he deny that it

would be a juſtification in caſe it were true: but he denies the truth of the *fact*; and puts in iſſue whether the *fact* of the plea is true. The plea avers that the aſſault for which the action was brought aroſe in the iſland of *Minorca*, *out* of the realm of *England*, and no where elſe. To this the plaintiff has made no new aſſignment, and therefore by his replication he *admits* the *locality* of the cauſe of action.

Thus it ſtood on the pleadings. At the trial the plaintiff went into the evidence of his caſe, and the defendant into evidence of his; but on behalf of the defendant, evidence different from the facts alledged in his plea of juſtification was given, to ſhew that the *Arraval* of *St. Phillip*'s, where the injury complained of was done, was not within either of the four precincts, but is a diſtrict of itſelf, more immediately under the power of the governor; and that no judge of the iſland can exerciſe juriſdiction there, without a ſpecial appointment from him. Upon the facts of the caſe the judge left it to the jury, who found a verdict for the plaintiff, with £.3000 damages. The defendant has tendered a bill of exceptions, upon which bill of exceptions the cauſe comes before us; and the great difficulty I have had upon both the arguments, has been to be able clearly to comprehend what the queſtion is, which is meant ſeriouſly to be brought before the Court.

If I underſtand the counſel for Governor *Moſtyn* right, what they ſay is this: the plea of not guilty is totally immaterial; and ſo is the plea of juſtification, becauſe upon the plaintiff's own ſhewing it appears, 1ſt, that the cauſe of action aroſe in *Minorca*, out of the

realm; 2dly, that the defendant was governor of *Minorca*, and by virtue of ſuch his authority impriſoned the plaintiff. From thence it is argued, that the Judge who tried the cauſe ought to have refuſed any evidence whatſoever, and have directed the Jury to find for the defendant: and three reaſons have been aſſigned. One, inſiſted upon in the former argument, was, that the plaintiff, being a *Minorquin*, is incapacitated from bringing an action in the king's courts in *England*. To diſpoſe of that objection at once, I ſhall only ſay, it is wiſely abandoned to-day; for it is impoſſible there ever could exiſt a doubt, but that a ſubject born in *Minorca*, has as good a right to appeal to the king's courts of juſtice, as one who is born within the ſound of *Bow* bell: and the objection made in this caſe, of its not being ſtated on the record that the plaintiff was born ſince the treaty of *Utrecht*, makes no difference. The two other grounds are, 1ſt, that the defendant being *governor* of *Minorca*, is anſwerable for no injury whatſoever done by him in that capacity: 2dly, that the injury being done at *Minorca*, *out* of the realm, is not cognizable by the king's courts in *England*. —As to the firſt, nothing is ſo clear as that to an action of this kind the defendant, if he has any juſtification, muſt plead it; and there is nothing more clear, than that if the Court has not a *general juriſdiction* of the ſubject-matter, he muſt *plead* to the *juriſdiction*, and cannot take advantage of it upon the *general iſſue*. Therefore by the law of *England*, if an action be brought againſt a judge of record for an act done by him in his judicial capacity, he may plead that he did it as judge of record, and that will be a complete juſtification. So in this caſe,

caſe, if the injury complained of had been done by the defendant as a Judge, though it aroſe in a foreign country where the technical diſtinction of a Court of Record does not exiſt, yet ſitting as a Judge in a court of juſtice, ſubject to a ſuperior review, he would be within the reaſon of the rule, which the law of *England* ſays ſhall be a juſtification; but then it muſt be pleaded. Here no ſuch matter is pleaded, nor is it even in evidence that he ſat as Judge of a court of juſtice. Therefore I lay out of the caſe every thing relative to the *Arravel* of *St. Phillip*'s.

The *firſt* point then upon this ground is, the ſacredneſs of the defendant's perſon as Governor. If it were true that the law makes him that ſacred character, he muſt plead it, and ſet forth his commiſſion as ſpecial matter of juſtification; becauſe *primâ facie* the Court has juriſdiction. But I will not reſt the anſwer upon that only. It has been inſiſted, by way of diſtinction, that ſuppoſing an action will lie for an injury of this kind committed by one individual againſt another, in a country beyond the ſeas, but within the dominion of the crown of *England*, yet it ſhall *not emphatically* lie againſt the governor. In anſwer to which I ſay, that for many reaſons, if it did not lie againſt any other man, it ſhall *moſt emphatically* lie againſt the *governor*.

In every plea to the juriſdiction, you muſt ſtate another juriſdiction; therefore if an action is brought here for a matter ariſing in *Wales*, to bar the remedy ſought in this Court, you muſt ſhew the juriſdiction of the court of *Wales*; and in every caſe to repel the juriſdiction of the king's court, you muſt ſhew a more proper and more ſufficient juriſdiction: for if there

there is no other mode of trial, that alone will give the king's courts a juriſdiction. Now in this caſe no other juriſdiction is ſhewn, even ſo much as in argument. And if the king's courts of juſtice cannot hold plea in ſuch caſe, no other court can do it. For it is truly ſaid that a governor is in the nature of a viceroy; and therefore *locally, during his government*, no civil or criminal action will lie againſt him: the reaſon is, becauſe upon proceſs he would be ſubject to impriſonment. But here, the injury is ſaid to have happened in the *Arraval* of *St. Phillip*'s, where without his leave no juriſdiction can exiſt. If that be ſo, there can be no remedy whatſoever, if it is not in the king's courts: becauſe when he is out of the government, and is returned with his property into this country, there are not even his effects left in the iſland to be attached.

Another very ſtrong reaſon, which was alluded to by Mr. Serjeant *Glynn*, would alone be deciſive; and it is this: That though the charge brought againſt him is for a *civil* injury, yet it is likewiſe of a *criminal nature*; becauſe it is in *abuſe* of the authority delegated to him by the *king's letters patent*, under the great ſeal. Now if every thing committed within a dominion, is triable by the courts within that dominion, yet the effect or extent of the *king's letters patent*, which gave the authority, can only be tried in the king's courts; for no queſtion concerning the ſeignory, can be tried within the ſeignory itſelf. Therefore, where a queſtion reſpecting the ſeignory ariſes in the proprietary governments, or between two provinces of *America*, or in the *Iſle of Man*, it is cognizable by the king's courts in *England* only. In the caſe of the *Iſle of Man* * it was ſo decided

* 4 Inſt. 284.

decided in the time of Queen *Elizabeth*, by the chief juſtice and many of the judges. So that *emphatically* the *governor* muſt be tried in *England*, to ſee whether he has exerciſed the authority delegated to him by the *letters patent*, legally and properly; or whether he has abuſed it, in violation of the laws of *England*, and the truſt ſo repoſed in him.

It does not follow from hence, that let the cauſe of action ariſe where it may, a man is not entitled to make uſe of every juſtification his caſe will admit of, which ought to be a defence to him. If he has acted right according to the authority with which he is inveſted, he muſt lay it before the Court by way of plea, and the Court will exerciſe their judgment whether it is a ſufficient juſtification or not. In this caſe, if the juſtification had been proved, the Court might have conſidered it as a ſufficient anſwer; and, if the nature of the caſe would have allowed of it, might have adjudged, that the raiſing a mutiny was a good ground for ſuch a ſummary proceeding. I can conceive caſes in time of war in which a governor would be juſtified, though he acted very arbitrarily, in which he could not be juſtified in time of peace. Suppoſe, during a ſiege, or upon an invaſion of *Minorca*, the governor ſhould judge it proper to ſend an hundred of the inhabitants out of the iſland, from motives of *real* and *general expediency*; or ſuppoſe, upon a general ſuſpicion he ſhould take people up as ſpies; upon proper circumſtances laid before the Court, it would be very fit to ſee whether he had acted as the governor of a garriſon ought, according to the circumſtances of the caſe. But it is objected, ſuppoſing the defendant to have acted as the *Spa-*

niſh governor was empowered to do before, how is it to be known here that by the laws and conſtitution of *Spain* he was authoriſed ſo to act. The way of knowing foreign laws is, by admitting them to be *proved* as *facts*, and the Court muſt aſſiſt the Jury in aſcertaining what the law is. For inſtance, if there is a *French* ſettlement, the conſtruction of which depends upon the cuſtom of *Paris*, witneſſes muſt be received to explain what the cuſtom is; as evidence is received of cuſtoms in reſpect of trade. There is a caſe of the kind I have juſt ſtated*. So in the ſupreme reſort before the king in council, the privy council determines all caſes that ariſe in the plantations, in *Gibraltar* or *Minorca*, in *Jerſey* or *Guernſey*; and they inform themſelves, by having the law ſtated to them.—As to ſuggeſtions with regard to the difficulty of bringing witneſſes, the Court muſt take care that the defendant is not ſurpriſed, and that he has a fair opportunity of bringing his evidence, if it is a caſe proper in other reſpects for the juriſdiction of the Court. There may be ſome caſes ariſing abroad, which may not be fit to be tried here; but that cannot be the caſe of a governor, injuring a man contrary to the duty of his office, and in violation of the truſt repoſed in him by the king's commiſſion.

* Foreign laws muſt be proved as facts.

Feaubert v. Turſt, Prec. Chan. 207.

If he wants the teſtimony of witneſſes whom he cannot compel to attend, the Court may do what this Court did in the caſe of a criminal proſecution of a woman who had received a penſion as an officer's widow: and it was charged in the indictment, that ſhe never was married to him. She alleged a marriage in *Scotland*, but that ſhe could not compel her witneſſes to come up, to give evidence. The

Court obliged the proſecutor to conſent that the witneſſes might be examined before any of the judges of the Court of Seſſion, or any of the barons of the Court of Exchequer in *Scotland*, and that the depoſitions ſo taken ſhould be read at the trial. And they declared, that they would have put off the trial of the indictment from time to time, for ever, unleſs the proſecutor had ſo conſented. The witneſſes were ſo examined before the Lord Preſident of the Court of Seſſion.

It is a matter of courſe in aid of a trial at law, to apply to a court of equity, for a commiſſion and injunction in the mean time; and where a real ground is laid, the Court will take care that juſtice is done to the defendant, as well as to the plaintiff. Therefore in every light in which I ſee the ſubject, I am of opinion that the action holds *emphatically* againſt the *governor*, if it did not hold in the caſe of any other perſon. If ſo, he is accountable in this Court, or he is accountable no where; for the king in council has no juriſdiction. Complaints made to the king in council tend to remove the governor, or to take from him any commiſſion, which he holds during the pleaſure of the Crown. But if he is in *England*, and holds nothing at the pleaſure of the Crown, they have no juriſdiction to make reparation, by giving damages, or to puniſh him in any ſhape, for the injury committed. Therefore to lay down in an *Engliſh* court of juſtice ſuch a monſtrous propoſition, as that a governor acting by virtue of *letters patent* under the great ſeal, is accountable only to God, and his own conſcience; that he is abſolutely deſpotic, and can ſpoil, plunder, and affect his Majeſty's ſubjects, both in their liberty and property, with impunity,

punity, is a doctrine that cannot be maintained.

In Lord *Bellamont*'s caſe, 2 *Salk.* 625, cited by Mr. *Peckham*, a motion was made for a trial at bar, and granted, becauſe the *Attorney General* was to defend it on the part of the king; which ſhews plainly that ſuch an action exiſted. And in *Way verſus Yally*, 6 *Mod.* 195. Juſtice *Powell* ſays, that an action of falſe impriſonment has been brought here, againſt a governor of *Jamaica*, for an impriſonment there, and the laws of the country were given in evidence. The Governor of *Jamaica* in that caſe never thought that he was not amenable. He defended himſelf, and poſſibly ſhewed, by the laws of the country, an act of the aſſembly which juſtified that impriſonment, and the Court received it as they ought to do. For whatever is a juſtification in the place where the thing is done, ought to be a juſtification where the caſe is tried.—I remember, early in my time, being counſel in an action brought by a carpenter in the train of artillery, againſt Governor *Sabine*, who was governor of *Gibraltar*, and who had barely confirmed the ſentence of a court-martial, by which the plaintiff had been tried, and ſentenced to be whipped. The Governor was very ably defended, but nobody ever thought that the action would not lie; and it being proved at the trial, that the tradeſmen who followed the train, were not liable to martial law; the Court were of that opinion, and the Jury accordingly found the defendant guilty of the treſpaſs, as having had a ſhare in the ſentence; and gave £. 500 damages.

Vide Poſt XI.

The next objection which has been made, is a general objection, with regard to the mat-

ter ariſing abroad; namely, that as the cauſe of action aroſe abroad, it cannot be tried here in *England*.

Where an action muſt be laid in the proper county.

There is a *formal* and *ſubſtantial* diſtinction as to the *locality* of trials. I ſtate them as different things: the *ſubſtantial* diſtinction is, where the proceeding is *in rem*, and where the effect of the judgment cannot be had, if it is laid in a wrong place. That is the caſe of all ejectments, where poſſeſſion is to be delivered by the *Sheriff* of the *county*; and as trials in *England* are in particular counties, the officers are county officers; therefore the judgment could not have effect, if the action was not laid in the proper county.

With regard to matters that ariſe *out* of the realm, there is a ſubſtantial diſtinction of locality too; for there are ſome caſes that ariſe out of the realm, which ought not to be tried any where but in the country where they ariſe; as in the caſe alluded to by Serjeant *Walker*: if two perſons fight in *France*, and both happening caſually to be here, one ſhould bring an action of aſſault againſt the other, it might be a doubt whether ſuch an action could be maintained here; becauſe, though it is not a criminal proſecution, it muſt be laid to be againſt the peace of the King; but the breach of the peace is merely local, though the treſpaſs againſt the perſon is tranſitory. Therefore without giving any opinion, it might perhaps be triable only where both parties at the time were ſubjects. So if an action were brought relative to an eſtate in a foreign country, where the queſtion was a matter of title only, and not of damages, there might be a ſolid diſtinction of locality.

But

But there is likewiſe a *formal* diſtinction, which ariſes from the mode of trial: for trials in *England* being by jury, and the kingdom being divided into counties, and each county conſidered as a ſeparate diſtrict or principality, it is abſolutely neceſſary that there ſhould be ſome county where the action is brought in particular, that there may be a proceſs to the ſheriff of that county, to bring a jury from thence to try it. This matter of form goes to all caſes that ariſe abroad: but the law makes a diſtinction between *tranſitory* actions and *local* actions. If the matter which is the cauſe of a tranſitory action ariſes within the realm, it may be laid in any county, the place is not material; and if an impriſonment in *Middleſex* it may be laid in *Surry*, and though proved to be done in *Middleſex*, the place not being material, it does not at all prevent the plaintiff recovering damages: the place of tranſitory actions is never material, except where by particular acts of parliament it is made ſo; as in the caſe of churchwardens and conſtables, and other caſes which require the action to be brought in the county. The parties, upon ſufficient ground, have an opportunity of applying to the Court in time to change the *venue*; but if they go to trial without it, that is no objection. So all actions of a tranſitory nature that ariſe abroad may be laid as happening in an *Engliſh* county. But there are occaſions which make it abſolutely neceſſary to ſtate in the declaration, that the cauſe of action really happened abroad; as in the caſe of ſpecialties, where the date muſt be ſet forth. If the declaration ſtates a ſpecialty to have been made at *Weſtminſter* in *Middleſex*, and upon producing the deed, it bears date at *Bengal*, the action is

gone; becauſe it is ſuch a *variance* between the deed and the declaration as makes it appear to be a *different* inſtrument. There is ſome confuſion in the books upon the *ſtatute 6 Rich. II.* But I do not put the objection upon that ſtatute. I reſt it ſingly upon this ground: If the true date or deſcription of the bond is not ſtated, it is a variance. But the law has in that caſe invented a fiction; and has ſaid, the party ſhall firſt ſet out the deſcription truly, and then give a *venue* only for form, and for the ſake of trial, by a *videlicet*, in the county of *Middleſex*, or any other county. But no judge ever thought that when the declaration ſaid in *Fort St. George*, *viz. in Cheapſide*, that the plaintiff meant it was in *Cheapſide*. It is a *fiction* of *form*; every country has its forms, which are invented for the furtherance of juſtice; and it is a certain rule, that a fiction of law ſhall never be contradicted ſo as to defeat the end for which it was invented, but for every other purpoſe it may be contradicted. Now the fiction invented in theſe caſes is barely for the mode of trial; to every other purpoſe, therefore, it ſhall be contradicted, but not for the purpoſe of ſaying the cauſe ſhall not be tried. So in the caſe that was long agitated, and finally determined ſome years ago, upon a fiction of the *teſte* of writs taken out in the vacation, which bear date as of the laſt day of the term, it was held, that the fiction ſhall not be contradicted ſo as to invalidate the writ, by averring that it iſſued on a day in the vacation: becauſe the fiction was invented for the furtherance of juſtice, and to make the writ appear right in form. But where the *true* time of ſuing out a *latitat is material*, as on a plea of *non aſſumpſit infra*

Fictions of law ſhall never be contradicted, ſo as to defeat the end for which they were invented; but for every other purpoſe they may be contradicted.

2 Burr. 967.

ſex

ſex annos, there it may *be ſhewn* that the *latitat* was ſued out *after* the ſix years, notwithſtanding the *teſte*. I am ſorry to obſerve, that ſome ſayings have been alluded to, inaccurately taken down, and improperly printed, where the Court has been made to ſay, that as men they have one way of thinking, and as judges they have another, which is an abſurdity; whereas, in fact, they only meant to ſupport the fiction. I will mention a caſe or two, to ſhew that that is the meaning of it.

In 6 *Mod.* 228. the caſe of *Roberts verſus Harnage* is thus ſtated: the plaintiff declared that the defendant became bound to him at *Fort St. David*'s in the *Eaſt Indies* at *London*, in ſuch a bond; upon demurrer the objection was, that the bond appeared to have been ſealed and delivered at *Fort St. David*'s, in the *Eaſt Indies*, and therefore the date made it local, and, by conſequence, the declaration ought to have been of a bond made at *Fort St. David*'s, in the *Eaſt Indies*, *viz.* at *Iſlington*, in the county of *Middleſex*; or in ſuch a ward or pariſh in *London*, and of that opinion was the whole Court. This is an inaccurate ſtate of the caſe. But in 2 Lord *Raym.* 1042, it is more truly reported, and ſtated as follows: It appeared by the declaration, that the bond was made at *London*, in the ward of *Cheap*; upon oyer, the bond was ſet out, and it appeared upon the face of it to be dated at *Fort St. George* in the *Eaſt Indies*; the defendant pleaded the variance in abatement, and the plaintiff demurred, and it was held bad: but the Court ſaid that it would have been good, if laid at *Fort St. George*, in the *Eaſt Indies*, to wit, at *London*, in the ward of *Cheap*. The objection there was, that they had laid it falſely;

falſely; for they had laid the bond as made at *London*; whereas, when the bond was produced, it appeared to be made at another place, which was a variance. A caſe was quoted from *Latch*, and a caſe from *Lutwyche*, on the former argument; but I will mention a caſe poſterior in point of time, where both thoſe caſes were cited, and no regard at all paid to them; and that is the caſe of *Parker* and *Crook*, 10 *Mod.* 255. It was an action of covenant upon a deed indented; it was objected to the declaration, that the defendant is ſaid in the declaration to covenant at *Fort St. George*, in the *Eaſt Indies*; and upon the oyer of the deed it bore date at *Fort St. George*, and therefore the Court, as was pretended, had no juriſdiction; *Latch. fol.* 4. *Lutwyche* 950. Lord Chief Juſtice *Parker* ſaid, that an action will lie in *England* upon a deed dated in foreign parts; or elſe the party can have no remedy; but then in the declaration a place in *England* muſt be alledged *pro forma*. Generally ſpeaking, the deed, upon the oyer of it, muſt be conſiſtent with the declaration; but in theſe caſes, *propter neceſſitatem*, if the inconſiſtency be as little as poſſible, it is not to be regarded; and here the contract being of a voyage which was to be performed from *Fort St. George* to *Great Britain*, does import, that *Fort St. George* is different from *Great Britain*; and after taking time to conſider of it in *Hilary* term, the plaintiff had his judgment, notwithſtanding the objection. Therefore the whole amounts to this; that where the action is ſubſtantially ſuch a one as the Court can hold plea of, as the mode of trial is by jury, and as the jury muſt be called together by proceſs directed to the ſheriff of the county;

county; matter of form is added to the fiction, to ſay it is in that county, and then the whole of the enquiry is, Whether it is an action that ought to be maintained. But can it be doubted, that actions may be maintained here, not only upon contracts, which follow the perſon, but for injuries done by ſubject to ſubject; eſpecially for injuries where the whole that is prayed is a reparation in damages, or ſatisfaction to be made by proceſs againſt the perſon or his effects, within the juriſdiction of the Court? We know it is within every day's experience. I was embarraſſed a great while to find out whether the counſel for the plaintiff really meant to make a queſtion of it. In ſea batteries the plaintiff often lays the injury to have been done in *Middleſex*, and then proves it to be done a thouſand leagues diſtant on the other ſide of the *Atlantic*. There are caſes of offences on the high ſeas, where it is of neceſſity to lay in the declaration, that it was done upon the high ſeas; as the taking a ſhip. There is a caſe of that ſort occurs to my memory; the reaſon I remember it is, becauſe there was a queſtion about the juriſdiction. There likewiſe was an action of that kind before Lord Chief Juſtice *Lee*, and another before me, in which I quoted that determination, to ſhew, that when the Lords Commiſſioners of prizes have given judgment, that is concluſive in the action; and likewiſe when they have given judgment, it is concluſive as to the coſts, whether they have given coſts or not. It is neceſſary in ſuch actions to ſtate in the declaration, that the ſhip was taken, or ſeiſed *on the high ſeas, videlicet*, in *Cheapſide*. But it cannot be ſeriouſly contended that the judge and jury who try the cauſe

cauſe, fancy the ſhip is ſailing in *Cheapſide*: no, the plain ſenſe of it is, that as an action lies in *England* for the ſhip which was taken on the high ſeas, *Cheapſide* is named as a *venue*; which is ſaying no more, than that the party prays the action may be tried in *London*. But if a party were at liberty to offer reaſons of fact contrary to the truth of the caſe, there would be no end of the embarraſſment. At the laſt Sittings there were two actions brought by *Armenian* merchants, for aſſaults and treſpaſſes in the *Eaſt Indies*, and they are very ſtrong authorities. Serjeant *Glynn* ſaid, that the defendant, Mr. *Verelſt*, was very ably aſſiſted: ſo he was, and by men who would have taken the objection, if they had thought it maintainable, and the actions came on to be tried after this caſe had been argued once; yet the counſel did not think it could be ſupported. Mr. *Verelſt* would have been glad to make the objection; he would not have left it to a jury, if he could have ſtopped them ſhort, and ſaid, You ſhall not try the actions at all. I have had ſome actions before me, rather going further than theſe tranſitory actions; that is, going to caſes which in *England* would be local actions: I remember one, I think it was an action brought againſt Captain *Gambier*, who by order of Admiral *Boſcawen*, had pulled down the houſes of ſome ſutlers who ſupplied the navy and ſailors with ſpirituous liquors; and whether the act was right or wrong, it was certainly done with a good intention on the part of the admiral, for the health of the ſailors was affected by frequenting them. They were pulled down; the captain was inattentive enough to bring the ſutler over in his own ſhip, who would never have got to *England* otherwiſe;

otherwiſe; and as ſoon as he came here he was adviſed that he ſhould bring an action againſt the *Captain*. He brought his action, and one of the counts in the declaration was for pulling down the houſes. The objection was taken to the count for pulling down the houſes; and the caſe of *Skinner* and the *Eaſt India* Company was cited in ſupport of the objection. On the other ſide, they produced from a manuſcript note a caſe before Lord Chief Juſtice *Eyre*, where he over-ruled the objection; and I over-ruled the objection upon this principle, namely, that the reparation here was perſonal, and for damages, and that otherwiſe there would be a failure of juſtice; for it was upon the coaſt of *Nova-Scotia*, where there were no regular courts of judicature: but if there had been, Captain *Gambier* might never go there again; and therefore the reaſon of locality in ſuch an action in *England* did not hold. I quoted a caſe of an injury of that ſort in the *Eaſt Indies*, where, even in a court of equity, Lord *Hardwicke* had directed ſatisfaction to be made in damages: that caſe before Lord *Hardwicke* was not much conteſted, but this caſe before me was fully and ſeriouſly argued, and a thouſand pounds damages given againſt Captain *Gambier*. I do not quote this for the authority of my opinion, becauſe that opinion is very likely to be erroneous, but I quote it for this reaſon; a thouſand pounds damages, and the coſts, were a conſiderable ſum. As the captain had acted by the orders of Admiral *Boſcawen*, the repreſentatives of the admiral defended the cauſe, and paid the damages and coſts recovered. The caſe was favourable; for what the admiral

admiral did was certainly well intended; and yet there was no motion for a new trial.

I recollect another cauſe that came on before me; which was the caſe of Admiral *Palliſer*. There the very giſt of the action was local: it was for deſtroying fiſhing huts upon the *Labrador coaſt*. After the treaty of *Paris*, the *Canadians* early in the ſeaſon erected huts for fiſhing; and by that means got an advantage (by beginning earlier) of the fiſhermen who came from *England*. It was a nice queſtion upon the right of the *Canadians*. However, the admiral, from general principles of policy, ordered theſe huts to be deſtroyed. The cauſe went on a great way. The defendant would have ſtopped it ſhort at once, if he could have made ſuch an objection, but it was not made. There are no local courts among the *Eſquimaux Indians* upon that part of the *Labrador coaſt*; and therefore whatever injury had been done there by any of the king's officers, would have been altogether without redreſs, if the objection of locality would have held. The conſequence of that circumſtance ſhews, that where the reaſon fails, even in actions which in *England* would be local actions, yet it does not hold as to places beyond the ſeas, within the king's dominions. Admiral *Palliſer*'s caſe went off upon a propoſal of a reference, and ended by an award. But as to tranſitory actions, there is not a colour of doubt but that every action that is tranſitory may be laid in any county in *England*, though the matter ariſes beyond the ſeas; and when it is abſolutely neceſſary to lay the truth of the caſe in the declaration, there is a fiction of law to aſſiſt you, and you ſhall

not

not make uſe of the truth of the caſe againſt that fiction, but you may make uſe of it to every other purpoſe. I am clearly of opinion not only againſt the objections made, but that there does not appear a queſtion upon which the objections could ariſe.

The three other Judges concurred.

Per Cur', Judgment affirmed.

I had ſome thoughts of ſhortening the Pleadings *in this caſe, but after conſidering how much they contribute to the underſtanding of the arguments, I thought it adviſeable to let them ſtand, as reported by Mr.* Cooper.

IX. Of other Matters reſpecting new Trials, &c.

(3.) *Of imperfect Verdicts.*

M. 26. Car. 2. B.R. 1 Sid. 234.
Verdict quod locutus eſt verba, in an action for words is imperfect.

NOTA—*Twiſden* J. ſaid that it had been adjudged, where in an action for words the defendant pleaded not guilty, and the Jury found *quod locutus eſt verba*—that this verdict was imperfect, and the plaintiff could not have judgment.

Vide poſt Rex v. Woodfall.

Matthews v. Hopkins, E. 17 Car. 2. B. R. 1 Sid. 244.
Action upon the caſe againſt a carrier, and trover in the ſame declaration ſeem bad.
Dy. 35. b. 1 Vent. 365. 1 Keb. 870.

In an action upon the caſe, the plaintiff declared upon the cuſtom of the realm, and that the defendant on the 10th of *May* was a common carrier, and the plaintiff the 6th of *May* was poſſeſſed of £. 50. and that afterwards, on the ſame day and year laſt-mentioned, he delivered it to the defendant to carry, and he neglected ſo to do, *&c.* And he alſo declared in trover for the ſame ſum, and the defendant pleaded not guilty, and verdict for the plaintiff generally, and it was moved in arreſt of judgment.

It ſeems that the cuſtom of the realm ought to be recited in an action againſt a carrier. Qu.?
2 Cro. 224. 242.

1ſt. Becauſe he had not well recited and ſhewn the cuſtom of the realm, and had not alledged that he was a carrier at the time of the delivery, but ſome days after:

And alſo that trover and an action upon the caſe may not be joined, becauſe the one is

founded upon a *tort*, and the other upon cuſtom.

But on the other part it was anſwered, that the declaration is good enough; for as to joining of trover and caſe, one plea goes to the whole, ſcil. *Not guilty*. And as to the miſ-recital of the cuſtom of the realm, it is part of the common law, and therefore the declaration is good enough without recital, and a bad recital does not vitiate in ſuch caſe.

Diverſity between the common law and ſtatute as to recitals. Plow. 84. 1 Cro. 96, 168. 2 Cro. 224. Hob. 310. 4 Co. 13. a. 10 Co. 57.

And there is a diverſity between the recital of the common law, and of a ſtatute; for if a general ſtatute is miſ-recited, this makes the declaration bad, becauſe the law is formed in words in which there is not any variance, but if the action is founded upon the common law, and the cuſtom is miſ-recited, yet the declaration is good, becauſe this is not written law, and formed in words, but the ſubſtance of it well known.

Not guilty may be a good iſſue where the verdict may not be general. Hob. 249. Vide the caſe of Beringſage and Ralſton. M. 34. Car. 2. B. R. 1 Cro. 20.

But *per Curiam* the declaration and verdict are bad, for although *not guilty* may go to both, yet the verdict ought not to be for the plaintiff generally, and although the declaration may be good without recital of the cuſtom of the realm, as *Hob.* ſays, yet the better way is to recite it. *Vide Sid.* 181, 233, 244. *V.* 2 *Rol. Rep.* 140.

In *Maſt verſus Goodſon, M.* 13. *G.* 3. *C. B.* 3 *Wilſ.* 348. Plaintiff declared for a tortious obſtruction of an *eaſement* (which he held under an agreement from the defendant); and added a count in *trover*. The Court was of opinion the latter count might well be joined with the former, that being founded upon *tort*.

Rex. v. Woodfall. M. 11 Geo. III. B. R. 5 Bur. 2661.

Tueſday 20th November, 1770.

Information for a libel—Verdict, defendant guilty of the printing and publiſhing, only.

This cauſe firſt came before the Court on *Friday* 22d *June* 1770.

Mr. *Lee* then moved, on behalf of the defendant, to *ſtay the entering up judgment againſt him*, upon the verdict found in this cauſe.

A croſs-motion was made at the ſame time, by the counſel for the Crown, for the defendant to ſhew cauſe why the verdict ſhould not be entered according to the *legal import of the finding* of the Jury.

It was an information againſt the defendant, by the Attorney-General, for printing, and publiſhing in the Public Advertiſer, a ſeditious libel ſigned *Junius*.

Upon the trial, the Jury found him *guilty* of the *printing* and *publiſhing*, ONLY.

The Court granted rules to ſhew cauſe, upon each of theſe two adverſe motions; and ordered them both to be brought on upon the ſame day.

Accordingly, on *Tueſday* 3d *July* 1770, cauſe was reciprocally ſhewn on each.

Serjeant *Glynn* and Mr. *Lee* argued for the defendant: Mr. *Thurlow*, (Solicitor General) Mr. *Morton*, Mr. *Wallace*, Mr. *Dunning*, and Mr. *Walker*, for the Crown.

On the part of the defendant, it was inſiſted that the verdict, *as found*, did not amount to find Mr. *Woodfall* guilty of the charge in the information; but rather to acquit him of it. For, he is charged with printing and publiſhing this as a libel, with a *malicious and criminal intention:* But the Jury find him guilty of printing and publiſhing, *only*. Whatever the Jury do not find implies a negative: but this goes further; it ſays expreſsly, that they find this and this *only*.

A *criminal*

A *criminal motive* goes to the conſtruction of the offence: a *criminal intention* is its eſſence. And this the Jury have negatived.

They are *judges of law and fact*, as far as law is involved in fact. They *may* take this upon them: and here they *have* done ſo. They meant to acquit him of all criminal intention: and one of the jurymen has made an affidavit, "That he meant to acquit him of "all criminal conſtruction: and if he had "thought that that could not have been thus "done, he would have acquitted him." Therefore this cannot be conſidered as a verdict of conviction by twelve jurymen. A verdict ought to be found clearly, fully, and diſtinctly: it cannot be ſupplied by inference; neither can it be amended by any notes of the aſſociate, in a criminal caſe. 1 *Salk.* 53, *Rex* v. *Bold.* 1 *Salk.* 47, *Rex* v. *Keate.*

They alſo cited *Cro. Jac.* 210, *Cooke* v. *Laneday*; and *Yelverton* 106; and *Drury* v. *Dennis*; 2 *Rolle*'s *Abridgment*, 693. Title, "Verdict," Letter, *S. pl.* 5. between *Baugh* and *Philips*, referred to by Ld. Ch. J. *Vaughan*, in the caſe of *Rowe* v. *Huntington*, *Vaughan*, 75, 76. Who there ſays, "That finding the point "in iſſue, by *way of argument*, in a general "verdict, is never permitted; not though "the argument be neceſſary and concluſive." There can be no ſupply by intendment, in any caſe; much leſs in the preſent, where it is impoſſible to ſupply the verdict by intendment, becauſe nobody can know what the Jury did intend, or by what rule, or upon what principle they decided; unleſs affidavits from the Jurymen were allowed to be read. Another authority that they cited, was the caſe of *Shelley* v. *Alſop*, in *Yelverton*, 77, 78,

which was a finding of the aſſumpſit by foreign implication; " which is not good," as it is there ſaid, " upon any general iſſue:" and it is there laid down, " that the Jury ought to " give their verdict preciſely according to " their charge."

They inſiſted, that the verdict ought to remain in the *words* of the Jury; without expunging any of their words, or ſubſtituting others in their places, or controlling them under any pretence of legal conſtruction. They ought to be left as they ſtand; that the defendant may have the benefit of a writ of error to the Houſe of Lords; if the opinion of this Court ſhould be againſt him.

They hoped, however, that the preſent finding would be eſteemed by the Court to amount to an *acquittal* of the defendant.

But, if the Court ſhould not go ſo far as to hold it tantamount to an acquittal, there ought, at leaſt, to be a *venire facias de novo*. It certainly is not a conviction: and if it be not an acquittal, it can be no more than an imperfect verdict. And if a verdict be *imperfect*, there muſt be a *venire facias de novo*. But we hope for his diſcharge, as upon a verdict of not guilty.

On the part of the proſecution, it was argued that the preſent verdict could not be conſidered as a verdict of not guilty. It poſitively and explicitly finds him *guilty* of the *printing and publiſhing*: and it does not import any negation of his guilt, as to the reſt. The word " *only* " does not import the excluſion of any thing but *facts*: it cannot exclude *concluſion of law*.

It is certain that a verdict cannot be amended in matters of *fact*: but it may be perfected

perfected in point of *form*. The officer takes his note ſhort: but the neceſſary finiſhing of the ſentence may be ſupplied.

The ſubſtance and matter of this iſſue is ſufficiently found: the Court may order it into a proper form. The *law* here implies the intention. The printing and publiſhing was all that the Jury were to inquire about. This verdict is not imperfect: nor is there any need of ſupplying any thing by *intendment*. The intention muſt be collected from the libel itſelf. The intention is the giſt of the offence. The verdict ought to be entered according to the true meaning and intention of the Jury. *Something* is always to be added to *every* verdict: the entry is never in the very identical words uſed by the Jury; which are always conciſe, and not full and formal enough to ſtand ſupported againſt a writ of error.

Whether a jury *may* or may not take upon themſelves to judge of matters of law, they muſt at leaſt do it at their peril. But here they have not done it at all: they have not determined, that this paper is *not* libellous.

So that whether they may at their peril do it, or whether they may not, they have not here riſqued that peril. The import of their verdict is a general finding of the *facts*, without expreſſing any ſenſe of their own upon the *law*.

In the caſe of the *King* againſt *Beere*, reported in 12 *Mod.* 218. 2 *Salk.* 217. 1 Lord *Raym.* 414. *Carthew*, 407. and *Holt*, 422. the Jury, as to the *writing* and *collecting* of the libels only, find him guilty, *prout* in *indictamento ſupponitur*: and as to all other things charged in the indictment, *præter ſcriptionem*

et collectionem, they find him not guilty. The charge was for compoſing, making, writing, and collecting ſeveral ſcandalous, falſe, and ſeditious libels. The finding was—" quoad " ſcriptionem et collectionem libellorum in " indictamento mentionat' tantum, quod de- " fendens eſt culpabilis; et quoad totum re- " ſiduum in eodem indictamento content', " quod defendens non eſt inde culpabilis." It was holden " that the bare writing and col- " lecting the libellous matter was criminal," and " that the general finding ſhall be taken " to be criminal;" and *Turton* and *Rokeby* cited ſome caſes to prove, " that the writing " of a libel, without publiſhing it, was pu- " niſhable by indictment."

They alſo cited *Moore*, 194. *Dyer*, 362. *Hobart*, 54. *Moore*, 888. 2 *Lev.* 111. and, to prove that the word " only" might be re- jected, 2 *Saunders*, 380. *Co. Litt.* 227.

Serjeant *Glynn* replied; enforcing the for- mer argument, and denying that the caſe of *Beere*, or other caſes now cited, were like the preſent caſe.

Lord MANSFIELD—It is much too late in this term, for any thing to be further done in this cauſe, with any effect. Let it ſtand over to next term.

Cur' advis'.

On this day (*Tueſday* 20th *November* 1770) his LORDSHIP delivered the opinion of the Court;

This comes before the Court upon *two* rules: The *firſt* (obtained by the *defendant*) " to *ſtay* " the entering up judgment on the verdict in " this cauſe;" the *ſecond* (obtained by the Attorney General) " that the verdict may be

" entered

" entered *according to the legal import* of the " finding of the Jury."

The laſt rule muſt, from the nature of it, be firſt diſcuſſed; becauſe the ground of argument upon the other cannot be ſettled, till this is diſpoſed of.

Upon *this* rule, it is neceſſary to *report* the trial.

The proſecution is an information againſt the defendant, for *printing and publiſhing* a libel, in the Public Advertiſer, ſigned " Ju- " NIUS:" The tenor of which is ſet out, with proper AVERMENTS as to the *meaning* of the libel, the *ſubject matter*, and the *perſons*, concerning which and of whom it ſpeaks; with INNUENDOS filling up all the blanks, and the USUAL EPITHETS.

In ſupport of the proſecution, they proved, by *Nathaniel Crowder*, " that He bought the " paper produced and twelve more, from *Col-* " *field*, the defendant's publiſher, in the de- " fendant's publiſhing room at the corner of " *Ivy Lane*; that he goes often there; has " occaſionally ſeen the printing-room; and " has had papers in the printing-room."

They *read* the paper produced: and the tenor *agreed* with the information.

George Harris, regiſter of pamphlets and news-papers, proved " that the defendant, by " himſelf and ſervants, paid the duty for ad- " vertiſements in the Public Advertiſer. That " the defendant had paid, himſelf; and all " the payments were on his account: That " the defendant has made the uſual affidavit; " and has been allowed the ſtamp duty for " ſuch papers as were unſold. That the du- " ties for advertiſements in the paper in queſ- " tion were paid by the defendant's ſervant; and

" the receipt given on the defendant's ac-
" count."

William Lee, clerk to Sir *John Fielding*, proved " That he often carried advertiſe-
" ments for the Public Advertiſer, to the de-
" fendant's at the corner of *Ivy Lane*. That
" he generally paid ready money. That he
" has ſeen money paid to the defendant for
" advertiſements; and he had a receipt from
" the defendant, ſigned by him, the 29th of
" *November*, for £. 32, for printing advertiſe-
" ments in the Public Advertiſer."

On the part of the *defendant*, they called no witneſſes.

His counſel objected *to ſome* of the INNUENDOS: but they *principally* applied to the Jury, to acquit the defendant, from the paper being INNOCENT, or *not liable to the* EPITHETS given it by the information; or, that the defendant's intent in publiſhing did *not deſerve the epithets* in the information.

There was no doubt but that the evidence, *if credited*, amounted to *proof* of *printing and publiſhing by the defendant*.

There *may* be caſes where the fact proved as a publication may be *juſtified* or *excuſed* as lawful or innocent. For, no fact which is *not criminal* in caſe the paper be a libel, can amount to a publication of which a defendant ought to be found *guilty*.

But *no* queſtion of *that* kind aroſe in *this* cauſe.

Therefore I directed the Jury to conſider " Whether *All the* " *innuendos*" and *all the ap-*
" *plications* to matter and perſons *made by the*
" *information*, were, in *their* judgment, the
" TRUE MEANING of *the paper*." If they thought *otherwiſe*, they ſhould *acquit* the de-
fendant;

fendant: but if they *agreed with the information*, and *believed* the evidence as to the *publication*, they ſhould find him *guilty*.

If the Jury were *obliged* to find whether the paper was *a libel*, or whether it was a libel to *ſuch a degree* as to deſerve the epithets given it by the information; or to *require proof of the expreſs intent* of the defendant in printing and publiſhing, and of its being *malicious to ſuch a degree* as to deſerve the epithets given it by the information, *then* this direction was *wrong*.

In ſupport of it, I told them (as I have, from indiſpenſible duty, been oblig'd to tell *every* jury upon every trial of this kind) to the following effect.

That, "Whether the paper, meaning as "alledged by the information, was *in law* a "LIBEL," was a *queſtion of law*, upon the *face of the record*: for, after conviction, a defendant may move in arreſt of judgment, if the paper is *not* a libel.

That all the *epithets in the information* were *formal inferences of law*, from the *printing* and *publiſhing*.

That *no proof* of *expreſs* malice ever was required; and, in moſt caſes, is impoſſible to be given.

That the verdict finds only what the *law infers* from the fact. Therefore, *after* conviction, a defendant may, by affidavit, leſſen the *degree* of his guilt.

That where an act *in itſelf indifferent*, if done with a particular intent *becomes* criminal; *there* the *intent* muſt be *proved and found*: but where the act is in itſelf *unlawful*, (as in this caſe) the proof of juſtification or excuſe lies on the *defendant*; and in failure thereof, the *law implies* a criminal intent.

The

The Jury ſtaid out a great while, many hours. At laſt, they came to my houſe; (the objection "of its being *out of the county*" being cured by *conſent*.) In anſwer to the uſual queſtion put by the officer, the Foreman gave their verdict in theſe words—"*Guilty* of the "*printing and publiſhing*, ONLY." Nothing more paſſed.

The officer has entered up the verdict *literally*; without ſo much as adding the uſual words of reference, to connect the verdict with the matter to which it related. Upon this, the *two* rules I have ſtated were moved for.

Upon that obtained by the *Attorney General*, *the affidavit of a juror* was offered by the counſel for the defendant.

But We are all of opinion, "that it can *not* "be received."

Where there is a doubt, upon the Judge's report, as to what paſſed at the time of bringing in the verdict; *there* the *affidavits* of jurors or by-ſtanders *may* be received, upon a motion "for a NEW trial," or to rectify a miſtake in the "minutes:" But an *affidavit of a juror* never can be read, as to what he then *thought or intended*.

This motion conſiſts of *two* parts: Firſt, "to fill up the *formal* words of reference;" the ſecond, "to omit the word *only*."

We are all of opinion, "that the *firſt* is a "*technical* omiſſion of the clerk; and *ought to* "*be ſet right*:" as to the *ſecond*, "that the "word ONLY *muſt ſtand* in the verdict."

There is *no ground* from any thing which paſſed, to explain the ſenſe of the Jury ſo as that the officer might have entered *a general* verdict.

No argument can be urged for *omitting* the word

word " *only*," which does not prove " that " it can have *no effect though inſerted*."

And therefore it is a queſtion of law, upon the face of the verdict.

THE DEFENDANT'S motion muſt be conſidered upon the ground of the word " *only*" STANDING. Was it *omitted*, there could be *no* doubt.

" Guilty of printing and publiſhing," where there is no other charge, is " GUILTY :" For, *nothing more* is to be *found* by the JURY.

In the caſe of the King and *Williams*, the Jury found the defendant guilty of printing and publiſhing the North Briton, " N° 45." The clerk entered it up, " GUILTY." And no objection was ever made.

Where there are *more* charges than one, guilty of ſome, " *only*," is an *acquittal* as to the *reſt*.

But in *this* information, there is *no* charge *except* for printing and publiſhing.

Clearly, there can be *no* judgment, of ACQUITTAL ; becauſe the fact found by the Jury is the *very crime* they were to try.

The *only* queſtion is, Whether, by any poſſibility, the word " only" can " have a mean- " ing which would *affect* or *contradict* the " verdict."

" That the *law*, as to the ſubject matter of " the verdict, *is* as I have ſtated," has been ſo often unanimouſly *agreed by the whole Court*, upon every report I have made of a trial for a libel, that it would be improper to make it a queſtion *now*, in this place.

Among thoſe that concurred, the Bar will recollect the *dead* and the *living not now here*.

And

And we all *again* declare our opinion, " that the direction is *right* and *according to* " law."

This direction, though often given with an expreſs requeſt from me, " that if there was " the leaſt doubt, they would move the " Court," has never been complained of in Court. And yet, if it had been wrong, a new trial would be of courſe. It is not *now* complained of.

Taking then the law to be according to this direction, the queſtion is, " Whether any " meaning can be put upon the word " only," " as it ſtands upon the record, which will *af-* " *fect* the verdict."

If they meant to ſay " they did not find it a " *libel*," or " did not find the *epithets*," or " did not find any *expreſs* malicious intent;" it would *not* affect the verdict; becauſe *none of theſe* things were to be proved, or found *either* way.

If, by " only," they meant to ſay, " that " they did *not* find the MEANING *put upon the* " *paper by the information*;" they *ſhould have* ACQUITTED him.

If they had *expreſſed* this to be their meaning, the verdict would have been *inconſiſtent* and *repugnant*; for they ought *not* to find the defendant guilty, *unleſs* they find the *meaning put upon the paper by the information:* and judgment of *acquittal* ought to have been entered up.

If they had *expreſſed* their meaning in any of the *other* ways, the verdict would *not* have been affected; and *judgment* ought to be entered upon it.

It is impoſſible to ſay, with certainty, *What* the Jury really " *did* mean." Probably they had *different* meanings.

If

If they could poſſibly mean *that* which, *if expreſſed*, would *acquit* the defendant, he ought not to be concluded by this verdict.

It is poſſible, *ſome* of them might mean not to find the *whole* ſenſe and explanation put upon the paper by the innuendos in the information.

If a doubt ariſes from an ambiguous and unuſual word in the verdict, the Court ought to lean in favour of a *venire de novo*.

We are under the *leſs* difficulty; becauſe, in favour of a *defendant*, though the verdict be *full*, the Court may grant a new trial.

And we are all of opinion, upon the whole of the caſe, "that there ſhould be a VENIRE "DE NOVO."

Mr. Attorney General ſaid, the *original* paper was loſt; or, at leaſt, was never returned back.

LORD MANSFIELD. Nothing of that ſort will vary the juſtice of the judgment.

IX. Of other Matters reſpecting new Trials, &c.

(4.) *Of New Trials on the Ground of Irregularity*, &c.

Vide ante VI. *Leeman verſus Allen*, and others; *et* VII. *Ruſſell verſus Ball.*

Vicary v. Farthing, E. 38 Eliz. Mo. 451. n. 616. Delivering written evidence to the Jury by one of the ſolicitors, which evidence had been produced in court.

AT *niſi prius* the iſſue was upon *full age*, and two church-books were given in evidence; one of which was delivered to the Jury in court by conſent of the parties, and the other was afterwards delivered to the Jury out of court, by the ſolicitor on one ſide, without the conſent of the Court, and this was indorſed upon the *poſtea*. The queſtion was, If the verdict ſhould be void? And the Juſtices differed in opinion, *Popham* and *Gawdy* that it ſhould not; *Fenner* and *Clench*, that in the caſe of *Landy* and *Metcalfe* in C. B. 33 *Eliz.* it was agreed to be good law, where the Jurors being conſulting upon their verdict, and ſeeing out of the window one of the witneſſes, they called to him, and deſired that he would again declare to them what he had teſtified in Court, and he did, and nothing more; yet for this the verdict was adjudged void. But in the principal caſe, the book was delivered in evidence, and the other party had anſwered to it. Therefore *quære? Nota.* the books for avoiding a verdict, 14 *H.* 7. fo. 1, 2. *Doctor*

V. Mo. 452.

et

et Student, fo. 126. 4 *Ma. Brq. Verdict*, 477. 11 *H.* 4, 16. 35 *H.* 6. *Fitz. Examination*, 17.

If the defendant appears and makes defence, he ſhall never have a new trial, for want of due notice.

Thermolin v. Cole, H. 8. W. 3. B. R. 2 Salk. 646.
No new trial for want of notice after defence.

This * was an action of treſpaſs for cutting down and carrying away twenty trees of plaintiff's. As to twelve of the trees, defendants juſtified for eſtovers; and as to the remaining eight, pleaded not guilty, and two ſeparate iſſues were joined thereupon.

* Southeby v. Day and others. H. 7. Geo. 2. Barnes, 154.
Juſt verdict for plaintiff, and moderate damages not ſet aſide for ſmall irregularity.

At the trial the merits were fully determined as to the iſſue joined upon the juſtification for eſtovers; but plaintiff gave no evidence upon the Not Guilty, and no notice being taken thereof, the Jury found a verdict for plaintiff generally, and gave five ſhillings damages, but omitted to acquit the defendants on the Not Guilty; whereupon defendants moved to ſet aſide the verdict, and obtained a rule to ſhew cauſe, which was afterwards diſcharged on hearing counſel on both ſides. The verdict appearing to be juſt, and the damages moderate, the Court would not overturn the verdict; but left plaintiff to enter up his judgment as he ſhould be adviſed.

Baynes for defendants. *Chapple* for plaintiff.

Grave v. Cliffe. E. 12 Geo. 2. Barnes 445.
Similiter omitted.

The words *(and the ſaid plaintiff likewiſe)* after iſſue tendered by defendant, were omitted in the iſſue delivered; but inſerted in the record of *niſi prius*. *Burnett* moved to ſet aſide the verdict, inſiſting upon this as a material variance, and had a rule to ſhew cauſe. But it appearing that Mr. *Lacy*, defendant's counſel, at the trial, had objected to the evidence

 given

given by plaintiff in point of law, (which is making defence) though he did not croſs examine, the rule was diſcharged. *Comyns* and *Draper* for plaintiff; *Eyre* and *Burnett* for defendant.

Thompſon v. Simmons, E. 6. Geo. 2. Barnes, 475. Variance between niſi prius record and iſſue. Vide Poſt Fitch and Nunn.

Darnal moved to ſet aſide the verdict, the record of *niſi prius* differing from the iſſue-book delivered, the defendant's name being inſerted in the paper-book, in joining iſſue, inſtead of plaintiff's; but in the record plaintiff's name was inſerted, and the iſſue properly joined; but two iſſues being joined, and a general verdict found for plaintiff, Court refuſed to make any rule.

Norman v. Beaumont, in treſpaſs and aſſault in Norfolk, M. 18. G. 2. Barns, 453. A wrong juryman ſworn, verdict ſet aſide.

Richard Geater, ſummoned and returned as a *niſi prius* juror, did not attend the Aſſizes; but one *Richard Sheppard*, a freeholder, who was verbally ſummoned to ſerve as a juror on the Crown ſide, and never had been at the Aſſizes before, did attend both courts (as he imagined himſelf in duty bound to do); when *Richard Geater* was called on the *niſi prius* ſide, *Richard Sheppard* (thinking himſelf called) anſwered, and was ſworn as a juror.

Defendant inſiſted, that the verdict was null and void, the trial not having been by twelve but by eleven jurors only.

Neither party knew any thing of the miſtake till after the trial. It was urged for plaintiff, that defendant ought to have challenged *Sheppard*; that after recording the verdict, no averment can be admitted againſt the record. That *Sheppard*'s place of abode was different from that of *Geater*, which would have been good matter of challenge. And if defendant could aver againſt the record, yet the

the defect is cured by the ſtatute 32 H. 8. c. 30. The verdict was for plaintiff, damages one ſhilling; and Lord Chief Juſtice *Lee*, who tried the cauſe, had certified, to entitle plaintiff to coſts. *Per Cur'*. By the ſtatute 3 Geo. 2. all the twelve jurors ought to be drawn out of the box, and the name of *Richard Sheppard* was never put into the box. The Court are not bound by the record. Here has been no trial. This is not matter of challenge, nor is the defect cured by the ſtatute 32 H. 8. The rule on *Richard Sheppard* to ſhew cauſe why an attachment, was diſcharged. The rule to ſhew cauſe why the verdict ſhould not be ſet aſide, was made abſolute. *Prime* for plaintiff; *Bootle* for defendant; *Leeds* for *Richard Sheppard.*

Wrey v. Thorn, M. 18 G. 2. Barnes, 454.

Motion for new trial, the chriſtian name of one of the jurors being miſtaken.

This was an action for breaking and entering plaintiff's cloſe, *&c.* Defendant juſtified in right of a way. Plaintiff replied *extra viam*; whereon iſſue was joined; and a ſpecial Jury and view applied for and granted. The name of *Henry Luppincott* of *Alverdiſcott*, in *Com' Devon*, Eſquire, was taken out of the freeholders book, and he ſtood as a juryman, and was returned among the other jurors, in the pannel annexed to the writ of *Venire facias*; and was ſummoned, and did attend both on the view and at the trial. After a verdict for plaintiff on the merits of the cauſe, defendant moved to ſet aſide the verdict, Mr. *Luppincott*'s chriſtian name being *Harry* and not *Henry*; and produced an affidavit thereof from two perſons. *Per Cur'*, this affidavit ought not to be received in a motion for a new trial. The record, and all the jury proceſs, are uniform. Mr. *Luppincott* is the real perſon re-

turned and intended to be a juror, and there is no pretence that the verdict is unjuſt. It is commonly underſtood that *Henry* and *Harry* are the ſame name; or that *Harry* is the ſame name as *Henry* corruptly ſpelt. The rule to ſhew cauſe why the verdict ſhould not be ſet aſide, was diſcharged. *Belfield* for plaintiff; *Huſſey* for defendant.

Love and Appleton, v. Jarrett. E. 19 G. 2. Barnes, 457. Paper-book received and paid for, but returned on diſcerning the replication to be bad, with notice of the miſtake. Verdict obtained without defence ſet aſide.

Defendant had time to plead by a judge's order, rejoining *gratis*. Plaintiff delivered a paper-book, containing a bad replication, and an iſſue joined by defendant. Defendant's agent's clerk received and paid for the paper-book; but his maſter perceiving the replication to be bad, returned the book to plaintiff's agent, and gave notice of the miſtake, notwithſtanding which plaintiff went on to trial, and had a verdict, without defence. Rule abſolute to ſet aſide the verdict, without coſts. *Skinner* for plaintiff; *Draper* for defendant.

Hicks againſt Young. M. 20 G. 2. Barnes, 458. Verdict for defendant in replevin (who brought down the record) ſet aſide, the plaintiff not appearing.

In *replevin*, plaintiff did not appear at the aſſizes, defendant brought down the record, and his counſel inſiſting ſtrongly on a verdict, Mr. Baron *Reynolds*, before whom the cauſe was tried, complied, and a verdict was found for defendant, though plaintiff did not appear. Upon application by plaintiff to ſet aſide the verdict, the Court, after hearing the Judge's report, ordered the *poſtea* to be amended, and a nonſuit to be returned inſtead of a verdict for defendant; and that defendant ſhould pay coſts of the motion. *Prime* for plaintiff; *Draper* for defendant.

In

In *ejectment*; the *Venire facias* was awarded by miſtake, returnable on the morrow of the *Aſcenſion*, inſtead of eight days of the *Purification*. Defendants, though their witneſſes attended the aſſizes, made no defence at the trial, but confeſſed leaſe, entry, and ouſter, and ſuffered plaintiff to take a verdict, relying on the miſtake in awarding the *venire*, returnable at a day ſubſequent to the aſſizes, 'till after which return, and default by jurors, there could be no *niſi prius*. The jury proceſs was made returnable at the proper day: the Court held the variance material, on the authority of two caſes cited by plaintiff's counſel, *Baſtard & al. verſus Bartlett*, *T.* 3 *G.* 2. *Dale verſus Holmes*, *M.* 4 *G.* 2. in *B. R.* Verdict ſet aſide on payment of coſts. *Prime* for defendants; *Draper* and *Wynne* for plaintiff.

Weeden, on the demiſe of Long againſt Saunders, widow, and others. E. 23 G.2. Barnes, 460.

Verdict ſet aſide, the venire being returnable at a day after the aſſizes.

MOTION, *per Draper* for defendant, for a new trial, after verdict for plaintiff, in an action upon a penal ſtatute (wherein no defence was made at the trial) founded on a variance between the iſſue delivered and the record of *niſi prius*, the words following, *(viz.) And thereupon the ſaid plaintiff, by* George Boldero, *his attorney, ſaith*, being omitted in the iſſue delivered, though put into the record. This was admitted not to be a material variance affecting the merits, and in civil actions helped by the ſtatute of *Jeofails*, but not in an action on penal ſtatute. In actions brought by original writ, the method is to recite the writ, and then to count; here is nothing but recital, without any count. By ſtat. 18 *Eliz.* a particular method is preſcribed to the proſecutor; he muſt declare in perſon, or by attorney. Plaintiff, in this caſe, may, poſſibly,

Fitch qui tam againſt Nunn. E. 26 G. 2. Barnes, 464.

Variance between the iſſue and niſi prius record.

Vide poſt IX. (11.) the ſame cauſe.

Vide ante Thompſon v. Simmons.

poſſibly, be under twenty-one years of age, and, if ſo, cannot ſupport this action, wherein he cannot declare by his *prochein amy*.

The Court, after hearing *Prime pro quer'*, did not incline to think the variance material, or to favour the diſtinction made *per Draper*. But as plaintiff's agent had made a blunder, and the merits had not been tried, ordered a new trial, and coſts to attend the event. *Vide poſt* IX. (11.)

Griffiths v. Williams, E. 27 G. 3. B. R. Durnford and Eaſt, 1 V. 710.

Paying money into court, where the demand is for unliquidated damages, by a judge's order after plea pleaded, is irregular; but if the plaintiff take the money out, he thereby waives the irregularity, and cannot afterwards have a verdict, unleſs he recover more than the ſum paid in.

The plaintiff is bound by the acts of his attorney's agent in town.

This was an action againſt the defendant as an attorney for negligence in not entering up judgment, on a warrant of attorney, againſt a creditor of the plaintiff, by which he had loſt his ſecurity. The defendant pleaded the general iſſue, and afterwards obtained a judge's order for paying money into court. Notice was given to the defendant by the plaintiff's attorney, that the payment was irregular, and that he ſhould not take the money out of court; but about ten days before the trial, the plaintiff's agent took the money out of court, and afterwards the plaintiff obtained a verdict for the exact ſum paid into court.

On a former day, *Bower* obtained a rule to ſhew cauſe why the verdict which had been given for the plaintiff, ſhould not be ſet aſide, and a verdict entered for the defendant.

Douglas and *Milles* now ſhewed cauſe, and contended, that as this was an action in which unliquidated damages were claimed, the defendant could not pay money into court as of courſe. But even if it could, this was too late, it being after plea pleaded, 1 *Wilſ.* 157. *Barnes*, 279. And that irregularity is not cured by the plaintiff's agent taking the money out of court; for the plaintiff cannot be

be in a better ſituation by thoſe means, than he would have been, if the defendant's attorney had paid the money into his hands. And even in that caſe, unleſs there had been a plea *puis darrein continuance*, the plaintiff muſt have obtained a verdict: for nothing can be taken advantage of under the general iſſue, but that which happens before plea pleaded. *Sullivan verſus Montague, Dougl.* 101. *Reynolds verſus Beerling, Dougl.* 108. n. 47. Beſide the agent's taking the money out of court, ought not to conclude the plaintiff, after his attorney had expreſsly given notice to the defendant's attorney, that he would not take the money.

The counſel in ſupport of the rule were ſtopped by the Court.

Ashurst, J.—This payment of money was originally irregular; for this is not one of thoſe actions in which money could, ſtrictly ſpeaking, be paid into court; but that irregularity was waived by the plaintiff's taking it out of court.

He ſhould have applied to diſcharge the rule as irregularly obtained; but inſtead of that, he received the money, which was paid into court, and went down to trial. It is no objection that the agent in town took the money out of court, becauſe he acted as the plaintiff's attorney in town, and therefore the plaintiff is concluded by his acts.

Buller, J.—Where the defendant is entitled to pay money into court, it is a matter of courſe before plea pleaded; and now, even after plea, it is perpetually done by obtaining a judge's order for that purpoſe. No inconvenience enſues to either party from this prac-

tice; becauſe if any expence has been incurred, that is ordered to be paid at the time of obtaining the rule. And this tends to the furtherance of juſtice; for if the defendant pays into court what is really due, the plaintiff ought in juſtice to take it. That is the caſe in general. It is true, indeed, that the defendant in this action could not in ſtrictneſs pay money into court, becauſe it is founded in damages: but if the plaintiff had intended to object to it, he ſhould have applied to diſcharge the rule. But he has acquieſced under this order by taking the money, and therefore is eſtopped from ſaying that the defendant could not pay money into court. It has been ſaid, that this is to be conſidered in the ſame light as if the defendant had, after plea pleaded, actually paid ſo much money to the plaintiff as a ſatisfaction, in which caſe, unleſs there had been a plea *puis darrein continuance*, the plaintiff would have been entitled to a verdict. But this is extremely different from that caſe; for there the payment would be the act of the party, but this payment under a rule obtained, is the act of the Court, and therefore could not be pleaded *puis darrein continuance*. Then as to the agent's taking the money out of court, it is the ſame as if it had been done by the plaintiff himſelf. For where there is an agent in town, all notices are given to him, and are not ſent into the country.

Grose, J.—Here the objection, if good, is waived; for the plaintiff is eſtopped, by taking the money out of court, from taking advantage of any irregularity. There was time enough for the agent to have written into the country after he had taken the money out of court;

court; and after that, the plaintiff ought not to have proceeded to trial.

The *Court* made the rule abſolute, directing that the plaintiff ſhould have coſts to the time of the money being paid into court, and that he ſhould pay the defendant the ſubſequent coſts (a).

(a) Durnf. and Eaſt, 1 V. 629.

IX. Of other Matters reſpecting new Trials, &c.

(5.) *Of granting a new Trial after two concurrent Verdicts.*

Vide ante V. *Tyndal* and others, *verſus Brown*, & VI. *Clerk verſus Udall.*

Salk. 649. M. 2 An. B. R. 6 Mod. 22. Improper to grant a new trial after ſecond verdict on ſame ſide.

PER Holt, Ch. J. After ſecond verdict on the ſame ſide, it is not fit to grant a new trial, becauſe the Judge did not like the verdict; but if there were any practice in obtaining it, it is otherwiſe.

Goodwin v. Gibbons, T. 7 G. 3. B. R. 4 Burr. 2108. Motion for new trial after two verdicts for plaintiff.

After two verdicts for the plaintiff, the defendant moved for another new trial. It was an action of treſpaſs; and the trials had been in *Cheſter*.

The defendant was an attorney. At the firſt trial, the Jury found that HE had acted beyond his office and authority, or his duty as an attorney; and gave a verdict for the plaintiff: which verdict was ſet aſide, and a new trial granted. The ſecond verdict was alſo found for the plaintiff: which ſecond verdict was now prayed to be ſet aſide alſo; and a third new trial was prayed. A rule was made upon the plaintiff, to ſhew cauſe.

Upon ſhewing cauſe, Mr. *Morton*'s report was read; and the queſtion was much litigated: but it is not neceſſary to ſpecify the particulars; becauſe only the general doctrine

laid

laid down is meant to be here taken notice of.

Lord MANSFIELD.—There is no ground to ſay that a new trial ſhall not be granted, after a former new trial has been once granted before.

The general doctrine in ſuch a caſe.

There is an index to a Report-book *, which miſtakes a deciſive *particular reaſon* in a particular caſe, for a GENERAL *rule*. See Modern Caſes, Index, under the word "TRIAL."

* I ſuppoſe his lordſhip meant 6th Modern, where the index ſays—"After a trial "at bar, a new "trial denied." Sed. qu.

But there is no ſuch general rule as has been ſuppoſed. A new trial muſt depend upon anſwering the ends of juſtice.

However, in the preſent caſe, he ſaid, he did not ſee any reaſon for a new trial. He obſerved that here is no queſtion of right, nor any great value: and upon the whole, he was clear that no new trial ought to be granted.

Mr. *Juſtice* YATES was clear, that a ſecond new trial might be granted, as well as a firſt, *if* the reaſons for granting it were ſufficient.

But he alſo thought that in the preſent caſe there was *no* ſufficient reaſon for granting one.

Mr. *Juſtice* ASTON.—The caſe of *Gwinne verſus Poole et al'*, in 2 *Lutw.* 935, which cites *Olliet* and *Beſſey*'s caſe in Sir *T. Jones*, 214, does not contradict the poſition—

"That an attorney may exceed his autho-"rity and juriſdiction; and if he acts ſo with "his knowledge, may be guilty as a treſpaſſer."

And the caſe of *Moravia verſus Sloper et al'*, in *C. B. Comyns* 574, recognizes the doctrine, "that in juſtifying under the proceſs of an in-"ferior court, it is neceſſary to ſhew it to be "within the juriſdiction."

Upon the whole circumſtances of this caſe, he concurred, that no new trial ought to be granted.

Mr.

Mr. *Juſtice* HEWITT.—If an attorney knows that the caſe is out of the juriſdiction of the inferior court, I think he will be anſwerable: eſpecially, if he knows it clearly. Here, he did know it. And beſides this, the Jury have found that He even *went beyond and out* of his duty as an attorney.

The granting a new trial a ſecond time, muſt depend upon the circumſtances of the caſe: it is very difficult to lay down any certain rule. Indeed, if two or three juries have determined upon the ſame point, and the ſame circumſtances, it may be a matter of diſcretion, not to grant a new trial, but to leave the matter at reſt.

Upon the circumſtances of the preſent caſe, no new trial ought to be granted.

Per Cur' unanimouſly—

The RULE to ſhew cauſe why there ſhould not be a new trial, was DISCHARGED.

IX. Of other Matters reſpecting new Trials, &c.

(6.) *Of granting new Trials in Ejectment.*

Vide note VIII. *Wright ex demiſs' Clymer verſus Littler & al. et poſt* IX. (16) *Goodtitle verſus Bailey.*

Argent v. Sir Marmaduke Darell, H. 11 W. 3. B. R. 2 Salk. 648. New trial after trial at bar, refuſed in ejectment, becauſe not concluſive. Sed. vide poſt, Smith and Parkhurſt.

IN *ejectment* after a trial at bar, Serjeant *Wright* moved for a new trial, becauſe the verdict was *contrary to evidence:* the Court thought ſo too. *Rokeby* was for it, on the caſe in *Style, cæteri contra*; for *per Holt*, Ch. J. the reaſon of granting new trials upon verdicts againſt evidence at the aſſizes is, becauſe they are ſubordinate trials appointed by *Weſt.* 2, *c.* 30. *Ubi de paucis articulis & facilis eſt examinatio.* And there have been new trials anciently, as appears from this: that it is a good challenge to the juror, that he hath been a juror before in the ſame cauſe; but we muſt not make ourſelves abſolute judges of law and fact too; and there never was a new trial after a trial at bar in ejectment, but in caſe of ill practice, for the plaintiff may bring a new ejectment: upon this a new trial at bar was denied in Sir *Richard Temple*'s caſe, where the Jury found a point of law on the ſtatute of bankrupts againſt the opinion of the Court.

In

Baker, on the demiſe of Brown, verſus Petcher. M. 8 G. 2. Barnes, 440.
Verdict for defendant upon a counterfeited deed, ſet aſide.

In ejectment. Upon the trial a verdict paſſed for defendant, but a new trial was granted, the mortgage deed under which defendant claimed, appearing to be a counterfeit by the ſtamp, the dye which impreſſed it not being made 'till ſeveral years after the date of the deed. Where matter of title is the diſpute, and defendant obtains a verdict, a new trial is always denied; but this is an extraordinary caſe where the revenue is concerned.

Brookes, on demiſe of Mence v. Baldwyn. T. 28 Geo. 2. Barnes, 468.
Verdict good in part, bad in part, in ejectment.

In ejectment. Upon motion for a new trial, Mr. Baron *Adams*, before whom the cauſe was tried, reported to the Court, that the verdict (which was a general verdict for the plaintiff) was good in part and bad in part, agreeable to evidence as to lands in poſſeſſion of one of defendant's tenants; contrary to evidence as to lands in poſſeſſion of another tenant. 12 *Mod.* 271. 2 *Salk.* 648, 3 *Salk.* 362, were quoted to ſhew that where a verdict is good in part it muſt ſtand. Rule, that plaintiff ſhall take poſſeſſion of that part of the premiſſes only as to which the Judge reported in favour of the verdict. *Martyn* for defendant, *Poole* for plaintiff.

Vide N° IV. Huddleſtone verſus Brigſtock and others.

Leighton v. Sir Edward Leighton. M. 1720. 1 P. Will. 671. Ca. 192. 2 Eq. Ca. Ab. 525. Pl. 4.
Increaſe of a truſt-eſtate deviſed to be ſold, or deviſed to J. S. if the will

The defendant, Sir *Edward Leighton*'s father, mortgaged, and afterwards ſold the manor of *Balſley*, in the county of *Montgomery* in *Wales*, to his brother the plaintiff, and upon his death the now Sir *Edward Leighton* ſet up an old intail created about two hundred years ſince, and got into poſſeſſion. The plaintiff brought an ejectment, which was tried in *Wales*, and a verdict

verdict paſſed for the defendant upon producing an old inquiſition finding the intail; but there was no deed produced creating this intail.

be diſputed, after two trials in favour of the will, equity will grant a perpetual injunction.

The plaintiff at law brought his bill in this Court, ſetting forth that the writings were all in the defendant's hands, and praying that they might be produced, and that the defendant might not ſet up a title under any truſt-term. Upon which Lord *Cowper* decreed, that the trial ſhould be upon the *mere right* in an ejectment; and that no truſt-term, mortgage, or leaſe, ſhould be ſet up, but that the defendant ſhould make title only under the intail.

Accordingly it was tried in *Shropſhire*, where, before Mr. Baron *Price*, the now defendant Sir *Edward Leighton* had a verdict; but the Judge certifying againſt it, a new trial was granted to be at the bar of the *Exchequer*, which was had, and a verdict for the plaintiff: there was afterwards a trial likewiſe in the *King's Bench*, and a verdict again for the plaintiff. And now on the equity reſerved, it was prayed that the plaintiff ſhould have a perpetual injunction with coſts.

Lord *Parker*.—The plaintiff has no reaſon to complain (as he does) of the inconvenience, that there is no end of trials in ejectment, for the two firſt were found againſt him; but it is true, the two trials at bar, which were by the direction of the Court, being for him, I do not ſee what this Court has been doing, unleſs it ſhould now grant a perpetual injunction. If a truſt-eſtate be deviſed to be ſold, and on a bill brought againſt the truſtees to ſell, the heir conteſts the will; after two trials, the Court will grant a perpetual injunction. In the caſe

of

of the *Earl of* (a) *Bath verſus Sherwin*, the title was a mere legal one; where, after ſeveral ejectments and five verdicts for the Earl of *Bath*, he brought a bill of peace for a perpetual injunction. Lord Chancellor *Cowper* thought this too much for him to grant, but ſeemed to recommend it to the plaintiff as a cauſe proper for the Houſe of Lords; and on an appeal, the Lords granted a perpetual injunction, which I take as a reverſal of Lord *Cowper*'s decree, and as a precedent in the higheſt court of what ought to be in this caſe. Conſequently it is very improperly ſaid, that only the Houſe of Lords in ſuch caſe ſhould grant a perpetual injunction; for that houſe on appeal gives ſuch a judgment as the Court below ought to have done. This Court, in directing trials, and ordering writings to be produced, has been doing nothing all this while; if it cannot grant a perpetual injunction, which really, after ſo many trials, ſeems to be for the benefit of both parties.

(a) Preced. in Chancery, 261.

So after ſeveral trials in ejectment, and verdicts in all, in favour of the will, equity on a bill of peace will grant a perpetual injunction.

As to the objection, that in the caſe of the Lord *Bath verſus Sherwin*, the Lords would not have granted a perpetual injunction, but from its being an odious cauſe, tending to baſtardize a noble perſon after his death; I anſwer, it did not tend to baſtardize the Duke of *Albermarle*, but to make him the legitimate ſon of Radford.

Equity will the rather grant a perpetual injunction where it directs the trial, or where the cauſe againſt which the verdicts are found is odious in its nature.

However, the principal caſe is ſuch as not in its nature to be entitled to any favour; for the defendant Sir *Edward Leighton* is contending againſt a purchaſe, under which there has been poſſeſſion for very many years; againſt a ſale made by his own father to his brother; and is ſetting up an old intail of about two hundred years ſtanding to defeat this purchaſe; and

if there was not the cleareſt proof imaginable of ſuch an intail, (as poſſibly there was not) the Jury were in the right not to find it. It is certainly an inconvenience in the law, that there ſhould be no end of trials in ejectment; and that one trial in a real action (which perhaps may be a trial by *niſi prius*) ſhould be final, when at the ſame time twenty trials in ejectment and at the bar in *Weſtminſter Hall* will not be concluſive; but this cannot properly be urged in the preſent caſe, when upon the two or three firſt ejectments the verdicts went againſt the now plaintiff, who, had they been concluſive, muſt have been barred.

But as to the coſts in this Court, the plaintiff *William Leighton* has had relief by producing the writings, and preventing the defendant from ſetting up any old terms; and it does not appear that the defendant Sir *Edward Leighton* (the heir of an ancient family) has ſo far miſbehaved, as that he ought to pay coſts; though he ſhall loſe his own coſts, the right appearing againſt him; but the plaintiff to have the coſts at law for all the trials.

This decree was affirmed (a) in the Houſe of Lords with £. 40 coſts.

(a) March 1720.

Upon a trial at bar in *ejectment*, the parties agreed to a ſpecial verdict as to a point of law ariſing upon a family ſettlement. But there being a queſtion of fact in which they did not agree, that was left to the Jury, who found it for the plaintiff againſt the weight of the evidence.

Smith ex demiſs' Dormer v. Parkhurſt et al. Hil. Term. 12 G. 2. B. R. 2 Stra. 1105.

New trials may be had in ejectment, and after a trial at bar.

The defendant moved for a new trial, and three objections were made. 1. That it was after a trial at bar. 2. That it was in the caſe of a ſpecial verdict. And, 3. That it was in ejectment.

ejectment. Theſe points were ſolemnly argued at the bar, and the Court took time to conſider of them.

And as to the firſt, the Court held, that in the caſe of a verdict againſt evidence, its being a trial at bar was no objection to a new trial, which had been granted in the caſe of *Bewdley*, and in the caſe of Sir *Chriſtopher Muſgrave* v. *Nevinſon*. *Paſ.* 10 *Geo.* 1. 1 *Stra.* 584.

As to the ſecond objection, they gave no opinion, it not being neceſſary to determine it upon the rule they intended to pronounce in this caſe.

As to the third objection, they ſtrongly inclined, that the verdict not being final in ejectment, a new trial ought not to be granted, but upon very particular circumſtances, where juſtice is no otherwiſe to be attained. And they obſerved, that no caſe had been cited of a new trial in ejectment after a trial at bar.

Sir T. J. 124. Carth. 507. et ante Argent v. Sir M. Darell.

But the point upon which the new trial in this caſe was denied was, becauſe they ſaid the evidence was doubtful, and in ſuch a caſe a verdict at bar ought to ſtand.

Goodtitle, on the demiſe of Alexander and others, verſus Clayton and others. E. 8 G. 3. B. R. 4 Burr. 2224. Contradictory evidence in ejectment, but judge not diſſatisfied with the verdict, as there was evidence on both ſides.

Sir *Fletcher Norton*, on behalf of the plaintiff, ſhewed cauſe againſt granting a new trial, in an *ejectment*-cauſe, wherein a ſpecial jury had given a verdict for the plaintiff, the heir at law of the teſtator; and the defendants had moved to ſet it aſide.

The QUESTION was on the execution of a will. The teſtator's name was *Weſton*.

Mr. Juſtice *Willes* read the report of Mr. Baron *Smythe* who tried the cauſe; which was very particular and circumſtantial; importing, in general, that the evidence was contradictory; but

but that he could not declare himſelf to be diſſatisfied with the verdict, as there was evidence on both ſides.

Lord MANSFIELD thought it a very ſtrong caſe for a new trial. He ſaid, its being an *ejectment*-caſe is no reaſon at all againſt granting a new trial: for, though a new ejectment may be brought, yet here will be a change of poſſeſſion; by which the defendant will be a ſufferer. This objection againſt granting a new trial, "becauſe a new ejectment may be brought," has been over-ruled again and again. An atteſting witneſs to a will has here come to ſwear againſt her own atteſtation. Upon the whole of the evidence reported, it is a clear caſe for re-conſideration.

Mr. *Juſtice* YATES—New trials are often granted in ejectment-caſes as well as in others; where the party praying a new trial would ſuffer by a change of poſſeſſion.

In the preſent caſe, I think, the witneſſes ought not to have been admitted to give evidence againſt their own atteſtation.

There are caſes where *one* witneſs has ſupported a will, by ſwearing that the other two atteſted, though thoſe other two have denied it.

Mr. *Juſtice* ASTON was of the ſame opinion.—Every one of theſe witneſſes has acknowledged their having atteſted this will. I think clearly that it requires a re-conſideration.

Mr. *Juſtice* WILLES concurred; and thought the weight of the evidence appeared to be on the ſide of the defendants.

Lord MANSFIELD.—I have ſeveral caſes, both upon bonds and wills, where the atteſtation of witneſſes has been ſupported by the

evidence of the other witneſſes, againſt that of the atteſting witneſſes who denied their own atteſtation.

It is of terrible conſequence, that witneſſes to wills ſhould be tampered with, to deny their own atteſtation.

Therefore—Let the rule be made abſolute, for ſetting aſide this verdict; and a new trial be had: but it muſt be upon payment of coſts.

Rule accordingly.

IX. Of other Matters reſpecting new Trials, &c.

(7.) *Of the Miſconduct of Witneſſes.*

Vide ante III. The *Queen v.* the Bailiffs and Burgeſſes of *Bewdley*.

George v. Pevice, T. 1 Ann. B. R. 7 Mod. 31.

IN order to a new trial an affidavit was read, that one of the witneſſes had declared that he had got a guinea to ſtifle the truth. *Gould*— An affidavit of him who had the guinea were ſomething, but his ſaying is nothing. A witneſs's laying a wager in the cauſe, is no hindrance to his being a witneſs, for the other has an intereſt in his evidence, which he cannot deprive him of.

I cannot find this caſe elſewhere reported, nor any other caſe upon the ſubject.

I ſhould not have made a ſeparate head of this one caſe, if I could, with propriety, have inſerted it under any other.—Upon the whole, I thought it better thus to inſert it, than omit the caſe.

IX. Of other Matters reſpecting new Trials, &c.

(8.) *New Trial not granted for want of Evidence which might have been originally produced.*

Vide ante IV. *Letgoe* v. *Dun*, *Wheeler v. Pitt.*

Anonymous. M. 8 W. 3. C. B. 1 Salk. 645. S. C. 1 Salk. 273. 2 Salk. 222. New trial for the abſence of counſel or evidence. Q. Vide 6 Mod. 22. 222. 242. Fareſl. 156. Vide poſt.

A NEW trial was granted becauſe the counſel were abſent, not thinking the cauſe would come on, and no defence was made; but a like motion was denied in *B. R. per Holt*, C. J. Alſo in one *Coppin*'s caſe, a cauſe came on at ſeven in the morning, and an old witneſs could not riſe to be there time enough; but it was denied, unleſs he would make affidavit of what he knew, and would anſwer ſo that the Court might judge of it, and how it was material.

Pitts, al. Wits v. Polehampton, Mich. 10 Will. 3. B. R. Salk. 647. New trial for omiſſion of the party refuſed.

It was moved for a new trial, becauſe the defendant having pleaded a compoſition, had forgot to carry down witneſſes to prove the ſubſcribers hands; and the motion was denied, becauſe the debt was honeſt. And *Holt*, C. J. remembered where debt on a bond was brought againſt an heir, who pleaded *riens per diſcent*, but the verdict went againſt him, by omitting to bring the ſettlement to the trial; and the Court

Court being moved, refuſed to grant a new trial, becauſe it was an honeſt debt.

An inquiry found four voluntary eſcapes, for which *Ford*, warden of the Fleet, forfeited his office: iſſues hereupon were tried in B. R. at the bar.

Ford v. Tilly, Paſch. 5 Ann. B. R. Salk. 653. S. C. Farreſl. 156, 157.

One eſcape was proved by a witneſs, who was aſked if he was never burnt in the hand for ſtealing a tankard; he anſwered, No. A new trial was moved for upon producing the record of the conviction, and the Court denied the motion, 1ſt, Becauſe it was a trial at bar. 2dly, It is no reaſon for a new trial, that you, for the defendant, came not prepared; and the Chief Juſtice ſaid *Soam*'s caſe was a hard caſe. *Vide* 3. *Keb.* 365, 369. 2 *Lev.* 114. *et Paſch.* 4 *Ann. B. R.* between *Cockcroft* and *Smith*. That the party's evidence was not ready, was held no reaſon for a new trial, though at *niſi prius*: and a new trial was denied.

New trial not granted for defect of preparation. See 6 Mod. 22, 222, 242. Vide ante.

2 Salk. 642.

Per Cur', a new trial ought not to be granted for want of evidence, which the party might have had at the trial, and had not; but if it be proved that endeavours have been uſed, but prevented by ſome unforeſeen accident, as ſickneſs of the witneſs, &c. it may be good cauſe of new trial.

Warren v. Fuzz. Mic. T. 2 Annæ B. R. 6 Mod. 22.

Cauſe of a new trial for want of evidence.

Per Cur', a new trial is never granted for want of evidence whereof the party was appriſed, and which he might have had at the trial.

M. 3 Annæ, in B. R. 6 Mod. 222.

New trial not granted for want of evidence, of which the party was appriſed and might have had

At *Guildhall coram Raymond, C. J.*

Price v. Brown, Hil. 12 Geo. 1 Stra. 691. Evidence.

Upon payment after the day, and before bringing the action, it was pleaded to be a payment of the principal and all intereſt then due: on evidence it appeared a groſs ſum was paid, which upon computation did not amount to the full intereſt, but it was ſworn that the plaintiff accepted it in full. I objected that they ought to prove it as they had pleaded; but the Chief Juſtice thought it well enough, upon which there was a verdict. And the next term I moved on affidavits of the falſity of the defence, and that we did not expect any defence, and therefore were not ready to contradict the ſingle witneſs, who ſwore to the payment of the money. But the Court would grant no new trial, ſaying it would be of dangerous conſequence, to ſuffer people to be ſetting up new evidence, after they knew what was ſworn before.

No new trial where party might have had evidence on firſt trial.

Richards v. Symes, June 26, 1742. 2 Atk. 319.

Of granting a new trial upon a ſuggeſtion that the party was not appriſed of a particular evidence, and therefore not prepared to give an anſwer.

The queſtion was, Whether there are grounds enough for a new trial?

The fact to be tried in the cauſe was, Whether Mr. *George Richards* gave the mortgage in queſtion to the defendant in equity.

Upon the trial, in order to diſcredit the evidence of one *Bere*, the moſt material witneſs for the defendant in equity, the plaintiff brought a perſon to ſwear, that this witneſs for the defendant was not in *England* at the time he ſwore to the fact.

Several affidavits were read, upon the motion, on behalf of the defendant in equity, to prove that *Bere* was actually in *England*, at the time he ſwore to the fact.

It

It was inſiſted therefore, by his counſel, that the credit of *Bere* being invalidated, as hath been mentioned, weighed greatly with the Jury, and was the principal reaſon that induced them to give the verdict for the plaintiff in equity.

It was inſiſted likewiſe, that the defendant in equity was not prepared to do any more than to ſupport the general character of his witneſſes, or otherwiſe could have given the ſame anſwer he is able to do now, if he had been aware of the objection.

LORD CHANCELLOR.—This is an application for a new trial, which comes before the Court after a conſiderable length of time, as the verdict was given in *November* laſt.

The ground for the new trial is, that the defendant in this Court was ſurpriſed with evidence he was not aware of, and ſo he was not prepared to anſwer it.

A great many objections have been made to this motion, both upon general and particular reaſons.

The firſt objection, That this is an application for a new trial, after a verdict found by a ſpecial Jury upon a trial at bar.

I do agree, that formerly ſome countenance has been ſhewn to this objection, a diſtinction taken between trials at bar, and at *niſi prius*, becauſe the latter are ſubordinate to the other, and therefore not of ſo ſolemn a nature.

A diſtinction was taken formerly, between trials at bar, and at niſi prius; but in the caſe of the Queen and the Bailiffs and Burgeſſes of Bewdley, eleven Judges againſt one determined a new trial ought to be granted. Vide ante III.

But this point was ſolemnly conſidered upon the caſe of the *Queen* and *the* Bailiffs and Burgeſſes of *Bewdley*, 1 *P. Will.* 207, where eleven judges againſt the ſingle opinion of Mr. Juſtice *John Powell*, determined that a new trial ought to be granted.

Another general objection was, that it is

contrary to the rules in courts of common law.

For it was ſaid, they never grant a new trial there for want of the attendance of witneſſes, or of a party's not being ready.

The reaſon is plain, becauſe the iſſue there is barely drawn out upon the fact which is to be tried, and it is impoſſible to tell, whether a jury found a verdict upon the merits, or upon a diſcrediting of witneſſes; and courts at common law might ſet aſide a verdict nine times in ten, if it ſhould be a ground for a new trial, that one of the parties was not appriſed of the evidence on the other ſide.

The intent of directing iſſues here, is only to inform the conſcience of the Court, and therefore not tied down to the ſame ſtrictneſs of verdicts as courts of common law.

But then it is ſaid, and materially too, that there is a difference between iſſues at common law, and iſſues directed by this Court, becauſe the intent of it here is only to inform the conſcience of the Court, and therefore not tied down to the ſame ſtrictneſs and regard for verdicts as courts of common law.

A notice to the defendant before the trial, that the plaintiff will prove a perſon to be abroad, though it does not point out the particular place where, is ſufficient for the defendant to be prepared to encounter this evidence.

But in the preſent caſe, there are no grounds for a new trial, the perſon who makes an affidavit on behalf of the defendant in equity ſwears, that he gave *Richards* notice a fortnight before the trial, that they would on the other ſide attempt to prove *Bere* abroad, which though it was not ſo particular as to point out the very place where they would ſhew him to be, yet was ſufficient notice for *Richards* to prepare to encounter this evidence.

Vide poſt, Eſſay IV.

