REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

Court of King's Bench,

With Tables of the Names of Cases and Principal Matters.

By EDWARD HYDE EAST, Esq.

OF THE INNER TEMPLE, BARRISTER AT LAW.

Si quid novisti rectius istis,
Candidus imperti; si non, his utere mecum. Hor.

VOL. IX.

Containing the Cases of Michaelmas, Hilary, and Easter Terms
In the 48th Year of Geo. III. 1807 and 1808.

LONDON:

PRINTED BY A. STRAHAN,

LAW-PRINTER TO THE KING'S MOST EXCELLENT MAJESTY;

FOR J. BUTTERWORTH, LAW-BOOKSELLER, FLEET-STREET
AND J. COOKE, ORMOND QUAY, DUBLIN.

1808.

JUDGES

OF THE

COURT OF KING's BENCH,

During the Period of theſe REPORTS.

EDWARD Lord ELLENBOROUGH, C. J.
Sir NASH GROSE, Knt.
Sir SOULDEN LAWRENCE, Knt.
Sir SIMON LE BLANC, Knt.
Sir JOHN BAYLEY, Knt.

ATTORNEY-GENERAL.

Sir VICARY GIBBS, Knt.

SOLICITOR-GENERAL.

Sir THOMAS PLUMER, Knt.

A

TABLE

OF THE

CASES REPORTED

IN THIS NINTH VOLUME.

N. B. Thoſe Caſes which are printed in *Italics* were cited from MS. Notes.

Collins

ERRATUM.

In Vol. VIII. p. 568. lines 5 and 6. *for* "deviſeable" *read* "diviſible."

CASES

CASES

ARGUED AND DETERMINED

IN THE

Court of KING's BENCH,

IN

Michaelmas Term,

In the Forty-eighth Year of the Reign of GEORGE III.

WM. ROBINSON *againſt* CHIPCHASE GREY, MARGARET ROBINSON, WM. GREY, and T. R. GREY.

THE Maſter of the Rolls ſent the following caſe for the opinion of this Court.

Margaret Robinſon by her will, dated the 10th of *March* 1762, duly executed and atteſted, after reciting

One, having entered into articles of agreement for the purchaſe of certain premiſes, deviſed the ſame

to a truſtee to pay the rents and profits to her three daughters (one of them being covert), and the ſurvivor of them, for their lives, ſhare and ſhare alike: and, after their deceaſe, in truſt for all and every the *child and children* of her three daughters who ſhould be living at the death of the ſurvivor of them, as tenants in common: but if all her daughters ſhould die without leaving any *iſſue*, then after the deceaſe of the ſurvivor, in truſt for her grandſon in fee, who was her *heir at law*: the reſidue of her real and perſonal eſtate to her three daughters. Upon a bill filed by the grandſon in the lifetime of the ſurviving daughter to reſtrain the tenant from cutting timber, &c.; and after a conveyance of the premiſes to the uſes of the will; held that under the will and deeds of leaſe and releaſe the three daughters took no legal eſtates, but that the releaſee took an eſtate for the lives of the daughters; and that ſuch of their children as ſhould be living at the death of the ſurvivor of the daughters would take eſtates *in fee* as tenants in common.

1807.

ROBINSON [illegible] and others.

that ſhe had lately entered into articles of agreement with *J. Roſamond*, and *Henry Waſtell*, clerk, for the purchaſe of ſeveral meſſuages and other premiſes in *High-ſtreet, Sunderland*, in the ſeveral occupations of *M. Harriſon, Chipchaſe Grey*, and others named, as tenants thereof; which agreement had not been carried into execution; ſhe thereby deſired that her executrix after named ſhould, as ſoon as conveniently might be after her deceaſe, procure the ſaid agreement to be carried into execution, and raiſe and pay the purchaſe-money out of her perſonal eſtate; (except the plate, china, houſehold goods, and other furniture in her dwelling-houſe at the time of her death), or by ſale or mortgage of the premiſes ſo purchaſed. The will then proceeded: "And I do hereby "give and deviſe the ſaid meſſuages and other premiſes "ſo purchaſed as aforeſaid to Lady *Ann Middleton*, her "heirs and aſſigns, upon the ſeveral truſts, and for "the uſes, intents, and purpoſes following; viz. in truſt, "firſt, *to pay the rents and profits* of the ſaid premiſes *to* "*my three daughters, Elizabeth Robinſon, Ann*, wife of "*Chipchaſe Grey*, and *Margaret Robinſon*, and to the ſur-"vivor of them, for their reſpective natural lives, to be "equally divided amongſt them ſhare and ſhare alike. "And I order and direct that the ſhare of my ſaid daugh-"ter, *Ann Grey*, ſhall be paid into her own proper hands, "&c. for her ſeparate uſe, and that her receipt, notwith-"ſtanding her coverture, ſhall be a ſufficient diſcharge "for the ſame. And from and immediately after the "deceaſe of all my ſaid daughters, the ſaid premiſes and "the rents and profits thereof ſhall be in truſt for all "and every the child and children, as well ſons as daugh-"ters, of my ſaid three daughters, *Elizabeth, Ann*, and "*Margaret*, who ſhall be living at the death of the ſur-"vivor

1807.

ROBINSON *againſt* GREY and Others.

" vivor of my ſaid daughters, ſhare and ſhare alike; to " take as tenants in common and not as joint tenants. " But if all my ſaid daughters ſhall happen to die with- " out leaving any iſſue, then immediately from and after " the deceaſe of the ſurvivor of my ſaid daughters, in " truſt for my grandſon, *Wm. Robinſon*, his heirs and " aſſigns for ever. And my will is that the ſaid pre- " miſes ſhall be conveyed in purſuance of the ſaid agree- " ment to and for the ſeveral uſes, intents, and purpoſes " hereinbefore limited, expreſſed, and declared. Alſo I " give and bequeath to my ſaid daughters *Elizabeth* " *Robinſon*, *Ann*, and *Margaret Robinſon*, all the plate, " china, houſehold goods, and other the furniture, &c. re- " maining in my dwelling-houſe at the time of my death, " equally to be divided between them, ſhare and ſhare " alike. And as to all the *reſt and reſidue* of my *real* and " perſonal eſtate, whatſoever and whereſoever, or of what " nature or kind ſoever, I give and deviſe the ſame to " my ſaid three daughters, their heirs, executors, &c. to " be equally divided amongſt them, ſhare and ſhare alike; " ſubject nevertheleſs to the payment of all my juſt " debts, legacies, and funeral expences, which I hereby " direct to be paid thereout by my ſaid executrix. Pro- " vided nevertheleſs, that the ſaid ſeveral bequeſts to my " daughter *Elizabeth Robinſon* are not intended to be any " ſatisfaction to her for a debt of 100*l.* due from me to " her, and ſecured by bond dated the 9th of *March* " inſtant; which I will that ſhe ſhall receive out of my " eſtate and effects, over and above what is hereinbefore " given to her. And I appoint the ſaid Lady *Ann Mid-* " *dleton* ſole executrix of this my will," &c.

The teſtatrix died on the 24th of *March* 1762, leav-

1807.

ROBINSON *againſt* GREY and Others.

ing the plaintiff, *Wm. Robinſon*, her grandſon and heir at law, and leaving alſo her ſaid three daughters, her ſurviving. Lady *Ann Middleton* declined to act in the truſts of the will, and having renounced the execution thereof, by indentures of leaſe and releaſe of the 12th and 13th of *February* 1767, made after her death, the ſaid *Henry Waſtell* and *John Roſamond* being ſeiſed in fee, and one *Wm. Middleton*, heir of the ſaid Lady *Ann*, did, for the conſideration therein mentioned, convey the premiſes in the will mentioned, in purſuance of the ſaid agreement, unto the ſaid *Wm. Robinſon*, his heirs and aſſigns, to the uſes following, viz. To the uſe of one *Adam Boulby*, his executors, &c. for the term of 2000 years, in mortgage, for ſecuring 1028*l.* and intereſt as therein mentioned; and ſubject thereto, upon the truſts and for the intents and purpoſes declared concerning the ſame in the will of the teſtatrix *Margaret Robinſon*. The ſaid mortgage term of 2000 years has by divers meſne aſſignments become veſted in *Chipchaſe Grey*. After making the ſaid indentures of leaſe and releaſe, *Ann*, wife of the ſaid *Chipchaſe Grey*, and daughter of the teſtatrix, died, leaving two children, viz. the defendants *Wm. Grey* and *T. R. Grey*, her ſurviving; and *Elizabeth Robinſon*, afterwards *E. Scott*, another of the teſtatrix's daughters, after the making of theſe indentures, alſo died without leaving any iſſue living at her death; and the defendant, *Margaret Robinſon*, is the ſurviving daughter of the teſtatrix. *Chipchaſe Grey* has, by virtue of the ſaid mortgage, and with the conſent of *Margaret Robinſon*, *Wm. Grey*, and *T. R. Grey*, been for many years in the poſſeſſion of the demiſed premiſes, and has cut down timber, and otherwiſe committed waſte thereupon; the

ſaid

ſaid *Wm. Robinſon* claiming to be entitled under the ſaid will to the remainder in fee of the premiſes expectant upon the death of *Margaret Robinſon*, *Wm. Grey*, and *T. R. Grey*. In *Michaelmas* term 1803, *Wm. Robinſon* exhibited his bill in Chancery againſt *Chipchaſe Grey*, *Margaret Robinſon*, *Wm. Grey*, and *T. R. Grey*, to have his right thereto declared and eſtabliſhed by a decree of the ſaid Court, and that *Chipchaſe Grey* might be reſtrained from cutting down timber and committing waſte on the premiſes. To which bill the defendants appeared and put in their anſwer: and on the 19th of *March* 1805 the cauſe came on to be heard before the Maſter of the Rolls, when his Honor ordered that this caſe ſhould be ſtated for the opinion of this Court upon the following queſtion; "What eſtate and intereſt the teſta- "trix *Margaret Robinſon*'s three daughters, *Elizabeth* "*Robinſon* ſpinſter, *Ann Grey* wife of *Chipchaſe Grey*, "and *Margaret Robinſon* ſpinſter, and the ſurvivor of "them, and their children, or ſuch of them as ſhould "be living at the death of ſuch ſurvivor, reſpectively "took under the ſaid teſtatrix's will and the ſaid inden- "tures of leaſe and releaſe?"

This caſe was argued in *Trinity* term laſt, by *Abbott* for the plaintiff, and *Holroyd* for the defendants: when it was admitted that the uſe was executed in the truſtee during the lives of the three daughters, *Elizabeth*, *Ann*, and *Margaret*; the truſtee being directed to pay the rents and profits into the hands of the daughters and the ſurvivor of them, one of whom alſo was a married woman; which could not be done, unleſs the truſtee were entitled firſt to receive and take ſuch profits; which carries the legal eſtate, according to *Jones* v. *Lord Say*

1807.

ROBINSON *against* GREY and Others.

and Sele (*a*), and *Doe* v. *Simpſon* (*b*). The queſtion therefore turned principally on the eſtate in remainder which the teſtatrix's daughters or their children might take by implication from the deviſe over being to the *heir at law* in a certain event only: aſſuming it to be clear that a legal remainder to the iſſue could not unite with a prior equitable eſtate for life to the daughters, ſo as to give them eſtates of inheritance in the firſt inſtance: and that the Court would not execute the uſe in the truſtee beyond what was neceſſary to give effect to the intention of the teſtatrix. And though at the time of making the will, the teſtatrix, having only an equitable, though a deviſable (*c*), intereſt in the premiſes contracted to be purchaſed, could not carve a legal eſtate out of it; yet the legal conveyance being afterwards made according to the truſts and uſes of the will, the queſtion came to be argued as if the terms of the will had been introduced into the deed; the legal eſtate paſſing by the deed, and the will operating in effect as a declaration of the uſes. However, it was agreed, at the requeſt of the Court, to relieve them from any difficulty in deciding on the deviſe of a mere equitable title, that the caſe ſhould be argued as if the teſtatrix had been ſeiſed in fee of the premiſes.

Abbott on the part of the plaintiff argued, that the children of the three daughters who happened to ſurvive all the three daughters (and ſuch only would take any

(*a*) 8 *Vin. Abr.* 262. and vi. *Bagſhaw* v. *Spencer*, 1 *Veſ.* 144. and *Harton* v. *Harton*, 7 *Term Rep.* 654.

(*b*) 5 *Eaſt*, 171.

(*c*) *Langford* v. *Pitt*, 2 *P. Wms.* 629. and vide 1 *Eq. Caſ. Abr.* 174. which collects the prior authorities.

thing)

1807.

ROBINSON *againſt* GREY and Others.

thing) took only eſtates for life; 1ſt, conſidering only the words of deviſe to the children, without the limitation over to the teſtatrix's grandſon *Wm. Robinſon*; 2dly, conſidering the firſt deviſe, with reference to the limitation over. 1ſt, The deviſe is of "the *ſaid premiſes*, and the *rents and profits thereof*, in truſt for all and every the *child* and *children*, as well *ſons* as *daughters*, of my ſaid three daughters, who ſhall be living at the death of the ſurvivor of my ſaid daughters, ſhare and ſhare alike, to take *as tenants in common* and not as joint-tenants." There is nothing in the deſcription of "the ſaid *premiſes* and the *rents and profits* thereof" to ſhew that any greater eſtate than for life was intended to be paſſed. There is not even ſo ſtrong a word as *hereditament*, which, however, in *Denn* v. *Miller* (*a*), was held not to be ſufficient to carry the fee. Nor are there any words of inheritance or limitation to carry a greater eſtate than for life. Then, 2dly, the word *iſſue* in the next clauſe limiting over the eſtate to the grandſon cannot enlarge the prior deviſe to the *children* of the daughters to which it refers: but it muſt be taken to be there uſed ſynonimouſly to children; in which ſenſe it is ſometimes uſed; as in *Goodright* v. *Dunham* (*b*), and *Doe* v. *Perryn* (*c*). [*Le Blanc* J. obſerved that in thoſe caſes the limitations were to the children *and their heirs;* and for default of *iſſue*, then over (*d*).] But here there are no words of limitation in the prior deviſe to carry a fee to the children; and the Court cannot ſupply them by conjecture of what the teſ-

(*a*) 5 *Term Rep.* 558. 6 *Term Rep.* 175. 1 *Boſ. & Pull.* 559. and 2 *Boſ. & Pull.* 247.

(*b*) *Dougl.* 264. (*c*) 3 *Term Rep.* 484.

(*d*) Vide *Lewis* v. *Waters*, 6 *Eaſt*, 336. and *Rex* v. *The Marquis of Staffford*, 7 *Eaſt* 521.

1807.

ROBINSON against GRAY and Others.

tatrix might have intended, however hard the caſe may ſeem (*a*). The period contemplated by the teſtatrix was the death of the laſt of her daughters; if they left any children, then thoſe children were to take, but for life only, for want of words to carry a greater eſtate: if there were no ſuch children then living, the grandſon was to take in fee.