The caſe of the *Attorney-General verſus Montgomery* has been mentioned, in which I granted a new trial, but upon very different reaſons from the preſent.

I was then aware of the inconvenience which might ariſe from granting new trials, upon

upon the diſcovery of new evidence relating to the ſame fact: but what I placed the chief weight upon was, that the evidence there was in the hands of the relators themſelves, and there was no kind of danger of perjury, and therefore can be no precedent in the preſent caſe.

There is another reaſon that weighs with me, that the new trial is prayed on behalf of the plaintiff at law, and if it had been better made out, I ſhould not have inclined to grant it, becauſe it was in his power to have been nonſuited; for if his counſel had been of opinion that there was evidence that they were not appriſed of, and too ſtrong for them to encounter, they might have adviſed him to ſuffer a nonſuit, and then he might have come back to this Court for new directions, who would have ordered another iſſue at law notwithſtanding the nonſuit.

If there is evidence a plaintiff is not appriſed of, he may ſuffer a nonſuit, and on his coming back to this Court, I would have ordered another iſſue at law, notwithſtanding the nonſuit.

Upon the whole, there are no grounds for a new trial, and of extreme dangerous conſequence, to grant it merely upon a ſuggeſtion, that the party was not appriſed of this evidence, and therefore was not prepared to give an anſwer.

Stace v. Mabbot. July 26, 1754. 2 Vezey 552. Trial.

A motion was made for a new trial: the queſtion was as to the forgery of a certain paper, relative to the eſtate of Captain *Girlington*.

New trial upon new evidence, where the conſcience of the Court was not ſatisfied, although the Judge certified in favour of the verdict, and where it would

Againſt it, it was ſaid, Juſtice *Foſter*, who tried the iſſues, had certified, that he was ſatisfied with the verdict; and two caſes were cited: the firſt, an action of *trover* brought among ſeveral other things for an ewer, wherein evidence was given, that thoſe particular goods were delivered to one, who took them into

not be granted in a court of law, which is ſtricter, and will not grant it to introduce new, or anſwers to, evidence.

into his cuſtody, was anſwerable for, and did not deliver them. A motion was made for a new trial; for that looking into Mr. *Deard's* books it was found, there were two ewers: whereas upon the material evidence, on which the converſion was found, it was one ewer only: but that was denied, for the Court ſaid, the parties might have introduced this evidence before. The other, *Walker* v. *Scot*, *B. R. Hil.* 1749-50; which was an action for criminal converſation, and a motion for a new trial on evidence, that the plaintiff was married to another, and therefore was not huſband to the woman, and could not maintain his action; and that the evidence given was infamous: but this was denied, becauſe it would be dangerous, if the Court was to permit the credit of evidence to be impeached by ſubſequent evidence, which was in the party's power before: and the fact of marriage might have been gone into before.

Lord CHANCELLOR.—If this had been an application for a new trial in a court of common law, in the ordinary courſe of proceedings there; I believe it is not ſuch a caſe, that it would be granted; for they hold theſe motions for new trials by pretty ſtrict rules. They have been a modern introduction; and by the diſcretion of the courts introduced, in order to avoid the difficulties of defeating verdicts by attaint, in which it was difficult to prevail. But however, on motions for new trials at law the rule is, that if a verdict is given on evidence fairly, according to proper notice, and the Judge does not report, that he is diſſatisfied with it, or that it was againſt evidence; the Court will not grant it, in order to introduce new evidence or new

New trials of modern introduction, and to avoid difficulties in attaint. Granted here in caſe of inheritance or of value, or where the Court was not ſatisfied, particularly on forgery

anſwers

anſwers to evidence; for the parties are ſuppoſed to come prepared to ſupport the characters of the witneſſes on either ſide, which is always preſumed, and is right for courts of law to adhere to that: otherwiſe it would be endleſs. But this Court directs iſſues to be tried at law to inform the conſcience of the Court as to facts doubtful before; and therefore expects in return ſuch a verdict and on ſuch a caſe, as ſhall ſatisfy the conſcience of the Court to found a decree upon; if therefore upon any material and weighty reaſon, the verdict is not ſuch as to ſatisfy the Court to found a decree upon, there are ſeveral caſes, in which this Court has directed a new trial for further ſatisfaction, notwithſtanding it would not be granted, if in a court of common law; becauſe it is *diverſo intuitu*, and becauſe the Court proceeds on different grounds.

This is known to be the ordinary rule of this Court, where a matter of inheritance is in queſtion; for the Court ſays, an inheritance is not to be bound by one verdict, if any ſort of objection ariſes to the trial; and that notwithſtanding the objection of inconvenience in examining over and over, which objection has not prevailed. This extends alſo to a perſonal demand, where of conſiderable value, and where the Court is not ſatisfied with the grounds, on which the determination was made at law, and when an objection is made and ſupported by proof; and particularly in a caſe of forgery new trials have been granted, and that by judges who have ſat here, who have been as reluctant as any, and who inclined to adhere to the rules of common law. I remember a caſe in Lord *King*'s time relating to a rent charge, granted out of the eſtate of

Mr.

Mr. *Hockmore*, in *Devonſhire*. It had been twice or thrice tried at common law, tried upon diſtreſs taken on the rent charge, and an avowry, and where the queſtion was ſingly whether it was a forgery or not, and upon all thoſe trials verdict was found for the deed.

A bill was, notwithſtanding, brought here to ſet it aſide for forgery; and Lord *King* ſent it to trial under an iſſue directed by the Court; and, I believe, there was a new trial after that; and notwithſtanding all thoſe verdicts, Lord *King* made a decree to have it brought into Court and cancelled here, the former trials not being to the ſatisfaction of the Court. Undoubtedly therefore it is in the diſcretion of the Court to grant new trials, if they think fit, if there is a ground for it upon the circumſtances here; and the queſtion is, Whether there is ſo or not? I own, I had very great ſuſpicion, when it was on before me upon exceptions; however I did not think fit to determine it, but ſent it to a Jury. The Judge has declared, he is well ſatisfied with the verdict; and if nothing appeared to me, but what appeared to him thereon, I think, I ſhould have been of the ſame opinion with him. My opinion, therefore, in granting a new trial is grounded upon new evidence, which was not before the Jury there, and which is material. I cannot ſay, that my conſcience is ſatisfied as to the grounds and truth of the evidence, upon which this verdict is given. I proceed therefore upon the principles of this Court in directing trials, and not to break in upon the rules which are wiſely laid down by courts of law, as to granting new trials; and ſhall therefore direct another trial upon theſe iſſues: but it muſt be on payment of coſts.

Aſſumpſit

Cooke v. Berry. T. 18 & 19 G. 2. B. R. 1 Wilſon, 98.

New trial never granted for want of evidence which might have been produced at the trial.

Aſſumpſit upon a promiſſory note; defendant pleaded that the plaintiff accepted of ſome cheſts of tea in ſatisfaction, upon which iſſue was joined, and there was a verdict for the defendant; it was now moved on behalf of the plaintiff by Sir John *Strange* and Mr. *Crowle* for a new trial, upon an affidavit that the plaintiff took this to be a ſham plea, and that he had a letter under the defendant's own hand, wherein it appears the defendant had diſpoſed of the tea to another perſon, and wherein the defendant ſays he will pay the plaintiff his money due upon the note; which letter the plaintiff did not produce at the trial, thinking the plea was a ſham, and that the defendant could not poſſibly prove it.

But *per Curiam*, new trials are never granted upon the motion of a party, where it appears he might have produced and given material evidence at the trial, if it had not been his own default, becauſe it would tend to introduce perjury, and there would never be an end of cauſes if once a door was opened to this.

In a ſcire facias on a judgment, the defendant hath a releaſe and omits to plead it, he ſhall not have an audita querela.

Suppoſe in a *ſcire facias* upon a judgment the defendant has a releaſe, he is ſummoned, and has an opportunity of pleading it, and does not, he ſhall never have an *audita querela*; this is a very ſtrong caſe at bar, for the plaintiff has notice of the defence of the defendant in his plea, and ought to have come prepared to falſify it at the trial.

Vide ante Ford v. Tilly. Et Warren & Fuzz. Et ca. following.

And *Denniſon*, J—— ſaid he remembered a caſe of a horſe plea, where the defendant pleaded he gave the plaintiff a horſe in ſatisfaction. Plaintiff looked upon it as a horſe (or ſham) plea indeed, but the defendant at the trial proved it a true plea. Rule to ſhew cauſe why

there

there ſhould not be a new trial was diſcharged.

Norris v. Freeman. Mic. Term. 10 Geo. 3 C.B. 3 Willſ. 38.

A new trial granted, altho' there was evidence on both ſides, becauſe all the witneſſes ſubſcribing to a releaſe, were not called and examined, &c.

Debt upon a bond; defendant pleaded a general releaſe; plaintiff replied *non eſt factum*, thereupon iſſue was joined; the cauſe was tried at the laſt aſſizes for the county of *Worceſter*, before the Lord Chief Baron *Parker*, when a verdict was found for the defendant. Serjeant *Nares* moved for a new trial, upon an affidavit that very ſtrong circumſtances of forgery and perjury appeared upon the trial, whereupon the Court made a rule to ſhew cauſe. The *Chief Baron* reported, that at the trial the defendant produced a general releaſe, ſuppoſed to be executed by the plaintiff the 10th of *October* 1768, to which *Albert* and *Goff* appeared to be ſubſcribing witneſſes. *Albert* was called, and ſwore that in *October* 1768, he was ſent for, to go to the plaintiff's houſe to be a witneſs; that he went thither, and there ſaw the plaintiff ſeal and deliver the releaſe produced in evidence, and alſo ſaw the defendant execute another general releaſe to the plaintiff, (that the other ſubſcribing witneſs was a poor labouring man, but he was not called to prove the releaſe); that this was done about one o'clock that day, at the plaintiff's houſe, which is about thirty miles diſtant from *Worceſter*. *John Webb*, a clergyman, and *Joſeph Collins*, were called for the plaintiff, who ſwore they had often ſeen the plaintiff write, and that the plaintiff's name ſubſcribed to the releaſe, was not of his hand-writing, as they believed; and that on the 10th and 11th of *October*, the plaintiff and witneſſes were at *Worceſter* all day; it was the mayor's feaſt-day. Then *Thomas Homer* was called, (for plaintiff) who

ſwore

ſwore he heard the defendant ſay, he would let judgment go by default in this cauſe, and file a bill in *Chancery* againſt the plaintiff for an account, and did not pretend he had any releaſe from the plaintiff. It alſo appeared, that the declaration in this cauſe was of *Trinity* term 1768, and that the releaſe was not pleaded until *Trinity* term laſt. In reply, the defendant called ſeveral witneſſes, who ſwore they believed the name ſubſcribed to the releaſe produced, to be the plaintiff's handwriting; upon ſumming up the evidence, the *Chief Baron* acquainted the Jury, that he thought the ſtrength of the evidence was with the plaintiff, but they found a verdict for the defendant.

Serjeant *Davy* for the defendant againſt a new trial, inſiſted, that there never was a new trial granted, ſingly, upon a Judge's reporting, that the ſtrength of the evidence was on the ſide of the plaintiff or defendant; that in this caſe, there was evidence on both ſides, of which the Jury are the only proper judges; and although it is ſworn (by the witneſſes for the plaintiff) that the plaintiff and the witneſſes to the releaſe were at *Worceſter* on the 10th and 11th of *October* 1768, yet the witneſs *Albert* did not ſwear, that the releaſe was executed on the day it bears date, it might be drawn and written on the 10th, and not executed till ſome days after; the *alibi*, only goes to falſify its being executed on the 10th; the *Chief Baron* hath not reported, that the verdict is contrary to evidence. Serjeant *Nares* was about to reply, when the Court, without hearing him, were of opinion, there ought to be a new trial.

† *Curia.*

There are caſes where the Court will grant a new trial, although there was evidence given on both ſides.

Curia. There are many caſes where the Court will grant new trials, notwithſtanding there was evidence on both ſides, as where all the light hath not been *let in* at the trial which might and ought to have been; we think the other ſubſcribing witneſs *Goff* ought to have been called and examined to the execution of the releaſe, and he not having been called, we think it would be hard the plaintiff ſhould be bound by this verdict, eſpecially as the releaſe is not in the power of the plaintiff, and ſo he cannot prefer an indictment for forgery. The *Lord Chief Juſtice* ſaid, he thought the evidence was very ſtrong on the part of the plaintiff, and that if the cauſe had been tried before him, he would (under the circumſtances appearing) have called out for *Goff* the other ſubſcribing witneſs, and if he had not been produced, he ſhould have thought it a very ſtrong caſe for the plaintiff, and directed the Jury to have found a verdict for him. A new trial was granted; *abſente Gould,* Juſtice.

Giſt v. Maſon and others, 26 G. 3. B. R. Durnford and Eaſt. 1. V. 84.

Where a policy does not appear on the face of it to be illegal, the Court will not grant a new trial, in order to let the defendant into proof that it was ſo; but he ſhould have ſhewn it on the trial. How far trading with an enemy is illegal in a ſubject? Qu.

Caſe for money had and received, to recover the *premiums* upon certain policies of inſurance underwritten by the plaintiff. This was tried before Lord *Mansfield,* at the ſittings after laſt *Michaelmas* term at *Guildhall,* when the following facts appeared. That the defendants were *Weſt India* merchants, and had property in the iſlands captured by the *French* laſt war. That it was a common practice to ſupply theſe iſlands with proviſions from *Ireland,* notwithſtanding they were in the hands of an enemy; that the defendants, who acted as their own brokers, had for this purpoſe employed neutral veſſels, and had cauſed them to be underwritten

written by the plaintiff from different ports in the Continent to *Ireland*, thence to *Madeira* and St. *Thomas*; and to all of them was annexed *the liberty of going to any of the captured iſlands*.

It had been long doubted whether theſe policies were legal: but in the caſe of the *Bella Juditha* (a), whereon a ſimilar policy was effected, the Court were of opinion that the aſſured could not recover.

(a) Dalmady v. Motteux. Mich. 25 G. 3.

N. B. In that caſe the court decided principally upon the ground of an embargo having been laid on proviſions in Ireland.

The plaintiff, in conſequence of the above deciſion, had refuſed to pay where there had been a loſs.

The defendant's counſel at the trial contended, that as theſe *voyages* were illegal, and as both the parties were in *pari delicto*, the maxim of law *melior eſt conditio poſſidentis* ought to prevail: but Lord *Mansfield*, being of opinion, that theſe policies were not illegal on the face of them, directed a verdict for the plaintiff.

Bearcroft now moved for a new trial to let the defendants into evidence to prove, that this kind of trading was ſo notoriouſly illegal, that the plaintiff muſt have known it to be ſo; that the reaſon why this evidence was not offered at the trial, was founded on a preſumption that the Jury of their own knowledge muſt have concluded, that the illegality of theſe contracts was known to the parties at the time of making them.

Lord MANSFIELD, *C. J.*—This, upon the face of it, is the caſe of a neutral veſſel. It is no where laid down that policies on neutral property, though bound to an enemy's port, are void. And indeed I know no caſes that prohibit even a ſubject trading with the enemy, except two; one of which is a ſhort note in *Roll. Abr.* (b), where trading with *Scotland*, then

(b) 2 Roll. Abr. 173.

then in a general ſtate of enmity with this kingdom, was held to be illegal; and the other was a note (which is now burned) which was given me by Lord *Hardwicke*, of a reference in King *William*'s time to all the Judges, whether it was a crime at the common law to carry corn to the enemy in time of war; who were of opinion that it was a miſdemeanor.

By the maritime law, trading with an enemy, is cauſe of confiſcation in a ſubject, provided he is taken in the act; but this does not extend to a neutral veſſel.

Ashhurst, *J.*—The defendant makes this application to the Court in order to ſupply his own negligence, when it is evident he was not taken by ſurpriſe at the trial. If it does not appear on the face of the policy that it is void, it ought to have been ſhewn by evidence; but no ſuch evidence was offered.

Buller, *J.*—As to the illegality of the contract being within the knowledge of both parties, ſuch a fact is not to be taken for granted: what paſſes between two parties can never be ſuch a matter of notoriety as ſhould be left to a jury to preſume.

Rule refuſed.

IX. Of other Matters reſpecting new Trials, &c.

(9.) *Verdict wrong delivered by the Foreman amended.*

Cogan v. Ebden, and another. T. 30 and 31 Geo. 2. 1 Burr. 383.

Thurſday 23d June 1757.

Verdict delivered by the foreman, contrary to the opinion and intention of eight of the Jury. Eight of the Jury made affidavit that it was the intention of the whole of the Jury to find otherwiſe than the verdict delivered.

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's, *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 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 MEAN-"ING and INTENTION of the WHOLE *Jury* to "find the former iſſue for the defendant; and "the LATTER 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. The counſel for the plaintiff mentioned the caſe of *Baker v. Miles*, in *C. B. in M.* 4 *Geo.* 2. *B. R. S. P.* where eleven of the jurymen ſwore "That "the foreman had miſtaken their verdict;" and it was thereupon ſet aſide.

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 re-* "*ſpective* iſſue," and in not making the Jury fully *underſtand* their own finding; and that it was agreeable to right 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. Juſtice 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.

Vide poſt IX. (10.) 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

ſet aſide the verdict *without* coſts. But difficulties occurring how the coſts would be, in ſuch a 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 *propoſe* what ſeemed to him the moſt proper method of coming at it.

* [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.* 22 *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 *ge-*

neral 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.

* None are mentioned by Strange, pa. 1197. But Cro. Car. 338. Eliot v. Skypp. 1. Salk. 53. Bold's caſe, and a caſe of Fry v. Horder, in Ld. 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* jurymen: 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* jurymen, 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."

IX. Of other Matters reſpecting new Trials, &c.

(10.) *Of amending the Poſtea.*

A Writ of error was brought to reverſe a judgment given in the Common Pleas in an action of treſpaſs, and the error aſſigned was, that in the poſtea there is no aſſociation to the juſtice of aſſize expreſſed, as ought to be. *Roll Chief Juſtice* anſwered, this is the fault of the clerk of the Aſſize: *therefore let him attend and ſhew cauſe why the poſtea ſhall not be amended.*

Poynes v. Francis, H. 1649. Banc. Sup. M. 24 Car. rot. 222. Sty. 191.

Error to reverſe a judgment in treſpaſs —No aſſociate to the Judge. Amendment.

This cauſe was tried at *niſi prius* before the Lord Chief Juſtice, and a verdict taken by miſtake of the aſſociate generally for the plaintiff againſt both defendants, inſtead of finding the defendant *Edward Jones* not guilty; as to the other defendant, verdict was found for the plaintiff, damages £. 200. Plaintiff moved that the return of the *poſtea*, as to *Jones*, might be amended, which was ordered on the Chief Juſtice's report, and hearing counſel on both ſides. The return of the *poſtea* is the act of the Chief Juſtice, and muſt be made as it ought to be: it was urged by defendant's counſel, that the verdict as to the other defendant, was contrary to evidence; but be that ſo or not, the verdict being right in part,

Williams againſt Jones and another, E. 8 Geo. 2. Barnes 6.

A verdict taken generally by miſtake againſt two defendants, when one of them ſhould have been acquitted.

Vide poſt IX. (14.)

cannot be ſet aſide. *Darnall* and *Wright* for defendants; *Eyre* for plaintiff.

Hankey, Knight, who as well,&c. againſt Smith. H. 15 Geo. 2. Barnes 449.

To amend the poſtea, by returning the verdict on the third inſtead of the firſt count.

Rule to ſhew cauſe why the *poſtea* ſhould not be amended, by returning the verdict on the *third* inſtead of the *firſt* count, according to the finding of the Jury, was made abſolute, upon the report of Mr. Baron *Carter*, before whom the cauſe was tried. It was ordered, that the aſſociate do amend the *poſtea* in Court; that defendant have four days after the amendment to move in arreſt of judgment; and that plaintiff do pay defendant coſts of this application. *Prime* for plaintiff; *Bootle* for defendant.

Newcombe v. Green. M. 17 G. 2. 2 Stra. 1197.

Poſtea amended by the judge's notes.

In covenant the breach was aſſigned in non-payment of £. 270 mortgage-money. And on the trial the Jury gave a verdict for £. 274. 11 *s.* damages: and Mr. Juſtice *Burnet* entered it ſo in his minutes, but the clerk of *niſi prius* had only marked 1 *s.* damages on the *diſtringas*.

The Court was now moved, to alter the indorſement, by making it agreeable to the Judge's notes. And Mr. Juſtice *Deniſon* having conferred with him, and reporting the matter to be as above ſtated, the Court ordered it to be amended accordingly.

Vide Auger and *Wilkins*, *poſt* IX. (19.)

Eddowes and another againſt Hopkins and another, executors of Harris. E. 20th G. 3. B. R. Doug. 361.

Where there is a general ver-

Aſſumpſit tried before Lord *Mansfield*, at *Guildhall*, at the ſittings after laſt *Michaelmas* term. The declaration contained ſeveral counts; ſome upon promiſes made by the teſtator, others on other promiſes by the defendants themſelves. To the firſt ſet of counts

plene

plenè adminiſtravit was pleaded, and the general iſſue to the others; and the Jury having found for the plaintiffs with £. 147 damages, a *general* verdict was entered by the officer.

At the trial, the only queſtion was, Whether the plaintiffs were entitled to intereſt on the value of goods ſold by them to the teſtator? They were wholeſale linen drapers, and the teſtator an *American* merchant, and it appeared to have been the uſage of the *American* trade, for merchants here to allow their *American* correſpondents twelve months credit, and then to charge them five *per cent.* for intereſt, and for the tradeſmen here, to allow the merchants fourteen months credit, and then to charge five *per cent.* This was hardly diſputed by the defendants, and his Lordſhip held, that though, by the common law, book debts do not of courſe carry intereſt, it may be payable in conſequence of the uſage of particular branches of trade; or of a ſpecial agreement; or, in caſes of long delay under vexatious and oppreſſive circumſtances, if a jury in their diſcretion ſhall think fit to allow it. But none of the articles for which the teſtator was indebted to the plaintiffs had been delivered *fourteen months before his death*, ſo that no intereſt was owing when he died, and the defendants contended that the uſage did not bind the executors. Lord *Mansfield*, however, and the Jury, thought otherwiſe.

In the laſt term, the *Solicitor-General* obtained a rule to ſhew cauſe why the judgment ſhould not be arreſted, on the ground that the verdict was general, and the counts inconſiſtent, and ſuch as require different judgments to be entered, *viz.* judgment *de bonis teſtatoris* on thoſe where the promiſes were laid to be by the

dict on a declaration conſiſting of different counts, ſome of which are inconſiſtent or bad in point of law, and evidence has only been given on the good or conſiſtent counts, the verdict may be amended by the judge's notes.

the teſtator, and *de bonis propriis* on the others.—Some time afterwards, *Baldwin*, for the plaintiffs, obtained a croſs rule for the defendants to ſhew cauſe why the *poſtea* ſhould not be amended by the judge's minutes, and a verdict entered for the plaintiffs, only on the counts to which the evidence given at the trial applied, and for the defendants on the others.—Both theſe rules came on to be argued this day.

The *Solicitor-General*, for the defendants, inſiſted, that, if the Court were to alter the *poſtea*, they would, in fact, do what was properly and excluſively the province of the Jury, for that the verdict would then be the act of the Court.

Lee, for the plaintiffs, contended, that this was not a new ſort of application, and cited a caſe of *Newcombe* v. *Green*, in *Strange*, where it appeared by the judge's minutes that the jury had found for the plaintiff with £. 274. 11 *s.* damages, but the officer only entered a verdict with 1 *s.* damages, and the court directed an amendment to be made according to the judge's minutes (a.)

V. ante.

(a) Vide Mayo v. Archer. B. R. E. 8 Geo. 1. 1 Str. 513, 515, where a venire de novo was moved for, on an affidavit that certain facts which the court thought material, but which were not found, in the ſpecial verdict, were proved at the trial; but the court directed the verdict to be amended in that reſpect.

Lord MANSFIELD * ſaid it was impoſſible to believe there was ſuch an abſurdity in the law, as that a mere miſtake of the officer ſhould be without a remedy, and that neither the judge nor jury could poſſibly have proceeded on what there was no evidence of before them: and he mentioned a caſe of one *Gibſon*, who had been tried for robbing Mr. *Francis*, and convicted, and a miſtake being diſcovered in the verdict, upon conſultation with all the judges at his chambers, it was corrected from minutes ſigned by the jury, and the priſoner executed.

* Vide alſo Bois v. Bois. B. R. T. 16 Car. 2. 1 Lev. 134.

BULLER,

BULLER, *Juſtice*, ſaid there was this diſtinction, that if there was only evidence at the trial upon ſuch of the counts as were good and conſiſtent, a general verdict might be altered from the notes of the judge, and entered only on thoſe counts, but that if there was *any* evidence which applied to the other bad or inconſiſtent counts (as for inſtance in an action for words, where ſome actionable words are laid, and ſome not actionable, and evidence given of both ſets of words, and a general verdict) there the *poſtea* could not be amended, becauſe it would be impoſſible for the judge to ſay, on which of the counts the jury had found the damages, or how they had apportioned them: that, in ſuch a caſe, the only remedy is by awarding a VENIRE DE NOVO (b.)

He mentioned an inſtance where Sir *Fletcher Norton* had moved for and obtained a *Venire de novo* in a caſe of that ſort (c.)

The rule to arreſt the judgment was diſcharged, and the other rule made abſolute; but on the payment of coſts, including thoſe of the motion, in arreſt of judgment.

(b) Vide Auger v. Wilkins. Poſt IX. (19.)

Where this was done, and ſaid to be according to an ancient rule of court.

(c) Grant v. Aſtle. T. 21. G. 3. Vide IX. (19.)

IX. Of other Matters reſpecting new Trials, &c.

(11.) *Not granted in penal Actions, where the Verdict is for the Defendant.*

Seymour, Bart. qui tam v. Day. 2 Stra. 899.
No new trial in a qui tam, after verdict pro def'.
This on the game law.

ACTION for a penalty in killing an hare, not being qualified.

The Jury found for the defendant, contrary to the direction of the Judge: but the Court refuſed a new trial, ſaying it had never been carried ſo far as a penal action.

Fitch who as well, &c. againſt Nunn, M. 27 G. 2. Barnes, 466.
Verdict for defendant againſt evidence, on the game law—new trial refuſed. Vide ante IX. (4.)
Same cauſe.

This was an action brought on one of the penal ſtatutes made to preſerve the game, wherein defendant obtained a verdict; plaintiff moved for a new trial, and the Judge before whom the cauſe was tried, reported the verdict to be contrary to evidence. Notwithſtanding which, the rule to ſhew cauſe why a new trial ſhould not be had, on payment of coſts, was diſcharged; becauſe no inſtance could be ſhewn wherein an action on a penal ſtatute, in which a verdict was found for defendant, a new trial had ever been granted. *Willes* and *Agar* for plaintiff; *Wynne* for defendant.

Mattiſon qui tam v. Allanſon. M. 19 G. 2. 2 Stra. 1238.

An action was brought upon the late ſtatute againſt horſe-racing for the penalty; and the Jury found a verdict for the defendant,

contrary to plain evidence; and the Court denied a new trial, there being no proof of any miſbehaviour in the defendant, or tampering with the Jury. And this was within the reaſon of caſes in the Exchequer where verdicts for defendants are never ſet aſide for penalties in the caſe of duties; and this is excepted out of the ſtatute of Jeofails, as much as indictments.

New trial where not grantable.

Verdict for defendant againſt evidence, on the ſtatute againſt horſe-racing, refuſed to be ſet aſide.

L. Raym. 63. 2 Keb. 226. V. poſt.

Qui tam upon the game act for killing a hare, verdict for defendant; motion for a new trial, becauſe the Judge who tried the cauſe refuſed to admit a perſon to be a witneſs, who was a pariſhioner of the ſame pariſh where the hare was killed; but *C. J. Lee* ſaid, he did not remember that ever a new trial had been granted in the caſe of a penal action; and ſo *per Cur'*, the motion was refuſed.

Jervois qui tam. v. Hall. E. 16 Geo. 2. B. R. 1 Wils. 17.

No new trial in a penal action, videlicet, on the game act.

In an action upon the ſtatute againſt bribery, there was a verdict for the defendant; and now Serjeant *Forſter* moved for a new trial, as being againſt evidence. But *per totam Curiam*, we never grant new trials in actions on penal laws; and it has been ſo held for more than fifty years paſt.

The Court condemned the caſe in 2 *Keb.* 226.

Fonereau v. ——— E. 10 Geo. 3. C. B. 3 Wils. 59.

A new trial is never granted in actions upon penal laws, where verdict for defendant. This on the ſtatute againſt bribery.

IX,

IX. Of other Matters reſpecting new Trials, &c.

(12.) *Of new Trials in criminal Proſecutions.*

(a.) *In the nature* of Civil *Proceedings.*
(b.) *In actual* Criminal *Proſecutions.*

(a.) *In the nature* of Civil *Proceedings.*

Vide XII. The *King v. Roger Philips*, Mayor of *Caermarthen.*

Rex v. Lord Fitzwater. T. 27 Car. 2. B. R. 2 Lev. 139.

If Jeofails in informations, &c. are cured by verdict, or not. This an information in the nature of a quo warranto for fiſhing in the river Thames.

INFORMATION in the nature of a *quo warranto* for fiſhing in the river *Thames*, in a place extending to B. in ſeven pariſhes, as appears upon the record. After verdict for the defendant, it was moved in arreſt of judgment by *Maynard*, that the *venire* was taken of one pariſh only, where it ought to have been of all, and that it was not cured by the ſtatute of *Jeofails*, being an information which is excepted out of the ſtatute. 1 *Cro. Rex* v. *Talbot*, and alſo in the new ſtatute 16, 17 *Car.* 2. is the ſame exception of all *appeals, indictments, informations, and informations upon penal ſtatutes.* To this it was anſwered that this is the fault of the proſecutor himſelf who ſued out the *Venire facias, ergo* he ought not to take advantage of his own default. And the *proviſo* excepts informations, &c. upon

penal laws only, which is not the caſe here. And as to the opinion in *Talbot*'s caſe, they ſaid, it ſeemed unreaſonable, to hold that the king was not bound by the law, not being named, for it appears by the exception that the parliament underſtood that the king was bound though not named, otherwiſe there had not been any occaſion for the exception. And if he had been bound, if the exception had not been in thoſe caſes, he ſhould be bound in this caſe which is not excepted. *Twiſden* and *Wild* held this caſe not cured by the ſtatute. *Hale ſemb contra & adjournatur.* And afterwards in *Michaelmas* term the verdict was ſet aſide upon *affidavits*, that the Jury caſt lots for their verdict, and gave it according to lot; ſo the exception here was not determined.

The Jury caſt lots for their verdict. This a ground to ſet it aſide.

The queſtion was, if upon a trial, a point in law be ſtarted by the judge, and the counſel do not take it up, but inſiſt upon other facts, which are found againſt them; whereas had the counſel inſiſted upon the matter of law ſtarted by the Judge, the verdict muſt have paſſed for them, whether this is ſufficient cauſe to move for a new trial?

Queen and Corporation of Helſton in Coun'Cornwall. H. 12 Ann. B.R. Lucas, or 10 Mod. 202.

Motion for a new trial, a point of law ſtarted by the Judge, which the counſel did not take up.

Chief Juſtice PARKER.—The granting of new trials is of late original; it began about the year 1652, when the firſt new trial was granted for exceſſive damages. Experience ſhews, that they are grantable, as well for a fault in the judge, as jury, in cauſes tried at *niſi prius*, becauſe a judge of *niſi prius* acts rather in a miniſterial than judicial capacity; and the ground and foundation of granting new trials, when either the judge or jury are to blame is one and the ſame, *viz.* doing juſtice to the party.

When granting new trials began.

Vide poſt, and qu. de hoc?

When grantable. Salk. 649.

The

The queſtion in this caſe, I take to be this: Whether we are ſo bound down by forms of law, as that though we ſee a verdict given contrary to a point of law (which the Judge himſelf took notice of, and yet for want of the counſel's doing their duty to their client, was not inſiſted upon) we cannot grant a new trial?

When a point of law ariſes, whether the counſel inſiſt, or not inſiſt upon it, the judge is bound to direct the jury accordingly.

But yet, if the ſupporting of this verdict, be of no more ill conſequence, than in point of coſts, and the party has another remedy left him, then I am of opinion, that the party ought to ſuffer for the neglect of his counſel.

But if the verdict binds and concludes the right of the party, then I think it hard, that the party ſhould loſe his right, by a miſtake, or ſlip of the counſel.

Powys *ſenior.*—It would be a vaſt inconvenience, if the bare ſtirring of a point at *niſi prius*, and which for ought appears, neither judge, counſel, nor jury thought upon more, ſhould be a ground for granting a new trial; for it may be, the reaſon why it was not inſiſted upon by the counſel was, becauſe they knew the other ſide had evidence, that would give it a full anſwer, by quite altering the fact. What happens now accidentally, may hereafter happen deſignedly; matter may be ſlided in by the counſel, and then dropt, only in order to move for a new trial; and it is better to ſuffer a particular inconvenience, than open the way to a general miſchief.

Miſtake of a judge or jury a good cauſe for granting a new trial, but not the miſtake of counſel.

Eyre.—Miſtake of judge or jury, a good cauſe of granting a new trial; but never yet heard, that the miſtake of the counſel was ſo. The counſel ſtands in the place of his client; and

and therefore if the counſel waive a point, it is the ſame as if the client did it himſelf.

In debt upon bond, if the defendant, who has a good defence upon the merits, ſhould hazard his cauſe upon a demurrer, he can have no relief afterwards.

Powys *Junior*.—If a defendant in an action of debt upon a bond who has a good defence upon the merits, ſhould, by advice of counſel, hazard his cauſe upon a demurrer, which is adjudged againſt him, this miſtake of counſel would not be allowed in Chancery, as a good cauſe of relief*.

Parker, *Chief Juſtice*.—There muſt be no new trial. And I ſo far aſſent to my brothers, that though a verdict ſhould leave the party remedileſs, yet if the counſel does not only, not inſiſt, but expreſsly waive an objection, *&c.* that then there ought to be no new trial.

The King v. Bennet. T. 4 Geo. 1. B. R. 1 Stra. 101. Court divided about a new trial, in an information in nature of a quo warranto, for exerciſing the office of Mayor of Shafteſbury.

Upon the trial of an information in the nature of a *quo warranto* for exerciſing the office of Mayor of *Shafteſbury*, the Jury found a verdict for the defendant; and upon a motion for a new trial, great doubts aroſe, whether after a verdict for the defendant, there could be any new trial, though the Judge ſhould certify (as he did in this caſe) that it was a verdict againſt evidence.

After the point had been twice ſpoken to *in B. R.* it was adjourned *propter difficultatem* to be argued before all the Judges of *England*, who being this term aſſembled at *Serjeant's-Inn*, the following arguments were made.

Denton.—New trials can only be granted by the ſuperior courts, and not by any inferior ones. Trials at the aſſizes are ſubordinate

* At common law, in ſuch caſes, the courts frequently give leave to withdraw a demurrer, even after argument, and to plead, upon payment of coſts.

trials, and under the inſpection of the ſuperior court out of which the record iſſues. In *Stiles* 466. which was the firſt * new trial that ever was granted, it was ſaid by *Glynne*, that the court in theſe caſes has a judicial, but not an arbitrary diſcretion. I muſt agree that generally no new trial ſhall be granted after a trial at bar, but yet in the *ſcire facias* againſt *Bewdley*, *Trin.* 11 *Annæ*, which was brought to the bar, and the Jury refuſed to find a ſpecial verdict, the Court ordered a new trial.

* V. ante VI. Wood & Gunſton, & Qu. If this was the firſt?

1 Will. Rep. 207. Vide ante III.

It is objected, that this is a criminal proceeding. But we ſay, that ſince 9 *Annæ*, c. 20, it has a mixture of civil. The relator is liable to coſts, and the ſtatutes of Jeofailes extend to it. And why ſhou'd not this be conſidered in the ſame view as *Mandamus*'s, upon which new trials are granted frequently. The original writ of *quo warranto*, was merely civil. *Old. N. B.* 107. *Sid.* 54. 86. 2 *Inſt.* 282. *Raſtal*, 540. *Old Ent.* 133, 134. and upon that the franchiſe, which was a civil right, might be ſeiſed. Formerly, indeed, upon an information in the nature of a *quo warranto*, the party could only be puniſhed for the uſurpation. *Yel.* 190. *Cro. Jac.* 260. 1 *Bulſt.* 54. *Co. Ent.* from 527 to 564. But now judgment of *ouſter* may be pronounced.

Theſe rights are of a high nature, and it would be a great inconvenience, to tie them up ſtricter than actions. Suppoſe the Jury ſhould refuſe to find a ſpecial verdict, or the Judge ſhould miſtake the law, will there not be a failure of juſtice, if a new trial cannot be had? *Mich.* 2 *Geo. Rex* v. *Inhabitantes de Walthamſtow*, in an indictment for not repairing the highway, and *Regina* v. *Inhabitantes*

de

de com' Wilts, for ſuffering *Lacock Bridge* to be in decay, new trials were granted.

Pengelly, Serjeant.—This is a diſcretionary queſtion, wherein no defect of power is to be ſuppoſed. The defendant cannot plead Not Guilty. 2 *Inſt.* 282. 2 *Co.* 24. *b.* 28. b. *Hardr.* 423. *Cro. Jac.* 43.; but muſt diſclaim, or ſhew his right.

It is the prerogative of the Crown, to determine civil rights by way of information. Thus the King brings his information of intruſion in the *Exchequer*, which is but a common ejectment. And ſo informations by way of *devenerunt*, which is in effect an action of trover; and in theſe caſes new trials are every day granted. *Co. Ent.* 390. And in thoſe caſes there is a fine.

It will be no objection that the year is expired; for this proſecution was commenced within the year, and the judgment muſt be the ſame, becauſe it is to avoid all meſne acts. *Co. Ent.* 527, 530. *Trin.* 8 *Ann. Regina* v. *Barber.* That was an information of this nature againſt the defendant, who claimed to be burgeſs of *Thetford*. There was judgment by default, and then came a pardon, which was held only to diſcharge the fine, but not the judgment of *ouſter*. The fine here will be *ſalvo contenemento* according to *Magna Charta*, and the bill of rights. Since the ſtatute this has all the incidents of a civil proſecution, the commencement only excepted. Before, the King only could have it, but now any private perſon may at peril of coſts. If no new trial be granted, the Crown will be in a worſe condition than the ſubject: for here the verdict will be final, and no new information can be had.

Earl, Serjeant, *contra*.—The only queſtion is, Whether this be a criminal or a civil pro-

ſecution? For, on the one hand, if it be of a civil nature, I muſt agree a new trial may be granted: and on the other hand, it muſt be admitted, that if this be merely criminal no new trial can be had.

It is not denied, but that at common law this information was a criminal proceeding; whether the ſtatute has altered the nature of it, is the doubt. We think it remains as it did before. The conſequence of it is ſtill fine and impriſonment, with this addition, that judgment of *ouſter* may be given, which could not before; and becauſe the ſtatute has made it more penal than it was at common law, therefore, ſay they, it is now changed from a criminal to a civil nature. This is ſuch an inference, as I cannot ſee into the reaſon of. But, ſay they, the ſtatutes of Jeofails do not extend to criminal proceedings, but they extend to this; *ergo*, this is not a criminal proceeding. I deſire to know, whether it will be pretended, that they would have extended to this caſe without the expreſs proviſion of the ſtatute? Certainly they would not. And the Parliament was aware of that, and therefore added that clauſe. The firſt * new trial is *Stiles* 448. and there the witneſs died of an apoplexy. Lord *Townſend v. Dr. Hughes in C. B.* 2 *Mod.* 150†. In *ſcandalum magnatum* a new trial was denied.

* Qu.? Vide ante VI. Wood & Gunſton, Sty. 466.

† Vide ante VI.

Cannot the King releaſe, pardon, or ſtop this proſecution? Surely he may. In capital caſes the defendant may plead *autre foits acquit*; ſo careful is our law, that the ſubject ſhall never be borne down by the weight of the Crown. 1 *Sid.* 405. 2 *Keb.* 403, 765. 1 *Lev.* 9. 1 *Keb.* 124. are caſes where the defendant was convicted, and in *favorem libertatis* a new trial may

may be granted. *Mich.* 3 *W.* & *M. Rex v.* *Davis*, in an information for a riot, a new trial was denied. 1 Show. 336.

Mich. 7. *W.* 3. *Smith* v. *Frampton*, *Salk.* 644. in an action for negligently keeping his fire, wherein the defendant was acquitted, it was refuſed to be tried again. Indeed *Paſ.* 4 *Jac.* 2. *Rex v. Simpſon et al'*, information for ſeditious words, after acquittal a new trial was granted, but whoever obſerves the time that caſe happened, and that it was denied for law by *Holt* in *Davis*'s caſe before cited, will think it of little weight. *Paſ.* 2 *W.* & *M. Dr. Salmon*'s caſe, the defendant was convicted of perjury, and had a new trial; but the Court ſaid it would have been otherwiſe if he had been acquitted. *Paſ.* 5 *Ann. Regina v. Clarke*, in an indictment for a nuſance, after acquittal the Court denied a new trial, 'till the defendant came in and conſented. It was granted in Sir *Jacob Banks*'s caſe, only becauſe he had carried it down by proviſo, which could not be againſt the Crown. Vide ante IV. 2 Salk. 652.

Mich. 3 *Ann. Hartneſs v.* Sir *J. Barrington*, after the defendant had been acquitted of an aſſault, a new trial was denied. So *Salk.* 646. after acquittal for a libel.

In this caſe the office is determined, ſo there can only be a fine and impriſonment. And if one new trial may be had, the ſame reaſon will hold for a ſecond and a third, and nobody can ſay where it will ſtop. It may happen that the defendant may be convicted on a ſecond trial, for want of that evidence which acquitted him before. The caſe of *Bewdley* was only a *ſcire facias*, which is a proceeding purely civil.

Yorke.—This queſtion is of far greater conſequence to the ſubject than the Crown. It conſiſts of two parts:

1. Whether a new trial can be granted in any of thoſe caſes?

2. Whether there be any particular circumſtances in this caſe, to diſtinguiſh it from the general ones, and ſo induce the Court to refuſe it?

Firſt, When new trials firſt came in, they introduced a great alteration. The caſe of *Fenwick* v. *Holt* (which was an information, and not an indictment, as ſome of the books ſay) is full in point; and the Court ſaid they could not do it without altering the law; which ſhews there is not a diſcretionary power. This is the rule in criminal caſes, which I ſhall ſhew this to be. At common law, uſurpations were a crime, a contempt to the King, and an oppreſſion of the ſubject. A *quo warranto agit in rem*, an information in nature of a *quo warranto in perſonam.* The firſt charges a crime, and the other a *uſer* of the franchiſe. This is all of the Crown ſide, which the civil rights of the Crown are not, as *quare impedits*, which are of the plea ſide. The replication concludes, *petit quod convincatur*; and ſo is *Co. Ent. tit. quo warranto*; now *conviction* implies *crime.* This cannot be called an action, the proſecutor neither demands nor recovers any thing, *et actio nil aliud eſt quam jus proſequendi in judicio quod ſibi debetur.*

Vide poſt IX. (12.) (b.)

When proceedings in *Eyre* dropt, then informations came in, which are of a higher nature than the proceedings in *Eyre.* 2 *Inſt.* 282, 498.

The ſtatute 9 *Ann.* takes notice of this as a criminal proceeding: as for the coſts, they are collateral,

collateral, and cannot change the nature of it. The 4 & 5 *W.* & *M. c.* 18. gives coſts in perjury, where proſecuted as a miſdemeanor by information; and can any one ſay it is now become a civil proſecution? In the caſe of *Strode* v. *Palmer*, it was held, that *mandamus*'s would not come within the deſcription of *actions*, ſo as error might lie in the Exchequer-Chamber. Litt. Ent 248.

The Jury may take the law upon them, if they will. *Litt.* §. 368. The relator here is only appointed for the ſecurity of the coſts. In the caſe of *Ilcheſter* he died, and thereupon the defendant moved to ſtay the proceedings: No, ſays the Court, this is the cauſe of the Crown.

I omit his argument from the facts in this caſe.

Denton replied, The clauſe of jeofails was only thrown in, *in majorem cautelam*, as declaratory of the law.

Pengelly.—Sir *T. Jones*, 163. new trial after conviction of perjury.

Afterwards in *B. R.* PRATT, *Ch. J.* declared, that they had called in the aſſiſtance of the other Judges, and that upon the whole they were equally divided; ſo no rule for a new trial could be made. The diviſion, as I was informed, was thus: For a new trial, in B. R. *Pratt* and *Eyre*; in C. B. *King* and *Tracey*; in *Scacc. Price* and *Montagu*. Againſt a new trial, in B. R. *Powys* and *Forteſcue*; in C. B. *Blencowe* and *Dormer*; in *Scacc. Bury* and *Page*. *Vide poſt Eſſay* III. the *King* and *Francis*.

Upon an information of ſeiſure of Jeſuits bark on the ſtat. 14 *Car.* 2. *cap.* 11. *ſect.* 12. Robinſon qui tam v. Lequeſne, Trin. Term

1728, Bunbury 253. Whether a new trial can be granted on an information of ſeiſure, where a verdict is for the defendant.

for fraudulent exportation of Jeſuits bark, two caſks out of ſix being duſt. There was a verdict for the defendant, and now a motion was made for a new trial; but, *per totam Curiam*, it was denied.

Nota, It ſeemed to be admitted in a caſe of this nature a new trial might be granted, if the fact would have admitted of it, and the counſel for the plaintiff were prepared with precedents (if they had been called for) to that purpoſe.

Nota, Nothing is forfeited on this clauſe of the act, but the goods themſelves.

The King v. Bell, M. 8 G. 2 Stra. 995. No new trial to be granted after four years acquieſcence. This a quo warranto againſt a perſon acting as a common-council-man of Marlborough.

An information in nature of a *quo warranto* was brought againſt the defendant, to ſhew by what authority he claimed to be a common-council-man of *Marlborough:* and upon a trial in 1731, there was a verdict for the defendant.

This term the proſecutor moved for a new trial, as being a verdict againſt evidence; and the proſecutor referred to the report of the Judge, and inſiſted he was not too late, there being no judgment yet ſigned, according to the caſe of *Gilman* v. *Smith*, *Mich.* 9 *Geo.* 1. where it was held, that though the four day rule be out, yet it is ſufficient if they come before judgment. 2 *Stra.* 845.

But the Court would not ſuffer the merits of the motion to be gone into, on account of the length of time ſince the verdict; it being poſſible that many men's rights might depend on the validity of this man's vote, which the corporation was bound to admit, after a verdict eſtabliſhing his right. And it would be much leſs miſchief, to let this verdict ſtand (ſuppoſing it to be wrong) than introduce a general inconvenience. They ſaid, all new trials were

were diſcretionary: and though my Lord *Holt* entertained a notion of their being ancienter than the caſe in *Stiles*, from the challenge we meet with in the old books, that the juror had before given a verdict in the ſame cauſe; yet it does not thence follow, that the court granted a new trial upon the evidence; for it might appear to be a miſ-trial upon the record, or there might be other reaſons to award a *venire facias de novo*.

The King v. Poole, E. 7 Geo. 2. Annaly 23. 2 Barnard, K. B. 93, 447. S. C. 2 Kel. 210. Pl. 164. Quo warranto for acting as Mayor of Liverpoole.

On a motion for a new trial, on an information in the nature of a *quo warranto* againſt defendant, to ſhew cauſe by what authority he acted as *Mayor* of *Liverpoole*, for that the verdict was found on the matter of law, againſt the direction of the Judge; the Judge at laſt ordered the Jury to find it ſpecially; but they brought in a general verdict.

Reſolved, That the certificate of the Judge reporting the matter of fact, as appearing before him, at the trial, is concluſive, nor can any affidavit be received againſt it, for that would be to try the matter again upon affidavit.—Stands over.

The King v. Bennet, vide ante. See And. 168, Hil. 4 G. 1.

N. B. It has been a doubt, which divided the twelve Judges in the caſe of the town of *Shafteſbury*, whether a new trial may be granted on an information in the nature of a *quo warranto*, after a verdict found for the defendant, as this ſuit partakes both of a civil and criminal nature; but it never was doubted, but that a new trial might be granted after a verdict for the King.

Trin. 11 Ann. Wil. Rep. 221.

In the caſe of *the Queen* and *the Mayor and Burgeſſes of Bewdley*, it was determined by the opinion of eleven Judges againſt Mr. Juſtice *Powell*, that if the jury find a verdict upon a point

point of law, contrary to the direction of the Court, or find a general verdict where they are directed to find the matter ſpecially, a new trial may be granted even after a trial at bar. The principal cauſe came on again, 8 *Geo.* 2, 1734. Mr. Juſtice *Forteſcue*, who tried the cauſe, certified that the verdict was found againſt his direction, and that he was diſſatisfied with it. There were four iſſues, the three firſt were preparatory to the laſt, and were excuſes for the late Mayor's adjournment of the Court to a day after the day appointed by the charter, and the Jury found that there was no neceſſity for ſuch adjournment, with which verdict the Judge reported himſelf ſatisfied. The laſt iſſue was, whether or no the defendant was duly elected Mayor, and the Jury found him not duly elected; and this was the verdict with which the Judge was diſſatisfied. The point of law was, Whether the late Mayor had a power to adjourn the election of a new Mayor to a day beyond the charter-day?

Trin. 8 Geo. 2. 1734.

Serjeant *Eyre*, Mr. *Bootle*, Mr. *Strange*, and others for the proſecutors: that though it is the general rule to grant a new trial on a Jury's finding the matter of law againſt the direction of the Judge, yet if it ſhould appear to the Court above, that the Judge had miſtaken the law, in his direction, and that therefore the Jury had found right, the Court would not grant a new trial, ſince the Jury could at length find no otherwiſe; and it would put the parties to the expence of a new trial to no purpoſe, for ſhould they again be directed in the ſame manner as before, and find accordingly, the Court would grant a new trial for the miſ-direction of the Judge.

And that it would appear in this caſe, by the record before the Court, that the Judge had miſtaken the law, and that though his report is concluſive as to matter of fact, the Court having no other way to be ſatisfied of it, yet it is not ſo as to the matter of law, as that may be gathered in many caſes from the record.

Judgment, confeſſion.

That this may be compared to the caſe of an immaterial verdict for the defendant, wherein it appears that he has made out no title by his plea, or confeſſed the action, judgment will be given for the plaintiff, as in the caſe of the *King* and *Phillips* of *Godmin*, *Stra.* 394, where on an information in the nature of a *quo warranto*, there was a verdict for the defendant, and yet judgment for the proſecutors, becauſe the plea had not traverſed the uſurpation. 9 *H.* 6. 37. *pl.* 12. It is ſtated, that if in debt, the defendant pleads ſuch matters as ſhew that in point of law he owes the debt, and yet concludes that he owes nothing, the plaintiff may nevertheleſs claim judgment upon the confeſſion; and that though there ſhould be a verdict for the defendant, yet judgment will be given for the plaintiff. 2 *Rol. Abr.* 99. *pl.* 1. *Lacy* and *Reynolds*; and another in the ſame book, in an action on the caſe for words, after a verdict for the defendant judgment for the plaintiff on the confeſſion. 1 *Salk.* 173, *Jones* and *Bodnam*, and in the ſame place *Staple* and *Heydon*, *Yelv.* 169, *Mullineux*'s caſe. *Broome* and *Woodward*, *Trin.* 4 *Geo.* 2. Treſpaſs for entering plaintiff's houſe, and taking away his goods; the defendant juſtified for a diſtreſs for rent, and that the goods were appraiſed, and the appraiſers ſworn before the headborough, and the

Defendant now by virtue of the ſtat. 11 Geo. 2. c. 19. § 21. may plead the general iſſue, and give the ſpecial matter in evidence.

the reſidue of the money returned. Upon this iſſue joined; verdict for the defendant, but judgment for plaintiff, becauſe it appeared by the act of parliament, that the appraiſers ſhould be ſworn before the ſheriff or conſtable, whereas it was alledged in the plea that they were ſworn before the headborough.

Eaſter, 4 *Ann.* A caſe in Serjeant *Salk.* manuſcript notes; treſpaſs for throwing down and carrying away ſtalls; as to all the treſpaſs, but throwing down, the defendant pleaded Not Guilty; as to throwing down a ſpecial juſtification, in which the defendant admitted both the throwing down and carrying away the ſtalls. The Judge of *niſi prius* refuſed to try the cauſe, becauſe the action was confeſſed; and afterwards on motion in the Court above it was held, that the Judge did right.

The following exceptions were taken to the opinion of the Judge:

Firſt, That it appears upon the face of the record, that the defendant *Poole* was not elected Mayor agreeable to the charter, for the charter appoints the 18th of *October* for the day of election, whereas the defendant has ſet forth in his plea that he was choſen on the 19th, and that the act 11 *Geo. c.* 4, does not give a power to Mayors to adjourn the election at their own will, without any reaſon, to a day when their power is expired; neither does it give any authority even on an adjournment, to proceed upon a poll taken the firſt day, but they muſt begin *de novo*. That it appears upon the record that the late Mayor, whoſe power determined the day before, preſided at the election, when the defendant was choſen;

choſen; whereas the act requires, that the next officer ſhould preſide, the Mayor's power being determined. That the ſtatute directs the election to be begun between the hours of ten in the morning and two in the afternoon, whereas it appears by the defendant's plea, that this election began betweeen eight and nine in the morning; that it appears that the defendant was elected the 19th of *October*, and yet he pleads an election for the year next enſuing, whereas by the charter his office expires the 18th of *October* next, which is within the year; on all which accounts it appears that this cannot be a lawful election, and therefore no new trial ſhould be granted.

But *per* HARDWICKE, *Ch. Juſt.* A new trial ought to be granted in this caſe.

In the firſt place, that the general rule is, that if the judge of *niſi prius* directs the jury on the point of law, and they think fit obſtinately to find a verdict contrary to his direction, that is ſufficient ground for granting a new trial: and when the judge upon a doubt of law, directs the jury to bring in the matter ſpecially, and they find a general verdict, that alſo is a ſufficient foundation for a new trial.

But to thoſe general rules there are ſome limitations as clear as the rules themſelves; one is, that if the judge ſhould direct the jury plainly and certainly wrong in point of law, and the jury ſhould find contrary to his opinion, and it ſhould appear to the ſuperior court, under whoſe direction all trials at *niſi prius* are, (Salk. 643.) that the judge was undoubtedly miſtaken; the court would not grant a new trial, becauſe it would be putting the parties to trouble to no purpoſe; and if the next judge ſhould direct the jury in like manner,

manner, and they find accordingly, there muſt be a new trial for miſ-direction.

Another limitation is, that if it appear upon the record, before the court, that it is impoſſible that the defendant ſhould have judgment, by reaſon of his bad plea, though the verdict were found for him, the court would not grant a new trial. But then theſe things muſt appear very clearly, and it muſt be, where every thing appears upon the record, that can poſſibly ariſe upon the trial, for if all the matter does not ſo appear, and the verdict may poſſibly prejudice the defendant in point of law, the court ought, in juſtice, to grant a new trial.

That in the preſent caſe it does not appear ſufficiently upon the record, that the law is againſt the defendant, nor that his plea is ſo bad, that he could not have a judgment were the verdict found for him.

There are two points, one upon the common law, and the other upon the ſtatute; and had the preſent caſe reſted wholly on the common law, it ſeems that no new trial ought to have been granted; for the law, before the 11 *Geo. c.* 4. was taken to be, that the mayor's office determined at the end of the year, and therefore it ſeems that it would have been a void election, where the adjournment was made to a day after the expiration of his office, eſpecially where it is done without cauſe.

But the 11 *Geo. c.* 4. was made to remedy ſuch inconveniences; and on that act it ought to be tried again.

It ſeems, indeed it ought to have been the original intent of that act, to enable corporations to go to an intire new election on a ſubſequent

ſequent day, where no election had been begun before; but notwithſtanding, as this is a remedial law, to prevent inconveniences ariſing from new elections of annual officers on the charter-day, if the words of the act are large, and general enough, to comprehend the continuing of elections begun on the charter-day, but not completed within that time, as the miſchief is the ſame, the court ought to give a liberal conſtruction to them; the act ſays, that where, by any accident or default whatever, no election ſhall be made on the charter-day, they may proceed to an election on another day, *&c.* Upon this, ſuppoſing the Mayor had done wrong in making a voluntary adjournment, the wrong acts of officers were part of what was intended to be provided againſt by this act.

Another objection is, that the adjournment was made between the hours of eight and nine, inſtead of ten and twelve: but this mention of hours in the ſtatute, is certainly directory, and not reſtrictive; and intended to prevent ſurpriſe, by beginning at inconvenient times; now as to what appears on this record, there is no pretence of ſurpriſe in the preſent caſe.

Roll's Abr. The caſe of *Lanſdown*, that corporation choſe their officers eight days after the charter-day, and adjudged good, for that the day was only directory.

The next objection is, that the Mayor, whoſe office had expired the day before, preſided at this election, and did that appear on the face of the record, it would be a ſtrong objection in favour of the proſecutor; but it does not, therefore the whole matter not appearing upon the record, it ought to go again

to

to trial, that if the jury ſhould find a ſpecial verdict, the facts might come more fully before the court.

As to the objection, that it is pleaded to be an election for the year next enſuing, this may be, as it were, a technical year created by the act of parliament, as in corporations where the charter determines the office on a day after a moveable feaſt, the officers are nevertheleſs ſaid to be choſen for a year.

The thing that governs greatly in this determination is, that the point of law is not to be determined by juries; juries have a power by law to determine matters of fact only: and it is of the greateſt conſequence to the law of *England*, and to the ſubject, that theſe powers of the judge and jury are kept diſtinct; that the judge determine the law, and the jury the fact; and if ever they come to be confounded, it will prove the confuſion and deſtruction of the law of *England*.

The verdict given in the preſent caſe may prejudice the defendant on a writ of error, ſince for any thing that can appear to a ſuperior court, the jury might have found their verdict on this, that the defendant had not the majority of votes: ſo that though the law ſhould be with him, he is yet concluded, as they might have found it upon the fact.

The Court concurring in opinion, a new trial was granted, on the common rule of payment of coſts.

The St. Ives Cauſes.

Rex v. Praed, or Rex v. Edwards. M. 9 G. 3. B. R. 4 Burr. 2257.

A criminal motion was put off, till the validity of a rate ſhould be tried in a feigned iſſue, "Whether it was an equal, or a par-

"tial

" tial one." And a verdict having paſſed *for the defendant*, upon ſuch iſſue,

Verdict for defendant againſt evidence, refuſed to be ſet aſide, conſidering the proceeding as of a criminal nature.

Mr. Solicitor-General *(Dunning)* moved, and was ſeconded by Sir *Fletcher Norton*, for a new trial; the verdict having been given *contrary to evidence.*

But the *Court* were clear againſt granting a new trial; becauſe it was within the *ſame reaſon* as if it had been in a *criminal* proſecution. For, as this iſſue was directed in order to know " Whether this was an illegal and " partial rate;" and if it had been found to be partial, the conſequence would have been either an attachment or an information; it was juſt the ſame thing, as if it had been a verdict found for the defendant, *upon an information:* and *if* it *had been upon an information*, the Court would not have ſet aſide the verdict and granted a new trial, although the acquittal had been contrary to the weight of the evidence.

However, it was agreed that when the original motion ſhould come on again, it would be open to any *other* objections, to the legality of the rate; only taking it for a fact, " that it was *not* a partial one."

The King v. Thomas Amery. Same v. John Monk. H. 27 G. 3. B. R. Durn and Eaſt. 1 V. 575.

Quo warranto againſt defendant acting as alderman of Cheſter.

Queſtions as to uſage; acceptance of charters; corporation by pre-

The firſt of theſe was, an information in the nature of a *quo warranto*, calling upon the defendant *Thomas Amery*, to ſhew by what authority he claimed to be an alderman of the city of *Cheſter*.

The defendant, after having *pleaded* that the corporation of *Cheſter* was a preſcriptive corporation, ſet forth a charter granted in the 37th year of King *Charles* the Second, by which the citizens and inhabitants of the city of *Cheſter* were incorporated. That the char-

ſcription; and by charter; of the ſuſpenſion of franchiſes; and various other points of law.

ter directed, that the corporation ſhould conſiſt *(inter alia)* of a mayor, recorder, twenty-four aldermen, and forty common-councilmen, *&c.* and it appointed the firſt twenty-four aldermen by name. The defendant then averred, that the ſaid charter, as to the election of aldermen of the ſaid city, was duly accepted and agreed to by the ſaid citizens, and inhabitants. And then deduced a regular title as alderman under that charter.

Replication 1ſt. That the mayor and citizens, *at the time of making the ſaid charter*, were not, nor had from time immemorial been, a body corporate, *&c.* and iſſue.

2dly. That *Charles* the Second did not grant the charter mentioned in the plea; and iſſue.

3dly. That the charter 37 *Car.* 2. as to the election of aldermen, was not duly accepted by the citizens, and inhabitants; and iſſue.

4thly. That certain perſons in the ſaid charter mentioned did not become, nor were, aldermen of the ſaid city; and iſſue.

5thly. That the mayor, aldermen, and common council, have not exerciſed the franchiſe of electing aldermen according to the intent of the ſaid charter; and iſſue.

6thly. That the defendant was not at the time in the plea mentioned a citizen, and one of the common-council; and iſſue.

7thly. That the defendant was not elected an alderman by the major part of the then mayor, aldermen, and common-council, *&c.* and iſſue.

8thly. That the defendant was not duly admitted, *&c.* and iſſue.

The *ſecond Replication* ſtated, that in the 35th year of the reign of *Car.* 2. an information

tion was filed, in the nature of a *quo warranto*, againſt the mayor, and citizens of *Cheſter*; that in *Hilary* term, 35 and 36 *Car.* 2. there was a judgment (by default) by the Court of *King's-Bench*, that the liberties, privileges, and franchiſes in the ſaid laſt-mentioned information ſhould be ſeiſed into the hands of the king, until the ſaid Court there further ordered. That in *Trinity* term, 36 *Car.* 2. it was adjudged by the ſaid Court, that the ſaid liberties, *&c.* ſhould be ſeiſed into the hands of the king, and remain in his hands, and that thoſe liberties, *&c.* ſhould be extinguiſhed, and the ſaid mayor and citizens expelled and removed therefrom; which judgment was in force at the time of making the charter of *Car.* 2.

It then alledged that there were other matters in the charter of *Car.* 2. and particularly that the king willed that the charter ſhould be ſealed, as well under the great ſeal of *England*, as under the ſeal of his county Palatine of *Cheſter* (a), which were not ſtated in the defendant's plea, and that the charter, not being accepted by the ſaid citizens and inhabitants, as to thoſe as well as all other matters therein contained, was void.

(a) The king died on the 6th February 1684, two days after granting this charter. Vide poſt.

The *third Replication* ſtated, that *Car.* 2. by his ſaid charter reſerved full power to himſelf, his heirs and ſucceſſors, at his and their free will and pleaſure to remove the mayor, recorder, common-clerk, or any one or more of the aldermen, common-council-men, *&c.* of the ſaid city, by an order of privy-council to them reſpectively ſignified; and that as often as he, his heirs, and ſucceſſors, by any ſuch order made, ſhould declare any ſuch mayor, *&c.* to be removed from his or their reſpec-

tive offices, that then and from thenceforth the mayor, *&c.* and all or any of them, ſo amoved from their reſpective offices, ſhould without further proceſs, actually be amoved, *&c.* and that in every ſuch caſe, ſome other fit perſon or perſons, within a convenient time after any ſuch amotion, ſhould be choſen, *&c.* in ſuch manner as by the letters patent was before directed, into the place and office, *&c.* of any perſon ſo amoved. That King *James* 2. by an order of privy-council, dated the 12th of *Auguſt*, 1688, according to that power, amoved all the corporators then in being, which was regularly ſignified to them; wherefore the power in the ſaid charter, as to the election of aldermen, ceaſed and determined.

The *fourth Replication* ſtated a charter of the 21ſt *Hen.* 7. which was accepted, and a confirmation of it in the 16th *Eliz.* which was alſo accepted; that both thoſe charters were in force at the time of the judgments in *quo warranto*; and that thoſe judgments were in force on the 17th *October*, 1688. That King *James* 2. afterwards on the 26th *October*, 1688, granted a charter of reſtoration to the mayor and citizens of *Cheſter*, which was accepted. Wherefore the charter of the 37th *Car.* 2. after the granting and acceptance of the charter of reſtoration, was of no further effect.

The *fifth Replication* ſtated a charter of incorporation in the 21ſt *Hen.* 7. with a power of electing aldermen annually, by the corporation at large, which was accepted; a confirmation of it in the 16th *Eliz.* which was alſo accepted, and that both thoſe charters were in force at the time when the charter 37 *Car.* 2.

was

was granted: wherefore it was of no force as to the election of aldermen.

Rejoinder, That the charter of 37 *Car.* 2. was accepted by the citizens and inhabitants, as to all the matters contained therein; and 9th iſſue thereon. That the order in council was not ſignified as ſtated in the replication; and 10th iſſue thereon.

That the charter of 37 *Car.* 2. continued in full force as to the election of aldermen from the time of the granting and acceptance thereof, until the time of exhibiting the information; traverſing the acceptance of the charter of *James* 2; 11th iſſue thereon.

That after the granting of the charters of *Hen.* 7. and *Eliz.* there were judgments of ouſter againſt the mayor and citizens, in the 35th *Car.* 2. *&c.* traverſing the charters of *Henry* 7. and *Eliz.* being in force at the time of the charter of *Car.* 2. and now; 12th iſſue thereon.

This cauſe was tried at the laſt aſſizes for *Salop*, before *Eyre*, Baron, when the Jury found a verdict for the proſecutor, on the 3d, 5th, 9th, 10th, 11th, and 12th iſſues; and for the defendant on the 1ſt, 2d, 4th, 6th, 7th, and 8th iſſues.

The pleadings in the other cauſe of the *King* againſt *Monk*, were ſimilar to theſe, excepting that they were relative to the office of *common-council-man*. On a motion for a new trial, a very conſiderable body of evidence was read from the report of the learned Judge, a detail of which it is not thought neceſſary to enter into here; the report of this caſe being given only for the purpoſe of ſhewing the different points of law which aroſe in it.

In general it appeared that the ſelect body named in the charter of *Car.* 2. aſſumed their corporate functions, and acted under that charter for about three years, during which time about thirteen of the old freemen were admitted under the new charter. That upon the order of council of *James* 2d. the old corporation reſumed their functions, and the members of the other retired. The reſtored corporation returned to their antient mode of proceeding in moſt articles; but in ſome inſtances, and particularly in the election of aldermen and common-council, they had in general continued to proceed according to the method directed by the charter of *Car.* 2. excepting during four years, ſoon after the revolution: during which time they proceeded nearly, though not entirely, according to the charter of *Hen.* 7. They likewiſe continued to hold the hoſpital lands, and a fair, to which it did not appear that they had any title, but under the charter of *Car.* 2. It alſo appeared, that the election of aldermen by the ſelect body, had been made previous to the charter of *Car.* 2. by virtue of a bye-law under the charter of *Hen.* 7.

It is alſo to be remarked, that the charter of *Charles* the Second did not appear to have the ſeal of the county palatine, according to the directions of the charter; and evidence was given to ſhew that there was no entry in the ſeal-keeper's books of the county palatine, of any fees having been paid for affixing the county palatine ſeal (a).

(a) Ante.

The learned Judge, after ſtating particularly all the evidence, concluded his report with obſerving, that, in his directions to the Jury, he

he had told them that the right of election of aldermen of this corporation, in the mode contended for on the part of the defendant, ought to be ſupported if poſſible. That the uſage had prevailed in *Cheſter* for a great number of years, and was reaſonable in itſelf. But that on a general view of the caſe in evidence, he found it extremely difficult to ſupport it under the charter of *Charles* 2d. the granting of which appeared to have been a meaſure of the times, and which, from the moment when it became neceſſary to tread back thoſe ſteps in the latter end of the reign of King *James*, ſeemed to have been entirely laid aſide. That in ſumming up the evidence he had aſſumed that there was no contrariety. That the Jury might conclude upon it, that the corporation of *Cheſter* was a corporation by preſcription, and under charters, at the time of the judgment in *quo warranto*; in which however he ſtated, that he had differed from the counſel on both ſides. That the franchiſes of the corporation were in fact ſuſpended by that judgment. That the charter of *Charles* 2d. was acted upon for three years next after the granting of it. That after the charter of reſtitution was granted, the officers of the old corporation reſumed their places; and that from that time they went on without appearing to advert in any one inſtance to the charter of *Charles* 2d. as the authority under which they were to act. For though it was true that one of the witneſſes had ſtated in his evidence, that, as he underſtood it, the ſelect body was now ſomewhat differently conſtituted from what it appeared to have been before the charter of *Charles* 2d. in repect of the two ſheriffs making or not making a part of the forty common-council-

men; and the elections of mayor and recorder, are now approved of by the King, which is conformable to the charter of *Charles* 2d. and is not required by the charter of *Hen.* 7.; that thoſe, and a few other inſtances which might occur, of apparent conformity to the charter, having obtained, without any actual reference to it; and in a multitude of other inſtances, the uſage being in direct contradiction to the charter, he had thought there was in effect no evidence that the old corporation had ever recognized that charter. As to the election of aldermen, it was clear that the uſage had exiſted a great number of years, before the charter of *Charles* 2d.

That the operation of law upon this ſtate of the fact, applicable to the iſſues in this cauſe, was the next thing to be conſidered. That he went into the diſcuſſion of that queſtion, with a conſiderable degree of heſitation in his own mind. That he was not perfectly ſatisfied, as to the legal effects of the judgment in *quo warranto*; or of the charter of reſtitution; eſpecially as oppoſed to the charter of *Charles* 2d. which had intervened. That he had hazarded this opinion; that the judgment in *quo warranto*, being a judgment by default, where no cauſe of forfeiture appeared upon the record, did not diſſolve the corporation. That it only ſeiſed the franchiſe into the King's hands, and thereby *ſuſpended* the exerciſe of the functions of the corporation. That the charter of *James* the 2d. reſtored the franchiſe to the *old* corporators; and that after that reſtoration, the charter of *Charles* the 2d. was to be conſidered in the ſame manner, as if it had been granted before the judgment in *quo warranto*; in which caſe, without an *acceptance* by the old

old corporation, it would have no effect within the diſtrict wherein the old corporation had power to act. And that there was no ſuch acceptance; which was ſubſtantially determining the iſſue upon the acceptance of this charter, againſt the defendant.

Seeing the caſe in that light, he had treated the iſſue upon the notification of the order of amotion, as of no great conſequence in the cauſe; but however that he had directed the Jury, that there was evidence of the notification, proper to be ſubmitted to them.

The learned Judge then ſtated, that it had ſince occurred to him, that the queſtion upon the notification of the order of amotion, might become very material in ſome events, namely, if it ſhould be finally reſolved, that the charter of *James* the 2d. did not operate to reſtore the old corporation; or that the reſtitution of the old corporation, did not diſſolve or diſplace the new corporation, under the charter of *Charles* the 2d. if the old corporation was never reſtored, and the new corporation, in conſequence of the order of amotion, was deprived of all its officers, and conſequently could hold no legal aſſembly, or uſe any means to perpetuate itſelf, (and in point of fact, that corporation never did aſſemble again) it ſeemed as if there was no lawful corporation in *Cheſter* at this day. Or if the old corporation was well reſtored, but the reſtoring to them their franchiſe of being a corporation, did not operate to diſplace or diſſolve the new corporation, it ſhould ſeem as if there would be two bodies corporate exiſting in *Cheſter* at the ſame time; but in conſequence of the order of amotion, one effectually diſabled to act, and now probably diſſolved, by the natural death of its members,

members, the other active and perpetuating itſelf in the regular courſe. And in that caſe the queſtion now depending would be a queſtion touching the election of an alderman of the old corporation; in which caſe it ſeemed to be impoſſible to maintain the election under the charter of *Charles* the 2d. it being in his judgment moſt clear, that the old corporation did not accept that charter.

That at the trial the counſel for the defendant had inſiſted, that the judgment in *quo warranto* had diſſolved the corporation; and that the charter of *Charles* the 2d. created a new corporation. That the charter of *Jac.* the 2d. could not reſtore the corporation which had been diſſolved, but might be accepted by the new corporation, and might enlarge the powers of that new corporation. And that the queſtion in the third iſſue was, touching the acceptance of the charter of *Charles* the 2d. by the citizens at large, and not by the old corporation. But, he ſtated, that it had ſince occurred to him, that it was a queſtion which might deſerve conſideration, whether upon the iſſues joined upon theſe pleadings, it was open to the counſel for the defendant to put the caſe in that manner; the plea ſtating in effect, that at the time of granting the charter of *Charles* the 2d. there was a corporation by preſcription, exiſting in *Cheſter*, which ſeemed to confine the queſtion of acceptance in the third iſſue, to an acceptance by that preſcriptive corporation.

The *Court* here obſerved, that if all the points of law, which might ariſe in this caſe, were to be gone into, they were of too much importance to be decided when the bench was not full,

And

And they recommended it to the counſel to confine themſelves in their arguments to the third, fifth, and ninth iſſues, on the acceptance of the charter of *Charles* the Second; becauſe if it ſhould turn out either to be a verdict againſt evidence, or that the queſtion was not properly left to the Jury, as to thoſe iſſues, to exerciſe their judgment upon, that would be a ſufficient ground for a new trial, and the queſtions of law would be open hereafter.

Adair Serjeant, *Wood*, *Milles*, *Lane*, and *Topping*, againſt the rule, argued very fully on the verdict on thoſe iſſues, as it was warranted by the evidence alone; in the courſe of which two queſtions were made.

1ſt. That the charter of *Charles* the Second, was not accepted in point of law; becauſe an acceptance of a charter muſt be by a majority of thoſe perſons to whom it is granted. Now it appears on this charter itſelf, that it was granted to the citizens and inhabitants of *Cheſter*. And the queſtion is, Who are meant by *citizens*, as contradiſtinguiſhed from *inhabitants?* It could only mean thoſe perſons who had been incorporated before the judgment of *ouſter* in the *quo warranto* information, and who were the ancient freemen of the city.

According to *Bagge*'s caſe (a), a charter muſt be accepted by a majority of the perſons to whom it is directed, for the acceptance of a few will not bind the reſt. So if a part of a corporation apply for new privileges, it will not bind the reſt, unleſs they conſent. The inhabitants of a town cannot be incorporated without the conſent of a major part of them (b), and without their conſent the charter of incorporation is void. In the *King* againſt *Aſkew*

(a) 1 Rol. Rep. 226.

(b) 2 Brownl. 100

(c) 4 Burr. 2200.

Aſkew and others (c), Mr. *J. Yates* ſaid the Crown cannot compel perſons to become corporators againſt their aſſent; and that conſent can only be teſtified by their being admitted. But in this caſe there was no evidence which tended to ſhew that this charter had been accepted by a majority of the old freemen, thirteen only of whom were admitted; and the proof of that iſſue was on the defendant. This partial acceptance, therefore, could not operate. But it was contended at the trial, that the charter was at all events accepted as to the election of aldermen: now that argument cannot be ſupported, if (as was alſo contended) the judgment of *ouſter* entirely diſſolved the whole corporation, for then it would be a grant of franchiſes to a new body of men, who could not in point of law accept the charter in part only. Then, according to the defendant's argument, this charter muſt be conſidered to have been accepted in *toto*, or not at all. And if the Jury were not warranted by the evidence to find a verdict for the defendant on the ninth iſſue, in point of fact, they could not find for him on the third in point of law: and if any part of the charter was not accepted, the ninth iſſue muſt fall to the ground, for that is, that it was accepted *in all things*. The opinion of the Court in the caſe of the *King* v. *Johnſon* (a), is extremely ſtrong to ſhew that the charter of *Charles* the Second was never accepted.

(a) Durnford & Eaſt 1 V. 367.

2dly, But even if the Court ſhould be of opinion with the defendant on the acceptance, yet the charter itſelf is void on two grounds; in which caſe it would be nugatory to grant a new trial upon the queſtion of acceptance of a charter,

charter, which if accepted is void. 1ſt. A charter granted in a county palatine, muſt have the county palatine ſeal. The county palatine was united with the Crown in the reign of *Edward* the Firſt. And in *Selden* (b) it is ſaid, " that the laws and rightful uſages of a county " palatine are to be preſerved." It was by King CHARLES as *Earl* of *Cheſter*, and not as *King* of *England*, that this corporation was created. Many caſes have adjudged, that when a ſeal is neceſſary to the validity of a grant within a county palatine, it muſt be under the ſeal of the county palatine. *Moor*, 874. *Lutw.* 1232. A preſentation to a living within the county palatine, may be good without the ſeal of the county palatine; and the reaſon of that is, becauſe it may paſs by parol. But a grant of the next avoidance is void, for want of the county palatine ſeal, 2 *Rol. Abr.* 182. *D.* 1, 2. 1 *Brownl.* 182. It is ſufficient, in preſcribing for a franchiſe, to ſay that it is within his county palatine, which has *jura regalia*, and by reaſon of that he claims ſuch franchiſes; of which one is, to create corporations. 2 *Bulſtr.* 226, 7. In anſwer to an obſervation from the Court, that the Chief Juſtice, and Attorney-General of *Cheſter*, were appointed under the great ſeal; it was ſaid that by the *ſtat.* 27 *H.* 8. *c.* 24. §. 5. juſtices of aſſize, *&c.* within the county palatine of *Lancaſter*, were to be appointed under the king's uſual ſeal of *Lancaſter*, in *manner and form as hath been accuſtomed.* And it appeared by the 18th ſection of that act, that Sir *H. Engleſield* had been appointed juſtice of *Cheſter* and *Flint* by letters patent under the ſeal of the county palatine.

(b) Parke. 2. c. 5. p. 530.

And

And that the appointment of the Chief Juſtice of *Cheſter* under the great ſeal of *England*, was by virtue of the *ſtat.* 34*th* and 35*th H.* 8. *c.* 26. §. 10. That as to the Attorney-General, he was appointed under the great ſeal: becauſe he acted as well without the county palatine as within it. And 2dly. This charter is void on account of the general power of amotion reſerved to the king. It is a condition which the law will not endure; the conſequences of which would give the king a power which the law has expreſsly denied him. *Palm* 501. Sir *W. Jones*, 168.

A grant by the king to the ſubject, which is againſt law, is void. 2 *Rol. Abr.* 164. 2 *Inſt.* 533. 1 *Rep.* 43. b. 5 *Rep.* 55. b. And though where to a grant by one ſubject to another a condition is annexed, which is either impoſſible or illegal, the condition only is void, yet in the caſe of a grant by the king, the whole grant is void. 2 *And.* 156. 2 *Freem.* 17.

Bearcroft in ſupport of the rule obſerved, that the third, fifth, and ninth iſſues, altogether formed a queſtion of fact only. And as the learned Judge had miſ-directed the Jury, in telling them the queſtion was, whether the charter of *Charles* the Second was accepted by the *old corporation*, inſtead of the *citizens* and *inhabitants*, the defendant was intitled to a new trial. The queſtion left to the Jury was not the true one; for the iſſue joined was on the acceptance by the *citizens and inhabitants*, to whom it was directed, and not by the *old corporation*, who (the defendant contended at the trial) had no legal exiſtence after the judgment of ouſter. The old corporation were

not

not known by the name of the *citizens* and *inhabitants*. Thoſe terms were deſcriptive of the perſons to whom the charter of *Charles* the Second was directed. The word "citizens" does not mean "freemen," as freemen of the old corporation; for they were extinct at that time: but the expreſſion may be accounted for in this way; there had been a city, and a corporation; in common parlance the inhabitants were known by the name of the *citizens* of *Cheſter*: The word "inhabitants" was added for the purpoſe of preventing any miſtake; and they are uſed as convertible terms. The acceptance of a charter, in this caſe, was a pure ſimple queſtion of fact, without any mixture of law. And this has been confounded in the argument by the counſel againſt the rule, with the caſe of a charter granted to an exiſting corporation. He admitted that it would be a queſtion of law, whether a part of an exiſting corporation might or might not have accepted a charter; or whether they could partially accept or not. But this being a charter to a new corporation, there was ſufficient evidence given at the trial to be left to the Jury to determine as to the acceptance of it in fact.

Bower, *Leiceſter*, *Plumer*, and *Manley*, were to have argued on the ſame ſide; but they were ſtopped by the Court.

Ashhurst, *J.*—The only queſtions for our preſent conſideration are, Whether the Jury have done right in finding their verdict as they have done, againſt the acceptance of the charter of *Charles* the Second; and whether the Judge, who tried the cauſe, was or was not correct in his manner of ſumming up to the Jury?

As

As to the manner in which the queſtion was left for the Jury upon this part of the caſe, I am of opinion that the Judge was in ſome degree miſtaken; for he has ſtated to us pointedly, that he told them, that he thought there was in fact no evidence that the *old corporation* had accepted the charter of *Charles* the Second. In a matter of ſuch conſequence, I ſhould have thought, that if it were only a queſtion of fact, at all events there was evidence on this point, ſufficient to be left openly and fully to the conſideration of the Jury, without any ſuch ſtrong directions as were given. In the firſt place I think the learned Judge was miſtaken in telling the Jury, that the queſtion was, whether the charter of *Charles* the Second was accepted by the *old corporation* or not. That was not the iſſue upon the pleadings; for the words of the iſſue are, " That the letters patent were not duly " accepted and agreed to by the *citizens and* " *inhabitants* of the city of *Cheſter*;" which could not mean the *old* corporation. For it could only be accepted by the perſons to whom it was directed at the time it was made: but the old corporation did not exiſt at that time; for they were diſſolved by the judgment in the *quo warranto*. They no longer exiſted as a body. If they were not diſſolved, the queſtion might have been different; therefore, in reaſon, the only queſtion could be, whether this charter was accepted by the perſons to whom it was addreſſed, who were the *citizens* and *inhabitants*. Now this queſtion was not left to the Jury at all; the only queſtion having been, whether the charter was accepted by the old corporation.

Now with regard to the facts which were laid before the Jury in proof of the iſſue, reſpecting the acceptance by the *new* corporation, there were many inſtances: indeed the Judge himſelf ſays, that the evidence was all one way during three years. Several inſtances are ſtated of acts done by the new corporation, which could only have been done under the charter of *Charles* the Second; [which Mr. *J. Aſhhurſt* here enumerated.] Theſe were ſuch a degree of evidence as ſhould have been left to the Jury: and it does ſeem to me that the evidence was all on one ſide during that period. The evidence of thoſe acts ſhould at any rate have been left to the Jury, whatever verdict they might ultimately have given. And if they had been of opinion, that the charter had been accepted, and acted under, during thoſe three years, that would have been concluſive. For the charter once accepted and acted under, for three years, was accepted as much as it could be, and muſt ever afterwards be taken to have been accepted; and the corporation could not afterwards determine upon keeping thoſe franchiſes which were beneficial to them, and rejecting others which were not ſo. At all events this evidence ſhould have been left to the Jury. And I agree with the learned Judge in the opinion which he has delivered, that courts and juries ought to lean in favour of ancient uſages, eſpecially if they tend to preſerve the peace and quiet of corporations.

As to the queſtions of law which may ariſe in this caſe, they are matters for future conſideration; therefore I ſhall not enter into them at preſent. And as they are of great

 importance,

importance, the deciſion ought to be ſatisfactory to all the parties.

As this is a queſtion on which the exiſtence of the corporation depends, and as the ninth iſſue is thought the moſt material, I am of opinion that it ſhould be tried again.

BULLER, J.—This is an information in the nature of a *quo warranto* againſt the defendant, to ſhew by what authority he claims to be an alderman of *Cheſter?* The defendant, in anſwer to this information, has ſtated a charter of the 37th of *Charles* the Second, which he ſays was granted, not to the mayor and citizens, who were the old corporation, but to the citizens and inhabitants, and accepted by them: he has then derived his title under it.

On this plea, three iſſues have been taken. 1ſt. That the charter was not granted. 2dly. That it never was accepted by the citizens and inhabitants. 3dly. That in this charter there was a clauſe which enabled the king and his ſucceſſors, by an order of privy-council, to put an end to this corporation, by a power of amoving them, without aſſigning any cauſe; and that King *James* the Second made ſuch an order, which was notified to the corporation. On theſe three iſſues, the event of the cauſe muſt finally depend.

The others might have been diſpenſed with. Though I have ſtated thoſe three iſſues, they are more than are neceſſary, in order to diſpoſe of the queſtion now before us.

For as to the objection, which was taken by one of the counſel againſt the rule, that the charter of *Charles* the Second was void, becauſe it had not the ſeal of the county palatine of *Cheſter* affixed to it, there is no founda-

tion for it. The caſes which were cited, do not apply; for they are caſes of grants within the county palatine of *Lancaſter*. And it is obſervable that, even in one of thoſe caſes cited, it was held by Lord C. J. *Treby*, that a corporation made within the duchy, and not in the county palatine, is without warrant (a). But he ſaid within the county palatine, the king *may* create a corporation under the duchy ſeal, becauſe the Duke of *Lancaſter* had *jura regalia*. But it does not follow that, becauſe the king may create a corporation within the county palatine, under the duchy ſeal, he *cannot* do ſo under the great ſeal.

(a) Lutw. 1237.

Beſides, caſes which ariſe within the county palatine of *Lancaſter* are not applicable to the preſent. They depend on a particular ſtatute (b), which is confined to the county palatine of *Lancaſter*. With reſpect to offices granted under the great ſeal of *England* to be exerciſed in *Cheſter*, it is ſaid that they depend on the ſtatute 34th and 35th *Hen.* 8. *c.* 26, which (as it was contended) enacts, that offices in *Cheſter* ſhall be granted under the great ſeal of *England*, and the chief juſtice is particularly mentioned. But on adverting to that ſtatute, the argument does not appear to be well grounded; becauſe that act relates only to *Wales*, and not to *Cheſter*. Beſides, before the paſſing of that ſtatute, the crown had uſed to grant offices in *Wales* under the great ſeal: for there is a clauſe (c) in that ſtatute, which ſays, that commiſſions under the great ſeal *already granted* ſhall be in force. Another circumſtance, worthy of obſervation, is, that the ſheriffs of *Cheſter* are appointed at *Weſtminſter* in the ſame manner as the other ſheriffs in *England*. It is alſo to be remarked,

(b) 1 Ed. 4.

(c) S. 11.

that the charters of *Charles* the Second, and *James* the Second, are neither of them under the ſeal of the county palatine of *Cheſter*; but they are both under the great ſeal alone. However, this is not the point now before the Court, which is only as to the acceptance of the charter of *Charles* the Second.