Holroyd, on the part of the defendants, admitted, that if there had been nothing more in the will than the deviſe to the children living at the death of the ſurvivor of the three daughters, the children would only have taken eſtates for life: but he relied on the ſubſequent limitation over to *Wm. Robinſon*, who was the *heir at law* of the teſtatrix (a circumſtance material to be conſidered) in default of iſſue of the daughters. And he contended, 1ſt, either that the three daughters would take eſtates for lives, as joint-tenants; remainder to their children for lives, as tenants in common; with a veſted remainder in fee, or at leaſt in tail, to the three daughters by implication: or, 2dly, that after ſuch life eſtates, the children, as they came in eſſe, would take a veſted remainder in fee by implication, liable to be deveſted as to ſuch of them who died before the three daughters, or the ſurvivor of them: or, 3dly, that the daughters would take a veſted remainder in tail, after the life eſtates to them and their children; with a contingent remainder in fee to the children, as they came in eſſe; which would veſt in ſuch as were living at the death of all the daughters; which remainder was liable to be defeated by the particular event of the daughters dying, without leaving iſſue at the death of the ſurvivor; in which event

(*a*) *Doe* v. *Bagſhaw*, 6 *Term Rep.* 512.

only

only the eſtate is given over to *Wm. Robinſon, the heir;* who would take either by contingent remainder, if the whole fee were not before diſpoſed of; or by way of executory deviſe in the particular event, if it were: or, 4thly, ſuppoſing that the whole eſtate was not given over by implication to the daughters, or to their children, by the clauſe referred to, that the three daughters would take the fee, as tenants in common, under the reſiduary clauſe, giving to them and their heirs, equally to be divided amongſt them, ſhare and ſhare alike, the reſidue of the real and perſonal eſtate. The deviſe over to *Wm. Robinſon*, the heir at law, was not *generally*, but only in the particular event of there being no iſſue of the daughters living at the death of the ſurvivor of them; and there was no occaſion to deviſe the fee to him generally, in caſe none of the children ſurvived the daughters; for the law would have given it to him without the appointment of the teſtatrix. But it is clear that in the event of the daughters' leaving children the teſtatrix meant that it ſhould not go to her heir at law; and therefore the daughters muſt take ſome larger eſtate than for life; for unleſs they did, as the children were to take as tenants in common, upon the death of either, the ſhare of that one would go over to the heir at law; but he was not to take in the event of there being any iſſue left at the death of the ſurvivor of the daughters. By this the daughters would take a veſted remainder in fee, according to the doctrine in *Purefoy* v. *Rogers* (*a*), recognized by Lord C. J. *Willes* in *Moore* v. *Heaſeman* (*b*). So in *Doe* v. *Clayton* (*c*), where the teſtator deviſed his eſtate *at Eaton* to his grandſon, without any words of inheritance or limitation; yet this being accompanied with a prohibition to the huſband of his daughter and heir at law to

(*a*) 2 *Saund.* 388. *a.* (*b*) *Willes*, 143. (*c*) 8 *Eaſt*, 141.

"come

1807.

ROBINSON against GREY and Others.

"come upon his premiſes or hereditaments on any account whatſoever;" this was held to give a fee to the grandſon by implication. But certainly the daughters would not take leſs than a veſted remainder in tail, according to *Ives* v. *Legge* (*a*). The caſes of *Goodright* v. *Dunham*, and *Doe* v. *Perryn*, do not apply; for there the word *iſſue* clearly applied to children: but if the children of the daughters had died leaving iſſue, it could never have been the intention of the teſtatrix that the limitation over to *Wm. Robinſon* ſhould take effect. But if the daughters do not take a fee, their children muſt, as *the heir at law* is at all events excluded if the daughters die leaving iſſue. On the 4th point there are authorities to ſhew, that the whole intereſt of the deviſor not before diſpoſed of may paſs by a reſiduary clauſe to one to whom an eſtate for life was before given in the ſame premiſes; as *Hogan* v. *Jackſon* (*b*), and *Ridout* v. *Pain* (*c*).

In reply, it was urged, that as the daughters of the teſtatrix were admitted to take equitable eſtates for lives in the firſt inſtance, they could not take eſtates tail by the limitation over in default of their *iſſue*; which being a legal limitation could not coaleſce with a prior equitable eſtate for life. For the truſtee takes the firſt eſtate; and therefore the limitation over is the ſame in effect as if made in default of iſſue of a ſtranger, to whom no prior deviſe for life was made; and there is no caſe to ſhew that an eſtate tail can ariſe by implication from a deviſe over in default of the iſſue of a perſon to whom no life eſtate is before expreſsly given by the will. [*Lawrence* J. Was it not held otherwiſe in *Walter* v.

(*a*) 3 *Term Rep.* 488. in notis, and 1 *Fearn's Cont. Rem.* 554.

(*b*) *Cowp.* 299.

(*c*) 3 *Atk.* 493. and ſee alſo *Camfield* v. *Gilbert*, 3 *Eaſt*, 516.

Drew,

1807.

ROBINSON *againſt* GREY and Others.

Drew (*a*), in the caſe of an heir at law?] In *Moone* v. *Heaſeman*, the deviſe over to the heirs of the mother, in caſe the daughters died before their mother, was to the ſame perſon who took the intermediate eſtate: but here *Wm. Robinſon*, though the heir of the teſtatrix, was not neceſſarily the heir of his aunts. And in *Doe* v. *Clayton* the conſtruction aroſe upon the different proviſions of the whole will. Every eſtate which any perſon can take on the death of the daughters having children muſt be contingent, whether the children would take for life or in fee: for none of the children can take but in the event of their ſurviving the three daughters. At law the daughters themſelves can take nothing: on their death ſuch of the children as are then living will take for life; or if none be then living, *Wm. Robinſon* will take a fee. Then if the firſt remainder be contingent, every ſubſequent remainder muſt be contingent alſo, according to *Lodington* v. *Kime* (*b*).

The following certificate was afterwards ſent to his Honor.

This caſe has been argued before us by counſel: we have conſidered it, and are of opinion, that, under the will and the indentures of leaſe and releaſe, the three daughters of the teſtatrix, *Elizabeth*, *Anne*, and *Margaret*, did not take any legal eſtates; but that *Wm. Robinſon* the releaſee in the indentures of leaſe and releaſe took, ſubject to the term of 2000 years, an eſtate for the lives of the ſaid three daughters, and the life of the ſurvivor of them; and that ſuch of their children as ſhall

(*a*) *Com. Rep.* 372. and vide *Target* v. *Grant*, per *Parker* C. 10 *Mod.* 403.

(*b*) 1 *Salk.* 224.

be

1807.

ROBINSON against JELF and Others.

be living at the death of the ſurvivor of the ſaid daughters of the teſtatrix will take eſtates in fee, as tenants in common, ſubject to the ſaid term of years.

17th *June* 1807.

ELLENBOROUGH.
N. GROSE.
S. LAWRENCE.
S. LE BLANC.

Saturday, Nov 7th.

GILES and Another *againſt* PERKINS and Others, Aſſignees of DICKENSON and Others, Bankrupts.

A cuſtomer paying bills, not due, into his bankers' in the country, whoſe cuſtom it was to credit their cuſtomers for the amount of ſuch bills, if approved, as caſh, (charging intereſt), is entitled to recover back ſuch bills in ſpecie from the bankers becoming bankrupt; the balance of his caſh account independent of ſuch bills being in his favour at the time of the bankruptcy: and if payment be afterwards received upon ſuch bills by the aſſignees, they are liable to refund it to the cuſtomer in an action for money had and received.