And as to that, it is material, firſt, to conſider to whom that charter was granted; and, ſecondly, by whom it is ſaid to have been accepted. I think there was a miſtake at the trial by the Judge, in leaving the queſtion to the Jury, whether the *old* corporation had accepted this charter? Nothing is more clear than that the crown, at the time of granting this charter, conſidered the old corporation of *Cheſter* as totally annihilated, and extinguiſhed. It was not granted to them as to a corporation then in exiſtence. And with regard to the term "*citizens*," the counſel in ſupport of the rule has given the true anſwer to that obſervation. Then the queſtion is, whether the citizens and inhabitants had accepted the charter of *Charles* the Second or not? I feel leſs difficulty in differing from the learned Judge, who tried the cauſe, becauſe he has ſtated to the Court that he himſelf entertained conſiderable doubts at the time, and that he hazarded an opinion, that the judgment by default in the *quo warranto* did not diſſolve the corporation, but that it only ſeiſed the franchiſes into the king's hands, and thereby ſuſpended the exerciſe of the functions of the corporation. and on that ground conſidered the queſtion as being whether the old corporation accepted the charter or not?

As to the facts of the acceptance ſtated to have been proved, there is ſuch a body of

evidence during the courſe of three years, as in my opinion leaves the queſtion without a doubt. And if the corporation accepted the charter only for an hour, that is concluſive for ever; it cannot afterwards be ſaid, that they had not accepted.

[Here Mr. *J. Buller* commented very fully upon every part of the evidence, from whence he took occaſion to obſerve, that there was ſufficient evidence to have been left to the Jury, as to the acceptance of the charter of *Charles* the Second, by the citizens and inhabitants of *Cheſter*.]

I agree with the learned Judge, that the election of the defendant ſhould be ſupported if it can be ſo.

If on the evidence there is no ground for ſaying that the charter was accepted, it will be impoſſible to ſupport it. But all the evidence goes to ſhew an acceptance; and there was no contrariety.

Another objection has been made, that it does not appear, negatively, that the charter was not accepted by a *majority* of thoſe named in it. I am by no means ſatisfied that it was neceſſary that it ſhould be accepted by a majority of them. I hold that there is a great difference between a charter granted in general terms, to incorporate the inhabitants of a city, and a charter like the preſent, which creates diſtinct parts of the corporate body, fills up ſome of the offices by name, and leaves it open to them to elect a number of freemen.

What is ſaid by Mr. *J. Yates*, in the caſe cited from *Burrow*, exactly agrees with what I have juſt laid down. That was the caſe of the college of phyſicians. In the charter granted to them, ſix perſons by name, and all

others of the faculty, of and in the city of *London*, are made a body corporate: but the Court held that all the practiſing phyſicians in *London* were not, by virtue of this charter, members of the corporation.

Lord *Mansfield* ſaid, that the corporation were only bound to admit every perſon, whom they, on examination, thought fit to be admitted; and that any perſon who came within that deſcription, had a right to be admitted. *Yates*, *J.* ſaid, (a) "I am far from thinking "that all the men of and in *London*, then "practiſing phyſic, were incorporated by the "charter. The *immediate* grantees under the "charter, were the ſix perſons particularly "named in it. The reſt were to be admitted "by them. They were not, *ipſo facto*, made "members. They were firſt to give their "conſent, before they became members: they "could not be incorporated without their "conſent." Now, that charter ſeems applicable to the preſent caſe. For the king, by this charter, appointed a certain number of aldermen, and a certain number of common-council-men. Theſe, then, according to the language of Mr. *J. Yates*, are the immediate grantees of the crown; and a power is afterwards given to them, to ſwear freemen upon their requeſt, they firſt taking the oaths. Therefore, it appears to me, that theſe freemen ſtand in the ſame light, in which thoſe perſons do, who practiſe phyſic in *London*. The corporation have a power delegated to them, to ſwear in certain perſons on their doing particular acts. But if the law were not ſo; if any number of freemen had accepted, it would have been ſufficient: for the freemen are an indefinite body. And, in a corporation conſiſting

(a) 4 Burr. 2199.

ſiſting of different integral parts, if any of the freemen, being an indefinite body, attend the meetings of the corporation, it is ſufficient. It is not required, in all caſes, that a majority of the whole body ſhould be preſent. And if a ſmaller number than a majority of an indefinite part of the corporation, are ſufficient to conſtitute a lawful aſſembly for doing corporate acts, after they are incorporated, it will be difficult to find a reaſon why the ſame number may not accept the charter. Whether after hearing the opinion of the Court on theſe points, the parties may chooſe to go to trial again, in this caſe, is for their conſideration. But if the cauſe ſhould be tried again, theſe pleadings are ſo defective, that I recommend it to both parties, that they ſhould be amended.

To begin with the plea: it ſets out with ſtating, "that the mayor and citizens of *Cheſ-*"*ter* have, from time immemorial, and by "divers charters, and grants of divers kings "and queens of *England*, been a body cor-"porate and politic, in deed, and in fact."— It is impoſſible to ſuggeſt any reaſon why this averment was made: it was likely to have the effect which it produced at the trial, of embarraſſing the cauſe, and raiſing the doubt whether the charter of *Charles* the Second ſhould or ſhould not be conſidered to have been granted to a corporation then in being. It is true, that the plea has not actually ſtated that they were a corporation, at the time when the charter of *Charles* the Second was granted: but this allegation is altogether unneceſſary. The defendant's caſe is, that this was an *original* charter of incorporation; and therefore it was immaterial for him to ſtate a prior

corporation. The defendant has then ſtated the charter in the proper way, "that it was "accepted by the citizens and inhabitants;" but this is followed by another averment, which is quite new, and which is the foundation of another iſſue, namely, "that the mayor, al-"dermen, and common-council-men, or the "greater part of them, did exerciſe the li-"berty, privilege, and franchiſe, of making, "electing, and chooſing of aldermen of the "ſaid city, according to the direction of the "ſaid charter." Now this is perfectly nugatory and unneceſſary; for, if the charter were accepted, they were bound to act under it: this Court would have compelled them to act under it. But the plea, in ſpeaking of the manner in which it was accepted, only ſays, that the charter, as to the election of aldermen, was duly accepted. It is impoſſible to ſupport this iſſue in any way. The averment proceeds on a miſtake, by ſuppoſing that a charter may be accepted in part, and rejected as to the reſt. The only inſtance in which I have ever heard it contended that a charter could be accepted in part only is, where the King has granted two diſtinct things, both for the benefit of the grantees: there, I know that ſome have thought, that the grantees may take one, and reject the other. However that may be, it cannot extend to this caſe. This corporation muſt either have accepted in *toto*, or not at all: if they could have accepted a part only of the charter, they would have been a corporation created by themſelves, and not by the King. If a charter directed that the corporation ſhould conſiſt of a mayor, aldermen, and twenty-four common-council-men, they could not accept the charter for the mayor

and

and aldermen only, omitting the common-council-men. It is impoſſible to ſupport this part of the plea; therefore this allegation, confining the acceptance of the charter as to the aldermen only, ought to be amended. In the replication, the proſecutor has taken the iſſue on the firſt averment larger than the plea; for it ſays, "that the ſaid mayor and citizens, "*at the time of the making of the ſaid letters* "*patent in the ſaid plea mentioned*, were not, "nor have, from time immemorial, been a "body corporate, *&c.*" neither can this be ſupported. There are three other replications; one of which introduces the order of privy council for amoving the corporation. I read that part of the charter in a different ſenſe from that in which it is underſtood by the counſel on either ſide: for the charter ſtates, that the King reſerves to himſelf "a "power by any order of him, his heirs, or "ſucceſſors, in privy council made, under "ſeal, to them reſpectively ſignified, to amove "them, or any of them." But on looking farther into the charter, it appears to me, that that clauſe does not warrant a general amoval of the whole corporation. It only means, that the King intended, and has by the words of the charter, reſerved to himſelf the power of amoving one or more of the individuals of the corporation who miſbehaved, and not of deſtroying the corporation itſelf: for it afterwards directs, that in caſe of ſuch amoval, the *remainder of the corporation* ſhould elect others in their room in the manner directed by the charter. If that be the true conſtruction of the charter, one of the replications is entirely out of the queſtion.

With reſpect to the other replication; it is idle

idle on this record to ſtate what was the ancient conſtitution of the corporation, before the judgment of ouſter in the *quo warranto*; becauſe the defendant has by his plea put his election upon the charter of *Charles* the Second: he muſt ſtand or fall by that; and therefore it was nugatory to ſtate the charter of *Henry* the Seventh, or any other charter granted to this corporation.

I have thrown out theſe hints, that the parties may take them into their conſideration. But if this record goes down to trial again in its preſent ſtate, and the Court ſhould entertain the ſame opinion that I do now, I do not know any caſe that can call more for the animadverſions or cenſure of the Court.

Rule abſolute.

New trial in quo warranto, where verdict for defendant.

In the caſe of the *King* and *Francis* in *quo warranto*, E. 28 G. 3. new trial granted, though verdict for defendant; the Court paying no attention to the objection that it was a criminal proſecution. It is in the nature of a civil proceeding. The *King* v. *Bennet* was mentioned, but the Court paid not the leaſt attention to it.

I believe, in the *King* v. *Francis*, one ground of the new trial was, that evidence was produced on the part of the defendant that proſecutor could have contradicted, but was *ſurpriſed*, not expecting ſuch evidence would have been given, and was therefore, at the trial, unprepared to anſwer it.

IX. Of other Matters reſpecting new Trials, &c.

(12.) *Of new Trials in Criminal Proſecutions.*

(b.) In actual Criminal Proſecutions.

Vide ante IV. *Rex v. White* and *Ward.*

Anon. M. 12 Car. 2. B. R. 1 Lev. 9.

A new trial ſhall not be upon an acquittal of the defendant in criminal and capital caſes, otherwiſe upon his conviction.

This a proſecution for perjury.

INDICTMENT for *perjury*, and the defendant acquitted; and a motion was made for a new trial, on behalf of the King, becauſe ſeveral witneſſes were abſent. *Windham, J.* held this grantable, not being touching life; to which it was anſwered, that new trials may be in criminal caſes, at the prayer of the defendant, where he is convicted, not at the ſuit of the King, where the defendant is acquitted, any more than in criminal caſes, which are capital; and where two caſes were cited *ex parte regis*; *Twiſden* ſaid, this was in the late troubleſome times, *et ex aſſenſu partis*. And upon this *Cur' adv' vult*, and gave day to ſearch for precedents. *Note*, that afterwards, *Mich.* 13 *Car. inter Regem et Bowden*, an information for perjury, and the defendant acquitted; and motion for a new trial upon affidavit, that one of the witneſſes was abſent by reaſon of ſickneſs, denied per *Cur'*, the party being acquitted, may not be tried again, but after

after conviction, a new trial may be had for the defendant upon good cauſe; and *Trin'* 15 *Car.* 2. *Rex verſus Fenwicke* and *Holt*, information for perjury, and defendant acquitted; motion for a new trial upon affidavit, that ſome of the witneſſes were kept away by the practice of the defendant. *Windham, J.* held this grantable, being only in a criminal caſe, not capital. *Keeling* ſaid, no precedent could be ſhewn of a new trial in a criminal caſe, any more than in a capital one, for the defendant's *character* ſhall not be drawn in queſtion ſeveral times, for the ſame thing, any more than his life. *Forſter* and *Twiſden* directed an information to be brought for the practice, and that if it ſhould be found, a new trial ſhould be granted, to which *Windham, J.* agreed.

V. poſt.

M. 15 Car 2.

And this caſe being moved again, *Forſter*, *Twiſden*, and *Keeling*, continued of the ſame opinion. *Windham contra*, and ſaid, that in an information for the practice, he would not have the ſame puniſhment as he would have for the perjury, and therefore held a new trial grantable, without information for the practice. *Cæteri*, the courſe of the court is the law of the court, and it is better that one innocent perſon ſuffer, than that the law ſhould be changed; *et Hil.* 15 & 16 *Car.* 2. in the caſe of Sir *John Jackſon*, where he, upon an indictment for perjury, kept back the witneſſes; information was brought againſt him for the practice, and he was convicted, and fined a 1000 marks; and therefore, (*Levintz* ſays) as I ſuppoſe, a new trial was granted; this information being brought by the direction of the Court with that intent, but I did not

Vide poſt.

not hear that any rule for a new trial was given at this time.

In an information for *perjury* found for the King, it was moved upon ſeveral affidavits, to have a new trial; and it was doubted by the Court, that although cauſe appeared to them for granting a new trial, if they had power to do this without the conſent of the King's counſel, and it ſeemed to them that they had not *, but they agreed, that in debt by an informer, the Court might grant a new trial upon cauſe, without the conſent of counſel, becauſe there the party hath an intereſt.

Read v. Dawſon, M. 13 Car. 2. B. R. 1 Sid. 49.

If the Court may grant a new trial where the verdict is for the King, in an information, &c.

V. Sid. 153. 1 Keb. 124. Pl. 53. 1 Jon. 165.

In *treſpaſs* between Sir *John Jackſon* and *Primate*, the verdict being againſt *Primate*, he indicted the witneſſes for perjury: which being at iſſue and brought to trial, Sir *John* commanded his ſervants to beat and impriſon the witneſſes who were to prove the perjury, by which means they could not attend to give evidence, whereupon the defendants were acquitted. *Primate* moved for a new trial of the perjury, which was denied, being in a criminal caſe, as the party once acquitted ſhall not be tried again. But the Court directed an *information* againſt *Jackſon*, and he was thereupon convicted. And now it is moved in arreſt of judgment, becauſe the *information* was by way of recital, as an iſſue was joined,

Rex v. Sir John Jackſon, H. 15 & 16 Car. 2. B. R. 1 Lev. 124.

Q. as to new trial in a criminal caſe where the defendant is acquitted.

The ground of the motion was, for improper behaviour to witneſſes, and preventing them from attending to give evidence.

* New trial granted without the conſent of the king's counſel, *V. Smith* and *Frampton*, 1 *L. Ray.* 63. So in 3 *W.* and *M. B. R.* between the King and Queen and *Stone*, in an information for perjury, a new trial was granted to the defendant, without the conſent of the King's counſel, as mentioned by Mr. *Northey* in *Smith v. Frampton*, 1 *L. Ray.* 63. Strange reaſoning in the caſe in *Siderfin*, as if the intereſt a man hath in his character is not of more importance than any property whatever!

Vide ante IV

and

and it does not ſay poſitively that an iſſue was joined and appointed to be tried, *&c. ſed non allocatur*, it being only by way of inducement, to the ſubſtance of the information, which is for the battery and detaining the witneſſes.

Information againſt A. for procuring B. & C. to commit a treſpaſs: he may be convicted of the procurement, although the others are not convicted of the fact.

2. The *information* is againſt *Jackſon*, for procuring *A. et B.* to beat and impriſon the witneſſes, and *Jackſon* only tried, and convicted, and the others not yet tried, ſo *non conſtat* that they are guilty of the battery and impriſonment, and therefore *Jackſon* cannot be guilty of the procurement, of that which does not appear to have been done. But it was reſolved that he who commands is a principal and not an acceſſary, and he being found guilty, it ſhall be intended that the fact was done; and the Court impoſed a fine of £ 1000 upon *Jackſon*, and that he ſhould find ſurety for his good behaviour for a year, before he ſhould be diſcharged. But being ſpecially committed by the Court, at the ſuit of the King, they ordered that he ſhould not be charged with any action or execution during his impriſonment, without leave of the Court; and afterwards, *Primate* moved to have part of the fine towards his charges, and of this the Court would conſider. In the ſame term in Sir *Charles Stanlie*'s caſe, the Court would not permit him, being in priſon at the ſuit of the King, to be charged.

Vide ante & poſt.

A priſoner at the ſuit of the King ſhall not be charged at the ſuit of a ſubject, without leave of the Court.

Court gives the proſecutor part of the fine.

I conceive now, if a priſoner is in cuſtody at the ſuit of the King, the Court would give leave to charge the priſoner with civil ſuits, executions, *&c.* and for bail to ſurrender him in diſcharge of themſelves.

Rex v. Fenwick and Holt, M. 15 Car. 2. B. R. 1 Sid. 153.

Sir *John Jackſon* procured himſelf to be diſcharged from a large debt, upon a trial for it, at the aſſizes in *Cumberland*, by the perjury of *F.* and

F. and *H.* of which perjury they were indicted, and to be tried the next aſſizes there; of which Sir *John Jackſon* being informed, he procured the witneſſes who were to give evidence againſt *F.* and *H.* of the perjury to be arreſted for large ſums, as they were going to the aſſizes, by which means the witneſſes could not attend to give their evidence, and ſo *F.* and *H.* were tried, and acquitted; and upon affidavit of this practice, in *Trinity* term, a new trial was moved for, but the Court were in doubt if there ſhould be a new trial, in caſe of perjury after acquittal; and if it could be, they would not grant it upon affidavit, but directed that this practice of Sir *John Jackſon*, as it was a great miſdemeanor, ſhould be tried by information; and ſo it was at the laſt aſſizes for the ſame county, and the practice found; and now upon this verdict, it was often moved to have a new trial for the perjury, and it was ſaid, that this is only a miſdemeanor, as in treſpaſs at the common law, and that there was not any danger of life; but all the Court (except *Windham, J.*) ſaid, that they could not grant a new trial in the caſe of perjury, after an acquittal, inaſmuch as the record of acquittal was before them; but in the caſe of a new trial, between party and party, there is not any record of acquittal here, for one party comes here and moves for a new trial for a miſdemeanor, *&c.* and upon this the firſt *poſtea* is ſtayed, and not entered of record, and ſo a diverſity; and although ſearch had been made, yet no precedent could be found in this caſe, but where the new trial was by conſent; and farther, although the miſchief is great as hath been urged, yet we may not innovate the law, and they ſaid that all the Juſtices at *Serjeants Inn*, in

Where there ſhall not be a new trial in the caſe of perjury. Vide ante, and 1 Keb. 124. Pl. 33. Jon. 163. 1 Lev. 9. 10.

in *Fleet-Street*, were of their opinion *ſcil'*, that there cannot be any new trial in this caſe, but for deterring others from ſuch contrivances, they ſaid that they would fine Sir *John Jackſon* in a large ſum.

But *Windham*, J. held, that a new trial might be granted in the caſe of perjury, and the books are only, that the life of a man ſhall not be put in jeopardy twice for one crime. But in this caſe the puniſhment does not extend to life, and if there be not any authority againſt us in this caſe, I underſtand that we may do ſo for the extending of juſtice, that the innocent may not be puniſhed for the guilty, eſpecially when the way or means by which the party eſcapes juſtice, is a greater offence than the firſt.

1 Leon. 180.

Nota, In Hilary term following, Sir *John Jackſon* was brought into Court, and had judgment to be fined a 1000 marks, and to be impriſoned one *month* without bail, and to find ſecurity for his good behaviour for one year.

* Qu. Pounds.

One impriſoned for a miſdemeanor ſhall not be charged in execution, without leave. Noy. 1. 3 Inſt. 215. Sid. 90. 211.

And in this caſe it was reſolved upon ſeveral debates, that Sir *John Jackſon* ſhould not be charged in execution, nor any other who is ſo committed for a miſdemeanor, without leave of the Court, at the ſuit of any party, the ſame law as to putting in ſpecial bail to actions againſt him; and ſo it was ſaid in the caſe of Sir *Charles Stanlie* the ſame term. *Vide Sid.* 159, 160.

Several caſes and reports of the matter reſpecting Sir *John Jackſon* have been given, that the reader may, if he can, underſtand what was determined by the Court upon the ſubject.

A new

A new trial was granted in perjury on the Judge's information, that it was a malicious proſecution; but it ſhall not be granted without ſuch information, unleſs the Attorney-General or King's-counſel conſent to it. *Vide ante, p.* 157; *n. et Poſt.*

Lander v. Elliot, Hil. Term, 3 & 4 Jac. 2. B. R. Comb. 75. New trial in perjury.

Upon an indictment for a libel, the defendant was by verdict acquitted; Mr. Attorney-General moved for a new trial, but it was denied: And the Court ſaid, That anciently it was never done in criminal caſes where defendants have been acquitted; latterly where it has been a verdict obtained by fraud or practice, as ſtealing away witneſſes, *&c.* it has been done,* but never yet was done merely upon the reaſon that the verdict was againſt evidence. *Poſtea Mich.* 10 *W.* 3. *B. R. Per Holt, C. J.* in indictments of perjury we never do it, becauſe the verdict is againſt evidence; but if you prove a trick, as no notice, *&c.* it is otherwiſe. *Vide* 1 *Lev.* 9. 124. *Ne Serra, ſi le def. ſoit acquit, alit. s'il ſoit convict.*

Rex v. Bear, P. 9 W. 3. B. R. 2 Salk. 646. Indictment for a libel, defendant acquitted, and new trial denied. V. Fareſt. 31 & 37.

* Qu.?

On acquittal in perjury, no new trial, tho' againſt evidence: Contra, where there is a trick, as no notice, &c.

See 2 *Saund.* 336. The defendant in error, upon an error in fact, took out a record of *niſi prius*, and proceeded to trial at the firſt aſſizes after iſſue joined; yet held good, and a new trial denied.

Dennis v. Dennis.

The defendant was convicted of forgery, and would have moved for a new trial, without appearing in court; inſiſting that this differed from a motion in arreſt of judgment. But the Court held there was no difference; for the verdict fixes ſuch a preſumption of guilt, that the Court will be ſure of him, be-

Rex v. Gibſon, E. 7 G. 2. B. R. 2 Stra. 968. Defendant after conviction muſt be in court, to move for a new trial. V. 2 Stra. 844.

fore they intimate any opinion: and even when the verdict was brought in, would have committed him, had he ſtaid in court. And the Chief Juſtice mentioned the caſes of *Regina* v. *Ridpath*, *Paſch.* 12 *Ann.* and *Rex* v. *Lunt et Wombwell*, in perjury, where the diſtinction now taken was over-ruled.

Rex v. the Pariſh of Silverton, H. 24 G. 2. B. R. 1 Wilſ. 298.

No new trial where defendants are acquitted on indictment for not repairing an highway.

Indictment for not repairing an highway, and a verdict for the pariſh. It was now moved for a new trial (by Mr. *Pratt*) for miſdirection, or over-ruling evidence at the trial, by reaſon whereof the pariſh was unduly acquitted; *per Curiam*, This is a criminal caſe, and new trials are never allowed where defendant is acquitted in a criminal caſe. So alſo it is in *qui tam*'s and informations in nature of *quo warranto*'s.

Rex v. Simmons a Jew, 25 & 26 G. 2. B. R. 1 Wilſ. 329.

New trial granted for the defendant in a criminal caſe, upon the report of the Judge and affidavits of the Jury that the verdict was taken contrary to their meaning, and to the Judge's direction in point of law.

The defendant was indicted for putting into the pocket of one *Aſhley*, three *ducats*, with at malicious intent to charge him with felony, and was tried before Mr. Juſtice *Foſter*, at the laſt Aſſizes for the county of *Eſſex*, and found guilty generally as to all the counts in the *indictment*.

The Court was moved for a new trial upon the *affidavits of all the twelve jurymen*, " that " they only intended to find the defendant " guilty of putting the *ducats* into *Aſhley*'s " pocket, and did not intend, or underſtand, " that they had found him guilty of putting " the *ducats* into his pocket, *with an intent to* " *charge him with felony*; and *Dodſon* the *fore-* " *man* ſwears, that he declared at the bar to " the Court when they brought in their ver- " dict, *that they found the defendant guilty of*

" *putting*

" *putting the ducats in Aſhley's pocket, but* " *without any intent.*"

Mr. Juſtice *Foſter* reported, That after the evidence was gone through and ſummed up, the Jury departed from the bar to conſider of their verdict, and gave a private verdict at his lodgings that the defendant was guilty; the next morning they all appeared in court at the bar, and being aſked if they ſtood by their former verdict, they anſwered they found the defendant guilty. That Mr. Juſtice *Foſter* then told them that there were *four counts* in the indictment, and that the evidence for the king was only applicable to the *third*, which charged the defendant with maliciouſly putting three *ducats* into *Aſhley*'s pocket with an *intent* to charge him with *felony*; and told them that *the intent* was the principal thing to be conſidered by them, and that if they believed the defendant did not put the *ducats* into *Aſhley*'s pocket *with an intent to charge him with felony*, they muſt acquit him, whereupon the foreman at the bar ſaid, " *We find* " *him guilty of putting the ducats into his poc-* " *ket without any intent.*" But by ſome miſtake, or miſapprehenſion of the Court, or the Jury, or of both, a general *verdict* was taken that the defendant was *guilty*.

After this report, the *Jury*, by further affidavits, ſwear that there was a very great noiſe in court, and that when the Judge directed them to acquit the defendant if they believed he did not put the *ducats* into *Aſhley*'s pocket *with an intent to charge him with felony*, they did not hear or underſtand him.

This queſtion having been debated by five or ſix counſel on each ſide, the Court gave their opinion for a new trial.

LEE, *Chief Juſtice.*—There is no doubt but a *new trial* may be granted in a *criminal* caſe; and the true reaſon for granting new *trials*, is for the obtaining of juſtice; but to grant *them* upon the *affidavits of jurymen only*, muſt be admitted to be of dangerous conſequence. It appears to me from the *report* of my *brother*, and the *affidavits* of *Dodſon* the *foreman*, that this *verdict* was taken by a miſtake, for he ſwears that he declared in court, "that they "did not find the defendant guilty of any in-"tent," and therefore this is not granting a new *trial* upon any *after thought* of the *Jury*, but upon what the *foreman Dodſon* declared at the bar when they gave their verdict. I am very clear in my opinion there ought to be a *new trial*, and the rather, as this is a *criminal* matter.

WRIGHT, *Juſtice.*—*New trials* are generally ſuppoſed to be more ancient than appears in the books, for want of reporters when they firſt began to be granted; every caſe of this kind muſt depend upon its particular circumſtances; the Jury, every man of them, come here and tell us that they were not underſtood, for that they declared at the bar they did not find the defendant guilty of *any intent*. My *brother reports*, that he told them if they did not believe the *intent*, they muſt acquit him; the *Jury* now ſwear "*they did not hear him*;" therefore I am of opinion it is a verdict *miſ-entered*, contrary to the declaration of the *foreman*, not contradicted by any of the reſt, at the time it was ſpoken at the bar; and that it is moſt plainly *no after-thought*, ſo that we may keep clear of the danger of granting *new trials* merely upon the *affidavits of jurymen:* I think this man has been convicted contrary to the

judgment of his peers, that he has not had *Judicium Pariûm*, and that we are bound to grant *a new trial*; and this being a *criminal* caſe is more to be favoured as to a new trial, than if it had been a *civil* caſe.

DENISON, *Juſtice*.—The Court will be very cautious how they grant *new trials* upon the *affidavits of jurymen*, becauſe it would be of very dangerous tendency; but in this particular caſe, which partly depends upon my *brother*'s *report*, and partly upon the *affidavits of all the Jurymen*, I am very well ſatisfied there ought to be a *new trial*, becauſe it appears both by the *report* and *affidavits* that this *verdict* ought not to ſtand, and that the *Jury* were miſtaken in giving a *verdict* contrary to the direction of the Judge; and *that* is what I principally go upon, that it is a *verdict contrary to the direction of the Judge in a point of law*; one of the Jury ſaid, "*the defendant had no intent*," then the Judge ſaid, "*You muſt acquit him*;" ſome of the Jury ſwear they did not *hear*, others, that they did not *underſtand* the Judge.

FOSTER, *Juſtice*.—I am of the ſame opinion. I gave no direction at all in *point of fact*, only of law, "That if they did not believe the "*intent*, they muſt acquit the defendant," they told me "they did not believe any *in*-"*tention*;" this is a *verdict contrary to law*.

New trial granted upon payment of coſts.

The King v. Gough. T. 21 G. 3. B. R. Doug. 760.

Perjury being committed in the Booth-hall, within the limits of the city of Glouceſter, which is a coun-

The defendant was tried before PERRYN, *Baron*, at the Spring Aſſizes, in 1777, at *Glouceſter*, on an indictment for perjury. The indictment was found by the Grand Jury for the *county of Glouceſter*. It ſtated, That, on the trial of an action brought in the *King*'s *Bench*, in which the *venue* was in the *county of*

ty in itſelf, on the trial of a cauſe before a jury of the county at large, the indictment may be found and tried by juries of the county at large.

The king cannot by charter authorize the trial of crimes out of the county where they were committed.

A new trial may be granted at any time before judgment.

Glouceſter, between Lord *Ducie* and Doctor *Boſworth*, at the Aſſizes holden at *Glouceſter* for the ſaid *county of Glouceſter*, the defendant was produced as a witneſs, and falſely, wilfully, corruptly and maliciouſly, did, among other things, depoſe in ſubſtance as follows, *&c.* whereas in truth, *&c.* and ſo the jurors aforeſaid, *&c.* ſay that the defendant, *&c.* at the ſaid Aſſizes held at the *ſaid city of Glouceſter*, in his evidence, committed falſe, wilful, and corrupt perjury. Then another act of perjury was laid on the ſame occaſion, and at the ſame time and *place*. The record then ſtated, after the appearance of the defendant, and a plea of not guilty, that the ſheriff of the *ſaid county of Glouceſter* was commanded to ſummon a jury of the ſaid county of *Glouceſter* for the next Aſſizes and General Seſſion of Oyer and Terminer to be holden for the ſaid county of *Glouceſter*, and that, thereupon, ſuch proceedings were had, that, at the Aſſizes and General Seſſion of Oyer and Terminer holden at *Glouceſter*, for the *ſaid county of Glouceſter*, on the 12th of *March*, 17 *Geo.* 3. a jury impannelled and returned by the ſheriff of the ſaid county of *Glouceſter*, was choſen, tried, and ſworn to try the priſoner.

Upon the trial, a *ſpecial verdict* was found, which ſtated: 1. A charter to the burgeſſes of *Glouceſter* in the firſt year of *Ric.* 3. whereby that king granted to them, and their ſucceſſors, that the town of *Glouceſter* ſhould be, " *unus* " *integer comitatus per ſe corporatus, diſtinctus,* " *et penitus ſeparatus, a dicto comitatu* Glou- " ceſtrienſi *in perpetuum, et non parcellum ip-* " *ſius comitatus* Glouceſtrienſis; *et quod idem* " *comitatus ſic corporatus, et a dicto comitatu* " Glouceſtrienſi *diſtinctus et ſeparatus, comi-*

" *tatus*

" *tatus ville* Glouceſtrie *pro perpetuo nomine-*
" *tur*; ſalvis tamen et reſervatis nobis, et hæ-
" redibus noſtris, quod juſtitiarii ad aſſizas in
" comitatu *Glouceſtrienſi* capiendas aſſignandi,
" juſtitiarii ad goalam in comitatu *Glouceſtri-*
" *enſi* liberandam aſſignandi, nec non juſtiti-
" arii ad pacem in dicto comitatu *Glouceſtrienſi*
" conſervandam aſſignandi, in tenandas ſeſſiones
" ſuas, ac etiam vicecomites comitatus noſtri
" *Glouceſtrienſis*, in tenendos, comitatus ſuos,
" liberê poſſint, et eorum quilibet poſſit, *in-*
" *gredi villam prædictam*, et eaſdem ſeſſiones
" et comitatus tenere de quibuſcunque rebus
" et materiis *extra dictum comitatum ville*
" Glouceſtrie *et infra comitatum* Glouceſtri-
" enſem emergentibus, ſicut ante hæc tem-
" pora tenere conſueverunt preſenti conceſ-
" ſione noſtra in aliquo non obſtante." The charter then declared, that the bailiffs of the town of *Glouceſter*, ſhould be ſheriffs of the county of the town; that they ſhould hold county courts from month to month; that they ſhould exerciſe all the ſame powers, *&c.* belonging to the office of ſheriff, within the limits of the town, as other ſheriffs exerciſe in their bailiwicks; that all writs, *&c.* which would have been directed to the ſheriff of the county, if the town had not been made a county in itſelf, ſhould be directed to them; and that no other ſheriff or his bailiffs ſhould enter the town to do any thing belonging to the office of a ſheriff, except the ſheriff of the county of *Glouceſter* to hold his county courts as aforeſaid: 2. That this charter had been accepted: 3. That it had been confirmed by a charter of 5 *Hen.* 7. and declared to *be by authority of parliament:* 4. A charter in the 33d year of *Hen.* 8. under the privy ſeal, and *declared*

to be by the authority of parliament, whereby *Hen.* 8. incorporated the burgeſſes of *Glouceſter*, by the name of the Mayor and Burgeſſes of the *city* of *Glouceſter* and city of the county of *Glouceſter*, and made it a city, and confirmed to the ſaid city the former grants making it a county in itſelf: 5. That this charter was accepted: 6. A charter in the 24th year of *Car.* 2. confirming all former privileges contained in prior charters which had been ſurrendered; and containing a clauſe in effect the ſame and nearly in the ſame words with that above ſet forth from the charter of *Ric.* 3: 7. That this charter of *Car.* 2. was accepted: 8. That, during all the time aforeſaid commiſſions of *niſi prius*, aſſize, oyer and terminer, and general gaol delivery, had been, from time to time, granted to divers juſtices, to hear and determine, try and adjudge upon the ſeveral matters and things to ſuch commiſſions belonging, and ariſing, in the *ſaid city of Glouceſter*, and to deliver the gaols of the ſaid city; and that other, and ſeparate commiſſions of the ſame ſort, had, from time to time, during all the time aforeſaid, been granted to divers juſtices, to try and determine, *&c.* upon the ſeveral matters and things to ſuch laſt-mentioned commiſſions belonging, and ariſing in the *ſaid county of Glouceſter*, and to deliver the gaols of the ſaid county: 9. That the commiſſions both for the city and the county, had been executed *at a place in the ſaid city of Glouceſter* called the *Booth Hall:* 10. That, during all the time aforeſaid, *the jurors for the city* had enquired and made preſentment of ſuch matters and things belonging and given in charge to the jurors for the city, and ariſing in the ſaid city of *Glouceſter* in the ſaid place called the *Booth-hall*,

hall, and that ſuch matters and things ſo preſented by the ſaid jurors, when tried, had been tried by a jury of the ſaid *city of Glouceſter*: 11. That the grand and petty juries for the *county* had exerciſed the ſame juriſdiction as to matters ariſing within the county: 12. That, during all the time aforeſaid, the ſeſſions of the peace for the *county* had been held in the *Booth-hall*: 13. That the iſſue in the indictment mentioned had been tried by a jury of the *county* in the *Booth-hall*: 14. That the defendant, being then and there ſworn, did upon his oath, in the ſaid place called the *Booth-hall*, commit wilful and corrupt perjury, in the ſeveral matters charged in the indictment.

The objection to this indictment was, that the offence had been committed within *the county of the city*, and that the juries of the county at large had no juriſdiction to find or try an indictment for any crime not committed *in the county at large*.

It came on to be argued, on *Wedneſday*, the 23d of *May*, by *Bearcroft* for the proſecution, and *Baldwin* for the defendant.

The Court directed *Baldwin* to begin.

He ſaid, the general poſition was clear, that offenders can only be indicted and tried by juries of that county in which the offence was committed. This nicety was formerly carried ſo far, that, 'till the ſtatute of *Edw.* 6. (a) if a perſon received a mortal wound in one county, and died in another, the crime could not be tried in either. 2 *Hale's Pl. Cr.* 163. 2 *Hawk. p.* 220. § 34, 35, 36. 4 *Black. Com.* 303. *Stedman's Caſe*, *Cro. Eliz.* 137. *Richard Thomas's Caſe*, *ibid.* (in which, the indictment being that the defendant at the Caſtle of *Lincoln* falſely depoſed, without ſhewing in what county, he was

(a) 2 et 3 Edw. 6. c. 24. Vide 1 Hawk. Pl. Cr. c. 31. § 13.

was diſcharged) and 1 *Salk.* 288. Such being the general principle, the counſel for the proſecutor muſt endeavour to diſtinguiſh this caſe by ſome of the clauſes in the charters found by the ſpecial verdict. They will probably rely on the clauſe in the charter of *Ric.* 3. But by that clauſe, the juſtices for the county at large are only authoriſed to enter into the town, and to enquire of things there, which had ariſen out of the county of the town. The true meaning of this charter was, to give the uſe of the *Booth-hall* to the judges and juries for the county at large, and to authoriſe their proceedings there, relative to matters within their juriſdiction. At the *Old Bailey*, which is within the city of *London*, juries for the county of *Middleſex* ſit to try offences committed in that county; but, when perjury has been committed there on a trial before a *Middleſex* jury, ſuch perjury is never tried by a jury of the county of *Middleſex*, but by one of the city of *London*. In the celebrated caſe of *Elizabeth Canning*, after a proſecution at the *Old Bailey*, for a crime committed in *Middleſex*, the indictment of the witneſſes for perjury was laid in the city. In like manner on a trial at bar in *Weſtminſter Hall*, from *Yorkſhire* for example, though the cauſe is tried by a *Yorkſhire* jury, if perjury be committed by a witneſs, he muſt be indicted and tried by a *Middleſex* jury. In 2 *Hawk. c.* 5. § 19, where this caſe of *Glouceſter* is mentioned, and in the authorities there cited, all that is meant is, that juries of the county ſitting in the city, may find and try offences committed in the county. The caſe in *Popham*, 16. (alſo reported in *Anderſon*, 291) which will probably be mentioned on the other ſide, ſeems to be in favour of the

defendant,

defendant, for *the deciſion* only was, that the juſtices of aſſize and gaol delivery might ſit in the city for things which happened within the county; and in a note at the end of the caſe it is ſaid, that, by the commiſſion for the county, a thing which happens in the town cannot be determined, albeit it be felony committed in the Hall during the ſeſſions (a). Conſiderable pains have been taken to enquire if there is any precedent, or inſtance, in the city of *Glouceſter*, like the preſent caſe, and none has been found. No inconvenience will ariſe if the Court ſhould hold that this indictment cannot be ſupported, becauſe the verdict ſtates, that there are grand juries in the city, who may find offences committed in the *Booth-hall*.

(a) Poph. 17.

Bearcroft, for the proſecution, argued, that the perjury having been committed on the trial of a county cauſe, it muſt of neceſſity be taken, that, at that time, the ſpot where the offence took place was part of the county at large. It is no uncommon thing for the ſame ſpot to be conſidered, for different purpoſes, as being within different juriſdictions. The ſpace between the high and low water marks, when dry is within the juriſdiction of the ſheriff, but when it is overflowed, the ſheriff and admiralty have *diviſum imperium* over it (1). Before the charter of *Ric.* 3. this ſpot was clearly part of the county at large. By the ſtatute of 6 *Ric.* 2. *cap.* 5. the juſtices of aſſize and gaol delivery are to ſit in the county towns of the different counties; by 13 *Edw.* 1. *cap.* 30. trials at *niſi prius* are to be held before the judges of aſſize; and the authority of the judge at *niſi prius* is by the commiſſion of aſſize, as is laid down by Lord HOLT (*Salk.* 454). By giving authority to the juſtices for the

(1) Vid. 5 Co. 107.

the county at large, to try county cauſes within the limits of the town, the charter of *Ric.* 3. made the place where they ſat part of the county at large for that purpoſe. The trial on which the perjury was committed was at *niſi prius*. The whole proceedings were void, unleſs the *Booth-hall* be conſidered as being, at that time, part of the county. All the judges in Queen *Elizabeth*'s time, in the caſe reported by *Popham*, agreed, that they might ſit in the city for county cauſes, and that the king might, in making a ſeparate county, ſave and except part of the juriſdiction within it, which the county from which it was taken had in it before. By the ſaving in the charter of *Ric.* 3. all that appertains to, and is connected with, the execution of commiſſions in the county is neceſſarily ſaved. It is true, that a felony committed in the Hall during the aſſizes for the county, muſt be tried in the city, becauſe ſuch offence is entirely unconnected with the execution of the commiſſions for the county. The caſe in *Popham* is more materially reported by *Anderſon*, and *he* ſtates, that the Judges were of opinion, that it was the intent of the charter, that the town of *Glouceſter* ſhould continue, for the purpoſes mentioned in the exception, to be part of the county at large. It may be true, that indictments for perjury before *Middleſex* juries at the *Old Bailey*, are laid and tried in *London*, but no inference can be drawn from thence with regard to *Glouceſter*. There may be ſome particular proviſions for that purpoſe in the charters of *London*, which charters are confirmed by act of parliament. Perhaps the proſecution in the preſent caſe might be in *either* county. In point of law, the *Booth-hall* was, at the time,

time, in the county at large, and, in point of fact, and local ſituation, in the county of the city, and, therefore, the offence might be ſaid to have been committed either in the one or the other.

Lord MANSFIELD.—It ſeems to me, as at preſent adviſed, to be the better opinion, that the crime might be laid in either county; but the queſtion now before us is, whether it could be laid in the county at large? The doubt before the Judges, in the caſe in *Popham*, was as Mr. *Baldwin* ſtates it (*viz.* whether the judges could ſit in the city to try matters ariſing in the county at large)? But it is material to ſee how it was ſolved. In the time of *Ric.* 3. the town was part of the county at large. By his charter it was made a diſtinct county, but with an exception, that the judges for the county at large might ſtill try cauſes there. The king cannot by his charter give judges a power to try in one county offences committed in another. That was admitted in the caſe before the Judges, as reported by *Anderſon*. But, it was anſwered, that he had continued the city as part of the county at large. If this is ſo, the cauſe in which the perjury was committed, was tried in the county at large, and the witneſs was examined, and the crime committed in the county at large. This diſtinguiſhes the preſent caſe from that of the *Old Bailey*, which ſtruck me ſtrongly at firſt. The city of *London* has many charters and cuſtoms confirmed by act of parliament, and the cuſtom of trying offences committed in *Middleſex*, at the *Old Bailey*, has probably been confirmed by act of parliament; for otherwiſe it would be void.

WILLES, *Juſtice*.—If it had not been for the caſe of the *Old Bailey*, I ſhould have had no doubt;

doubt; but, with regard to that, there is no occaſion to ſuppoſe a grant or cuſtom confirmed by act of parliament, becauſe the whole Court ſeems to think, that the indictment may be laid either way, and, at the *Old Bailey*, the uſage has been to lay the indictment in the city.

ASHHURST, *Juſtice*.—No argument can be drawn from the practice at the *Old Bailey*, unleſs we knew more exactly how the caſe ſtands; there may be an act of parliament enabling the judges to try matters there, which ariſe in the county of *Middleſex*. Here, I think, the indictment would have been good either way. The king cannot, without an act of parliament, give the judges a power to try in one county, facts ariſing in another. Therefore, the meaning of the charter muſt have been, to continue the town as part of the county at large, for the purpoſe of trying county cauſes.

BULLER, *Juſtice*.—I am of the ſame opinion. There is no way of ſupporting the judicial proceedings at *Glouceſter* from the time of *Ric.* 3. but by conſidering them as having been had in the county at large; becauſe I take the law to be clearly as my lord and my brothers have ſtated it. We have no authority to compel a jury to come, or to adminiſter an oath, out of the county where the matter ariſes. Therefore, the meaning of the charter muſt have been, to leave the place as part of the county at large. I am very ſtrongly inclined to think the indictment might be laid in either, but, if there is a difference, I think this the moſt proper way.

The defendant was this day brought up for judgment, when *Buller*, *Juſtice*, read the re-

port of the evidence, and *Dunning* was heard on his behalf; after which, the Court obſerved, that, from the ſtate of the evidence, the conviction appeared extraordinary, and hinted that a new trial would be proper.

Dunning ſaid, he ſhould have made a motion for that purpoſe, if he had thought it was competent, after ſuch a long interval of time ſince the conviction. Upon this, Lord MANSFIELD declared, that it was ſtill competent, becauſe the report of the evidence coming regularly now before the Court, if enough appeared to raiſe an inclination in them to think the defendant ought not to have been convicted, they could only grant a new trial, or poſtpone for ever pronouncing judgment; for that there would be an abſurdity in a judgment on a conviction for perjury, where a fine of a ſhilling ſhould be impoſed as the puniſhment.

A new trial was awarded (a).

(a) Birt v. Barlow, E. 19 Geo. 3. Poſt IX. (16.)

IX.

IX. Of other Matters reſpecting new Trials, &c.

(13.) *Of Defendant's entering up Judgment againſt himſelf, where Plaintiff (who had recovered a Verdict with ſmall Damages) would not enter up Judgment.*

Pettey v. Hockley, E. 20 Jac. B. R. Palm. 281.

BAXDAL of *Lincoln's-Inn*, moved, that inaſmuch as the plaintiff had obtained a verdict againſt the defendant, and would not enter his judgment (becauſe he was deſirous of bringing treſpaſs for the ſame treſpaſs) that the defendant might enter the judgment againſt himſelf upon this verdict; ſo that he might have error, or attaint; and cited a precedent, *Hil. 6 Jac.* B. R. between *Hoggsfleſh* and *Humbers*, in covenant where the defendant was ſuffered to enter judgment for the cauſe aforeſaid againſt himſelf, where the plaintiff would not enter it, on account of the ſmallneſs of the damages; and it was ruled accordingly in this caſe by *Dodd* and *Chamberlaine*.

Dy. 194.

IX. Of other Matters reſpecting new Trials, &c.

(14.) *Of a Verdict right in Part, and wrong in Part, and of one Defendant being found guilty, and another acquitted.*

SATUR, a bankrupt, at the time of his going off, left ſome plate with his wife, who in order to raiſe money upon it, delivered it to her ſervant, who went along with the defendant to the door of Mr. *Woodward* the banker, and there the defendant took the plate into his hands, and went into the ſhop and pawned it in his own name, gave his own note to re-pay the money, and immediately upon the receipt of it, went back to the bankrupt's wife, and delivered the money to her. In trover for the plate, the Jury (conſidering the defendant acted only as a friend, and that it would be hard to puniſh him) found a verdict for the defendant. But upon application to the Court, a new trial was granted, upon the foot of its being an actual converſion in the defendant, notwithſtanding he did not apply the money to his own uſe. And upon a ſecond trial the plaintiffs obtained a verdict for the value of the plate.

Parker et al. v. Godin. M. 2 Geo. 2. B. R. 2 Stra. 813.

What meddling with the effects of a bankrupt is a converſion.

N. B. A difficulty aroſe upon the motion for a new trial, which was this. There were

other things beſides plate in the declaration, and as to them the verdict *pro def'* was right; and yet a new trial muſt be granted upon the whole. But on conſideration, the Court held, that could be no reaſon to refuſe a new trial, for if the merits as to thoſe other things were with the defendant, it would be found for him as to them.

But it was agreed on all hands, that if one defendant be acquitted, and another found guilty, that defendant can have no new trial. *Strange pro quer'.*

Sed qu.?

In the caſe of *Edic* and another *v.* the *Eaſt India* Company, *ante* V. there were two counts in aſſumpſit, upon two bills of exchange, the Jury found for the plaintiff on the firſt count, which was right—For the defendant, upon the ſecond, which was wrong, and the verdict was ſet aſide generally.

IX.

IX. Of other Matters reſpecting new Trials, &c.

(15.) *Where the Court is divided on Motion for a new Trial.*

Cartlidge v. Eyles, Bart. Hil. 10 Geo. 2. Barnes, 442.
Court divided on motion for new trial: plaintiff had judgment.

AT *niſi priſis* plaintiff had a verdict, and on a motion for a new trial, the Court were divided in opinion; and no rule being made, plaintiff was at liberty to ſign final judgment.—*Chapple* for plaintiff; *Eyre* for defendant.

Chandler v. The hundred of Sunning, on the ſtatute of Hue and Cry, H. 22 Geo. 2. Barnes, 458.
Plaintiff cannot recover for notes he does not ſufficiently deſcribe, but for what is ſufficiently deſcribed he may recover.

On a caſe made upon a point reſerved at the trial, where a verdict was found for plaintiff, ſubject to the opinion of the Court; Mr. Juſtice *Abney* and Mr. Juſtice *Birch* delivered their opinions, that though plaintiff cannot recover the value of Bank notes of which he was robbed to the value of £. 960, for want of a ſufficient deſcription thereof in his advertiſement, in the *London Gazette*, yet he ought to recover for what is ſufficiently deſcribed, (viz.) his watch and money, value £. 10, the words of the late act being to be taken diſtributively. Lord Chief Juſtice and Mr. Juſtice *Burnett* were of opinion, that nothing can be recovered. The words of the late act are, That plaintiff ſhall not maintain his action, unleſs he deſcribes the robbers, *&c.* together with the goods and effects of which he was robbed: twenty days before the advertiſement are given to the perſon robbed, to recollect a particular deſcription. The party robbed ought to diſcover,

as well as he can, all the goods he loſt, to give light to the Hundred to take the robbers. The perſon robbed gets nothing by the taking; the public indeed are benefited. A perſon robbed of a large ſum of money, probably cannot farther deſcribe it than that it was in gold and ſilver; but perhaps can deſcribe other particular things then loſt; which he ought to do. The deſcription of Bank notes by numbers, dates, and ſums (which in this caſe were omitted) are highly uſeful for diſcovery. No two have the ſame marks. If plaintiff, at the time of his advertiſement, had not known the numbers, *&c.* but recollected them afterwards, the action would lie. But on the trial he acknowledged that he knew them, and they were all particularly entered in his pocket-book at the time of the advertiſement. The Court being divided, no judgment could be entered on the verdict.

IX. Of other Matters reſpecting new Trials, &c.

(16.) *Of ſetting aſide Nonſuits, and Nonproſs's.*

IN *Northumberland* at the aſſizes, a plaintiff in *ejectment* was called and nonſuited, and this entered upon the record before the *venire*, or *diſtringas*, *&c.* was put in, and this appeared by the *poſtea* now produced, for it is only a nonſuit indorſed upon it, and the juſtices of *niſi priſis* had not power to nonſuit, for their power is by the *Habeas Corpora*, and for this cauſe the Court diſcharged the nonſuit, and gave leave to the party to proceed again.

Thompſon v. Hudſbet, M. 15 Car. 2. B. R. 1 Sid. 164. Nonſuit at niſi priſis before venire or diſtringas put in, diſcharged.

An action of *indebitatus aſſumpſit*, for money received *per* the defendant, to the plaintiff's uſe.

Upon evidence, the caſe came out thus: The plaintiff and another laid a wager; the defendant held ſtakes; the plaintiff brought evidence, that he had won the wager. *Blencowe* that tried the cauſe, being of opinion, that the plaintiff had miſtaken his action; becauſe this money could not at the time of the action brought, be ſaid to be money received to the plaintiff's uſe; ſince the defendant was not to pay the money, until the wager was *proved* to be won,—The plaintiff was nonſuited.

Temple v. Welds, P. 1 G. 1. B. R. Lucas, or 10 Mod. 315. Aſſumpſit for money had and received againſt a ſtake-holder.

The plaintiff now moved to ſet aſide the nonſuit; becauſe occaſioned by the Judge's miſtaking the law.

Court.—Action well brought; for upon the wager won, the money was actually the plaintiff's, though he could not receive it before the fact was made appear.—*Sed adjournatur.*

1757. Bennett qui tam, &c. v. Smith. M. 31 G. 2. B. R. 1 Burr. 401.

A regular non proſ. againſt a common informer, refuſed to be ſet aſide.

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 upon the ſtatute of uſury) though the plaintiff offered to pay the coſts of ſetting it aſide.

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. Juſtice Forſter 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. 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.

Hutchinſon Executrix, v. Brice, H. 11 G. 3. B. R. 5 Burr. 2692. Court will not ſet aſide a nonſuit voluntarily ſuffered, and give plaintiff leave to reply de novo, ſuch a replication as will make a new queſtion.

The COURT refuſed to ſet aſide a nonſuit voluntarily ſuffered by the plaintiff, and to give him leave to reply *de novo*. He had replied, "that the *cauſe of action aroſe* within ſix years:" which fact he could not prove. He wanted, therefore, to ſet aſide the nonſuit, and reply *de novo:* which, if he had ſucceeded in, he would have replied, "that the *writ of latitat* "iſſued within the ſix years." But

The COURT ſaid, that that would make a quite new queſtion; which the plaintiff had before pretermitted, and had put the iſſue upon quite another foot, and upon a point which he could not eſtabliſh.

Rule diſcharged.

Mr. *Dunning* was for the motion: Mr. *Wallace* againſt it.

Vide Robinſon v. Raley, and *Alder v. Chipp*, poſt IX. (21.)

Buſcall and others, aſſignees of Thickpenny, a bankrupt, v. Hogg. M. 11 Geo. 3. C. B. 3 Wils. 146. A new trial granted to plaintiff, without coſts, he having been improperly nonſuited. The queſtion, as to the trading of an innkeeper.

Trover for a great many goods, to the value of £. 700. Upon not guilty pleaded, this cauſe was tried at the laſt aſſizes for the county of *Norfolk*, before Lord Chief Baron *Parker*. Whereupon it appeared on the plaintiff's evidence, by ſeven witneſſes, that *Thickpenny* was an innkeeper; and that he not only ſold liquors to his gueſts *(hoſpitantibus)* in his inn, but alſo ſold divers quantities of wine, rum, and brandy, by four, five, and ſix gallons at a time, to ſeveral perſons living two and three miles diſtant from his inn, for them to retail out and ſell again, and had done thus for ſome years; whereupon it was inſiſted by the coun-

ſel for the plaintiffs, at the trial, that this ſort of trading by an innkeeper, made him liable to a commiſſion of bankrupt: but the *Chief Baron*, without hearing any other evidence, was of a different opinion; and ordered the plaintiffs to be nonſuited, with leave to move the Court for a new trial, without coſts, in caſe he was miſtaken in his opinion.

And now, upon the motion of Serjeants *Whitaker* and *Forſter*, to ſet aſide the nonſuit, the Court was clear of opinion, that the plaintiff ought not to have been called, but the matter ought to have been more fully ſifted and gone into at the trial; that it not appearing to the Court here, what proportion *Thickpenny*'s trade in his inn bore to his trading abroad and out of doors, they could not judge whether he was liable to be a bankrupt or not; and therefore they ſet aſide the *nonſuit*, and granted a new trial without coſts.

Nota. It was ſaid by *Wilmot*, Chief Juſtice, that if *Thickpenny*'s trade and profits in his inn was much larger than his trade and profits abroad out of the inn, he ſhould incline to think that he was not * liable to be a *bankrupt*. If it ſhould come out in evidence that *Thickpenny* got £. 600 *per annum* in his inn, and not 600 *s. per annum* by ſending out and ſelling liquors abroad; he ſeemed clear in opinion, that he could not be a *bankrupt*. However, as there was general evidence that he was a trader out of his inn, the plaintiffs ought not to have been nonſuited.

* Sed qu. if later determinations are not contra? And qu. farther, which are the moſt conſiſtent and agreeable to law?

Rackham v. Jeſſup & Thomſon, M. 13 G. 3. C. B. 3 Wilſ. 352. Plaintiff claiming a right to cut ruſhes on a

The plaintiff *Rackham* being poſſeſſed of a ſmall tenement or cottage at *Theberton*, in the county of *Suffolk*, and an inhabitant there, and, as ſuch, claiming a right to cut down ruſhes, (without

(without ſtint as to quantity) on a certain waſte or common there, called *Theberton Common* or *Home Common*, and to take and carry away the ſame for his own uſe; employed *Rudd* and *Farrow* as his ſervants for hire, to cut down ruſhes for him there; who accordingly did cut down and mow about five or ſix loads of ruſhes for the plaintiff; which ruſhes ſo cut down for the plaintiff's uſe, and lying and being upon the waſte or common, the defendants took, and with carts and carriages, carried away the ſame, and converted them to their own uſe; whereupon the plaintiff brought *trover* againſt the defendants, who pleaded not guilty; and iſſue being joined, this cauſe came on to be tried before my brother *Whitaker*, at the laſt ſummer-aſſizes held for the county of *Suffolk*, when the plaintiff proved he was an inhabitant of *Theberton*, and that as ſuch, claiming a right to cut and take away ruſhes on *Theberton Common*, he, by his ſervants, cut down five or ſix loads of ruſhes, and that the defendants took and carried away and converted the ſame to their own uſe; whereupon my learned brother, being of opinion that the evidence given for the plaintiff was not ſufficient to ſupport this action, was pleaſed to order him to be nonſuited upon the merits, without hearing counſel, or any evidence for the defendants.

common, cuts 5 or 6 loads, which defendants carry away, trover lies. Plaintiff nonſuited by the Judge upon a ſuppoſition that he had not ſufficient property to maintain the action. The nonſuit ſet aſide.

Plaintiff at the trial proved his claim of right to cut ruſhes, &c. but the Judge nonſuited him without hearing the defendants.

And in this term, upon producing an affidavit of the facts above, I moved for, and obtained a rule upon the defendants, to ſhew cauſe why the nonſuit ſhould not be ſet aſide, and why there ſhould not be a new trial, for that the plaintiff had given evidence of his property in the ruſhes, and of a converſion by the defendants, and that my brother *Whitaker* ought to have left it to the Jury; and that he might make his report to Mr. Juſtice *Nares*,

in

in order for him to ſtate the ſame to the Court, which, at another day, he accordingly did, as follows:

The report of the Judge.

Mr. Juſtice *Nares*.—My brother *Whitaker* reports, that this is an action of *trover* for ſix loads of ruſhes, which, upon the general iſſue, came on to be tried before him at the laſt aſſizes for the county of *Suffolk*, when the plaintiff called ſeveral witneſſes in order to ſupport and maintain this action.

The firſt witneſs was *John Rackham*, who ſwore that the plaintiff rented a ſmall tenement or cottage at *Theberton*; that about a year ago he went to help the plaintiff to mow ruſhes upon the common called *Home-Common*; but theſe (ſays my brother *Whitaker*) I underſtand not to be the ruſhes in queſtion.

That —— *Rudd* and —— *Farrow mowed the ruſhes in queſtion for the plaintiff*, about five or ſix loads, which were all about the value of ten ſhillings a load. He further ſaid, upon croſs examination, that the ruſhes were mowed in the night, and that his uncle (meaning the plaintiff) kept a hog, but no other ſtock upon his tenement.

The ſecond witneſs was *Henry Scarlet*, who proved that the defendants *Jeſſup* and *Thomſon*, who were farmers, having or claiming ſome right of common upon the place where the ruſhes were cut, came with their carts, and carried away the ruſhes which had been cut down for the plaintiff by *Rudd* and *Farrow*, and that all poor people had a right to cut ruſhes. That this was all the evidence upon the fact.

The third witneſs was *John King*, who ſwore to right of common upon the place in queſtion, and that any one may cut ruſhes from the

the common without ſtint at any time, as well as every body in the pariſh; that every body in the world may cut ruſhes on the common.

The fourth witneſs was *John Woolnoth*, who ſwore to the ſame effect, that every one cut what ruſhes he thought fit, and ſold them to whom he pleaſed.

The fifth and ſixth witneſſes were *Stephen Goodwin* and *William Foſter*, who ſwore to the ſame general right of common in every body to cut ruſhes on the common.

Upon my aſking the plaintiff's counſel if they had any more evidence upon any other matter, they ſaid they had ſeveral more witneſſes, but all to the ſame purport with the laſt.

Upon which, I thought the plaintiff had not made out a caſe proper to be left to the Jury, becauſe I conceived that in this action, the plaintiff ought to make a title by direct or preſumptive evidence.

There being no direct evidence, the witneſſes who ſpoke to the poſſeſſion of the ruſhes, proved it was either obtained by *ſtealth*, or under a pretence of right of common, which I thought was illegal and void, upon which the plaintiff was nonſuited. This is the report of my brother *Whitaker verbatim*.

Upon this report being made to the Court, Serjeant *Forſter* for the defendants ſhewed cauſe why the nonſuit ought not to be ſet aſide, by inſiſting that the plaintiff had not proved that he had any legal property in the ruſhes, for that it appeared by the report, the plaintiff had cauſed them to be moved down, and cut in the night-time, and that the plaintiff obtained the ruſhes by *ſtealth*, or under pretence of

of a right of common, which Serjeant *Whitaker*, before whom the cauſe was tried, thought was illegal and void; and therefore nonſuited the plaintiff very properly, he having proved no *legal* property in the ruſhes.

Serjeant *Wilſon* for the plaintiff, in ſupport of the rule to ſet aſide this nonſuit, inſiſted that it appeared by the report, that ſufficient evidence was given on the behalf of the plaintiff at the trial to ſupport this action; it being proved that he was an *occupier* of a tenement in *Theberton*, and (as ſuch occupier) had, or claimed to have a right to cut and take away ruſhes from and off this common, and that the plaintiff by his ſervants cut the ruſhes in the declaration, and the defendants afterwards took and carried them away; this he inſiſted was ſuch evidence of property in the plaintiff, and of converſion by the defendants, (who appear to be mere ſtrangers) that the defendants, if they had any legal defence, ought to have made it at the trial, and the iſſue ought to have been left to the Jury, for their verdict.

It was further ſaid on behalf of the plaintiff, that ſuppoſing, for argument's ſake, he had not any lawful right to cut ruſhes upon the common; yet as he claimed ſuch right, as an inhabitant of *Theberton*, and gave ſome evidence thereof at the trial, *that* was ſufficient to put the defendants upon their defence, and to have ſhewn or juſtified by evidence, what right they had to take and carry away the ruſhes in queſtion, for the plaintiff claiming a right to cut ruſhes, had gained a property therein by cutting the ſame, ſufficient to have put the defendants upon ſhewing that they had a better property therein; but they not having

ſhewn

ſhewn any right or property at all to the ruſhes, wrongfully took them away; and the plaintiff has been improperly nonſuited.

A commoner cannot juſtify diſperſing the aſhes of fern cut and burnt by a ſtranger (the plaintiff) for, after plaintiff had burnt the fern, he had a property therein.

The caſe of *Woadſon* verſus *Nawton*, 2 *Stra.* 777. is ſomething like this caſe; *that* was treſpaſs for taking and diſperſing a load of *fern-aſhes:* the defendant pleaded that he was an occupier of land in *A.* the tenants whereof had right of common, and cutting *fern* in the *locus in quo*, and that the plaintiff came and wrongfully cut *fern* and burnt it, whereupon the defendant came and ſcattered it about, *prout ei bene licuit*, demurrer *inde.*—*Strange* for the defendant cited 1 *Roll. Abr.* 405. *pl.* 5. that a commoner may juſtify taking the cattle of a ſtranger *damage feaſant*, or abate hedges, 9 *Rep.* 112. b. 2 *Mod.* 65. and the difference is where it is the act of the lord, or the act of a ſtranger. *Sed per totam Curiam contra*, for if the plaintiff did him any damage, he has his action, but after the plaintiff had burnt the fern, and thereby converted it to his own uſe, the commoner has no right to come and diſperſe it; and judgment was given for the plaintiff; ſo in the caſe at bar, after the plaintiff had cut the ruſhes, they were his own property, and the defendants have not, by evidence, or pleading, ſhewn any right to come and take and carry them away. The caſe at bar, indeed, is an action upon the caſe in *trover*, and the caſe cited from *Stra.* 777. is in treſpaſs; but there are many caſes where a man may have an action of *trover* or *treſpaſs* at his election; as if one takes my goods by wrong and converts them to his own uſe, I can have *trover* or *treſpaſs* againſt him, and ſhall recover damages in either of thoſe actions.

So

So if a man have wreck of the ſea by preſcription, or by the king's grant, if goods be wrecked upon his lands, and another taketh them away, he who hath the wreck ſhall have an action of treſpaſs *quare vi et armis* for thus taking away, without ſeiſure thereof *before*, *F. N. B.* 91. *D.* but in the very ſame caſe he might have had *trover* for the goods; and ſo was the caſe of *Biddulph*, Eſq. v. *Ather* in *C. B. Trin.* 28 & 29 *Geo.* 2. *Wilſon* 23. The plaintiff was lord of the manor of *Lancing* in the county of *Suſſex*; and being ſo, was intitled by preſcription to wreck of the ſea thrown upon that manor, and a *ſloop* being wrecked and thrown upon it, he brought *trover* againſt the defendant who had taken it away, as bailiff of the Duke of *Norfolk*, who alſo claimed to have wreck of the ſea in the ſame place, and ſome doubts ariſing upon the evidence given at the trial before Mr. Juſtice *Wilmot*, a ſpecial caſe was made for the opinion of the Court upon the point of evidence only; and no objection was ever taken or thought of, againſt the propriety of that action of *trover*, and judgment was given for the plaintiff.

The *giſt* of the action of *trover*, is the wrongful detainer of goods which are the property of another; and the *giſt* of treſpaſs for goods, is the wrongful taking and detaining them, ſo that wherever *treſpaſs* will lie for *taking goods of the plaintiff wrongfully*, it ſeems *trover* will lie for taking *goods of the plaintiff wrongfully*; ſo that there is no very material difference between the caſe in *Stran.* 777. and the preſent caſe.

One claiming a right to cut down wood,

There is a caſe in *Cro. Eliz.* 819. of *Baſſet* v. *Maynard*, and in 5 *Rep.* 24. *S. C.* very applicable

plicable to the preſent caſe cited by Serjeant *Wilſon*; it was *trover* for certain loads of wood; upon a ſpecial verdict; the caſe was, Sir *Thomas Palmer* was ſeiſed of a great wood, and bargained and ſold to one *Cornford* and his aſſigns, as many trees as would make 600 cords of wood, to be taken by the aſſignment of Sir *Thomas Palmer*.—*Cornford* aſſigns over his intereſt to the plaintiff. Afterwards Sir *Thomas Palmer* granted to the defendant ſo much of his wood as would make 4000 cords of wood, to be taken at the defendant's election.—The plaintiff afterwards by the aſſignment of Sir *Thomas Palmer* cut down the trees in queſtion to make 600 cords: and the defendant claiming them by virtue of his grant took them.—And it was found that there was ſufficient wood left for the defendant to take his 4000 cords. *Et ſi, &c.*—And upon this verdict it was moved, that here was not ſufficient title found for the plaintiff.—For firſt, it is not found that the bargain and ſale was for any ſum of money, nor upon any conſideration; *ſed non allocatur*, for it is intended to be ſo, being found by the verdict. But if it had not been ſo found, it might peradventure, have been otherwiſe; as *primo mariæ*. *Dyer* 91. is.—Secondly, it was alledged that this grant to the plaintiff is void; for, until the aſſignment made by Sir *Thomas Palmer*, no intereſt veſted in *Cornford* himſelf, ſo that he could not make any grant thereof over. But all the Court held the grant to be good: for being made to him and his aſſigns, he may make an aſſignee, which ſhall enure as a nomination to one, who is to have by the appointment of Sir *Thomas Palmer*. And it may well veſt in him, as the intereſt alſo: and here he hath an intereſt before the aſſignment made

cuts it down; although he has no legal right to this wood, yet by cutting thereof he gains ſuch a property therein, that trover lies againſt a ſtranger who takes it away.

made by Sir *Thomas Palmer*; inſomuch, that if Sir *Thomas Palmer* will not aſſign it in convenient time, he himſelf may take them, and therefore he may aſſign this intereſt, as 44 *Ed.* 3. 43. is.—But admitting the grant to the plaintiff had been void; yet *Popham* ſaid that the action was maintainable, becauſe by the cutting down of them he had *poſſeſſion*, and a good title againſt the defendant, and every ſtranger; and being cut down it was not lawful for the defendant to take them: for if one ſell 1000 cords of wood, to be taken at the vendee's election, and afterwards the grantor himſelf, or a ſtranger, cuts down ſome of the wood, the vendee cannot take that which is cut down: but he ought to make his grant good out of that which is growing. As if *eſtovers* were granted unto him, to be taken in a great wood, and the owner of the wood cuts down ſome of the wood, the grantee cannot take *that* which is cut down; but he muſt take his *eſtovers* out of the reſidue; and if all be cut down, he hath not any remedy, but an action upon the caſe. So here, although the plaintiff had not a good title, yet his having *poſſeſſion* of them, being cut down, ſufficeth. *Quod Gawdy and Clinch conceſſerunt.* Wherefore it was adjudged for the plaintiff.

The grantee of eſtovers cannot take wood cut down by the grantor.

It was ſubmitted to the Court by Serjeant *Wilſon*, that this caſe of *Baſſet* v. *Maynard*, was directly in point, or rather ſtronger than the caſe at bar, for it ſhews that although *Baſſet* had not a good title to the wood, yet that having cut it down, he thereby gained poſſeſſion thereof, and a good title againſt *Maynard* and every ſtranger. So in the caſe at bar, *Rackham* by cutting down the ruſhes on the common, gained poſſeſſion thereof, and a

good title againſt the defendants *Jeſſup* and *Thompſon*, who have ſhewn no title at all to the ruſhes, but appear to be mere ſtrangers.

Curia. A cuſtom for all the inhabitants of *Theberton* to cut ruſhes on *Theberton Common* is a good cuſtom; the plaintiff proved at the trial that he was an inhabitant, and that there was a cuſtom for every body inhabiting *there*, to cut and take ruſhes on the place in queſtion, that he (by his ſervants) having cut down five or ſix loads of ruſhes, the defendants took and carried the ſame away; this is ſuch evidence of property in the plaintiff and converſion in the defendants, that they appear to be wrong doers, for they have neither by evidence or pleading ſhewn any right or title whatever to theſe ruſhes, and appear to the Court to be mere ſtrangers. Indeed, if a perſon hath no colour of right at all to cut down ruſhes, or to take any other thing; he cannot, by cutting the ruſhes, or taking the thing, without any colour of right, acquire property therein; but in the caſe at bar the plaintiff proved he had a right to cut the ruſhes, that he did cut them, and we are all of opinion, that he thereby gained a property therein. As to what is reported by brother *Whitaker*, that the plaintiff's ſervants cut the ruſhes in the night-time, and the inference drawn from thence, that the ruſhes were cut, or obtained by *ſtealth*; the Court ſaid, that in ſummer, when ruſhes are generally cut, the night-time, or very early in the morning, is the moſt proper time for that purpoſe; the Court alſo held the caſes of 2 *Stra.* 777. and *Cro. Eliz.* 819. for good law, and ſeemed to think that the latter was a ſtronger caſe than the caſe at bar: whereupon,

per totam Curiam, the rule was made abſolute for ſetting aſide the nonſuit, and for a new trial; without coſts on either ſide, the plaintiff having been nonſuited upon a miſtake of the Judge in point of law.

For the pleadings in this cauſe, ſee 3 Wilſ. 338.

Birt v. Barlow, 19 G. 3. B. R. Doug. 162.

The Court, under particular circumſtances, will permit a new trial to be moved for after the four days are expired. In an action for crim. con. an actual marriage may be proved by a copy of the regiſter; and the miniſter, clerk, or ſubſcribing witneſſes to the regiſter are not the only competent witneſſes to prove the identity of the perſons married.

This was an action of treſpaſs and aſſault for criminal converſation with the plaintiff's wife. It was tried before BLACKSTONE, Juſtice, at the laſt aſſizes for *Kent*, when, by the direction of the Judge, the plaintiff was nonſuited.

On *Monday*, the 26th of *April*, *Rous* moved for a rule to ſhew cauſe why the nonſuit ſhould not be ſet aſide, and a new trial granted. *Wedneſday*, the 21ſt day of *April*, was the firſt day of term, and, by the practice of this Court, all new trials (in cauſes tried in vacation) muſt be moved for within four days of the beginning of the term, including the firſt; ſo that *Saturday*, the 24th of *April*, was the laſt day for moving. However, *Rous* having ſtated, that he had underſtood that the four days were reckoned *excluſive* of the firſt, and BLACKSTONE, Juſtice, having deſired, at the trial, that the opinion of the Court ſhould be taken, the Court entertained the motion, which was founded on the ground of a miſdirection in point of evidence; and the rule was granted. (c)

(c) Vide The King and Gough. Ante IX. (12.) (b.)

This day BULLER, *Juſtice*, read the Judges report, which was as follows:

The firſt witneſs called by the plaintiff was *Thomas Sharpe*, who proved a copy of the regiſter of the pariſh of *St. Alfred, Canterbury*, in *hæc verba*—" 1767, N° 106, *John Birt*, " Eſq; of pariſh of *St. Margaret, Rocheſter*,

" co.

" co. *Kent*, and *Harriot Champneys*, of this " pariſh, married by banns, 15 *December* " 1767, by *John Lynch*, miniſter. (Witneſſes " *Robert Lynch*, *Francis Champneys*, *Anne* " *Lynch*, *Elizabeth Lynch*," (a). Another witneſs, (*Suſanna* ———) was next called to prove the fact of adultery.—I was of opinion, that this was not ſufficient evidence of the marriage, but that the identity of the parties muſt be proved, elſe it might poſſibly be a regiſter of the marriage, not of the plaintiff and his ſuppoſed wife, but of ſome other perſons of the ſame name. The counſel for the plaintiff then ſaid, in the courſe of their examination to prove the adulterous intercourſe, it would come out from the mouths of the witneſſes, that the plaintiff's reputed wife was of the name and family of *Champneys*, and that they had long cohabited together, and were eſteemed to be man and wife by all their friends and relations. I ſtill thought that the evidence, ſo opened, would be inſufficient, holding in conformity to the caſe of *Morris v. Miller*, reported in 4 *Burr.* 2057, (b) (and of which I alſo had a MSS. note of my own) that this was the only *civil* caſe in which proof of an actual marriage was requiſite, as contradiſtinguiſhed from acknowledgment by the parties, cohabitation, reputation, &c. That the *beſt* proof that could be given of an actual marriage was, by ſome perſon perſonally preſent at the ſolemnity, which, in my ſmall experience, I had never ſeen an inſtance of not producing. If it did

(b) 7. E. 7. G. 3. 1 Black Rep. 632.

(a) I preſume the names of the huſband and wife were alſo ſubſcribed, although that was not ſtated in the report. It is expreſsly required by the marriage act, 26 *G.* 2. *c.* 33. § 15.

not appear that there were any perſons preſent beſides the miniſter *, and he was dead, perhaps other collateral proof might be admitted, which might render probable the identity of the plaintiff and his wife, and the perſons whoſe marriage was ſo regiſtered. But that in the preſent caſe, there appeared to have been no leſs than *five witneſſes preſent* at the marriage thus regiſtered, which was only eleven years ago. That the marriage act had directed the witneſſes to ſubſcribe their names to the regiſter, (†) in order to facilitate the inveſtigation of the legal evidence of marriages. And that 'till theſe five witneſſes and the miniſter were accounted for, as by ſhewing them all dead, or the like, I could not admit leſs proof than that of ſome perſon preſent to demonſtrate the identity of the parties. I accordingly nonſuited the plaintiff. After which, a proctor from the Eccleſiaſtical Court, then preſent, declared openly, that he had been ſubpœnaed by the plaintiff to prove, and could prove, the taking out of a *licence* for the marriage of the plaintiff and his reputed wife. I mention this circumſtance, though it could be no ground of my determination, as it ſhews *ſomething more than a bare poſſibility* that the plaintiff and his wife were not the identical perſons ſo regiſtered as marrying by banns."

† 26 G. 2. c. 36. § 15.

Kempe, Serjeant, and *Peckham*, ſhewed cauſe. —They argued, that the marriage act meant to introduce ſome more accurate proof of marriages than what was in uſe before the paſſing of that act. This purpoſe was expreſſed in the preamble to the 15th ſection. It had accord-

* Two witneſſes at leaſt, beſides the miniſter, are expreſsly required by the marriage act, § 15.

ingly

ingly been enacted, by that ſection, that witneſſes ſhould be preſent who ſhould ſubſcribe their names to the regiſter; and the purpoſe of ſuch ſubſcription muſt have been to point them out, that they might be produced when it ſhould become neceſſary to prove the marriage. There is no caſe in the law where ſubſcribing witneſſes are neceſſary, and yet it is not neceſſary to produce them, or, if they are ſhewn to be dead, to prove their hand-writing. The regiſter proved the marriage of two perſons of the ſame name with the plaintiff and his wife, but could not ſhew that they were thoſe identical perſons.

Dunning, and *Rous*, in ſupport of the rule, obſerved, that the preamble, to the ſection of the marriage act relied on, profeſſed an intention to render the proof of marriages *more eaſy*, and it would be a ſtrange ſoleciſm to contrive it ſo as to render them more difficult. It was admitted, that the proof of *a* marriage was complete, and no caſe could be ſhewn which had determined, that there could be no other evidence of the identity of the parties, but the teſtimony of perſons preſent. Proof of the parties having been ſeen going to church the morning of the day mentioned in the regiſter, or ſleeping together that night, would ſurely be evidence of the identity, and ſo would proof of their having cohabited together, from the time of the marriage downwards. In an action for goods furniſhed to a wife, evidence of cohabitation and reputation is ſufficient. In a caſe of criminal converſation, ſomething more, *viz.* an *actual* marriage muſt be ſhewn. This is done by the regiſter; and when that is coupled with evidence of cohabitation and reputation, the proof is complete. As the copy

of the regiſter only was produced (and was all that was neceſſary) the witneſſes could not have proved their atteſtation, even if they had been called.

Lord MANSFIELD.—From the report it appears, that the ground of the nonſuit was an idea, that the identity muſt be proved by the miniſter, or ſome of the atteſting witneſſes, unleſs their not being produced is accounted for in the ſame manner as is required in the caſe of ſubſcribing witneſſes to a deed. The counſel for the plaintiff ſtated other evidence of the identity; whether ſuch as would have been ſufficient when produced (as that might, or might not be, according to the differences ariſing from the manner of ſtating it) I give no opinion: but the Judge decided that it was *neceſſary* to produce ſome of the ſubſcribing witneſſes. The clauſes in the marriage act relative to regiſters are of infinite utility to the kingdom. They were meant, as well to prevent falſe entries, as to guard againſt illegal marriages without licence, or the publication of banns. The regiſters are directed to be kept as public books, and accompanied with every means of authenticity. But, beſides facilitating and aſcertaining the evidence of marriages, they were intended for other wiſe purpoſes. They are of great aſſiſtance in the proof of pedigrees, which has become ſo much more difficult ſince inquiſitions *poſt mortem* have been diſuſed, that it is eaſier to eſtabliſh one for five hundred years back, before the time of *Charles* II. than for one hundred years ſince his reign. But this advantage would be loſt, and it would be very prejudicial if the act were ſo conſtrued as to render the proof of marriages more difficult than formerly. I take

it

it for granted, that the law ſtands as it did before in that reſpect. Regiſters are in the nature of records, and need not be produced, nor proved by ſubſcribing witneſſes. A copy is ſufficient, and is proof of a marriage in fact, between two parties deſcribing themſelves by ſuch and ſuch names and places of abode, though it does not prove the identity. An action for criminal converſation is the only *civil* caſe where it is neceſſary to prove an *actual* marriage. In other caſes, cohabitation, reputation, *&c.* are equally ſufficient ſince the marriage act, as before. But an action for criminal converſation has a mixture of penal proſecution; for which reaſon, and becauſe it might be turned to bad purpoſes by perſons giving the name and character of *wife* to women to whom they are not married, it ſtruck me in the caſe of *Morris v. Miller*, that, in ſuch an action, a marriage in fact muſt be proved. I ſay, a marriage *in fact*, becauſe marriages are not always regiſtered. There are marriages among particular ſorts of diſſenters, where the proof by a regiſter would be impoſſible; and *Denniſon*, *Juſtice*, in a caſe of that kind which came before him, admitted other proof of an actual marriage. But, as to the proof of identity, whatever is ſufficient to ſatisfy a jury, is good evidence. If neither the miniſter, nor the clerk, nor any of the ſubſcribing witneſſes, were acquainted with the married couple, in ſuch a caſe, none of them might be able to prove the identity. But it may be proved in a thouſand other ways: ſuppoſe the bell-ringers were called, and proved that they rung the bells, and came immediately after the marriage, and were paid by the parties; ſuppoſe the hand-writing of

the parties were proved; ſuppoſe perſons called who were preſent at the wedding-dinner, *&c. &c.*

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

BULLER, *Juſtice*.—The original regiſter is not neceſſary to be produced, and it is only where *that* is required, that ſubſcribing witneſſes muſt be called. In this caſe, the wife's maiden name was *Harriot Champneys*. Suppoſe a maid-ſervant had proved that ſhe always went by that name till the day of the marriage, that ſhe went out that day, and, on her return, and ever ſince, was called *Mrs. Birt?* Surely that would have been evidence of the identity.

The rule made abſolute (*).

Goodtitle ex dim Robert Edwards, verſus Peter Bailey, E. 17 G. 3. B. R. Cowp. 597.

In ejectment which is a fictitious action to recover the poſſeſſion, the leſſor of the plaintiff ſhall not be permitted to defeat a ſolemn deed under his own hand, covenanting that the defendant ſhall enjoy the premiſſes, and alſo, for further aſſurance.

Upon ſhewing cauſe why the nonſuit entered in this caſe ſhould not be ſet aſide, and a new trial granted, the facts appeared to be as follows:

It was an ejectment brought for two tenements in the county of *Dorſet*, diſtinguiſhed by the names of the Greater and Leſs Tenement. The plaintiff claimed under the will of one *Nicholas Edwards*, dated *March* 12th 1750, by which he deviſed the premiſſes in queſtion " to his wife *F. Edwards*, for life, and after " her deceaſe to his brother *John Edwards*, to " be at his diſpoſal: but in caſe he ſhould " happen to die before the ſaid *F. Edwards*, " then he gave the premiſſes to his couſin " *Robert Edwards* (the plaintiff) and his heirs

* The cauſe was again tried at the enſuing aſſizes, and a verdict found for the plaintiff.

" and

" and aſſigns for ever:" and died ſoon after. Upon his death, *John Edwards* entered into and kept poſſeſſion of the *greater* tenement during his life; and by will deviſed *both* the tenements to the defendant *Peter Bailey*. He was poſſeſſed of ſeveral other premiſſes, which he deviſed to the leſſor of the plaintiff, by the ſame will: and died in the life-time of *Frances* the widow, who upon the death of *Nicholas* her huſband, entered into and kept poſſeſſion of the leſs tenement, till ſhe died.—Upon the death of *John*, *Peter Bailey*, the defendant, took poſſeſſion of the greater tenement, which *John* during his life had occupied. Soon after, *Robert*, the leſſor of the plaintiff, by deed of releaſe, bearing date the 5th of *January* 1764, reciting the will of *Nicholas*, and alſo reciting the will of *John Edwards* the brother of *Nicholas*; and further, that *Frances* the widow had ſurvived *John*, whereby the reverſion of the premiſſes were become veſted in him, *Robert*, in fee; reciting alſo that it had been agreed that he the ſaid *Robert* ſhould renounce all his right, title, and intereſt in the ſaid premiſſes to *Peter Bailey*, *the ſaid* Nicholas Edwards *having no power to deviſe the ſame*; he did thereby *renounce*, *remiſe*, *releaſe*, *and for ever quit claim* to the ſaid *Peter Bailey*, and the heirs male of his body, all the ſaid premiſſes, and all his right, title, and intereſt therein; with a covenant for further aſſurance. Subſequent to this releaſe, the widow died; and then *Robert*, the leſſor of the plaintiff, brought this ejectment. Upon the releaſe being read and proved, ſeveral objections were taken to it at the trial, on the part of the plaintiff. 1. That there was no *privity* of eſtate between the leſſor of the plaintiff and the

the defendant, at the time of the releaſe. To this it was anſwered, that it was not a releaſe by way of enlargement of the eſtate, but *pur mitter le droit*, therefore no privity was neceſſary: but this objection was given up. 2. That in reſpect of the leſſer tenement, the widow being in poſſeſſion, there was no eſtate in *Peter Bailey* at the time, upon which the releaſe could operate. 3. That it was fraudulent upon the face of it, being without conſideration; and alſo, for that the recital, relative to *Nicholas* having no power to deviſe the premiſſes was falſe; to prove which, the plaintiff in reply produced the will of *John*, the father of *Nicholas*, giving the premiſſes to *Nicholas* in fee. —But theſe objections were over-ruled by the Judge, who thought that as the leſſor of the plaintiff took a conſiderable eſtate under the will of *John Edwards*, under which will the defendant claimed, he ought not to be allowed to impeach it; and accordingly directed a nonſuit.

Mr. *Manſfield* and Mr. *Buller* now argued in ſupport of the nonſuit, and againſt the rule for a new trial. Mr. Serjeant *Heath contra*, for the rule.

For the defendant it was argued, that ſuppoſing the *releaſe* could not operate as *ſuch*, for want of a ſufficient poſſeſſion in the releaſee at the time, yet it might operate as a *grant* of the *reverſion*. It is a ſettled rule in the conſtruction of deeds, that if ſufficient appears to ſhew the intention of the party to convey, though it cannot take effect in the preciſe form in which it was intended, it ſhall operate in the way in which it can, rather than the intent of the parties ſhall be fruſtrated. *Sheppard*, in his *Touchſtone*, 82, ſays, " A deed

" made

" made to one purpoſe, may enure to ano-
" ther; if meant for a releaſe, it may amount
" to a grant of the reverſion; *or e converſo.*"
So in 2 *Wilſ.* 75, a deed, intended for a releaſe, was held to operate as a *covenant to ſtand ſeiſed:* and the caſes there cited eſtabliſh the doctrine. If ſo, nothing can be clearer than the intention of *Robert* to convey in this caſe; not only from the general words of the deed, but from the covenant for further aſſurance. But a deciſive anſwer is, that the plaintiff is eſtopped by his own deed. The claim he ſets up is expreſsly againſt his own deed, and the objections made to the form of it, go to defeat it. No man ſhall be ſuffered to do that. —As to the objection of *fraud*, becauſe the recital relative to *Nicholas* is falſe, the circumſtances manifeſtly ſhew there was ſome inſtrument, though none ſuch has appeared, under which *John Edwards* was intitled, which warranted him in taking poſſeſſion of the greater tenement, as he did, in the lifetime of the widow, and diſpoſing of them both at his death, notwithſtanding the will of *Nicholas*. With reſpect to there being *no conſideration*, the eſtate which the plaintiff took under the will of *John Edwards*, was a ſufficient conſideration, for his confirming the deviſe of the premiſſes to the defendant. But if it were not, as the plaintiff is content to take ſuch eſtate, he ought not to diſturb the other deviſees in the will. Therefore upon every ground the nonſuit was right.

Lord *Mansfield.* — As to the objection of fraud obſerved, there was no *evidence* of any fraud; that the recital did not appear to be the inductive cauſe of the releaſe; and unleſs ſome inducement was ſhewn, fraud could not be

be preſumed. If any colourable evidence of fraud had been given, the nonſuit would have been wrong; becauſe fraud in this caſe would be a matter of fact; of which the Jury are to judge. So if the plaintiff could have made out a caſe of *miſtake*, it would have been equivalent to fraud. But nothing of the kind appears; and as to the conſideration, it might be fair enough. It depends upon the treaty.