DICKENSON and Co. were bankers at *Birmingham*, with whom the plaintiffs had opened a banking account in 1804, which was continued down to the 18th of *November* 1805, when *Dickenſon* and Co. ſtopped payment and became bankrupts. On the 12th of *November* 1805 the plaintiffs paid into the bank three bills to the amount of above 1100*l.*, which were indorſed by them, but were not due till *December* and *January* following; and at the time of the bankruptcy there was a conſiderable balance due to the plaintiffs upon their caſh and bills (due) account, independent of the three bills in queſtion. It was ſtated to be the practice of this and other banking houſes in the country, that when bills which were approved were brought to them by a cuſtomer, though the bills were not then due, if they had not a long time to run, they would enter them in a groſs ſum with caſh, or paper which was immediately payable, to the credit of the cuſtomer; giving him either caſh or liberty to draw upon them to that amount.

And

1807.

GILES against PERKINS.

And the bankers ſo far conſidered theſe running bills (which were always indorſed by the cuſtomer) as their own, that they would, as convenience required, pay them away to other cuſtomers in the uſual courſe of buſineſs, or tranſmit them to their own correſpondents in *London*: and intereſt was charged on both ſides the account on ſuch paper tranſactions; and if the intereſt account turned out to be againſt the cuſtomer, the bankers alſo charged a certain commiſſion. Differing in this reſpect from the practice of bankers in *London*, who upon the receipt of undue bills from a cuſtomer do not carry the amount directly to his credit, but enter them ſhort, as it is called; that is, note down the receipt of the bills in his account, with the amount, and the times when due, in a previous column of the ſame page; which ſums when received are carried forwards into the uſual caſh column. In the preſent caſe the aſſignees of the bankrupts conſidering that the three bills in queſtion had been entered in the bank books in common with caſh, and that by the uſual mode of dealing the plaintiffs might have drawn for the amount before the bills were due, refuſed to deliver them up to the plaintiffs on demand; and as they became due the aſſignees received the money from the acceptors, to the credit of the bankrupts' eſtate: for which the plaintiffs brought their action for money had and received. And the queſtion was, whether they were entitled to receive back theſe bills in ſpecie from the bankrupts at the time of their bankruptcy, the ſame not being then due, though indorſed by them, and the balance of the caſh account being in favour of the plaintiffs; or whether they were only entitled to come in as creditors under the commiſſion for the whole amount of their banking account. Lord *Ellenborough* C. J. was of opinion, at the trial before

1807.

GILES against PERKINS.

him at *Guildhall*, that the plaintiffs were entitled to recover; and they accordingly obtained a verdict for the amount of the bills.

Garrow and *Richardson* now moved for a new trial; relying on the course of dealing of country bankers who always entered approved bills at the usual short dates, as cash, and gave the customers the benefit of drawing upon them for the amount accordingly. And he referred to *Bent* v. *Puller* (*a*), where there having been a general bill account between two parties, one of whom became bankrupt, it was considered that the solvent party, in whose favour the balance was, could not maintain trover for the bills deposited by him with the other; they having been paid in on a general account, and not specifically appropriated to answer particular drafts which had not been paid by the bankrupt.

Lord ELLENBOROUGH C. J. Every man who pays bills not then due into the hands of his banker places them there, as in the hands of his agent, to obtain payment of them when due. If the banker discount the bill or advance money upon the credit of it, that alters the case; he then acquires the entire property in it, or has a lien on it pro tanto for his advance. The only difference between the practice stated of *London* and country bankers in this respect is, that the former, if overdrawn, has a lien on the bill deposited with him, though not indorsed; whereas the country banker who always takes the bill indorsed, has not only a lien upon it, if his account be overdrawn, but has also his legal remedy upon the bill by the indorse-

(*a*) 5 *Term Rep.* 594. and vide *Buckler* v. *Buttivant*, 3 *East*, 72. Sed vide *Parke* v. *Eliason*, 1 *East*, 544. and *Finch* v. *Walker*, 2 *Blac.* 1154.

ment;

ment; but neither of them can have any lien on such bills until their account be overdrawn: and here the balance of the cash account at the time of the bankruptcy was in favour of the plaintiffs.

1807.

GILES *against* PERKINS.

Per Curiam, Rule refused.

DOE, on the Demise of WEBB, *against* DIXON.

Monday, Nov. 9th.

THE defendant held the premises, for which this ejectment was brought, situated in *Cornwall*, as tenant at rack-rent, under a lease, the habendum of which was *for 14 or 7 years*. Notice was given by the landlord to determine the lease at the end of the first seven years; and the question was, whether by this mode of demise an option were reserved to the landlord, as well as to the tenant, of determining the lease at the end of seven years, or whether the tenant alone had such option. At the trial before *Lawrence* J. at *Bodmin*, there was cited, in support of the lessor's right to bring the ejectment at the end of the seven years, *Goodright* v. *Richardson* (*a*), where it was considered to be the intention of the parties under such a demise, that either might determine it at the end of the first period. And the rule of construction there laid down, it was said, was most consonant to the modern consideration of leases at rack-rent, regarding them as mutual contracts, equally beneficial to both parties, and not merely as grants from the lessors to the lessees; in which view the old rule of construction was applied to them, that every grant should be taken most strongly against the grantor and for the benefit of the grantee.

Under a lease for 14 or seven years, the lessee only has the option of determining it at the end of the first seven years; every doubtful grant being construed in favour of the grantee.

(*a*) 3 *Term Rep.* 462.

1807.

Doe against Dixon.

On the other hand it was obſerved, that this was not the point in judgment in that caſe, but an obiter opinion only: and that the contrary was decided in the ſubſequent caſe of *Dann* v. *Spurrier* (*a*), which was a caſe ſent by the Lord Chancellor for the opinion of the Court of C. B.; and underwent much conſideration; and where it was finally held and certified, that on a leaſe granted for 7, 14, or 21 years, the leſſee alone had the option of determining it at the end of 7 or 14 years: and that went upon the old principle of law in favour of grantees, where the grant was doubtful. The learned Judge held himſelf bound by this laſt determination, and nonſuited the plaintiff.

Lens Serjt. now moved to ſet aſide the nonſuit, and brought theſe conflicting authorities in review before the Court. But by

Lord ELLENBOROUGH C. J. All doubts which might at one time have exiſted on the ſubject are concluded by the deciſion in the Court of Common Pleas, which was made upon full conſideration of the caſe in this Court, and the antecedent authorities; and which proceeded upon the application to leaſes of the general principle, that where the words of a grant are doubtful, they are to be conſtrued in favour of the grantee: and that was certified to the Lord Chancellor, who muſt be taken to have been ſatisfied with the deciſion,

Per Curiam, Rule refuſed.

(*a*) 3 *Bos. & Pull.* 399. and 442.

1807.

DOE, on the Demiſe of DUCKET and LADBROKE, *againſt* WATTS.

Tueſday, Nov. 10th.

Where ejectment is brought after a fine levied by the defendant, but before all the proclamations have been made under the ſtat. 4 *H.* 7. *c.* 24. it is not neceſſary for the leſſor to prove an actual entry to avoid ſuch fine; conſidering it to operate only as a fine at common law: but by the defendant's confeſſion of leaſe, entry, and ouſter, the merits only of the leſſor's title are put in iſſue.

AT the trial of this ejectment before *Rooke* J. at *Warwick*, the leſſors of the plaintiff ſhewed a *primâ facie* title. The defendant, who claimed under her late huſband's will, having confeſſed leaſe, entry and ouſter, gave in evidence a fine ſur cognizance de droit, &c. levied by her huſband before his death, as of laſt *Eaſter* term, with proclamations, of which one proclamation was made on the 8th of *May* in that term, and another on the 16th of *June* in *Trinity* term; but the plaintiff having ſerved his declaration on the 23d of *May*, one proclamation only had been made before the commencement of the ſuit. But no actual entry had been made by the leſſors to avoid the fine: and the queſtion was, whether ſuch entry were neceſſary to maintain the action? The learned Judge held, that as the four proclamations had not been made, the fine was not ſo far complete as to render an entry neceſſary by one who had title previous to the bringing of the ejectment; and therefore the plaintiff obtained a verdict.

Balguy moved to ſet aſide the verdict on the ground of the Judge's miſdirection in law: for that the effect of a fine at common law is to deveſt all the prior eſtates, which can only be reveſted again by entry, or by judgment in a real action (*a*). Then the ſtat. 4 *H.* 7. *c.* 24., which ſuperadds the proclamations, does not alter the effect of the fine at common law in that reſpect (*b*). Therefore, though the fine in this caſe could not operate as a fine

(*a*) Vide *Plowd.* 357. (*b*) *Goodright* v. *Forreſter*, 8 *Eaſt*, 565.

1807.

DOE *againſt* WATTS.

with proclamations, ſo as to bar ſtrangers within 5 years; yet ſtill it would have the effect of a fine at common law, and conſequently an entry would ſtill be neceſſary to avoid it and reveſt the old eſtate. It is true that in *Jenkins* d. *Harris* v. *Prichard* (*a*), it was ſaid that an actual entry was not neceſſary to avoid a fine without proclamations: but that was not the principal point in judgment; but only a ſecondary point, which became unneceſſary to be decided, as the Court were clear that the leſſors of the plaintiff had no title. And it ſeems not to have been argued at the bar, or much conſidered by the Court. It is contrary to principle; and *Plowden* 265., which is referred to in the margin of the Reporter, ſo far from ſupporting the poſition, rather bears againſt it: for there it was conſidered that the ſtat. 4 *H.* 7. *c.* 24. did not alter the form or ſubſtance of the fine at common law, but only enabled the party to add proclamations to it for another purpoſe: and, therefore, though any of the proclamations upon a fine, according to that ſtatute, ſhould be erroneous, as if made on a *Sunday*, it would not avoid the fine itſelf, which would ſtill operate as a diſcontinuance at common law.

Lord ELLENBOROUGH C. J. The ſtat. 4 *H.* 7. makes a fine with proclamations a bar, ſaving the rights of perſons who purſue them by *action* or *lawful entry* within a certain time. In *Oates* v. *Bridon* (*b*) Lord *Mansfield* ſaid

(*a*) 2 *Wilſ.* 45.

(*b*) *Bull. N. P.* 103. Vide S. C. 3 *Burr.* 1897. where Lord *Mansfield*'s expreſſion is more general; that to avoid *a fine* there muſt be an actual entry, &c. and that in *all other caſes* the confeſſion of leaſe entry and ouſter is ſufficient: without adverting to the diſtinction, as in the note in the Law of Niſi Prius, between a fine *with proclamations*, and a fine at common law. See alſo *Goodright* v. *Cator*, *Dougl.* 478. and *Smith* v. *Clyfford*, 1 *Term Rep.* 741.

1807.

DOE against WATTS.

that the confeſſion of leaſe, entry, and ouſter, was ſufficient in all caſes except in the caſe of a fine *with proclamations*, in which caſe it was neceſſary to prove an actual entry. The entry therefore previous to the bringing of an ejectment is only neceſſary by the words of the ſtatute ſo far as reſpects a fine with proclamations; an *ejectment* not being conſidered as an *action*, within the meaning of it. So is the caſe of *Jenkins* v. *Pritchard* (*a*); and the practice ever ſince has been in conformity with that deciſion. And when it is ſaid in ſeveral caſes that an entry is neceſſary before ejectment brought to avoid a fine, it muſt be underſtood of a fine with proclamations (*b*). The point, therefore, having been ſettled in theſe caſes, there ſeems to be no ground for diſturbing it.

Per Curiam, Rule refuſed (*c*).

(*a*) 2 *Wilſ.* 45.

(*b*) *Berrington* v. *Parkhurſt*, *Andr.* 125. and 2 *Stra.* 1086. was the caſe of a fine with proclamations, as appears from the argument.

(*c*) The reſolution in this caſe is contrary to the deciſion of *C. B.* in *Tapner d. Peckham and Others* v. *Merlott and Another*, *Willes*, 177.; which was not referred to upon this occaſion, nor noticed in the caſes of *Jenkins* v. *Prichard*, and *Oates* v *Briden*, though prior to both in point of time. Ld. C. J. *Willes* there ſaid, that the Court would not determine whether the fine there was to be conſidered as a fine with proclamations, or not; the action having been brought before the time when all the proclamations were expired; and all the proclamations having been made that could be made before that time: becauſe it was clear that it was a fine of one ſort or another; and there was no pretence to ſay that the fine was void. And if not void, all the Court were of opinion, that when a perſon in poſſeſſion levies a fine of any ſort, the parties out of poſſeſſion cannot maintain an ejectment without an actual entry. Lord *Kenyon* alſo, in *Compere* v. *Hicks*, 7 *Term Rep.* 732. obſerved, that in *Berrington* v. *Parkhurſt*, as reported in *Andrews*, 136. Lord *Hardwicke* ſaid that in the caſe of a fine, the party had no title before entry; *not on account of the ſtat. of* H. 7., but on account of the puiſſance of a fine at common law.

1807.

Doe *againſt* Watts.

On the other hand, the neceſſity of an entry, before ejectment brought, to avoid a fine ſeems in other caſes, prior to thoſe, to have been put upon the ground of the ſtat. of *H.* 7. in relation to a fine with proclamations; as in *Lutterel*'s caſe, *Moor*, 450.; and in *Awdeley*'s caſe, *ib.* 457. where it is ſaid that the ſtatute is to be conſtrued ſtrictly, being made for the ſecurity of titles. Alſo at common law it was neceſſary to enter for a condition broken; but in *Little* v. *Heaton*, 1 *Salk.* 259. (which was endeavoured to be diſtinguiſhed from the caſe in *Willes*) an entry was held not be neceſſary before the bringing of the ejectment. And the opinion of Lord C. J. *Hale* was referred to, who in an ejectment tried before him at the aſſizes in *Bucks* had held that the confeſſion of leaſe, entry, and ouſter, was ſufficient; in which opinion all the Judges afterwards concurred with him upon a caſe reſerved. And ſubſequent reſolutions to the ſame effect were alſo referred to. It is true that the confeſſion of leaſe, entry, and ouſter, as was obſerved by Lord C. J. *Willes*, is, as to the *entry*, a confeſſion of the *entry* of the leſſee, and not of the leſſor, in ejectment: but it muſt alſo be recollected that by the ancient practice, to ſuperſede which the rule for confeſſing leaſe, entry, and ouſter was made in the time of Lord C. J. *Rolle*, (*Runnington* on Ejectment, 14.) leaſes to try title in ejectment were actually ſealed and delivered on the land itſelf; and conſequently the leſſor muſt have entered upon it before, in aſſertion of his title: becauſe, ſay the books, it was maintenance in any one who was out of poſſeſſion to convey to another. And indeed where the rightful owner was diſſeiſed there might be ſome riſk of his failing in his ejectment, if he had merely entered and afterwards executed a leaſe off the land; for the diſſeiſee continuing in, or immediately after regaining, poſſeſſion, would have operated as a new diſſeiſin, and conſequently as a re-diſſeiſin of the leſſor at the time of executing the leaſe. Then there is nothing in the ſtat. 18 *Ed.* 1. *ſt.* 4. de modo levandi fines, which requires that an entry ſhall be made on the land in order to avoid the fine; though it concluded thoſe who had right if they made not their claim of their action within a year and a day *ſur la pie*; that is, *upon the foot of the fine*; and not *by the country*, as it is tranſlated in *Runnington*'s edition of the Statutes, and other books; as if it had been written *pays* inſtead of *pie*. Vide 2 *Blac. Rep.* 994. But Lord *Coke* ſeems to conſider the ſtat. of *Ed.* 1. as repealed by that of *H.* 7. ſo far as to render an entry of the party's claim at the foot of the fine unavailable at this day. Certainly it muſt be unavailable againſt a fine levied with proclamations according to the latter ſtatute. And ſince the ſtat. 21 *Jac.* 1. *c.* 16. the party having a right of entry has 20 years within which to make his entry after his right accrues; but by ſtat.