For the plaintiff as to the *other* point, it was contended, that admitting the rule laid down to be true in its fulleſt extent, yet nothing paſſed by the releaſe in this caſe for want of proper operative words. There are appropriated terms to every conveyance: and where the word "grant" is uſed, being *genus generaliſſimum*, if the inſtrument cannot take effect according to its proper form, it ſhall operate in ſome other, if by law it can. But here the words are, "*renounce*, *remiſe*, *releaſe*, and *quit* "*claim*," which are the ſpecial form of words adapted to a *releaſe* only; therefore it cannot operate as a grant. And ſo is *Co. Lit.* 301. "A releaſe cannot operate as a grant, becauſe "it is a peculiar manner of conveyance adapt-"ed to a ſpecial end." In the caſe from 2 *Wilſ.* 75, the word "*grant*" was uſed; and ſo it was in the caſes there cited. But here there is no ſuch word, nor any thing equivalent to it, conſequently nothing paſſed by the deed. If not, the defendant's caſe is not aided by the covenant for further aſſurance; for that at moſt conveys only an equitable right: and as to its being an eſtoppel, the plaintiff is not eſtopped from ſaying any thing, but that the defendant has *no intereſt*.

Lord MANSFIELD.—The rules laid down in reſpect of the conſtruction of deeds are founded

in

in law, reaſon, and common ſenſe: that they ſhall operate according to the intention of the parties, if by law they may. And if they cannot operate in one form, they ſhall operate in that, which by law will effectuate the intention. But an objection is made in this caſe, which, it is ſaid, takes it out of the general rule and the doctrine of the authorities cited: and that is, that in the releaſe in queſtion the word "*grant*" is not made uſe of. But that the intention of the parties was to paſs all the right and title of the plaintiff in theſe premiſſes, is manifeſt beyond a doubt. One thing however is deciſive. This is a *fictitious* action to recover the poſſeſſion. In ſuch an action, if a man has made a ſolemn deed covenanting that another ſhall enjoy the premiſſes, and likewiſe for further aſſurance, it ſhall never lie in his mouth to diſpute the title of the party to whom he has ſo undertaken; no more than it ſhall be permitted to a mortgagor to diſpute the title of his mortgagee. No man ſhall be allowed to diſpute his own ſolemn deed. Therefore *quâcunq' via datâ*, the nonſuit was right. It would be very idle to ſet aſide the nonſuit, only to ſend the party into equity, and make him pay the coſts that way.

Aston, *Juſtice.*—This is the common wording of a releaſe: but though in the ſhape of a releaſe, if there are ſufficient words, it may operate as a grant. The laſt ground however is deciſive: it is clear from the general complexion and circumſtances of this caſe, that there had been ſome diſpute between the parties relative to the wills of *Nicholas Edwards*, and his brother *John*; and that this releaſe was an agreement between them for the purpoſe of adjuſting all matters in difference: and there

there is a covenant for further aſſurance. I think it would be extremely improper, after that, to let the party take a legal objection for the purpoſe of defeating his own ſolemn agreement.

Per Cur. Rule diſcharged.

Minns v. Baxter, M. 26 Geo. 3. B. R. Durnford and Eaſt. 1 V. 16.

The defendant is bound to ſearch in the office, whether the plaintiff has brought in the iſſue roll, before he ſigns judgment of non pros, even though he may have ſearched on the expiration of the rule to bring in the roll.

Baldwin ſhewed cauſe againſt a rule, which had been obtained by *Shepherd* laſt *Trinity* term, calling on the defendant to ſhew cauſe, why the judgment of *non pros*, which had been ſigned in this cauſe, ſhould not be ſet aſide for irregularity. The irregularity conſiſted in this; the plaintiff had a four day rule to bring in the iſſue-roll, which expired the 14th of *June* laſt: the defendant on that day ſearched in the office, and the roll not being then brought in, ſigned judgment of *non pros* the next day at twelve. This practice *Baldwin* contended was regular.

Shepherd, contra. As in fact the judgment was not ſigned till after the roll was actually brought in the next morning, on the 15th, it was then irregular to ſign judgment *without making another ſearch*. He contended, that this was not like a caſe where a party puts himſelf in contempt; as, for inſtance, where an attachment is moved againſt him; becauſe there the perſon, moving for ſuch attachment being once intitled to it, does not waive his right, by omitting to take advantage of it on the very day. But it is like the caſe of a plea, where if it be not put in on the day the rule expires, and the other party does not take advantage of it immediately, the defendant may deliver his plea any time before judgment is actually ſigned againſt him: and

The Court was of that opinion. And it appearing

pearing that the plaintiff's attorney had told the defendant's attorney of the irregularity, and had deſired the matter might be rectified, without its being brought before the Court, but that he had refuſed, the Court made the Rule abſolute with coſts.

Upon ſhewing cauſe why the nonſuit entered in this caſe ſhould not be ſet aſide and a new trial granted, the facts, as they appeared by the report, were as follow: This was an action by an indorſee of a bill of exchange againſt the acceptor. The bill was drawn on defendant, and was made payable forty days after ſight to one *Lenox* or order. *Allen*, the plaintiff's clerk, ſwore that on the 24th of *September* 1785, he preſented the bill to the defendant who lived in *London*, for acceptance, who told him "that the drawer had conſigned "a ſhip and cargo to him and another perſon "at *Briſtol*, but as he could not then tell "whether the ſhip would arrive at *London* or "*Briſtol*, he could not accept at that time;" upon which *Allen* ſaid, that he would leave the bill upon this condition, that in the event of the defendant's not accepting it from the day when it was preſented, he ſhould be at liberty to note it for non-acceptance as from that time. To this the defendant aſſented, and the bill was accordingly left at his houſe, 'till the 8th of *October*, when *Allen* called again, in company with the plaintiff, to know whether the defendant would accept the bill or not, who on being preſſed to accept, ſaid "the "bill was a good one, and *that it would be* "*paid, even if the ſhip were loſt.*" *Allen* immediately upon this, carried the bill to a notary public, and had it noted for non-acceptance

Sproat v. Matthews, 26 G. 3. B. R. Durnford and Eaſt, 1 V. 182.

Where a bill of exchange was drawn upon A. reſiding in London by a conſigner of goods living abroad; on its being preſented for acceptance, A, ſaid, he could not then accept, becauſe he did not know, whether the ſhip would arrive at London or Briſtol. B. the holder of the bill, agreed to leave it for ſome time, reſerving the liberty of proteſting it, for non-acceptance, in caſe A. did not accept. On a ſecond application, A. ſaid the bill would be paid even if the ſhip were loſt. This is only a conditional acceptance, depending on two events, of the ſhip's arriving at London, or being loſt. And B. having the liberty of re-

ſuſing ſuch conditional acceptance, precludes himſelf from recovering againſt A. by afterwards noting the bill for non-acceptance. Whether a conditional or an abſolute acceptance, is a queſtion of law.

ance from the time when it was firſt left with the defendant. The ſhip afterwards arrived ſafe at the port of *London*, and the cargo was diſpoſed of by the defendant.

Buller, *J.*—who tried this cauſe at the laſt ſittings at *Guildhall*, being of opinion that this amounted only to a *conditional acceptance*, which the plaintiff was at liberty to refuſe or not as he choſe, and that his noting the bill immediately after the ſecond converſation, ſhewed that he was not ſatisfied with ſuch conditional acceptance, nonſuited the plaintiff.

This motion had been made on two grounds;

1ſt. That this muſt be conſidered as an abſolute acceptance.

2dly. That even if it were a conditional one, it ſhould have been left to the Jury to conſider whether the plaintiff had precluded himſelf by his ſubſequent conduct from recovering againſt the acceptor.

Wilſon and *Baldwin*, againſt the rule, contended that this was only a conditional acceptance; and it was clear that it was ſo underſtood by the parties at the time; for if the plaintiff had conſidered it as an abſolute acceptance, he would not have proteſted it immediately for non-acceptance. No perſon could explain the converſation which took place between the parties ſo well as themſelves; and the acts of the plaintiff prove what an impreſſion it made on him. After the plaintiff had proteſted the bill for non-acceptance, he ought not to be permitted to ſay, he was ſatisfied with the acceptance. It is concluſive againſt him; for by noting the bill for non-acceptance, he gave up the defendant altogether. Then it ought not to have been left to

the

the Jury to conſider whether the parties had miſunderſtood the converſation.

Erſkine and *Wood*, *contra*, inſiſted that the ſecond converſation alone amounted to an abſolute acceptance; if ſo, nothing which the plaintiff did could be a waiver of it. The words "*even if the ſhip were loſt*," can only admit of one grammatical conſtruction. It is taking for granted that the bill would be paid, if the ſhip arrived ſafe; and theſe words import, that it would be paid at all events, whether the ſhip was loſt or not.

Then taking the ſecond converſation as explanatory of the firſt, it proved that the defendant only doubted at firſt on the event of the ſhip's arrival at *London*; but that doubt was put out of the queſtion, by the ſubſequent converſation, when he ſaid he would accept at any rate, even if the ſhip were loſt; that is, even if that event ſhould take place which he apprehended and doubted at firſt.

But ſuppoſing the acceptance to be conditional, the event, on which the defendant was to accept, having happened by the arrival of the ſhip at *London*, the only point to be conſidered was, whether the plaintiff had precluded himſelf by his ſubſequent conduct, in noting the bill, from having recourſe to the defendant. This might be reconciled from conſidering the purport of the bill, which was payable forty days *after ſight*. The *noting* of the bill *was not* for the purpoſe of proteſting it for non-acceptance, but only in order to aſcertain the time when it was preſented for acceptance. At all events, if there was any ambiguity in the tranſaction, either reſpecting the acceptance, or the waiver of it, it ſhould have been left to the Jury to conſider, whether, un-

der all the circumſtances, the plaintiff had precluded himſelf from recovering on this acceptance.

Lord MANSFIELD, *Ch. J.*—was abſent on this day, and continued abſent during the reſt of the term.

WILLES, *J.*—Whether this nonſuit was right or not, depends on two queſtions.

1ſt. Whether this was an abſolute, or a conditional acceptance? in determining which, we muſt conſider the two converſations between *Allen* and the defendant together. When the bill was firſt preſented to the defendant for acceptance, he ſaid, he could not accept at that time, becauſe he did not know, whether the ſhip would come to *London* or not. The reaſon of this anſwer is obvious, becauſe if the ſhip arrived at *Briſtol*, ſhe was conſigned to another perſon. Then, in a ſubſequent converſation, he ſaid, " the bill will be paid, " even if the ſhip be loſt." So that he accepted on two conditions; namely, the *one*, if the ſhip came to *London*, in which caſe he would be enabled to pay himſelf with the profits of the cargo; *the other*, in caſe the ſhip was loſt, when he would have wherewithal to ſatisfy the bill, he having a policy of inſurance on the ſhip in his hands: but he did not accept in the third inſtance, which was in the event of the ſhip's going to *Briſtol*.

The Court has not of late been very nice with regard to what ſhall be conſtrued to be an acceptance; for though, formerly, it was held neceſſary, that an acceptance ſhould be in writing, yet of late years, a parol acceptance has been deemed ſufficient. And indeed, at preſent, almoſt any thing amounts to an acceptance. Therefore, if there were a doubt, whether

whether this was a conditional or an abſolute acceptance, or whether (admitting it to be a conditional one only) the party had precluded himſelf by his ſubſequent conduct, the whole of the facts ſhould have been left to the Jury. So that I am of opinion that the nonſuit ought to be ſet aſide.

Ashhurst, *J.*—I do not concur with my brother *Willes*, that this nonſuit ought to be ſet aſide. In the caſe of a written acceptance, the acceptance ſpeaks for itſelf: but this being a parol acceptance, the conduct of the plaintiff is deciſive againſt him. And the *evidentia rei* ſhews that he put the right conſtruction on this tranſaction, by procuring the bill to be noted. On the firſt converſation, the defendant expreſſed a doubt, whether the ſhip would come to *London*, or to *Briſtol*; if to *London*, he would have had effects in his hands to indemnify himſelf, becauſe the cargo was conſigned to him; if to *Briſtol*, it was conſigned to another perſon. Then it was agreed between the parties, that the bill ſhould be left with the defendant, with liberty to the plaintiff to note it, as from the firſt tender of the bill, in caſe the defendant ſhould not eventually accept. On the ſecond converſation, the defendant is repreſented to have ſaid, "the bill "will be paid, even if the ſhip be loſt." The witneſs might have varied this phraſe.

But at all events, this only amounted to a conditional acceptance, in caſe the ſhip arrived at *London*, or was loſt; which the plaintiff afterwards waived. If the party had conceived it to be an acceptance, he ſhould have required that to be ſignified on the bill itſelf: then it was ſaid that the reaſon why the bill was noted, was to mark the time from which

it was to be conſidered as accepted; but that might have been better effected on the bill, by accepting it as from that day. Then it is manifeſt that the parties underſtood at the time, that the matter was left unconcluded. If ſo, the plaintiff is abſolutely bound by his ſubſequent act; for he proteſted the bill for non-acceptance; therefore, there could be nothing to leave to a jury.

Buller, J.—We are now to determine on a point of law, which is deciſive that this queſtion ought not to have been left to the Jury. Whatever may have been the doubts formerly of what amounted to an acceptance, I conceive it is the ſole province of the Court to decide, whether this is an abſolute or a conditional acceptance. This caſe was proved by one witneſs, on the part of the plaintiff; the defendant's counſel admitted this evidence to be true; but inſiſted that upon that evidence, the defendant was not liable in point of law. Then there was nothing to be left to the Jury. If the defendant had objected at the trial that the plaintiff's witneſs might be miſtaken in his expreſſions, that might properly have been left to the Jury, who are to decide on the credit or accuracy of a witneſs. Then, ſuppoſing theſe facts had been ſtated on a ſpecial verdict, the Court would have been bound to determine whether this, in point of law, was an acceptance or not. And this brings it to the true queſtion before us, namely, whether this is a conditional or an abſolute acceptance? There is no ground for ſaying it was an abſolute one. It was not thought of at the trial; and the words of the defendant preclude every idea of it. Taking both the converſations together, it is deciſive againſt the plaintiff. At

the

the firſt converſation the defendant ſaid, I do not know whether the ſhip will come to *London*, and therefore I cannot accept at preſent. At that time then, he only intended to accept in the event of the ſhip's coming to *London*; at the ſecond he ſaid, " the bill will be paid, " even if the ſhip be loſt;" both the converſations therefore amount to this, that there were two events in which the bill would be paid, the one, if the ſhip came to *London*; the other, if ſhe were loſt. It is evident from what paſſed, that the defendant did not intend to accept, unleſs he had wherewithal in his hands to reimburſe himſelf. If the ſhip came to *London*, he had the diſpoſal of the cargo; if ſhe were loſt, he was in poſſeſſion of the policy. This, therefore, was a conditional acceptance; and in theſe caſes the holder may chooſe whether he will be ſatisfied with it or not: but here the plaintiff has waived it, by proteſting the bill for non-acceptance. And his reaſon for noting it for non-acceptance, as from the firſt day, was, that he might proceed againſt the drawer for intereſt for a longer time.

Rule diſcharged.

Caſe for goods ſold and delivered.

Pleas the general iſſue, and a ſet-off.

The cauſe was tried at the laſt aſſizes at *Lancaſter*, before *Willes*, Juſtice, when the plaintiff was nonſuited.

On a motion to ſet aſide the nonſuit, it appeared, that the plaintiff had bargained to ſell to the defendant, who lived at *Mancheſter*, a quantity of tobacco, the value of which, in addition to a former debt of £. 23. for ſome other tobacco, amounted to £. 50. It was

Alexander v. Owen, E. 26 G. 3. B. R. Durnford and Eaſt. 1 V. 225.

Where goods are delivered under an agreement to take a ſpecific parcel of copper money in payment; a delivery of ſuch copper will be a good bar to an action for the value of the

goods, though in fact it was counterfeit money. An illegal contract if reſcinded as to part, muſt be reſcinded in toto.

agreed at the ſame time between the parties, that the plaintiff ſhould take in payment of that debt, a quantity of copper halfpence, which were made up in crown papers, in each of which was no more than five pennyworth of good halfpence; and it was alſo agreed, that if the amount of the copper ſhould exceed the value of the tobacco, ſome more of the latter ſhould be ſent to balance the amount. Part of the tobacco was delivered, but the plaintiff refuſed to ſend the remainder, unleſs the defendant would pay for the whole in good money. Several ſamples of this copper were ſhewn to the plaintiff at the time of the agreement, who ſaid it would paſs very well at *Liverpool*, where he lived. The copper was accordingly ſent to the plaintiff, on the 19th of *July*, and on the 30th of *Auguſt* the defendant wrote a letter to the plaintiff, refuſing to take it back, in anſwer to a letter of his of the 28th of the ſame month, complaining of the badneſs of it, and refuſing to accept it. It alſo appeared, that before the writing of this letter, the parties had correſponded on the ſubject: but the copper was not actually returned till *November*.

The queſtion was, Whether the delivery of the copper was a good payment? If ſo, there was more than enough to balance the plaintiff's demand. *Bolton*, Serjeant, againſt the rule, inſiſted that this was not a contract for the purpoſe of uttering bad money, which would have been illegal, and therefore void under the ſtat. 15 *Geo.* 2. *c.* 28. but it was an agreement by the plaintiff to take a ſpecific parcel of copper, which was valid and legal. But ſuppoſing it otherwiſe, the plaintiff was equally culpable with the defendant, and as it appeared

appeared that he had ſeen the identical copper at the time of entering into the agreement, he ought not to be permitted to object to it now, as an illegal contract.

Scott and *Haywood*, *contra*, contended that this agreement was void, becauſe it was an agreement to commit an offence; and therefore the defendant could not protect himſelf under it, for, independant of the ſtatute of the 15 *Geo.* 2. it was a miſdemeanor to utter counterfeit money knowing it to be ſuch.

But ſuppoſing the plaintiff would have been bound by the agreement, if it had been concluded; yet it was only executory, for the plaintiff ſent word that he would not take the copper money as payment; and he kept back part of the tobacco which had been agreed for. If an action had been brought by the defendant to compel the delivery of the reſt of the tobacco, he could not have recovered, becauſe there was no legal conſideration: and if the defendant had never ſent this copper in payment, the plaintiff could not have compelled him to perform the contract, which would have ſubjected him to a criminal proceſs. Then he ought not to be permitted to take advantage of it in this ſhape.

This queſtion ſhould have been left to the Jury, to determine the extent of the agreement; and at leaſt the plaintiff was entitled to recover that part of his debt which accrued previous to this contract.

It has been ſettled, that if a contract is valid as to part, and void as to the reſt, the plaintiff may recover upon that part of it which is legal. *Robinſon* v. *Bland*, 2 *Burr.* 1077.

WILLES, *J.* declared himſelf ſatisfied with the nonſuit.

ASHHURST, *J.*—The nonſuit in this caſe ought to ſtand; for it does not appear that the parties entered into this contract, knowing it to be illegal: but even if it were ſo, it does not lie in the plaintiff's mouth to take advantage of it.

BULLER, *J.*—It has been objected that this is an illegal contract: there is no doubt but that an agreement to take counterfeit money, knowing it to be ſo, is void; but the fact does not come up to it in this caſe. The plaintiff did not agree to take counterfeit money in payment, but the agreement was to take ſuch copper money as was then ſhewn to him.

Suppoſing, however, that this contract was illegal, the plaintiff would not ſtand in a better ſituation. He could never recover; for the argument of the plaintiff's counſel, in caſe an action had been brought by the defendant to recover the remainder of the tobacco, would have been equally applicable to the plaintiff. It cannot be ſaid that the ſale is good, and that the payment is bad; if it is an illegal contract, it is equally bad for the whole. It would be great injuſtice to allow the plaintiff to recover in this action the whole value of the goods ſold, becauſe that would be permitting him to take advantage of a corrupt agreement, which is never allowed in caſes where a party applies to the Court to ſet aſide ſuch agreements.

That was the principle on which the Court went in a late caſe of *Fitzroy* and *Gwillim* (a), where they ſaid, that, if a party applies to the Court to reſcind a contract on the ground of its illegality, it muſt be done in *toto*, and he muſt not derive any advantage under it. The parties are in *pari delicto*, and if one of them ſeek relief,

(a) Durnford and Eaſt, 1 V. 154.

relief, he muſt firſt do what is juſt; according to the principle eſtabliſhed on the other ſide of the hall, that he who aſks equity muſt do equity.

This nonſuit will not preclude the plaintiff from recovering the £. 23, which was owing upon a former agreement, becauſe that debt aroſe from a fair and valid tranſaction: but that is no reaſon for ſetting aſide the nonſuit in this caſe.

Rule diſcharged.

King v. Pippet, E. 26 G. 3. B. R. Durnford and Eaſt, 1 V. 235.

In an action for bribery at an election where the declaration ſet forth the precept from the ſheriff to the portreeve of a borough, the improper inſertion of the word "if," in ſuch precept is not a fatal variance, but it will be rejected as ſurpluſage.

Debt for two penalties of £. 500 each, under the ſtatute of the 2 *Geo.* 2. *c.* 24. for preventing bribery at elections.

This was tried at the laſt aſſizes for the county of *Devon*, before *Eyre*, Baron, when the plaintiff was nonſuited upon the ground that there was a variance between the precept ſtated in the declaration, and the one which was proved.

The declaration recited the writ to the ſheriff for the election of members to ſerve in parliament, and then proceeded to ſtate, that the ſheriff *made his precept* to the portreeve of the borough of *Honiton*, which concluded in theſe words, "and *if* the ſaid election ſo made, "diſtinctly, and openly, under the ſeal of the "portreeve, and the ſeals of thoſe who ſhould "be preſent at ſuch election, the ſaid por-"treeve ſhould certify to the ſaid ſheriff, ſo "that the ſaid ſheriff ſhould certify to his ſaid "majeſty, in his ſaid majeſty's chancery, at "the day and place aforeſaid, without delay; "remitting to the ſaid ſheriff one part of the "aforeſaid indentures, ſo that the ſaid ſheriff "might remit the ſame to his ſaid majeſty, "annexed to his majeſty's writ." The precept when produced, had not the word "*if*," which

which the Judge thought did not ſupport the declaration.

Gibbs ſhewed cauſe againſt a rule which had been obtained to ſet aſide this nonſuit.

The precept ſtated in the declaration, is not proved by the real one, which has a perfect concluſion inaſmuch as it contains a poſitive direction to the portreeve to proceed to election, and return the precept; whereas that ſet out in the declaration has an imperfect and conditional concluſion.

(a) Dougl. 642.

The principle laid down in the caſe of *Briſtow* and *Wright* (a) decides, that this is a legal objection. That was an action againſt the ſheriff, for taking goods without leaving a year's rent. In the declaration, the particulars of the demiſe were ſet forth, which was held to be unneceſſary; but the plaintiff, having undertaken to do it, and not proving them as ſet forth, was nonſuited. It was ſaid by Lord *Mansfield* in that caſe, that "the diſtinction is "between that which may be rejected, as ſur-"pluſage, (which might have been ſtruck "out on motion) and what cannot. Where "the declaration contains impertinent matter, "that will be rejected by the Court, and need "not be proved; but if the very ground of "the action be miſtated, as where you under-"take to recite that part of the deed on which "the action is founded, and it is miſrecited, "that will be fatal; for then the caſe declared "on, is different from that which is proved, "and you muſt recover *ſecundum allegata et* "*probata.*" The queſtion then is, whether the ſetting out this precept be impertinent or immaterial? if the former, the variance in the declaration is not fatal, becauſe in ſuch caſe, it is not neceſſary to prove the precept; but

if

if immaterial only, as the plaintiff has undertaken to ſet out that which he need not have done, he is bound to prove it as ſtated. Here perhaps it might have been ſufficient to have ſtated that there had been an election, and that at ſuch election the bribery had been committed; but the plaintiff having undertaken to ſet out this precept, is bound to prove it as ſet forth, becauſe he makes out his caſe through it.

If the inſertion of the word "if" makes any alteration in the ſenſe, it is a ſufficient objection; and it is clear in this caſe, that it alters the ſignification of every ſubſequent word, by making that conditional which ought to be poſitive: therefore every word which follows "*if*," in the declaration, muſt be taken in a different ſenſe from that in which they are to be underſtood in the precept. It is not enough to ſay, that by the rejection of the word "*if*" the ſenſe will be complete, for any perſon reading this record, would rather ſuppoſe that ſomething had been omitted in the concluſion, than that the word "*if*," had been improperly inſerted in this part.

Lawrence and *Watſon contra* argued, that the declaration did not affect to ſet out the *tenor* of the precept, in which caſe the variance would have been fatal; but it only ſtated that the ſheriff had made his precept, by which he had given certain directions to the portreeve.

The Court may not only read the declaration without the word "*if*," but even without any part of the precept in which it is contained, becauſe it was not neceſſary to be ſet forth. In the caſe of the *King* and *Beach* (a), *undertood* was written for *underſtood*, in the aſ-

(a) Cowp. 229.

ſignment

ſignment of perjury, which was held not to be a fatal variance. If then the Court can ſupply a letter in order to make ſenſe, they may alſo reject a word for the ſame purpoſe. For the introduction of the word "*if*" makes the whole ſentence unintelligible.

In the caſe of *Briſtow* and *Wright*, the whole of the contract was neceſſary to be proved, and conſequently the *time* when the rent was payable; but here the matter ſtated was perfectly unneceſſary. The mode of election, and the return by the portreeve to the ſheriff, were irrevelant to this action, and therefore they may be rejected as ſurpluſage, according to what was ſaid by the Court in *Briſtow* and *Wright*, with reſpect to irrelevant covenants in a leaſe.

(b) Dougl. 183. The *King* and *May* (b) was an indictment for perjury, committed on the trial of an indictment for an aſſault, in which were theſe words, "whereby his life was greatly *deſpaired* "of." This laſt indictment was ſet out in the former, omitting the word "*deſpaired*;" this was *ſupplied* by the Court; upon the ground that the omiſſion of that word made it nonſenſe; the ſame reaſon therefore holds for *rejecting* this word.

They then cited *Wilſon* againſt *Mawſon*, at the ſittings after *Michaelmas* term, 13 *Geo.* 2. at *Weſtminſter*. That was an action for falſe impriſonment, and the bill of *Middleſex*, upon which the party had been arreſted, was ſet forth in the declaration as follows: that the ſheriff was commanded to take A. B. (the then defendant) and *John Doe*, if, *&c.* and them, *&c.* ſo that he might have their bodies before our Lord the King, at *Weſtminſter*, on, *&c.* (*verbatim* to the end.) The bill of *Mid-*

†

dleſex

dleſex being read, was in theſe words: the ſheriff is commanded to take *A. B.* and *John Doe, if they ſhall be found in his bailiwick, and them ſafely keep*, ſo that he may have their bodies before, *&c.* it was inſiſted by the defendant's counſel, that this was a variance between the bill of *Middleſex*, and the record, and that it was not ſufficiently ſet out, on account of the words, *&c.* *Sed per Lee*, C. J. the objection is, that all the bill of *Middleſex* is not ſet out in the record, but there is no occaſion to ſet it all out. The ſubſtance is ſufficient, and there is no variance between the bill of *Middleſex*, and ſo much of it as is ſet out in the record.

So alſo the caſe of *Hendray* againſt *Spencer* (a), which was an action brought by the high bailiff of *Weſtminſter*, againſt the defendant, in the nature of an eſcape. The declaration ſtated a *latitat* againſt *Donner* and *J. Doe*, with an *acetiam* againſt *Donner*, for £. 30. That a warrant was made to the high bailiff, *&c.* and that the plaintiff (the high bailiff) arreſted *Donner*, and delivered him to the defendant, who promiſed ſafely to keep him, but afterwards permitted him to eſcape, by which means the plaintiff was obliged to pay the money. The writ produced in evidence, was againſt *Donner* and two others, and not againſt *J. Doe*. Mr. *Mansfield*, on behalf of the defendant objected that this writ did not prove the declaration, but was a variance; for a writ againſt *Donner* and two others, could not be the ſame as a writ againſt *Donner* and *J. Doe*. *Wallace contra*, ſaid, the only queſtion was, whether ſuch a writ iſſued, as warranted the arreſt of *Donner*, and that had been proved. Lord *Mansfield* over-ruled this objection, and ſaid,

(a) Sittings at Weſtm. after Mic. 1773.

ſaid, this was a ſufficient writ to warrant the arreſt, and that was all that was neceſſary.—Plaintiff had a verdict.

WILLES, *J.*—I am of opinion, that this nonſuit ought to be ſet aſide. It is agreed that the whole precept need not have been ſet out; ſo that ſtating it was ſurpluſage. It is likewiſe agreed, that the precept is not ſet out according to its *tenor*. But it is objected that the laſt clauſe of the precept is ſet out as conditional, inſtead of its being a poſitive averment. If it were ſo, the argument would have ſome weight: but I do not think the inſertion of the word "if" varies the ſenſe of the ſentence; but, if it has any effect, it makes nonſenſe of a precept, which ought not to have been ſet out at all, therefore the Court is bound to reject ſuch a word. The caſe of the *King* and *Beach* (b) applies very ſtrongly; there the omiſſion of the letter "s," did not change the ſenſe; neither in the preſent caſe does the addition of the word "if," convey a different meaning. If this word be rejected, the ſenſe is complete; and I think we are warranted in rejecting it by the caſe of *Hendray* v. *Spencer*, where though there was a variance in the names of the two perſons in the writ, yet enough of it was ſet forth to warrant the arreſt.

(b) Cowp. 229.

This is totally different from the caſe of *Briſtow* v. *Wright*. There the demiſe was particularly ſet forth, which varied materially from the demiſe as proved; therefore the ſenſe itſelf was different.

ASHHURST, *J.*—I think the Court may, and ought to reject the word "if," as ſurpluſage; for on reading the record, we ſee that the word introduced is nonſenſical. The Court

Court is bound to judge according to certain and known rules of law, and they muſt take notice, *ex officio*, of what is the form of the precept. It is a matter of notoriety, and looking on the record, we ſee the word "if," inſerted, which is contrary to the form of the precept. Therefore, this is not like a matter in *pais*, which the Court can know nothing of 'till it comes before them.

This caſe does not appear ſo ſtrong as thoſe of *Hendray* v. *Spencer*, and *Wilſon* v. *Mawſon*; for the addition of a name was a thing which the Court could not poſſibly know 'till the production of the writ at the trial: but this is what they muſt, on reading, know to be wrong. Therefore I am of opinion, that the nonſuit ought to be ſet aſide.

BULLER, *J.*—The declaration in this caſe is much longer than it need have been. There was no neceſſity to ſet out the precept, but, being ſet forth, the queſtion is, whether the variance is or is not material? I think it is impoſſible for any perſon to read this part of the declaration, without knowing what it ſhould be: every one muſt ſee by it, that the portreeve *is abſolutely to certify to the* ſheriff, *&c.* The inſertion of the word "if," is a mere miſtake. The caſe of the *King* v. *Beach*, is much ſtronger than the preſent. There, the Court ſupplied a letter to make up a word, which was neceſſary in ſetting out an indictment: but here, it was not neceſſary to ſtate the precept at all. But it does not reſt here only: there are other caſes equally ſtrong, as *Hendray* v. *Spencer*, and *Cuming* v. *Sibly*, *E.* 9 *Geo.* 3. *C. B.* which was an action for bribery: there the declaration ſtated the precept to be directed to the *mayor only*; but the precept which was proved, was directed to the

Mayor and Burgeſſes; and the only queſtion in the caſe which was reſerved for the opinion of the Court, was, whether the precept that was proved, ſupported the declaration? The Court of Common Pleas was of opinion, that it did, and gave judgment for the plaintiff. In that caſe, there was a variance in the perſon to whom the precept was directed; but the Court was of opinion, that if it were the ſame in ſubſtance as that which was ſet forth in the record, it was ſufficient, unleſs the *tenor* was ſtated. So in this caſe, the variance, to have any effect, muſt be a variance of ſenſe, and of ſomething material.

(a) Dougl. 643. (b) Dougl. 640. (c) Dougl. 695. Vide poſt IX. (19.)

The three principal caſes which have been argued in this Court of late years, are, *Shute v. Hornſey* (a), *Briſtow v. Wright* (b), and *Grant v. Aſtle* (c), all of which were upon contracts. In theſe kind of caſes, it is neceſſary to ſet out the contract in the declaration; and if it be different in any part, the whole foundation of the action fails, becauſe the contract is entire.

(d) Trin. 7 Geo. 3. B. R.

In the caſe of the *King* v. *Lookup* (d), which was an indictment for perjury; the objection was, that the indictment ſtated the bill in Chancery, to be directed to "*Robert Lord* "*Henley*, *&c.*" whereas it was directed to "Sir *Robert Henley*, Knight, *&c.*" But that objection was over-ruled.

(e) 2 Stra. 1155.

The caſe of *Shuttleworth* v. *Pilkington* (e), is likewiſe extremely ſtrong. That was an action on a bail bond. The ſpecial original was returnable, *coram domino rege ubicunque tunc fuerit in Angliâ:* but the word "ubicunque," was omitted in the bail bond: and it was objected, that by the ſtatute of *Hen.* 6. (which was pleaded) the ſheriff could take no bond, but

but ſuch as correſponded with the writ; whereas this might be to compel an appearance out of *England*, if the king ſhould happen to be ſo. But the Court ſaid it was ſufficient in theſe bonds, to ſtate in *ſubſtance*, the deſign of the writ; and that they would underſtand, that by appearing before the king, was meant before the *king in his court*, and not before the *king in perſon*. And the plaintiff had judgment.

In the preſent caſe, the ſenſe of the precept as ſtated in the declaration, is the ſame as that which was proved: it commands the returning officer to proceed to an election. Therefore as this is not a variance in ſenſe; I am of opinion, that the nonſuit ſhould be ſet aſide.

Rule abſolute.

Kulen, Kemp and others againſt Vigne, T. 26 G. 3. B. R. Durnford and Eaſt, 1 V. 304.

Money having been expended in reclaiming a cargo on board a ſhip captured, was inſured by the owners upon the event of the ſhip's arrival at Marſeilles. The ſhip being captured and reſtored upon appeal, relinquiſhed her voyage, and was afterwards loſt. Pending the appeal, the goods were ordered to be ſold, and the expences of the appeal were afterwards defrayed therewith, yet an

This was an action on a policy of inſurance, which came on to be tried at the ſittings after laſt *Eaſter* term, at *Guildhall*, before *Buller*, *J.* —who nonſuited the plaintiff.

Upon a motion to ſet aſide that nonſuit, the following facts were reported, That the inſurance was upon goods on board the ſhip *Emanuel*, at and from *Falmouth* to *Marſeilles*, warranted a *Daniſh* ſhip; and on the policy was this *memorandum*; "The following in-"ſurance is declared to be on money ex-"pended for reclaiming the ſhip and cargo "valued at the ſum which ſhall be declared "hereafter. The loſs to be paid in caſe the "*ſhip* does not arrive at *Marſeilles*, and with-"out farther proof of intereſt than this po-"licy; warranted free from all average, and "without the benefit of ſalvage."

It appeared that the plaintiffs were proprietors of the *cargo*, but not of the *ſhip*. That the ſhip originally ſailed with the cargo on

averment of a loſs by capture is bad, becauſe the ſhip might notwithſtanding the capture have afterwards arrived at Marſeilles: and this being a wagering policy, the aſſured could not at any time abandon.

board from *Riga* on a voyage to *Marſeilles*, and that an inſurance had been effected at *Bremen* upon the cargo for that voyage; in the courſe of which ſhe was taken, and brought into *Falmouth*, by an *Engliſh privateer*. That ſentence of condemnation had been there obtained, which was afterwards reverſed upon the prize having been proved to be a neutral ſhip, but the expences of procuring that reverſal were ordered by the admiralty court to be a charge upon the cargo. The plaintiff's agents accordingly paid the ſum of £. 1031. 14*s*. for the expences of reclaiming the ſhip and cargo; and immediately procured the policy in queſtion to be effected in *January* 1781, according to the purport of the *memorandum*. In the *February* following the ſhip ſet ſail from *Falmouth* with the original cargo on board, in the proſecution of her voyage to *Marſeilles*; but on the 26th of the ſame month, before her arrival there, was captured by a *Spaniſh* ſhip, and carried into *Ceuta* in *Spain*, where ſhe was again condemned.

An appeal was brought in the ſuperior court of *Madrid*, which promiſing to be of long continuance, the cargo, which was of a periſhable nature, was ordered to be ſold, and the proceeds to be brought into court, to wait the event of the ſuit. In *May* 1783, the veſſel was reſtored by ſentence of the court, and the ſurplus of the proceeds which aroſe from the ſale of the cargo, was paid to the owners, deducting the expences incurred in *Spain* in proſecuting the appeal. After all the charges paid, there only remained twenty-ſix rix-dollars. As ſoon as the ſhip was liberated, ſhe ſailed from *Ceuta* to *Malaga*, in order to refit, and having there made the neceſſary

ceſſary repairs, ſet ſail for *Bremen*, and in that voyage was loſt.

The inſurance made upon the cargo at *Bremen* has been paid. The declaration averred, that "*whilſt the ſhip was proceeding in* "*her ſaid voyage from* FALMOUTH *to* MARSEILLES, *and before ſhe could arrive* at MARSEILLES, ſhe was captured by the SPANIARDS, and thereby the ſaid ſhip, and alſo "the goods and merchandizes on board her, "were totally loſt to the plaintiffs."

Buller, *J.*—then proceeded to obſerve, that at the trial, it was objected on the part of the defendant; 1ſt. That this was not an inſurable intereſt; and, 2dly. That the plaintiffs could not recover upon the policy in this form of declaring, for they had ſtated the loſs to have happened by *capture*; whereas, though the veſſel was captured, yet, having been afterwards reſtored, ſhe might have reached her deſtined port notwithſtanding the capture, in which caſe the underwriters would have been diſcharged by the terms of the memorandum. And that he, being of that opinion, had nonſuited the plaintiffs.

Erſkine and *Adam* ſhewed cauſe, and contended that the nonſuit ought to ſtand, as well upon the merits, as upon the validity of the objection, which had been taken in point of form. It is material in the firſt inſtance for the Court to conſider how far the averment made by the plaintiffs, that they are intereſted in the premiſes, is well founded in point of law; for if it appears that the under-writers at *Bremen* were anſwerable for the expences which had been incurred in reclaiming the goods, in that point of view the preſent contract would amount to a re-aſſurance, and was conſequently

void. Then as to the event inſured, which is the arrival of the *ſhip* at *Marſeilles*; in order to entitle the plaintiffs to recover upon an averment of a loſs by capture, they ſhould have proved that the ſhip did not arrive there in conſequence of the *capture*. But notwithſtanding that event, the ſhip might afterwards have reached her port of deſtination.

This policy is eſſentially defective and nugatory; for the ſubject matter of the inſurance is entirely unconnected with the event which is inſured againſt, the plaintiff not having inſured againſt any event by which he might be deprived of his property. And whether the ſhip and cargo arrived or not at *Marſeilles* was perfectly immaterial; for, if the ſhip and cargo arrived, the plaintiffs could not have been reimburſed the expences which they had been put to; the cargo would ſtill only have been worth its original value; and if it did not arrive there, the under-writers at *Bremen* would have been liable. So that it would have made no difference as to the real intereſt of the plaintiffs, whether this inſurance had been made upon the arrival of any other ſhip; and it is in the nature of a wager.

To entitle the plaintiffs to recover, it was incumbent on them at the trial to have ſhewn two things; 1ſt. That the veſſel uſed her utmoſt endeavours to get to *Marſeilles*; and for this purpoſe it muſt be taken that the plaintiffs had a right to order the deſtination of the veſſel. 2dly. That ſhe was prevented from arriving there by ſome peril inſured againſt. The event inſured againſt here, was the non-arrival of the ſhip at *Marſeilles*, and there is an averment that the ſhip was captured. If this had been a policy upon intereſt, the averment

that

that the ſhip was captured would have been good; for in ſuch caſe, wherever the voyage is interrupted or defeated, the party intereſted may abandon; but it is otherwiſe upon a wagering policy; there being nothing to abandon, as the ſubject matter of the inſurance in queſtion is incapable of abandonment; and this diſtinction was taken in *Fitzgerald* and *Pole* (a). Here then the plaintiffs have entered into two inconſiſtent contracts. As againſt the under-writers at *Bremen*, the plaintiffs were entitled to abandon upon the firſt of theſe contracts, and recover as for a total loſs; for ſuch a policy is an indemnity againſt a particular event by which a loſs or damage may accrue to the thing inſured: but with regard to the preſent contract, the event inſured being the arrival of the ſhip at *Marſeilles*, the plaintiffs could not abandon, but were bound to uſe their beſt endeavours to ſend the ſhip thither. For, if by any act of the aſſured, as by abandonment, it was rendered unneceſſary for the ſhip to proceed to *Marſeilles*, and in conſequence, ſhe ſteered a different courſe, the under-writer was inſtantly diſcharged. Therefore, the very act of abandonment, which enabled the plaintiffs to call upon the under-writers at *Bremen*, precludes them from maintaining their preſent demand.

(a) 5 Brow. App. 137.

Piggot and *Baldwin*, *contra*, argued from the clear intention of the parties, that the only object of the inſured, in procuring the policy in queſtion to be effected, was to indemnify themſelves againſt the expences which they had been put to in reclaiming the cargo. They had acted *bonâ fide*, and laid all the information which they were in poſſeſſion of before the under-writers. This demand is declared

to be for money actually expended upon the goods, and therefore the increaſe is only to be conſidered as an increaſe of the original value of the cargo, and as if it had been under-inſured at firſt; in which caſe it would certainly have been competent to them to have covered the whole of their intereſt by a freſh inſurance.

Although by the terms of the *memorandum* on the policy, the event inſured was the arrival of the *ſhip* at *Marſeilles*, and *not* of the *cargo*; yet that muſt neceſſarily be confined to her arrival in *that voyage*. It could never have been the meaning of the parties that the aſſurers were to be diſcharged, if the ſhip arrived at *Marſeilles* at any diſtance of time; every contract of this nature is obviouſly confined to the voyage intended. But if the object of the voyage was defeated, by any peril in the courſe of it, the continuation of it became nugatory, and the aſſured having in conſequence abandoned that voyage, and afterwards ſteered a different courſe, cannot be conſidered as amounting to a deviation, for the purpoſe of diſcharging the under-writers; for the moment that the voyage was defeated, that event happened upon which they were liable. The ſubſequent ſentence for reſtoring the ſhip and cargo will not vary the queſtion. When the veſſel was taken and carried into *Ceuta*, it was impoſſible to foreſee what expences would be incurred, and the cargo being of a periſhable nature, it was thought moſt for the advantage of all parties to diſpoſe of it; this being accordingly done, a total end was put to the voyage, and from that moment the defendant was fixed. What afterwards became of the ſhip, was perfectly im-

material to theſe parties. The ſale therefore of the cargo, being the unavoidable conſequence of the capture, muſt have relation back to its original cauſe; and then the averment in the declaration is true and proper.

Lord MANSFIELD, *Ch. J.*—The intereſt on which the plaintiff effected this policy, was money laid out in reclaiming the *cargo*. The event inſured by the policy, was the arrival of the *ſhip* at *Marſeilles*. If *ſhe* did not arrive, then the money was to be paid; if *ſhe* did, there was an end of the inſurance; a loſs accrued upon the cargo in the voyage; the under-writer is ſued, and the loſs is averred in the declaration to be *by capture*. The fact of the caſe is, that the ſhip was taken by a *Spaniſh* privateer, but was afterwards reſtored, and in a condition to purſue her voyage, and was afterwards loſt in another voyage.

The anſwers to this caſe are deciſive.

Firſt, this is a wagering policy, and it is juſt the ſame, as if the event inſured, had been the arrival of any other ſhip at *Marſeilles*. The loſs or ſafe arrival of the ſhip did not alter the ſecurity. The parties were intereſted in the *cargo alone*, but the event inſured, was the arrival of the *ſhip* and *not* of the *cargo*. A neceſſary conſequence of this being a wagering policy, is, that the inſured cannot abandon. But, even ſuppoſing it to be a policy on intereſt, it is enough to ſay, that in this caſe, the parties never did abandon. In effect, there was only a temporary capture, and though by conſtruction, a temporary capture is ſuch a loſs, as that an aſſured upon intereſt is warranted in abandoning at the time, if he pleaſes, yet we muſt conſider what the truth of the

caſe was, between theſe parties; now this was a wagering policy, and in ſuch caſe, there can be no abandonment.

But what alone is a fatal objection to the plaintiff's claim is, that they did not attempt to purſue the voyage to *Marſeilles*, which it was in their power to do, after they left *Ceuta*. The circumſtance of the ſhip's having been captured and detained for a time, did not prevent her from proſecuting her voyage after ſhe was liberated. Nor is it any excuſe, that the plaintiffs could no longer control her deſtination; for in wagering policies the aſſured take upon them to perform all that the owners themſelves of the veſſel could have done in the ſame ſituation.

Therefore in every point of view, the plaintiffs are precluded from recovering.

WILLES, *J.*—I ſhall confine myſelf to the formal objection which has been taken, becauſe I have ſome doubts, whether the plaintiffs had not an inſurable intereſt; for by the ſentence of the court of admiralty, the expences of reclaiming were thrown upon the owners of the cargo, by which the price of it was increaſed; therefore I forbear to give any opinion upon that ground. But on the other grounds it is clear, that the plaintiff cannot recover. In the firſt place, there was certainly a deviation, for the ſhip ſet ſail for *Malaga*, inſtead of proceeding to *Marſeilles*. Secondly, the plaintiff has declared for a loſs by *capture*; but after the capture, the policy might ſtill have been complied with by the ſhip's going to *Marſeilles*; and therefore the loſs cannot be ſaid to have happened by that circumſtance.

ASHHURST, *J.*—I am of the ſame opinion with

with my lord upon both points. In the firſt place, this is to be conſidered as a wagering policy; and in ſuch caſe, the party inſured takes upon himſelf to do every thing which the owners of the ſhip might have done; and they might have directed the ſhip to *Marſeilles*. It is alſo certain, that the party inſuring a ſhip to any place, muſt uſe all due diligence to further her voyage thither, which not having been done in this caſe, upon that ground alſo the nonſuit ought to ſtand.

Buller, *J.*—It would be a ſufficient objection in this caſe, that the loſs is averred to be *by capture*; but as the merits have been gone into, I ſhall give my reaſons for ſupporting the nonſuit upon theſe grounds alſo. Policies of inſurance are of two ſorts, either upon intereſt, or by way of wager. Where it is upon intereſt, it has been ſolemnly determined, that it is merely a contract of indemnity, and therefore ought to be ſo framed, that the party can only recover in caſe of a loſs really ſuſtained, and to the preciſe amount of that loſs. My opinion at the trial was, that the parties had it in view to inſure a real intereſt, and protect themſelves by the policy. But whatever their intentions might have been, the Court is bound to look to the inſtrument, and ſee what they have done; and if they have not expreſſed their intentions upon the policy, the Court cannot help them, and they muſt remain bound by their contract. The circumſtances of this caſe are, that the plaintiffs were owners of the cargo, but were not intereſted in the ſhip. They laid out the money which is the ſubject of the inſurance in reclaiming both after a capture and condemnation; and although they were in no degree intereſted in the

ſhip,

ſhip, yet the event which they inſured, is the ſafe arrival of the ſhip at *Marſeilles*. Theſe parties, therefore, who were intereſted in the cargo alone, did not inſure that, but ſomething elſe with which they had no concern. The goods might all have arrived ſafe, and the ſhip have been loſt; and yet they would have been entitled to recover on this policy as for a total loſs. And on the other hand, if the ſhip had arrived, and the goods had been loſt, they could not have recovered, even though they would have really ſuſtained a damage. The policy is not adapted to the real truth of the caſe. This then is a wagering policy, and that circumſtance alone is deciſive upon the ground of merits. The caſes of wagering policies, and policies upon intereſt, have been confounded in the argument. In the latter caſe, if the voyage be loſt, it is not neceſſary for the aſſured to proceed on with the hulk of the ſhip; for they are at liberty to abandon; but then there muſt be an abandonment in point of fact. Therefore, in this caſe, it is enough to ſay, that even if the parties could have abandoned, they have not done it. The plaintiffs have no ground for maintaining this action, either upon the merits, or upon the formal objection.

Rule diſcharged.

Stocks v. Booth, M. 27 G. 3. B. R. Durnford and Eaſt, 1 V. 428.

Poſſeſſion for abovefixty years of a pew in a church is not a ſufficient title to maintain an action upon the

Caſe for diſturbing the plaintiff in his pew. The declaration ſtated, that the plaintiff had a right to this pew, without laying it to be appurtenant to a meſſuage in the pariſh.

At the trial of this cauſe before *Buller*, J. at the laſt *York* aſſizes, the plaintiff did not ſet up any claim under a faculty from the biſhop, or ſhew any enjoyment in reſpect of any

any houſe, but offered evidence of poſſeſſion for above ſixty years, and would have derived a regular title from one *Chapple*, to whom the miniſter and church-wardens, in the year 1711, gave their conſent in writing to build the pew in queſtion.

caſe for diſturbance in the enjoyment of it; but the plaintiff muſt prove a preſcriptive right, or a faculty, and ſhould claim it in his declaration as appurtenant to a meſſuage in the pariſh. A faculty to a man and his heirs is bad.

The learned Judge, being of opinion that this did not entitle the plaintiff to recover, directed a nonſuit, which

Bolton, Serjeant, moved on a former day to ſet aſide on three grounds, 1ſt. That no faculty was neceſſary in this caſe to ſupport the plaintiff's action. 2dly. That, if a faculty were neceſſary, it might be preſumed after ſuch a length of poſſeſſion. 3dly. This being a poſſeſſory action, mere poſſeſſion was ſufficient to maintain *it* againſt a wrong doer.

Chambre now ſhewed cauſe, and contended that no title to a pew can be derived but by preſcription, or by a faculty.

There is no pretence for the firſt; for it was ſtated by the plaintiff's counſel at the trial that the pew was built in 1718.

Neither is any title claimed under a faculty; but, even if there had been one to the perſon who built the pew, this action could not have been maintained, becauſe that perſon could not have conveyed his right under that faculty. A faculty is only to the firſt grantee, and cannot be transferred by him. A faculty to a man and his heirs (a) is not good in point of law; for a ſeat in the church does not belong to the *perſon* but to the *houſe*. This doctrine is recognized in the caſe of *Langley* v. *Chute* (b), the pariſhioners, who repair the church and the pews in it, are entitled to ſeats in the church; the power of the ordinary is merely

(a) Poph. 140.

(b) Sir T. Raymond, 246.

merely to diſtribute the pews among theſe, and does not extend further.

As to the poſſeſſion on which the plaintiff relies, there can be no poſſeſſion to ſupport ſuch an action as the preſent, but as belonging to the houſe. He was then ſtopped by the Court.

Wood, in ſupport of the rule, admitted that the plaintiff in this action had not a complete title as againſt the *ordinary*, but contended that it was a ſufficient title as againſt a *wrong doer*.

1ſt. No faculty was neceſſary. In *Burn*'s *Eccleſiaſtical Law* (c) it is ſaid, " if the in-
" cumbent, churchwardens, and pariſhioners
" agree that more pews are neceſſary, it doth
" not ſeem that there is any neceſſity for the
" ordinary's interpoſition." Therefore the plaintiff has made out a ſufficient title under the conſent of the miniſter and churchwardens in 1718, to build this pew.

(c) 1 Burn, 331.

2dly. But a faculty, if neceſſary, may be preſumed, the plaintiff and his anceſtors having had actual poſſeſſion above ſixty years. In *Rogers* v. *Brooks* (d), poſſeſſion for thirty-ſix years was held to be evidence of a preſcriptive right, though there was no evidence of a faculty from the biſhop, and though the church itſelf had been rebuilt within forty years.

(d) M. 24 G. 3 B.R. Vide poſt the end of the caſe.

3dly. There might probably be a doubt whether the plaintiff had a right as againſt the *miniſter* or the *ordinary*. But the defendant was a wrong doer, unauthoriſed by either of theſe perſons; and great inconvenience would reſult from permitting the defendant to diſturb the plaintiff in the enjoyment of his pew; becauſe the defendant himſelf may be evicted the next moment; and it would encourage a

perpetual

perpetual ſtruggle for the poſſeſſion of the pews in the church. In *Kenrick* v. *Taylor* (e), it was held that bare poſſeſſion was ſufficient againſt a *wrong-doer*; and that the plaintiff need not ſhew repairs in an action againſt *him*, which would have been neceſſary in an action againſt the ordinary, (which diſtinction was taken in 1 *Lev.* 71. and 3 *Lev.* 73.) and the Court there ſaid, "that it was a rule of law, "that one in poſſeſſion need not ſhew any title "or conſideration for ſuch poſſeſſion againſt a "wrong doer." The ſame doctrine is laid down in *Gibſ. Cod.* 197, 8. with reſpect to the purpoſe of this action, as the plaintiff had poſſeſſion he need not ſhew any title. Though in the caſe of *Kenrick* v. *Taylor*, it was laid as appurtenant to a meſſuage, yet that is not neceſſary; ſince a faculty would undoubtedly give a right, and that may be only to the perſon. Beſides, it is ſaid in that caſe in *Wilſon*, that it is not neceſſary to prove a title as againſt a wrong doer: now if it be not neceſſary to *prove* it at the trial, it is not neceſſary to *alledge* it in the declaration; for the plaintiff need only alledge that which he is bound to prove.

(e) 1 Wilſ. 325.

Ashhurst, *J.*—In an action againſt a wrong doer, poſſeſſion may perhaps be *primâ facie* a ſufficient title, and it is not neceſſary to ſet forth ſo ſtrict a title as in an action againſt the ordinary. As in the caſe in *Wilſon*, where it was ſaid, that laying the pew to be appurtenant to a meſſuage was ſufficient; that muſt be taken to be legally appurtenant, which can only be by preſcription, or by a faculty.

But a bare poſſeſſion can never give a right, becauſe every pariſhioner has a right to go into the

the church. And therefore it is the plaintiff's own fault if he does not gain to himſelf a complete title to a pew, which he may do, either by applying to the ordinary for a faculty, or to the miniſter or churchwardens to allot him a ſeat in the church. But if the plaintiff will not take the trouble of applying to the ordinary for a faculty, or to the miniſter or churchwardens to allot him a ſeat, he cannot maintain this action, though againſt a wrong doer; becauſe he has not ſet forth that the pew is appurtenant to a meſſuage in the pariſh. If bare poſſeſſion were allowed to be a ſufficient title, it would be an encouragement to commit diſorders in the church; for diſputes would frequently ariſe reſpecting the poſſeſſion.

BULLER, *J.*—This is an *action on the caſe*, and not an action of *treſpaſs*. *Treſpaſs* will not lie for entering into a pew, becauſe the plaintiff has not the excluſive poſſeſſion; the poſſeſſion of the church being in the parſon. The word "poſſeſſion" muſt always be underſtood, *ſecundum ſubjectam materiam*: therefore in an action on the caſe for diſturbing the plaintiff in his pew, for which treſpaſs will not lie, the plaintiff muſt prove a right either by preſcription, or by a faculty. I do not go the length which the defendant's counſel went, in ſaying that a faculty only extends to the firſt grantee; for if a faculty be annexed to a meſſuage, it may be transferred with the meſſuage to another perſon. And therefore if the plaintiff had declared for diſturbance in a pew *as annexed to a meſſuage in the pariſh*, ſuch a right would have been colourable, and againſt a wrong doer would have been ſufficient. A pew may be annexed to an houſe by a faculty,

as

as well as by preſcription, for the latter ſuppoſes a faculty. I have lately ſeen a faculty for exchanging ſeats in a church; after ſtating that *A.* in right of a particular houſe in the pariſh had immemorially a right to a certain pew in the church, the ordinary gave his conſent to exchange it for another; but ſtill each was annexed to the houſe. There cannot be a gift of a pew to a man without a faculty; it was ſo ſaid in the caſe of *Rogers* v. *Brooks* (a), in which caſe it was laid *as appurtenant to an ancient meſſuage.* It was alſo ſaid in the caſe in *Wilſon*, that it muſt be laid as appurtenant to a meſſuage. But there never exiſted a caſe before the preſent, where the plaintiff attempted to make out a title to a pew, without laying it to be appurtenant to a meſſuage.

(a) Vide at the end of the caſe.

A faculty of a pew to a man and *his heirs* is not good; ſo of an aiſle in the church. And Dr. *Burn* ſays (b), "No title can be good either upon preſcription, or upon any new grant by a faculty from the ordinary to a man and *his heirs*; but the aiſle muſt always be ſuppoſed to be held in reſpect of the houſe, and will always go with the houſe to him that inhabits it." 12 *Co.* 106. 2 *Keb.* 92. 2 *Bulſt.* 150. 1 *Sid.* 88. Therefore I am of opinion that this nonſuit was right.

(b) 1 Burn's Eccl. Law, 316.

Rule diſcharged.

This was an action on the caſe tried at the ſummer aſſizes at *Exeter* 1783, before *Perryn*, B. when the Jury found a verdict for the plaintiff, damages 1*d.*

(a) Rogers v. Brooks & Wife, M. 24. G. 3 B.R.

A legal title to a pew may be preſumed after thirty-ſix years poſſeſſion.

The declaration ſtated, that the plaintiff was poſſeſſed of an ancient meſſuage in the pariſh of *Biddeford*, and that he had, *as appurtenant*

purtenant to that meſſuage, the uſe and occupation of a certain pew in the church in *Biddeford*; and that the wife of the defendant ſat in the pew, and prevented him from enjoying it, *&c.*

Plea the general iſſue.

At the trial, notice to the defendant's wife not to ſit there was proved. Several witneſſes ſwore, that above forty years ago this was an open pew; that about that time the church was pulled down; and that the rector and churchwardens, after the church was rebuilt, put the *Blinch* family (under whom the plaintiff claimed) into poſſeſſion of the pew, which they had enjoyed uninterruptedly ever ſince, till about two years ago; when the defendants (who claimed under another meſſuage in the pariſh, called the *Winxford* eſtate) began to moleſt them. That about thirty-ſix years ago, the plaintiff put a lock upon the door, and lined and matted the pew. That ſoon after the rebuilding of the church, a woman got over the pew, as if to claim for the *Winxford* family, but ſhe was turned out by the *Blinch* family.

One witneſs for the defendants ſwore, that the *Winxford* family ſat in the pew for thirteen years after the rebuilding of the church; and ſhe and other witneſſes ſwore as to the pew's being common.

The Judge told the Jury that, after ſo long a poſſeſſion as thirty-ſix years, they might preſume a legal title in the plaintiff. The Jury without heſitation found a verdict for the plaintiff.

Motion for a new trial on the ground that there was no evidence to be left to a Jury; becauſe from the plaintiff's own witneſſes it appeared

peared that the ſeat was common forty years ago; and that they had proved a gift from the rector and churchwardens ſince the rebuilding of the church. This evidence, it was contended, deſtroyed the plaintiff's title which he claimed by *preſcription*.

After argument by *Groſe* Serjeant, and *Fanſhaw* againſt the rule, and *Morris* and *Kirby*, Serjeant, in ſupport of it,

Lord MANSFIELD ſaid—The queſtion in this caſe is, Whether there was *any* evidence at all to be left to the Jury?

The plaintiff's title to this pew is, that it has immemorially belonged to the houſe which he poſſeſſed. The defendant has ſet up a joint title in right of the houſe enjoyed by himſelf and another perſon. The plaintiff in ſupport of his claim proved, that he was put in poſſeſſion of this pew by the rector and churchwardens thirty-ſix years ago. The queſtion is, Whether this act of the rector was to give poſſeſſion under an *old immemorial right*, or in conſequence of a *new gift?* There are ſtrong reaſons to induce us to ſuppoſe it was not a gift; they would not make a gift of that which other people claimed. *A gift cannot be made without a faculty*, and there is none in this caſe.

The *Winxford* family have acquieſced for thirty-ſix years, which is almoſt double the time which the ſtatute of limitations requires as a bar in certain caſes.

WILLES, *J.*—It is obſervable that an attempt was made to diſturb the *Blinch* family in the enjoyment of their pew ſoon after the rebuilding of the church; but their right has been acquieſced in ever ſince.

One of the defendant's witneſſes ſwore falſe, in ſaying that the *Winxford* family ſat in the pew thirteen years after the church was rebuilt; for the church has only been built forty years, and the *Blinch* family are proved to have ſat there thirty-ſix years without interruption.

It is very common when a church is rebuilt, to leave the adjuſtment of the pews to the rector and churchwardens; and thus I ſuppoſe the plaintiff got his pew at the adjuſtment in right of his meſſuage. But after ſo long a poſſeſſion, I would preſume any thing in favour of the plaintiff.

Per Curiam *, rule diſcharged.

Churchill v. Wilkins, M. 27 G. 3. B. R. Durnford and Eaſt, 1 V. 447. Where the contract declared upon was, that the defendant ſhould deliver to the plaintiff all his tallow at 4s. per ſtone, and the contract proved was, that the defendant ſhould deliver it at 4s. per ſtone, and ſo much more as the plaintiff paid to any other perſon. This was held a fatal variance.

This was an action upon the caſe, tried before *Eyre*, Baron, at the laſt ſummer aſſizes at *Oxford*, in which the plaintiff declared upon a ſpecial agreement, to buy of the defendant all the fat or tallow which the defendant ſhould have to diſpoſe of for twelve months, from the 31ſt of *July*, 1784, at the price of 4*s.* *per* ſtone. There was a ſecond count, ſtating the agreement to be, to deliver the fat or tallow at the price of 4*s.* *per* ſtone, and two gallons of gin to be delivered at *Chriſtmas*, with general counts.

The agreement proved was, That the plaintiff was to give 4*s.* *per* ſtone, *and if he gave any other perſon more, he was to give the ſame to the defendant.* Upon which *Eyre*, Baron, being of opinion, that this was a material variance, nonſuited the plaintiff.

Plumer ſhewed cauſe againſt a rule which had been obtained for ſetting this nonſuit aſide.

* *Buller*, J. was abſent.

In

In order to maintain this action, the plaintiff ought to have ſtated in his declaration the entire contract; but he has omitted to ſet forth a moſt eſſential part, namely the *whole* conſideration of the promiſe, which is now only *partially* ſet forth. Whether it would or would not have been neceſſary beſides to aver performance, that is not at preſent material to be conſidered. If it had been ſtated generally that the defendant undertook to deliver to the plaintiff all his tallow, without expreſſing any conſideration at all, it would have appeared to be *nudum pactum*, and therefore void. Then, if it was neceſſary to ſet out ſome conſideration, it muſt be equally as neceſſary to ſet it out truly; for if the conſideration proved is different from that which is laid, it is a fatal variance. The declaration ſhould have ſtated the whole conſideration, and then have averred that the plaintiff was ready to have paid the 4*s*. *per* ſtone, and ſo much more as he had given to any other perſon; for if, in fact, the plaintiff had given more to any other perſon, that would have been a ſubſtantial defence for the defendant, which upon this occaſion he was precluded from going into.

As to *Ughtred*'s caſe (a), the diſtinction there taken was between conditions precedent and ſubſequent, and what was neceſſary to be averred; but that caſe does not ſay that it is not requiſite to ſet out the whole contract. In *Cro. Eliz.* 888, where the declaration, after ſtating, that in conſideration that the plaintiff would pay a ſum of money, the defendant undertook to ſurrender a leaſe, only averred a tender of the money, without going on to ſay that it was either refuſed or accepted, the averment was held ill.

(a) 7 Co. 9.

Bower and *Abbot*, *contra*. The queſtion is, Whether this is a diſjunctive contract? Here is enough ſet forth in this contract to ſhew the plaintiff's title, and that is all that is neceſſary. There was no precedent condition. 1 *Lutw.* 249. *Doctr. Pl.* 91. Where two conſiderations are in the alternative, the party who is to perform is at liberty to elect, and need only ſet forth ſo much as gives him a right to ſue. In *Laton* v. *Pearce* (a), the plaintiff, who ſued for a penalty under the lottery act of 17 *G.* 3. *c.* 46. declared as upon an abſolute agreement for £. 20. The fact was, that the contract was in the alternative, either to take £. 20. *or* an undrawn ticket in the lottery; but the election was in the party *ſued*. There Lord *Manſfield* ſaid, that if the option had been in the plaintiff, and he had elected to take the £. 20. the contract would have been ſufficiently ſtated, becauſe he would thereby have converted the agreement into an abſolute contract for the payment of the money; and then the other part of the alternative in the original bargain would become ſurpluſage. Here it was in the power of the plaintiff to elect whether he would give more than 4 s. *per* ſtone to any body elſe; and having elected, he reduced the contract to a certainty; and then the whole is ſet out, and there is no ſubſtantial variance between the contract laid, and that proved. If a contract is variable upon a contingency which does not happen, the original contract becomes abſolute.

(a) Dougl. 15.

This caſe may be conſidered in another view. The contract in effect is, that the plaintiff will buy of the defendant all the tallow at a certain price, *provided* that, if he gave more to any body elſe, he would give the ſame to the defendant.

defendant. Then how is the defendant precluded by this declaration from entering into the nature of his defence? It is enough for the plaintiff to ſhew that part of the contract which he is to perform, and upon the trial the defendant may take advantage of the proviſo by way of defence.

As to the caſes which make a diſtinction between conditions precedent and ſubſequent, they are not applicable to the preſent; for here nothing more was to be performed by the plaintiff. He could not have proved that he had not paid more than 4 s. *per* ſtone to any other perſon; therefore it was not neceſſary to alledge it, becauſe it would have been averring a negative.

Ashhurst, *J.*—This nonſuit is proper. It was incumbent on the plaintiff to ſtate his caſe truly. But the contract, as ſtated, is different in ſenſe from that which is proved. For a contract, that the defendant ſhall deliver all his tallow *at a particular price*, is not the ſame as a contract, that he ſhall deliver it at that price, *or at a greater*, on the happening of a particular event. The plaintiff ſhould have ſtated the whole, and then have averred that he had not given more than 4 s. *per* ſtone to any other perſon, and that he was ready to have paid that ſum.

As to the caſe of *Laton* and *Pearce*, it does not appear to me to contradict that principle.

Buller, *J.*—I wiſh to have an opportunity of looking into the caſe of *Laton* and *Pearce*, before I finally decide this. But laying that out of the queſtion for the moment, (for I think it will not be found to apply) this caſe admits of no difficulty.

This is an action on a ſpecial agreement. The agreement is the giſt of the action, therefore it muſt be ſtated truly. And this does not claſh with the principle drawn from the caſes cited by the plaintiff's counſel, which ſays that the plaintiff need not ſet forth different parts of an agreement which are not eſſential to the right of action; for here the contract proved is different in ſubſtance from that which is alledged. For the declaration ſtates, that the plaintiff was at all events to pay *only four ſhillings*, whereas the contract proved was, that he was to pay *ſo much*, or *ſomething more*, as events might happen. They differ therefore in this reſpect; the agreement ſtated in the declaration is for a particular price *abſolutely*, whereas that proved is for the ſum ſtated in the declaration, *or ſome other price conditionally*.

This is not the caſe of an alternative contract; where the party has his option to do one thing or another, but it depends upon a contingency; becauſe according to ſome future event it is a contract for a greater or a leſs ſum. Therefore the term *alternative* is improperly uſed here. Neither is this like the queſtion in *Ughtred*'s caſe. But the queſtion here is, Whether the plaintiff muſt not ſtate the contract as it is? and whether he can ſtate a contract as abſolute, when, whether it is abſolute or conditional, depends on the event of another fact.

I will look, however, into the caſe of *Laton* and *Pearce*, and if it makes any difference in my opinion, I will mention this caſe again.

Rule diſcharged.

On

On the next day, *Buller*, J. ſaid, that the caſe of *Laton* and *Pearce* was rather againſt the plaintiff than otherwiſe: for the Court, in that caſe, held the variance to be fatal. But he obſerved that that was an *alternative* contract.

Buckley v. Buckley, E. 27 Geo. 3. B. R. Durnford and Eaſt, 1 V. 647.

A tenant to a mortgager, who does not give him notice of an ejectment brought by the mortgagee, to enforce an attornment, is not liable to the penalties of the 11 Geo. 2. c. 19. ſ. 12. for ſecreting ejectments.

This action, which was brought againſt the defendant upon the 11 *Geo.* 2. *c.* 19. *ſ.* 12. for ſecreting an ejectment, was tried at the laſt *Leiceſter* aſſizes, before *Heath*, *J.* when the plaintiff was nonſuited. It appeared that in 1785, the premiſſes being in mortgage, and the mortgage forfeited, the defendant (who was tenant to the plaintiff) had agreed, in a converſation which he had with the attorney of the mortgagee, to attorn to him from that time; but the attorney, not thinking the promiſe ſufficient, delivered to the defendant an ejectment in *April* 1785, informing him at the ſame time, that it was only for the purpoſe of procuring a written attornment, and that it would not be proſecuted further; in conſequence of which, the defendant actually attorned to the mortgagee. He gave no notice to the landlord, either of the ejectment or of the attornment; for omitting the former of which, this action was brought. The learned Judge being of opinion that this caſe did not come within the ſtatute, nonſuited the plaintiff; which nonſuit,

Balguy now moved to ſet aſide; contending that the ſecreting of this ejectment was productive of ſome of the inconveniences which the act intended to remedy, becauſe by theſe means the mortgagor had been prevented applying to this Court to ſtay the proceedings

of the ejectment on paying the principal, intereſt, and coſts.

The COURT however were of opinion, that this caſe did not come within the ſtatute; for that it only extended to caſes where ejectments were brought which were inconſiſtent with the landlord's title. They obſerved likewiſe that the ejectment was brought for the purpoſe of compelling the tenant to attorn to the mortgagee, which the act expreſsly permitted him to do.

Rule refuſed.

Smith v. Cheſter, E. 27 G. 3. B. R. Durnford and Eaſt, 1 V. 654.

In an action againſt the acceptor of a bill of exchange, it is neceſſary to prove the hand-writing of the firſt indorſer, notwithſtanding ſuch indorſement was on the bill at the time it was accepted.

Indorſee of a bill of exchange againſt the acceptor.—It appeared at the trial before *Buller*, J. at the laſt ſittings at *Weſtminſter*, that when the bill was accepted, there were ſeveral indorſements on it. But the plaintiff, not being able to prove the hand-writing of the firſt indorſer, was nonſuited.

Bower now moved to ſet aſide this nonſuit, on the ground that as theſe indorſements were on the bill, at the time of the acceptance, they muſt be taken to have been admitted by the drawee, and he could not afterwards diſpute them; and he cited in ſupport of this, a determination of Lord *Mansfield*'s in the caſe of *Pratt* againſt *Howiſon*, at the ſittings after *Trin.* term, 23 *G.* 3. at *Guildhall*, and another caſe in *Sayer*, 223. obſerving that there would be great hardſhip in the caſe of foreign bills of exchange in many inſtances, on account of the difficulty and inconvenience of proving the hand-writing of the firſt indorſer, who may be unknown to the holder.

ASHHURST, *J.*—The law has been otherwiſe ſettled; and if it were not ſo, there would be no difference in this reſpect, between bills payable

payable to order, and thoſe payable to bearer. And it would open a door to great fraud.

BULLER, *J.*—This point was much conſidered in a late caſe before this Court, when they were perfectly clear, that an indorſee of a bill of exchange, in an action againſt the acceptor, was obliged to prove the hand-writing of the firſt indorſer. For when a bill is preſented for acceptance, the acceptor only looks to the hand-writing of the drawer, which he is afterwards precluded from diſputing; and it is on that account that an acceptor is liable, even though the bill be forged.

GROSE, *J.*—This matter appears extremely clear; for a bill of exchange is no payment to the perſon in whoſe favor it is drawn, unleſs it is indorſed by him.

Rule refuſed.

In this action againſt the defendant for negligence as an attorney, the declaration ſtated, that the plaintiff's inteſtate had retained the defendant to proſecute one *John Schultze* for £. 625, due on a bond; and that the defendant had promiſed diligently to proſecute the ſaid ſuit, *&c.* It then ſtated that afterwards, to wit, on 24th of *January* 1785, the defendant ſued and proſecuted a bill of *Middleſex*, returnable on *Monday* next, after fifteen days of St. *Hilary*, and delivered it to the ſheriff, who made his precept, under which *Schultze* was arreſted, and detained by him, 'till the ſaid *Schultze* afterwards and before the return of the ſaid precept, to wit, *on 31ſt of January in the year aforeſaid*, was in due manner committed to the cuſtody of the marſhal, *&c.* that though the ſaid defendant, whilſt the ſaid *Schultze* was in cuſtody, *&c.* to wit, in *Eaſter term*

Green v. Rennett, E. 27 G 3. B. R. Durnford and Eaſt, 1 V. 656.

In an action againſt the defendant for negligence as an attorney, in not proſecuting a debtor of the plaintiff's to judgment; the return of the writ on which the debtor was arreſted being laid to be in the 25th year, &c. and the writ itſelf appearing to have been returnable in the 24th year, &c. this was held to be a fatal variance, even though the day of the return

was alledged in the declaration under a videlicet.

term in the year aforeſaid might, and ought to have obtained and ſigned a judgment againſt the ſaid *Schultze* for the ſaid debt, yet the defendant well knowing, *&c.* did not truly and diligently proſecute the ſaid ſuit, *&c.* and did not then, or at any time whatſoever, obtain or ſign any ſuch judgment therein; by reaſon whereof the ſaid *Schultze* afterwards, to wit, on the 4th of *November* 1785, was in due manner ſuperſeded and diſcharged, the ſaid debt being wholly due and unpaid.

The writ was in fact ſued out on the 24*th of January* 1785, but by a miſtake it was indorſed on the 24*th of January* 1784. At the trial of this cauſe before *Buller*, J. at the laſt ſittings at *Weſtminſter*, on the production of the writ, it was objected that there was a material variance between the writ and the declaration, the writ itſelf appearing on the face of it to have been ſued out in *January* 1784, but that was over-ruled; but the learned Judge being of opinion that *the return of the writ* was material, and there being a ſimilar variance in that reſpect, nonſuited the plaintiff.

Gibbs now moved to ſet aſide this nonſuit, contending, that as this was an action againſt the defendant for negligence in not proſecuting a perſon to judgment, it was equally immaterial when the writ was returnable, as when it was ſued out. That the damage to the plaintiff, which was the giſt of the action, was preciſely the ſame, at whatever time it was returnable. Suppoſing the defendant had ſued out a void writ, the action would have lain; therefore, if it be immaterial whether the writ be good or not, the return of it muſt be equally ſo. At all events, it may be rejected as coming under a *videlicet*. He then cited a caſe of

Nichols

Nichols qui tam v. *Bamfylde*, at *Bodmin ſumm. aſs.* 1784, before *Hotham*, Baron. It was an action of debt on the ſtat. *Wil.* 3. againſt an exciſe-officer for ſoliciting a vote at *Mitchel* for the late election. The declaration ſtated the writ and delivery to the ſheriff; and that he afterwards, and before the return thereof, to wit, on the 4th of *April*, made his precept in writing. The evidence was of a precept dated 1ſt of *April*. *Groſe* objected to it as a variance, with which Baron *Hotham* concurred, and nonſuited the plaintiff. A motion was made the enſuing term in the Court of Common Pleas, to ſet aſide the nonſuit, and grant a new trial, which was accordingly granted, that court entertaining no doubt on the queſtion.

But in this caſe *the Court* were all of opinion, that the time when the defendant ought to have charged *Schultze* in execution depending on the *return* of the writ, *the return* became material, and therefore the variance was fatal.

Rule refuſed.

Holliday v. Camſell and White, E. 27 G. 3. B. R. Durnford and Eaſt, 1 V. 658.

A member of an amicable ſociety intruſted with a box, containing the fund, and bound by bond to keep it ſafely, cannot maintain trover againſt another member, and a third perſon, who take it from him.

In this action of trover, which was brought to recover a box of money, *Heath*, J. before whom it was tried at the laſt aſſizes at *Nottingham*, nonſuited the plaintiff, on the ground that one tenant in common could not maintain an action of trover againſt another. The circumſtances were theſe; the plaintiff and defendant, *Camſell*, were members of a friendly ſociety, which was inſtituted for the purpoſe of relieving each other in caſe of ſickneſs or other diſability. The fund for this purpoſe was levied by weekly contributions from each of the members; and the aggregate ſum was kept in a box which was depoſited in the plaintiff's

tiff's houſe, who was an innkeeper; and a bond was given by him for the ſafe cuſtody of it. *Camſell* got poſſeſſion of this box, carried it away, and delivered it to the other defendant *White*, who was not a member of the ſociety.

Galley moved to ſet aſide this nonſuit, and contended that the plaintiff had a *ſpecial* property in the box, excluſive of any right which the defendant had in it; for the box with its contents was lodged in the plaintiff's hands by the club, and he had given ſecurity for the ſafe cuſtody of it. But the defendant had no other intereſt than a mere contingency in the event of his ſickneſs, and then only in a certain proportion. No perſon therefore had any right as againſt this plaintiff, but the majority of the club, by whom alone he could be releaſed from his obligation. Beſides, the rule of law, that one tenant in common cannot maintain an action of trover againſt another, does not apply in caſes where the poſſeſſion of that other is tortious. And here the defendant has no right whatever to keep poſſeſſion of the box againſt the conſent of the plaintiff.

Ashhurst, *J.*—The rule of law is undoubtedly true, and applies to this caſe. All the members of this ſociety have a joint property in the box and its contents; they are therefore tenants in common, and one tenant in common cannot maintain trover againſt another.

Buller, *J.*—It is here admitted, that one of the defendants was a member of this ſociety, and conſequently had a general property in the box; at any rate therefore a ſpecial property cannot give a right in this action againſt a general property. The *cuſtody* only is committed

mitted to the plaintiff, the *property* remains in the ſociety.

GROSE, J. of the ſame opinion.

Rule refuſed.

Aſſumpſit againſt a common carrier for not ſafely carrying and delivering goods ſent by the plaintiffs. The declaration ſtated, that the defendant undertook to carry the goods "for a certain hire and reward, to be paid *by the plaintiffs.*" It was proved at the trial, that *Clarke*, the conſignee, had agreed with the plaintiffs to pay the carriage of the goods, which the defendant's counſel contended did not prove the declaration. And

BULLER, *J.* before whom the cauſe was tried at *Guildhall*, being of that opinion, nonſuited the plaintiffs.

Law had obtained a rule on a former day to ſhew cauſe why the nonſuit ſhould not be ſet aſide on the ground that the allegation, that the hire was to be paid *by the plaintiffs*, was immaterial, and that in all caſes of this kind the contract was virtually made between the carrier and the ſender of the goods. That no private agreement between the conſignor and conſignee could vary the queſtion as between the conſignor and the carrier. That, though the conſignor might have parted with the property in the goods, he might maintain an action againſt the carrier. *Davis Jordan* and *James*, 5 *Burr.* 2680. *Vale* v. *Bayle*, *Cowp.* 294. but at all events, the conſignor might be conſidered as the agent of the conſignee for the purpoſe of bringing this action.

BULLER, *J.* on this day ſaid, that on conſidering the queſtion, he found he had been miſtaken in point of law; for, that, whatever

Moore and others v. Wilſon, E. 27 G. 3. B. R. Durnf. and Eaſt, 1 V. 659.

In an action by the conſignor of goods againſt a carrier for non-delivery, where the plaintiff averred, that the defendant undertook to deliver, &c. in conſideration of the hire to be paid by the plaintiff, proof that the hire was to be paid by the conſignee was held to be no variance, the conſignor being by law liable.

might be the contract between the vendor and the vendee, the agreement for the carriage was between the carrier and the vendor, the latter of whom was by law liable. And the other two Judges being of the ſame opinion, the rule was made abſolute without farther argument.

Rule abſolute.

King v. Pippett, E. 27 Geo. 3. B. R. Durnford and Eaſt, 1 V. 695.

Where the defendant carries down the record by proviſo, it is ſufficient if he obtain the uſual rule for trial by proviſo any time before trial, even though it be obtained after he has given the plaintiff notice of trial.

It having been determined in laſt *Michaelmas* term (a), that the defendant was not entitled to ſign judgment as in caſe of a nonſuit in this cauſe, becauſe he might have carried the record down to trial, at the laſt ſummer aſſizes, by proviſo, the defendant, on the 8th of laſt *March* (the commiſſion day being the 19th) gave notice of trial, and on the 10th of *March*, obtained and ſerved the uſual rule for a trial by proviſo; and the plaintiff, not appearing at the trial according to this notice, was nonſuited.

(a) Durnford and Eaſt, 492.

Law now moved to ſet aſide this nonſuit, contending, that the notice given by the defendant was irregular for want of the antecedent rule to ſupport it. 2 *Stra.* 1055.

Gibbs was to have oppoſed it in the firſt inſtance; but *the Court* ſaid, that, according to the old eſtabliſhed practice, wherever the defendant carries down the record to trial by proviſo, he muſt obtain a rule, that in caſe the plaintiff ſhould make default, he might be at liberty to go to trial. But the only uſe of that rule is, that if two records are carried down to trial (the one by the plaintiff, and the other by the defendant) the former only ſhould be tried. Then it is quite ſufficient if the defendant has this rule at the trial. Beſides, no inconvenience can reſult to the plaintiff from

this practice; becauſe, if the defendant does not carry down this record to trial after notice, he is liable to pay the plaintiff his coſts.

And the maſter of the Crown-office informed the Court, that in criminal trials, where the defendant carries the record by proviſo, no ſuch rule is obtained at all.

Rule refuſed.

IX.

IX. Of other Matters reſpecting new Trials, &c.

(17.) *Of Coſts on new Trials.*

Vide ante III. The *Queen v.* the Bailiffs, *&c.* of *Bewdley*, and IV. *Tamplin* and *Vorſell.*

Maſon v. Skurray. T. 20 G. 3. B. R. Doug. 421.

Where a new trial has been granted and nothing was ſaid in the rule concerning the coſts of the firſt, although the ſame party ſucceed on the ſecond trial, he ſhall not have the coſts of the firſt.

ACTION on a policy of inſurance; verdict for the defendant; new trial granted; and a ſecond verdict for the defendant. The rule for a new trial had not been drawn up, "upon payment of coſts," nor had the coſts been reſerved. On *Saturday* the 27th of *May*, *Cowper* obtained a rule to ſhew cauſe why the defendant ſhould not be allowed the coſts of the firſt trial.

Dunning now ſhewed cauſe.

Lord *Mansfield* abſent.

The Court ſaid, as nothing had been ſaid about the coſts of the firſt trial in the rule, and they had not been reſerved to abide the event of the ſecond verdict, the defendant was not entitled to receive them.

The rule diſcharged.

IX. Of other Matters reſpecting new Trials, &c.

(18.) *Of Privy Verdicts.*

Vide poſt, Eſſay IV. *Gay* v. *Croſs.*

IN quid juris clamat the tenant ſaid, that he had held in tail of the gift of one *A.* The plaintiff ſaid, that *A.* did not give; upon which they were at iſſue, and the *niſi prius* was in the county of *North'*, where before *Dyer*, and *Benlowe*, the inqueſt was charged upon the ſaid iſſue; and the Jurors departed from the bar, and after the riſing of the Court, they came again before the Juſtices, and gave a privy verdict for the defendant, and had leave to eat and drink; and afterwards, at another day, when the Court was ſitting, they came again, and gave their verdict openly for the plaintiff.

T. 3 Eliz. Mo. 33. n. 108. Privy verdict for the defendant, public verdict contra for plaintiff.

Jurors eating and drinking.

And all this matter was entered upon the *poſtea.* And at the day in bank, the queſtion was, for which of the parties judgment ſhould be given? And the opinion of all the Juſtices was, that judgment ſhould be given for the plaintiff; for the laſt verdict which was given openly in Court is the verdict in fact, and not the firſt; for upon a privy verdict before the Juſtices none of the parties ſhall be demanded; and if one of the jurors dies between the firſt verdict given, and the ſecond, or if the judge die, the verdict taken before is void:

and yet neither the one nor the other, after the ſecond verdict given ſhall hurt, but judgment ſhall be given. So alſo if the next day, the jurors will not ſay any thing, the acceptance of the privy verdict ſhall be nothing to the purpoſe, for the giving of this verdict is only ſuffered for the eaſe of the jurors. And it is ſaid per *Dyer*, that eating and drinking before the giving of the ſecond verdict, ſhall not make the verdict void, becauſe it was by licence of the juſtices, and it was alſo at their own coſts. And although the jurors, before giving their verdict, eat and drink, yet this ſhall not avoid the verdict, unleſs it be at the coſts of one of the parties; for if it be at the coſt of the jurors themſelves, it is not material, as was lately adjudged in the caſe of one *Powleſkin*, of *Cornwall*.

As to the Jurors eating and drinking.

And *nota*, That *Brown* moved in this caſe what judgment the plaintiff ſhould have, if to recover the land or not: for upon ſuch claim it is clear, that the defendant had forfeited the land; and for ſuch claim, the grantee, as it ſeems to me, may enter immediately without more: but if judgment ſhall be given to recover the land, I have never ſeen any precedent.

Moor, 33.

IX. Of other Matters reſpecting new Trials, &c.

(19.) *Of a Diſtringas or Venire facias de novo.*

Vide ante III. *Bro. Ab. tit. Verdict*, 17, 18. IX. (3.) *Rex v. Woodfall*, IX. (10.) *Eddowes v. Hopkins*; *et poſt*, *Eſſay* V.

BEFORE we proceed to caſes of *Venire facias de novo*, after trials, we ſhall ſtate from 1 *Brownlow*, ſome particulars worthy notice, reſpecting *meſne*, and *jury proceſs*, &c. as the law ſtood at the beginning of the reign of *James* the firſt.

In treſpaſs the proceſs is attachment and diſtreſs infinite, but if *nihil* be returned, proceſs of outlawry lies; and if the defendant be returned attached by his goods and chattels, if he omit to caſt an eſſoyn at the return of the writ of attachment, he ſhall forfeit the goods by which he was attached; but if he caſt an eſſoyn, he ſhall have a ſpecial writ (reciting the matter) to the ſheriff, to deliver to him his goods or cattle, although he do not appear at the day of adjournment of the eſſoyn: and if the defendant at the return of the attachment will appear without an eſſoyn, he may, and then he ſhall not forfeit the goods: and note, the eſſoyn ſhall not be adjourned by, from fifteen days to fifteen days:

M. 2 Jac. 1. Brownl. 193. Of jury proceſs, challenges, venire facias de novo, &c.

and if the original writ be againſt many, they ſhall have but one eſſoyn in perſonal actions: and if a lord of the parliament appear not, he ſhall forfeit an hundred pounds; and upon iſſue joined in this action, the proceſs againſt the jury, is the *venire facias*, *habeas corpus*, and *diſtreſs*: and if a baron of the parliament be a defendant, then if a knight be not returned upon the pannel, the defendant may at the aſſizes quaſh the pannel; and if at the aſſizes the jury do not appear full, to wit, twelve men, this may be ſupplied by the juſtices at the requeſt of the plaintiff, and the ſheriff ought to return two hundreders, at the leaſt, in this action, and ſo in every perſonal action: but four in real actions, for if a challenge be made *pro defectu hundredorum*, if two be not returned, the jury ſhall remain; and a *diſtringas*, with a *decem tales* ſhall be awarded, returnable in court, but no *circumſtantes* ſhall be awarded in court, for if the jury in court do not appear full, or are challenged, for that the jurors have no freehold, and it be tried, a new *habeas corpus* ſhall iſſue out with a *decem tales*, if it be deſired: and if the jury appear full in the court, and the array be challenged, either for that it was of the plaintiff's nomination, or that the ſheriff or under-ſheriff, who returned the jury, is of the kindred of the plaintiff, or any other principal cauſe of challenge, and this is confeſſed or tried by two of the jurors who have appeared, being aſſigned and ſworn by the court to be triers of the challenge, who ſhall give their verdict that the challenge is true, then the array ſhall be quaſhed; and if he that arrayed the pannel remain ſheriff, the *venire facias de novo* ſhall be awarded to the coroners, if there be no cauſe

of

of exception againſt them, or any of them by reaſon of kindred, or any other principal cauſe: and if there be cauſe of challenge to any of them, the *venire facias* ſhall iſſue to the reſt, and his companion ſhall not intermeddle with the execution of it; and if there be good cauſe againſt all, then a *venire facias* ſhall iſſue to *eſlizors* to be appointed by the court to return the writ, but if the ſheriff who returned the firſt pannel be removed, then a new *venire facias* ſhall iſſue to the ſheriff who ſhall be then in office: and note no challenge ſhall be made to the array returned by the *eſlizors* but to the poll: and if the jury appear full, and no challenge be made until twelve be ſworn, the jury ſhall proceed to hear their evidence, and give their verdict; and if the jury find for the plaintiff, then they ſhall give coſts and damages, but if they find for the defendant, they ſhall find neither coſts nor damages: and the judgment for the plaintiff is, that the plaintiff ſhall recover his damages found by the jury, and coſts of ſuit; but if the jury find for the defendant, the judgment is, that the plaintiff *nil capiat per breve*; but if judgment in this caſe had been by *nil dicit*, *confeſſion*, or *non ſum informat.* then the court ſhall award to the ſheriff a writ to enquire of damages, and no challenge lies to the jury upon a writ to enquire: and if the ſheriff return but twenty and one upon the jury, and twelve of them appear, and try the iſſue and give a verdict, it is a good verdict; but if only ten or eleven of them appear, and the jury be made up at the aſſizes, *de circumſtantibus*, and the iſſue be tried, and a verdict given, it is naught, and not holpen by the ſtatute: and if the iſſue be joined, and the ſheriff be couſin to the defendant, the plaintiff ſhall not have a *venire*

facias upon the challenge of kindred of the ſheriff to the defendant, but it ought to ſtay until that ſheriff be removed and another ſheriff made: and if the defendant be lord of the hundred, within which hundred the ten doth ariſe, the plaintiff may ſhew that, and have a *venire facias* to the next hundred; or if the array be quaſhed for that cauſe, he may have a *venire facias* to the coroners of the next village in the next hundred next adjoining: and note, the *venire facias* ſhall not iſſue to the coroner but upon the principal challenge; and if a challenge be to the *tales*, and that be found true, the *tales* only ſhall be quaſhed, and the principal pannel ſhall ſtand: and if an iſſue be joined between the mayor and commonalty of a city, and another concerning a treſpaſs done within that city; the plaintiff ſurmiſing that the ſheriff and coroners are citizens of that city, may pray a *venire facias* to the next county, or the body of the county, or of the next villages in the next county: and if the challenge of kindred be not rightly alledged in the challenge, it matters not if it be kindred; and if a *venire facias* be quaſhed, becauſe it was returned by the under ſheriff, who was kin to him, or other good cauſe, it ſhall be quaſhed, and the *venire facias* ſhall be returned by the high ſheriff, with words in it, that the under ſheriff ſhall not intermeddle with it: and if the array be challenged and affirmed, the defendant may after challenge the poll, and muſt ſhew his cauſe of challenge preſently: and if the land in queſtion lie in four hundreds, if four of any hundred appear, it is good; and note, that the challenge of the array ſhall be drawn in paper, and delivered preſently after the jury appears; and the defendant is not bound to make good his challenge

lenge with theſe words, *Et hoc parat. eſt verificare, &c.* And thoſe that try the principal challenge may alſo try the challenge upon the *tales*. If the king had been party alone, no challenge was to be allowed, but if the ſuit had been in the name of another, who ſued as well for the late king as for himſelf, in a writ to enquire of waſte after a diſtreſs, no challenge to the poll lies.

It is good cauſe to challenge a juror becauſe he was attainted in a conſpiracy or attaint, or if any juror was put into the pannel at the deſire of the party, it is good cauſe of challenge to the array: and if a jury be of two counties, and both arrays are challenged; two of one county ſhall try the array of that county, and two of the other county ſhall try the array of the other county; and they ſhall not join until they be ſworn of the principal, and two of one hundred, and two of the other hundred do ſuffice. If in treſpaſs the defendant juſtify as a ſervant to the lord, and by his commandment, it is good cauſe of challedge to the juror, that he is a tenant to the lord although the lord be no party to the record; and if proceſs by challenge is awarded to the coroners, the proceſs afterwards ſhall not go to the ſheriff, although there be another ſheriff, but after judgment execution ſhall iſſue to the new ſheriff: and where a man challenges the polls of the principal pannel, he afterwards ſhall not challenge the array of the *tales*, and if the array be quaſhed, it is entered upon record, but if it be affirmed, then it is not entered. If treſpaſs be done in divers towns in one ſhire, they may all be joined in one writ, to wit, why by force and arms the cloſes and houſes of the plaintiff at A. B. and

C. the defendants have broken: and, *&c.*

Stat. 14 Eliz. c. 9. A *tales*, *&c.* may be granted at the prayer of the defendant.

Stat. 4 and 5 W. and M. c. 24. § 20. No fee ſhall be taken on return of a *tales*.

Stat. 7 and 8 W. 3. c. 32. § 3. The tales to be of jurymen returned on other pannels.

Stat. 27 Eliz. c. 6. § 5. Two hundreders appearing ſhall be ſufficient.

Stat. 24 G. 2. c. 18. § 4. No challenge to the array for want of a knight.

Stat 7 and 8 W. 3. c. 32. After a *venire* returned, if the cauſe is not tried, a new *venire* may be ſued out.

A great variety of other proviſions reſpecting juries, have been made by ſeveral ſtatutes, not neceſſary to be here farther noticed. *Vid. Tab.* to *Stat. tit. Juries.* *Vide poſt* at the end of the caſe, next but one.

Laxworth v. Weſt, Mich. 3 Jacobi. 1 Brownl. 203. Treſpaſs, two iſſues, the ſubject of which are in different places. Venire miſ-awarded.

Treſpaſs brought for the taking of hay ſevered from the ninth part of *Elthorp*, in the county of *Warwick*, the defendant to *part* pleads *Not Guilty*, and to the *reſidue* pleads a *deviſe* of the parſonage made by *Lepworth* to the defendant at *Wapenbury* in the ſame county, and to enable the deviſe for tithes in L. alledges L. to be a hamlet at *Wapenbury*, to the intent that the whole tithes may paſs: and upon a *non deviſavit*, the *ven.* was of *Wapenbury*, and found for the plaintiff, that *T. L.* did not deviſe it, and the other iſſue of not guilty found for the defendant, and moved in arreſt of judgment, that the *venue* was miſtaken, becauſe it was of *Wapenbury* only, and not of *Elthorp*, and they of *W.* could not try a matter in *E.* and although it was anſwered, that the defendant himſelf by his plea had confeſſed that *E.* was but an hamlet, yet the Court held the *venue* miſtaken; for when the plaintiff

plaintiff declares of a treſpaſs in *E.* this by general intendment is preſumed to be a village: of which village the matter which is there in queſtion ought to be tried: and although the defendant had alledged *Elthorp* to be an hamlet; yet it was but to enable the deviſe, and doth not extend to the iſſue before joined upon the not guilty for part; for in that iſſue both parties agree that *Elthorp* is a village, and it is a perfect iſſue taken, which hath not any coherence with the other iſſue of *non deviſavit:* but if the defendant had to the whole iſſue pleaded the deviſe as his excuſe, and had alledged *E.* to be an hamlet of *W.* and that only had been in iſſue, there the *venue* awarded had been good of *W.* only; but in this caſe it was adjudged that the *venire* was miſ-awarded, and that the plaintiff ſhould have a *venire facias de novo.*

Kniveton v. Roylie, M. 8 Jacob. 1 Brownl. 218. Treſpaſs, liberum tenementum in the manor of Wig. Venire of Wo. venire ought to have been of both—Venire facias de novo.

An action of treſpaſs brought for breaking the plaintiff's cloſe called *G. in Woodthorpe,* in the county of *Derby,* to the damage of, *&c.* The defendant pleads that the cloſe was known as well by the name of *G.* as by the name of *D.* and that it was and had been, time out of mind, parcel of the manor of *Wigenworth*; and pleads his freehold in the manor: the plaintiff maintains his declaration, and traverſes that the place where, *&c.* was parcel of the manor, and upon this they are at iſſue, and a *venire facias* awarded of *Woodthorpe* only: and moved in arreſt of judgment by the defendant, the verdict being for the plaintiff, and urged that it was a miſtrial, for the *venire facias* ought to have been as well of the manor, as of *Woodthorpe*; for although the parties be agreed, that the place where

where the treſpaſs was committed lies in *Woodthorpe*, yet that being ſuppoſed indeed to be parcel of the manor of *Wigenworth*, the *venue* of the manor by intendment have a more perfect and better knowledge of it than the village of *Woodthorpe* only; which was agreed by the whole Court, and a new *venire* awarded to try the iſſue again.

What the law *was*, hath been already ſhewn under this head.

Now as to the *venire facias*, by ſtatute 4 *Ann. c.* 16. *ſ.* 6, every ſuch writ for the trial of any iſſue in any of the cours of record at *Weſtminſter*, ſhall be awarded of the *body* of the proper *county* where ſuch iſſue is triable. But *per ſ.* 7. not to extend to writs of *appeal* of felony, murder, *&c.*

Perriman v. Pierce, M. 20 Jac. B. R. Palm. 303.

Conſtruction of the words proximo conſanguinitatis de ſanguine of the deviſor in a deviſe.

In *ejectment* the Jury found a ſpecial verdict to this effect, that one *Harpur* was ſeiſed of ſoccage land (in queſtion) in fee, and had iſſue eight daughters, and one ſon, by three ſeveral *venters*; and that he deviſed this land to *Catharine* his youngeſt daughter by the laſt *venter*, for life, remainder *proximo de ſanguine*; remainder in tail to *William* his ſon by the ſame *venter*, and if he ſhould die without iſſue of his body, remainder for life to two others of his daughters by the middle *venter*, remainder *proximo conſanguinitatis de ſanguine* of the deviſor. The deviſor died: *Joan*, the eldeſt daughter, to whom nothing was given by expreſs name by the will, died, having iſſue *John* and *William Perriman* the leſſor of the plaintiff; and they only found generally, that *Joan* had *John* and *William*, that *William* entered claiming with his brother, as *proximus de ſanguine*; but they did not find that *John* was the eldeſt

eldeſt ſon, or that he was heir: they found that *William* the ſon of *Harpur*, to whom the tail was limited died without iſſue, and that all the daughters died without iſſue, but the two daughters, who were advanced by expreſs eſtates in the will, and except the eldeſt daughter, who had iſſue the ſaid *John* and *William*, and if upon the whole matter, *&c.* And the queſtion was who ſhould have the land by the words *proximo conſanguinitatis de ſanguine* of the deviſor; *ſcil.* the iſſue of the eldeſt only, or the iſſues of all the daughters, or the ſecond ſon of the daughter *Joan:* the eldeſt daughter had iſſue *John* and *William: John* had iſſue the leſſor of the plaintiff; if he being her grand child, ſhall have before the ſon of the eldeſt daughter, or if the eldeſt ſhall be ſaid to be nearer, than the ſon of the ſon of the eldeſt: and it was argued by *George Crooke*, that the ſon of the ſon of the eldeſt daughter ſhould be preferred. 1. He ſaid, that the iſſues of thoſe, who are advanced by expreſs eſtate, are excluded from taking any implied eſtate; alſo *proximus de ſanguine* in legal conſtruction is the eldeſt; and for this he urged 30 *E.* 3. 27. 30. *Aſſ.* 47. Alſo all the daughters may not take *here*, for the ſingular word *proximo*, which excludes all multiplicity in wills, as 1 Co. *Archer*'s caſe, *proximo hæredi*; and he applied to this purpoſe *Chapman*'s caſe, 18 *Eliz. Dyer*, where the eldeſt of the family was preferred; and *Clacke*'s caſe, 16 *Eliz.* and 1 *Eliz. Frencham*'s caſe; where a ſpecial eſtate limited, excludes a general eſtate implied; as if it be given to a *feme durante viduatate*, and after her death, remainder to a ſtranger, this does not give an eſtate for life to a *feme*.

Bridgman

Bridgman and *Trotman contra*, becauſe all the daughters are in equal proximity of blood to the deviſor, as 5 *E.* 6. for having letters of adminiſtration; and 3 *Co. Ratcliffe*'s caſe; alſo the mother of *Perriman* was dead before the remainder fell, and becauſe the two ſons are nearer to the deviſor, than the ſon of the eldeſt ſon of *Joan. Briton*, 189, ſaith, that the ſecond daughter ſhall elect before the iſſue of the eldeſt daughter, with which agrees 30 *E.* 3. 25. and *Bracton* ſaith, *quod nomine hæredis includitur tota poſteritas.*

And ſo of daughters, the eldeſt ſhall have all.

And after ſeveral motions, it was reſolved by *Dodderidge*, *Houghton*, and *Chamberlaine*, that judgment ſhould be given for the plaintiff *(abſente Lea, Chief Juſtice)* but they did not agree in the reaſon of this reſolution; *Houghton* held, that if one hath iſſue three ſons, and deviſes to the youngeſt in tail, *remanere proximo conſanguinitatis*, that the eldeſt ſhall have all, becauſe the word *proximo* declares the intent of the deviſor, that one only ſhall have, admitting that they are in equal proximity of blood; and to this reaſon *Chamberlaine* agreed; and he ſaid, that ſo it was held in *Levett*'s caſe, 25 *Eliz.* by all the Juſtices; and *Chapman*'s caſe *ſupra*; and he ſaid that the diverſity was there taken, when the words are *propinquioribus*, that there all ſhall take; but *aliter* when it is limited *proximo:* which was denied by *Dodderidge*; becauſe there is not any diverſity between *nearer* and *neareſt*, any more than between *no* and *not*; alſo *Houghton* ſaid, that if one hath three ſons, and the eldeſt is attainted, and land is deviſed to the youngeſt, remainder *proximo de conſanguinitate*, that the king ſhall take all: *Dodderidge contra*; but in ſuch caſe their iſſue ſhall have it; for although the bond

of

of marriage is gone, and the blood corrupted for producing heritable iſſue, yet they may take by purchaſe, becauſe they are of his blood; but *Dodderidge* held, that all the daughters, and the ſons alſo in caſe of purchaſe and conſtruction of the will, are as near in blood, and they ſhall equally enjoy the land purchaſed; for the blood of the youngeſt iſſue, in nature, is in the ſame degree with the blood of the eldeſt; but *aliter* it is in the caſe of deſcent; but the reaſon of this is drawn from the general cuſtom of the realm, which conveys the land by deſcent to the eldeſt only; but this alſo is grounded upon the law of God, that the eldeſt, who opens the womb, ſhall be ſanctified to God, and ſhall be deemed by ſacrifice; *aliter* of *femes* as appeared with reſpect to the daughters of *Selaphead*; but by him, although the daughters are in the ſame proximity, yet the youngeſt ſon of the deviſor is nearer to him than the ſon of the ſon of the eldeſt daughter; but by him and *Houghton* and *Chamberlaine* this is not the caſe here, for the eldeſt daughter herſelf ſurvived the deviſor, ſo that the remainder and intereſt was veſted in *her*, although it was not executed in poſſeſſion until after her death, by the death of the tenant in tail without iſſue; ſo that afterwards it *went* in deſcent to her heirs, and not by proximity of blood to the deviſor; ſo that he held that the eldeſt daughter ſhould take but an equal portion with her ſiſters; but in this caſe it appeared upon the record that all the daughters died without iſſue *ſcil.* the eldeſt, to whom no eſtate was given by name in the will; and the two daughters, who had expreſs eſtates by it; and he held, that this expreſs eſtate excluded them, and their iſſues from

The reaſon why the eldeſt ſon is preferred to all others by deſcent.

from taking any other eſtate by implication; and ſo all fell upon the eldeſt daughter; to which *Chamberlaine* agreed; but *Houghton* denied this reaſon, becauſe this did not exclude their iſſue; ſo that they all agreed that the iſſue of the eldeſt daughter ſhould have the whole of the land, and commanded that judgment ſhould be entered accordingly for the plaintiff: but the counſel for the defendant ſhewed, that the ſpecial verdict was uncertain in point of title, upon which no judgment could be given: for they found that *Joan* the eldeſt daughter had iſſue *John* and *William*, and that *William clamando* as *proximus de ſanguine* of the deviſor, entered with his brother: and did not find that *John* was the eldeſt ſon or heir to *Joan*, and in point of title it ſhall not be intended that he is, although that he is firſt named; but when it is ſaid that *William clamando intravit*, this increaſes the uncertainty, and the Court cannot ground their judgment upon an intendment who is heir, and that the remainder veſted in *Joan*, and this is conveyed by deſcent to her heir, which doth not, by this verdict, appear to be the plaintiff; and ſo he cannot have judgment; and for this reaſon the Court would not give judgment; but awarded a *venire facias de novo:* but they declared their opinion upon the matter of law.

Special verdict finds plaintiff had iſſue two ſons, but does not find which is eldeſt or heir.

Uncertainty.

Venire facias de novo.

Young v. Englefield, T. 21 Jac. B. R. Palm. 378.

Variance between the roll and the niſi prius record.

In *treſpaſs*, the plaintiff alledged the treſpaſs in two acres, which abut upon *Gray's-Inn-Lane*; but the *niſi prius* record recited the abuttals upon *Graves-Inn-Lane*; and for this variance between the *niſi prius* and record here, *Crook* moved to have a new *diſtringas*; for that what had been done at the aſſizes was void,

void, and without warrant; and he cited a precedent in this court, *Trin.* 9 *Jac. Rot.* 430. between *Farthing* and *Dupper*, that the *niſi prius* for variance from the record here, in this that the *niſi prius* recited 6 *menſes*, where the record was 6 *ſeptimanas*, was adjudged without warrant and void. And inaſmuch as it appeared that this precedent was upon deliberation, it was ruled by *Lea*, C. J. and *Dodderidge*, J. that the plaintiff ſhould have a new *diſtringas*, although he was nonſuited at *niſi prius*; for this was without warrant and ſo no *nonſuit:* but if original proceſs or other proceſs be erroneous, yet it is a record: but the *niſi prius* was but a tranſcript from the record. *Houghton*, J. held, that it was a record, although erroneous; and ſaid that it was againſt the precedent: but it was reſolved as above according to the precedent.

If a verdict be imperfect, it ſhall not be rectified by the ſame jury, but a *venire de novo* muſt iſſue. R. 2 Cro. 210.

If there are ſeveral iſſues, and a verdict good as to one, and imperfect as to others, a *venire facias* goes to all. R. 2 Rol. 722. l. 45.

So, in an action againſt ſeveral, if the verdict is good as to ſome, imperfect as to others, there ſhall be a *venire facias de novo* as to all, and a defendant found not guilty, may afterwards be found guilty. R. 2 Rol. 722. l. 35. 2 Cro. 627.

So, if there be a demurrer to part, and iſſue for part, and the verdict does not find damages for the matter in the demurrer, it is wholly void. Dub. 2 Rol. 723 l. 5.

But it may be aided by a releaſe of damages on the demurrer, or a *non pros.* R. 1 Salk. 346.

Vide as to imperfect verdicts, 5 *Com. Dig.* 142, *&c.* a great variety of cases.

Rex v. John Huggins, Eſq. M. 4 G. 2. B. R. 2 Stra. 882. Ld. Raym. 1574.

A ſpecial verdict in murder and judgment for the defendant, after debate upon the uncertainty of the verdict, and whether the priſoner ſhould be diſcharged, or a venire facias de novo awarded.

The defendant ſtood indicted before the Juſtices of *Oyer* and *Terminer* at the *Old Bailey*, and the indictment ſet forth that *John Huggins*, 1 *October*, 12 *Geo.* 1. and long before, and until 1 *January* following, was warden of the *Fleet*, and had the care and cuſtody of the priſoners committed thither. That *James Barnes* was his ſervant, employed by him in taking care of the priſoners. That *Barnes* being a perſon of a cruel nature and diſpoſition, did, 1 *November*, 12 *Geo.* 1. make an aſſault upon *Edward Arne*, then a priſoner in the *Fleet*, and feloniouſly took him againſt his will, and carried him to a new-built room in the priſon, where he kept him ſix weeks without fire, chamber-pot, or cloſe-ſtool, the walls being damp and unwholeſome, and the room built over the common-ſewer. That at the time of ſuch impriſonment *Barnes* and *Huggins* knew the room to be as before deſcribed. That *Arne*, by reaſon of his impriſonment in the ſaid room, ſickened, and by dureſs thereof died; and that *Huggins* was aiding and abetting *Barnes* in committing the ſaid felony and murder.

The defendant *Huggins* only was taken, and having pleaded Not guilty, the Jury find this ſpecial verdict.

That Queen *Anne*, by letters patent under the great ſeal, dated 22 *July*, in the 12th year of her reign, conſtituted *Huggins* warden of the *Fleet* during his life, to be executed by himſelf, or his ſufficient deputy or deputies. That from the date of the letters patent until

* 1 *Ja-*

1 *January* 12 *Geo.* 1. the defendant was warden, and *Thomas Gibbon* all the ſaid time his deputy, and acted as ſuch. That *James Barnes* was the ſervant of *Gibbon*, and acted in the care of the priſoners, and particularly of *Edward Arne*. That *Barnes*, 7 *September* 12 *Geo.* 1. aſſaulted *Arne*, and felonioufly put him into a room (which is found to be as deſcribed in the indictment) and kept him there forty-four days without fire, chamber-pot, or cloſe-ſtool, or ſuch like utenſil. That *Barnes* knew the room to be ſituate as in the indictment, and that it was unwholeſome; and that for fifteen days at leaſt before the death of *Arne*, *Huggins* knew the condition of the room, but whether he knew it before, *penitus ignorant*. That by dureſs of the impriſonment, *Arne* 10 *September* became ſick, and languiſhed till 20 *October* following, upon which day he died by dureſs of the ſaid impriſonment in the ſaid room. That fifteen days at leaſt before his death, *Huggins* was once preſent at the ſaid priſon, and ſaw *Arne* under dureſs of the ſaid impriſonment, and turned away, and at the ſame time he ſo turned away, *Barnes* ſhut the door, and *Arne* continued in the room till he died. That during the time that *Gibbon* was deputy, *Huggins* ſometimes acted as warden. But whether he be guilty of the murder of *Edward Arne*, is the doubt of the Jury; on which they pray the advice of the Court; *et ſi pro Rege, pro Rege*; *et ſi pro defendente, pro defendente*.

This verdict was removed at the prayer of Mr. Attorney into B. R. and there argued by Mr. *Willes* and Serjeant *Eyre*; after which it was argued at *Serjeant's-Inn Hall*, in *Chancery Lane*, before all the Judges, by Serjeant *Cheſhyre*,

hyre, Mr. Attorney, Mr. Solicitor, and Mr. *Willes*, for the king; and by Serjeant *Darnall*, Serjeant *Eyre*, Serjeant *Hawkins*, Mr. *Peere Williams*, Mr. *Strange*, and Mr. *Forſter*, for the priſoner. But as every thing inſiſted on by either ſide is taken notice of in the opinion delivered by the Chief Juſtice, it will not be neceſſary to ſtate the arguments of counſel.

Raymond, Chief Juſtice, after ſtating the heads of the ſpecial verdict, went on as follows. The general queſtion in this caſe is, Whether, upon the facts as found in the verdict, the priſoner at the bar is guilty of the murder of *Edward Arne*.

For that purpoſe it will be neceſſary to conſider theſe two things: 1. What offence it is in *James Barnes*; and, 2. Whether the priſoner is guilty in the ſame degree.

And as to the firſt point, we are all of opinion, that if *Barnes* was now before the Court, and the facts, as found in this verdict, were found againſt him; he would undoubtedly be guilty of murder. It is certain there is no particular way of killing another, that is neceſſary to conſtitute murder; but the committing of murder is as various as the ſeveral ways of putting an end to life. In the caſe of a priſoner there is no occaſion for an actual ſtroke: the reſtraining him by force, and killing him by ill uſage, is enough to conſtitute this offence. All the authors who ſpeak of this ſpecies of murder, deſcribe it by a general expreſſion *per dure garde de ſes gardens*. The duty of a gaoler is not to puniſh, but confine the party, for the ſingle purpoſe of his being forth-coming to anſwer a legal charge or demand. *Fleta* 38. In this caſe *Barnes* has certainly exceed-

ed

ed his duty: he has been guilty of a breach of that truſt, which the law has repoſed in him, and is anſwerable for all the conſequences of it.

Another conſideration to make it murder is, that it is a deliberate act, of long continuance, and of great cruelty. It is likewiſe accompanied with force, againſt the conſent of the party. On all which accounts the law implies malice. Had he therefore been before the Court, there would have been no difficulty in adjudging it murder with regard to him.

2. Having thus determined what offence it would be in *Barnes*, let us now conſider how it ſtands with regard to the priſoner at the bar. And though the indictment has charged him equally with the other, yet we think the verdict has made a wide difference between them. The indictment charges *Barnes* to be his ſervant, but the verdict finds he was the ſervant of *Gibbon*. The whole charge in the verdict againſt the priſoner is, that for fifteen days before *Arne*'s death, he knew what ſort of a room he was in: that he once ſaw him under the dureſs of impriſonment that *Barnes* had put him in: and that during the time *Gibbon* was deputy, *Huggins* ſometimes acted as warden.

But notwithſtanding theſe circumſtances which are found againſt the priſoner at the bar, we are all of opinion he is not guilty of murder.

It is a point not to be diſputed, but that in criminal caſes the principal is not anſwerable for the act of the deputy, as he is in civil caſes: they muſt each anſwer for their own acts, and ſtand or fall by their own behaviour. All the authors that treat of criminal proceedings, proceed on the foundation of this diſtinction;

that to affect the ſuperior by the act of the deputy, there muſt be the command of the ſuperior, which is not found in this caſe.

The dureſs in this caſe conſiſted in the firſt taking him againſt his conſent, and putting him in that room, and the keeping him there ſo long without neceſſaries, which was the occaſion of his death. Now none of theſe circumſtances are found as againſt the priſoner. The Jury does not ſay he directed his being put into the room, that he knew how long he had been there, that he was without the neceſſaries in the indictment, or was ever kept there after the time the priſoner ſaw him, which was fifteen days before his death. And as theſe are circumſtances found againſt *Barnes*, and not againſt *Huggins*; and as in theſe caſes the Court is never to intend any thing, but muſt found their judgment on the facts as ſtated in the ſpecial verdict, and on them only; there can be no colour to think one equally guilty with the other. The only circumſtance relied upon to ſupply all this is, the priſoner's being once at the priſon where he ſaw the deceaſed under the dureſs, and turned away. But ſurely the bare being preſent can never amount to an aiding and abetting. He ſaw him there, it is true; but does that infer he knew how it was occaſioned, or conſented to the continuance of it? It is very material in this caſe, that the dureſs by which this unfortunate man came to his end, could not be known by a bare looking in upon him: he could not know he was there againſt his conſent, he could not by ſeeing him know the length of his confinement, or how long he had been without the decent neceſſaries of life: and it is likewiſe material, that no application is found to have been

been made to the defendant, which perhaps might have altered the caſe.

Theſe circumſtances, taking them altogether, are a very ſlender evidence of a conſent in the priſoner to the dureſs: though this I muſt ſay, that were they ever ſo ſtrong an evidence of conſent, they will not be ſufficient for us to ground a judgment upon: we are to determine upon facts, and not on evidence of facts; ſo is *Kelyng* 78, 111, where it is found, that *Plummer* diſcharged the fuzee, but not that he diſcharged it *againſt* the king's officers; and the Court could not take it that he did. It would be the moſt dangerous thing in the world, if we ſhould once give into the doctrine of inferring facts from evidence; which is the proper buſineſs of a jury, and not of the court.

But it is objected, that though the priſoner had made a deputy, he had ſtill the inſpection of the gaol; and for the time he was there, the power of the deputy ceaſed. To this I anſwer, that there is no caſe in law which proves, that the accidental preſence of the principal amounts to a revocation; and in reaſon it ought to be conſtrued ſuch a coming, as ſhews he intended to take upon himſelf the execution of the office. If a diſſeiſee comes to dine with the diſſeiſor, that will not amount to an entry.

It is likewiſe inſiſted on, that in many caſes a perſon who is abſent when the murder is committed, may nevertheleſs be an aider and abetter; and the caſes were put of laying poiſon, putting a child in a hog-ſtye, covering it with leaves, or leaving a ſick man in the cold, by which he dies, which are all to be met with in *Kelyng*. Now as to theſe caſes I

muſt obſerve, that in every one of them the perſon abſent did the act which was the occaſion of death; whereas here the act is found to have been done by another.

It was further obſerved upon this head of abſence, that in *Staunf.* 17. *Crimp.* 24. *b.* the caſe is ruled to be murder, of letting a miſchievous beaſt go abroad, which happens to kill a man. But ſurely that is laid down too general in thoſe books: and it would be very hard, if a man takes a reaſonable care to keep up the beaſt, that he ſhould be anſwerable, if the beaſt ſhould break out without his knowledge or conſent.

There is but one thing more that was preſſed by the king's counſel, *viz.* that ſince it was determined in *Oneby*'s caſe, that it is not neceſſary for the Jury to find malice, why is it more neceſſary to find the priſoner's conſent? To this I anſwer, that malice is matter of law ariſing from a legal conſtruction of the act; and from the act of the party the law has always conſtrued, whether there was malice expreſs or implied: but conſent is an act of the mind; a ſudden killing is conſtrued to be malicious, though there is no time for any conſent. Theſe are the reaſons which induce us to determine, that upon this verdict the priſoner at the bar is Not guilty of the murder of *Edward Arne.*

But then upon the argument of this cauſe a difficulty aroſe, what the Court ſhould do in this caſe, ſuppoſing the verdict to be too incertain to found any judgment upon. It will therefore be neceſſary further to conſider: 1. Whether this is an incertain verdict; and, 2. Suppoſing it is, whether we are to diſ-

charge

charge the priſoner, or award a *venire facias de novo.*

Now as to the laſt point, it is obſervable, that no inſtance could be produced where, in a criminal caſe, it was ever done for a fault in the verdict itſelf. *Arundel*'s caſe in 6 *Co.* was for a fault in the jury proceſs, and in the caſe cited of *Hil.* 8 *H.* 7. *Ro.* 3. there was no verdict, the Judge diſcharged the Jury, and would not take their verdict, becauſe it was put into their hands in writing as they ſtood at the bar.

And in the caſe of Mr. *Keate*, 5 *Mod.* 287. *Skinner*, 666. though the verdict was ſo incertain, that it was impracticable to determine either way, for want of finding who ſtruck firſt; yet *Holt*, C. J. was ſo averſe to a *venire facias de novo*, that he himſelf took an exception, that quaſhed the indictment, in order to put it into a proper way of being tried over again.

But whatever may be the determination of the Court, when that point comes properly before us, it is unneceſſary for us now to conſider; becauſe as to the other point we are all of opinion, that this verdict is not incertain.

There is no incertainty as to the facts that are found: the only fault is, that there are not ſuch facts found as will amount to murder. The conſequence of which is, that the defendant is not guilty of murder; and it would be endleſs to ſend it back to a jury, till they find facts enough to make it murder; beſides its being contrary to law, in expoſing a man to a ſecond hazard of his life.

It would have been a circumſtance very material in the caſe of *Plummer*, *Kelyng* 111. to

have found, that the fuzee was diſcharged at the king's officers; but the Jury were ſilent as to that, and the Court ſaid they could not take the fact to be ſo, upon bare evidence of the fact; and proceeded to give judgment, as if the fuzee had not been diſcharged againſt the king's officers, without ſending it back to the Jury to find it poſitively one way or the other.

So in the caſe of *Meſſenger et al'* (*Kelyng*, 79.) who were indicted for high treaſon in aſſembling and pulling down bawdy-houſes. The verdict was ſilent as to *Green* and *Bedell*, whether they were aiding and aſſiſting; and this (ſays *Kelyng*) being a matter of fact, which ought to be expreſsly found by the Jury, and not be left to the Court upon any colourable implication from their being preſent; they two were diſcharged, without ſending it back to the Jury for their further opinion as to the fact.

In *Kelyng*, 66. on a ſpecial verdict, it was found that *Thompſon* and his wife were fighting, and *Dawes*, endeavouring to part them, was killed by *Thompſon*; and it not being found that *Thompſon* knew *Dawes* intended only to part them, it was held man-ſlaughter, without ſending it back to the Jury to be certified of his knowledge.

Theſe are caſes directly in point as to this head; and I muſt obſerve, that *Plummer*'s caſe was after the caſe of *Keate*, wherein *Holt*, *Chief Juſtice*, had had this point under his conſideration.

This verdict therefore being ſufficient to found a judgment upon, our judgment is, that the priſoner is Not Guilty, and therefore he muſt be diſcharged.

This

Anger v. Wilkins, M. 6 G. 2, Barnes, 478.
General verdict for plaintiff in action for words: ſome not actionable, venire de novo that damages might be ſevered.

This was an action on the caſe for ſeveral ſets of ſcandalous words ſpoken of plaintiff by defendant. Plaintiff on the trial obtained a verdict, and the damages were found entire, though ſome of the words were not actionable. *Belfield* moved for a *venire facias de novo* on payment of coſts, that plaintiff might ſever his damages according to an ancient rule of court; which was granted by the Court.—*Eyre* for plaintiff.

I have given this caſe becauſe reported by Mr. *Barnes*; but I doubt the law, and do not know to what rule the author alludes.

Kynaſton v. the Mayor, Aldermen, and Aſſiſtants of Shrewſbury, T. 9 Geo. 2. 2 Stra. 1051.
If one member be omitted to be ſummoned to a corporate aſſembly, the act is void.

To a *mandamus* to reſtore the plaintiff to the office of alderman, it was returned, that at an aſſembly held ſuch a day the plaintiff was, for being abſent three years, removed. And upon a traverſe of every part of the return, a ſpecial verdict was found as to ſome points which are not neceſſary to be ſtated, inaſmuch as no opinion was given upon any but one, which was this, The removal was not upon a charter-day, ſo a ſummons of an aſſembly was neceſſary. The mayor gave orders for a ſummons of all the members, but the ſerjeant being informed, and believing that one of the aldermen was out of ſummons, neglected to give him notice, though he had a houſe and family in the town, and accordingly returned him out of ſummons. And upon this part of the caſe the Court was of opinion, it was not a regular aſſembly, for every member ſhould be ſummoned; and he has a right to debate as well as vote. And this point has been ſo often ſettled, that it is not now to be made a queſtion. And by the ſame reaſon that the omitting to ſummons one man may be

be excuſed, the omiſſion of a greater number may be paſſed over.

Whereupon a rule was pronounced for a peremptory *mandamus*; and the plaintiff prepared to enter up a judgment for his damages and coſts, when it was found, that at the trial there was an omiſſion of damages, and conſequently there could be no judgment for coſts.

Where on trying a traverſe in a return, no damages are given, this cannot be ſupplied by writ of inquiry. 2 Stra. 1021.

To ſupply this defect, the Court was moved for a writ of inquiry; and *Cro. Car.* 143. and the caſes of *quare impedit* and dower were cited, where damages not being the gift of the action, the want of them may be ſupplied by writ of inquiry.

To this it was anſwered and reſolved by the Court, that the rule laid down in *Cheney*'s caſe, 10 *Co.* is right, that where the Jury are charged with a matter for which an attaint will lie if they give a falſe verdict, it can never be ſupplied by writ of inquiry, but muſt be by *venire facias de novo*, and ſo is *Salk.* 205. 5 *Mod.* 113.

By the ſtatute 9 *Ann. c.* 20. this traverſe is given in the room of an action for a falſe return: and as there it cannot be ſaid the damages are collateral, ſo neither can it here; for they are conſequent upon the iſſue, and as much within the charge of the Jury. No one can doubt, but that if in an action for a falſe return, damages had not been given, they could not be ſupplied by a writ of inquiry. All the caſes of replevins upon the ſtatute 17 *Car.* 2. *c.* 7. are in point as to that. 1 *Sid.* 380. *Raym.* 170. 1 *Ven.* 40. 2 *Keb.* 408. *Tucker* v. *Stevens in C. B. Trin.* 6 *Geo.* 1. Here it ought to be by the ſame jury, and there is no difference between a ſpecial and a general verdict. The plaintiff's counſel will therefore conſider what to do, or pray.

And

And a writ of error being then depending in parliament, it was not thought adviſeable to pray a *venire facias de novo*, but to conſider of ſome form of a judgment to be entered up, in order to carry to the Lords. And the judgment that was entered was, " It is conſidered " by the Court, that the return is not ſuffi- " cient in law to bar or preclude the ſaid " *Corbet Kynaſton* from being reſtored to the " ſaid place or office of one of the aldermen " of the ſaid town, and that the ſaid return " for the reaſons aforeſaid be diſallowed and " quaſhed."

And thereupon the cauſe was argued at the bar of the Houſe of Lords, where no opinion was given upon the points of the ſpecial verdict, but a judgment pronounced for remitting the record to *B. R.* who were directed to award a *venire facias de novo*. There were three Judges preſent, *C. J. Willes*, *J. Denton*, and *B. Thompſon*, to whom two queſtions were put.

1. Whether there being no damages, any judgment could be entered? To which they anſwered, that there could not; and declared that no waiver or *remittit.* of damages below could have ſet this right, for then there would be nothing to give judgment for, the entry being only a judgment for damages and coſts, and the peremptory *mandamus* goes by rule for him, for whom judgment is given, which are the words of the ſtatute.

The ſecond queſtion put to the Judges was, Whether, as no damages are given, the plaintiffs in error would not be ſubject to an action, which would be a double vexation? As to this their opinion was, that an action might be brought, the ſtatute only taking it away

in

in caſe damages are given upon trying the traverſe.

The judgment was reverſed, and a *venire facias de novo* directed to be awarded by *B. R.*

Street v. Hopkinſon, et al' Mic. 10 G. 2. 2 Stra. 1055.

Upon pleading the ſtatute of limitations in error, the judgment is to bar the plaintiff of his writ. 1 Stra. 127, 439, 683.

A writ of error was brought, *tam in redditione judicii* againſt the teſtator, *quam in adjudicatione executionis* againſt the executors: as to the principal judgment, the defendant in error pleaded the ſtatute of limitations, and prayed that the judgment be affirmed. As to the award of execution, *in nullo eſt erratum* was pleaded. And that appeared to be in a *ſcire facias* againſt two executors, one of whom pleaded *ne unques executor*, and the other pleaded payment by the teſtator: and upon this plea there was a verdict againſt it, but no verdict as to the other, and then follows the award of execution.

As to the principal judgment, the only doubt was, whether, as the defendant in error had concluded with a prayer that the judgment be affirmed, the Court could give the proper judgment, which was, that the plaintiffs be barred of their writ of error.

But the Court held, that they were not bound by the prayer of an improper judgment, and therefore pronounced the rule, that the plaintiff in error ſhould be barred.

Vide ante. There cannot be a venire facias de novo awarded on error. Vide poſt. Grant v. Aſtle, and Parker v. Wells, contra.

And as to the award of execution, they were of opinion it was wrong, and that not being in the ſame court, they could not award a *venire facias de novo*; and this being a diſtinct judgment, might be reverſed without affecting the other. And it was reverſed accordingly. The caſes cited upon the firſt point were *Show.* 50. *Carth.* 369, 370. *Lutw.* 1386. 3 *Lev.* 58. And on the ſecond point, 1 *Roll. Abr.* 803. 1 *Inſt.* 127. 3 *Salk.* 372. *Cattle v. Andrews,*

Andrews, Hil. 5 W. & M. rot 826. in B. R. Cumb. 259. Salk. 4. 363.

Bartlett v. Spooner, E. 24 Geo. 2. Barnes 461.

Not guilty in treſpaſs and two juſtifications. Verdict for defendant on the two firſt iſſues, not any proof or verdict as to the third iſſue. Motion for venire de novo as to the third iſſue, but refuſed.

This was an action of treſpaſs, to which defendant, by leave of the Court, had pleaded three pleas, *viz. Not guilty*, and two ſeveral *juſtifications*. On the trial, defendant proved his ſecond plea, to the ſatisfaction of the Court, and obtained a verdict on the firſt and ſecond iſſues; but as to the third iſſue, no proof was gone into, nor any verdict found relating to it. *Belfield*, for plaintiff, objected, that the verdict was incomplete, imperfect, and uncertain, nothing being found as to a material fact put in iſſue; and therefore, as to the third iſſue, *a venire facias de novo* ought to be awarded. On ſhewing cauſe, *Prime*, for defendant, obſerved, that by the firſt plea, (not guilty) the whole is put in iſſue; that, by the ſecond plea, the whole treſpaſs is covered, and therefore the verdict is complete. It is found thereby, that plaintiff has no cauſe of action, and the Judge who tried the cauſe did not think it needful to go farther. As plaintiff has no cauſe of action, he can have no damages. Contingent damages in caſe of iſſue and demurrer, and iſſue tried before argument, are not neceſſary to be found at the trial on plaintiff's verdict, but may be afterwards ſupplied, if judgment for plaintiff on the demurrer.

Per Cur'. Here is enough found for the Court to give judgment upon. No *venire facias de novo* ought to iſſue. It was not the buſineſs of defendant, but of plaintiff, to have the third iſſue determined, if he imagined that thereby he might be intitled to coſts, or any other advantage.—The rule diſcharged.

N. B.

N. B. Plaintiff gave no evidence on the Not Guilty.

Crowder v. Rocke, T. 2 G. 3. 2 Wilſ. 144.

If it appears on the face of the *jurata*, that the cauſe was tried after the day of *niſi prius* mentioned therein; there muſt be a *venire facias de novo* awarded, for the *hab. corpora* and *jurata* cannot in this caſe be amended.

Eichorne v. Lemartre, H. 8 G. 3. 2 Wilſ. 367.

Wherever attaint would lie, writ of inquiry cannot be awarded to aſſeſs damages, but *venire de novo* muſt go; ſo, if iſſue is joined in abatement, and verdict for plaintiff.

Drage v. Bravet, P. 8 G. 3. 2 Wilſ. 377.

In debt for a penalty of £. 500 on articles not to cut trees, *&c.* on penalty, *&c.* if there is verdict for plaintiff, that defendant owes the debt and one ſhilling damages, a *venire facias de novo* ſhall go, for the Jury ſhould have aſſeſſed the real damages on the breaches aſſigned, and plaintiff cannot take a verdict for the whole debt by 8 and 9 *W.* 3. *c.* 10.

Grant v. Aſtle, T. 21 G. 3. Doug. 696. B. R.

One fine cannot be aſſeſſed on the admiſſion to ſeveral copyhold tenements. If any count in the declaration ſtate one fine, although the others ſtate ſeveral, and there are entire damages, and judgment for the plaintiff, it is error. A court of error may award a venire de novo.

This was a writ of error from the Court of *Common Pleas*, on an action of *aſſumpſit*, by *Aſtle*, as lord of the manor of Great *Tay*, in the county of *Eſſex*, againſt *Grant*, for the fines aſſeſſed by the lord, on *Grant*'s admiſſion to eight different cuſtomary tenements. The declaration conſiſted of three counts. The firſt ſtated, that *Aſtle* was lord of the manor; that the eight tenements (enumerating and deſcribing them particularly with their names, and the names of the different parts of which each conſiſted, where there were different parts of the ſame tenement with diſtinct names, and the number of acres which each tenement, or its different parts, by eſtimation, contained)

were, and for time immemorial had been, parcel of the ſaid manor, and cuſtomary tenements of the ſaid manor, *demiſed and demiſeable* by copy of court roll of the ſaid manor, by the lord of the ſaid manor, or by his ſteward, or deputy ſteward of the courts of the ſame manor for the time being, to any perſon or perſons intitled to take the ſame in fee-ſimple, or otherwiſe, at the will of the lord, according to the cuſtom of the ſaid manor; and that within the manor there was a cuſtom, that every cuſtomary tenant, upon his admiſſion to any cuſtomary tenement, parcel of the manor, by the lord or his ſteward, or deputy ſteward, ſhould pay to the lord a *reaſonable ſum, to be aſſeſſed by him*, or his ſteward, or deputy ſteward, for a fine, for ſuch his admiſſion to ſuch cuſtomary tenement. It then ſtated eight ſeveral admiſſions of *Grant*, by the deputy ſteward, to each of the eight cuſtomary tenements reſpectively; that the *firſt* was of a large annual value, *viz.* of the annual value of £. 23. 8*s*. 9*d*. and that *Aſtle*, at the time of admiſſion of *Grant* to this firſt tenement, did aſſeſs or appoint the ſum of £. 46. 17*s*. 6*d*. as and for a fine for his admiſſion to that tenement, to be paid by *Grant to Aſtle*, at the meſſuage called the *Guildhall*, in Great *Tay aforeſaid*, being the place where the courts for the manor were uſually holden, at twelve o'clock, *A. M.* on *Thurſday* the 20th of *Auguſt* then next enſuing; that the ſaid £. 46. 17*s*. 6*d*. was *a reaſonable ſum* of money to have been paid to *Aſtle* by *Grant*, for his admiſſion to that tenement; and then an *aſſumpſit* by *Grant* for the £. 46. 17*s*. 6*d*. Then ſimilar ſeparate allegations with regard to the ſeveral fines of

£. 4.

£. 4. 10s.; £. 2. 12s. 6d.; £. 11. 18s.; £. 3.; £. 1. 10s.; £. 7. 10s.; and £. 24. reſpectively, for the ſeven other cuſtomary tenements (1). The ſecond count ſtated, that, "whereas *Grant* afterwards, *to wit*, &c. was indebted to *Aſtle* in the further ſum of £. 98. 18s. 4d. for *a certain other fine* due and of right payable from the ſaid *Grant* to the ſaid *Aſtle*, as lord of the manor of Great *Tey*, for the ſaid *Aſtle*'s admiſſion of the ſaid *Grant*, at his ſpecial inſtance and requeſt *to certain other cuſtomary tenements*, parcel of the ſaid manor, to be held by the ſaid *Grant* and his heirs, of the lord of the ſaid manor, at the will of the lord, according to the cuſtom of the ſaid manor, by *certain rents, ſervices, and cuſtoms* therefore formerly due, and of right accuſtomed; and then an *aſſumpſit* for the ſaid laſt-mentioned ſum. The third count was for £. 100. money paid, laid out and expended. *Grant* pleaded the general iſſue, paying, at the ſame time £. 84. 5s. 8d. into Court; and the cauſe came on to be tried before ASHHURST, *Juſtice*, at the aſſizes for the county of *Eſſex*, when a general verdict was found for *Aſtle*, with £. 98. 18s. 4d. damages, ſubject to the opinion of the Court of *Common Pleas*, on a caſe reſerved. That court having decided in favor of *Aſtle*, he remitted the £. 84. 5s. 8d. upon the record, and took judgment for the difference. *Grant* then brought this writ of error, and (beſides ſeveral on the firſt count, which, not having been inſiſted on, I omit) aſſigned the following errors on the ſecond count: 1. That no title was alledged, nor did appear to be veſted in *Aſtle*, to entitle him to a fine upon the admiſſion of *Grant*; whereas, by the law of the land,

(1) Some of the counſel ſpoke of what is here called the firſt count, and was ſo deſcribed in the aſſignment of errors, as conſiſting of eight counts, there being eight ſeparate aſſumpſits alledged.

land, a title ought to have been ſtated, whereby he claimed the ſaid fine. 2. That no cuſtom or preſcription was therein ſtated or alledged, whereby ſuch a fine as was thereby claimed could ariſe, or become payable. 3. That it appeared, "*that one groſs ſum had been aſſeſſed, and was claimed as a fine for divers diſtinct and ſeparate cuſtomary tenements*; whereas, by the law of the land, ſeparate and diſtinct fines ought to be ſet and aſſeſſed upon each ſeveral and reſpective tenement."

Wood for the plaintiff in error,—*Law* for the defendant.

Wood inſiſted, that the ſecond count was bad, and that, if ſo, as the verdict was general, the judgment muſt be reverſed: 1. In order to ſupport this count, he ſaid, a great many circumſtances, eſſential to intitle the plaintiff to maintain his action, muſt be preſumed, and ſupplied by intendment. 1. There is no allegation of any cuſtom to take fines, and, without ſuch a ſpecial cuſtom, no fine is payable. 2. It is not alledged that the fine was reaſonable. 3. It is not ſtated how it was aſſeſſed. 4. Nor how appointed to be paid. 5. Nor that the defendant had notice before the action brought. 6. It is not ſufficiently ſhewn, that the tenements are copyhold, for, they are not alledged to have been *demiſed and demiſable* from time immemorial, *&c.* They are indeed called cuſtomary, but *that* they may be, and yet not copyhold, nor ſubject to the payment of fines upon admiſſion. It is not denied, that *indebitatus aſſumpſit* will lie for a copyhold fine (2), but all the circumſtances juſt mentioned are neceſſary to raiſe the *aſſumpſit*, and there is no caſe in which the court has preſumed ſo many things even after verdict.

(2) It was ſolemnly decided, that aſſumpſit will lie, in the caſe of Shuttleworth

v. Garnet, cited Cowp. p. 762. by the opinion of Dolben, Gregory, and Eyres, Juſtices, againſt that of Holt, Chief Juſtice.

verdict.—Upon this head of objection he cited *Moore* v. *Lewis* (a), which was an action of *aſſumpſit*, and the declaration contained two counts; in the firſt, the conſideration of the *aſſumpſit* was, that the plaintiff had done the defendant *multum et gratiſſimum beneficium*; in the ſecond, that he had done him *multa beneficia*. There was a general verdict; and motion in arreſt of judgment, becauſe neither of the conſiderations were ſufficient, eſpecially not the laſt, for that ſome particular ſervice ought to have been alledged; and the Court held clearly, that nothing being particularly expreſſed in the conſideration of the ſecond promiſe, and entire damages being given, the plaintiff could not have judgment. He alſo cited *Elkin* v. *Waſtell* (b), where, upon a writ of error, the Court agreed that land could not be *intended* to be copyhold, but muſt be ſo alledged. But, 2. He contended that there was another objection which was deciſive, *viz. that* aſſigned as the third error on the ſecond count. He ſaid, he took it to be quite ſettled, that there cannot be one groſs fine for ſeveral diſtinct tenements; and it was impoſſible to read this count, and not to ſee that the fine was for divers tenements. The words are, "*a certain* "*other fine*," and "*certain other cuſtomary te-* "*nements*;" not, "*a certain other cuſtomary* "*tenement.*" This muſt mean more than one tenement. It goes on farther, and ſtates them to be held by "*certain rents, ſervices, and cuſ-* "*toms*;" and, if there is a plurality of rents and ſervices, there muſt alſo be a plurality of holdings. In the firſt count, the words cuſtomary tenements, are manifeſtly uſed to expreſs ſeveral diſtinct tenements, and there cannot be a better way of explaining the meaning

(a) B. R. E. 21 Car. 2. 1 Ventr. 27.

(b) B. R. M. 14 Jac. 1. 3 Bulſtr. 230.

of

of one part of the declaration, than by comparing it with the other part. On this head he relied on *Hobart* v. *Hammond* (c), where it was expreſsly reſolved, that, when a copyholder has ſeveral lands held by ſeveral ſervices, by copy, there the lord ought to aſſeſs and demand the fines ſeverally for every parcel which is ſo ſeverally held; *Taverner* v. *Cromwell* (d), and *Hitch* v. *Wallis*, before BLACKSTONE, *Juſtice*, at the Lent *aſſizes* for the county of *Cambridge*, 17 *Geo.* 3.

(c) B. R. M. 42 et 43 Eliz. 4 Co. 27 b. S.C. Moore 622. and Cro. Eliz. 779. by the name of Dalton v. Hammond.

(d) B. R. T. 26 Eliz. 4 Co. 27. a.

Lord MANSFIELD deſired *Law* to confine himſelf to *Wood*'s ſecond objection.

Upon that point, *Law* ſaid, it ought to be conſidered, that, here, the objection was made after verdict, not on a demurrer, or at the trial, as in the caſe of *Hitch* v. *Wallis*, in which caſe the plaintiff would have given evidence of one groſs conſolidated fine for divers tenements. The Court, in this caſe, will give to the word "*tenements*," ſuch a ſenſe, if poſſible, as will ſupport, rather than overturn the count. "Tenements," as defined in *Coke Littleton* (a), means any "corporate inheritances," or any "inheritances iſſuing out of thoſe." It may ſtand for *meſſuages and lands*, and, if you tranſlate the ſign into the thing, the declaration will run "certain other cuſtomary "meſſuages and lands," which would certainly be ſufficient, as the fine may be ſuppoſed to have been aſſeſſed for one copyhold eſtate compoſed of different parts, as houſes, arable grounds, *&c.* As to the words, "rents, "ſervices, *&c.*" in the plural, one copyhold eſtate may be held by ſeveral different ſorts of rents and ſervices, to be paid and performed at different times. In *Shuttleworth* v. *Garnet*,

(a) Co. Litt. 19 b.

net, as reported in ſeveral different books (b), the declaration was on a general *indebitatus aſſumpſit* for a *fine*, payable on the death of every lord, and aſſeſſed on the defendant, as tenant *quorundam cuſtumariorum tenementorum* (c), and upon a motion in arreſt of judgment, it was determined that the action lay (3). So in the caſe of *The Mayor of Exeter* v. *Trimlet*, (d) where on a general demurrer to an action of *aſſumpſit* for petty cuſtoms, in which the declaration contained two counts, the firſt ſetting out a preſcriptive right, and the ſecond being a general *indebitatus aſſumpſit* for a certain ſum due for petty cuſtoms,—the demurrer was over-ruled, and WILLES, *Chief Juſtice*, in delivering the judgment of the Court, ſaid, they gave no *poſitive* opinion as to the *ſecond* count, but inclined to think it was well enough upon a general demurrer, and that, if the defendant had pleaded *non aſſumpſit*, the plaintiff at the trial would have been obliged to ſhew his right to the petty cuſtoms. Surely the plaintiff here, is intitled to, at leaſt, as much advantage after verdict, whatever might have been the caſe upon a ſpecial demurrer. There, it is ſaid, the plaintiff muſt have *proved* his right. Here, the Court will preſume, that the right was proved, and no judge at *niſi prius* would have ſuffered evidence to be produced of one general conſolidated fine for ſeveral copyholds: it muſt be intended that the proof was either of one eſtate, or of ſeveral aſſeſſments. If the Court ſhould think "tenements" in the plural, cannot be interpreted to mean one eſtate compoſed of different parts, they will reject the letter *s*, rather than turn the plaintiff

(b) B. R. M. 1 W. et M. Carth. 90. 3 Mod. 239. 3 Lev. 261. 1 Show. 35. Comb. 151.

(c) Carth. 91.

(3) The preſent queſtion does not appear to have been made in that caſe; the only point argued being, whether aſſumpſit was a proper form of action. Vide Cowp. p. 700. note (3).

(d) C. B. T. 32 & 33 G. 2. 1 Wilſ. 95.

tiff round. The word "parcel" may aſſiſt to ſhew that only one copyhold was meant.

Lord MANSFIELD.—I have exceedingly lamented, that ever ſo inconvenient and ill-founded a rule ſhould have been eſtabliſhed, as that, where there are ſeveral counts, entire damages, and one count is bad, and the others not, this ſhall be fatal; upon the fictitious reaſoning, that the Jury has aſſeſſed damages on all, although they in truth never thought of the different counts, but the verdict was ſo taken, from the inadvertence of counſel in the hurry of *niſi prius*. And, what makes this rule appear more abſurd, is, that it does not hold in the caſe of criminal proſecutions; for, when there is a general verdict of *Guilty* on an indictment conſiſting of ſeveral counts, if any one of them is good, that is held to be ſufficient. But in civil caſes the rule is now ſettled, and we have gone as far as we can, by allowing verdicts in ſuch caſes to be amended by the judges notes (a). *That* might have been done in this inſtance in an earlier ſtage of the proceeding, but cannot now after judgment.

(a) Eddowes v. Hopkins, ante ix. (10.)

BULLER, *Juſtice*.—The Court may grant a *venire de novo*. A good cauſe of action is ſhewn in the firſt count; and that it is true, appears by the verdict; but the plaintiff has alſo laid damages aſſeſſed to him on a count in which he has not ſhewn any cauſe of action. The Court, under theſe circumſtances, may ſend the caſe back to have damages aſſeſſed only on that count, on which, in point of law, he is intitled to recover.

The Court then ſaid, there was no doubt

but a *venire de novo* might be granted by a court of error: that it had been done by the Houſe of Lords, and was not a new practice, for upon an enquiry made by this Court on a late caſe from *Ireland*, a great many inſtances had been found.

A *venire de novo* awarded (4).

Upon

(4) The cauſe came on to be tried, on the *venire de novo*, before *Aſhhurſt*, Juſtice, at the *Lent* aſſizes for the county of *Eſſex*, 22 *Geo.* 3. when the Jury, upon the evidence, thought that the ſum of £. 46. 17 *s.* 6*d.* ſtated to have been aſſeſſed as a fine on the admiſſion to the firſt of the eight tenements, exceeded two years value, and that the fine ought only to have been £. 46. 4 *s.* 3*d.* *Aſhhurſt*, Juſtice, was of opinion, that the plaintiff could not have a verdict for that ſmaller ſum, but muſt recover either to the exact amount of the fine declared upon, or not at all. The plaintiff's counſel, however, inſiſting ſtrongly that he might recover whatever the Jury ſhould find the two years value to be, a verdict was found for the plaintiff, by conſent, on the firſt count for two years value, with liberty to enter the verdict for the defendant, if the Court ſhould think the plaintiff was bound to prove the exact ſum laid.

In *Eaſter Term* 22 *G.* 3. this queſtion was argued by *Rous*, *Erſkine*, *B. Hunter*, and *Law*, for the plaintiff *(Aſtle)*; and *Peckham* and *Mingay* for the defendant; and in the ſame term, on *Saturday* the 11th of *May*, Lord MANSFIELD delivered the opinion of the Court in favour of the defendant, as follows:

Lord *Mansfield*.—The only count in the declaration which is now material, is for ſeveral fines for admiſſion to ſeveral copyholds; the declaration ſtates a cuſtom for every cuſtomary tenant to pay a reaſonable fine upon his admiſſion, to be aſſeſſed by the lord, &c. that this tenement was of a large annual value, viz. of the annual value of £. 23. 8 *s.* 9*d.* that the lord had aſſeſſed £. 46. 17 *s.* 6*d.* as a fine for the defendant's admiſſion to this tenement, and that this ſum was a reaſonable fine. On the evidence it appeared, that the fine ſhould have been only £. 46. 4 *s.* 3*d.* that being the full amount of two years value, and the queſtion now is, Whether the plaintiff

Upon a writ of error from the judgment (a) of the Court of *King*'s *Bench*, the following queſtions were put to the Judges by order of the Houſe of Lords.

Parker v. Wells in error, E. 27 G. 3. B. R. Durn. & Eaſt, 783. 15th May 1787. Dom. Proc.

(a) Durnford & Eaſt, 40.

Firſt,

tiff can, in this caſe, recover a ſmaller ſum than the fine aſſeſſed? Two things are neceſſary parts of this cuſtom: 1. The fine muſt be *aſſeſſed*; 2. It muſt be *reaſonable*. The lord ſays in his declaration, that he has *aſſeſſed* £. 46. 17 *s.* 6 *d.* for a fine, and that this ſum was *reaſonable*, and brings his action for that preciſe ſum. The queſtion for the Jury was, Whether £. 46. 17 *s.* 6 *d.* was a reaſonable fine? and they found it was not, therefore the plaintiff is not intitled to recover. He has not aſſeſſed two years value, but a preciſe groſs ſum; and by what rule he went in aſſeſſing that ſum, does not appear upon the record. It is true, he has averred that the eſtate is of a large yearly value, *viz.* of the yearly value of £. 23. 8 *s.* 9 *d.* but that is no averment of what the yearly value really is. And the averment in this caſe is totally immaterial. It would have been enough if the plaintiff had ſtated, that he had aſſeſſed the ſum of £. 46. 17 *s.* 6 *d.* as a fine, and that ſuch ſum was reaſonable; and it would *then* have been matter of evidence, juſt as it was on *this record*; whether the ſum aſſeſſed exceeded two years value or not, becauſe that is the eſtabliſhed criterion whether it be reaſonable or not. In the preſent caſe the duty is numerically certain, for it is not aſſeſſed with relation and in proportion to the annual value, but is fixed at a groſs ſum. The only caſe on this ſubject is *Titus* v. *Perkins* (a), which is reported in *Skinner* (b), *Carthiew* (c), *Levinz* (d), and 3 *Mod.* (e). The *Chief Juſtice* there ſays, "If the lord demand more than "he ought, he may make his demand *de novo*, for the "Judge, in caſe of a *greater* demand than is due, ought "not to adjudge as much as is due to the lord, and bar "him for the reſidue, but ought to adjudge againſt him "for the whole, and that his entry was tortious, *if he* "*had entered*, and put him to a new demand (f)." This goes to the demand itſelf, and is not confined to the caſe of a forfeiture; and there is no ſuch diſtinction made in that caſe (which had been inſiſted on at the bar.) The *giſt* and foundation of every action muſt be proved as laid

(a) C. B. H. 1 et 2 Jac. 2.
(b) Skinn. 247.
(c) Carth. 12.
(d) 3 Lev. 249. 255.
(e) 3 Mod. 132. Reported alſo in Comberb. 43.
(f) Skinn. 249.

A venire facias de novo awarded by the Houſe of Lords, upon a writ of error upon a ſpecial verdict, the finding being inſufficient.

Firſt, Whether the finding on this verdict be ſufficient whereupon to give final judgment?

Secondly, If the finding be inſufficient, what award ought to be made on ſuch finding?

Thirdly, If the finding be ſufficient, whether upon ſuch finding the plaintiff in error appear to be a trader, within the true intent and meaning of the ſtatutes concerning bankrupts?

The Lord Chief Baron *Eyre* delivered the unanimous opinion of the Judges preſent upon the *firſt* queſtion in the negative; and upon the ſecond queſtion, that a write of *venire facias*

in the declaration. This action is for a certain preciſe ſum, and, under the circumſtances of the caſe, it could not be brought in any other way. The caſes cited for the plaintiff, *viz.* of debt on a foreign judgment (g); or againſt a tenant for *double the value of the land*, when he holds over under the ſtatute of 4 *Geo.* 2. *cap.* 28 (h); or for *treble the value* for not ſetting out tithes, under the ſtatute of *Ed.* 6. (i); or of *aſſumpſit* for a total loſs on a policy of inſurance, when there has been only a partial loſs (k), are not at all applicable to the preſent caſe; for, in all of thoſe the *giſt* of the action is ſupported, and a caſe proved conſiſtent with the declaration, thoſe actions being not for a preciſe ſum, but for a ſum in proportion to what the Jury ſhall find to be the value or the damage. We give no opinion whether the lord might not have aſſeſſed a fine for two years value, and made that ſolely the foundation of his declaration. In *Titus* v. *Perkins*, a cuſtom to have a year's value, generally, for a fine, was held to be good. But, however that might be, it is very clear that the evidence here did not ſupport the declaration, for the plaintiff has no right to any thing but the ſum aſſeſſed; the duty ariſes upon the aſſeſſment, and *that* by the evidence is proved to have been illegal and void. Therefore the caſe ſtands as if no aſſeſſment had ever been made, and conſequently the plaintiff's right

(g) Walker v. Witter, Doug. M. 19 G. 3. p. 1.
(h) Vide Doe & Jackſon, Doug. E. 19 G. 3. p. 167.
(i) 2 & 3 Ed 6. c. 13.
(k) Gardiner v. Croaſdale, B. R. H. 33 G. 2. 2 Burr. 904. 1 Blackſt. 198.

cias de novo ought to be awarded; whereupon it was adjudged accordingly that the Court of King's Bench do award a *venire facias de novo.*

right to demand a fine is not yet complete. Therefore we are all of opinion with the defendant.

There was accordingly judgment for the defendant, becauſe, as the fine for the firſt tenement was to be deducted from the damages, he had paid more into Court than the plaintiff was intitled to recover.

IX.

IX. Of other Matters reſpecting new Trials, &c.

(20.) *Of New Trials in Inferior Courts.*

Cole v. Greene, H. 22 & 23 Car. 2. B. R. 1 Lev. 309. Converting a brewhouſe into tenements of greater value is waſt.

WASTin the *Huſtings*, *London*, upon a leaſe for years of a brewhouſe in *London:* the defendant pleaded *null waſt*, and iſſue upon this; and upon the evidence it appeared, that the defendant *took down the brewhouſe* and erected ſeveral houſes in the place, and improved the rent from £. 120 to £. 200 *per annum*, and by the direction of *Howell*, Deputy Recorder, before whom the cauſe was tried; (inaſmuch as by this, the nature of the thing and the evidence was altered;) the Jury found this to be waſt, and gave ſingle damages £. 200, which was trebled at £. 600; but then judgment was arreſted upon motion before Sir *William Wild*, the Recorder himſelf, for the inſufficiency of the verdict; becauſe the writ and count are *que fecit vaſtum venditionem & deſtructionem:* and the Jury found *fecit vaſtum venditionem & deſtructionem ſcil. divellendo* the brewhouſe, and taking the coppers, and the other particulars, *&c.* but they did not find any ſale of any of the particulars upon the place. *Long quinto E.* 4. 100. *in waſt* for felling and ſelling of trees, the defendant pleaded that he felled and employed them in repairs,

repairs, and the plea was ill, becauſe he did not traverſe the *ſelling* notwithſtanding that to this it was anſwered, that although in a plea the *ſelling* is material, becauſe if he ſell them it is waſt, although he repurchaſes them and employs them in repairs, and becauſe the *ſelling* is traverſable, ſo that it may appear to the Court, if the employing them in repairs be *waſt* or not: but in a verdict when the waſt is found this is ſufficient whether they are ſold or not. But the verdict was for this exception ruled to be inſufficient, and a rule for a new trial granted, upon which the Jury, in reſpect to the improvement, by the directions of Sir *William Wild*, before whom the new trial was had, gave a verdict for the defendant, and judgment was thereupon given for the defendant.

Verdict ſet aſide, and new trial and contrary verdict, and judgment, and upon this error brought, and all certified without diminution.

Upon this judgment *Cole* brought a writ of error before *Vaughan*, C. J. of C. B. *Hale*, C. B. *Turner*, B. and *Rainsford* and *Morton* Juſtices, aſſigned at *St. Martin's-le-Grand*, and upon hearing of counſel before *Howell*, Deputy Recorder, the judgment, and both verdicts, and the rule for the new trial (which was) *quia videtur Cur' quod verdict prædict. eſt vitioſum & erroneum, ideo caſſetur, & habeatur nova triatio*, were all certified, and before the ſaid Juſtices ſo aſſigned, four points were argued and adjudged. *Firſt*, That the firſt verdict was ſufficient, for the reaſon before alledged, *Raſt. Entr.* 695. *b.* 696. *d.* 689. *Paſch.* 7. *Eliz.* 3. *Pl.* 1. *Secondly*, That both the verdicts and the rule were well certified at firſt upon the writ of error, becauſe the Huſtings being an inferior court, no diminution may be alledged of certifying more than is certified at firſt, and if the firſt verdict be not certified and the rule, the

the erroneouſneſs of the proceedings in the Huſtings cannot appear, and ſo no remedy upon the writ of error; and for this were cited *Co.* 8. 65. *Loveday's caſe*, *Co Entr.* 252. *Donnal's caſe*. *Thirdly*, That the Court here ought to reverſe the judgment, becauſe the court below erred in ſetting aſide the firſt verdict as inſufficient when it was ſufficient. *Fourthly*, That the Court here ought to give the ſame judgment here for the plaintiff, upon the firſt verdict, as the court below ought to have given. And this by virtue of the words in the writ of error, *Et ulterius facturi quod ad juſtitiam pertinet ſecundum leges regni & conſuetudinem civitatis prædict'*, and although no precedent was produced of ſuch a thing done before in this caſe, yet they ſaid they would preſume the cuſtoms of *London* to be according to the common law, if no precedent was ſhewn to the contrary. And upon this all the Judges agreed and reverſed the judgment, and gave judgment for the plaintiff upon the firſt verdict.

The Judges at St. Martin's give the ſame judgment as the Judges in the Huſtings ought to have given.

Upon which judgment of reverſal the defendant brought a writ of error in the Houſe of Lords, and aſſigned for error that the Jury did not come *from the four next wards*, which according to the cuſtom of *London* they ought to have done; upon which the defendant in error pleaded *in nullo eſt erratum*; and upon argument there, the Lords, with the advice of the Judges, reſolved theſe points. Firſt, that this was not aſſignable for error, being contrary to the record; becauſe the award of the *venire facias eſt de quatuor proximis wardis*, and the writ returned ſerved accordingly, and it is not like to the caſe 3 *Cro.* 329. nor 1 *Roll. Ab.* 761. which are of more inferior

Error contrary to the record is not aſſignable.

rior courts, where it was aſſigned that one named *Alderman* was not an alderman. And one named *Steward* of *St. Catherine*'s, was not *ſteward*. But the courts and cuſtoms of the city of *London* are confirmed by act of parliament, and are as the *grand ſeſſions* of *Wales*, or the *palace-court*, and *Roll*'s 1. *Abr.* 758. *nu.* 3. It may not be aſſigned that the deputy of the *grand ſeſſions* before whom the cauſe was tried, was not deputy, and *Molins* and *Neſby*'s caſe, *Trin.* 14 *Car.* 2. *B. R. Rot.* 1098. and *King* and *Allen*'s caſe in the ſame court, it may not be aſſigned that the Judge of the *Marſhalſea* was not judge, or was not preſent in court. *Secondly, that in nullo eſt errat'* is a demurrer, and although that this is error *in fact*, it is not confeſſed by the demurrer, not being aſſignable. But the demurrer is upon this in point of law, becauſe not aſſignable, wherefore the judgment was affirmed and remanded to *St. Martin*'s to be executed. And there it was objected that they could not execute it, becauſe they had not any ſeal for ſealing the execution. But to this a precedent was produced dated 11 *June*, 22 *Eliz.* between *Crowther* and *Gee*, where in a ſimilar caſe, the juſtices ſeal the writ of execution with their particular hands and ſeals, and ſo the court reſolved to have it done here, but before that this was done *Greene* the plaintiff in error died, not having any goods in *London*. And *Forth*, alderman of *London*, claiming by leaſe under *Greene*, had preferred a bill in Chancery, to be relieved by his bill. This waſt being an improvement, but he for having an injunction, was ordered by the court to enter into a recognizance to anſwer for *Greene*, being an ancient man, and upon hearing the cauſe there in

In nullo, &c. is a demurrer, but does not confeſs error in fact not well aſſigned.

How the Juſtices in error at St. Martin's grant execution.

Chancery after verdict and judgment, and this affirmed in error, directs a new trial in waſt.

in reſpect that there had been one verdict for the plaintiff and another for the defendant, *Bridgman*, Lord Keeper, after all theſe proceedings, directed a new trial at the bar of the *King*'s-*Bench* to try in a feigned action, *waſt or not*, and upon this trial before *Hale*, then Chief Juſtice, it was reſolved to be waſt notwithſtanding the improvement, by reaſon of the alteration of the nature of the thing, and of the evidence, and the Jury gave their verdict accordingly, and 100 marks ſingle damages, which trebled amounted to £. 200. which the Chancellor compelled *Cole* to take.

The record certified immediately from St. Martin's into B. R. without mittimus out of Chancery.

Cole, for having execution of the place waſted, had the record tranſmitted by *certiorari* immediately from the juſtices at *St. Martin*'s into B. R. without having this certified in Chancery, and from thence by *mittimus* ſent into *B. R.* and from thence a *ſcire-facias* iſſued againſt the adminiſtrator of *Greene*, and againſt *Forth* and others, ſurmiſing that they were intereſted in the place waſted, and now held it; they came in and demurred to the writ, becauſe the plaintiff ought not to have ſeiſin, becauſe *non conſtat* that *Forth* entered upon title under *Greene*. 2. Becauſe the record is not legally removed into this Court to be executed, wherefore judgment was prayed of the writ, and that the ſame might be quaſhed.

And now four queſtions were reſolved by the whole Court; *Firſt*, That the record was legally removed immediately into this Court by the *certiorari*, without *mittimus* from the Chancery, upon theſe precedents, *Reg.* 209. *F. N. B.* 242, 246. *B.* 190. *F. Reg.* 160, 285. and *F. N. B.* 243. *Secondly*, That it being in this Court, this Court ſhall execute it notwithſtanding *Hutt.* 117. *Riſham* v. *Goodwin*, that

Scire-facias againſt tenants in poſſeſſion quia ingreſſi ſunt, without ſhewing title.

 this

this Court ſhall not execute the judgments of inferior courts, and this reſolution was grounded upon *Paſch.* 22 *H.* 7. *Rot.* 369. *Raſtall's Entr.* 531. *Aſhton's Placita Rediviva*, 145. *Mich.* 3. *Jac.* 1. *B. R. Rot.* 2311. *Hil.* 3. *Jac.* 1. *Co. B. Rot.* 1819. *Paſch.* 4 *Jac.* 1. *B. R. Rot.* 337. *Bre. Judicialia*, 130. *Hil.* 9. *H.* 4. *Rot.* 130. *Theſaurus Brevium.* 40, 41, 42. *Raſt. Entr.* 169, 192. *Co. Entr.* 180, 342. *Reg.* 170. *F. N. B.* 242, 243. *Thirdly*, That the *ſcire-facias* was good, without ſhewing by what title *Forth* entered. And this upon *Raſt. Entr.* 236. *Moyle*, 160. 2 *Bro.* 110. *Bre. Judicialia*, 155. 253. *Raſt. Entr.* 279. 452. *Reg. Judic.* 20. 50. and generally in recoveries in real actions, the *ſcire-facias* is againſt *tales* and *tales qui ingreſſi ſunt*. *Fourthly*, It was reſolved by all the Juſtices, that the plaintiff ſhall have judgment to have execution, and not *reſpondeas ouſter*, becauſe although the concluſion of the demurrer is in abatement, yet the beginning being in bar, the judgment ſhall be peremptory, *Mich.* 15 *Car.* 2. *B. R. Rot.* 703. and ſo it was, and the plaintiff had execution.

B. R. executes judgments given in inferior courts.

Plea beginning in bar, although it concludes in abatement, judgment peremptory.

Norton and *Levinz* for the plaintiff *Cole*, throughout this cauſe. *Finch*, *Jones*, and others for the defendant.

It was held by the Court that a new trial cannot be granted in an inferior court; for they are not like trials by *niſi prius*, which are ſubordinate upon writs iſſuing out of this Court, over which the Court have authority and inſpection; but this was a new trial a year after the firſt, which the Court blamed.

The caſe of the Mayor and Aldermen of Briſtol, Mich. 1 Ann. B. R. 2 Salk. 650. S. C. Fares. 84. 85. 1 Salk. 201. pl. 4.

No new trial in inferior courts. Sed vide poſt.

YORKE

Brooke v. Ewers & ux. M. 5 G. in B. R. 1 Stra. 113.

Mandamus in nature of a procedendo ad judicium.

YORKE moved for a *mandamus* to the Judge of the Court of *Sandwich*, to give judgment upon a verdict, though he had granted a new trial for exceſſive damages, without payment of coſts.

And for the *mandamus* he quoted 1 *Ven.* 187. *Raym.* 214. 2 *Keb.* 871. And he likewiſe inſiſted, that a judge of an inferior court cannot grant a new trial, as was held by *Holt, C. J. Mich.* 1 *Ann. Hall v. Hill.* 1 *Mod. Ca.* 84. *Salk.* 201. 650. And likewiſe by *Parker*, C. J. *Paſ.* 12 *Ann. Page* v. *Round.*

A judge of an inferior court cannot grant a new trial. Sed vide poſt.

And to that opinion the Court inclined, and granted a *mandamus* unleſs cauſe, and upon that the Judge below, as well adviſed, *quierit.*

Rex v. Peters et al', or Cavil v. Burnaford et al', E. 31 G. 2. B.R. 1 Burr. 568.

An inferior court may ſet aſide a regular interlocutory judgment, for the purpoſe of trying the merits.

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-court of *Cornwall*; an INTERLOCUTORY JUDGMENT *was regularly entered*; and a writ of inquiry of damages executed thereupon; and 2*d.* aſſeſſed for damages,

mages, 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) INTERLOCU-" TORY JUDGMENT *itſelf*; UPON the *defend-*" *ant's paying the coſts of entering it*," (to be taxed by the STEWARD) *and on avowing iſ-ſuably*: 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* judgment," 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 judgments 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 *inſtanter*;" 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* " *benè 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 interlocutory judgment en-" tered in this cauſe *be* SET ASIDE, on pay-" ment of coſts taxed; and that the avowry " filed in this cauſe *de benè eſſe*, laſt court-" day, be now, on conſideration of the Court,

" made abſolute: and therefore rule for the " plaintiff in replevin to plead in bar to the " avowry."

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 underſtanding; 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*, 823. *Fox* v. *Glaſs*. H. 1728. 2 *G.* 2. as the *firſt* time that even *this Court* had ſet aſide REGULAR judgments; and 1 *Strange*, 392. *Bayly* v. *Boorne*, *M.* 7. *G.* 2. where they doubted of an *inferior* judge's having ſuch power.

On *Friday* laſt (21ſt *April*, 1758) Mr. *Huſſey* ſhewed cauſe why this *mandamus* ſhould not iſſue. And he made the two following queſtions.

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 firſt 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. *Ewers*, *et al'*, 1 *Strange*, 113. *S. P.* A *mandamus* iſſued to a judge of an inferior court, " to give judg- " ment:" *though* he had granted a new trial. Therefore he would not contend that an inferior

v. ante.

v. ante.

ferior court has a right to ſet aſide *a regular* judgment, UNLESS it be to let in the *merits*. 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. *Glaſs*) that they had done. V. ante.

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 "arbitrary 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* (vide 1 *Burr.* p. 560. and 561, 562.) And he ſaid that DISCRETIO is, as Lord *Coke* ſays, "diſcernere *per legem* quid "ſit juſtum."

To which obſervation, Mr. *Juſt. Wilmot* deſired to add another, from 5 *Co.* 100. *a. Rooke*'s caſe: "DISCRETION is a ſcience and underſtanding of diſtinguiſhing and diſcerning between falſhood 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 conſidera- "tion."

But there is *no precedent* or *authority* to the contrary of their having ſuch a power. 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. Juſtice Foſter was abſent.

Mr. Juſt. *Deniſon* 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.

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 ſtu-

dents: (for 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 an *error* and *miſtake).*

Here, the *queſtion*, upon the *true* ſtate of the caſe (which *v. ante)* appears to be " Whe- " ther an INFERIOR *court* has POWER *to* SET " ASIDE *a* REGULAR INTERLOCUTORY *judg-* " *ment*, 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 *infe-* " *rior* court,") and indeed the ſetting aſide a *verdict of a* JURY, is too great 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 *Baily* v. *Boorne*, 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.

Mr. Juſt. *Deniſon* added, that in the caſe of *Eaſtwell* v. *Livermore*, 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."

* It is true that there was no diſtinction expreſſed in the diſcuſſion of that caſe. But no irregularity was there pretended; nor 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.

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, ſhould 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 Burneford*, *Anthony Pomery*, and *Ni-*"*cholas Pelyne*, defendants, in which ſaid cauſe "the ſaid *John Cavil* obtained an interlocu-"tory judgment in the ſaid county-court, on

"the

" the 12th day of *October* laſt;" — *be* DISCHARGED.

RULE DISCHARGED.

N. B. In the caſe of *Blackquiere* and others, aſſignees of *Sampſon* and another, *v. Hawkins*, aſſignee of *Wooldridge* a bankrupt, *Doug.* 365. *per* Lord *Mansfield*, Inferior courts cannot grant a new trial. This muſt be underſtood in a limited ſenſe. *Vide* the caſe preceding.

IX. Of other Matters reſpecting new Trials, &c.

(21.) *Of withdrawing Pleas, Replications, Demurrers, &c.*

Nichols v. Sutcliff, T. 7 G. 2. B. R. Ann. 56. Motion to withdraw plea of nihil debet, and plead non aſſumpſit; granted in the common terms.

IN an action on the caſe on *aſſumpſit*, it was moved on behalf of the defendant for leave to withdraw the plea of *nihil debet*, which he had put in, and to plead *non aſſumpſit*. The following caſes were cited to ſhew that the Court had granted this liberty before: *Edes* and *Maſon*, *Paſch.* 5 *Geo.* 2. *B. R.* moved to withdraw the general plea *non aſſumpſit*, and to plead a *tender* as to part, and *non aſſumpſit* to the reſt, and granted. In the caſe of *Moſtyn* and *Totty*, 3 *Geo.* 2. in *Scacc.* the Court gave leave to withdraw demurrers, and plead the general iſſue.

Granted on the common terms of payment of coſts, and taking ſhort notice of trial.

Jeffereys v. Walter, M. 21 Geo. 2. B. R. 1 Wilſ. 177. Leave given to withdraw non eſt factum to a bond, and to plead the ſtatute of gaming. V. poſt. Taylor v. Joddrell.

Rule for the plaintiff to ſhew cauſe why the defendant ſhould not have leave to withdraw his plea of *non eſt factum* to a bond, and to plead the *ſtatute of gaming*, upon payment of coſts, taking ſhort notice of trial, and giving judgment of this term in caſe there be a verdict for the plaintiff, grounded upon an affida-

davit

davit that inſtructions had been given by the defendant to his attorney to inſiſt upon the *ſtatute of gaming*; and the attorney apprehending that he could give *that ſtatute* in evidence on *non eſt factum*, did not plead the *ſtatute* ſpecially. It was objected for the plaintiff that this had never been done, that the defendant had been guilty of an affected delay by exhibiting a bill in Chancery againſt the plaintiff for a diſcovery, relief, and injunction, to which he had put in his anſwer, that the defendant firſt pleaded *nil debet*, which he would not ſtand by, and then pleaded *non eſt factum*, and an injunction with liberty to proceed to judgment was granted in Chancery.

PER CURIAM, *(abſente Cap. Juſtic.)* The Court will not give leave to withdraw the general iſſue, and plead ſpecially where it is to the prejudice of the plaintiff, or where there has been an affected delay; in this caſe it appears by the anſwer in Chancery that the defendant has a good defence at law, and here is no affected delay. In the caſe of *Malters* and *Shelmandine*, *Mic.* 15 *Geo.* 2. leave was given to withdraw the general iſſue Not Guilty, and plead a juſtification, upon the like terms as in the preſent caſe; and they ſaid they remembered ſeveral other caſes where the like had been done by the Court; ſo the rule was made abſolute.

TRESPASS: the defendant juſtified for toll at *Hounſlow*, and pleaded two pleas in *Hilary* term laſt; and in this term, after iſſue joined, obtained a rule to ſhew cauſe why he ſhould not have leave to amend his two pleas, and to add a third plea. Upon ſhewing cauſe, Mr. *Ford* objected to adding the third plea, becauſe

Waters v. Bovell, T. 21 & 22 Geo. 2. B. R. 1 Wilſ. 223.

Leave given to add a plea after two terms ſince the firſt pleas were pleaded, and after iſſue joined.

becauſe it was now *two* terms ſince the defendant pleaded; and compared it to the courſe of the Court not to give a plaintiff leave to add a count after *two* terms.

But *per Curiam* (abſente *Wright*, *J.*) the rule muſt be abſolute upon paying coſts, both as to amending the two pleas, and adding a third; for there is no time limited for application to the Court to plead ſeveral pleas; the reaſon why a plaintiff muſt apply for leave to add a count within *two* terms, is becauſe he is obliged to declare within *two* terms, otherwiſe he will be out of Court, and a new count is conſidered as a declaration; and the plaintiff's being refuſed after *two* terms to add a count, is not under ſuch difficulty as the defendant would be if he were refuſed to add a plea after *two* terms, becauſe the plaintiff may have a new action.—Serjeant *Draper* for the defendant.

Taylor v. Joddrell, M. 23 G. 2. B. R. 1 Wilſ. 254.

The defendant permitted to plead a ſpecial juſtification after he had pleaded the general iſſue, upon terms.

IMPRISONMENT: defendant pleaded the general iſſue inadvertently, and now moved to withdraw it, and for leave to plead a juſtification that he was maſter of a ſhip, that the plaintiff was making a mutiny therein, and ſo he impriſoned him; this was done in *Blackburn* v. *Matthews*, upon terms of taking ſhort notice of trial. And in *Tarlton* v. *Wragg*, *Trin.* 20 *Geo.* 2. defendant pleaded the general iſſue, and wanting afterwards to pay money into court, the defendant had leave to withrdaw his plea, pay money into court, and plead the general iſſue again. In *Trin.* 21 *Geo.* 2. *Water* v. *Bowell*, the defendant in *Hilary* term before having pleaded two pleas, had leave in *Trin.* term following to plead a third plea; and in *Mic.* 21 *Geo.* 2. *Jeffereys* v. *Walter*, leave was given

Vide ante.

Vide ante.

given to withdraw *non eſt factum*, and to plead the ſtatute of gaming.

Per Curiam: There are many inſtances of this having been done when the Court can prevent the plaintiff from ſuffering any inconvenience by it, as by obliging the defendant to take ſhort notice of trial, and that, if there be a verdict for the plaintiff, he ſhall have judgment as of the preſent term; therefore let the defendant be at liberty to plead a juſtification, and the general iſſue alſo, if he pleaſes, upon the terms mentioned.

Robinſon v. Raley, T. 25 Geo. 2. Rot'lo. 775. E. 30 Geo. 2. B. R. 1 Burr. 321. Motion for leave to withdraw two demurrers, and plead to iſſue, upon payment of coſts, refuſed, becauſe ſeveral iſſues in fact had been tried.