2 Inſt. 518. and vide Serjt. *Williams*'s Note on *Clarke* v. *Pywell*, 1 *Saund.* 319. *c.*

4 *Ann.*

1807.

Doe *againſt* WAITE.

4 *Ann. c.* 16. *ſ* 16. no claim or entry on lands ſhall be of any force or effect to avoid any fine levied *with proclamations*, or ſhall be a ſufficient entry or claim *within the ſtatute of* James I. unleſs an action ſhall be thereupon commenced within one year after, &c. and proſecuted with effect. Upon the whole it ſeems now that for every purpoſe, except that of avoiding a fine *with proclamations*, in which caſe the ſtat. of *H.* 7. requires an *entry*, the bringing of an ejectment will ſerve the ſame purpoſe; and indeed, if the good ſenſe of the thing is to be regarded, it ſeems better adapted to anſwer any uſeful purpoſe for which an actual entry on the land was originally required, or can at this day be made. But if the conceſſion of the *leaſe* made by the leſſor in ejectment be evidence of an admiſſion on the part of the defendant, that the leſſor had made an actual entry on the land before or at the time of making the leaſe, in order to enable him lawfully to make it; it ſhould ſeem, while the matter was res integra, that the ſame evidence might have been applied to a fine levied with proclamations under the ſtatute of *H.* 7. without doing violence to the words of that ſtatute.

DONOVAN, Aſſignee of KENNETT, an Inſolvent Debtor, *againſt* DUFF, Aſſignee of the ſame KENNETT under a Commiſſion of Bankrupt.

Tueſday, Nov. 10th.

THIS was an action for money had and received by the defendant to the plaintiff's uſe, the proceeds of property belonging to the bankrupt which had been diſpoſed of by his aſſignee under the commiſſion. The bankrupt had no certificate. The plaintiff became a creditor of his after the commiſſion ſued out, and ſubſequently took an aſſignment of his effects under the laſt inſolvent debtors' act: and after the bankrupt had made application to the Great Seal to ſuperſede the commiſſion, (on which an iſſue was directed to try the validity of it,

Neither the bankrupt, nor any perſon claiming from him by aſſignment ſubſequent to the commiſſion of bankrupt, ſhall be permitted in an action at law to queſtion the validity of ſuch commiſſion, and recover from aſſignees the property of the bankrupt taken under it, by proving an act of bankruptcy committed by the bankrupt prior to the petitioning creditor's debt; though it be alſo ſhewn that there was a ſufficient petitioning creditor's debt exiſting at the time of ſuch prior act of bankruptcy, whereon a better commiſſion might have been ſued out.

1807.

DONOVAN *against* DUFF.

but on which no further proceeding was had;) the plaintiff now brought this action; and in anſwer to the defendant's proof of a petitioning creditor's debt, an act of bankruptcy, and the commiſſion regularly ſued out thereupon under which he was choſen aſſignee, the plaintiff called the bankrupt to prove an act of bankruptcy prior to the petitioning creditor's debt, in order to invalidate the commiſſion; and alſo offered proof of a good petitioning creditor's debt exiſting at the time of ſuch prior act of bankruptcy, whereon a new commiſſion might be ſued out. But Lord *Ellenborough* was of opinion, at the trial at the laſt ſittings at *Weſtminſter*, that it was not competent for the bankrupt himſelf, or any perſon ſtanding in his ſituation, like the plaintiff, to controvert the claim of his aſſignees under a commiſſion regularly ſued out, by ſhewing a prior act of bankruptcy; however ſuch a defence might be ſet up by a debtor of the bankrupt reſiſting a claim made by the aſſignees under the commiſſion againſt him; as it opened a great door to fraud; and there was another and more proper method pointed out by the ſtatutes for the bankrupt to obtain redreſs, by application to the Great Seal to ſuperſede a commiſſion improperly iſſued againſt him. The defendant therefore obtained a verdict.

Marryat now moved for a new trial, and referred to the claſs of caſes where commiſſions of bankrupt have been conſidered to be nugatory, on trials at niſi prius, upon proof of a prior act of bankruptcy, and a ſufficient petitioning creditor's debt at the time whereon to ſupport a commiſſion. *Doe* v. *Boulcot* (*a*), *Toms* v. *Mytton* (*b*),

(*a*) 2 *Eſp. N. P. Caſ.* 595. (*b*) 2 *Stra.* 744.

and

1807.

DONOVAN *againſt* DUFF.

and *Bingley* v. *Maddiſon* (*a*). And if a debtor of the bankrupt may object to the claim of the aſſignees ſuing for the property of the bankrupt, on account of proving an act of bankruptcy prior to the petitioning creditor's debt, there ſeems no reaſon for precluding the bankrupt himſelf, or any perſon claiming from him ſubſequent to the commiſſion, from availing himſelf of the ſame objection. The objection goes to the validity of any debt contracted after an act of bankruptcy, as proveable under a commiſſion founded upon ſuch act of bankruptcy: and this is ſupported by ſeveral acts paſſed to make debts of a certain deſcription ſo proveable: as the ſtat. 7 *G.* 1. *c.* 31. making bills, &c. payable at a future day, proveable under a commiſſion ſued out on a prior act of bankruptcy: the ſtat. 5 *G.* 2. *c.* 30. *ſ.* 22. enabling ſuch bills, &c. to be a ſufficient petitioning creditor's debt: and laſtly, the ſtat. 46 *G.* 3. *c.* 135., which enables bonâ fide creditors, without notice, to prove their debts under any commiſſion of bankrupt, notwithſtanding any prior ſecret act of bankruptcy. [Lord *Ellenborough* C. J. The exiſting commiſſion can only be cut down by ſhewing that another better commiſſion may be taken out; and that can only be done by ſhewing not only an act of bankruptcy antecedent to the preſent petitioning creditor's debt, but alſo a ſufficient petitioning creditor's debt exiſting at the time of ſuch prior act of bankruptcy.] That was ſhewn. [Lord *Ellenborough* C. J. Still, the only effect of that was to ſhew that *ſome other perſon*, as aſſignee under a commiſſion to be ſued out upon ſuch prior act of bankruptcy, would have a better title than the defendant: but it does not prove that *the plaintiff* has a better right.] In the mean time, and until another valid commiſſion

(*a*) *B. R. Mich.* 1783, *Co. Bankt. Laws, ch.* 2.

1807.

DONOVAN *againſt* DUFF.

was ſued out, the right to the property would be in the plaintiff by aſſignment from the bankrupt.