Mr. *Norton* moved for leave to *withdraw* two *demurrers*, and plead to iſſue (upon payment of coſts); and a RULE was thereupon granted, to SHEW CAUSE.

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* (a), 6 *Mod.* 1. The caſe of *Staple v. Haydon* (b), 1 *Ld. Raym.* 668. The caſe of *Fox* v. *Wilbraham*, and 2 *Strange* 1002. (c) *The Bank of England* v. *Morrice.*

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]. *Dutcheſs of Marlborough* v. *Widmore*, *Hil.* 4 *G.* 2. *B. R.* The caſe of *Cope* v. *Marſhall*, *Tr.* 28 *G.* 2. *B. R.* [V. 1 *Burr.* 259, *S. C.*]

The caſe of *Giddins v. Giddins*, [Tr. 29, 30 G.

(a) V. poſt Eſſay V.

(b) V. poſt Eſſay V.

(c) V. poſt Eſſay III.

30 G. 2. B. R.] was even after the Court had given their opinion*.

* It was after a demurrer and argument only; but the Court had given no opinion; and the rule was made abſolute without defence.

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. *Juſtice* 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 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

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 'tis plainly *upon* RECORD. Mr. *Juſtice* FORSTER concurred.

Per Cur' unanimouſly JUDGMENT for the PLAINTIFF upon the DEMURRERS.

After iſſue joined upon a plea in bar to an avowry, the Court would not ſuffer the plea to be withdrawn, and the avowry confeſſed, without conſent, as the avowant would loſe his coſts. *Skin.* 594.

In the caſe of *Collins* v. *Blantern*, 2 *Wilſ.* 341. *C. P.* refuſed to let plaintiff withdraw a demurrer to the defendant's plea, and take iſſue; but this was after two arguments.

Vide ante, L. E. Intro. (k).

Mr. *Huſſey* ſhewed cauſe againſt a rule of Mr. *Gould*'s, "why the plaintiff ſhould not "be at liberty to *withdraw his replication*, and "*reply de novo.*"

Alder v. Chipp, H. 32 Geo. 2. B. R. 2 Burr. 755. Withdrawing a replication and replying de novo, conſidered as an amendment.

The caſe was, that the plaintiff had (by the miſtake of his former attorney) traverſed a leaſe under which he himſelf claimed.

The Court made the rule abſolute.

And Lord MANSFIELD ſaid, he conſidered this as an *amendment*, and that the propoſing it in this method of withdrawing the replication and replying *de novo*, was only to prevent the defacing and obliterating the roll. And he obſerved, that the Court had not uſed the ſame *ſtrictneſs* of late years, with regard to *amendments*, as they formerly did: and he ſaid, it was much better for the parties that they ſhould

not:

not: however, the Court would always take care that if one party obtained leave to amend, the *other* party ſhould not be *prejudiced nor delayed* thereby.

* 2 Stra. 1102. And he obſerved that the caſe of the * Bank of *England* v. *Morrice*, turned upon its own particular circumſtances, and was the caſe of an *executrix* too.

Note,—The length of time in the preſent caſe had been objected; *viz.* ſix terms. But it was anſwered, "that in many caſes, amendments had been made after a much longer "time."

Rule made abſolute.

Wilkes, Eſq. v. Wood, Eſq. member of parliament, M. 4 Geo. 3. C. B. 10th of November, 2 Wilſ. 204.

Leave to withdraw the general iſſue, and plead a ſpecial plea upon terms, and waiving privilege of parliament.

V. ante.

In treſpaſs, aſſault, and impriſonment, the defendant pleaded the general iſſue, whereupon iſſue was joined laſt term, and notice of trial given for to-morrow the 11th of *November*. On *Monday* laſt the 7th of *November*, the defendant moved for leave to withdraw his plea of the general iſſue, and to plead again the general iſſue, and a ſpecial juſtification under a warrant of *Lord Hallifax*, ſecretary of ſtate; and relied upon the caſe of *Taylor* v. *Jodrell*, *B. R. Mich.* 23 *Geo.* 2. where, in impriſonment, the defendant had pleaded the general iſſue, the Court gave him leave to withdraw that plea, and plead a juſtification that he was maſter of a ſhip, that plaintiff was making a mutiny therein, and ſo he impriſoned him, upon terms of taking ſhort notice of trial, and giving plaintiff judgment of the ſame term. The like was done in *Blackburn* and *Matthews*, *Trin.* 23 *Geo.* 2. *B. R.* and in many other ſimilar caſes, where the Court could prevent the plaintiff from being delayed, or ſuffering any inconvenience.

Serjeant *Glynn* for the plaintiff, objected that the defendant could not, by coming into the uſual terms, put the plaintiff into the ſame ſituation he was now in, the privilege of parliament taking place next *Monday*; whereupon defendant agreed to waive his privilege; but it was anſwered by *Glynn*, that the privilege of a member was the privilege of the whole houſe, and that he could not waive it without leave of the houſe; and that the houſe might inſiſt upon the privilege.

CURIA. We will not ſuppoſe any thing ſo diſhonourable in the Houſe of Commons: let the rule be made abſolute upon defendant's taking ſhort notice of trial, and that if the plaintiff has a verdict, he ſhall have judgment of this term.

Wilkes againſt *Webb*, Eſq. member, *&c.* the like motion, and the like rule. 2 Wilſ. 205.

This was a ſpecial action upon the caſe againſt the defendant, for deflowering the plaintiff's daughter *per quod ſervitium amiſit*: the defendant having pleaded the general iſſue, now moved for leave to withdraw that plea, and to plead the ſame plea again, together with the plea of the ſtatute of limitations; upon an affidavit made by the defendant's attorney, that at the time when he was bound to plead by the rule of the Court, and then pleaded the general iſſue only, he was not fully inſtructed by his client what to plead; and a ſimilar caſe was cited in B. R. of *Vile* v. *Barry*, wherein the Court permitted *this*, upon an affidavit made by the very ſame attorney, that he was preſſed for a plea, and was obliged to plead before he was inſtructed, and therefore pleaded

Cox v. Rolt, T. 5 Geo. 3. C. B. 2 Wilſ 253.

Practice. The Court refuſed to permit a defendant to add the plea of the ſtatute of limitations.

pleaded the general iſſue to prevent judgment.

Upon ſhewing cauſe it was inſiſted for the plaintiff, that the general rule of both the courts of B. R. and C. B. is to permit a defendant to withdraw a ſpecial plea, and plead the general iſſue, but not *vicê verſâ*; and many caſes were cited to ſhew this to be the practice, which was agreed to be ſo by the Court; and it was ſaid, that in the caſe of *Vile* v. *Barry*, the attorney was ſurpriſed, not inſtructed, and pleaded the general iſſue to prevent judgment: and for that reaſon the Court of King's Bench deviated from the general practice in that particular caſe; but here the affidavit made by the ſame attorney does not go ſo far, and therefore the rule ought to be diſcharged.

CURIA. It is a good maxim, that the law will rather ſuffer a particular miſchief than a general inconvenience; general rules of practice muſt be ſtrictly obſerved for the ſake of certainty, or practiſers will be negligent. Indeed under very ſpecial circumſtances, the Court will permit a defendant to add a ſpecial plea; in a late caſe of public concern, the defendant being adviſed by his counſel that he might give the ſecretary of ſtate's warrant in evidence upon the plea of the general iſſue, pleaded *that* plea only; the judge before whom that cauſe was tried, having been of a contrary opinion, it was afterwards moved in a ſimilar caſe of *Wilkes* v. *Webb*, to withdraw the general iſſue, and plead the ſame plea again, and a ſpecial juſtification under the ſecretary of ſtate's warrant, which was allowed by the whole court; the defendant at the time of pleading the general iſſue only, being ill adviſed

Vide ante.

adviſed by his counſel, and not knowing then the opinion of the judge who tried the former ſimilar cauſe; beſides, *that* ſpecial plea was allowed to try the real merits of the caſe, but the plea of the ſtatute of limitations is not to be favoured, becauſe it excludes the merits; the Court gives leave to add a plea for the furtherance of juſtice, but to permit this plea of the ſtatute of limitations, would not be ſo. The rule was diſcharged *per totam Curiam*.

Serjeants *Hewitt* and *Davy* for the defendant, Serjeant *Burland* for the plaintiff.

Action upon the ſtatute for ſelling coals ſhort in meaſure, to recover £. 50. penalty. The defendant laſt term pleaded a recovery in B. R. for the ſame offence, and now he moved to withdraw *that* plea, to plead the general iſſue, and take ſhort notice of trial; but *per Curiam*, the defendant has delayed the plaintiff by this ſham plea, he has produced no affidavit that he has any merits, and deſerves to pay the £. 50. for pleading a ſham plea, ſo the rule muſt be diſcharged.

Ellis qui tam, &c. v. —— H. 8 G 3. C. B. 2 Wilſ. 369. Where a defendant pleads a ſham plea, the Court will not let him withdraw it and plead the general iſſue.

ESSAY III.

Of Special Verdicts, &c.

Uncertainty of the verdict.

IN the caſe of *Hayward* v. *Fulcher*, *Trin.* 21 *Jac. Rot.* 662. *Palmer*, 491—505, in treſpaſs, judgment was given for the defendant by reaſon of the uncertainty of the verdict.

Where a ſpecial verdict is good becauſe it is true, the Court muſt adjudge the law upon the truth, and are not bound by the finding of the Jury.

Lane v. Cowper, E. 17 Eliz. Mo. 103. n. 248. Recovery ſuffered to certain uſes, remainder to ſeniori puero.

In ejectment in B. R. in this cauſe, the ſpecial matter was found as follows, *viz.* that *William Humfryſon*, who was ſeiſed in fee, ſuffered a common recovery to *Simmerton* and *Fulke*, M. 28 *H.* 8. to the intent that they ſhould grant an eſtate to him and *Elinor* his wife, for their lives, the remainder *ſeniori puero* of the body of the huſband in tail, the remainder over in fee to one *Kinerſley*: the recoverors made a feoffment accordingly *Anno*, 2 *E.* 6. and afterwards *Humfryſon* covenanted by indenture with the ſaid *Kinerſley*, to levy a fine with his wife, to the uſe of himſelf and his wife for their lives, the remainder *to the uſe of the eldeſt child of his own body in tail*, the remainder in fee to *Kinerſley*; which fine *Anno*, 3 *E.* 6. was levied accordingly with general warranty; and the feme died, and *Humfryſon* took

Covenant to levy a fine, with his wife, to uſes, remainder to eldeſt child of his own body in tail, remainder in fee to K.
Fine levied.
Feme dies, covenantor

takes another wife; hath iſſue, firſt a daughter, afterwards a ſon, who, within age, leaſes to the plaintiff, without reſerving rent: defendant, as ſervant to the daughter, entered upon the leſſee.

took another wife, by whom he had iſſue, firſt a daughter, and afterwards a ſon, and died: the ſon, within age, made a leaſe to the plaintiff, as in the declaration is alledged, but no mention in the verdict of any rent reſerved; the defendant, as ſervant to the daughter, entered upon the leſſee; and ſo, *&c.* upon the whole matter, if it ſhould ſeem to the Court that the entry of the daughter was lawful, the jury found the defendant not guilty; but if it ſhould ſeem to the Court that the entry of the daughter upon the leſſee of the ſon was not lawful, they found the defendant guilty, and aſſeſſed coſts and damages: upon which verdict ſo returned, it was often argued at the bar, and by the bench, and at laſt by all the juſtices in bank openly: and it was divided into *ten* points.

Uſes.

The 1ſt. To what uſes the recoverers are ſeiſed as to the execution of the eſtate again to *Humfryſon* and his wife: and as to this, all the Juſtices argued that they were ſeiſed to their own uſe, by the intent of the recovery, becauſe otherwiſe they could not rightfully make an eſtate to him who ſuffered the recovery again, as they ought to do.

Remainder.

The 2d. If *ſeniori puero* be a good name of purchaſe by way of remainder, he not being in *rerum natura*, at the time of the limitation. And in this alſo they all agreed that it is a good name of purchaſe: and *Gawdy* and *Wraye* put the diverſity, *(viz.)* that a perſon not in being at the firſt, may take a remainder by purchaſe, if he be *in eſſe* before the particular eſtate determined, ſo that the limitation of the remainder be in general words, as to the right heirs of *J. S.* or to him who ſhall firſt come to *St. Paul*'s, to the wife that ſhall be, and the like. But if the limitation be in ſpecial

cial words, as to *Jane*, the firſt wife of *J. S.* where he hath not any wife at the time, or to the mayor and commonalty of *Iſlington*, where there are not any ſuch at the time there, although before the determination of the particular eſtate, *J. S.* takes one *Jane* to wife, or *Iſlington* be incorporated by the name of the Mayor and Commonalty, yet they ſhall not take the remainder.

Remainder in abeyance.

The 3d. If the remainder ſhall be in abeyance until the birth of a ſon, or whether the eſtate tail ſhall be executed in the father until the birth of a ſon: and in this alſo they all agreed that the remainder is in abeyance, until the tail executed, and vouched 30 *Aſſ. Staffford*'s caſe, where the remainder was limited *propinquioribus de ſanguine*, and 1 *Aſſ.* to the wife that ſhall be.

The 4th. If by the fine the remainder which followed the eſtate in abeyance was put to a right, or whether it ſhould be preſerved from tort, by the law: and as to this, *Gawdy* and *Wraye* agreed that the remainder in abeyance is preſerved, and the eſtate is not converted into a right by the fine of the particular tenant; and they compared this to deſcents and non-claims in the time of vacation of a biſhoprick, which ſhall not prejudice the ſucceſſor; nor non-claim where land is in the hands of the king by guardianſhip; becauſe in the one caſe there is not any perſon to make claim; and, in the ſecond, claim cannot be made upon the poſſeſſion of the king.

Warranty.

The 5th point. If the warranty being collateral ſhall bind the remainder in the ſon: and it was argued by all that it ſhould not, becauſe, admitting that the remainder ſettled upon the ſon by the name of *ſeniori puero*, then if af-

terwards, when he is born, he takes the poſſeſſion in remainder, that this being before the deſcent of the warranty, avoids the warranty: beſides, the fine is not a diſcontinuance of the remainder, becauſe it was in abeyance, and therefore there is not any reaſon that the daughter ſhould have the benefit of the warranty, becauſe ſhe is in as him who hath an uſe *en le poſt*.

The 6th point. If by the words *ſeniori puero* ſhall be underſtood the daughter who was firſt born, or the ſon who is the male: and in this the Juſtices unanimouſly agreed, that the
Puer. word *puer* is common as well to the female as the male, and may be taken for both in grammatical conſtruction, and expoſition of the civil law: but the beſt interpreter of the intent in this limitation, is the father himſelf who made the limitation, and he hath explained by the indenture that the remainder ſhould be to his eldeſt child; and therefore the Juſtices all agreed that the daughter is to take the remainder; but *Wraye* ſaid, if the indenture had not been made, then the Juſtices ought to expound the word *puer* according to the moſt common intent, which is to ſignify a male child. *Southcot è contra* as to this, becauſe the daughter being the firſt upon whom the remainder is aptly enough ſettled before the birth of the ſon, ſhe ſhall be preferred for her priority.

Infant. The 7th. If the leaſe of an infant, without rent reſerved, be *void* or *voidable:* and they all, but *Gawdy*, agreed that it is *void*, becauſe he had not any conſideration, but if rent was reſerved, it would be only *voidable*. So a feoffment made with the proper hand of an infant is only voidable: and they ſaid that any ſtranger

ſtranger may take advantage of this by way of allegation, evidence, or otherwiſe.

The 8th. If any averment lies by the daughter againſt the fine, to ſay that *ſeniori puero* in the fine means the eldeſt child. And they all agreed that it did, becauſe it was with [*ove*] the fine to add matter which ſhould explain the words of the fine one way or another. Averment.

The 9th. When the Jury find, that if the entry of the daughter was *not lawful*, the defendant is guilty; if the Judges ought ſo to adjudge him guilty if they find the entry *not lawful*, when in truth it appears to the Juſtices, by the other matters found, that he cannot be guilty of the *ejectment*, becauſe the leaſe was *void à principio*. And in this they all agreed, that the Juſtices are not bound by the concluſion of the Jurors, but may adjudge according to law: and they cited 34 *Aſſ.* where the jurors found a releaſe of an infant, and concluded, and ſo no *diſſeiſin*. So 10 *E.* 4. *fo.* 7. *treſpaſs* againſt the lord for diſtraining, the Jury found for the plaintiff; but becauſe the ſtat. of *Marlbridge* is *non ideo puniatur dominus*, &c. the Court adjudged for the defendant. So 9 *E.* 4. *fo.* 3. *a.* *Tilly* and *Wooddye*'s caſe. Verdict.

The 10th point. If the verdict was imperfect in finding the daughter *primogenitam filiam*; and the ſon *ſecund' genitum filium*: and they all agreed that the verdict was good, becauſe it is true, and the Court is to adjudge the law upon the truth. And ſo, at length, judgment was given *quod querens nihil capiat per billam*.

Where the Jury find matter againſt law, the Juſtices will not take notice of it, but will adjudge according to law.

Lee v. Lee, M. 30 & 31 Eliz. Exch. Mo. 268. n. 420.

Deviſe. The deviſor hath three ſons, F. J. & G. He deviſes to J. for twenty-one years, for certain purpoſes, and makes J. executor If J. die within the term, G. (the plaintiff) to have the like term, and G. to be executor. Deviſe of the land over to F. in tail, remainder in tail to J. remainder in tail to G. J. entered, F. died without iſſue. J. had iſſue P. the defendant, and died within the term, upon which G. entered, and P. ouſted him.

Qu. If by the deſcent of the eſtate of inheritance to J. being in poſſeſſion of the term, the term was extinct?

Upon an *ejectment* by *George Lee* v. *Patrick Lee*, it was found by verdict, that *Vincent Lee* was ſeiſed of land in *Denbigh*, in the county of *Denbigh*; and having three ſons, *viz. Francis*, *Jaſper*, and *George* the now plaintiff, made his will, whereby he deviſed the land to *Jaſper* for twenty-one years, to the intent of performing his will, and paying his debts, and he alſo made *Jaſper* executor; and if *Jaſper* died within the term, he willed that *George* the now plaintiff ſhould have the *like* term as he had given to *Jaſper*, and that *George* ſhould alſo then be his executor. And he deviſed the land over to *Francis* in tail, remainder in tail to *Jaſper*, remainder in tail to *George*, and died. *Jaſper* entered, *Francis* died without iſſue: *Jaſper* had iſſue *Patrick* the defendant, and died within the term; upon which *George* entered, and *Patrick* ouſted him. And if by the deſcent of the eſtate of inheritance to *Jaſper*, being in poſſeſſion of the term, the term was extinct, they found an *ejectment*. And it was argued by *Cowper* and *Piggot* upon the point, to wit, if the poſſibility limited to *George* the plaintiff, was prejudiced by the extinguiſhment of the term in *Jaſper*, and the books were cited. And the Court agreed if a term for years be deviſed to one, and if he die within the term remainder to another, that by deſcent of the inheritance to the firſt, unity of poſſeſſion, his grant, or his forfeiture, the remainder is defeated. But *Manwood* ſaid, and all the Court agreed, that if lands be deviſed for years to one,

and

and if he die within the term, that another ſhall have the reſidue of the term, that no act of the firſt can prejudice the remainder in the ſecond; but, *per Manwood*, it is otherwiſe if one who hath a *term* deviſe his *term* with ſuch remainder. And the reaſon of the diverſity was, that if he deviſe the *term*, it is all one complete eſtate, becauſe power is given to the *firſt* deviſee, over all the term for a certain time; but it is not ſo where the *land* is deviſed, for which reaſon their opinion was againſt the defendant, and with the plaintiff that he ſhould recover: but the judgment was reſpited. And it was moved, that the verdict found that if the term was extinguiſhed in *Jaſper*, it was an *ejectment* to *George*, and it was clearly extinguiſhed in *Jaſper* for his time, by which the verdict found for the defendant. And the Juſtices ſaid, that where the jurors find matter againſt law, the juſtices will not take notice of it, but will adjudge according to law. Verdict.

Of a ſmall variance in a corporate title: of granting a leaſe by a corporation for the purpoſe of bringing an ejectment: alſo of demanding rents.

Ejectione Firmæ. It was found by verdict, that the Dean and Chapter of *Exeter* let the land to *Harvy* for years, rendering rent payable at their chapter-houſe in *Exon*, and for default of payment, the leaſe to be void. *Harvy* aſſigneth his eſtate to the defendant, the rent was in arrear, and not paid, being demanded at their chapter-houſe. The dean and chapter, by the name of the Dean and Chapter of *St. Mary de Exon* (whereas they were Willis v. Jermin, Hil. 31 Eliz. Rot. 674. Cro. Eliz. 167. Variance.

were incorporated by the name of *St. Mary in Exon)* make an indenture of leaſe for twenty-one years to the plaintiff of the land, and in their chapter-houſe put their ſeal to it, and make a letter of attorney to *J. S.* to enter and make delivery of this deed upon the land, which he did accordingly; and if this be a good leaſe, they pray the opinion of the Court.

1ſt Objection. *Harris*, Serjeant, prayed judgment for the defendant. *Firſt*, The leaſe of the land is void by *miſnomer* of the corporation, *ſed non allocatur*; for it is no material variance, and ſo

2d Objection. it hath been ruled. The *ſecond* cauſe, that the leaſe was not good, becauſe the dean and chapter let it in their chapter-houſe, by ſetting their ſeal to it; which being a perfecting the deed of the corporation, there can be no other delivery: then the firſt leſſee continuing in poſſeſſion, and they out of poſſeſſion, the leaſe was void, and the delivery after by the attorney, it having a former delivery, is void; *ſed non allocatur:* for there is no other means for a corporation to make a leaſe but this. And *Gawdy* ſaid it is plain, that it is not the leaſe or deed of the corporation until delivery, as of

3d Objection. another perſon. *Thirdly*, The firſt leaſe ceaſeth not till entry, and ſo cannot make a new leaſe. *Wray*, the firſt leaſe doth clearly ceaſe without entry. *Gawdy* doubted. *Fourth-*

4th Objection. *ly*, The leaſe is not good, for the attorney hath not executed his warrant according to his authority; for it was, that he ſhould enter and claim it to the uſe of the corporation, and then deliver the leaſe; and the Jury found, that he delivered it upon the land, but found not that he had entered and claimed, *&c. ſed non allocatur:* for in a ſpecial verdict, the circumſtances of every thing need not ſo ſtrictly be found,

as ſtated in a plea, &c. and it being found, that by virtue of the warrant he delivered it upon the land, it ſhall be intended he purſued it duly. *Fifthly*, It is found that they demanded the rent at the chapter-houſe, where the demand ſhould be upon the land. *Sed non allocatur*; for the demand at the place where it is payable is ſufficient, and the plaintiff had judgment. 5th Objection.

Of the difference between pleading, and ſpecial verdicts.

In *ejectment* for land in *Devon*, a ſpecial verdict was found to this effect: that *J. P.* being ſeiſed of land in fee, by indenture between him and *T.* his ſon of the one part, and two ſtrangers on the other part, in conſideration of the natural love and affection which he had for *T.* his ſon, &c. gave, granted, and infeoffed the two ſtrangers with the ſaid land, to the uſe of himſelf for life, remainder to his ſon *T.* and his heirs males of his body, with remainders over. And covenanted in the ſaid deed with the two ſtrangers, that they ſhould enjoy the aforeſaid land to the uſes before ſpecified, and this *exonerated*, *freed*, &c. from other *incumbrances*. And the Jury found that this deed was *ſealed* and *delivered*, but that it was not executed by *livery* nor by *attornment*. *J. P.* died, and afterwards *T.* died. And if his iſſue was tenant in tail by force of this uſe, or ſeiſed of the antient fee, was the doubt; and it was reſolved *per totam Curiam*, that the iſſue was ſeiſed of the antient fee, and that no uſe was raiſed by this deed, and ſo judgment was given for the plaintiff; and in this caſe it was reſolved,

Hore & Dix. H. 12. Car. 2. C. P. Entr. T. 1658, Rot. 1824. 1 Sid. 25.

An uſe ſhall not be raiſed by covenant, nor by declaration, where it was intended to be otherwiſe raiſed.

2 Vent. 319.

Judgment.

1ſt.

1ſt Reſol. 1ſt. That no eſtate paſſed to the two ſtrangers, becauſe as the deed indented was never executed by *livery*, &c.; nor any uſe raiſed to them, inaſmuch as there was not any conſideration for raiſing it; and if it was raiſed to them, it could never come again to *P.* and *T.* his ſon, becauſe an uſe could not be raiſed upon an uſe.

2d Reſol. 2d. If an uſe ſhould be raiſed here, it ought to be by way of tranſmutation of the poſſeſſion, and this could not be ſo here, inaſmuch as the deed was not executed as hath been ſaid; and this is manifeſt from the words of the deed, which are *que done, grant & infeoffe. Vide* for this *Foxe*'s caſe, 8 *Co.* 94. and Sir *Row. Hayward*'s.

3d Reſol. Mod. Rep. 176. Sid. 82. 3d. The intent of the parties is the foundation of uſes, 2 *Inſt.* 672. But this intent ought to have three qualifications, it ought to

Win. 60. be manifeſt upon the face of the deed. 2. It ought to be according to the rules of law. 3. This intention ought to be taken upon the

1 Cro. 127. pl. 14. 3 Cro. 394. pl. 19. Winch. 59. Roll's Uſes, 788. Winch. 35. March. 50. Sid. 82. 354. 1 And. 25. Vide caſe of Croſſe and Seydamore. Frem. 368. entire deed *& res & modus habendi* is to be conſidered, and the caſe of *Buckler* and *Simonds*, 21 *Jac.* was cited, where the father granted that his land ſhould remain to his ſon, and held that this would not raiſe an uſe, for although there is *res*, yet there is not *modus habendi:* ſo is the caſe of *Pitfield* and *Pierce*, 16 *Car.* in *B. R.* where the father granted his land to the uſe of his ſon, but no livery was made, and held that no uſe aroſe. Theſe reſolutions the Chief Juſtice ſaid were founded upon the book 21 *H.* 7. 18. If I covenant that my ſon ſhall have my land, this is held good by reaſon of the word *covenant*, 1 Co. *Chudley*'s caſe, and this is cited in *Seimour*'s caſe in *Dyer*, 96. But *Hob.* denied this; and according

according to *Hob.* was the opinion of the Chief Juſtice at preſent, becauſe a conſideration was wanting. But the Chief Juſtice ſaid that if I will that my ſon ſhall have my land in conſideration of marriage, although the word *covenant* is wanting, yet the uſe is well raiſed. Winch. 60, 1. 1 Cro. 427. 7 Co. 40. b.

4th. It was reſolved that an uſe at this day may not be raiſed without deed, and to prove this *vide Callard* and *Callard*'s caſe, 1 *Rep.* 75. a. 12 *El. Dy.* 296. b. And as to the caſe of a deviſe of land to uſes by will in writing which is not a deed, it was ſaid that this was upon another reaſon, *Sc.* rather upon the ſtatute 32 *H.* 8. of wills, than upon the ſtat. 27 *H.* 8. of uſes. 4th Reſol. Poph. 45. cont. v. Sid. 82. 2 Roll's Uſes, 788. Poph. 50. Mo. 688. 2 And. 164. 3 Cro. 345.

5th. The covenant in this deed cannot raiſe an uſe, which is that J. P. covenants with the two ſtrangers, that they ſhall enjoy the land to the uſes aforeſaid, *freed* from all *incumbrances*. 1. Becauſe this is made to ſtrangers. 2. Becauſe this is made between the parties only, without mention of their heirs, and ſo is intended to be perſonal. 3. Becauſe if the deed had been good, it would enure to another effect, *viz.* to free the land from incumbrances; and they ſaid that this *very matter* was in *Simonds* and *Buckler*'s caſe, mentioned before, and was never diſputed. 5th Reſol.

Nota, That *Bridgman*, C. J. took a diverſity between covenants obligatory, and covenants declaratory, for covenants declaratory ſerve to limit and direct uſes, but covenants obligatory, as in the preſent caſe, for enjoying this *freed* from incumbrances ſhall never be conſtrued to raiſe an uſe, inaſmuch as they have another effect. In this caſe exceptions were taken to the ſpecial verdict, 1. Becauſe the declaration is of land in *Spreton*, and the verdict Winch. 60. Exceptions to verdict. Carter, 80.

verdict in *Spriton*, and in the declaration the land is named *Begly*, whereas in the verdict it is called *North-Begley*. 2. Becauſe it is not found that the lands named in the verdict which the deeds concern, are the ſame lands mentioned in the declaration.

6th Reſol. But it was reſolved that the verdict was good, and there is a difference between pleading which is done *per peritos*, and a ſpecial verdict, which is the ſaying of the *Leys gen'*, and therefore, 1. Neither the miſpriſion of a letter, nor the addition of a word, ſhall hurt in a verdict, ſo long as *conſtare poteſt* that it is the ſame place and the ſame land. As to 2, Although they have not found that it is the ſame land in the declaration mentioned, yet they have found the *entry* and *ejectment* according to the declaration, and there he declares of land in *S.* that he was ejected from land in *S*, And for authority in this caſe, *vide* the pleading of Sir *G. Brown*'s caſe, which is in *Coke* 3, where *Anthony* is found the ſon, but not the heir, yet good, and yet, without being heir the plaintiff had not title. And the like exception was taken by *Barkley*, J. (as in our caſe) in the caſe of *Cleeve* and *Vere*, reported, although not at large, 1 *Cro.* 458. *V.* 4 *Co.* 65, 9 *Co.* 51. *Hutt.* 55.

3 Rep. 46.

Sir W. Jones, 385. Hutt. 56.

Where the Jury find more than is in iſſue, and aſſeſs damages, &c. if it be error.

Calvert v. Arnold, M. 14 Car. 2. B. R. 1 Sid. 96.

Aſſault, battery, wounding. —As to the force not guilty;

Error to reverſe a judgment given in *Lancaſter*, in an action of *treſpaſs*, where the plaintiff declared for an *aſſault*, *battery*, and *wounding*; the defendant pleaded, *quo ad* the *force*, *not guilty*, and *quo ad* the *aſſault* and *battery*, that he

he was removing a market-croſs to a more convenient place, and the plaintiff interrupted him, for which reaſon *molliter manus injecit, &c.* and iſſue joined. The Jury found the defendant guilty *de injuria ſua propria*, and ſo recited the entire declaration of the *aſſault, battery*, and *wounding* (where the *wounding* was not in iſſue) and aſſeſſed damages *occaſione tranſgreſſionis illius ad* 20*l.* and after ſeveral debates, it was held by the whole Court, except *Windham*, J. that it ſhould be intended that they had given damages for every thing in the declaration, *ſcil.* the *wounding*, which was not in iſſue, and therefore it is error, for the plaintiff might have demurred to the plea.

as to the aſſault and battery, a juſtification. No notice taken of the wounding—Jury find and aſſeſs damages for the whole, tho' the wounding was not in iſſue—this is error. Co. Ent. 644. 5 Co. 35. a. Yelv. 5, 6.

And it is ſimilar to where the jury find more than the plaintiff declares for, and aſſeſs damages for it. *V. Hob.* 187. and *Co. Entr.* 643.

Vide poſt, Hinks v. Clerk.

N. B. Where the jury aſſeſs more damages than laid, plaintiff may enter a *remittitur* for the *ſurplus*. If he does not, but takes judgment for the whole, it is error, and cannot afterwards be amended.

In all ſpecial Verdicts the Judges will not determine upon any matter of fact, but that which the Jury have declared to be true, by their own finding.

Street v. Ld. Roberts al. Sir Wm. Roberts, T. 1658. Sup. Banc. 2 Sid. 86. Extent of land, upon a ſtatute acknowledged after a jointure, and before iſſue, but extent le-

The caſe found by the ſpecial verdict was briefly, that *J. S.* ſeiſed of land in fee, made a jointure on his wife, and afterwards acknowledged a ſtatute, and having iſſue a daughter within age who was his heir, died. The land

vied after iſſue, pending infancy.

Reſol.

Extent void as to the feme.

Lands cannot be extended whilſt in the hands of an infant.

land was extended upon the poſſeſſion of the *feme*.

Reſolved, 1ſt. The extent is void as to the *feme*, and cannot prejudice her title, which is paramount the ſtatute, and it was ſaid that if the *feme* die, yet the lands may not be extended whilſt they are in the hands of an infant.

Reverſion not extendable.

2dly. A reverſion may not be extended.

Jury muſt in ſpecial verdicts find the facts to be true.

Vide the next caſe.

3. In all ſpecial verdicts the judges will not determine upon any matter of fact but that which the jury have declared to be true by their own finding. And for this reaſon the judges will not determine upon an inquiſition or *aliquid tale* formed at large in a ſpecial verdict, for their finding of this is not an affirmation that all that is in it is true.

Where the Jury find the iſſue, and more, it is good for the iſſue, and void for the reſidue.

Hinks v. Clerk, E. 31 Car. 2. B. R. Ent. H. ult. Rot. 945. 2 Lev. 252.

A ſtranger puts his cattle in the common, and the commoner diſtrains them.

Error upon a judgment in *replevin* in *Durham*, where the defendant avowed that *Sunderland* is an ancient borough, conſiſting of twelve capital burgeſſes called *Freemen*, and of twelve inferior burgeſſes called *Stallingers*, and that there is a cuſtom there, that each *freeman*, inhabiting any meſſuage there, hath common in the place in which, *&c.* for certain cattle, to wit, for two horſes, *and* four cows; and that each *ſtallinger* inhabiting any meſſuage there, had common for one cow; and becauſe the plaintiff being a ſtranger, put his cattle there to the prejudice of his common, the defendant avows the taking. The plaintiff traverſes the cuſtom. The Jury find, that the capital burgeſs, *ſs*, the *freemen* have had common for two horſes, *or* four cows; and that the *ſtallingers*

have had common for one cow. But farther they find, that the *wife* of each *freeman* or *ſtallinger* inhabitant, hath the ſame common after the death of her huſband. And that the copyholders, burgeſſes, and ſtallingers have common alſo for *vaches*, *vitulis*, *bobus*, *ſpadonibus*, *iuvencis*, *et omnibus ad quantitat' et loco et vice*, *Anglice* their ſtints, *ut præſent' limitat'*, *et ſi ſuper tota materia*, *&c.* for the plaintiff, if not, for the defendant; and upon this verdict, judgment was given for the *avowant*. And upon this two errors were aſſigned, 1. That the common is other and variant from that which is pleaded, *ſs.* for *ſheep*, *calves*, *heifers*, *&c.* 2. The cuſtom for inhabitants to have common is bad, and exactly the ſame with *Gateward*'s caſe, 6 Co. To which it was anſwered and reſolved, 1. The Jury had found the cuſtom expreſsly as to the firſt, and all that they had found over is void, as the caſe in *Dyer*, in *aſſumpſit* the jury found that the defendant undertook *modo et forma ſi J. S.* ſaid true, this is good, and the *et ſi*, *&c.* is ſurpluſage and void, and 3 *Cro.* 405. *Gray* v. *Fletcher*, *et ibid* 546. *Lovelace* v. *Reynolds* are in point. 2. The cuſtom here is not for inhabitants, but for *freemen* and *ſtallingers* who are members of the corporation inhabiting, and the inhabiting in this caſe is merely *reſtrictive*, *ſcil.* that they ſhall not have common, *unleſs* they inhabit. 3. The cuſtom laid for each member is good, as well as where it is laid in the corporation, to have for them, and each member, as it was in the caſe of *Derby* in *Stable* and *Miller*'s caſe. And of ſuch opinion was the Court, and affirmed the judgment. *Holt*, *junior*, for the plaintiff; *Levinz* for the defendant in error. *Vide ante.*

Each member may preſcribe in right of the corporation.

A new trial granted after a ſpecial verdict ſigned by counſel on both ſides.

Namink v. Farwell, M. 1719. Bunbury, 51.
Action for a ſeiſure without probable cauſe.

Upon an action brought againſt an officer for a ſeiſure *abſque probabili cauſa*, there was a ſpecial verdict ſigned by the counſel on both ſides; but the Attorney-General, notwithſtanding, moved for a new trial, and obtained it: although it was ſaid by the counſel on the other ſide, that there never was any inſtance that a new trial was granted after a ſpecial verdict which is ſigned by counſel.

The opinion of the Court as to finding or not finding of robbery.

The King v. Francis, & al'. 8 G. 2. Annaly. 113. 2Stra. 1015. Com. Rep. 478. pl. 210. See Foſt. Cr. Law, 128.
Uncertainty of finding, as to robbery.
The finding.

Lord *Hardwicke*.— Many objections were made to ſhew that this ſpecial verdict is not a charge of robbery; but they have been all over-ruled but one, which was ſingly to the uncertainty of the finding, *viz.* That it does not certainly appear from theſe words in the ſpecial verdict, "That *Coxe* offering to take "the money up again, the ſix perſons then "and there being preſent, threatened him if "he took it up to knock out his brains, "whereby *Coxe* then and there was put in "fear, and then and there deſiſted, and the "ſix perſons then and there immediately took "it up, and got on horſeback and rode off "with it; that the money was taken up in "*Coxe*'s preſence," ſo that the Court adjudged it to be a taking from the perſon: upon this point it has been argued before all the Judges, and my brothers *Carter*, *Comyns*, and *Thompſon* doubt, but all the reſt are of opinion that

this is not a ſufficient finding to make it robbery.

Robbery is a felonious taking from the *perſon*, putting him in fear, 3 *Inſt.* 68. and therefore all the indictments lay a taking *a perſonâ*, but then the law conſtrues a taking in a man's preſence to be taking from the perſon; ſo *Stamford* 27. *a.* and when the taking ſhall be ſaid to commence is matter of evidence to the jury.

Therefore I would premiſe that we had no doubt as to the definition of robbery, or of what would be evidence thereof to a jury; but all our doubt was as to the uncertainty of this ſpecial verdict.

The ſtriking of the hand here found, does of itſelf exclude all force, for it is that he gently ſtruck, and yet if that had been found to have been done *animo furandi*, it would have made the caſe plain, but for aught appears now, it might be but a ſimple aſſault, or an accidental blow, and without intention to make the money fall.

It is found that *Coxe* was put in fear, and then and there deſiſted to take up the money; but it does not appear how he deſiſted, and it might be by going away, *&c.*

The jurors alſo find that the ſix perſons then and there immediately took up the money, and got on horſeback and rode off, and upon theſe words our great doubt was; now there is no colour to ſay that the words *then and there* can aid any uncertainty therein, for they only relate to the *venue*, and cannot tie up the fact; ſo then the only material word remaining, is the word *immediately*, and nine of the Judges agree that this is of ſo uncertain a ſignifi-

As to the ſignification of the word immediately.

ſignification, that it cannot warrant the Court upon this finding to ſay that the taking was in *Coxe*'s preſence.

It was ſaid that that word excludes all intermediate time and actions, but it will appear that it has not neceſſarily ſo ſtrict a ſignification: *Stevens* in his *Theſaurus* expounds the word *immediate*, by *cito et celeriter*; ſo *Cooper*'s *Dictionary* renders in *Engliſh* immediately, forthwith, by and by; and *Minſhew* gives it as various meanings, and refers it to the word preſently: nor is its ſignification more confined in legal proceedings, as appears even from 2 *Lev.* 77. in the caſe of *Pibus* and *Mitford*, which was cited to the contrary, which ſay thus, though the word immediately, in ſtrictneſs, excludes all *meſne* time, yet to make good the deeds and intents of parties it ſhall be conſtrued ſuch convenient time as is reaſonably requiſite for doing the thing: this word has alſo been frequently uſed in ſpecial verdicts of murder, as in *Oneſby*'s caſe, *Trin.* 13 *Geo.* 1. 2 *Stra.* 766. 2 *R. Raym.* 1485. *Barnard. B. R.* 17. it is uſed four or five times with different applications; and in the ſpecial verdict in *Mawbridge*'s caſe, *Kel.* 120. it is twice uſed in different ſenſes and explained ſo by other words, as in one place it is ſaid immediately thereupon without intermiſſion drew his ſword; and in another place, immediately, in a little ſpace of time between *Mawbridge*'s drawing his ſword, and the giving the mortal wound, *&c.* Alſo the *ſtat.* of 27 *Eliz. c.* 13. *ſ.* 11. enacts that no perſon robbed ſhall have an action againſt the hundred, except he ſhall, with as much convenient ſpeed as may be, give notice of the robbery to ſome of the inhabitants

habitants of ſome town near the place; and in all declarations on that ſtatute, the averment of ſuch notice is thus, *quod immediate poſt feloniam* the plaintiff gave notice, *&c.* and ſo are all the precedents in *Coke*'s *Entries*, tit. *Hue and Cry* throughout, which ſhews that the word *immediate* there means only with convenient ſpeed, and convenient ſpeed uſed has accordingly been always allowed to be evidence of that averment, and likewiſe writs of *habeas corpus* returnable *immediate*, mean only with as much convenient ſpeed as may be.

And if the meaning of this word is thus unſettled, the Court cannot ſay it abſolutely excludes all *meſne* acts: the circumſtances here found were certainly probable evidence to the Jury to have found that the taking was in *Coxe*'s preſence; but if the Jury have not found that as a fact, we can make no intendment, but as my Lord *Holt* ſays, in the caſe of the *King* and *Plummer*, *Keyling* 111. as the Jury have not found that matter, we are confined to what they have found poſitively, and are not to judge the law upon evidence of a fact, but upon the fact as it is found. And my Lord *Raymond* ſaid to the ſame purpoſe in the caſe of the *King* and *Huggins* *, that it would be of moſt dangerous conſequence to leave inferences to be made in caſe of life by the Judges, where the fact was not found.

2 R. Raym. 1581. 2 Stra. 886. Fitzgib. 187. Barnard. B. R. 397.

* Vide ante, IX. (19.)

Therefore the priſoners muſt be acquitted of this indictment.

But we are all of opinion that the priſoners muſt not be diſcharged out of cuſtody, becauſe here is plain charge of grand larceny upon them by this verdict; but however we cannot give judgment of grand larceny againſt the priſoners upon this indictment; for though on

indictment for burglary and felony, the jury may acquit the party of burglary and convict him of felony; or if a perſon is indicted of felony ſo circumſtanced as to exclude him from the benefit of clergy, the jury may acquit of felony to ſuch a value as would forfeit that benefit, and only find him guilty of felony within benefit of the clergy, and judgment may be given accordingly thereupon; yet here the indictment is for robbery *a perſona*, and the only doubt referred to the Court by the Jury is, whether he is guilty of *that* felony and robbery, upon the facts ſtated by them; but as I ſay here is a plain charge of grand larceny upon this verdict, the priſoners cannot be diſcharged, but muſt be remanded, and then they may be removed by *habeas corpus* to be tried for this grand larceny; and this differs from the caſe of the *King* and *Burridge*, 3 *Wil. Rep.* 439. 2 *Seſ. Caſ.* 264. *pl.* 173. laſt term, becauſe here is a felony appears plainly upon the verdict, but there no felony appeared.

Where an executor ſhall cover aſſets by pleading the penalty of a bond to be due, and where he ſhall only cover aſſets to the amount of the ſum in the conditions: the method of pleading theſe bonds.

The Bank of England v. Catharine Morrice widow, executrix of Humphrey Morrice, deceaſed, H. 9 G. 2. Annaly. 219. 2 Stra. 1028. 2 Barnard. B.R. 183. 2 Kel.

Plaintiffs declare upon ſeveral *indeb. aſſumpſits*, of ſeveral ſums lent, and had and received to the plaintiff's uſe, by the teſtator, to the amount of £. 31,432. 10*s.* and then there is a count in the declaration (upon which the verdict was found) for £. 32,000. had and received to the uſe of the plaintiffs *ad dampnú* of the

the plaintiffs £. 35,000. Defendant pleads a judgment recovered, and ſeveral bonds and articles with penalties unſatisfied, and particularly a bond entered into by teſtator to Sir *William Morrice*, Bart. dated 6th of *March* 1727, in the penalty of £. 53,000. conditioned for payment of £. 26,000. in manner therein mentioned, *viz.*

165. pl. 139. Tri. at Ni. Pri. 131. See Andr. 110.

£. 5000. and intereſt for the whole on the 24th of *June* 1728.

£. 5000. and intereſt for £. 16,500. on the 24th of *June* 1729.

£. 5000. and intereſt for £. 11,500. on the 24th of *June* 1730.

£. 5000. and intereſt for £. 6,500. on the 24th of *June* 1731.

£. 5000. and intereſt for £. 1,500. on the 24th of *June* 1732.

And £. 1,500. and intereſt on the 24th of *June* 1733.

And if default ſhould be made in payment of any or either of the ſaid ſums, or any part thereof at the times therein limited, that then the ſaid bond ſhould be in full force; and ſhe avers that the two laſt payments of £. 5,000. and of £. 1,500. and intereſt have not been made, and that the bond remains in full effect, and not cancelled or ſatisfied; and another bond entered into by the teſtator to *Thomas Wilſon*, dated 27th of *July*, in the 4 *G.* 2. in the penalty of £. 5,000. conditioned for payment of £. 2,500. upon the 27th of *July* 1731, which ſhe avers is ſtill unpaid. And another bond entered into by the teſtator to *Duncan Campbell*, dated 25th of *March*, 4 *G.* 2. in the penalty of £. 3,000. conditioned for payment of £. 1,500. on the 1ſt of *May* then next, which ſhe likewiſe avers is ſtill unpaid;

and ſhe pleads *plene adminiſtravit* in this manner, "*Et eadem Catharina ulterius dicit, quod ipſa plene adminiſtravit omnia bona et catall' quæ fuer' præfat' Humfredi tempore mortis ſuæ in manibus ipſius Catharinæ adminiſtrand' præterquam bona & catall' ad valenc' mille libr' quodq; eadem Catharina non habet nec die exhibition' billæ præd' ipſor' gubernat' et ſocietat', nec unquam poſtea habuit aliqua bona ſeu catall' quæ fuer' præfat' Humfredi tempore mortis ſuæ in manibus ipſius Catharinæ adminiſtrand' præterquam bona & catall' præd' ad valenc' præd' mille libr' quæ ſolution' & ſatisfaction' ſeparal' denar' præd' per ſeparal' ſcript' obligator' articulos & judic' præd' debit' & ſolubil' onerat & obligat' exiſtunt. Et hoc parat' eſt verificare unde pet' judic' ſi præd' gubernat' & ſocietas action' ſuam præd' inde verſus eam habere ſeu manutenere debeant, &c.*" Plaintiff's reply, "*Quod præd' Catharina die exhibition' billæ præd' ipſor gubernat' & ſocietat' habuit divers' bona & catall' quæ fuer præd' Humfredi tempore mortis ſuæ in manibus ſuis adminiſtrand' ultra bona & catall' ſufficien' ad ſatisfaciend' ſeparal' denar' præd' per ſeparal' ſcript' obligator' articul' & judic' præd' debit' & ſolubil' unde præd' Catharina dampn' ſua præd' eiſdem gubernat' & ſocietat' ſatisfeciſſe potuit, viz. apud London' præd' in paroch' & warda præd.*" And iſſue is joined thereupon; and at the trial the plaintiffs allowed the defendant to cover aſſets for the penalties of all the bonds and articles except thoſe particularly mentioned above, and on which only the plaintiffs made objection; and the Jury found a ſpecial verdict to this effect.

That the teſtator was at his death indebted to the plaintiffs in £. 28,993. 8 *s.* 1 *d.* for money had and received to their uſe.

That

That the money due on Sir *William Morrice*'s bond, *Wilſon* and *Campbell*'s bonds, for the ſums in the conditions and for intereſt together with the penalties of all the other ſpecialties and judgments pleaded, amounts to £. 22,182. 10 *s.*

That at the time of exhibiting the plaintiff's bill, the defendant had aſſets in her hands to the value of £. 41,152. 2 *s.* 5 *d.*

That there was juſtly due and owing on Sir *William Morrice*'s bonds at the teſtator's death, for the ſum in the condition and intereſt £. 6,830. for principal and intereſt on *Wilſon*'s bond £. 2,520. and for principal and intereſt on *Campbell*'s bond £. 1,540.

That at the time of exhibiting the bill, the defendant had not aſſets to diſcharge the penalties of ſaid three bonds.

That deducting the above £. 22,182. 10 *s.* out of the aſſets found as above, there remains in her hands at the time of exhibiting the bill £. 18,969. 12 *s.* 5 *d.* liable to the demand of the plaintiffs, if the penalties of the ſaid three bonds ought not in this caſe to be allowed as charges upon the aſſets.

But whether they ought to be ſo or not, the Jury pray advice of the Court; and if they are not, they find for the plaintiffs' damages £. 28,993. 8 *s.* 1 *d.* coſts 40 *s.* aſſets to the value of £. 18,969. 12 *s.* 5 *d.*

If otherwiſe they find for the defendant.

They find every thing elſe neceſſary to bring the merits in queſtion.

N. B. The declaration was of *Hilary* term 1731.

This verdict was ſeveral times argued at bar, in *Eaſter* term laſt, by *Strange* for plaintiffs, and *Bootle* for defendant; in *Trinity* term by Serjeant

Serjeant *Eyre* for plaintiffs, and Serjeant *Chapple* for defendant; and in *Michaelmas* by *Marſh* for plaintiffs, and *Denniſon* for defendant.

Strange argued, That the defendant upon this plea and replication can cover no more aſſets on the three bonds than for the ſums due upon the conditions; that ſhe ought to have pleaded theſe bonds as ſingle bonds, without ſetting forth the condition, and that is the method which chiefly occurs in the reports, and then plaintiffs muſt have over-reached the penalties, becauſe the Court could not have gone out of the record to conſider them as penalties only; but as that method uſed to drive the creditor into a court of equity to diſcover what the real debt was, therefore the courts of law encouraged another method of pleading, either for the defendant to ſet forth the condition in the plea, as the defendant here has done, or elſe for the plaintiff to reply the penalties or judgments were kept on foot *per fraudem*, and upon ſuch an iſſue they allowed ſlight evidence to ſhew a fraud, ſo that if one judgment was falſified, all the judgments were taken to be falſified likewiſe, *Carthew*, 196, 431. That the courts recommended this way of pleading, he cites 1 *Vent.* 354. and *Salk.* 312. *Parker* and *Atfield.* That though in the plea ſhe does not ſay no more is due than the ſums in the conditions, yet it muſt be taken to be ſo, becauſe *ambiguum placitum accipiendum eſt contra proferentem. Co. Lit.* 303. *b.* that the replication here is good, becauſe in all replications, except *nul award fait*, it is ſufficient to meet the plea and falſify the excuſes made therein, and that replication of *nul award* depends on a particular reaſon; *Salk.* 138. *Meredith* and *Allen*;

len; now this replication has done ſo. That the penalty is not to be abſolutely taken as the debt, he cites *Tully* and *Sparkes*, 2 *Stra.* 868. *Paſch.* 3 *G.* 2. where the queſtion was, what was the meaning of the word debts in the bankruptcy act, and the Court held it meant a demandable and juſtly due debt.

Bootle argued, that this caſe muſt be taken according to the ſtrict rules of law, and as it ſtands upon the pleadings as they are, and not as they might have been pleaded. Now the iſſue ſtands thus, ſhe pleads that ſhe has fully adminiſtered, except *quæ ad ſatisfaciend' denar' præd per ſcript' obl', &c. ſolubil' onerat' exiſtunt:* and the replication is, that ſhe *habuit ultra bona ſufficient' ad ſatisfaciend' denar' præd' per ſcript' obl', &c.* So that the iſſue is, whether ſhe had aſſets *ultra* the ſums in the bonds, *&c.* and that cannot be referred by the rules of law to any ſums but the penalty, for every bond is a debt immediately. *Stevens* and *Lofting*, *Michaelmas* 7 *Geo.* 2. and the expediency of pleading will not alter the law. That the penalties are pleadable whether the conditions be due or not. 1 *Roll. Abr.* 925. *Lit.* 2. *pl.* 2. *&* 4. and 3 *Lev.* 368. *Thompſon* and *Hunt*. The plea ſays that the bond is not ſatisfied, which, as the replication does not deny, conſequently confeſſes according to all the rules of pleading.

He cites 3 *Lev.* 368. likewiſe to ſhew that the penalty is a protection for ſo much of the aſſets, unleſs it appears to be kept on foot *per fraudem*. That the caſe of *Vent.* 354. there is this difference from the preſent caſe, *viz.* that there the executor pleaded the teſtator indebted to himſelf, and therefore he was bound to take only what was juſtly due, but where the

the debt is to a ſtranger he may always claim the whole, and there is only relief in equity. He cites *Cro. Cha.* 362. *Goldſmith* and *Sydnor*, that a bond for payment of money is pleadable as a debt *in præſenti* even before the day of payment, though it be otherwiſe of a bond for performance of covenants.

Lord *Hardwicke*.—I do not think the queſtion now is, whether in ſtrictneſs the penalty is the debt, but what muſt be adjudged to be the debt upon the pleadings, as they are in this caſe. The iſſue is, whether ſhe has aſſets *ultra* what will ſatisfy the ſums aforeſaid payable by the bonds, *&c.* ſo that the queſtion is, whether the penalties of the bonds, or the ſums in the condition, are meant by the words ſums aforeſaid. The modern way of pleading is for the defendant in the plea to ſet out the bonds with the conditions; but ſure that ſeems to be an argument againſt the defendant in the preſent caſe; for the reaſon of introducing that method was, that the truth might appear. I think it would be moſt unnatural, when ſhe herſelf has pleaded that ſo much is due, for us to lay any weight on her not having ſaid, and no more, unleſs it appears from the whole, that we are to take the penalty to be the debt; and if we are to take that to be the debt in this caſe, there is no uſe in pleading fairly, and ſhe might as well have pleaded as they uſed to do, and then the plaintiff muſt have craved *oyer* and replied *per fraudem*; therefore the queſtion is, whether this replication ſhould have ſhewn that the obligees were willing to take the ſums in the condition; but no caſe has been ſhewn where the plea ſets out the condition, that it ſhould ſay that and no more is due, or that the plaintiff ſhould reply ſpecially,

and

and I ſhould be glad to ſee a caſe of that ſort; as to *Page* and *Denton*, 1 *Vent.* 354. as *Bootle* obſerves, it is not an authority in this caſe, for there it was a plea of retainer, and when the executor had as much in his hands as was ſufficient for the juſt debt, it was conſidered as a payment of the bond, but ſtill it ſhews that in theſe kinds of pleading the Court is not in all caſes bound to take the penalty to be the debt in law. It is pretty ſtrong for the court, when the defendant has claimed what is to ſatisfy ſo much as due, to preſume that more is due. And it is conſiderable that ſince the caſe of *Thompſon* and *Hunt*, *in Lev.* the Court, by a general law, *viz.* the ſtatute for amendment of the law, is bound to take notice that the ſum in the condition may be the debt; as to the want of an averment in the replication, that the obligees were willing to accept a leſs ſum, do but conſider what is the evidence required of ſuch willingneſs, only to ſhew that it is a bond with a condition for a leſs ſum.

Serjeant *Eyre* in his argument cites no new caſes.

Serjeant *Chapple*.—That the penalty is the legal debt, for a releaſe of actions diſcharges the penalty, though made before the condition due. *Co. Lit.* 291. 8 *Rep.* 153. *a.* 1 *Brownlow*, 62. That the ſums in the condition are deemed parcel of the penalty, 1 *Roll. Rep.* 405. *Robinſon* and *Francis*. That there is difference between obligation with a condition annexed, and obligation with a deſeazance made afterwards, *Cro. Eliz.* 755. 1 *Inſt.* 207. That if ſeveral penalties are pleaded, and aſſets only enough for one, the plaintiff muſt in his replication aver aſſets more than ſufficient to ſatisfy all, 1 *Roll. Abr.* 922. *pl.* 5. That the

uſe

uſe of the defendant's fair pleading in this caſe is, that plaintiffs in fact take judgment of aſſets *in futuro*; that the covin is the matter in iſſue on replication *per fraudem*, *Turner*'s caſe and *Co.* 132. and Sir *William Jones*, 91. where ſee the manner of ſuch pleading *per fraudem*; he cites for the ſame 1 *Lutw.* 445. *Bell* and *Bolton*.

Serjeant *Eyre* in reply cites 3 *Lev.* 57. *Lenum* v. *Fooke*, replication would be good if avers aſſets *ultra* the money in the condition.

He cites *Carthew*, 208. *Page* and *Watts*, that the concluding the plea with a general *plene adminiſtravit* will waive the ſpecialties pleaded before; therefore in this caſe, if the words *ſums due and payable*, relate not to the ſums mentioned in the condition, the bond to Sir *William Morrice* is waived, ſince the penalty is not due 'till a breach of the condition, and there was no breach of that condition at the time of the plea.

Lord *Hardwicke*.—This is a new point which my brother *Eyre* has ſtarted, and as to that of Sir *William Morrice* keeping it up *per fraudem*, how could the plaintiffs prove that?

Marſh cites *Cro. Cha.* 490, that an executor may releaſe a bond upon receipt of the ſum in the condition, and it ſhall not be a *devaſtavit* in him.

Denniſon cited further *Cro. Jac.* 8. 35. 382. and 3 *Lev.* 311. *Knighton* and *Moreton*.

And now this term, without any further argument, the opinion of the Court was delivered by Lord *Hardwicke*, as follows:

Upon this ſpecial verdict two points have been made; Firſt, Whether upon the pleadings in this record, and the matter found by the

the verdict, the penalties of the bonds whereof the days of payment are paſt, or only the ſums mentioned in the conditions, ought in a court of common law, to be conſidered as liens on the aſſets. Secondly, If in theſe reſpects there be any difference between thoſe bonds whereof the days of payment are paſt, and the bond to Sir *William Morrice*, the days of two payments not being come at the time of the plea; and then another queſtion will remain, what judgment muſt be given upon the matter as here found. As to the firſt point, nothing is more certain than that if there be a bond with a penalty, that when the day appointed for payment by the condition is paſt, that the penalty is the debt at law, and relief can be only had in a court of equity; and therefore the defendant might have pleaded ſo as to have had the full penalties allowed her as charged upon the aſſets; but ſhe having in her plea ſet forth the real ſums due, and having, by ſpecial averment, tied herſelf up to them, it has been inſiſted on by plaintiff's counſel, that no more ought to be allowed her to cover aſſets than thoſe leſs ſums, which ſhe has ſhewn were payable by the conditions; but we are all of opinion, * that is my brothers *Page* and *Probyn*, and myſelf, that the penalties of thoſe bonds whereof the days of payment are paſt, ought to be conſidered as the debts due at law, ſo as to cover aſſets: the ancient method was only to plead the penalty, and to leave it to the plaintiff to ſhew that the obligee was willing to accept the debt due in conſcience, and that the penalty was only kept on foot *per fraudem*; and this was ſo conſtantly the method, that there is not any precedent either in the ancient or modern books of entries, of a plea of *plene adminiſtravit*,

* Mr. Juſtice Lee gave no opinion, he being a relation of the defendant.

adminiſtravit, where the ſums of the conditions of the bonds pleaded are ſet out; and when this method was firſt departed from I do not find, but I believe it was when the Judges began to complain of the difficulties plaintiffs were put to by ſuch a diſcloſing of only part of the caſe; the firſt inſtance whereof is in the caſe of *Page* and *Denton*, 1 *Vent.* 354. where the court ſaid, that if men would plead their caſe ſpecially, it would ſave many a ſuit in Chancery; the other is in the caſe of *Parker* and *Atfield*, 1 *Salk.* 312. where the court ſaid that the beſt way for an adminiſtrator to plead, is to plead truly and honeſtly; and though there is a judgment for a penalty, he ought to plead the judgment, and ſhew how much is due; from which ſayings it was inferred by the plaintiff's counſel in this caſe, that when the defendant ſhews what is due, no more aſſets ſhall be covered than to the amount of what is ſo ſhewn, or elſe, ſaid they, what is the uſe of this new way of pleading? But as no authority can be found to prove that the penalty is not to be taken to be the debt, this *obiter* ſaying in the books ſhall not ſettle it; and yet notwithſtanding this manner of pleading will remain to be of great uſe. Upon the old method nothing appears in the plea but the penalty, and the plaintiff is not thereby enabled to tell whether it be a ſingle bond, or with a condition, and the defendant is not bound to make a *profert* of the bond pleaded, not being ſuppoſed to have the ſame in his cuſtody, much leſs is the obligee in ſuch bond bound to produce it; and if there were any colluſion between the obligee and the executor who pleads ſuch bond, the plaintiff might perhaps be never able to come at the truth of the fact,

fact, in order to make a proper replication, which would oblige him to reſort to a court of equity to diſcover and make a proper caſe at law, whereas by ſetting out the condition in the plea all theſe delays are avoided, for the plaintiff ſees what is the real debt, and may, upon enquiry, know whether the penalty is kept on foot *per fraudem*; and this is ſufficient to ſatisfy the ſaying of the court in the caſe of *Page* and *Denton*, that ſuch pleading will ſave many ſuits in Chancery; for ſo it will, and will enable the plaintiff to have the equity of his caſe even in a court of common law, but to require more might be perilous to an honeſt executor, for the penalty is to ſecure intereſt, coſts, and charges to the obligee as well as the ſum mentioned in the condition; and the executor of the obligor is likewiſe intitled to this out of the aſſets, and therefore it is impoſſible to ſettle and adjuſt that at law, without confounding law and equity; and diſputes may happen between the obligee and the executor, which may oblige the executor to apply to a court of equity, of which he muſt pay coſts, as if he ſhould apply to equity to oblige the obligee to take only his real debt; or if he would take the benefit of the ſtatute for amendment of the law, and pay the money really due into court, he cannot do that till an action is brought againſt him, and then too he muſt pay coſts; and therefore if the matter were to be taken thus ſtrictly upon the plea, the executor might be left to pay ſuch intereſt and coſts out of his own pocket, though it would be no inconvenience to oblige the obligee, if he were plaintiff to take his real debt; therefore it is better it ſhould be open to equity in ſuch caſes, than for us to blend

the rules of law and equity together. This is the ſenſe in which that general expreſſion which has been ſo much relied on for plaintiffs ſhould be taken. There were cited for plaintiffs *Cro. Cha.* 490. *Knyveſton* and *Latham*, but the caſe is really an authority againſt them, for it was held that the penalty of the bond is the debt at law, and relief could be had only in a court of equity; and that was confirmed, as the book ſays, by the judges at the table in Serjeant's-Inn; though it was held by two judges, that a releaſe by an executor of full age, having received the principal and intereſt which was due in equity, ſhould be only aſſets for the intereſt and money received, and not be a *devaſtavit* for the reſidue; and it was for this latter opinion only that the caſe was cited; but there is a great deal of difference between charging an executor with a *devaſtavit* for not receiving a penalty which a court of equity would not ſuffer him to receive, and letting him have the advantage of a penalty to cover aſſets, as in this caſe. The caſe of *Page* v. *Denton*, 1 *Vent.* 354. was likewiſe cited for the plaintiff; and at firſt ſight it ſeemed a ſtrong caſe for him, but upon conſidering it, it is otherwiſe, for it is a plea of a retainer by an executor himſelf, and not of payment to a third perſon; ſo that it would have been abſurd to require a replication that the obligee was willing to accept a leſs ſum, or that the executor kept the bond on foot *per fraudem*; and this was the true ground of that caſe; and the court took care to diſtinguiſh that caſe from the caſe of a forfeited bond ſtanding out to a ſtranger, ſo that caſe is like the caſe of *Thompſon* and *Hunt*; that caſe was a plea by an executor of judgments obtained againſt him upon

upon ſeveral bonds made by the teſtator, and replication that the obligations were with conditions to pay leſs ſums, and that the defendant had aſſets to pay the plaintiff *ultra* what would ſatisfy the debts and judgment in his plea, and on demurrer to the replication it was held good, becauſe the penalties are the legal and due debts, and the plaintiff might have aided himſelf by pleading that the bonds were kept on foot by fraud and covin, and upon iſſue of the fraud, the plaintiff might give in evidence ſuch matter as would ſerve him to avoid the penalties, and ſo judgment was given for defendant: and that caſe of *Thompſon* and *Hunt* is affirmed to be law in *Bell* and *Bolton*, 1 *Lutw.* 450. to diſtinguiſh that caſe from this it was ſaid, that the ſeveral leſs ſums were ſet out in the replication in that caſe, but that here they are ſhewn by the defendant herſelf in the plea, and that therefore it muſt be underſtood in this caſe that ſhe herſelf inſiſts on more being due; but that makes no difference, for when in *Thompſon* and *Hunt* the defendant averred in his rejoinder, that he had not *ultra* to ſatisfy the penalties, it was an admiſſion of the replication, and the ſame as if the defendant had himſelf ſet out the leſs ſums; another difference was made from the different manner of pleading in this caſe, becauſe the defendant in pleading the ſeveral bonds has added that the ſums in the conditions remain ſtill due and unpaid, and then concludes her plea, that ſhe has not aſſets *ultra* what will ſatisfy the ſeveral ſums by the bonds, articles, and judgments due and payable, and therefore they would have it that the ſums ſaid in the concluſion to be due and payable on the bonds, mean the ſums before

to be due thereon, *viz.* the leſs ſums; but in anſwer to that, the words in the concluſion of the plea are not the ſame as in the ſeveral averments; in the averments the words are, *due*, and in the concluſion the words are, *due and payable*, which in law is the penalty; but there is a more ſubſtantial anſwer to be given to that, for the defendant has averred that the penal ſums of the articles remain due and unpaid as well as the ſums of the bonds; and as to the articles at leaſt the words muſt of neceſſity mean the penalties, and it would make ſtrange confuſion in the ſame plea to conſtrue the ſame words to refer ſometimes to penalties and ſometimes to the leſs ſums, ſometimes to the debts at law, and ſometimes to the debts in equity; therefore, if thoſe words are to be applied to the penalties in the articles, they ought likewiſe to be applied to the penalties of the bonds; it was likewiſe objected that there is no precedent of a replication *per fraudem*, where the defendant's plea ſets forth the particular ſums due by the condition, but the anſwer that has been given to that is ſufficient, that neither is there any precedent of ſuch a plea.

As to the ſecond point, we are of opinion that the defendant can be allowed no more upon Sir *William Morrice*'s bond than is due in equity and conſcience, for it appears that the days of payment of the two laſt inſtalments were not come, and we conceive that upon this plea all the prior inſtalments muſt be taken to be ſatisfied; then the queſtion will be, if a bond be pleaded with a penalty conditioned to pay a leſs ſum at a day to come after the plea, whether it ſhall be allowed to cover aſſets to the amount of the penalty; it muſt be allowed

lowed that ſuch a bond is pleadable; ſo is *Cro. Cha.* 363. and 1 *Rol. Abr.* 925. *pl.* 2. but then it will cover aſſets no further than the amount of the ſum payable in conſcience, for the bond not being payable, nothing is due at the time of the plea, and it would be abſurd to let the executor cover aſſets for a debt which cannot be recovered againſt him; and this is proved by the way of pleading in ſuch caſes; ſo in *Cro. Eliz.* 315. the defendant avers that he has no aſſets *ultra* the money due by the condition, and not *ultra* the penalty; ſo 3 *Lev.* 57. *Leman* and *Fooke*, judgment given for the defendant, becauſe plaintiff in his replication did not ſay that the defendant had aſſets *ultra* what would pay the money in the condition, which directly admits that if the replication had averred aſſets in the defendant's hands *ultra* to pay the leſs ſum, it would have been good. If we conſider too how this differs from a forfeited bond in the reaſon of the thing: this bond the executor may pay, by paying the leſs ſum when the day comes, for ſhe has admitted aſſets in this caſe by pleading it; ſo is 1 *Salk.* 198. and 312. and if ſhe has aſſets it is her duty to pay it; and if ſhe does not, but lets the intereſt run upon it, having aſſets, that will be a *devaſtavit*; ſo is 1 *Vent.* 198. 2 *Lev.* 39. it differs alſo from a forfeited bond in this, that the plaintiff could not reply *per fraudem*, for it was no fraud in her not to pay a bond which was not due.

But the greateſt difficulty is, what judgment muſt be given in this caſe, for upon this verdict there are two objections; 1*ſt*, That the aſſets found liable to ſatisfy the plaintiff, are found in one intire ſum, ſuppoſing all the penalties are not to be allowed as charges upon

the aſſets, and no diſtinction is made in the verdict as to the penalties of the bonds, and the aſſets to be liable, if ſome are allowed and others not; but as the Court is now of opinion that ſome of the penalties ought to be allowed and not others, that will reduce thoſe aſſets in defendant's hands, which are really liable to the plaintiff's demand. The other objection is, that the intereſt included in the ſums found to be really due upon the bonds, is only carried on to the teſtator's death; and yet it appears that the executor muſt pay intereſt on Sir *William*'s bond, to the time of payment of the two laſt inſtalments, for which reaſons the Court cannot give judgment for the intire ſum found by the Jury; but then the queſtion is, whether we can ſever the ſum found by the Jury, or whether the verdict can be amended, or whether there muſt be a *venire facias de novo* awarded.

How ſpecial verdicts ſhall be conſtrued; may be rectified in point of computation.

To which purpoſe the Court ſet a further day in this term for hearing counſel upon the ſaid points, and then *Strange* for plaintiff argued, " That the Court may give judgment as the verdict now ſtands, and for that purpoſe may compute what allowance is to be made to the defendant, and ſo give judgment for the plaintiff for ſuch ſum as he appears to be lawfully intitled to upon this record; and he cited *Hob.* 54. *Foſter* and *Jackſon*, that howſoever the verdict may ſeem to ſtray, yet if a verdict may be concluded out of it to the point in iſſue, the court ſhall work it into form and make it ſerve; and for the ſame purpoſe he cited 1 *Sid.* 5, 27. and *Carter*, 80. that the court will ſet verdicts right, which give greater damages than are declared for; and cites a precedent of that ſort in *Thompſon*'s *Entries*,

Entries, fo. 458. he cited alſo the *King* and *Hayes*, *Hil.* 1 *G.* 1. 2 *Stra.* 843. 2 *R. Raym.* 1518. *Barnard. B. R.* 31. he was indicted for three facts; 1*ſt*, For forging a bond; 2*dly*, For publiſhing ſuch bond; 3*dly*, For publiſhing a bond generally, knowing it to be forged; a ſpecial verdict was given that he forged a bond in the words and figures following; that he publiſhed the ſame bond knowing it to be forged; and ſaid nothing as to the third fact. And it was objected, that as the verdict neither found the defendant guilty or not guilty as to that, that no judgment could be given; but the court held that upon the facts ſtated to them, they muſt adjudge the defendant guilty as to the two firſt, and not guilty as to the laſt, and that they were to do what the jury ought to have done; he likewiſe cited a precedent from *Townſend's firſt book of Judgments*, 165. which he would have to be a precedent for this."

Serjeant *Chapple*, for defendant, argued, "That no judgment can be given upon this verdict, for there will be no *quantum* of aſſets plainly appearing wherewith to charge the defendant; and he cited 2 *Roll. Abr.* 693. *Lit. ſ.*— *Cro. Cha.* 549. *Criſpe* and *Pratt*, *Bro. Exe.* 141. 1 *Roll. Rep.* 234.

Lord HARDWICKE. — The rules which have been laid down as to ſpecial verdicts muſt be allowed; on the one hand that the facts found can only warrant the judgment; on the other, that when the matter ſufficiently appears upon the whole, the Court may ſo mould and form it as to give a proper judgment reſulting from the whole taken together, and to this purpoſe the words in

Hob. are very right: the only queſtion here then is, whether ſufficient facts are found to give judgment upon; and as to the doubt which the Jury make, the Court is not ſtrictly tied to that, nor by the concluſion they make, but are, if neceſſary, to diſtribute the facts found, and to give a proper judgment upon the whole taken together, even though it were to contradict the concluſion, 2 *Roll. Abr.* 706. *pl.* 33. which is cited and allowed to be law in *Hard.* 347. and I am of opinion that it does ſufficiently appear upon this verdict what allowance ought to be made the defendant, and that without any intendment; for as the Jury have found the penalties and conditions, the reſt is but matter of computation, and they have found the intereſt to be at the rate of £. 5 *per cent.* and the *terminus a quo* to be from the death of the teſtator, which facts being found, all that remains is computation, which the Court has always had power to make or alter; therefore I think there is ſufficient found for us to give judgment upon; but the queſtion is, in what manner it ſhould be entered; and as to that I think the precedents that have been ſhewn are ſtronger than the preſent caſe, for if damages which are intire may be ſevered, *a fortiori* aſſets may. There is a precedent in *Townſend's ſecond book of Judgments, fo.* 151. which might be made agreeable to this caſe, and that book was printed by the authority of Ld. Ch. J. *Vaughan*, and is of better authority than *Thompſon's Entries.* There are likewiſe in the ſame book, *p.* 117. a judgment in ejectment with a *remittitur*, and *p.* 189. another of the ſame in *quare impedit*; there-

fore

fore I think judgment ought to be ſpecially entered for the plaintiff.

Page and *Probyn accord:* but as it was to be a ſpecial entry, a rule was, that the parties ſhould attend a judge to ſettle the entry.

The entry of the judgment was thus:— " Whereupon all and ſingular the premiſes " being ſeen and fully underſtood by the " Court here, inaſmuch as it appears to the " ſaid Court here, that the penal ſums in the " aforeſaid two bonds to the ſaid *Thomas Wil-* " *ſon* and *Duncan Campbell* ought in this caſe " to be allowed as charges upon the aſſets of " the ſaid *Humphry Morrice*, and that the pe- " nal ſum in the ſaid bond to the ſaid Sir " *William Morrice* ought not in this caſe to " be allowed as a charge upon the aſſets of the " ſaid *Humphry Morrice*, but that only the " principal ſum of £. 5,000. payable on the " ſaid 24th day of *June*, in the ſaid year of " our Lord 1732, and the further ſum of " £. 1,500. payable on the ſaid 24th day of " *June* in the ſaid year of our Lord 1732, to " the ſaid Sir *William Morrice*, with all intereſt " for the ſaid two laſt-mentioned ſums from " the ſaid 24*th* day of *June* in the ſaid year of " our Lord 1731, to the reſpective days of " payment thereof, ought in this caſe to be " allowed as charges upon the aſſets of the " ſaid *Humphry Morrice*; therefore by the " aſſent of the ſaid governor and company of " the bank of *England*, the ſum of £. 4,310. " being deducted out of the ſaid ſum of " £. 18,969. 12*s.* 9*d.* by the Jury aforeſaid " in form aforeſaid found, whereby the aſſets " in the hands of the ſaid *Catharine Morrice* " on the day of exhibiting the plaintiff's bill

" liable

" liable to the demands of the ſaid plaintiffs,
" are only the ſum of £. 14,659. 12*s*. 9*d*. it
" is conſidered by the Court, that the afore-
" ſaid governor and company do recover
" againſt the ſaid *Catharine* their ſaid da-
" mages to £. 28,993. 8*s*. 1*d*. and alſo the
" ſaid 40*s*. by the Jury aforeſaid in form
" aforeſaid aſſeſſed, and likewiſe £. 198. 7*s*. 7*d*.
" to the ſaid governor and company at their
" requeſt, for their coſts and charges aforeſaid
" by the Court here of increaſe adjudged,
" which ſaid damages amount in the whole
" to the ſum of £. 29,193. 15*s*. 8*d*. to be
" levied of the goods and chattels of the ſaid
" *Humphry Morrice* deceaſed, at the time of
" his death in the hands of the ſaid *Catharine*
" to be adminiſtered, if ſhe hath ſo much in
" her hands, and if ſhe hath not ſo much in
" her hands, then £. 200. 7*s*. 7*d*. parcel of
" the damages aforeſaid, to be levied of the
" proper goods and chattels of the ſaid *Ca-*
" *tharine*, and that the ſaid *Catharine* be in
" the mercy of the Court; and that the ſaid
" governor and company be alſo in the
" mercy of the Court for their falſe clamour
" againſt the ſaid *Catharine* for the reſidue of
" the aforeſaid premiſes, whereof the ſaid *Ca-*
" *tharine* is by the Jury aforeſaid in manner
" aforeſaid acquitted, and that the ſaid *Catha-*
" *rine* go therefore without day, and ſo
" forth."

Whatever

Whatever is written in the margin of a policy of inſurance is a warranty, and muſt be literally complied with.

De Hahn v. Hartley, Trin. 26 G. 3. B. R. Durnford and Eaſt, 1 V. 343. Aſſumpſit, attempts of an under-writer to recover back amount of loſs he had paid in his own wrong, the inſured not having complied with the terms of the policy, of which the plaintiff was ignorant at the time of the payment.

This was an action upon promiſes brought by the plaintiff (an under-writer) to recover back the amount of a loſs which he had paid upon a policy of inſurance.

Plea the general iſſue.

This was tried before *Buller*, J. at the ſittings after laſt *Eaſter* term at *Guildhall*, when the Jury found a ſpecial verdict, which ſtated,

That the defendant on the 14*th June* 1779, at *London*, gave to one *Alexander Anderſon*, then being an inſurance broker, certain inſtructions in writing, to cauſe an aſſurance to be made on a certain ſhip or veſſel called the *Juno*, which were in the words and figures following; " Pleaſe get £. 2000. inſured on " goods as intereſt may appear, ſlaves valued " at £. 30. *per* head, comwood £. 40. *per* ton, " ivory £. 20. *per* hundred weight, gum copal " £. 5. *per* pound, *at and from Africa to her* " *diſcharging port or ports in the Britiſh Weſt* " *Indies*; *warranted copper ſheathed, and ſailed* " *from Liverpool with fourteen ſix-pounders*, " (excluſive of ſwivels, *&c.*) 50 *hands* or " upwards, at 12 not exceeding 15 guineas. " *Juno—Beaver. S. Hartley* and company, " *June* 14th, 1779."

That the ſaid *Alexander Anderſon*, in conſequence of the ſaid written inſtructions from the ſaid defendant, on the ſaid 14th *June* 1779, at *London* aforeſaid, *&c.* did cauſe a certain writing or policy of aſſurance to be made on the ſaid ſhip or veſſel called the *Juno*, in the words and figures following; (reciting the

policy) which was upon any kind of goods and merchandizes, and alſo upon the body, tackle, apparel, *&c.* of and in the ſhip *Juno at and from Africa, to her port or ports of diſcharge in the Britiſh Weſt Indies, at and after the rate of £.* 15. *per cent.*

The verdict after reciting two *memoranda*, which are not material, then proceeded to ſtate, *that in the margin of the ſaid policy were written the words and figures following*; "*Sailed* "*from Liverpool with* 14 *ſix-pounders, ſwi-* "*vels, ſmall arms, and* 50 *hands or upwards,* "*copper-ſheathed.*"

That on the ſaid 14th *June* 1779, and not before, at *London* aforeſaid, *&c.* the plaintiff under-wrote the ſaid policy for the ſum of £. 200. and received a premium of £. 31. 10*s.* as the conſideration thereof.

That the ſaid ſhip or veſſel called the *Juno* ſailed from *Liverpool* aforeſaid, on the 13th *October* 1778, *having then only* 46 *hands on board her*, and arrived at *Beaumaris*, in the Iſle of *Angleſea*, in ſix hours after her ſailing from *Liverpool* as aforeſaid, with the pilot from *Liverpool* on board her, who did pilot her to *Beaumaris* on her ſaid voyage; and that at *Beaumaris* aforeſaid the ſaid ſhip or veſſel took in ſix hands more, and then had, and during the ſaid voyage, until the capture thereof hereinafter mentioned, continued to have fifty-two hands on board her.

That the ſaid ſhip or veſſel in the ſaid voyage from *Liverpool* aforeſaid to *Beaumaris* aforeſaid, until and when ſhe took in the ſaid ſix additional hands was equally ſafe, as if ſhe had had fifty hands on board her for that part of the ſaid voyage.

That divers goods, wares, and merchandizes

of

of the ſaid defendant, of great value, were laden and put on board the ſaid ſhip or veſſel, and remained on board her until and at the time of the capture thereof hereinafter mentioned. And that on the 14*th March* 1779, the ſaid ſhip or veſſel while ſhe remained on the coaſt of *Africa*, and before her ſailing for her port of diſcharge in the *Britiſh Weſt India Iſlands*, was, upon the high ſeas, with the ſaid goods, wares, and merchandizes on board her as aforeſaid, met with by certain enemies of our Lord the now King, and captured by them, *&c.* and thereby all the ſaid goods, wares, and merchandizes of the ſaid defendant, ſo laden on board her as aforeſaid, were wholly loſt to him.

That when the ſaid plaintiff received an account of the ſaid loſs of the ſaid ſhip or veſſel, he paid to the ſaid defendant the ſaid ſum of £. 200. ſo inſured by him as aforeſaid, not having then had any notice that the ſaid ſhip or veſſel had only forty-ſix hands on board her when ſhe ſailed from *Liverpool* as aforeſaid. But whether upon the whole matter, *&c.*

Law, for the plaintiff, was ſtopped by the Court.

Wood, for the defendant,

Admitted, that a *marginal note* in a policy of inſurance *may be a warranty*, but contended, that this was diſtinguiſhable from the caſe of *Bean* v. *Stupart* (a), and all the other caſes on the ſubject. In the caſes decided, it has always been a warranty of a fact relating to the voyage inſured: but in the preſent caſe, that which is written in the margin has no relation whatever to the voyage; for it relates merely to the force of the ſhip at *Liverpool*, before the voyage commenced, and is totally

(a) Dougl. 11.

unconnected with the riſque inſured. The policy is, " at and from *Africa* to her port of " diſcharge in the *Britiſh Weſt Indies*;" and the warranty is from *Liverpool*; which is antecedent to the voyage inſured, and is merely a *repreſentation* of the ſtate of the ſhip when ſhe ſet out on her voyage from *Liverpool*. Then, if it be only a repreſentation, it is immaterial whether complied with, becauſe it is found by the verdict that the ſhip was equally ſafe with the number of hands ſhe had on board, as if ſhe had had the whole number contained in the warranty. The warranty then can only relate to her being *copper-ſheathed:* that part indeed was extremely material, becauſe otherwiſe the riſque would have been conſiderably encreaſed; and that extended to the voyage inſured: but the other part of the marginal note was merely a repreſentation, becauſe the manner of ſailing from *Liverpool* was unconnected with the riſque inſured.

But even if the Court ſhould conſider the whole as a warranty, it has been ſubſtantially complied with.

Lord MANSFIELD, *Ch. J.*—There is a material diſtinction between a warranty and a repreſentation. A repreſentation may be *equitably and ſubſtantially* anſwered: but a warranty muſt be ſtrictly complied with.

Suppoſing a warranty to ſail on the 1ſt of *Auguſt*, and the ſhip did not ſail till the 2d, the warranty would not be complied with.

A *warranty in a policy of inſurance is a condition* or a contingency, and unleſs that is performed, there is no contract.

It is perfectly immaterial for what purpoſe a warranty is introduced; but being inſerted, the contract does not exiſt unleſs it is literally complied

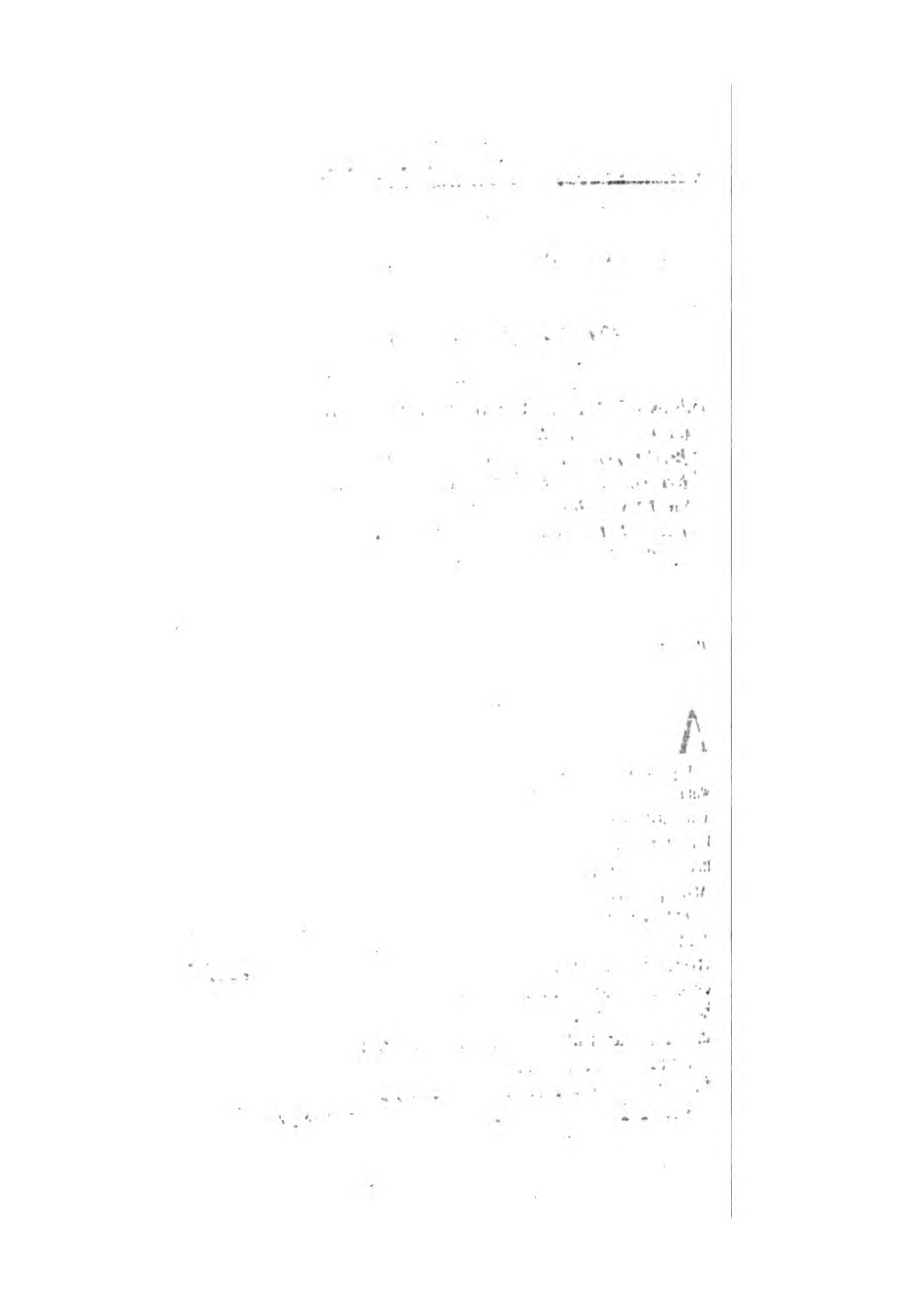
complied with. Now in the preſent caſe, the condition was, the ſailing of the ſhip with a certain number of men; which not being complied with, the policy is void.