Lord ELLENBOROUGH C. J. That brings it to the original queſtion again, whether *Kennett* himſelf could have maintained this action againſt his aſſignee under the commiſſion of bankrupt, by evidence that he had committed a prior act of bankruptcy; for his aſſignee ſubſequent to the commiſſion cannot be in a better ſituation than himſelf. I know of no inſtance where ſuch proof has been admitted on the part of the bankrupt and for his benefit againſt the aſſignees under the commiſſion: but I know that in a caſe before Lord *Loughborough* when Chief Juſtice of the Common Pleas, he refuſed to permit a bankrupt, in an action againſt his own aſſignees under the commiſſion, to prove a prior act of bankruptcy, in order to defeat the title of the aſſignees: and indeed it would be pregnant with enormous miſchief to ſuffer it. If the bankrupt be aggrieved by the commiſſion ſued out againſt him, he may apply to the Great Seal for relief, which the ſtatutes have authorized the Lord Chancellor to adminiſter. But here we have it admitted that ſuch an application has been made; and not ſucceeding there, it is now attempted to queſtion the commiſſion in this collateral objectionable ſhape, after the bankrupt himſelf has acquieſced in it, and after an ineffectual attempt to impeach it directly before the proper tribunal.

LAWRENCE J. If this were permitted to be done, it would place every aſſignee of a bankrupt in a dreadful ſituation. For then, after a commiſſion had been ſued out upon a clear act of bankruptcy proved, to which the bankrupt ſubmitted, without queſtion, at the time; and

after

1807.

DONOVAN *againſt* DUFF.

after his property had been collected and diſtributed under that commiſſion; it would be in the power of the bankrupt, if it were competent to him to adduce ſuch evidence, by bringing an action for money had and received againſt his aſſignees, and proving a ſecret act of bankruptcy prior to the petitioning creditor's debt, to recover from his aſſignees the whole amount of his property after diſtribution.

The other Judges concurred in refuſing the Rule.

The KING *againſt* SWEET.

Wedneſday, Nov. 11th.

In an order of filiation and maintenance the juſtices have no power by the ſtat. 18 *Eliz. c.* 3. to direct the defendant to pay the coſts of the pariſh in obtaining the order: but having in ſuch order ſeparated the ſum to be paid for maintenance, and the ſum to be paid for coſts, the order was quaſhed as to the latter, and confirmed as to the reſt of it.

AN order of filiation, made at the quarter ſeſſions for the county of *Surry*, ſtated that

"*Whereas it appears to this Court*, as well on the complaint of the churchwardens and overſeers of the poor of the pariſh of *Saint Mary*, *Newington*, in the county of *Surry*, as on the oath of *Elizabeth Kenrick*, ſingle woman, that ſhe the ſaid *E. K.* on 13th *May* 1805 was delivered of a male baſtard child in the ſaid pariſh of *Newington*, and that the ſaid child is now chargeable to the ſaid pariſh and likely ſo to continue: and further, that one *Joſeph Sweet* did beget the ſaid child, &c. And whereas the ſaid *J. S.* hath been duly ſummoned to be and appear before this Court, and hath been now heard, &c. but no ſufficient cauſe hath been ſhewn why he ſhould not be adjudged the reputed father of the ſaid child: now (upon hearing counſel on both ſides, examination of witneſſes upon oath, and the premiſes fully conſidered,) *it is adjudged* by this Court that the ſaid *J. Sweet* is the *reputed father* of the ſaid child: and it is ordered, as well for the better

1807.

The KING *againſt* SWEET.

better relief of the ſaid pariſh of *Newington* as for the ſuſtentation of the ſaid child, that the ſaid *J. S.* ſhall and do forthwith upon notice of this order pay or cauſe to be paid to the churchwardens, &c. of *Newington*, &c. 11*l.* 6*s.* 6*d.* for and towards the lying in of the ſaid *Elizabeth Kenrick*, and the maintenance of the ſaid child to the time of making this order; *and the further ſum of* 12*l.* *for the coſts of the ſaid pariſh in and about the obtaining of this order.* And it is further ordered, that the ſaid *J. S.* ſhall likewiſe pay to the churchwardens, &c. of *Newington*, &c. 3*s.* 6*d.* weekly, &c. during ſo long time as the ſaid child ſhall be chargeable to the ſaid pariſh of *Newington.*"

Two objections were made to this order; 1ſt, that there was no ſufficient adjudication of the birth of the baſtard child in the pariſh of *Newington*, but only a recital of that fact. 2dly, That the Seſſions had no juriſdiction to award the payment of coſts.

Garrow ſhewed cauſe in ſupport of the order. As to the firſt objection; it is ſufficient that the fact of the baſtard's birth in the pariſh is recited by the juſtices as appearing to them upon the complaint of the pariſh officers and upon oath; and unleſs that were proved the juſtices could not have made the order on the defendant as the putative father. *Rex* v. *Graveſend* (*a*), and *Rex* v. *Moravia* (*b*), are in point. And the ſame conſtruction was made in *Rex* v. *Fox*, *Tr.* 29 & 30 *G.* 2., cited by Lord *Kenyon* from his own MS. in *Rex* v. *Price* (*c*); both of which orders were in the ſame form, in this reſpect, as the preſent. The caſe of *The King* v. *Moravia* fur-

(*a*) *E.* 15 *G.* 2. MS. 1 *Conſt's Bott*, 437. *pl.* 595.
(*b*) *Ib. pl.* 596. (*c*) 6 *Term Rep.* 148.

niſhes

1807.

The KING *againſt* SWEET.

niſhes an anſwer to the ſecond objection alſo; for there a ſum in groſs adjudged to be paid "for the maintenance of the child *and other incident charges and expences*" was held well: and as the *coſts* which the pariſh are put to in ſecuring the reputed father and obtaining the order againſt him would fall under that general deſcription, there can be no objection in ſtating the charge for *coſts* in the order. The caſe of *The King* v. *Skinn* (*a*) may be cited as an authority the other way; but that only goes the length of ſhewing that the Seſſions cannot delegate to the clerk of the peace the power of taxing the amount of the coſts awarded by them. And *Rex* v. *Nelſon* (*b*) is an expreſs authority that the Court have a power of awarding coſts upon an order of filiation; ſupported as the report is by the original order for coſts made in that caſe (*c*).

(*a*) *E.* 15 *G.* 2. MS. 1 *Conſt's Bott*, 421. *pl.* 552. (*b*) 1 *Ventr.* 37.

(*c*) Die *Veneris* prox. poſt. 15. *Sanctæ Trinitatis*, anno 21° *Car.* 2di Regis.

NORTHTUSH, REX *v.* BENJ. NELSON. } Ordinatum eſt quod defendens inveniat ſecuritatem pro manutenentiâ ſpurii per ipſum nuper geniti ſuper corpus *Elizabethæ Barrett*; et ſimiliter pro indemnificatione parochianorum de *Orten* in comitatu prædicto ab eodem ſpurio. Et quod idem defendens ſolvit omnia *cuſtagia* et expenſa quæ iidem parochiani expenderunt in et circa manutenentiam prædicti ſpurii, et prædictæ *Elizabethæ Barrett*, tempore incubationis ejuſdem *Elizabethæ*. Necnon quod idem defendens ſolvit prædictis parochianis omnia *cuſtagia* et expenſa quæ iidem parochiani expenderunt *in et circa defenſionem et proſecutionem ordinis* per juſticios pacis comitatus prædicti facti verſus defendentem pro manutenentiâ prædicti ſpurii *a tempore quo ordo* illa ſic facta fuit. Et quod *Thomas Fanſhaw Miles* interim attendatur cum comptis cuſtagiorum et expenſorum prædictorum parochianorum ſic (ut prefertur) expoſitorum, et quod idem *Thomas Fanſhaw* certificabit curiæ hic ſuperinde.

Ex motione Mr^i *Lovell*,

Per Cur.