ASHHURST, *J.*—The very meaning of a warranty is to preclude all queſtions whether it has been *ſubſtantially* complied with: it muſt be *literally* ſo.

BULLER, *J.*—It is impoſſible to divide the words written in the margin in the manner which has been attempted; that that part of it which relates to the copper ſheathing ſhould be a warranty, and not the remaining part. But the whole forms one entire contract, and muſt be complied with throughout.

Judgment for the plaintiff.

ESSAY



ESSAY IV.

Of Trials at Bar.

Vide ante Eſſay II. Head III. The *Queen v.* the *Bailiffs* and *Burgeſſes* of *Bewdley*. D° IV. *Bright, exor.* of *Criſp v. Eynon*. D° IX. (3.) *Rex v. Woodfall*. D° IX. (6.) *Argent v.* Sir *Marmaduke Darell*. — *Leighton v.* Sir *Edward Leighton*. — *Smith, ex. dm. Dormer v. Parkhurſt*; *et* IX. (8.) *Richards v. Symes*.

If a new trial ſhall be granted after a trial at bar.

A VERDICT contrary to the opinion of the Court.

Upon a trial at bar by a *Middleſex* Jury, where the iſſue was whether the copyholders of a manor (of which Sir *George Reynolds* was ſeiſed) ought by the cuſtom, upon their admittance, to pay fines, certain, or uncertain? And upon the whole evidence (although precedents were produced both ways) the Court was ſatisfied that the copyholders ought to pay uncertain fines; but the next morning the Jury came and gave their verdict that the copyholders ought to pay certain fines; and for this cauſe, and alſo upon *affidavit*, that ſeveral of the principal freeholders named in the *venire facias* by *Horne*, ſecondary, were never ſummoned

Wheeler v. Honour, M. 13 Car. 2. B. R. 1 Sid. 58. 1 Keb. 154, 166. Ray. 41.

Queſtion if copyholders of a manor ought upon their admittance to pay fines certain or uncertain?

Obj. ſeveral freeholders named in the

venire facias were not ſummoned.

moned, it was moved two days after to have a a new trial; but becauſe there was full evidence, the Court would not grant a new trial (unleſs the other party would conſent) for it

1 Keb. 40, 41

was ſaid that trials at bar were ſolemn and of great authority; and although the Court was not ſatisfied, yet the Jury, who were the proper judges of the fact, were well ſatisfied. And it was not known that more than two new trials had ever been granted, after a trial

Three actions againſt an hundred by three Welſh drovers. —One verdict for, two verdicts againſt the hundred. —New trial in the firſt, after a trial at bar.

at bar; one of which was in this caſe; three *Welſhmen* were robbed in *Surrey*. One brought his action upon the ſtatute, and a verdict was found *for* the hundred: the other two brought their actions, and verdicts were found *againſt* the hundred (all of which were tried at this bar *Anno* 1657) and upon this the court granted a new trial in the firſt, and they had great reaſon ſo to do, for there were two verdicts againſt one. The other was granted becauſe *exceſſive damages* had been given for words, *viz.* £. 115.

If debt lies for a fine againſt a copyholder, V. Sid. 176, 177.

Nota, It was ſaid by *Twiſden* and *Windham*, Juſtices, and not denied by any one, that, in this caſe, the lord might bring an action of debt againſt the copyholder, and ſo he is not without remedy: and *Twiſden* ſaid that ſo it was held by *Forſter*, Juſtice, 15 *Jac.* which was not denied, but it was ſaid that the opinion of *Bacon* was, that the lord could not have debt for a fine againſt his copyholder.

Trial at bar granted, where a juſtice of the King's Bench, or a maſter in Chancery is concerned.

Sir *William Morton*, one of the juſtices of this bench, brought debt againſt *H.* and *S.* for tythes, *ſcil.* for not ſetting them out, *&c.* and in this action the title of a parſonage in the county of *Oxford*, which *M.* had as executor to his ſon, was to be in queſtion, and a motion was moved for a trial at bar the next term, which was granted without any *affidavit*, becauſe, if one of the juſtices of the bench, or a maſter in *Chancery* is concerned, it is a good cauſe for a trial at bar, be the value what it will; and a trial was granted, and the next term it was tried, and it was held as before, that debt lies upon the *ſtat.* 2 *E.* 6. *by* executor for tythes, but not *againſt* an executor.

Morton v. Hopkins and Spencer, H. 20 and 21 Car. 2. B. R. 1 Sid. 407.

1 Vent. 30.

Executor may have debt upon the ſtat. 2 E. 6. of tythes, but it does not lie againſt an executor. Hob. 188.

There was a verdict for the plaintiff, but he abſented himſelf from the Court, the day of the trial, although he was preſent at other times when the cauſe was moved.

Information for extortion againſt a clerk of aſſize, ſhall be tried at the bar.

Difference between a ceſſat proceſſus, *and* nolle proſequi, *by the Attorney General.*

An information was exhibited here againſt *B.* for extortion in the office of clerk of the *aſſize*, in the county of *York*, and it was moved, after the defendant had pleaded *not guilty*, to have a trial here at bar, and it was oppoſed by the King's counſel, becauſe they had a great

Rex v. Berſon, T. 21 Car. 2. B. R. 1 Sid. 420.

Information for extortion. 1 Vent. 33. 2 Keb. 521.

number of witneſſes in *Yorkſhire*, and it would be a great expence to the proſecutor to bring them up here, and that it was well known in the country whether he was guilty or not. But, becauſe this was a great offence, if he was guilty of it, the *ſenior* judge of the circuit would have his place, and becauſe nothing ought to be tried, before thoſe who are to have advantage by it, it was ordered that the trial ſhould be at bar; and this term the Jury appeared, and whilſt they were ſwearing, the King's attorney came into court and ſaid that he had entered a *ceſſat proceſſus:* but the Court notwithſtanding proceeded in ſwearing the Jury, and told the Attorney-General, that he ſhould enter a *nolle proſequi* before they would ſtop, and then the Attorney-General commanded the clerk of the Crown to enter a *nolle proſequi*, which was done, and the Jury diſcharged. 1 *Cro.* 254.

The jury appearing, ſhall not be diſmiſſed upon a ceſſat proceſſus, without a nolle proſequi.

Trial at bar the laſt paper day.

Lord Bellamont's caſe, Paſch. 12 Will. 3. B. R. 2 Salk. 625.

The Attorney-General moved for a trial at bar laſt paper-day in the term, in an action againſt the governor of *New York* for matter done by him as governor; and granted, becauſe the King defended it.

Where the venue is in London, *there cannot be a trial at bar.*

Anonymous, Paſch. 5W. & M. B. R. 2 Salk. 644.

Trial at bar. Vide ante.

A cauſe cannot be tried at bar where the action is laid in *London*, by reaſon of their charter.

Trial

Trial at bar where to be granted, or denied.

Where there is value or difficulty, we are bound of common right to grant trials at the bar. *Inquiſitiones de groſſis et pluribus articulis, quæ magna indigent examinatione capiantur coram Juſticiariis de Bancis. Stat. Weſt.* 2. *c.* 30. *per Holt, C. J.* yet *Trin.* 1 *Ann.* it was denied, becauſe the plaintiff was poor, unleſs the defendant would agree to take *niſi prius* coſts, *Et poſtea ſcil. Trin.* 4 *Ann. B. R.* between the truſtees of my Lady *Sandwich* and my Lord *Sandwich*, though the eſtate was £. 3000. *per annum*, a new trial at bar was denied, becauſe the title of the leſſor of the plaintiff being from the defendant himſelf, there would be nothing to do but to prove the executing of a conveyance.

Lord Sandwich's caſe, Trin. 2 Will. 3. B. R. 2 Salk. 648.
Vide ante, & poſt.

When a trial at bar is to be moved for.

If *H.* would have a trial at bar in *Eaſter Term*, he ought to move for it in *Hilary Term*; if in *Michaelmas Term*, he ought to move for it in *Trinity Term*, except where lands lie in *Middleſex*; and anciently there was no other notice given of ſuch trial, but the rule in the office; but now there muſt be fifteen days notice. *Per Holt*, C. J.

Turner v. Barnaby, Paſch. 1 Ann. B. R. 2 Salk. 649.
Vide ante et poſt.

Trials at bar not denied to officers of the court, or barriſters.

Upon a *ſcire facias* brought againſt Sir *Samuel Aſtrey*, for his place of clerk of the crown in the Court of King's Bench, and iſſue joined thereupon;

Sir Samuel Aſtrey's caſe, H. 2 Ann. B. R. 2 Salk. 651.

Vide 2 Mod. 651. 6 Mod. 123. Salk. 625. 2 Keb. 133, 164. 1 Cro. 248.

thereupon; Sir *Samnel Aſtrey* moved that the iſſue might be tried at the bar. The Attorney-General oppoſed it; but the Court ſaid, a trial at bar was never denied to any officer of the court, nor hardly to any gentleman at the bar: and though Mr. Attorney was never bound to conſent to a trial by *niſi prius* in the Queen's caſe, yet they did not ſee how he could refuſe a trial at bar, where it was reaſonable to try it there; for the ſtat. *Weſt.* 2. *cap.* 30. is *atterminentur*, that they may be determined there, *qui magna indigent examinatione*.

A new trial refuſed after a trial at bar, though the Court much diſſatisfied with the Jury.

Gay v. Croſs, T. 1 Annæ, in B. R. 7 Mod. 37. 1 Salk. 190.

Mandamus to ſwear in a common-council-man of Totneſs. Corporation.

Verdict.

Trial at bar.

The plaintiff brought an action on the caſe for a falſe return to a *mandamus* to ſwear him *common-council-man* for the borough of *Totneſs*, which, by charter from *Queen Elizabeth*, the manner of their election was chalked out for them; and a uſage was given in evidence to a jury at the bar, that the election had gone quite contrary, which uſage was allowed to be good evidence of a by-law whereupon it was founded? So the counſel on both ſides conſented to have it found ſpecially, and to have it determined by the Court; whether ſuch a by-law and a long uſage purſuant to it, could alter the direction, or rather annihilate the direction of the charter? And the Jury having given their verdict in private over night, ſaid, that they had found the matter ſpecially, and the next day in court delivered their verdict for the defendant generally, and would give no reaſon for it, nor be moved to depart from it. And hereupon a new trial was moved for, and the caſe of

Wood

Wood and *Gunſton* in *Stiles*, and a caſe of the *Welſh* drovers were quoted for new trials, after a trial at bar. And though the Court were very much diſſatisfied with the Jury, and *Holt* ſaid, he never had known the like, and that he would have but little value for the verdict of a jury that would not, at a judge's deſire, declare the reaſon which had induced them; and that as the judges do publicly declare the reaſons of their judgments, and thereby expoſe themſelves to the cenſures of all that be learned in the law, and yet there is no law obliges them to it, but it is for public ſatisfaction; ſo the jury ought, for the ſame reaſon, to declare the reaſon of their verdict, when required by the court. Notwithſtanding all this, it being a trial at bar, the Court would not grant a new trial.

V. ante VI. V. ante in the caſe of Wheeler v. Honour.

Qu. If this determination was not wrong?

Application to put off trial refuſed, the affidavit being inſufficient.

Affidavits to put off a trial at bar, ſet down for the firſt *Tueſday* in term, upon account of the witneſſes being not likely to be there, denied; for that it was not ſworn endeavours had been uſed in ſuch convenient time to have them, that without an unforeſeen accident they would be at the trial at the ſet time.

Gravenor v. Fenwick, H. 1 Annæ in B. R. 7 Mod. 121. Trial.

New trial denied after trial at bar, upon inſufficiency of the affidavit.

After a trial at bar, and verdict for leſſees in ejectment, a new trial was moved for upon the

Gravenor al' Grovenor and Fenwick, H.

1 Annæ in B. R. 7 Mod. 156. 2 Salk. 650. S. C.

New trial denied after trial at bar.

Affidavit.

the merits of the cauſe, and alſo upon an affidavit brought into Court containing in ſubſtance, that the defendant's witneſſes were kept back by a report ſpread in *Holland*, where they were in their way to *England*, that the witneſſes that were already come over, had been laid by the heels; but the *affidavit* did not name any who had ſpread the report, or that it was by the agents or perſons employed by *Fenwick*. And though the Court were diſſatisfied with the verdict, upon ſeveral reaſons, one whereof was, that the trial laſted about ſixteen hours, and abundance of evidence was given on both ſides, yet the Jury were agreed on their verdict in half an hour's time; yet the Court would not grant a new trial: and the caſe of *Gay* and *Croſs*, heretofore, was remembered; for the Court *declared*, that after a trial at bar they would not *eaſily* grant a new trial, more eſpecially in ejectment, where the firſt verdict is not peremptory; and where there is no foul practice made appear in the Jury, or party for whom the verdict was, as keeping back of witneſſes, *&c.* in which caſes alone it was diſcretionary in the Court to grant it. And here they begged leave to amend their *affidavit*, which was oppoſed for this reaſon; that now they had learnt of the Court what would do their buſineſs, it would be dangerous to let them in to ſwear it: to which *Holt* ſaid, that it was frequent in *Chancery*, after a witneſs had ſworn before a maſter, to examine him again *viva voce* in Court. But Serjeant *Powis* replied, that it was no frequent thing ſo to do; for in all his time, he had known it done but twice. And *Powell* declared his diſlike of mending *affidavits* where the party knew

V. ante.

knew before what was neceſſary, and had not ſworn it.

In 2 *Salk.* 650. *S. C.* it was ſaid as to iſſues out of Chancery, they being only to ſatisfy the conſcience of the chancellor, are not *ſtricti juris*; and that in the principal caſe a new trial was denied, *contra opinionem (ut videbatur) capital. juſticiar'. Sed. qu.?*

A witneſs examined at a former trial of an iſſue between the ſame parties, and who has been examined in the cauſe, in caſe he dies, not only his depoſitions may be read, but what he ſwore at the former trial may be given in evidence.

On the hearing of this cauſe, the *Lord Chancellor* directed an iſſue to be tried at the then next aſſizes at *Dorcheſter*, whether by the general words of the deed in queſtion, the lands in queſtion were intended to paſs; whereupon at the trial, and which was by a ſpecial jury, a verdict paſſed for the plaintiff; but upon a motion for a new trial, it being ſent by the *Lord Chancellor* to the Judge to certify, whether this was proper to be tried again, Mr. Juſtice *Price* did certify, "That evidence was "given on both ſides, and that he ſhould "have thought this caſe proper to be tried "again, but that one of the witneſſes ex-"amined for the plaintiff was ſince dead, by "means whereof the plaintiff might ſuffer on "ſuch new trial, and that therefore he rather "inclined againſt any new trial."

Coker v. Farewell, Hil. 1729. 2 P. Wms. 563. Lord Chancellor King, Maſter of the Rolls, 2 Eq. Caſ. Abr. 723. Pl. 5. Evidence on both ſides. Two trials.

After which certificate, there was another motion for a new trial; and the *Maſter of the Rolls* being preſent in Court, and his lordſhip deſiring

deſiring his thoughts on this matter, his Honour ſaid, the only objection to the new trial, appeared to be the death of the witneſs, and though it had been ſaid, that the weight of a living witneſs would be greater than depoſitions, yet it was his opinion, that ſince this witneſs had been examined in the cauſe, and was dead, the depoſitions might be read; alſo, as the teſtimony which the witneſs had given at the former trial, might be given again in evidence againſt the ſame parties, he ſhould rather think, that the other ſide had ſuffered by the death of the witneſs, ſince they had thereby loſt the advantage of croſs-examining. And the Court ordered a new trial to be had at the bar of the Common Pleas, where, after much evidence on both ſides, the Jury found a verdict for the defendant, which was contrary to the former verdict.

And now a trial was again moved for; upon which it being ſent back to the Judges of C. B. to know whether this cauſe was proper to be tried again, the *Chief Juſtice* acquainted the *Lord Chancellor*, that there had been very ſtrong evidence given on each ſide, inſomuch that he could not have blamed the verdict, on which ſide ſoever it had been given, and that he could not ſay this verdict was againſt evidence.

Afterwards another application was made for a new trial, when it was inſiſted, that this matter relating to an inheritance, it would be very hard to have the right determined by one trial, though at bar, and divers caſes were cited where new trials were granted after a trial at (a) bar; and this ought the rather to be done in the preſent caſe, where there had been

(a) See the caſe of Leighton v.

been verdict againſt verdict, and conſequently the matter ſeemed to be left at large.

Sir Ed. Leighton, ante Eſſay II. IX. (6.)

But the *Chancellor* and the *Maſter of the Rolls* denied a new trial; ſaying, otherwiſe there would be no end of ſuits; that a trial at bar, where more time might be allowed, and the party was put to more expence, was of greater weight than one by *niſi prius*; that the intent of the Court in ſending the cauſe to be tried at bar was, that it might be final; but this caſe was the ſtronger, as the iſſue to be tried related only to the intention of the party, and not to any legal title, which queſtion might have been determined at the hearing, without ever ſending it to a trial; and here being a trial at bar, this might juſtly claim a preference to a trial by *niſi prius*, and was ſufficient to ſatisfy the conſcience of the Court; but that ſtill, if the party, againſt whom the decree was, thought he had a legal title, the Court did not debar him of that.

The Court lays more weight on a trial at bar than at niſi prius, *from the ſolemnity of it, and the length of the examination.*

LORD CHANCELLOR.—Where there are two trials, and the laſt was at the bar, this Court has ſuffered the laſt to prevail; and to lay down a rule that there muſt be three, will be attended with great expence: what turns in favour of the laſt trial, is the ſolemnity and length of examination, and the reaſon for directing a trial at bar is in order to that.

The Attorney General, at the relation of Clarke and others, verſus Montgomery, July 28th 1742. 2 Atk. 378.

The laſt verdict here was on further evidence, which makes this a ſtronger caſe than the common one, where there are two trials

on the ſame evidence, and therefore I ſhall not grant a new trial on that ground.

An original motion muſt be made for a new trial, and the Court will not anſwer a petition for it, where the cauſe comes on upon the equity reſerved.

I do declare, that for the future, I will not anſwer a petition for a new trial, where the caſe comes on upon the equity reſerved, for I do expect an original motion to be made for that purpoſe, otherwiſe it is tending to great delay.

There were ſeveral proceedings in favour of the will, which make it reaſonable to hear what the Judges ſay to the verdict.

Let it ſtand over to the firſt day of rehearing in the next term, for that purpoſe.

Trial at bar granted, upon conſideration of the conſequences of a conviction upon an information.

Rex v. Foley and Harley, E. 3 Geo. B. R. 1 Stra. 52.

Information for taking 3*s.* 4*d.* for regiſtring a warrant of attorney, contrary to the lottery act, which ſays it ſhall be entered without fee or reward, and all perſons offending ſhall be incapable to hold any place.

The defendants moved that they might have a trial at bar, for though the queſtion ſeemed very ſhort, whether they took the fee or not; yet the conſequence was very conſiderable: the defendants are auditors for life, and that is a freehold of which they will be diveſted by a conviction upon this information. *Paſch.* 9 *Annæ Regina v. Harcourt, ſcire facias* to repeal letters patent, and there a trial at bar was had. *Sid.* 420. The Crown, it is true, may ſue any where, but when the ſuit is commenced, it is in the power of the Court.

On the other ſide it was inſiſted, that the Court could not take notice of what would be the

the conſequences of a conviction; that the queſtion was ſhort, and the *onus probandi* upon the Crown, who might try the cauſe where it pleaſed.

Powys, *Eyre*, and *Pratt*, were for a trial at bar; but the Chief Juſtice ſaid, the defendants ought not to pray a trial at bar in an iſſuable term. A trial at bar was granted for next term. *Vide poſt Rex v. Johnſon.*

Trial at bar granted, on the ground of value.

In *ejectment* on the demiſe of Lord *Coningſby*, the plaintiff moved on the common affidavit of value, for a trial at bar, which was oppoſed by the defendants on another affidavit, that they ſeverally held but ſmall parcels of lands by different titles: and this is putting it in the power of the plaintiff, by joining ſeveral together, to bring the owner of but £. 5. *per ann.* to the bar. *Sed per Curiam*, there muſt be a trial at bar, for if the plaintiff makes but one title to the whole, he has a right to join them all together. It was moved that the leſſor, having privilege, might name a good plaintiff to be liable to coſts; but the Court denied it with ſome reſentment, ſaying it had been often attempted, and as often refuſed.

Preſton v. Lingen, M. 8 Geo. B. R. 1 Stra. 479. Trial at bar where grantable.

A new trial granted, after a trial at bar.

A corporation were all invited to a treat, when one of the aldermen deſired leave to reſign, upon which his reſignation was taken, and the plaintiff at the ſame time choſen and ſworn in.

Sir Chriſtopher Muſgrave v. Nevinſon, E. 10 Geo. B. R. 1 Stra. 584. L. Raym. 1358. The reſignation of an al-

derman, and election of another in his place, at a meeting not convened for corporation buſineſs, adjudged fraudulent and void.

Upon a trial at bar the Jury found it a good election; and the Court granted a new trial, it being fraudulent, and it appearing one of the members was not there 'till after the election, and there was no ſummons to meet to do ſuch a corporate act, that the members might come prepared. The meeting likewiſe was not in the *Moothall*, but at a tavern, and it was a plain ſurprize, and even all not preſent.

As to the point of its being a trial at bar, the Court made no difficulty of that, ſince the caſe of *Bewdley*, and another of Sir *Joſeph Tyley* v. *Roberts*, *in C. B.* where on a trial at bar whether *compos* or *non compos* the Jury found againſt the weight of the evidence, and there was a new trial. The caſe in *Stiles* (which is the firſt new trial *in print*) was after a trial at bar; and in the caſe of an alderman of *Derby* he was afterwards ouſted upon a *quo warranto*.

Et per RAYMOND, *Juſtice.* — My Lord Chief Juſtice *Holt* uſed to ſay, he was of opinion that the practice of granting new trials was much ancienter than the caſe in *Stiles*; ſince we meet with challenges that the party was ſworn on the former trial, and therefore ought not to be a juror again.

A corporator on a recent proſecution muſt prove receiving the ſacrament within a year.

N. B.—As to another of the corporators of *Apulby*, he was put to prove the receiving the ſacrament within a year before his election, it being recent, and therefore the Court required it, though no notice was given him for that purpoſe.

N. B.—By *ſtat.* 5 *Geo.* 1. *c.* 6. *ſ.* 3. no perſon choſen into any corporate office mentioned in the *ſtat.* ſhall be removed or proſecuted, nor any incapacity, diſability, forfeiture,

or

or penalty be incurred, by omiſſion to take the ſacrament, unleſs removed, or proſecution commenced within ſix months after being placed or elected into office, and the proſecution be carried on without wilful delay. Vide 2 Burr. 1016.

Trial at bar granted in an information againſt a Juſtice of peace for a miſdemeanor in his office.

An information was exhibited by order of B. R. againſt the defendant for neglects and abuſes in his office of juſtice of the peace, in relation to deer-ſtealers; and it was moved on behalf of the Crown, on affidavit of the defendant's having £. 700. *per annum*, and there being above thirty witneſſes for the proſecutor, that it might be tried at the bar: and the caſe of *Regina* v. *Wakefield*, the town-clerk of *Litchfield*, who fixed up a paper reflecting upon a jury, which was tried at the bar, was mentioned; and alſo the caſe of auditor *Harley*, where the matter in diſpute was a trifle, but like to be of long examination; upon which authorities the Court granted a trial at bar in this caſe. Mr. Attorney ſaid, had it been an information exhibited by him, he would have had a right to bring it to the bar if he had thought fit. N. B. The defendant was convicted and fined £. 400. and committed 'till paid. Rex v. Johnſon, M. 12 Geo. B R. 1 Stra. 644. Vide ante Rex v. Foley and Harley. v. Id.

Motion,

Motion, before iſſue joined, for trial at bar refuſed.

Caſe of the borough of Chriſt Church, E. 12 Geo. B. R. 1 Stra. 696.

Upon a motion for a trial at bar, which was conſented to on both ſides, it appeared iſſue was not joined: and the Court refuſed to grant it, ſaying it was below the dignity of the Court to do it, 'till they knew whether the iſſue joined would be a matter of difficulty or not.

Sed. qu. vide ante.

In what caſes of the Crown a trial at bar is demandable.

Rex verſ. Robertum Hales, M. 2 G. 2. B. R. 2 Stra. 816.

Mr. Attorney moved for a trial at bar, on an information filed by him for forgery. But it not being carried on at the expence of the Crown, but of a private proſecutor, the Court held that he muſt make out the uſual requiſites to bring it to the bar. So the motion was denied. At another day, Mr. Attorney moved on an authority from the king to proſecute, and it was granted as of right to the king in his own cauſe. In *Hil. ſequen'* it was tried, and the defendant convicted. And in *Trin. ſequen'* being called to judgment, he produced a pardon, which was allowed; and being only for a miſdemeanor, he was not put to go to the bar, or plead it upon his knees.

Where the venire is laid in London, there cannot be a trial at bar, the citizens not being to be brought out of the city. Vide ante.

In an appeal of Murder *Caſtell, vid. v. Bambridge et Corbet*, (2 *Stra.* 855.) it was moved to fix a time for the trial, the appellees offering to take ſhort notice; but it being by original, there was a neceſſity to have fifteen days between the *teſte* and the return of the *diſtringas*,

diſtringas, and they could not be tried on the *venire*, becauſe being in *London*, there could be no trial at bar, (the citizens not being to be brought out of the city) and as it muſt be tried at *niſi prius*, there muſt be *a diſtringas*.

Trial at bar in an action for crim. con. upon application of defendant, he having many witneſſes to examine, &c.

This was an action for criminal converſation with plaintiff's wife; and the damages were laid for £. 50,000. defendant moved for a trial at bar, upon an affidavit that he had upwards of twenty witneſſes to be examined. Rule granted to ſhew cauſe, which was afterwards made abſolute, plaintiff having liberty to examine a witneſs in an ill ſtate of health, before a judge in the mean time, and defendant conſenting to waive his privilege of parliament.

Ld. Hillſborough v. Jefferyes, Eſq. T. 7 & 8 G. 2. Barnes, 438.

Darnal for defendant; *Chapple* for plaintiff. *Vide poſt.*

Reaſons for granting, or refuſing trials at bar, eſpecially where there are old infirm witneſſes who cannot travel to Weſtminſter, *and the cauſe may be ſooner tried at the aſſizes.*

A rule to ſhew cauſe why the trial ſhould not be at bar, was founded upon an affidavit that the premiſſes in queſtion were of the yearly value of £. 100. and upwards; and that a ſtrict and careful examination of the title would be requiſite. At the time of ſhewing cauſe it was alſo alledged on plaintiff's behalf,

Froſt againſt Whadcock, alias Avery and others, on the demiſe of Avery, in ejectment, E. 14 Geo. 2. Barnes, 447.

that he had a great number of witneſſes to examine: and that the point to be tried was *compos vel non* in *William Avery*, at the time of making his will, under which the defendant *Whadcock* claims his right. On behalf of defendant it appeared, that they had ſome ancient and infirm witneſſes to examine, who could not travel to *Weſtminſter*.

Per Cur': We are not, according to the courſe of the Court, bound down by the value of the premiſſes in queſtion, which is ſworn to be £. 100. *per ann.* As to ſtrict examination, it is neceſſary in all caſes, and is nothing with reſpect to a trial at bar. When a long cauſe is to be tried, a judge, upon notice, will take a day extraordinary at the aſſizes, where an examination of a great number of witneſſes is moſt proper and leaſt expenſive. There is no nicety in this point, or difficulty, ſo as to require the attention of the whole Court. Ancient witneſſes grow weaker every day, and often are not able to travel to *Weſtminſter*. Let the rule be diſcharged. Plaintiff prayed leave to examine an old witneſs before a judge, upon interrogatories. But *per Cur'*, that cannot be done without conſent. A croſs examination cannot be ſupplied by depoſitions. If a trial at bar was ordered, it could not be 'till next *Michaelmas* term; and before that time the aſſizes will be held. *Birch* for plaintiff; *Willes* for defendants.

Vide ante.

Motion, before appearance, for trial at bar, granted.

Roe againſt Doe, in ejectment, on the

Rule for tenants in poſſeſſion to ſhew cauſe why the iſſue to be joined ſhould not be tried

at

at bar next term. Objected on the part of Lady *Wentworth* the landlady, Sir *Butler*'s widow, That a trial at bar cannot be moved for by plaintiff 'till after appearance, and the time to appear will not expire 'till four days after this term. Two rules of the Court of King's Bench produced, one by conſent, the other not by conſent, except as to *niſi prius* coſts, where trials at bar had been ordered before appearance. Rule abſolute for trial at bar on 8th *May* next. If plaintiff's motion had not been received before appearance, no trial at bar could be appointed 'till next *Michaelmas* term. Lady *Wentworth*'s counſel prayed the conditional rule, and to defend for part; which was granted, and ſix weeks time to deſcribe the part defended for.

demiſe of Cholmondly and his wife, for a conſiderable eſtate in Yorkſhire late Sir Butler Wentworth's, deceaſed, H. 18 Geo. 2. C. B. Barnes, 455.

Prime & al' for leſſors of plaintiff; *Skinner & al'* for Lady *Wentworth*.

The grounds for granting a trial at bar are, great value, probable length, and probable difficulties in the trial.

The Court may lay the party applying under the terms of receiving niſi prius *coſts, and paying* bar *coſts.*

This was an application for a trial at bar. *Kenyon*, ſome time before, had obtained a rule to ſhew cauſe, and *Partridge* this day ſhewed for cauſe, (upon affidavits) that the leſſor of the plaintiff was in ſuch indigent circumſtances, as not to be able to bear the expence, and that one of his witneſſes was a woman of above eighty years of age, who might die before a trial at bar could be had. The value of the premiſſes was ſtated to be about £. 2000. a

Holmes, leſſee of Brown, againſt Brown, T. 20 Geo. 3. B. R. Dougl. 420.

year; and the queſtion, whether a codicil to a will by which they were deviſed was duly executed. *Partridge* cited Lord *Sandwich*'s caſe in *Salkeld*, (a).

(a) V. ante.

Kenyon, in ſupport of the rule, ſaid, that the grounds on which a trial at bar ought to be granted, were, the great value of the ſubject matter of the litigation, the probable length of the inquiry, and the likelihood that difficulties might ariſe in the courſe of the trial (1). He then endeavoured to ſhew, that theſe reaſons co-operated in this caſe.

(1) The words of the ſtatute of Weſtminſter, 2 (13 Edw. 1 cap. 30.) are; "Sed inquiſitiones de groſſis & pluribus articulis, quæ magna indigent examinatione, capiantur coram Juſticiariis Banci."

Lord MANSFIELD abſent.

The Court were of opinion, that this was a caſe where it was fit that a trial at bar ſhould be granted; but ſaid, that, as it was a favour aſked by the defendant, they would lay him under the terms, that, if he ſucceeded, he ſhould only have *niſi prius* coſts; but, that if the leſſor of the plaintiff were to ſucceed, *he* ſhould have bar coſts, and that the old witneſs ſhould be examined upon interrogatories, and her depoſitions read, if ſhe ſhould die before the trial. It was alſo (by conſent) made part of the rule, that the cauſe ſhould be tried by a *Middleſex* jury, inſtead of one from *Norfolk*, where the premiſſes were ſituated.

The rule made abſolute.

Upon

Upon an application for a trial at bar, the Court will, in every caſe, exerciſe its own diſcretion, upon the peculiar circumſtances thereof. Where a fair trial cannot be had in the county where the matter ariſes, the trial will be awarded in the next Engliſh *county* where the king's writ of *venire* runs.

A rule was made abſolute, no cauſe being ſhewn, on a motion by *Erſkine*, for leave to enter a ſuggeſtion on the record in this action, " that the corporation and citizens of *Cheſter* " were intereſted in the event of this ſuit, and " therefore, that a fair and impartial trial " could not be had in the county of the city " of *Cheſter*."

Rex v. Amery, Trin. 26 G. 3. B. R. Durnford and Eaſt, 1 V. 363.

Erſkine then moved for a trial at the bar of this Court; and relied upon the importance of the queſtion to be agitated. Lord *Holt* ſays, that a trial at bar is of common right; and in caſes of intricacy it is peculiarly requiſite.

It will be ſufficient therefore to induce the Court to grant it in this inſtance, by ſtating to them the magnitude of the ſubject in diſpute, and the variety of iſſues which are to be tried.

The principal queſtion is, whether the right of electing aldermen in the city of *Cheſter*, is veſted in the citizens at large, or in a ſelect body?

There are twelve iſſues on this record.

1ſt. That this is not a body corporate by preſcription.

2d. *Non conceſſit*, by the charter of the 27 *of Car.* 2.

3d. That the charter of *Car.* 2. was not accepted, as to the election of aldermen.

4th. That certain perſons appointed aldermen under that charter, did not act as ſuch.

5th. That the mayor, aldermen, and common-council, have not uſed to elect under the charter.

6th, 7th, and 8th, Relate to the qualification and election of the defendant, to the office of alderman.

9th. That the charter of *Car.* 2. was accepted, as to all matters contained both in the plea, and replication.

10th. That the order of amoval in the time of *Jac.* 2. was not ſignified.

11th. That the charter of reſtoration of *Jac.* 2. was accepted.

12th. That the charters of *Hen.* 7. and *Elizabeth* are ſtill in force.

Theſe iſſues muſt neceſſarily give riſe to many intricate queſtions of evidence, and in fact go to the very exiſtence of the corporation. In the *Maidſtone* caſes (a), the Court granted a trial at bar upon ſimilar grounds, becauſe the queſtion to be tried involved in it the conſtitution of the borough.

(a) Vide at the end of the principal caſe.

The Court granted a rule to ſhew cauſe.

Bearcroft, *Cowper*, *Bower*, *Leyceſter*, and *Manley* ſhewed cauſe, and contended, 1ſt. That the number of iſſues on a *quo warranto* information, was not of itſelf a ſufficient reaſon to induce the Court to grant a trial at bar; for the ſame reaſon would equally extend to every *quo warranto* information; neither is there any peculiar difficulty ariſing from theſe iſſues to warrant the application; for the principal queſtion is upon the acceptance of

the charter of the 27 *Car.* 2. which muſt be proved by the records of the corporation.

But if the Court grant a trial at bar, they cannot ſummon a jury from the county palatine (b); there never having been an inſtance of that kind hitherto, except in caſes of treaſon and error. Then 2dly, if the Court ſhould not grant a trial at bar, the next queſtion is, in which county this information ſhall be tried.

(b) 4 Inſt. 212.

It is not a matter of right to have a record ſent into a county palatine, as being the next adjoining county; and if it be only a matter of diſcretion in the Court, they will not think it adviſeable to ſend this queſtion to be tried in the county palatine of *Cheſter*, as the aſſizes are held in the heart of the city, where the parties concerned have extenſive connexions, who are intereſted in the event of the trial.

It appears from all the caſes (a) upon the ſubject, that it is not a matter of right to ſend a record down by *mittimus* to be tried in a county palatine, unleſs the matter ariſes within that county. All the caſes upon this ſubject are collected in the caſe of the *King* and *Cowle* (b), which aroſe in the town of *Berwick*; there, though *Durham* was in fact the next adjoining county, yet the court upon full conſideration ſent the iſſue to be tried in *Northumberland*. Wherever it is ſuggeſted that a record ſhould be ſent down to be tried in the next adjoining county, it means the next county into which the king's writ runs. So, where the matter aroſe in *Ireland*, the *venire* was directed to the ſheriff of *Salop* (c), though the *Welſh* counties, and the county palatine of *Cheſter* are both nearer. Again, the whole of *Flintſhire* joins to the county palatine of *Cheſter*, and no part of it to

(a) 19 H. 6. fo. 12. b. pl. 31. 2 Rol. Abr. tit. Trial L. 1. pl. 6, 7, 8. Bro. Abr. tit. Trial pl. 27. 4 Inſt. 205.

(b) 2 Burr. 834.

(c) 2 Rol. Abr. tit. Trial, I. pl. 8.

Salop, and yet there is no inſtance of a record in any action ariſing in *Flintſhire* having been ſent to *Cheſter*. Wherever there has been an exception to this general rule, it has always been by conſent, as in the caſe of the *King* and *Johnſon* (d).

(d) Hil. 7 Geo. 2.

Wilſon, *Erſkine*, *Wood*, and *Topping*, admitted, as to the firſt queſtion, that whether there ſhall be a trial at bar or not, depended upon the diſcretion of the Court; but that diſcretion ought to be regulated by law, and founded on precedent; and the *ſtat of Weſtm.* 2. authoriſes the party to claim a trial at bar, in every queſtion of importance. A *quo warranto* information, on which depends the exiſtence of a corporation, is of greater conſequence than a mere queſtion of right between two individuals. One of the iſſues to be tried is, whether the charter of *Car.* 2. was accepted as to the election of aldermen, and upon that a conſiderable queſtion of law will ariſe, whether a charter can be *partially accepted*. Another iſſue is *non conceſſit*, which involves a queſtion, whether the king can grant otherwiſe than under the ſeal of the county palatine; and whether the grant was made to perſons capable of taking it.

(a) V. ante.

In Lord *Sandwich*'s caſe (a) the Court ſaid, that where there was value and difficulty, they were bound of common right to grant trials at bar.

As to the doubts which have been thrown out reſpecting the juriſdiction of the court, and their power to ſummon a jury to their bar from a county palatine, there can be no foundation for them; for wherever the court can ſend down a record to be tried, they muſt likewiſe have a power of ſummoning a jury from

from the ſame place to attend them at their bar. Now here the court might certainly ſend down this record to the Chief Juſtice by *mittimus*; and if the jury ſhould be ſummoned to attend at the bar of this Court, and they refuſed to attend upon the ground of an excluſive juriſdiction, the Court might proceed againſt them for a contempt. In the caſe of the *King* and *Godfrey* (b), the ſheriff of the city of *Canterbury* was fined £. 100. for returning to a *diſtringas*, that the mayor and commonalty of the city were exempted from ſerving on juries; in conſequence of which a jury was afterwards returned. The cauſe of *Lockyer* againſt the *Eaſt India Company* (c) was tried at bar by a ſpecial jury of merchants from the city of *London*, notwithſtanding there had been a different deciſion upon the ſame point in *E.* 5 *W.* and *M.* (d) by reaſon, as it was ſaid of their charter. So alſo in the caſe of the *King* and *Lambe* (e), an application was made to the court for a new trial, becauſe the warrant for a *tales de circumſtantibus* was only ſigned by his Majeſty's Attorney-General, whereas it ought to have been procured from the Attorney-General of the county palatine; but that was held to be no good ground. The caſe of the *King* and *Johnſon* (f), which was ſent down to be tried by *mittimus* in the county palatine of *Cheſter*, and where a ſimilar queſtion aroſe upon the acceptance of a charter of 16 *Car.* 2. does not appear upon the face of it to have been ſent down by conſent.

(b) Hard. 389.

(c) M. 2 G. 3.

(d) 2 Salk. 644. V. ante.

(e) 4 Burr. 271.

(f) Hil. 7 G. 2.

As to the ſecond point: whenever the matter cannot be tried in the place where the cauſe

cauſe ariſes, it muſt neceſſarily be tried in the next adjoining county; the *King* againſt *Harris* (g). This rule is ſupported by a variety of precedents. One in particular is more immediately applicable. In the caſe of the *Mercer's* and *Ironmonger's* Company of *Cheſter* againſt *Radford* (a), the exchequer court of equity of *Cheſter*, granted a trial in the county palatine, becauſe an impartial trial could not be had in the county of the city.

(g) 3 Burr. 1330.

(a) 2 Lev. 33.

Such has always been the invariable rule, unleſs both parties have conſented to a trial in another place: and even in thoſe caſes, where the matter has ariſen in a diſtant county, and there has been a trial at bar by a jury of the county of *Middleſex*, the form of the ſuggeſtion has always been, that the jury were ſummoned from the next adjoining county. And in the preſent caſe, the county palatine is the next adjoining county, where the record may be ſent by *mittimus*.

Lord MANSFIELD, *Ch. J.*—All queſtions concerning trials at bar muſt depend upon their own circumſtances. Many informations in the nature of a *quo warranto*, upon which the exiſtence of corporations depended, have been tried at *niſi prius*, and many at bar. The only rule therefore to go by is, the judgment which the court ſhall form on the nature of the iſſues and their dependencies. Now, it ſeems to me as clear as poſſible, that no queſtion of magnitude can ariſe in this caſe to render a trial at the bar of this Court neceſſary. Many of the iſſues will admit of no litigation, ſuch as, that it is a corporation by preſcription; and the granting, in fact, of the charter by *Car.* 2.

and

and ſome others, are only conſequential. The great queſtion is on the *acceptance* of the charter of *Car.* 2. but that cannot involve in it much difficulty. We know the obloquy which charters granted at that time lay under. As my Lord *Hardwicke* ſaid (b), they have never received any countenance in *Weſtminſter Hall*; and he never would give any opinion in ſupport of them, unleſs the ſtrongeſt evidence was laid before the court of their having been accepted and uniformly acted under. Therefore there is no ground in this caſe for a trial at bar.

(b) In. R. v. Johnſon.

Then the next conſideration is, where it ſhall be tried. Now, with regard to that, all local queſtions which ariſe in a county palatine, muſt be tried there (c). In the preſent caſe, the matter ariſes locally in the county *of the city* of *Cheſter*: but, by the ſuggeſtion which has been entered upon the record, it appears, that an impartial trial cannot be had there, therefore it muſt be tried in the next county: but that muſt mean the next county where the king's writ of *venire* runs. The county palatine of *Cheſter* cannot be called the next county for this purpoſe, becauſe the king's writ of *venire* does not run there. All this I take to have been fully, finally, and in point eſtabliſhed in the *Berwick* caſe. And though *Northumberland* was not there ſaid expreſsly to be *the next county where the king's writ runs*, yet it was taken for granted that it was ſo.

(c) 4 Inſt. 212.

For the ſame reaſon, where a matter ariſing in *Wales* is tried in the next county, it is never tried in the county palatine of *Cheſter*, but always in the next *Engliſh* county where the king's writ runs.

BULLER,

BULLER, *J.*—It is obſervable, that there is no inſtance, except that of the *King* and *Johnſon*, where the court has ever ſent a record by *mittimus* to be tried in a county palatine, where the fact did not ariſe there; and I very much doubt the power of the court to do it. It is not quite clear when the doctrine of ſending records by *mittimus* into counties palatine was firſt taken up; but in the 11 *Will.* 3. (a), the Court expreſsly ſaid, that they could not order a trial in the county palatine of *Lancaſter*, and therefore they ſent the record to be tried in *Yorkſhire*, as being the next county.

(a) Vid. 12 Mod. 313.

Then as to the meaning of the expreſſion of the next *Engliſh* county, it is ſufficiently explained in *Plowd.* 200. where the reaſon given for directing the *venire* to the ſheriff of *Hereford* was, becauſe the town of *Cardiff* was in the county of *Glamorgan* in *Wales*, *where a ſheriff of this kingdom of England cannot intermeddle.* From this reaſon it is manifeſt, that it muſt be the next *Engliſh* county where the king's writ of *venire* runs. That is the only way of accounting for the *Welſh* cauſes having always been tried in the next *Engliſh* county where the *venire* runs, and not in *Cheſter*, though in fact that is nearer to *Wales*.

Rule diſcharged.

And the *venire* awarded into the county of *Salop*.

(a) The *Maidſtone* caſes came before the Court in *Hil.* 13 *G.* 2. under the names of

Rex v. *Weldiſh.*

Rex v. *Rand.*

Rex v. *Curteis.*

Theſe were informations in the nature of *quo warrantos* againſt the defendants, to ſhew cauſe

cauſe by what title they exerciſed the office of Jurats of the *King's Town*, and pariſh of *Maidſtone* in *Kent*: and the queſtion was, whether there ought to be trials at bar?

It was objected againſt the trials at bar, by Mr. *Solicitor-General*, that there was no reaſon for it, either upon account of the length or difficulty of the trials, becauſe there was but one ſingle iſſue that was material, and that was upon a bye-law, which was a fact, the proof of which could not take up any great length of time. As to the other iſſues upon the election, ſwearing and admiſſion, they were only conſequential, and muſt attend the fate of the iſſue upon the bye-law.

E. contra, it was inſiſted, that the bye-law was pleaded as a bye-law, not extant in writing, which muſt depend upon uſage, which uſage muſt be proved by entries out of the books of the corporation.

That there was alſo another bye-law ſet out in the proſecutor's replication, though no iſſue was taken upon it, which would have very great weight upon the trial: and the proof of that would likewiſe depend upon a great variety of entries, in order to ſhew that it was under that bye-law and not under the bye-law alledged in the defendant's plea, that the common-council had exerciſed a power of electing jurats.

That the conſtitution of the corporation depended upon theſe trials, and that ſeveral points of law might ariſe in the courſe of them.

That,

That, in *Eaſter* term laſt, the defendants themſelves conſented to trials at bar, which the court would then have granted, but that the iſſues were not then joined. That the proſecutor had made an affidavit of all theſe facts.

Per Cur. let there be trials at bar.

ESSAY V.

Of Repleaders.

Whether upon an improper or immaterial iſſue, a repleader ſhall be granted, or not.

Serjeant v. Fairfax, E. 13 Car. 2. B. R. 1 Lev. 32.

To an action of debt for rent, defendant pleads aſſignment of the term before rent due, of which plaintiff had notice, who takes iſſue upon the notice.

DEBT againſt leſſee for years for rent. The defendant pleaded that *he* before the rent was due, for which the action was brought, had aſſigned the term to another, of which the plaintiff had *notice:* the plaintiff took iſſue upon the *notice*, and the verdict being for the defendant, it was moved by *Allen* for the plaintiff, that no judgment ought to be given, but a *repleader* awarded, becauſe the iſſue was of an immaterial thing, for it is not the notice of an aſſignment of the term, without the agreement of the leſſor, or acceptance of rent by him from the aſſignee, which diſcharges the leſſee, but an agreement to this, or acceptance of rent from the aſſignee doth. And he cited *Nicholl*'s caſe, 5 *Co.* Iſſue taken of *payment* upon a ſingle bill (without acquittance) being found for the plaintiff, he ſhall have judgment: but if it had been found that defendant had paid, judgment ſhould be arreſted. And the difference he ſaid is when the iſſue is found againſt the pleader, judgment ſhall be for the plaintiff; but if for him not. *Twiſden*, J.—ſaid, if an *improper* iſſue is taken and verdict given, judgment ſhall be given upon

V. poſt Jones v. Bodiner.

upon it whether it be for the plaintiff or defendant, and cited 5 *Cro.* 575. But an *immaterial* iſſue is, where upon the verdict, the Court do not know for whom to give judgment, whether for the plaintiff, or for the defendant, as *Hob.* 175. And the *Chief Juſtice* and *Windham* agreed with him, and awarded a *repleader*, 2 *Cro.* 585. 3 *Cro.* 227, 228. and 2 *Cro.* 5.

Day *and* place *made part of the iſſue.*

Holbech v Bennett, T. 23. Car. 2. B. R. 2 Lev. 11. M. ult. 670.

Plea in bar to an avowry for rent in arrear, that H. did not demiſe on the ſaid 1ſt October at F. iſſue thereon and verdict for plaintiff.

Error of a judgment in replevin in C. B. where *Bennett* was plaintiff in the replevin for taking his cattle in *Fillingly Field* in *Fillingly*; and *Holbech* avowed for that the mayor, and commonalty, and divers other particular perſons by name, were ſeiſed and by their indenture dated 11 *March* 1647, it was witneſſed, that they demiſed to *Bennett* for twenty-one years, and by indenture 1ſt *May* in the 11th year of the new king, it was witneſſed, that he aſſigned to *Holbech*, and that 1ſt *October* in the 11th year of the new king, *Holbech*, at *Fillingly*, demiſed to *Bennett*, rendring rent; and for rent in arrear he avowed; the plaintiff *Bennett* in bar ſaid, that *Holbech* did not demiſe the ſaid 1ſt *October*, at *Fillingly* aforeſaid, in manner and form as, *&c.* Upon which iſſue, and verdict for the plaintiff, that he did not demiſe, the ſaid 1ſt *October*, at *Fillingly*, in manner and form as, *&c.* and upon this judgment for the plaintiff, and now error aſſigned that this was an immaterial iſſue, making the *day* and *place* of the demiſe part of the iſſue, for a demiſe at any other day, or place, had been ſufficient to maintain the

avowry, and they are only put for conformity in pleading, but the plea ought to have been general, that he did not demiſe, in manner and form as, *&c.* and the *day* and *place* ought to have been omitted out of the traverſe, for they are not traverſable, and if it had not been a fact, the avowant might have given in evidence a demiſe at another *day* and *place*, which had been ſufficient for him to maintain his avowry for rent, of which he is now deprived, by the bad bar of the plaintiff, and the Court knows not for whom to give judgment, according to the right of the matter, and becauſe this caſe is not remedied by the new ſtatute, which cures defaults, where the right of the matter is tried; as was objected for the plaintiff that it is; and of ſuch opinion was the Court, after the matter had been twice debated; but then it was doubted by the Court what ſhould be done: for *per Hale*, Chief Juſtice, the Court cannot now award a repleader upon a writ of error, if they reverſe the judgment, as was anciently done, for which he cited *Trin.* 8 *E.* 2. *Rot.* 59. *Trin.* 11 *E.* 3. *Rot.* 75. *Trin.* 27 *E.* 3. *Rot.* 21. *Hil.* 33. *E.* 3. *Rot.* 79. where this Court awarded a repleader upon a writ of error, after reverſing of the judgment, as the court of C. B. ought to have done before judgment; for this he ſaid had been diſuſed above one hundred years, and it could not be put in practice now, upon which it was prayed on behalf of the avowant, to reverſe the judgment, and leave the matter at large, but then *Hale*, Chief J. took two exceptions to the avowry; 1. It is ſaid that the mayor and commonalty, and the feoffees, were ſeiſed, which is intended of a joint ſeiſin, and a corporation and natural perſons cannot be ſeiſed jointly.

If B. R. reverſe a judgment for miſpleading, they cannot award a repleader. Qu?

Plea of indenture by teſtatum exiſtit not good.

jointly. 2. The aſſignments are not pleaded poſitively, but by a *teſtatum exiſtit*, and then, if they reverſe this judgment, perhaps they might give judgment for the plaintiff, upon his declaration, for the defect of the avowry. *Et adjournatur*; *Saunders* for the plaintiff, *Levinz* for the avowant.

Outlawry and proceſs of execution thereon, pleaded to an action of treſpaſs; replication, the lands where, &c. traverſed, and verdict for QUER'.

Quære, if he ſhall have judgment on the verdict, or on the declaration and plea; or a repleader?

Jones v. Bodiner, T. 8 W. 3. B. R. Comb. 379.

Treſpaſs for breaking his cloſe and taking his cattle: the defendant pleads, that the plaintiff was outlawed, and a *capias utlagatum* iſſued, and an extent thereupon, and then a writ of *Levari. Hil.* 7 *W.* & *M.* reciting the outlawry, and commanding to levy from the day of the taking upon the extent; that this writ was delivered to the ſheriff, who made a warrant, by virtue whereof the defendant took the cattle in thoſe lands.

The plaintiff replies, that the defendant took them upon other lands of the plaintiff *abſq' hoc*, that he took them upon thoſe lands; whereupon iſſue was joined, and verdict *pro quer'*.

It was now debated by Sir *Barth. Shower pro quer'*, and *Northy pro defendente*, whether the plaintiff ſhould have judgment upon the verdict or upon the declaration, and the defendant's confeſſion of the treſpaſs by his plea, or that there ſhould be a repleader; for it was

agreed on all hands, that the bar was ill, for there could be no ſuch writ, *Hil.* 7 *W.* & *M.* (for the queen was then dead) and the iſſue ſeemed immaterial.

Sir *Barth. Shower pro quer'*, that where the plea contains matter of bar, though not a good bar, and iſſue is taken upon it is holpen by the verdict. 3 *Cro.* 228. *Lovelace* and *Grimſden*, 3 *Cro* 455. *Chamberlain* and *Nichols*. *Mo.* 692. *S. C.* where in debt upon a ſingle bill, the defendant pleaded payment without an acquittance, yet iſſue being taken and found for the plaintiff, he had judgment. 3 *Cro.* 778. *Dighton* v. *Bartholomew*, in treſpaſs and aſſault the defendant pleaded a concord, but without ſatisfaction; and after iſſue and verdict *pro quer'*, it was adjudged that it was helped by the ſtatute. *Mo.* 867. *Taſker* and *Salter*. *Hob.* 326. *Reynolds* verſus *Buckle*. *Raymond* 458. *Spathurſt* verſus *Overind*.

The iſſue being immaterial, judgment was on the defendant's confeſſion, and the verdict ſet aſide.

Vide ante Serjeant v. Fairfax.

Northy agreed, the rule laid down by Sir *Barth. Shower*; but here is no matter of bar at all, becauſe there could be no ſuch writ.

Holt, C. J.—There might be a writ out of the exchequer; and if it had been well pleaded, it had been a good bar, ſure it hath the countenance of a plea in bar. 2 *Cro.* 678. *Jones* verſus *Ridler*, in ejectment, where the defendant pleaded an ill ſpecial plea (for ſometimes they pleaded ſpecially in thoſe days) it was held he could not take any advantage of his own ill plea, but the plaintiff might if the verdict had been againſt him.

I take the caſe of *Reynolds*, *Hob.* 326. to be miſprinted, for the entry is no bar. Expulſion makes the firſt part of the bar, and holding out the reſt, the book ſaith it was found for the defendant, which could not be, the judge

Hob. 326. denied.

muſt direct the jury otherwiſe. 3 *Cro.* 367. *Stokes* verſus *Anneſby*. In the caſe of *Taſker* and *Salter* the judgment was reverſed.

And the Court inclined to give judgment for the plaintiff upon the verdict, but afterwards *Holt* cited 3 *Cro.* 214. *Lacy* verſus *Reynolds*, and 2 *Roll.* 99. *S. C.* and the Court agreed, that the plaintiff ſhould have judgment in this caſe upon the defendant's confeſſion of the treſpaſs, the iſſue being immaterial, ſo that the Jury could not give damages, but there muſt be a new writ of enquiry. *Per Holt*, 1 *Cro.* 25. *Knight* verſus *Harvey* (though not clearly reported) is home to the purpoſe, only in that caſe being in debt, there needed no writ of inquiry. 22 *E.* 4. 46. *a.* (though before the ſtat. of jeofails) yet goes to the reaſon of the thing.

The verdict was ſet aſide and judgment *pro quer'*.

Of an impertinent iſſue; of repleaders in general; of jeofails, defaults, and eſſoins, &c.

Staple v. Haydon, M. 2 Ann. B. R. 6 Mod. 1. The caſe. Treſpaſs, juſtification as to one treſpaſs for a way. Replication, defendant had a more convenient way, and iſſue.

The plaintiff *S.* brings treſpaſs againſt *J. H.* and *G. Fowler*, for that they, on the 31ſt of *May*, in the thirteenth year of the late King *William*, broke his cloſe called the *Wharf*, in *Stepney*, in *Middleſex*, and threw down a perch of rails therein ſtanding: and alſo, for that on the 7th of *July* following, they entered into the ſame wharf, and committed the like treſpaſs.

Hob. 66.

The defendant *G. F.* as to all, pleads Not guilty: but *J. H.* as to the treſpaſs laid on the 31ſt of *May*, pleads Not guilty as to the force, and juſtifies the entry, and throwing down the rails;

rails; for that long before one *Edward G.* was poſſeſſed by virtue of a certain leaſe for eighty years then to come, and yet unexpired of the ſaid wharf, and alſo of a yard next adjoining thereunto; and that for the neceſſary uſe of the ſaid yard, he had and uſed a way over the ſaid wharf to certain ſtairs on the river *Thames*, which was thereunto contiguous, there to take water, *&c.* and being ſo poſſeſſed, he, on ſuch a day and year, which was prior to the time laid in the treſpaſs, demiſed the ſaid yard *(inter alia)* to the defendant *J. H.* for a term of years yet unexpired, with all lawful ways, *&c.* thereunto belonging: by virtue whereof he entered, and was poſſeſſed, *&c.* whereby he was intitled to the ſaid way: that the plaintiff obſtructed it with rails, ſo he coming to uſe it could not paſs; and that he requeſted the plaintiff to open the rails, which he refuſed, ſo he juſtifies the throwing them down, and pleads directly in the ſame manner to the other treſpaſs laid on the 7th of *July*, and avers, that at the ſeveral times he had no other way to the ſaid ſtairs and river *Thames*, than by and through the ſaid wharf.

Plea to the other treſpaſs that he had no other way to, &c. demurrer and joinder.

Plaintiff, as to the plea to the firſt treſpaſs, replies, that the defendant *J. H.* had another more convenient way to the river *Thames* than through the ſaid wharf, and thereupon they are at iſſue; and upon the plea to the treſpaſs on the 7th of *July*, he demurs, *ideo fiat jurat*, to try the iſſues, and aſſeſs contingent damages upon the demurrer. Both defendants make default at *niſi prius*; which being recorded, the inqueſt is awarded by default, and *G. Fowler* is found guilty of the treſpaſs on the 31ſt of *May*, but acquitted of that on the 7th of *July*; and *J. H.* is acquitted of the treſpaſs

Hob. 66.

on the 31ſt of *May* as to the force, but the Jury found as to the reſt, that he had no other way to the ſaid ſtairs and river *Thames* than through the ſaid wharf, and aſſeſs damages upon the demurrer, and acquit him of the treſpaſs on the 7th of *July*.

In this caſe ſeveral points were moved and reſolved by the Court:

(1.) If a repleader ought to be in this caſe.

R. Whether a repleader ſhould be in this caſe, there being, as was ſaid, an immaterial iſſue joined; and the Court held clearly the iſſue was *impertinent*, but as to repleaders generally.

When a repleader ſhall be upon an immaterial iſſue.

1. 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.

2. That before the ſtatute of *jeofails*, if ſuch an iſſue were joined, the Court before trial might award a repleader.

Where the amendment muſt begin as to repleader.

3. When a repleader is awarded, the amendment muſt begin where the plea which makes the iſſue bad begins to be faulty; and therefore if one makes himſelf a bad title in his declaration, to which there is a bad bar, and thereupon a bad replication on which there is iſſue, there the repleader muſt be awarded and entered on record; and plaintiff ſhall declare *de novo*, &c. But if the bar be good, or plea be good, and the replication bad, and iſſue thereupon, there a repleader will be only as to replication; but if bar and replication be bad, and a repleader awarded, it muſt be as to both. *Vid.* 3 *Keb.* 664.

Error.

4. If the Court award a repleader where it ought not to have been, or deny it when it ought to be, it is error.

5. That

5. That upon award of repleader, there must be no coſts, becauſe it is a judgment of the Court upon the pleading; but upon amendment of a plea in paper, there muſt be coſts.

No coſts on award of repleader.

6. That upon a general rule for repleader, without any direction from the Court from what they ſhould begin the repleader, it muſt begin from the firſt fault which occaſioned the bad pleading commenced, for the judgment is *quod partes replacitent.*

General rule of repleader.

7. That the pleadings in this caſe were ſuch as a repleader would be awarded upon at the common law; for the defendant having inſiſted upon a title to a way by grant, his averment, that he had no other way, was immaterial, and by conſequence the iſſue thereupon impertinent; beſides there was no iſſue at all joined, for the plaintiff's affirmative does not meet with the defendant's negative.

Averment immaterial, and the iſſue impertinent.

8. That though a repleader ſhould have been at common law in this caſe, this motion having been made before trial, and it being doubtful whether a verdict would not help it by the ſtatute of *jeofails*, the Court ſaid it would be juſt in them not to grant a repleader till after verdict; for they ſaid they might indeed grant a repleader before verdict at common law, but they were not bound to do it. So note the diverſity ſince the ſtatute; for though it were reaſonable to award a repleader before verdict at common law, where the pleading appeared ſuch on which no judgment could be after verdict; yet ſince the ſtatute, when verdict may cure immaterial or informal iſſues, it may not be proper to do it.

Repleader by common law, and when grantable.

Aid by ſtatute law.

9. After the trial, the Court held, That this iſſue was ſuch on which no judgment could be;

Vid. 2 Lev. 135. Acc. 2 Saund. 318, 319.

be; for defendant pleaded, that he had no other way to the ſtairs and river *Thames*. Plaintiff replies, that he had another way to the ſaid ſtairs and river *Thames*; and Jury found no other way to the ſaid ſtairs and river *Thames*, ſo in truth there was no iſſue joined.

10. That in this caſe there could be no repleader, for the parties were quite out of Court by the default.

(2) Points agreed; as to a way claimed.

In reference to the way claimed, theſe points were agreed on by all:

1. That a man cannot claim a way over my ground from one part thereof to another; but from one part of his own ground to another, he may claim a way over my ground.

Vid. 2 Cr. 170.

2. A ſtranger may have a way over another's ſoil three manner of ways, *viz.* for *neceſſity*, by *grant*, and by *preſcription*: for *neceſſity*, as if *A.* has an acre of ground ſurrounded by ground of *B.* *A.* for neceſſity has a way over a convenient part of *B*'s ground to his own ſoil, as a neceſſary incident to his ground: ſo if *A.* grant a piece of land which is ſurrounded by land of vendor, he grants a way as a neceſſary incident therewith.

Way for neceſſity.

By grant. 2 Cr. 121, 122, 170.

3. If one be ſeiſed of *Black-acre* and *White-acre*, and uſes a way over *White-acre* from *Black-acre* to a mill, river, *&c.* and he grants *Black-acre* to *B.* with all ways, eaſements, *&c.* the grantee ſhall have the ſame conveniency that grantor had when he had *Black-acre*: ſo if *A.* has two acres of land, and has a way from them over another's ſoil, and grants one of them with all ways, the grantee ſhall have the ſame way that grantor had: but there the grantee in making title muſt alledge ſuch an eſtate in the grantor as is traverſable, and not only

only ſay, that the grantor was poſſeſſed of the place to which, &c. for a term of years, for there the poſſeſſion would be traverſable materially.

If a way of neceſſity be claimed, it is a good plea to ſay, the party has another way; but *ſecus* where a way is claimed by grant or preſcription. Preſcription.

4. The way of pleading in this caſe had been to ſhew, that ſuch a one was ſeiſed in fee of the place to which, &c. and being ſo ſeiſed was intitled to a way, and ſhew how, and that he granted to leſſor, &c. who alſo granted it to him, &c. For when one ſhews a particular eſtate, he muſt ſettle the fee in ſomebody. The way of pleading a particular eſtate.

5. It was agreed, that by grant of a houſe to which there is a way of neceſſity, without more, the grantee ſhall have the way as well as if it were ſpecially mentioned in the grant. 2 *Cr.* 190. A way of neceſſity.

It was reſolved, that if the plaintiff had demurred to the defendant's plea, without doubt he ſhould have had judgment. (3) If demurrer to plea.

Upon the point, Whether the matter were now cured after verdict by the ſtatute of *jeofails*, theſe points were agreed: (4) If aided here by the ſtat.

1. If a jury find a point in iſſue, and a ſuperfluous matter over and above, that ſhall not vitiate the verdict.

2. That in this caſe the Jury found nothing that was put in iſſue, for they do not find that either he had no other way, or had another way to the *Thames*; but that he had no other way to the ſtairs and *Thames*, which might well be, and yet he might have another way to the *Thames*.

As to defaults after iſſue, the Court took a diverſity between a real and a perſonal action; for (5) As to defaults after iſſue, &c. in real actions.

for in a real action, if a tenant make default, the demandant may, if he pleaſe, waive the benefit of it, and proceed by further proceſs againſt him; as if the tenant make default on the original, the demandant ſhall have a *grand cape*; and if the tenant do not ſave his default, the demandant, if he inſiſts upon it, ſhall have judgment final upon the firſt default; but he may, if he pleaſe, releaſe the default, and continue further proceſs againſt him. In like manner of a default after appearance, the demandant ſhall have a *petit cape*, &c. and if the tenant do not ſave his default, he may have judgment upon the default; or if he will waive that advantage, he may, and proceed by further proceſs. If in a real action the tenant make default at *niſi prius*, the default is never recorded, but only the *poſtea* marked; and the demandant, if he will, ſhall have a *petit cape*, and judgment thereupon if the default be not ſaved, or elſe he may waive the default, and continue with further proceſs. But in caſe of a perſonal action, a default at the trial is always recorded, and there is no farther proceſs in law to bring the defendant into Court upon releaſe of the default. And anciently at every continuance-day the parties were demandable; and if the defendant did not appear, or were not eſſoined, his default was recorded, and judgment given againſt him thereupon: but by the ſtatute of *Marlbridge*, *c.* 13. and *Weſtm.* 2. *c.* 27. after iſſue joined in a perſonal action, the defendant ſhall have but one eſſoin and one default; and if the default be upon the *venire fac'*, then it is recorded, and a *diſtringas* ſhall go againſt the *jur. ad triand'*, and againſt the defendant, to receive his judgment; but if he comes in at the

Vid. 2 Cr. 36. 1 Vent. 60. 2 Saund. 45.

1 Jo. 412, 413. 1 Cro. 517.

Perſonal actions.

1 Cr. 511.

Eſſoins in a perſonal action.

the day of *niſi prius*, he ſaves his default; but if he does not, the default is peremptory, and final judgment ſhall be given thereupon. And it is to be obſerved, that this one eſſoin and one default that the ſtatutes give, muſt be at the firſt continuance after the iſſue; for if the defendant ſhould appear at the firſt continuance, *viz.* at the *venire fac'*, he ſhall neither be eſſoined, or have a default ſaved at return of the *diſtringas*, but judgment peremptory ſhall be given on ſuch default. 2 *Inſt.* 217.

Default peremptory.

If defendant imparl to a day in a perſonal action, and he does not appear at the day, judgment final ſhall be given againſt him; for the default is peremptory to him, and there is no proceſs to bring him into Court again. *Vid.* 38 *H.* 6. 33. In debt the defendant pleads in abatement to the writ, to which the plaintiff imparls, and at the day given the defendant makes default: judgment final is upon the default, though the plea was only in abatement, 18 *E.* 4. 7. In treſpaſs the defendant demurred, and made default at day given, and judgment final. In debt upon an obligation, defendant pleads a releaſe, and after demurrer day is given, and default is made by the defendant at the day, judgment final ſhall be given: *Vid.* 1 *H.* 7. 11. In treſpaſs defendant imparls, and makes default at the day, judgment final ſhall be given: ſo in debt, 11 *H.* 7. 5. and the caſe in 2 *Cr.* 357. was remembered, where a judgment in an inferior court was reverſed for this error; that the defendant being eſſoined, and making default at the day given by eſſoins, they gave a further day when it ſhould be a judgment by default.

Imparlance and default in a perſonal action.

Abatement in debt.

Demurrer in treſpaſs, &c.

Judgment final.

So now, what ſtuck with the Court was, whether

Whether here judgment

ſhould be upon the demurrer, or upon the default.

whether judgment ſhould be given upon the demurrer againſt the defendant, or upon the default; that is, whether he being out of court as to one iſſue by the default, he could be preſent in court as to the iſſue in law upon the demurrer, ſo that the Court might give judgment thereupon: and as to this point, the caſe was, a defendant in two ſeveral treſpaſſes *pleads* an ill plea to one, on which plaintiff demurs, and joins iſſue upon the other, and makes default at the day of *niſi prius*; whereupon the inqueſt is taken by default as to the iſſue, and contingent damages upon the demurrer. And *Ward*, for plaintiff argued, that judgment ought to be upon the demurrer.

Diverſity as to defaults of the defendants.

1. This is not ſuch a default on which judgment can be given, and he took this diverſity, that wherever in a real action the default is ſaveable, ſo that *grand* or *petit cape* ſhall go, there in a perſonal action a default is not peremptory, but there is indeed a proper proceſs to iſſue, and bring the party into court. As for the purpoſe in a real action after imparlance *prece partium*, or upon eſſoin, if the party having choſe his day fail thereupon, peremptory judgment ſhall be thereupon, and the lands ſeiſed; and in that caſe, judgment would be likewiſe peremptory in a perſonal action; but if the default were upon the return of a proceſs, which is ſaveable in a real action, there judgment peremptory ought not to be in a perſonal action, becauſe there the day is not taken or choſen by the party, but given to him by the court, and it ſeems but reaſonable he ſhould be more ſeverely uſed upon his default at his own day, than at a *dies datus* by the Court.

As to default of plaintiff, &c.

But this is only in reference to defendants; but

but in caſe of plaintiffs, they are in many caſes demandable at day given to purſue their writ: but in caſe of defendants, upon default at a day given before plea pleaded, there ſhall be no judgment peremptory. *Vid.* 7 *H.* 6. 19, 41. 19 *H.* 8. 6.

In treſpaſs the defendant appears upon the exigent, and day is given over to another term, at which the defendant makes default, and *per Cur.* plaintiff can only have proceſs *ad reſpond.* And if he fail thereat, then three *capias*'s and *exigent* as before; and he quoted 20 *Ed.* 3. 12. 2 *H.* 4. 1. *pl.* 3. 2 *H.* 4. 4. 11 *H.* 4. 31, 32. 20 *H.* 6. 44. *Jud. Reg.* 1 *a. b.*

Breve ad audiendum judicium.

The writ of *ad audiend. judicium* was of great uſe then, though now altogether diſuſed.

37 *H.* 6. 29. gives an account of it, that formerly, when a demurrer was joined in a real or perſonal action, this writ uſed to go to bring parties to hear judgment, but now the courſe is, that he attend at his peril. 4 *H.* 6. 29. That the defendant is not demandable on demurrer, but the plaintiff is only to appear and pray his judgment. Juſt as upon a writ of inquiry of damages, the defendant has no day in bank; and in *Common Pleas*, neither plaintiff nor defendant have a day given them, but plaintiff is to attend for his judgment. *Cro. El.* 75. 144.

But plaintiff has day by courſe of *K. B. Yel.* 97. 1 *Rol. Ab.* 486. Now here, though there be but one *ve. fa.* to try the iſſue, and inquire of the contingent damages, yet theſe are as two diſtinct matters, for anciently the courſe was not to put both together; but that is new, and for eaſe and diſpatch, and here the

Here are two diſtinct matters in the ve. fa.

the jury might have been diſcharged of the iſſue, and yet enquire of the damages as an inqueſt of office. 16 *Ed.* 4. 1. 2 *Inſt.* 440.

How, if judgment were to be upon the default.

2. He inſiſted on it, That if judgment were to be upon the default, it muſt have been given at the *niſi prius*, and that being not done, and the default being for the plaintiff's advantage, he might waive or releaſe it, and quoted 42 *Ed.* 3. 1. and the defendant upon a writ of error can never take advantage of the matter. *Vid.* 2 *Saund.* 46.

Demurrer waived by default in a perſonal action.

Darnel contra. Wherever there is a demurrer in any perſonal action, and the defendant makes default at the day, the demurrer is waived. *F. Default*, 59. 38 *H.* 6. 33. In perſonal actions, if the parties are at iſſue or demurrer, and after defendant makes default, the judgment ſhall be upon the default, and the demurrer is waived. *Bro. Default*, 58. 39 *H.* 6. 16, and continued to 18. *Bro. Default*, 73. *Fitz. Jour.* 33. *Proceſs*, 147. 45 *Ed.* 3. 3. And as to objection, That if judgment were to be given on the default, it ſhould have been immediately. *Anſwer*, All the judges of *niſi prius* could do, was to record the default.

When inqueſt may be taken by default, before count, or after, &c.

Powell, *Juſtice.*—I do not find but the parties are demandable, both in caſe of day given upon demurrer, and upon iſſue joined; but after iſſue, inqueſt may be taken by default. But in debt, ſuppoſe the defendant comes in upon the *exigent*, and the plaintiff, as he may, prays a day; there it being a day had on prayer of the plaintiff before count, if defendant make default, proceſs ſhall go to bring him in; but if the plaintiff had counted, and before iſſue the defendant had made default, if plaintiff will demand him, he may have

have judgment upon the default; and I take it to be the ſame upon demurrer where day is given at which defendant makes default, for there judgment final ſhall be, and no proceſs *ad audiend' judic'. vid.* 18 *Ed.* 4. 7. And the book of 20 *H.* 6. 44. is miſtaken by *Fitz.* for the book is full, that judgment muſt be upon the default. 44 *Ed.* 3. 1. After demurrer in perſonal action, that proceſs ſhould go *ad audiend' judic'*; but before demurrer or iſſue joined, if day be given after pleading, a default will be peremptory, and judgment final upon default, but the uſage now is not to demand them. Modern uſage.

It is very hard to make a default at a day given by court on demurrer, peremptory; but here is an iſſue as to part, and a demurrer as to the other part, and a *ve. fa.* to try the iſſue, and inquire of damages. And day is given with a *niſi prius*, which day of *niſi prius* is in truth but to try the iſſue, and inquire of damages, but the day on demurrer is *ad audiend' judic'*; ſo that in truth the day given *ad triand. exit'*, *&c.* has nothing to do with the day of demurrer, and it is not neceſſary that the defendant ſhould have a day on the writ of inquiry; ſo that the day *ad audiend' judic'*, in this caſe, is the day in bank, and the default at *niſi prius* is only to that for which defendant had a day there, that is, to try the iſſue, and the taking the inqueſt by default is a waiver of taking advantage of judgment by default.

Nor do I know where plaintiff may, in a perſonal action, take advantage of a default upon the inqueſt; but where the defendant pleads a releaſe or acquittance, and at iſſue makes default, there indeed he may pray judgment

Quod Holt conceſſit.

ment upon the default; or that inqueſt be taken by default; but after he takes inqueſt by default, he is too late to pray judgment by default, for his taking the inqueſt is a waiver of the judgment by default, and judgment muſt be upon the verdict, and not upon the default, that being waived by prayer of inqueſt. Upon an iſſue of *non eſt factum*, you cannot take a judgment by default.

Holt.—The queſtion firſt is, Whether if default be in a perſonal action after declaration, and day given over, either by imparlance or any other day; whether, I ſay, this be ſo peremptory that judgment final ought to be upon that default; and I think in caſe of imparlance, whether to a day in the ſame term, or another, judgment final ought to be. 18 *Ed.* 4. 7. 36 *H.* 6. 19. and 19 *H.* 6. are full in the point, without taking any difference.

Two defaults in action real, and but one in action perſonal.

Now then upon demurrer, becauſe parties are at iſſue in judgment of court, ſuppoſe it had been in real action, and *Cur' adv' vult*; defendant makes default, *petit cape* muſt go, and he does not ſave his default, ſhall not judgment final be given upon the default? If it be ſo when there is a demurrer in a real action, is it not much ſtronger in demurrer in a perſonal action? And it is not leſs peremptory upon demurrer than imparlance; for if default be after demurrer on day given in ſame term, it is peremptory; that is, if party does not come at ſuch day in the ſame term, it is a departure in deſpite of the court; and there in real action, no *petit cape* ſhall go, but judgment final ſhall be on the demurrer, and not upon the default; ſo that, if the book of *H.* 6. be law, as ſure it is, judgment is as much to be given upon default in perſonal actions, as

in

in real, only that there muſt be two defaults in a real action, and but one in a perſonal one.

19 *H.* 8. 16. If party comes in upon proceſs in perſonal action, or upon *cepi corpus*, or *exigent*, and day is given *prece partium*, that is, by conſent of parties, at which day default is made, no judgment can be given. Why? Becauſe there is no declaration. But if it were after declaration, and at a day default had been, it were peremptory. So is the caſe of 7 *H.* 6. 19. 41. one in cuſtody of marſhal upon a *premunire*, is charged by bill in nature of an appeal of *Mayhem*, and day is by conſent of parties, at which there is a default: there cannot be judgment final, becauſe though he had been charged in cuſtody of the marſhal, yet he never had been in court; but if the default there had been upon an imparlance, it had been peremptory, and final judgment had been thereupon. Indeed, in annuity, which, though perſonal, yet partakes of the nature of a real action, for there is final judgment given to recover an inheritance, and the proceſs in annuity therefore imitates that of a real action, after default there ſhall be *a diſtringas ad audiend' judic'* to afford the defendant an opportunity to ſave his default, becauſe though the recovery ſhall charge the perſon only, yet it may be of an inheritance. So in a *ſecta ad molendinum* if defendant make default, there ſhall be a *diſtringas* to give him liberty to ſave his default, for that alſo follows the nature of a real action, as being of freehold or inheritance. *F. N. B.* 123. *D.*

Where day is given, prece partium, before declaration, &c.

7 H. 6. 19. 41.

Appeal.

Annuity.

Secta ad molendinum.

Ay, but this is like an inquiry of damages. 1. If judgment be againſt a defendant, and an inquiry of damages, he has no day given him thereupon,

Diverſity where only inquiry of damages, and where both if-

ſue and demurrer.

thereupon, and therefore he can make no default; for the Court have already given their judgment againſt him, and he thereby is quite out of court, and the inquiry is only to aſcertain the damages. But where there is both iſſue and demurrer, and before judgment on the demurrer a *ve. fa.* goes to try iſſue, and inquire of damages, whereupon defendant has day, on which he makes default; is not that a default to the day of demurrer as well as of iſſue? For though they be in truth different, *viz.* one the day of *niſi prius*, and the other the day in bank, yet in conſideration of law they are the ſame. If there be two defendants who plead ſeverally, one of them demurs, and judgment is given againſt him, before iſſue joined with the other, then he againſt whom the judgment paſſed has no day in court, yet the plaintiff may continue proceſs againſt the other; but if in that caſe the iſſue were to be tried before judgment, then the defendant who demurred has a day, and that is the ſame that the other has by the *niſi prius*, which by law is the ſame with the day in bank. A default in real action at the day of *niſi prius* is the ſame as a day in bank, and as fatal, for they are not to be ſevered. And why not ſo in a perſonal action, and it is incident to the trial of the iſſue, to inquire of the damages upon the other iſſue in law. So if the day of *niſi prius* be the ſame with the day in bank, the two have the ſame day; but here, though it be one defendant, yet you would have him be out of court as to iſſue, by reaſon of default at *niſi prius*, and in court upon the demurrer in the day in bank; that is, in and out of court the ſame day.

If

If there be default after demurrer joined, judgment ſhall be upon the default, or upon the demurrer; and when continuance is given, the appearance of both parties are entered at the continuance day, and anciently they uſed to demand the parties; ſo then they lay at lurch for one another, but now theſe are things of courſe.

Judgment upon default after demurrer joined, &c.

And whereas my brother *Powell* affirms, that there can be no day on the demurrer but the day in bank: I would ſuppoſe there are two defendants, one pleads to demurrer, and the other pleads to iſſue, and *ve. fa.* goes to try iſſue, and inquire of contingent damages; before the day of *niſi prius* and *puis darrein continuance*, a releaſe is made by plaintiff to the defendant that demurred; can he plead it at *niſi prius*? And if he fails in doing it, can he plead it in bank at day there? And *Powell ſubito* allowed he might plead it at *niſi prius*, but not in bank; but after ſeemed to doubt, whether after demurrer a plea *puis darrein continuance* could be pleaded.

Vid. Hob. 81.

If at a day given upon a writ of error defendant makes default, the writ of error may go on, and the judgment be affirmed, becauſe it is no new judgment that is given for the defendant, who is now out of court by his default, but only his former judgment affirmed and ratified; but in that caſe it were hard to give the defendant coſts upon the ſtatute: ſo if a defendant make default, plaintiff may have judgment; for a man that is out of court may have a judgment given againſt him, though not for him: And he wiſhed the defendant's counſel to take care how they made default; for after default, though plaintiff could not prove his declaration, ſo as verdict would

A man out of court may have judgment againſt him, though not for him.

would be for him; yet it were very hard to give him a judgment, for he was out of court.

At another day another point moved in this caſe, was, whether judgment might not be given againſt the defendant upon the iſſue, though looked upon as immaterial, and a jeofail? Becauſe the defendant confeſſed the treſpaſs in his plea, and made no good juſtification: ſo (as was urged) judgment ought to be given againſt him by confeſſion. And hereupon Ch. J. *Holt* took diverſity, if one confeſs the cauſe of action, but pleads matter, which, if well pleaded, would bar the plaintiff, there it were hard to hold the defendant to ſuch confeſſion, and give judgment againſt him, as here the defendant indeed confeſſes the treſpaſs, but offers ſuch matter as if true and well pleaded would juſtify him: but where the fact is confeſſed, and ſuch matter of juſtification offered, which though never ſo true, and well pleaded, would not bar the plaintiff, there judgment may be upon the confeſſion, as in an action for words, for calling plaintiff a thief. Defendant juſtifies, for that the plaintiff received a thief, and pleads it ill; there judgment may be upon the confeſſion, for that matter could not have been ſo pleaded, as to have juſtified the words.

If defendant confeſſes the treſpaſs, but offers good matter of bar, if well pleaded. Vid. Hob. 69.

Hard to hold the defendant to his confeſſion.

Aliter, Where the matter confeſſed would not bar the plaintiff.

In the further debate of this caſe, the court held, that if there be two defendants who ſever in pleas, and one is found guilty, and an iſſue not helped by the ſtatute of *jeofails* is tried for the other, who having made default is out of court, ſo as there can be no repleader, and of conſequence the judgment muſt be to quaſh the writ or bill, it neceſſarily ſhall be abated thereby as to the other; for though one defendant

Two defendants ſever in pleas, &c. ſo as there can be no repleader.

fendant may be acquitted in part, and condemned in part of a treſpaſs, or one of two condemned, and the other acquitted, yet the writ cannot abate as to one, and ſubſiſt as to the other; and as to treſpaſs againſt two, when the acquittal or diſcharge of one ſhall diſcharge the other. *Vid.* 2. *Cr.* 134. Treſpaſs againſt two for taking gun and dagger; one juſtifies the taking in his own defence, being aſſaulted by plaintiff; the other pleads not guilty, and is found guilty, and damages againſt him, and the other iſſue is found for the defendant, there judgment ſhall be againſt him that is found guilty; for the other's plea does not deſtroy the plaintiff's title for good and all: but if treſpaſs be againſt two for taking the plaintiff's goods, and one pleads not guilty, and is found guilty, and the other juſtifies the taking by gift, *&c.* and his plea is found true, there for as much as the defendant's plea entirely deſtroyed the plaintiff's cauſe of action, he ſhall have judgment againſt neither.

When the acquittal of one treſpaſſer ſhall diſcharge the other.

Hob. 54. Where the plea of one of the defendants intirely deſtroys the plaintiff's action.

But the laſt day of *Hilary term* following, the whole Court declared, That they were of opinion, that the iſſue was helped by the ſtatute of *jeofails*, and for ſo much gave judgment for the defendant, and as to the demurrer, gave judgment for the plaintiff, without any reaſon. *Vid.* 2 *Saund.* 318, 319.

Per Cur. This iſſue helped by ſtatute of jeofails.

In replevin, plea in bar, with an abſq. hoc. *replication to an iſſue, demurrer to the replication, and concludes in abatement. Judgment final in* C. B. *for the plaintiff.* Qu. *If repleader can be upon demurrer. Of a plea in bar concluding in abatement. Of matter of abatement, and concluding in bar.*

Croſſe v. Bilſon, Hil. 2 Ann. B. R. 6 Mod. 102. Error in B. R.

Replevin for taking his mare in *quodam loco*, called *The King's Highway*. The defendant *cognovit captionem*, damage feſant, *in quodam loco*, called *The Queen's Highway*, as bailiff to the Lord *L.* whoſe freehold the place where, is. *Abſque hoc*, That he took *equam pred' in pred' loco*, called *The King's Highway*; *pro ut* the plaintiff *adverſus eum narravit, & hoc paratus eſt verificare, unde petit judicium & return', &c.* Plaintiff comes and ſays, *Quod cognoſcere non debet, quia dicit quod dicto tempore quo, &c. cepit equam pred' in pred' loco tunc*, called *The King's Highway, modo & forma pro ut pred' plaint' allegavit, and hoc petit quod inquiratur per patriam.* The defendant demurs, and concludes, *Unde (ut prius) petit judicium, & quod narratio' pred' caſſetur:* judgment final in *Com' Banc'* for plaintiff, and affirmed here upon error.

1. That all the matter of conuſance is waived by the abſque hoc, &c.

Holt, *Ch. Juſt.*—The whole point of the caſe, take it the ſtrongeſt that can be, is, after a plea in bar, and a replication, the defendant demurs to the replication, and concludes in abatement, and ſure there judgment final ought to be given; and they all agreed, that all the matter of conuſance in the plea was waived by the *abſque hoc*; and the conuſance in a different place from where the declaration lays the taking, is in truth matter only proper in abatement;

abatement; but the concluſion turning it into an avowry, makes it a plea in bar, as all avowries are, and final judgment is always given upon them, if they go for the avowant. They alſo agreed, that where matter in abatement is pleaded in bar, and concluded in bar, judgment final ought to be given.

2. That where matter of abatement is pleaded in bar, &c. judgment final ought to be.

But it was objected, That the demurrer being ill concluded, *viz.* in abatement, and contrary to the bar, it was to be looked upon as if there were no concluſion at all, and it would be a diſcontinuance, and judgment ought to be by *nil dicit*.

To which the Court anſwered, That the concluſion to the demurrer was, *unde petit judicium (ut prius)* and that is well enough, and according to the concluſion of the plea in bar, and the ſubſequent words, *& quod narr' caſſetur*, being inconſiſtent, ſhall be rejected.

So *per tot' Cur'* the judgment was affirmed.

Judgment affirmed.

Note, here *Powell* poſitively ſaid, That repleader could never be upon demurrer, but is always after iſſue; though the old books ſeemed to make a queſtion of it, yet there were twenty authorities in the new books of it: and yet *Brotherick* ſeemed as earneſt of a contrary opinion at the bar, *tacente Holt, Ch. Juſt. & Cur' reliquâ.*

If a repleader can be upon a demurrer.

Note, In the debate of this caſe at the bar, it was agreed, That the matter of this plea was matter in abatement, *viz.* a variance in the places.

That in this caſe the matter was abatement, viz. a variance.

2. That in replevin the defendant is both actor and defendant. As defendant, he may abate the plaintiff's writ, and that were vain for him to do if he could not have a return, and therefore he muſt proceed from his plea in abatement to make conuſance; for his action

being a claim of right to diſtrain, he ought to make title to it againſt the plaintiff in the replevin who claims property in the diſtreſs.

Where defendant claims property.

Yet this rule would be explained; if defendant in replevin claim property in himſelf, he ſhall have return without conuſance, becauſe his plea deſtroys the plaintiff's title: ſo if he lays property in a ſtranger, and make no conuſance, if that matter be admitted by the plaintiff, there ſhall be a return without conuſance; for in that caſe by the admittance, the plaintiff's property is deſtroyed. But in all pleas that do not ſhew the property out of the plaintiff, there muſt be a conuſance made, and the plea is what only is anſwerable, and not the conuſance, for to traverſe that would be a diſcontinuance, 8 *Ed.* 4. 41 b. *Cro. El.* 372. *Mic.* 2. *W.* and *M.* in *B. R. Hall* verſus *Foot.*

Vid. 2 Lev. 92. 1 Vent. 127. 3 Cro. 896. 2 Cro. 519.

If plea be in bar, and concludes in abatement.

If a man plead matter in bar, and conclude in abatement, it ſhall be taken for a plea in bar from the nature and reaſon of the thing; for the plaintiff can have no writ, if he has not a cauſe of action, and therefore the Court will take the plea in bar. 37 *H.* 6. 24 a. 36 *H.* 6. 24.

Vid. 1 Vent. 15b.

If one pleads matter of abatement, and concludes in bar, *et petit judicium ſi pl. actionem habere debet*, though he begin in abatement, and the matter be alſo in abatement, yet the concluſion being in bar, makes it a bar; and the reaſon is, becauſe you admit the writ by concluding ſpecially againſt the action, 18 *H.* 6. 27. 32 *H.* 6. 17 b. 36 *H.* 6. 18. 22 *H.* 6. 53 b.

If the plea be matter of abatement and concludes in bar.

How the defendant in replevin may take advantage of a variance.

And here *Holt, Ch. J.* ſaid, That in replevin, if the defendant will take advantage of a variance in the place where the taking is laid, from that in which really it was, he muſt plead it

in

in abatement, and begin either *petit judicium de breve*, or *de narr' quia dicit*, the cattle were taken in ſuch a place, *abſque hoc*, that they were taken in the place in the declaration. Then indeed he comes, *et pro retorn' habendo* diſtinctly; he ſays, he avows the taking in the place mentioned in the inducement of his traverſe, damage *feſant*, or for rent, *&c.* To which no anſwer is to be given, but all is to depend on the plea in abatement; and it is a proper concluſion in replevin to ſay, *nude petit judicium & return' averior'*, without ſaying any thing of damages, for they are given by the ſtatute.

Concluſion.

In quo warranto, *as to a ſuppoſed mis-direction of the judge, that defendant could not prove a mode of ſwearing, contrary to what he had ſet forth in the record; the merits might be with the defendant, but his plea wrong, Court gave leave to move to ſet aſide the verdict, and that a* repleader *ſhould be awarded; one of the iſſues joined, and verdict, being impertinent and void, other iſſues were found for the King (as well as this) but without evidence.—After long argument on the doctrine of* repleader, *all the verdicts ſet aſide, and defendant had leave to amend his plea, whereon the immaterial iſſue was taken, on payment of common coſts.*

Monday, 9th May 1757. Rex v. Roger Phillips, mayor of Carmarthen, E. 30 G. 2. 1 Burr. 292. The defendant elected mayor, and ſworn under a mandamus: by

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

miſtake alledged ſwearing as if upon a charter-day.

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 preſide 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 execute 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 aforeſaid, he the ſaid " *Roger Phillips*, IMMEDIATELY *after* his ſaid " election, did *then and there*, ACCORDING TO " *the* DIRECTIONS of *the* LETTERS PATENT *of* " *the ſaid late King* HENRY *the* 8*th*, TAKE *his* " *corporal oath*, upon the holy Evangeliſts of " God," BEFORE *John Evans* MERCHANT, *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

the ſaid county-burrough, 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-burrough, *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-burrough, BEFOREWHOM the ſaid *Roger Phillips*, ſo elected and choſen mayor of the ſaid county-burrough as aforeſaid, WAS *to* TAKE *his ſaid* OATH: and that he the ſaid *Roger Phillips* was THEREUPON, then and there, *in due manner, admitted into the ſaid office of* mayor of the ſaid county-borough.

BY VIRTUE WHEREOF he the ſaid *Roger Phillips*, 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 Phillips*, on, *&c.* and from, *&c.* until, *&c.* did "there uſe and exerciſe 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 of 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

" 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 *mis-directed* the Jury:" which *mis-diſcretion* conſiſted, as they alledged, in this—*viz.* " that the Judge had precluded " 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 admitted*, 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 *ſpecies of election* under which he *claimed*.

Sir *Richard Loyd*, Mr. Serjeant *Poole*, and Mr. *Aſton* were prepared as they ſaid, to ſhew cauſe, by convincing the Court, " that the di- " rection of the *Judge was* RIGHT; and con- " ſequently 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: for, AS *the record ſtands*, the *ſame* direction muſt be *given again*.

Yet

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.

The rule was enlarged; with this *addition*, *viz.* to ſhew cauſe "why the verdict ſhould "not be ſet aſide, AND *a repleader awarded.*"

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 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 that the court can give *no* judgment upon. Vide ante.

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 'tis 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

preſide upon the CHARTER-*day*; *viz.* (BEFORE *twelve 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 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 *Reynell* 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 miſ-

§ pleaded

* N. B. This was 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.

pleaded 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.

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

But this is abſolutely a *defective* TITLE; a ſwearing before improper perſons: and is like
V. ante. 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
V. ante. *Carthew*, 371, the caſe of *Jones* v. *Bodinner*; and 1 *Salk.* 173. S. C. a like reſolution. So,
V. ante Eſſay II. IX. (8.) 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 intitle us to judgment for the king.

Repleaders are never awarded for the ſake of *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. [FO. 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.

V. ante. 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 can not 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*,

proper, 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* 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 was *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.

Now here, the defendant who claims to be mayor has NOT *ſhewn* "that he was *ſworn* be-"fore the *proper* perſons:" 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)* ſwear-"ing;" 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."

And 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. *Nicholl'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 true title, it ſhall be againſt him; and he ſhall *not* ſet up *another* title, *afterwards*.

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 of the ejecting.

v. ante.

In

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. *Harvy*, adminiſtrator of *Harvy*, *M.* 1. *C.* 1. (where the defendant pleaded an impoſſible judgment, and *riens en ſes maines*, 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 *information*; 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 et 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: and " the PERSONS *before whom* the ſwearing is al- " ledged 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 alleged to be before " the perſons " directed by the 11 *G.* 1. *viz.* the then *pre-* " *ſiding 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 there- " fore judgment ſhall be given againſt the de- " fendant."

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. *Cropwell*, the huſband pleaded " Not Guilty," when no tort was ſuppoſed in him: ſo that this was a caſe where

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.

V. ante.

* No: The verdict was for the defendant; and the plaintiff moved for a repleader. Indeed Twyſden ſaid, that it was the ſame thing, "be the verdict "for the plain-"tiff, or for the "defendant."

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.

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 *determine 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) 6 *Mod.* 2. The caſe of *Staple* v. *Haydon*, [1ſt. reſolution] where the Court held, " That a " repleader is to be awarded, when *ſuch* an iſ- " ſue is joined, as the Court, after trial there- " of, cannot give a judgment, as being im- " pertinent, and NOT *determining the right:* (I lay the ſtreſs on theſe words, " AND NOT *de-* " *termining 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,

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 obligation 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 payment "*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 *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 that 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* 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 judgment upon the good- " neſs or badneſs of it."

And Lord Chief Juſtice *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 [Vide 1 *Strange* 398.]

Now *here*, ſuppoſing (as I ſaid before) the ſwearing to be the *only* iſſue; is it not a queſtion totally *inconcluſive*, " whether he was, or " was not, ſworn before THESE perſons?" " 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*.

* N. B. This plea ſeems to have been good in form; but inſufficient as to fact.

See Forteſcue's diſtinction in 1 Strange 398.

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

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 Lord Chief Juſtice *Pratt* ſays, a vain and idle thing, to grant a repleader.

But if the reſt of the iſſues are only *parts* of, and *dependent* upon the WHOLE TITLE; the ſame reaſon does not then hold.

The way to do *complete* juſtice indeed, is to let in the *one* ſide, without prejudicing the *other*.

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

* V. 6 Mod. 2. 5th point, accord.

not to blame) we ought to do the moſt complete juſtice we can, between both.

My Lord *Chief Baron* was right in his opinion, " that he could not admit proof *dif-* " *ferent* 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 *with-* " *out* PREJUDICE:" therefore, ſuch verdicts ought to be ſet aſide, *as* without evidence; and not to conclude againſt the defendant, which *would be* a *prejudice.*

Therefore he propoſed to ſet aſide the 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.

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. Juſtice 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.

Here

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.

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;

depend; which will be a much greater delay of juſtice.

Mr. *Juſtice* FORSTER.—This was an election under a *mandamus*, upon the ſtatute of 11 *G.* 1. in order to ſettle the peace of the burrough.

Here are twelve *iſſues* joined, *all* found for the king; and without evidence on 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.

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 cannot be done.

And I think, as the caſe is circumſtanced, the agreement mentioned by the Lord Chief Baron *, "that the verdicts were to be without "prejudice in any future trial," may without a ſtrain be extended to any *future litigation* in the cauſe.

* Vide ante.

Lord MANSFIELD. I am now fully ſatisfied, by what my brethren have ſaid, that the *whole verdict* may be *ſet aſide* on *payment of coſts*, and with *liberty to amend the plea*.

But that muſt be on a particular motion. And I have no doubt but that we may do this, WITHOUT *the conſent* of the proſecutors.

Which motions were accordingly afterwards made by Mr. *Norton*, and granted, after a faint attempt by Mr. Serjeant *Poole* to ſhew cauſe,

and

and then to get coſts as between client and attorney; in both which attempts he was unſucceſsful: for the rules were both of them made abſolute, upon payment of common coſts; obliging the defendant, however, to take ſhort notice of trial.

By an expreſs agreement *the obligee of a bond to ſecure an annuity, may* waive the forfeiture *for nonpayment on the day, ſo as to be intitled to recover againſt the obligor, although he has been diſcharged under an inſolvent debtor's act, between the time of the forfeiture and the action brought.*

Webſter v. Banniſter, E. 20 G. 3. B. R. Doug. 378.

This caſe, which came before the Court at different times, and in various ſhapes, was finally diſpoſed of this day. As it was often cited in other caſes during the period I have undertaken to report, I thought it might be proper to ſtate the ſubſtance of the pleadings in the different proceedings, although I cannot give an account of the arguments of the counſel, and the Court, on the principal motion, from my own notes, having been abſent when it came on.

The caſe was an action of debt on a bond—*Plea*, that the plaintiff ought not to have any execution *againſt the perſon, or perſonal eſtate, of the defendant, except money in the funds, or money lent upon real ſecurity only* *; becauſe he ſays that the debt in the declaration mentioned was contracted or due before the 22d of *January* 1776, mentioned in a certain act of parliament, intituled, "An Act for the relief "of Inſolvent Debtors, *&c.*" (16 *G.* 3. *cap.* 8.) and that he was, before the 1ſt of *January* 1776,

* 16 G. 3. cap. 38. § 41.

1776, arreſted, and in actual cuſtody; that he ſurrendered himſelf in diſcharge of his bail, and was thereupon committed a priſoner to the priſon of the *King*'s *Bench* before the 26th of *June* 1776, and was afterwards diſcharged, according to the form of the ſaid act, at the quarter ſeſſions for *Surry*, on the 29th of *July* 1776, and this he is ready to verify, wherefore he prays judgment if the plaintiff ought to have any execution againſt his perſon or perſonal eſtate, except money in the funds, or money lent upon real ſecurity only. The *replication* ſtated and made *profert* of the condition of the bond—which was for the payment of an annuity of £. 30. a year by the defendant and another obligor, to the plaintiff, in quarterly payments, on the 11th of *January*, of *April*, of *July*, and of *October*; the firſt payment to be made on the 11th of *January* 1772.—The replication then ſet forth, That after the 22d of *January* in the plea mentioned, and before the exhibiting the bill of the plaintiff, to wit, on the 11th of *July* 1776, £. 7. 10*s*. for one quarter, and ſo other quarterly payments, on the 11th of *October* 1776, the 11th of *January* 1777, and the 11th of *April* 1777, became due; and that the defendant hath not paid them, or any part thereof, on thoſe reſpective days, or at any other time, but the whole remained due; "by reaſon of which premiſes the ſaid writ- "ing obligatory in the declaration mention- "ed *became forfeited*, and the debt and ac- "tion accrued *after* the 22d of *January* 1776, "in the plea mentioned," and ſo concluded with a verification. After this replication, there was an *entry of judgment* on the record, for want of a plea in bar to the action,

tion, but with ſtay of execution againſt the perſon and perſonal eſtate, except, &c. until the plea depending between the parties in that behalf ſhould be determined.—*Rejoinder*, That before the ſaid 22d of *January* 1776, to wit, on the 11th of *January* 1776, £. 7. 10*s.* for one quarter of the annuity became due, and was not paid then, nor at any time ſince, but ſtill remained due, whereby the bond was *forfeited*, and the ſaid debt, by virtue thereof, accrued to the plaintiff before the ſaid 22d of *January* 1776.—*Surrejoinder*, That true it was, that £. 7. 10*s.* for one quarter became due on the 11th of *January* 1776; but that the plaintiff afterwards, at the inſtance and requeſt of the defendant, *agreed* to give him day of payment of the ſaid £. 7. 10*s.* until a future day, to wit, till *April* following, and that, on the 18th of *April*, the ſaid £. 7. 10*s.* was duly paid, and that at the time when the plaintiff ſo gave day of payment, he did, at the inſtance of the defendant, *waive* and relinquiſh any forfeiture of the bond, which had accrued, or might accrue to him by reaſon of the nonpayment according to the condition, and acquitted and diſcharged the defendant from ſuch forfeiture, and all and every debt and debts due thereby; and the plaintiff further ſays, that the defendant, *by reaſon of the premiſes, was acquitted and diſcharged from ſuch forfeiture and debts.*—*Rebutter*, By which (proteſting that the *ſurrejoinder* was not ſufficient in law, and proteſting alſo that the defendant never requeſted the plaintiff to give ſuch day of payment) the defendant ſays, that the £. 7. 10*s.* in the ſurrejoinder mentioned, was not paid to the plaintiff in manner and form, &c.—Upon this *iſſue* was joined.

The

The cauſe was tried before Lord MANSFIELD, at the ſittings for *Middleſex*, in *Eaſter Term* 18 *Geo.* 3. and a verdict being found for the plaintiff, a rule was obtained by the defendant for the plaintiff to ſhew cauſe why the judgment ſhould not be arreſted; which rule was afterwards enlarged to *M.* 19 *Geo.* 3. when the *Solicitor General* and *Bower* ſhewed cauſe; *Dunning* and *Baldwin* for the defendant.

The ground of the motion (as I have been well informed) was, that the bond being once forfeited, the debt became abſolute, and could not be again made contingent by any waiver of the forfeiture, on the condition of payment at a future day; at leaſt it continued abſolute till the compliance with the condition, which was not till after the inſolvency, therefore the fact of the compliance with the condition after the inſolvency was immaterial, and the plaintiff ſhould have demurred to the rebutter, inſtead of joining iſſue on an immaterial fact. That the Court therefore ought to award a *repleader*.

On the other ſide it was inſiſted, that an obligee might waive the forfeiture, and thereby prevent the debt from becoming abſolute even at law, eſpecially ſince the ſtatute of 4 and 5 *Anne*, *cap.* 18. The iſſue therefore was not immaterial, becauſe the debt was to be conſidered as contingent or not at the time of the inſolvency, according as the condition was or was not afterwards complied with. Or if the iſſue was immaterial, that was no reaſon why the plaintiff might not have judgment, provided enough appeared to intitle him to it on any part of the record; for, in ſuch caſe, all that followed would be rejected (a), and here the conditional waiver appeared in the ſur-

(a) For this they cited 8 Co.

rejoinder

rejoinder and was not denied, and the debt was to be looked upon as contingent till a breach of the condition, and therefore was ſo at the time of the inſolvency. 120. Ib. 122. 9 Co. 110. Hob. 56. Salk. 273.

BULLER, *Juſtice*, aſked if it was not a rule never to grant a *repleader* when the iſſue is found againſt the party tendering it. He ſaid he thought it was, and that he could find no caſe of any exception to it.

The rule was diſcharged.

The defendant, when he was arreſted in this action, had applied to ASTON, *Juſtice*, and afterwards to the Court, to be diſcharged on filing common bail, and obtained a rule to ſhew cauſe, but which was afterwards diſcharged.

In *Michaelmas*, 19 *Geo.* 3. a writ of error was brought, but bail in error not being juſtified, *a capias ad ſatisfaciendum* iſſued in the enſuing term, the effect of which was prevented by a commiſſion of bankruptcy againſt the defendant. The validity of the commiſſion being afterwards diſputed by the plaintiff, and another creditor who oppoſed the allowance of the certificate, the Chancellor directed an iſſue, which was not proceeded upon, and the plaintiff having brought a *ſcire facias* againſt the original bail, the defendant ſurrendered himſelf, and on a former day in this term, obtained a rule to ſhew cauſe why he ſhould not be diſcharged out of cuſtody.

This day, the *Solicitor-General* and *Bower* ſhewed cauſe;—*Dunning* and *Howorth* for the defendant.

The ground of the application now was, that although the defendant, by imprudently taking iſſue on an improper fact, had failed in his defence to the execution againſt his per-

ſon upon the pleadings, yet he was clearly intitled to be diſcharged under the inſolvent act. They produced an affidavit denying that there had been an agreement to waive the forfeiture, and ſaid that no ſuch agreement had been proved at the trial, and, if iſſue had been taken on that fact, it muſt have been found for the defendant. The penalty therefore was a debt due at the time of the diſcharge under the act, and conſequently he was no longer anſwerable for it, with his perſon.

On the other hand, it was inſiſted, that if there was any miſtake in the pleadings, it was the defendant's own fault, and he had never moved for leave to amend. Beſides, they ſaid, (which was not contradicted on the other ſide) that it appeared at the trial, that a note had been given to the plaintiff for the payment both of the quarter due on the 11th of *January* 1776, and of that which was to become due on the next quarter day, and that the plaintiff, by taking this note, muſt be conſidered as having agreed to give further day of payment.

Lord MANSFIELD ſaid, he thought the note would have been evidence of ſuch an agreement, if iſſue had been joined on that fact, and that there was no doubt but the party might waive the forfeiture, and accept what he was equitably intitled to.

BULLER, *Juſtice*, abſent.

The rule diſcharged.

Dougl. 381. 2. Upon ſubſequent proceedings in *B.R.* in this cauſe, Lord MANSFIELD ſaid, that there was no doubt but the party might *waive* the *forfeiture*, and accept what he was equitably intitled to.

A motion

A motion may be made in arreſt of judgment, after a rule for a new trial has been diſcharged, and at any time before judgment is entered up.

Taylor v. Whitehead, Trin. 21 G. 3. B. R. Doug. 716. Thurſday 28th June.

It is not a good juſtification in treſpaſs, that the defendant hath a right of way over part of the plaintiff's land, and that he had gone upon the adjoining land, becauſe the way was impaſſable from being overflowed by a river.

Treſpaſs for breaking and entering the cloſe of the plaintiff, at the pariſh of *Otley*, in *Yorkſhire*. The defendant pleaded; 1. The general iſſue; 2. A right of way, by preſcription, through a lane of the plaintiff's contiguous to the *locus in quo*, to *Otley* Bridge on the river *Wharfe*; *that the tenants and occupiers of* THE LOCUS IN QUO *were, from time whereof, &c. by reaſon of their tenure, bound to repair the lane, and the banks thereof next the river*; that, at the ſeveral times when, *&c.* the lane was out of repair, and overflowed with water, ſo that the defendant could not uſe the way without imminent danger of the loſs of his life and goods; and that he *neceſſarily* went into, through, and over, the *locus in quo*, as near to his ſaid way as he poſſibly could, as it was lawful for him to do for the cauſe aforeſaid; 3. That the *locus, &c.* lay contiguous to a lane of the plaintiff's, and that the ſaid lane was adjoining to the river *Wharfe*; that the defendant had a right of way by preſcription, through and over the lane; and, that becauſe the lane and way were *overflowed with water from the ſaid river* ſo much that the defendant *could not* at the ſeveral times, *&c. paſs or repaſs*, he did *neceſſarily* go out of the ſaid way, as near to the ſaid way as he poſſibly could, into, through, and over, *&c.*

The plaintiff having traverſed the preſcription to repair laid in the firſt ſpecial plea, and the right of way laid in the laſt, the cauſe

came on to be tried before Lord LOUGHBOROUGH, at the ſummer aſſizes for *Yorkſhire*, 1780; and the jury found for the plaintiff on the general iſſue and the firſt ſpecial plea, and for the defendant on the laſt.

(a) Thurſday 9th Nov. 1780.

In Michaelmas term (a), a rule was obtained to ſhew cauſe why there ſhould not be a new trial on the iſſue found for the defendant, as having been found againſt evidence, which rule was, upon argument diſcharged (b).

(b) Friday 24th Nov. 1780.

Afterwards, *Fearnly* obtained a rule to ſhew cauſe why the plaintiff ſhould not be at liberty to enter up judgment on *that* iſſue, as well as the others, notwithſtanding the finding of the jury, on the ground, that in point of law, although the defendant had the right of way through the plaintiff's cloſe, he was not intitled to go upon the adjoining land of the plaintiff, when the way was out of repair.

On *Saturday*, the 3d of *February*, cauſe was to have been ſhewn againſt this rule, and *Lee* objected, that it had been applied for too late, for that it was in the nature of a motion in arreſt of judgment; and, he ſaid he had always underſtood the practice to be, that ſuch a motion could not be made after a new trial had been moved for, unleſs the court, upon granting the rule for a new trial, ſhould have given leave, if that ſhould be diſcharged, to follow it by a motion in arreſt of judgment. It ſeemed, he ſaid, very unreaſonable, that a party ſhould be permitted to avail himſelf in ſo late a ſtage of the cauſe, of an objection that might have been taken in the firſt inſtance, by a demurrer to the plea, by which mode of proceeding, if the objection was founded in law, all the expence and vexation of a trial, and the motion

to

to ſet aſide the verdict, would have been avoided. In anſwer to this, it was obſerved by *Dunning*, that it would be extremely abſurd if an objection ſhould be ſtated to the court, and they ſhould be convinced that the party had not, by law, a right to judgment in his favour, that they ſhould yet be neceſſitated, by any rule of practice, to pronounce an erroneous judgment in his favour, and ſo force the other party to bring a writ of error.

After ſome conſideration, and conference with the maſter, the Court declared their opinion, that a motion in arreſt of judgment might be made at any time before judgment was entered up, and that the preſent motion, being of the ſame nature, was not too late.

It now appeared, that the officer, by miſtake, had entered a verdict for the defendant on all the iſſues; upon which it became neceſſary for the plaintiff's counſel, to move for a rule to ſhew cauſe why the *poſtea* ſhould not be amended from the Judge's notes, agreeably to the finding of the jury, and that the rule then before the Court ſhould, in the mean time, be enlarged.

The *poſtea* was afterwards amended, and, this day, the queſtion on the validity of the laſt plea was argued.

Lee, *Davenport*, and *Wood*, for the defendant. They argued as follows: It is clear law, eſtabliſhed by a number of caſes, particularly that of *Abſor* v. *French* in *Shower* (a), and *Henn*'s caſe (b), that, where a common highway is out of repair, by the overflowing of a river, or any other cauſe, paſſengers have a right to go upon the adjacent ground. So, if the water impairs the banks of a navigable river, (which indeed is conſidered as a high-

(a) B. R. M. 37 Car. 2. 2 Show. 28. S. C. Lev. 234.

(b) 8 Car. 1. Sir W. Jones, 1[illegible]

way) it is juſtifiable to go upon the neareſt part of the field next adjoining (c). No caſes are to be found upon the queſtion as to private ways; but there are determinations, the principle of which is, that, where it becomes impoſſible for a perſon to exerciſe his right without a treſpaſs on the ſoil of another, the law will *excuſe* the treſpaſs. Thus in *Dike* and *Dunſtan*'s caſe (a), it is ſtated (1) from the year-book of 6 *Ed.* 4. "That, if a man is to "lop his tree, and *he cannot do it unleſs it fall* "*upon the land of another*, then he may well "juſtify the felling it upon the other's land, "becauſe, otherwiſe, he could not lop it all." So in the caſe of *Miller* v. *Faudrye*, reported in *Popham* (b), "a man may juſtify chaſing "ſheep with a dog upon another man's "ground, if he cannot otherwiſe drive them "off his own." And in that caſe, there is one cited from 22 *Ed.* 4. 8. where it was held, "that, for neceſſity, a man who plows may "turn his plow on the land of another."—(BULLER, *Juſtice*, "There a *cuſtom* was laid")—And another from 8 *Ed.* 4. where it was laid down, "that if a tree grow in a hedge, "and the fruit fall into another's land, the "owner may go upon the land and fetch it." Theſe are all treſpaſſes occaſioned, as in the preſent caſe, by the unavoidable interruption of the exerciſe of private rights in the regular way. It is of no conſequence, upon this iſſue, who is bound to repair the road, becauſe the juſtification is not that the road was out of repair, and ought to be repaired by the plaintiff, but that, by the overflowing of the river, it was *impoſſible* for the defendant to paſs along the way, and therefore, he *neceſſarily* went out of it. If the queſtion who ought to repair is ſaid to be the material

(c) Young v.—— N. P. before Lord Holt, 1 Lord Raym. 725.

(a) B. R. M. 28 & 29 El. God. 452.

(1) (By counſel.)

(b) B. R. E. 2 Car. 1. Poph. 161. —But that part of the reports is not by Popham.

terial part of the caſe, and that the iſſue tried on the ſecond ſpecial plea was immaterial, the motion ought to have been for a *repleader*, but as the plaintiff took the iſſue, the Court will not grant a *repleader* on his application (c). Suppoſing it not to be true in all caſes, that a perſon having a private way over the land of another, may, when the way is impaſſable, juſtify going on the adjoining ground; yet, ſurely, he may, where the land over which the way is, and the adjoining land, both belong to the ſame perſon. He, or thoſe under whom he claims, having granted a right of way over his eſtate, if the uſual tract becomes impaſſable, the right continues, and muſt be exerciſed on the neighbouring ground belonging to the grantor.

(c) Vide ante, Webſter v. Baniſter.

Lord MANSFIELD mentioned that *Blackſtone*, in his Commentaries, expreſſes an opinion that the law of *England* correſponds with the *Roman* law, on this point, extending the right of going on the adjoining ground when a road is out of repair, to private as well as public ways (a), and that *Comyns* in his *Digeſt*, ſeems to have entertained the ſame opinion (b).

(a) 3 Bl. Com. p 36.
(b) Com. Dig. tit. Chimin. D. 6.

Walker, Serjeant, for the plaintiff, inſiſted, that, by the common law, the *grantee* of a private way is bound to repair, unleſs there is an expreſs ſtipulation for the grantor to do it. This principle, he ſaid, was clearly deducible from the ultimate determination in the caſe of *Pomfrett* v. *Ricroft* (c), where one having granted the uſe of a pump, for a term, to another, and the pump having fallen into diſrepair, the grantee brought his action againſt the grantor, and, upon demurrer, the court of *King*'s *Bench* held (three judges againſt TWISDEN)

(c) B. R. M. 21 Car. 2. 1 Saund. 321.

DEN) that it well lay, for that the grantor was bound to repair, but, upon a writ of error to the *Exchequer Chamber*, their deciſion was unanimouſly reverſed. Now, on this record, he ſaid, it was expreſsly found, on the firſt ſpecial plea, that the plaintiff was not bound to repair; and by the ſecond, no cuſtom or duty for him to repair was alledged. The defendant, therefore, muſt be conſidered as bound to repair in this caſe, and, if the road had become impaſſable by his neglecting to guard againſt the overflowing of the river, by keeping up the banks, it was his own fault, and he could not, on that account, be intitled to treſpaſs on the neighbouring ground.

The Court ſtopped *Fearnly*, who was to have argued on the ſame ſide.

Lord MANSFIELD.—The queſtion is upon the grant of this way. Now it is not laid to be a grant of a way, generally, over the land; but of a preciſe ſpecific way. The grantor ſays, you may go in this particular line, but I do not give you a right to go either on the right, or left.—I entirely agree with my brother *Walker*, that, by the common law, he who has the uſe of a thing ought to repair it. The grantor *may* bind himſelf; but here, he has not done it. He has not undertaken to provide againſt the overflowing of the river; and, for ought that appears, *that* may have happened by the neglect of the defendant. Highways are governed by a different principle; they are for the public ſervice, and if the uſual tract is impaſſable, it is for the general good that people ſhould be intitled to paſs in another line.

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

BULLER, *Juſtice.*—If this had been a way of neceſſity, the queſtion would have required conſideration, but it is not ſo pleaded. It does not appear that the defendant had no other road. There can be no ground for a *repleader*; for the plea is ſubſtantially bad; there is no fact alledged in it which could ſerve any purpoſe to deny, or go to iſſue upon.

The rule made abſolute.

One *information* only, *may, by leave of the Court, be exhibited under the* Iriſh *ſtatute* 19 Geo. 2. c. 2. ſect. 4. *againſt* different *perſons, and againſt the* ſame *perſons, for uſurping* different *franchiſes: and there is not any neceſſity to ſtate ſuch leave upon the record.*

Symmers & al' v Regem in error, M. 17 Geo. 3. B. R. Cowp. 489. Error from judgment of B. R. in Ireland, in quo warranto, againſt corporators of Galway.

This was a writ of error from a judgment of the Court of *King's Bench* in *Ireland*, in *quo warranto*, againſt *Alexander Symmers*, *James Brown*, *George Staunton*, *Franklin Kirby*, *Abraham Marſhall*, and *Thomas Grubb*; to ſhew by what authority they claimed to exerciſe the privileges and franchiſes of *freemen*, *freeburgeſſes*, and *common-council-men* of the town and borough of *Galway*.

The information ſet forth, that the borough of *Galway* is a town and borough incorporated by the name of the Mayor, Sheriffs, Freeburgeſſes, and Commonalty of the town and county of the town of *Galway*, and that a common-council is a conſtituent part of the ſaid corporation. That the mayor, ſheriffs, recorder, town-clerk, and all other officers of the ſaid town of *Galway*, are to be elected and choſen only by the *mayor, ſheriffs*, and *common-council* of the ſaid town. And that the ſix defendants

ſendants have uſed and exerciſed the franchiſes of freemen, free-burgeſſes, and common-council-men, without any lawful authority whatſoever.

Plea. The defendants by way of plea ſet forth, that the town and borough of *Galway* is, and from time immemorial hath been an ancient town and borough; and that the mayor, ſheriffs, free-burgeſſes, and commonalty thereof, at the time of granting of the letters patent hereinafter mentioned, was a body corporate in deed, fact, and name; and that from time immemorial there was and yet is a *commonalty* conſiſting of an indefinite number of freemen, and alſo an indefinite number of free-burgeſſes; and alſo a common-council, conſiſting of an indefinite number of members duly elected, admitted, and ſworn into the places or offices of common-council. That the ſheriffs for the time being have been members of the ſaid common-council, and alſo of a tholſell or general aſſembly of the ſaid town; and ſay, that the mayor, ſheriffs, recorder, town-clerk, and all other officers of the ſaid town of *Galway*, have been, and are for the future to be elected and choſen only by the mayor, ſheriffs, and common-council preſent, on the days whereon ſuch elections were uſually made.

That from time immemorial the cuſtom hath been, that the *mayor* or other the chief officer and *common-council* of the ſaid town for the time being, or *the greateſt number* of the *ſaid common-council preſent*, did and might, being duly aſſembled from time to time, *elect* ſuch other diſcreet perſons, not diſqualified by any law in being, *members* of the ſaid *common-council*. That from time immemorial the *electing* of any perſon or perſons to be *freemen*

or

or free-burgeſſes, ſhall be by the ſaid *tholſell* or *general aſſembly*. That by certain rules, orders, and directions made and eſtabliſhed by the lord-lieutenant and council of the realm of *Ireland*, on the 23d of *September* 1672, for the better regulating of the corporation of the town of *Galway*, and the electing of magiſtrates and officers there, in purſuance of the ſtat. 17 and 18 *Car.* 2. intituled, " An act for the explaining of ſome " doubts ariſing upon an act, intituled, An act " for the better executing of his Majeſty gra- " cious declaration, for the ſettlement of his " kingdom of *Ireland*, and ſatisfaction of the " ſeveral intereſts of adventurers, ſoldiers, and " other his ſubjects there, and for making " ſome alterations of and additions unto the " ſaid act; for the more ſpeedy and effectual " ſettlement of the ſaid kingdom," it is directed, " that no perſon or perſons, that ſhall " be elected either mayor, recorder, ſheriff, " treaſurer, alderman, town-clerk, or one of " the common-council, ſhall be capable of " holding, *&c.* until he or they ſhall have " taken the *oath* of *ſupremacy* therein menti- " oned, and the *oath* of *allegiance* beſides the " oaths uſually taken upon the admiſſion, *&c.* " and alſo an oath in the ſaid rules preſcribed, " commonly called the little oath. That *no* " *matter* or thing in anywiſe relating to the af- " fairs of the ſaid town, ſhall be *propounded* " or debated in the *tholſell*, or any general aſ- " ſembly of the ſaid town, *until* the ſame ſhall " have *firſt paſſed* the *common-council* of the " ſaid town." And it is further ordered, " That all foreigners, ſtrangers, and aliens, " as well others as Proteſtants, who are or ſhall " be merchants, traders, artiſans, artificers,

" ſeamen,

" ſeamen, or otherwiſe ſkilled in any myſtery,
" craft or trade, who were then *reſiding* and
" inhabiting within the ſaid town of *Galway*,
" or who ſhould at any time hereafter come
" into the ſaid town of *Galway*, with *intent*
" and reſolution to *inhabit* and *reſide*, upon
" payment down or tender of 20*s.* by way of
" fine, unto the chief magiſtrate or magiſtrates,
" and common-council, or other perſons au-
" thorized to admit and make freemen, be
" admitted freemen *during his* or their *reſi-*
" *dence* for the moſt part, and no *longer*."
That King *Charles* the 2d. by his letters pa-
tent the 14th of *Auguſt*, in the 29th year of
his reign, did grant, " That the ſaid town of
" *Galway*, and all caſtles lying within the
" ſpace of two miles from every part of the
" ſaid town of *Galway*, be one entire county
" of itſelf: and that there ſhould be for ever
" thereafter, one new body corporate and po-
" litic in deed and name, conſiſting of one
" mayor, two ſheriffs and free-burgeſſes, and
" commonalty, by the name of the mayor,
" ſheriffs, free-burgeſſes, and commonalty of
" the ſaid town and county of the town of
" *Galway*;" and did thereby make certain
perſons particularly named in the ſaid letters
patent, to be free-burgeſſes: and grant, " that
" the ſaid perſons ſo particularly named, and
" made free-burgeſſes, as alſo their ſucceſſors,
" and likewiſe all and every ſuch perſon and
" perſons as ſhould be of the common-council
" of the ſaid town, *before* they be *admited* into
" their reſpective offices, places, or employ-
" ments, *ſhould take* as well the ſaid herein-
" before mentioned *oaths of ſupremacy and al-*
" *legiance*, and the oath commonly called the
" *little oath*, and alſo the *oaths theretofore uſu-*

" *ally*

" *ally taken,* for the due execution of the ſaid " places and offices; the *ſaid ſeveral oaths* to " be *adminiſtered* by the *mayor* or recorder, " and *two of the free-burgeſſes* of the ſaid " town:" which letters patent the then mayor, ſheriffs, burgeſſes, and commonalty accepted of. That by an act of parliament made in the 4th year of the reign of *George* 1ſt. intituled, " An act for the better regulating the " town of *Galway*, and for the ſtrengthening " the Proteſtant intereſt therein," it is enacted, " that no perſon ſhall be *elected mayor* or " ſheriffs, or common-council-men, who ſhall " not be an *inhabitant* or inhabitants within " the ſaid town and liberties thereof, at the " time of being elected into any of the ſaid " offices, reſpectively; and that hath or have " not been reſident for the ſpace of one whole " year before ſuch election; and that *all per-* " *ſons* who profeſs themſelves of any *trade,* " myſtery, or handicraft, that do or ſhall come " to *reſide* in the ſaid town of *Galway*, in or- " der to follow their reſpective trades, *ſhall* " *and are hereby declared to be free* of the ſaid " town and corporation, and alſo of that com- " pany or corporation to which their reſpec- " tive trades belong, *without paying any thing* " *for ſuch freedom*; and ſhall continue free- " men of ſuch company or corporation, *as* " *long as they dwell* in the ſaid town, and *no* " *longer*: PROVIDED, that no perſons are to " have the benefit of their freedoms as afore- " ſaid, unleſs they have been profeſſed *Pro-* " *teſtants* for *ſeven* years, or upwards, next *be-* " *fore* their *demanding* their *freedoms*, purſuant " to this act; and ſhall alſo take the uſual " *oaths* of *freemen*; and alſo *the oaths of alle-* " *giance, and ſupremacy, and abjuration*; and

" make

" make and ſubſcribe the *declaration againſt* " *tranſubſtantiation, before the mayor of the* " town, who is required to adminiſter the " ſame."

The plea then ſet forth that *Symmers, Brown,* and *Staunton* were, on the 22d of *November* 1771, *duly elected* freemen and free-burgeſſes, their election and admiſſion having firſt paſſed the common-council, and been propounded in the *Tholſell.*—The defendants, *Marſhall* and *Grubb,* ſetting forth that they were *tradeſmen, Proteſtants for ſeven years,* and *reſidents* within the town, further pleaded, that on the 4th of *February* 1772, an aſſembly or meeting of the mayor and common-council was in due manner holden at the *Tholſell,* and that they then and there *offered to take the oaths* of allegiance, ſupremacy, and abjuration, and *demanded* from the mayor of the ſaid corporation and the *common-council* there aſſembled, their freedom, purſuant to the ſaid laſt-mentioned act of the 4th *Geo.* 1. And thereupon the *electing and admitting* them the ſaid *Abraham Marſhall* and *Thomas Grubb,* to be freemen of the ſaid town, *&c. paſſed the ſaid common-council.* That afterwards, to wit, the 5th day of *February* 1772, a *tholſell* or general aſſembly was in due manner held at the *Tholſell,* and then and there the *electing* and *admitting* them the ſaid *Abraham Marſhall* and *Thomas Grubb* to be freemen was *propounded,* and they were *then and there* in *due manner elected* by the ſaid *tholſell, freemen* of the ſaid town and corporation. *All* the defendants further pleaded, that they were in due manner elected into the reſpective offices of free-burgeſſes and common-council-men, and that being ſo elected into the offices of freemen,

free-

free-burgeſſes, and common-council-men, they did before they were admitted, take the oaths of allegiance, ſupremacy, and abjuration, *&c.* and all the oaths uſually taken, *&c.* before the *mayor* and *two free-burgeſſes.*—The *replication* took iſſue that the defendants were "*not elected* in *manner and form* aforeſaid into the offices of *freemen*, free-burgeſſes, and common-council-men reſpectively." And at the trial all the iſſues were found for the Crown. The defendants, in ſupport of their title, gave in evidence the corporation books, in which were contained entries of their reſpective elections.

On the part of the proſecutor, a witneſs was produced, who gave in evidence, out of the corporation book ſo produced by the defendants, the orders of elections of *nineteen* perſons there named; and further gave in evidence, that upon the elections of the defendants in the common-council, on the 21ſt of *November* and 4th of *February*, ſeveral of the nineteen, to wit, *ten* on the 21ſt of *November*, and *twelve* on the 4th of *February*, who were freemen, free-burgeſſes, and common-council-men, and who had done ſeveral corporate acts, tendered their votes againſt the elections of the defendants. That the mayor rejected their votes; and that if they had been permitted to vote, that is to ſay, the ten on the 21ſt of *November*, and the twelve on the 4th of *February*, there would have been a majority againſt the reſpective elections of the defendants.

The counſel for the defendants then gave evidence of the *diſfranchiſement* of *all* the nineteen perſons, before the time of the elections of the defendants, by producing the orders of diſfranchiſement in the ſame corporation book.

That

That thereupon the relator's counſel gave in evidence ſeveral orders out of the ſame book; by which it appeared that *fifteen* of the ſaid nineteen perſons had been *reſtored* in purſuance of peremptory writs of *mandamus*; which fifteen included the ten who had done corporate acts, and whoſe votes were refuſed on the 21ſt of *November*, and the twelve who had alſo done corporate acts, and whoſe votes were refuſed the 4th of *February*; but by the dates of the orders, the reſtoration of the fifteen appeared to have been *ſubſequent* to the *election* of the defendants.

Whereupon, and after the ſaid entries and alſo another entry had been read, the counſel for the defendants did object thereto. For that the ſaid *entries* of reſtoration in the ſaid book were not admiſſible evidence, without firſt producing the *mandamus's*, and returns, or *atteſted copies* thereof. But the juſtices over-ruled the objection, and did permit the ſaid matter to go to the jury as evidence of the reſtoration of the ſaid perſons without producing the writs, returns, or atteſted copies.

And thereupon the defendants counſel, to prove the ſaid iſſue, and that the defendants were duly elected, did produce, give in evidence, and read the ſtat. 4 *Geo.* 1. by the defendants particularly pleaded; and offered to give in evidence, that the ſaid ſeveral perſons (the fifteen who had tendered their votes and done corporate acts) were not inhabitants, *&c.* and reſident for one whole year before their reſpective elections; and did inſiſt that ſuch evidence ought to go to the jury, which the juſtices refuſed to admit. Upon which, the defendants counſel tendered a bill of exceptions to *Godfrey Lill*, Eſq. the judge of aſſize, which he ſealed.

The

The bill of exceptions having been returned into the Court of *King's Bench* in *Ireland* as part of the record; the Judges, after hearing arguments upon it, gave judgment of *ouſter* againſt all the defendants; whereupon this writ of error was brought.

Mr. BULLER, for the plaintiffs in error, argued, that this information was bad; 1ſt. Becauſe filed againſt *ſix* different perſons, for uſurping *three* different offices. That ſuch an information would clearly have been bad at common law. In 2 *Strange*, 921. *ſix* were indicted for perjury, and judgment was arreſted ſolely on that ground. In 1 *Str.* 623. an indictment againſt ſix for exerciſing a trade, was quaſhed. In *Rex* verſus *Tucker et al'. Paſch.* 7 *Geo.* 3. *B. R.* 4 *Burr.* 2046. an indictment againſt *eleven* was quaſhed for the ſame cauſe. 2 *Barnard.* 24. So in *quo warranto*, ſeveral cannot be joined. *Rex* verſus *Jarvis* and *Clarkſon, Tr.* 10 *Geo.* 2. M. S. If not good at common law, the next queſtion is, whether it is aided by the *Iriſh* ſtatute 19 *Geo.* 2. c. 12. which directs, "that it ſhall be lawful for the "proper officer of the court, to exhibit one or "more informations againſt any perſon or "perſons uſurping offices, and to proceed "thereon in ſuch manner as is uſual in *quo* "*warranto*; and if it appears that divers "rights may be determined on one informa-"tion, one ſhall be ſufficient to try them." This ſtatute muſt be conſtrued with ſome reſtriction; otherwiſe the words themſelves would carry a meaning nobody could contend for; and authoriſe an information againſt the mayor of one corporation, the alderman of another, and the freemen of a third. The true conſtruction muſt be, to confine it to caſes

where the offices or franchiſes are in the *ſame corporation*, and *ejuſdem generis*. But here, the offices are of a *different nature*. Again, the ſtatute gives no authority to join *different claims*, but ſpeaks merely of joining *different perſons*. Therefore, if this information had been filed againſt *one* defendant only, and had charged him, as in this caſe, with uſurping the *three* different offices of freeman, free-burgeſs, and common-council-man, it would have been equally bad. There is no precedent of ſuch an information, and the practice is univerſally againſt it. But ſuppoſe this were a caſe within the ſtatute, and that the Court could give leave to join different claims; it does not appear, that any ſuch leave was given, or any diſcretion exerciſed by the Court on the occaſion. Therefore, it muſt be taken to be an information at common law. Where ſeveral pleas are pleaded, it is the practice to ſtate, that they are pleaded by leave of the court: and ſo it ſhould have been done here.

2dly, As to the iſſues and the judgment on them, *two* of the defendants, *Marſhall* and *Grubb*, have ſtated their right to the offices of freemen in virtue of their being *reſident Proteſtant traders* within the ſtat. 4 *Geo.* 1. which enacts, that, in that caſe, they ſhall have a right to be admitted without *paying a fine*. The right they ſtate therefore is a right under this act of parliament; and not by virtue of an election. The two iſſues joined on theſe pleas is, that they are *not elected*: at the ſame time, their true title is not denied; and yet judgment of *ouſter* is given againſt them. Whereas the iſſue joined being an *immaterial iſſue*, and not founded on any fact in the plea, the judgment ought to have been for them.

3*dly*,

3*dly*, The judgment of the court below is *founded* on the *bill of exceptions*, of which they had no juriſdiction. *Davenport* verſus *Tyrrel*, *Trin.* 9 *Geo.* 3. *B. R.* * So that the judgment is on iſſues not diſputed; againſt titles admitted; and founded on what the court has no juriſdiction of.

* Since reported in 1 Black. Rep. 675.

Laſtly, On the bill of exceptions itſelf, *four* different queſtions ariſe. 1*ſt*. Whether the perſons whoſe votes were rejected at the elections of the defendants, were even voters *de facto*, at the time of the election. 2*dly*, Whether the evidence given by the proſecutor to prove them members *de facto*, was proper and admiſſible for that purpoſe. 3*dly*, Whether, if they were not freemen *de jure*, though they might be freemen *de facto*, it was not competent to the defendants, under the circumſtances of this caſe, to prove at the trial that they were not ſo *de jure*. The 4*th* queſtion is, if it were competent to them to do ſo, whether the evidence offered was proper and ſufficient for that purpoſe.

As to the *firſt* queſtion upon the face of the entry produced by the proſecutor to prove their admiſſion, it appears that none of them were *actually* admitted, but only that there was an order they *ſhould be admitted:* that is not an admiſſion in any ſenſe; and ſo it was held in *Rex* verſus *Liſle*, *Andrews* 163. But it is infinitely ſtronger here, becauſe the order was not made by the *general aſſembly*, but by the *common-council* only, who have no right to elect either freemen or free-burgeſſes. Another reaſon againſt their being members *de facto* is, that they had been *removed* before the election of the defendants, and ſuch removal was then in force. The evidence given of their being

reſtored was ſubſequent to the time of the election. The *mandamus's* could have no effect 'till they were actually reſtored; and the very application for the *mandamus's* is evidence of their being out of poſſeſſion. During the intermediate time, therefore, they could not be officers *de facto*. If disfranchiſed, it was no longer neceſſary to ſummon them to meetings of the corporation; though it ſhould afterwards appear they were illegally disfranchiſed. It was ſo decided in 10 *Mod.* 76 *. But leſs would do here; for if the Court ſhould be of opinion, that while disfranchiſed (unleſs rightful members) they could not vote; the judge did wrong in not receiving evidence to prove they were not *de jure* members.

* Hil. 10 Ann. Queen v. Sutton.

The *ſecond* queſtion is, Whether the entries in the corporation books, of their being reſtored to the office of common-council-men, were proper and admiſſible, to prove them officers *de facto*. The entries of reſtoration were not voluntary acts of the corporation, but under the authority and compulſion of writs of *mandamus*. Therefore, the writs of *mandamus* themſelves ſhould have been produced, as being the beſt evidence: as in the caſe of inquiſitions taken under a commiſſion, the commiſſion as well as the inquiſition muſt be produced.

As to the *third* queſtion, How far, and in what caſes the right of the electors may be gone into on informations againſt the elected, as a *general* queſtion, has never been decided. That a latent objection cannot be gone into, has been ſettled; but the reaſon in that caſe is not applicable to the preſent. Here, there was no ſurpriſe on the proſecutor. Rejecting evidence

evidence of this ſort does not tend to keep matters quiet; for if bad votes muſt be admitted, it is only introducing the elected into the corporation, for the ſake of turning them out again. If the ojection is notorious to the other party, it may be made; and here, the objection to the eleven voters in queſtion was a matter notorious to both parties: therefore, their right might be gone into. Where the elector has been ouſted by *quo warranto*, though the defendant was no party to the ſuit, and may be a ſtranger to it, yet the judgment is evidence againſt him; becauſe of the public notoriety. Here, the objection to theſe eleven perſons, was the point on which both parties agree the election muſt be decided. Both therefore were equally appriſed. If the legality of theſe voters could not be entered into on this information, a preſiding officer at an election can have no power of examining whether the votes are legal or not. But in all elections, particularly of members of parliament, the preſiding officer exerciſes his judgment, whether a vote is good or bad. If the preſiding officer has no right to judge, there can be no action for a falſe return. Beſides, in this caſe, the evidence reſpecting the right, was begun by the proſecutor himſelf; by entries to ſhew they were qualified and rightful members. If ſo, the plaintiffs ſurely have an equal right to rebut that evidence, and to prove they were not qualified. If, in ſuch caſes, evidence of the right is not to be gone into; by delaying the trial of ſome informations, and puſhing on the trial of others, bad members might be eſtabliſhed and rightful ones ouſted. For inſtance, ſuppoſe three claſſes of voters, elected in *Auguſt*, *September*, and *Oc-*

tober; the firſt not duly elected; the ſecond not duly elected without the votes of the firſt; the laſt elected by a majority, excluding thoſe in *Auguſt*. On an information againſt the laſt, they muſt be ouſted becauſe they cannot diſqualify the firſt ſet. Then, on an information againſt the ſecond ſet, they muſt be eſtabliſhed, and the proſecution fail, for the ſame reaſons; then on an information againſt the firſt ſet, and they ouſted; the conſequence would be, that the ſecond ſet, though not duly elected, would be eſtabliſhed, and the third ſet, though duly elected, would be ouſted.

The *remaining* queſtion is, Whether the evidence offered was proper to prove that the perſons rejected were not common-councilmen *de jure*. This depends on the ſtat. 4 *Geo.* 1. which is ſtill in force, and the law of the place: it enacts, "that no perſon ſhall be "elected, who is not reſident a twelvemonth "before." If ſo, there can be no doubt of the propriety of the evidence offered; for it was to prove they were not reſident a twelvemonth before.—Upon the whole, whether the iſſue, of "not elected" be conſidered as an iſſue of fact only, or of fact blended with law, the plaintiffs in error are equally intitled. For if an iſſue of fact only, then ten were not members *de facto*, having been removed; and the proſecutor's evidence ought not to have been received. If the iſſue is blended with law, and it was competent to the proſecutor to go into the right, it was equally competent to the defendants to diſprove what was given in evidence by the proſecutor. If it be merely a queſtion of fact, we had a majority at the poll. If of law, the evidence of the title of the electors muſt be received. Therefore,

fore, in either caſe, the Judge did wrong; and conſequently the judgment ſhould be reverſed.

Mr. *Davenport contra.* As to the *firſt* objection that ſeveral perſons are included in one information, the ſtatute 19 *Geo.* 2. furniſhes a clear anſwer, by giving the court a diſcretion to join as many perſons as they pleaſe. And as to the objection that the leave of the court does not appear on the record: it never does appear; and there is no neceſſity it ſhould. *Secondly*, as to *ſeveral* claims being joined, it is ſaid, it would have been bad at common law: but the caſes quoted of ſeveral perſons joined in an indictment for perjury*, and for exerciſing a trade†, are not applicable. Six could hardly be guilty of the ſame perjury. But there is no caſe which ſays, one man ſhall not be called on, for uſurping different offices, in one information. The caſe in 2 *Barnardiſton* 25, ſays, "*two perſons* cannot be joined in one indict-"ment;" it does not ſay *ſeveral offences* cannot. But this act ſays, "By leave of the "court *different uſurpations* may be joined." There is a caſe of *Rex* verſus *Clendon*, in 2 *Str.* 870. where it was ſaid, "two could "not be joined in an indictment for an aſ-"ſault:" but that has been often over-ruled. If there be no precedent, it muſt be reſolved on principles of law: and what principles of law ſays, the Crown cannot call on a man to ſhew why he exerciſes ſeveral franchiſes? It is more beneficial for the defendant, that his different claims ſhould be joined; and one expence only be incurred. In *Co. Entries* and *Raſtal's*, there are ſeveral precedents of informations, for uſurping different offices. *Co. Entries*, 527.

* 2 Stra. 921.
† 1 Str. 62, 3. 4 Burr. 2046.

tit. *quo warranto*, for uſurping *fourteen* different franchiſes. And in the Earl of *Shrewſbury*'s caſe, *ibid. ſixteen* franchiſes are joined; and theſe in *quo warranto*; which is a ſtricter mode of proceeding than the information in *nature* of *quo warranto*, now ſubſtituted in its place. Theſe caſes occurred in the time of Lord *Coke*, and *Hobart*, attorney-general. It might as well be ſaid, that goods ſold, and work and labour done, ſhall not be joined. Therefore, the act of parliament is an anſwer to the firſt objection; and the principles of law to the ſecond. The next objection goes to the *form* of the iſſue, with reſpect to *Marſhall* and *Grubb*; who claim under the ſtatute 4 *Geo.* 1. as reſident traders. Now the right given by the ſtatute, is a claim to be *admitted*, provided they are reſident Proteſtant traders; but inſtead of ſhewing a title by *admiſſion* under the act, they waive that, and ſhew a title by *election*, preciſely in the ſame manner as the other defendants have done. Therefore the replication taking iſſue on ſuch election is right.

Thirdly, As to the objection that the Court have proceeded on the bill of exceptions, of which they had no juriſdiction. If they had not, it is a mere *nullity*; and if the judgment be good independent of it, the Court will conſider it as given on the verdict alone.

As to the fourth objection on the bill of exceptions, that the ten were not even voters *de facto*; 1ſt, becauſe not *actually* admitted, and 2dly, becauſe removed; if they were not actually admitted, the defendants themſelves never were; for the entry of their admiſſion is preciſely in the ſame manner. As to their being removed, that of itſelf is an admiſſion they were

were once burgeſſes: but by whom is the removal? By the common-council *only*, who are but a *part* of the body; conſequently, had no right to remove them. With regard to the admiſſibility of the proſecutor's evidence to prove them voters *de facto*; if the defendants had a right to produce the entry they did, to diſprove their right by ſhewing their amotion, it was clearly competent to the Crown to ſhew they were reſtored by an entry in the ſame book, without producing the writs of *mandamus* themſelves. Written evidence muſt be all taken together; therefore the evidence was clearly admiſſible, and if ſo, the act of reſtoration, by relation back, makes them in from 1761, and puts them in the ſame ſituation as if they had never been out of poſſeſſion.—As to the 3d *point*, it is dangerous to attack *derivative* titles, by an objection to the *original* title. If the *electors* were *de facto* members, they ought not to have been rejected on the ground of a defect at the time of their own election; nor could the queſtion be gone into. There are but two ways of attacking the title of an elector *de facto*; the firſt is by information, which is the propereſt mode; becauſe the party beſt knows his own title. The other is by an iſſue introduced on the record, upon the title of the perſon whoſe right is meant to be queſtioned. A third way was attempted in the famous caſe of *Strode* verſus *Palmer*, *Lillie's Ent.* 248. by *notice* on the record, that particular votes would be objected to. But neither of theſe ſteps have been taken in the preſent caſe. Even judgment of *ouſter* is not concluſive; for if by colluſion, it may be controverted. *Rex* verſus *Hebden*, *Andr.* 388—392. But where there is no judgment of

ouſter,

ouſter, no act of removal apparently tortious will do. In other caſes, the court requires that notice ſhould be given of the fact meant to be inſiſted on. *Tufton* verſus *Neviſon*, 2 *Ld. Raym.* 1354. As to the 4th objection, it was decided in *Comyns* 243. *Auſtin* verſus *Oſborn*, that a man may have a right to vote, though never admitted.

Lord MANSFIELD.—There are *three* objections made to this judgment, independent of the ſubject matter of the bill of exceptions. The *firſt* is, that this is an information againſt *different* perſons; and againſt the *ſame* perſons for *different uſurpations*. As to its being againſt the *ſame* perſons for *different uſurpations*, I think what Mr. *Davenport* has ſaid, and the caſes he has cited are very ſtrong to ſhew, that the information would have been good at common law: but if it would not have been good at common law, it is ſtrongly within the ſtatute 19 *Geo.* 2. c. 12. *ſect.* 4. *a fortiori*, when the ſtatute gives leave to exhibit one and the ſame information, if the court ſhall think fit, againſt *different* defendants for the *ſeveral* rights claimed, or ſet up by them reſpectively. As to the other part of this objection, that this is an information againſt *different* perſons; the anſwer is, that the act of parliament gives a diſcretionary power to the court to grant one or more informations, according to the nature and circumſtances of the caſe: and to ſuppoſe extravagant caſes, or that the Court would be abſurd enough to join two franchiſes in different corporations, is to ſuppoſe a caſe that cannot exiſt. The legiſlature truſts the court with the diſcretion of joining them; and upon an application for leave, the court goes into the nature of the queſtion to be tried. In this caſe, nothing could be more proper, than to

join

join the ſeveral defendants and the reſpective franchiſes they claim, which are three. The right of election is exactly the ſame, the queſtion is the ſame, and the evidence the ſame. But then it is contended, that ſuppoſing this *ſubſtantially right*, it is *formally wrong*; becauſe it is not ſtated to be filed againſt the ſeveral perſons, and for the ſeveral offices they claim, by *leave of the court*. No ſuch thing is neceſſary; no information ever ſtates it to have been filed by leave of the court. The court gives the order, and the information is filed. But ſuch leave never appears on the record. Counſel cannot ſign an information without leave is firſt given: but it never appears on the pleadings; therefore, that objection is out of the caſe.

The next objection, independent of the bill of exceptions is, that *Marſhall* and *Grubb* claim to be freemen under the *act* of parliament, and not by *election*, and therefore, the iſſue as to them is an *immaterial* iſſue, being joined on the *election*. The anſwer to that is, the defendants themſelves have put it ſo; and call their admiſſion by the corporation, an election. They are not freemen *ipſo facto*, by the act of parliament; but they muſt ſhew they are ſo, by proving themſelves Proteſtants, reſident in the town of *Galway* for a year, antecedent to their being admitted, and that they have taken the oaths preſcribed. Therefore the defendants themſelves have led the proſecutor into the miſtake, if any, by calling their admiſſion an election. That objection, therefore, has no weight.

The next objection is, that the court below have given judgment, not only on the verdict, and what ariſes out of it, but have likewiſe

gone into arguments on the bill of exceptions; and the judge before whom it was tried, appeared perſonally, and brought his bill of exceptions before the court of *B. R.* in *Ireland*. It certainly is ſo: the court has proceeded by miſtake on the bill of exceptions, and gone into arguments upon it. Till very lately, there was no bill of exceptions in *Ireland*, and they were at a loſs in this caſe how to proceed. The ſtatute giving the bill of exceptions, ſays, it ſhall be brought by the judge who tried the cauſe into the ſuperior court. It is ſo here: a bill of exceptions from the *C. B.* comes into this Court immediately; it goes from hence originally, to the lords in parliament. Where there is a bill of exceptions from the *B. R.* in *Ireland*, the judge muſt bring it into this Court. To eaſe him from that trouble in this caſe, a commiſſion iſſued to Lord *Annaly* to take the acknowledgment of his hand and ſeal. They were doubtful whether they ſhould not certify the tranſcript, as they do of all their other records.

But if the court of *B. R.* in *Ireland* had no juriſdiction upon the bill of exceptions, What is the conſequence? They have proceeded on good and bad grounds. Though this Court differs from them on the bad ground, it does not follow that they differ from them on the good. If there is a good ground, independent of the bill of exceptions, that is ſufficient. This Court cannot reverſe a right judgment, becauſe the court in *Ireland* has proceeded erroneouſly in reſpect of ſomething elſe which they ought not to have entered into.

Then we come to the merits of the ſubject matter of the bill of exceptions; and as to that, *four* queſtions have been made.

The

The *firſt* queſtion is, Whether the ten voters who offered their votes, and were rejected, ought to have been received. Upon this queſtion the validity of the defendants election entirely depends.

The firſt objection that has been made againſt their right to be received, is, that they were not even voters *de facto*. This objection has been attempted to be ſupported on two grounds; 1ſt, becauſe they were never admitted of the corporation, the order produced in evidence, being only that they *ſhould* be admitted, and does not ſay they *were* admitted. But on the proceedings produced it appears, that for ten years they acted as burgeſſes; and *that* which was called an order of diſfranchiſement, conſiders them as burgeſſes. So the order for their reſtoration is evidence to be left to the jury, of their having been admitted; even ſuppoſing it reſted on ſo nice a point, as whether it was made before, or after their admiſſion.

The next ground is, that they had been *diſfranchiſed*; that the diſfranchiſement was ſtill in force, and their reſtoration not till *after* the election. As to this objection, a great deal depends upon the uſe of the word *diſfranchiſement*; otherwiſe it creates a confuſion. But on looking into it, this is no diſfranchiſement, nor is there a pretence for calling it ſo: but it is doing that which the common-council had not the ſemblance of a right to do; taking upon themſelves to judge of the validity of an election ten years before, and to declare it *null* and *void*, for want of a qualification at that time. The word "diſfranchiſement" ſignifies taking a franchiſe from a man for ſome reaſonable cauſe; which they do not do, but only ſay they

never were common-council-men. What authority have the common-council to do that? None. It could be done only by information in the nature of a *quo warranto*. But ſuppoſe it had been a disfranchiſement, how does it appear to the Court that the common-council have a right to disfranchiſe. It is incident to the corporation at large to disfranchiſe, but not to a ſelect body. It does not follow that the ſelect body who has a right to elect, has from thence a right to disfranchiſe. But the fact is, it is no disfranchiſement at all.

The next objection is, that the *order of reſtoration*, as it appears by the corporation books, was not made till *after* the election, and that this order alone, is *not* the *beſt evidence*. As to that, the corporation books are clearly as good evidence to ſhew theſe perſons were reſtored, as to ſhew they were disfranchiſed. It ſtruck me at firſt, that the time of the reſtoration, and conſequently the time of iſſuing the *mandamus*, which was not proved, might be material: that is, if the *mandamus* to reſtore the voters in queſtion, was *before* the *election* of the defendants, and the order *actually* reſtoring them, was not till *after*; and to ſupport their right, it had been neceſſary to make the order *relate back* to the *date* of the *mandamus*, the time of the writ iſſuing ſhould have been ſhewn. But upon conſideration, I think, that let the reſtoration come when it will, it *relates* to the *original right*. It would be ſo in the caſe of a probable ground of disfranchiſement. But here, there is not a probable ground: there is no colour for a removal; the act of common-council was a mere nullity, and the reſtoration makes them in from the beginning.—Thus it ſtands as to their being voters *de facto*.

The

The next queſtion is, being voters *de facto*, whether, on the trial of the reſpective rights of the ſeveral defendants, the elected, the rights of the voters to their corporate franchiſe can be gone into, without any notice on the record, or collaterally. It is true, that, in general, the perſon elected muſt take upon himſelf to ſupport the right and title of his electors: it is ſo in a variety of caſes. In the election of aldermen of the city of *London*, coroners, members of parliament, *&c.* all theſe are bound to ſupport the rights of their electors. But, for the ſake of juſtice and convenience, a diſtinction has been made in caſes where the right of election depends upon corporate franchiſes. There are qualifications to the exception, ſuch as have been ſtated by Mr. *Buller*. The general queſtion has never been fully ſettled, though it has been touched upon in many caſes. But this is ſetled; that no corporator is bound, by ſurpriſe, to go into the original qualification of any corporator in poſſeſſion, who voted for him at his election; eſpecially without notice. What would be the condition of theſe people? There are ten of them who, for ten years, have been quietly in poſſeſſion without any information, or the idea of an information being brought againſt them. How can the queſtion be gone into, with regard to their qualification, at ſuch a diſtance of time; more particularly as that qualification depends on their reſidence and inhabitancy for a year, previous to the time of their election?

Aston, *Juſtice*. This has not the leaſt appearance of a disfranchiſement. Can a common-council-man declare the election of another common-council-man null and void? In general, a disfranchiſement muſt be the act of

of the whole body: and if a ſpecial power be delegated to a part of the body, it ought to be ſhewn. But no ſuch power appears in the common-council. Therefore I look upon their order, in this reſpect, as a mere nullity. As to the qualification of the electors, it is not neceſſary at preſent to decide whether their right could have been gone into; becauſe, if the mayor was bound to receive theſe votes, the election is clearly bad. As to the ſtat. 4 *Geo.* 1. that ſtatute gives a man only a *right* to the freedom of the town; and to complete his title, he muſt go before the mayor, take the oaths, and produce the other proofs required. The iſſue follows the words of the plea. Therefore I am at preſent ſatisfied, that the judgment entered, is the proper judgment to be entered up on the verdict; and the circumſtance of the court below having proceeded upon the bill of exceptions, ſhall not vitiate it.

WILLES, *Juſtice.*—My only doubt is as to *Marſhall* and *Grubb*; for their right to be admitted freemen, is different from the others: and if they have performed the requiſites of the ſtat. 4 *Geo.* 1. they are intitled to be admitted, and are by the act declared to be free. Whether the ten are good voters or not, as at preſent adviſed, I think *Grubb* and *Marſhall* are good burgeſſes under the ſtatute.

ASHHURST, *Juſtice.*—I entirely concur, that if enough appears upon the whole of the record, to ſhew that the court of *B. R.* in *Ireland* have given a right judgment, we ought not to reverſe it: and I think the bill of exceptions makes no difference. The iſſue is taken in the

the ſame words as the plea, and the plea calls it an election.

Lord MANSFIELD. We will think of it as to this point, and give you our opinion; and if any thing more is neceſſary, we will let you know it.

Cur' adviſare vult.

The Court afterwards ſaid, they wiſhed this caſe to be argued again. Accordingly it was argued again in *Hilary* Term 1777, by Mr. *Dunning* for the plaintiffs in error, and by Mr. *Mansfield* for the Crown: but all the points were given up except two. 1ſt. Whether, at all events, the defendants *Grubb* and *Marſhall* were not intitled to judgment, their title under the *Galway* act not being denied or put in iſſue. 2dly. Whether the Judge below did not do wrong in rejecting the evidence offered, to ſhew that the perſons rejected by the returning-officer had not a right to vote.—After the argument, the Court delivered their opinion, as follows:

Lord MANSFIELD.—There are two queſtions, *firſt*, Whether, upon this record, judgment ought not to be given for the defendants *Grubb* and *Marſhall?* And, *ſecondly*, Whether the Judge below ought not to have gone into the ſeveral qualifications of the ſeveral voters, who voted as common-council-men, and whoſe titles he refuſed to enter into?

As to the firſt queſtion, enough appears upon the record to incline us to think, that *Grubb* and *Marſhall* really had a right to be freemen, if they had pleaded in a proper way: and if judgment of *ouſter* on this record were to bar them for ever of the benefit of that right, a reluctance would ariſe in the Court, from the general prejudice they have againſt any party

loſing his right, by a mere defect in his form of pleading. If that were the caſe, another principle muſt be adhered to, which is, that in all queſtions concerning the rights of corporations, it is moſt deſirable and neceſſary, that the law ſhould be certain, not only in reſpect of the matter, but alſo in reſpect of the form and manner of all their proceedings.

But my mind, with regard to *Marſhall* and *Grubb*, is conſiderably eaſed, by being of opinion, that the judgment of *ouſter* on this record will not bar them, if they apply in a proper way: becauſe they will then have a new title, not affected by the preſent judgment. It may happen, that perſons might apply at one time under the act of parliament, when they had no title; and at the end of ſix months after they might have a very good one. If it ſhould be ſo in reſpect of theſe two defendants, the queſtion is ſtill open.

This caſe, as it is now brought before the Court, is an information againſt the two defendants, to ſhew by what authority they claim the offices of freemen, free-burgeſſes, and common-council-men of the town and borough of *Galway*. As to the offices of *common-council-men* and *free-burgeſſes*, the qualification and mode of election depend intirely upon the *conſtitution of the borough*. As to the office of *freemen*, there are two modes of acquiring that right: the one, according to the conſtitution of the borough, by the election of the mayor, common-council, and freemen, in general aſſembly, agreeable to the rules of the borough and its charter: the other, by ſpecial act of parliament, which conſiſts and is complicated of many facts. This latter gives a *right* only, not a *title*; becauſe the qualifications of the claimants

claimants muſt be judged of. They are to be tradeſmen of certain trades mentioned; inhabitants within the borough for a year preceding; Proteſtants profeſſed for ſeven years; and then they are to apply for their freedom. The act therefore gives but a *qualification*. The mode of obtaining their freedom is by application to the mayor upon the facts before mentioned. The mayor, therefore, *ex officio*, is to judge whether they are qualified within the act or not; if they are, he muſt admit them; if not, he ſhould reject them; and if he ſwears any one in without a qualification, ſuch perſon may be *ouſted* by an information.

But theſe two modes of acquiring the freedom of this corporation are attended with different conſequences. The freemen elected according to the conſtitution of the borough, remain in poſſeſſion of their franchiſe *for life*: thoſe admitted under the act of parliament, continue ſo only during their actual *reſidence* in the town. It is neceſſary therefore to know which are choſen the one way, and which the other.

To the preſent information in nature of *quo warranto*, the two defendants have pleaded the *qualification* under the *act* of parliament. They certainly have pleaded that they deſired to be ſworn under the act of parliament: but then they join the title of common-council-men and the office of freemen in the ſame right, and they apply exactly the ſame words to each. They aver, that they were firſt propoſed by the common-council, purſuant to the new rules for regulating the town of *Galway* ſtated in the plea, which require that they ſhould be firſt approved of by the common-council, and

propounded to be elected at the *Tholſell*. But that is not neceſſary under the act of parliament 4 *G.* 1. Then they ſtate that they were *duly elected*, and that being *ſo elected* into the office of freemen, free burgeſſes, and common-council-men reſpectively, they took the oaths before the *mayor* and *two burgeſſes*; which is the form in caſes of election by the *conſtitution* of the borough. Here, therefore, they plainly reſt their title on *election*, and go to iſſue on that title.

Upon this record it does not appear that they took any ſtep to be made freemen by the act of parliament; therefore they have not ſhewn a complete title under the act of parliament: but reſt their claim upon another title, upon which they have gone to iſſue, and which has been found againſt them. It is impoſſible therefore to give judgment for them.

The next, which is an objection of leſs difficulty, is, that the Judge below has refuſed to go into the qualification and capacity of ſeveral freemen and common-council-men who offered their votes. Let us ſtate the objection as it is put, and examine it. The propoſition is, that the Judge, on this information, ſhould have done exactly what he ought to have done, if the title of theſe perſons, who were common-council-men *de facto*, had actually been in queſtion before him upon *quo warranto*. They were *de facto* members of the corporation, admitted, ſworn, and in the actual enjoyment of the office. The queſtion is, whether the Judge *collaterally* at the trial ought to have gone into the validity of theſe men's titles? Could the mayor have gone into it at the election? I am very clear he could not. There are modes ſufficient, open to the partiality of returning-

returning-officers, without adding more. Where the qualification is to be judged of by him, it cannot be avoided. In caſes of elections in the city of *London*, certain qualifications are required at the poll: therefore it muſt be ſeen that in ſome degree the candidates have that qualification. So where an election is to be tried which may involve many other rights. But where the right of election is in freemen in their corporate deſcription; whether they were duly choſen or not, is not to be tried at the election of a third perſon; but they muſt be properly *ouſted*. What? after a poſſeſſion of twelve years, ſhall their right be called in queſtion and tried on an information againſt other perſons who are propoſed to be freemen? It is impoſſible to be done. Suppoſe the right depended upon their being ſworn in before twelve burgeſſes: is the right of thoſe twelve to be tried in an information againſt one? But the objection would go further; for there are corporations where there are thouſands of freemen. Upon the trial of a right of a freeman's election made by them, is the Court to go into the qualifications of all the thouſand to have been made freemen at the time they were elected? Certainly not. For this purpoſe they are to be conſidered as having a right. It is ſtronger too in the preſent caſe, becauſe theſe were reſtored upon a *mandamus*, though I do not go upon that. It is all one objection. It would be to lay down a rule, that a party upon every new election, ſhall be at liberty to go into the corporate rights of all the members *de facto*; which is a propoſition that was never before heard of. Therefore I think the Judge did right in refuſing evidence to impeach their titles.

Suppoſe a corporate body conſiſting of twenty-four were to add ten to their number. That would be an abſolute nullity; becauſe they never were corporators *de facto*. But the preſent queſtion is, whether in a *quo warranto* againſt particular members, you can go into the title of other corporators *de facto?* And I am clearly of opinion you cannot.

Aston, *Juſtice.*—Upon the ſecond queſtion I am very clearly of the ſame opinion. The *Carmarthen* caſe is in point.

The more material queſtion is the firſt queſtion, whether upon this record, there is ſufficient to diſtinguiſh the caſe of *Grubb* and *Marſhall* from the others? It does appear, that perhaps *Grubb* and *Marſhall* may have been very well intitled under the ſtatute 4 *Geo.* 1. to have demanded their freedom. But I cannot conceive a caſe, where a man has a right under a charter or ſtatute by claiming it of the proper perſon, that, if refuſed upon that claim, and that claim only appearing on the record, it would be a good and complete right without a real admiſſion. Upon the whole of the record, I think that *Grubb* and *Marſhall* have put their defence upon their election, and ſtand on the ſame title as the reſt. They have pleaded the uſage of the borough in relation to the election. They then ſtate the new rules of *Ireland* relating to this town of *Galway*; that nothing ſhall be done by the *tholſell* 'till it has paſſed the common-council. Then they ſtate the oath to be adminiſtered; their reſidence; their being Proteſtants; their offer to take the oaths; and the demand of their freedom purſuant to the act. But ſaying ſo, does not make it in purſuance of the act.

Then

Then they ſtate that a *tholſell* was held, and that *Grubb* and *Marſhall* were propounded to be admitted; and were in due manner *elected* in conſequence. They plead therefore juſt as the reſt do. They join with the reſt at leaſt in ſaying they were *elected*, and that they took the *oaths* agreeable to *the charter*. Upon this plea therefore this was not a demand of their freedom in conſequence of the qualification under the act; but they have pleaded that they were elected as other perſons, without the act. The iſſue purſues the plea, that they were not elected; and I am clearly ſatisfied that this was a proper and not an immaterial iſſue.

WILLES, *Juſtice*.—I am clearly of the ſame opinion on the firſt point, but not on the ſecond: with reſpect to which the doubts I before entertained are not ſatisfied.—There is a confuſion upon the record whether freemen and freeburgeſſes are not the ſame. But certainly the common-council-man was a different perſon, and is not included in the act of parliament. The firſt right is by election, according to the cuſtom of the borough, and where a man is *elected*, he is in for life, unleſs he commits a forfeiture of his franchiſe. But the act of parliament declares the freedom ſhall continue only during reſidence. As it ſtands on the record, I cannot agree with my brother *Aſton* that the plea of all the defendants is alike. For *Grubb* and *Marſhall* have pleaded a title under the act of parliament. The others do not. The queſtion therefore is, whether there is enough ſtated in the plea to ſhew they are intitled under the act of parliament, and have done enough to acquire their freedom. If there is enough to ſhew that, and the iſſue is

joined on the election, it is an immaterial iſſue.

Now they firſt ſtate the qualifications; next the act of parliament: what is the other requiſite for them to do? they are to demand their freedom purſuant to the act. Does the plea go to it? The words are, "that they offered to take the oaths purſuant to the act of parliament." This was previous to any claim they had by election. But then they confound the two rights, by ſaying they *elected* and *admitted* them: as if the one term applied to one right, and the other to the other. They add that they have taken the oaths before the *mayor* and *two* of the *burgeſſes*; but joining the *burgeſſes* was not a neceſſary circumſtance upon taking the oaths on admiſſion: if they took them before the mayor, they had a right under the act of parliament. I do not therefore think the judgment of *ouſter* ſhould paſs againſt them.—There is a ſtrong caſe in *Strange*, 625. *Rex* verſus *Hearle*, which makes me alſo in doubt, whether the judgment of *ouſter* on this record will not bar the defendants title under the act, even if they ſhould apply in a proper way; unleſs they can ſhew a new *ſubſequent* acquired right.

Ashhurst, *Juſtice*.—I had a doubt about a repleader upon the firſt title: but the joining iſſue upon the election makes the title under the act of parliament unneceſſary. For if they had meant to have relied on that, they would have demurred to the replication.

Further, upon theſe pleadings, the title they have ſet forth in the plea under the act of parliament, is not complete; becauſe the qualifi-

cation of being a Proteſtant, *&c.* is not a complete, but an inchoate title; which they had a right to have rendered complete, by taking the proper ſteps before the mayor. Have they taken thoſe ſteps? If they meant to be admitted under the act, they ſhould have given notice of ſuch their intention. But it does not appear that they applied to the mayor to be admitted under the act. The contrary rather appears: for the admiſſion ſet out is, an admiſſion by the *mayor* and *common-council*; which was an admiſſion *under the charter*; and not under the act of parliament. Therefore, if there is not a complete title under the act of parliament, judgment of *ouſter* muſt go againſt them.

Beſides, the court will not grant a repleader, but where complete juſtice may be anſwered. If a repleader were to be granted, the parties muſt begin from the point of pleading where the immateriality begins: the defendants ſay, it is in the replication. I think the iſſue taken on the replication is not an immaterial iſſue. What would be the conſequence of granting a repleader? The relator might reply *de novo*. He might in that caſe demur; it would be doing nothing more therefore than putting him to demur for the duplicity of the plea, and the ends of juſtice would not be anſwered. If judgment of *ouſter* is given on this right, it will not make the other title of the defendants bad. Therefore I think the judgment ought to be againſt them.

On the ſecond point I concur, that the diſqualification of voters for non-reſidence ought not to have been gone into at the time of election. If upon ſuch a general iſſue as *non fuit electus*,

electus, it could be done, it would be the cauſe of endleſs prolixity.

Judgment affirmed.

As the doctrine of repleader is not generally known, the following abſtract of caſes (collected together in *Com. Dig.* V. 5 & 6.) may prove uſeful, as containing a great deal of matter, thrown into a narrow compaſs.

Yel. 210. Dan. Ab. 720. In an action againſt huſband and wife, both ought to join in plea, and therefore if the wife alone comes and pleads, there ſhall be a repleader.

2 Cro. 28 So, if the entry be that the huſband and wife come and defend the force and injury, and the aforeſaid *wife* ſaith that ſhe is not guilty.

5 Com. Dig. 168. Though the *firſt* be ſuppoſed by the wife only: as, in battery againſt huſband and wife, for a battery by the wife.

R. 2 Cro. 288. Yel. 210. So, in *aſſumpſit* againſt huſband and wife, upon a promiſe of the wife *dum ſola*.

R. Yel. 210. So, in an action for words ſpoken by the wife only.

R 1 Brownl. 197. So, in battery againſt huſband and wife and others, if the wife and others plead *not guilty*, and the huſband *ſon aſſault*, it will be bad.

R. 2 Cro. 239. So, in battery againſt huſband and wife, if the huſband juſtifies in aid of his wife, and the wife only pleads *ſon aſſault*, it is bad.

Semb. Cro. Car. 594. So, they ought to join in the averment, *and this they are ready to verify*.

R. Cro. El. 883. R. Hob. 126. R. 2 Cro. 5. But, where the *tort* is ſuppoſed by the wife alone, though both join in pleading, yet the iſſue ought to be, that the wife is not guilty; and therefore in *trover* upon a converſion by the wife, if the huſband and wife plead that *they* are not guilty, it is bad, and a repleader

ſhall be awarded, for it ought to be, that *ſhe* is not guilty.

R. Cont' in an action for words by the wife, for both are chargeable with a wrong done by the wife. Cro. Car. 417. 1 Brownl. 6. Pal. 68. and Q. if this is not law?

R. Acc. in action for words by the wife. Noy, 41.

Yet in debt againſt them, they may plead, that *they* do not owe.

The iſſue that *they* are not guilty cannot be amended. This after verdict. 2 Cro. 530. R. Cont. 1. Brownl. 7.

But, if the dogget be that the huſband and wife *plead* not guilty, and the roll be that the wife *ſaith*, omitting the huſband, it ſhall be amended; for it is only the miſpriſion of the clerk, for the dogget was a warrant to him to enter on the roll a plea for both. R. 2 Cro. 530.

If the verdict finds that the wife alone is guilty, it aids the plea. R. Pal. 68.

If an iſſue is misjoined, or joined on an immaterial point, *&c.* when it is not aided by the *ſtat.* 32 *H.* 8. a repleader ſhall be awarded. Cro. El. 883. R. 1 Lev. 32. (Vide ante.) 2 Mod. 137. 144.

So, if the iſſue joined is nugatory and void, whereon the court cannot give judgment. R. Mod. Ca. 2. Hard. 331.

So, if the iſſue is concluded to the country, where it ſhould be to the record, *&c.* or *è contra.* R. 1 Leo. 90.

There ſhall be a repleader of a bar, replication, or rejoinder, which is bad; for at the firſt defect the repleader begins. Ray. 458.

By the common law, if an immaterial iſſue was joined, the court might award a repleader before trial. 2 Salk. 579.

But will not now, where the iſſue joined will be aided by the ſtatutes of *jeofaile*. R. Mod. Ca. 3. Salk. 579.

So there ſhall not be a repleader where the treſpaſs is confeſſed, though the iſſue was immaterial. 1 Salk. 173.

And

Cro. El. 883. Hard. 331. 1 Leo. 79. There may be a repleader after a verdict.

But generally there ſhall be no repleader upon a demurrer, without the conſent of the parties. *Per* 2 *J. Rol.* 271. *Mo.* 461. *Agr. Mo.* 867. *Lat.* 147. *Adm.* 2 *Lev.* 142. *Cont. allowed* 3 *Lev.* 440. *per Powell Mod. Ca.* 102. *R. Sav.* 89. 2 *Bul.* 37.

Yet, if there be a bad bar, and a bad replication, a repleader may be awarded upon a demurrer. Bro. Replead. 39. *But Periam ſaid, the roll of that caſe could not be found. R. Pl. Com.* 138. *a. But Periam ſaid, that there it was by conſent.* 1 *Leo.* 79. *Acc. per* 3. *J. Periam Cont.* 1 *Leo.* 79. *But in the ſame caſe it is doubted. Sav.* 89. *Semb. Cro. El.* 318. 1 *And.* 167.

R. Mod. C. 3. So there ſhall be no repleader, where by the defect in joining iſſue, there is a diſcontinuance.

R. 1 Salk. 216. 2 Salk. 579. Or the defendant make default at the trial, whereby he is out of court.

R. 1. Rol. 287. If iſſue be joined in Chancery, and the record ſent into *B. R.* to be tried, for a defect in the *venire facias* a repleader ſhall be awarded in *B. R.* and not in Chancery; for the record being in *B. R.* can never be remanded.

Per Hale, 2 Saund. 319. 2 Lev. 12. V. ante. So anciently a repleader was awarded upon a writ of error, but this is now obſolete. *Cont.* in *Tindal* and *Brown*, *b.* 152.

R. Mod. Ca. 2 Salk. 579. If a repleader be awarded or denied, when it ſhould not be, it will be error.

Ibid. If a repleader be awarded, the judgment is *quod replacitent*, and the freſh pleading begins where the firſt defect was.

Ibid. There ſhall be no coſts on a repleader. *Sed vide ante* 441, *&c.*

Hackſhaw v. Rawlings, H. 3 G. Stra. 23. There ſhall be no repleader where defendant pleads payment, and acceptance in ſatisfaction of

of debt on bond, and plaintiff takes iſſue on the acceptance.

After inqueſt is taken by default, defendant cannot be received to make ſuggeſtion on the roll, for after default there can be no repleader. Brampton v. Crabb, H. 3 G. Stra. 46.

Although an iſſue is immaterial, yet a repleader ſhall not be granted, if the cauſe can be ended more expeditiouſly; as if the plea be ill, or good in form, though not in fact, and amounts to confeſſion. Rex v. Philips, M. 7 G. Stra. 394.

If plaintiff declares on a leaſe to *A.* which he lays is come by aſſignment to defendant, and he pleads that *A.* did not aſſign to him, and iſſue is joined, there ſhall be a repleader, for it is an immaterial iſſue. Enys v. Mohun, M. 3. G. 2 Stra. 847.

In debt on bond, if defendant pleads payment before the day under a *ſcilicet*, there ſhall not be a repleader. Cowne v. Barry, M. 7 G. 2. Stra. 954.

If a bond is conditioned for payment of money, *on or before* 5th of *December*, and defendant pleads payment on 5th of *December*, and plaintiff replies, and verdict for plaintiff, there ſhall be a repleader, for it is an immaterial iſſue. Tryon v. Carter, M. 8 G. 2. Stra. 994.

Qu. de hoc? Suppoſe evidence of payment before the day, is not that payment on the day?

When the finding on an iſſue does not determine the right, the court ought to award a repleader, unleſs it appears from the record, that no manner of pleading the matter could avail. Rex v. Philips, p. 30 G. 2. 1 Burr. 292. which vide ante.

FINIS.

This Day is publiſhed,

In three large VOLS. Octavo, price £.1. 2*s. bound,*

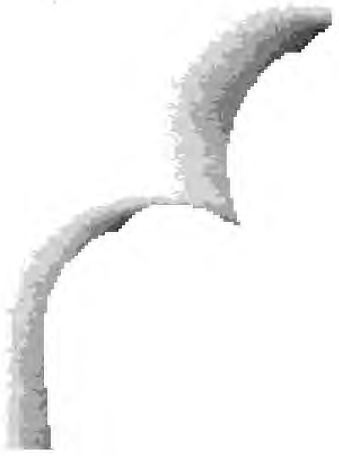
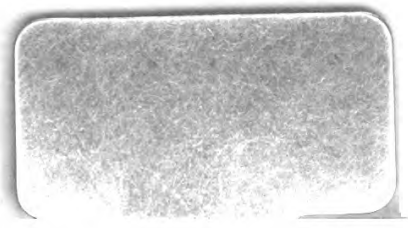
THE ATTORNEY'S VADE-MECUM,

AND

CLIENT'S INSTRUCTOR,

Treating of ACTIONS, ſuch as are now moſt in uſe; of PROSECUTING and DEFENDING them; of the PLEADINGS and LAW; alſo of HUE and CRY. The ſubjects arranged in a clear and perſpicuous manner.

By JOHN MORGAN, of the INNER TEMPLE, BARRISTER at LAW.

Printed by his Majeſty's Law Printers, for T. CADELL, in the Strand; P. URIEL, Inner Temple-Lane; and T. WHIELDON, in Fleet-Street.

*** The third Volume conſiſting of PRECEDENTS, adapted to the Work, and arranged according to its order, many of them drawn by the ableſt pleaders; others tranſlated from the beſt Latin entries; and all reviſed by the author; may be had ſeparate. Price 7*s.* in boards.