Lawes,

1807.

The KING *againſt* SWEET.

Lawes, in ſupport of the firſt objection, referred to *Rex* v. *Cuddington* (*a*) as in point, that the order ſhould ſtate that the baſtard was born in the pariſh to which the relief was ordered; which was not cited in *Rex* v. *Graveſend*, and *Rex* v. *Moravia*. [The Court obſerved, that it did not appear in that caſe what the form of the order was: the fact might no where have appeared in the order.] In *Rex* v. *Butcher* (*b*), where the order ran; "We *A.* and *B.*, two juſtices, &c. reſiding within the limits where the pariſh church is, *within which pariſh the child was born*, do," &c.; it was held not to be a ſufficient averment that the child was born in the pariſh to which the relief was ordered. [*Per Curiam.* The objection there was of another ſort, viz. that it did not appear that the pariſh ordered to be relieved was the ſame pariſh where the child was born.] Secondly, The Seſſions have no juriſdiction to award coſts in any caſe except by ſtatute; and none of the ſtatutes (*c*) touching baſtards give the juſtices ſuch a power. In *Rex* v. *Moravia*, the objection was to the generality of the charges and expences as incident, not to the obtaining the order of filiation, but to the *maintenance of the child*, of which the coſts of obtaining the order could form no part: and even that did not paſs without great doubt. And the order for coſts referred to in *The King* v. *Nelſon* was an order of *this Court*, and not of the Seſſions; which was probably made upon the particular circumſtances of the caſe attending the removing of the orders by certiorari; and reſts altogether upon the general diſcretionary power of the Court in all caſes where an improper uſe is made of

(*a*) *E.* 9 *Ann.* 1 *Conſt's Bott*, 434. *pl.* 583. (*b*) 1 *Stra.* 437.

(*c*) 18 *Eliz. c.* 3. 7 *Jac.* 1. *c.* 4. 3 *Car.* 1. *c.* 4. 13 & 14 *Car.* 2. *c.* 12. 6 *G.* 2. *c.* 31. and 25 *G.* 3. *c.* 82.

1807.

The KING *againſt* SWEET.

their proceſs. And the caſe of *The King* v. *Skinn* is an authority, as far as it goes, to ſhew that the Seſſions have no power to award coſts. [*Groſe* J. ſtated, that he felt a difficulty upon the words of the ſtat. 18 *Eliz. c.* 3. *ſ.* 2. which directs the juſtices to "take order, as well for the puniſhment of the mother and reputed father of ſuch baſtard child, as alſo for the *better relief* of every ſuch *pariſh* in part or in all." And unleſs the magiſtrates below had a power of directing the coſts of obtaining the order to be paid, ſo far from the pariſh being relieved, it might in ſome caſes be burthened ſtill more than before.] The ſame might be ſaid in the caſe of other orders made by juſtices of the peace; but except in certain caſes where a power to award coſts is expreſsly given, it never was conſidered that ſuch a power was incident to the power of making the order for the relief of the parties aggrieved. There is no common law juriſdiction even in this Court to give coſts upon proceſs; but it is given by different ſtatutes.

LE BLANC J. obſerved, that at any rate Mr. *Lawes* could only pray that ſo much of the order as directed the payment of the 12*l.* for coſts ſhould be quaſhed. In anſwer to which he ſuggeſted, that the order being one and entire could not be divided. But the learned Judge ſaid, that the juſtices themſelves had ſeparated the ſums in their order.

Lord ELLENBOROUGH C. J. The firſt objection made is, that there is no adjudication of the pariſh where the child was born: but when the order ſtates, that whereas *it appears* to the juſtices on the oath of the mother that *ſhe was delivered of the child in the pariſh of* Newington; we

1807.

The KING *againſt* SWEET.

we muſt underſtand it as an affirmative propoſition by the juſtices that the fact was ſworn to by the mother before them, and that they find it to be true; for they proceed upon that ground to adjudicate that the defendant is *the reputed father*, and that for the better relief of that pariſh he ſhall pay ſuch and ſuch ſums: and by the ſtatute, giving relief in this caſe, the reputed father is only bound to pay ſuch relief to the pariſh in which the baſtard child is born. And there is no caſe where an order in this form has ever been held to be bad; for in *The King* v. *Butcher*, which was ſuppoſed to come neareſt to this, the ambiguity was of another ſort. Secondly, it is objected that there is no expreſs power given by any of the ſtatutes to the juſtices to award *coſts* in this matter; and that, without that, they have no ſuch power. The only words of the ſtat. 18 *Eliz.* relied on are, that the order is to be made for *the better relief* of the pariſh; which it is ſaid, cannot effectually be relieved, without ſuch a power. But there does not appear to be any inſtance from the paſſing of the ſtatute to the preſent time when the juſtices have awarded coſts: the only caſe which has been found ſeeming at all to bear the other way is that of *The King* v. *Nelſon*: but upon looking into it more accurately, it appears that the award of the coſts there to be paid was by the order of this Court upon the removal of the original order by certiorari; and thoſe it is evident were coſts incurred ſubſequent to the making of the original order, by the very terms of it. Under what particular circumſtances thoſe coſts were awarded does not appear, as there is no recital of the matter in the order itſelf. The caſe of *The King* v. *Skinn* may indeed be open to the anſwer which has been given, that at any rate the Seſſions could not delegate the power of taxing the coſts: otherwiſe it would bear againſt

the

1807.

The KING *againſt* SWEET.

the power contended for. In *The King* v. *Moravia* the queſtion turned on the generality of the award of "*incident* charges and expences:" but the charges and expences there meant were ſuch as were *incident to the maintenance of the child.* There is therefore no caſe which enables us to put the conſtruction contended for on the words of the ſtatute of *Elizabeth*, as giving the juſtices authority to award coſts in this caſe. Then let us look to the reaſon and view of the ſtatute itſelf to ſee if ſuch muſt have been the intention of the Legiſlature; for it might not be too late even now to put a right judicial conſtruction upon it, if a wrong conſtruction had been put upon it by uſage. But there is nothing appearing in the ſtatute which neceſſarily requires ſuch a power to be given to the juſtices: the miſchiefs recited are the charges of keeping the baſtard children, and the evil example of others; for each of which a particular remedy is given; the one by making an order for the charges already incurred by the pariſh on account of the child, and for its future maintenance; the other by the puniſhment of the lewd mother and reputed father. Therefore neither in expreſs terms, nor by fair inference is there any power given to the juſtices to order the coſts of obtaining the order to be paid by the defendant: the order therefore is bad pro tanto; but it is good for the reſt, as the juſtices have diſtinguiſhed how much was given for maintenance, and how much for coſts. And this very caſe ſhews the inconvenience which would ariſe from extending the power of the juſtices in this reſpect; for much additional expence has been incurred by going to the Seſſions to get an original order of filiation, inſtead of applying to two magiſtrates near at hand.

GROSE

1807.

The KING *againſt* SWEET.

GROSE J. I ſtill feel a difficulty in ſaying that the juſtices may not direct the defendant to pay the coſts of the pariſh obtaining the order. It is true that the expences may be improperly enhanced by going in the firſt inſtance to the Quarter Seſſions, inſtead of applying to two neighbouring juſtices, where that may be done; but of that the juſtices will judge in conſidering the quantum of coſts. But as the Seſſions have an original juriſdiction in this matter, and the words of the ſtatute of *Elizabeth* being, that the juſtices ſhall take order "*for the better relief of every ſuch pariſh in part or in all*;" and this being a remedial law; it did appear to me that the juſtices had a power of directing the fair and neceſſary expences of the pariſh in obtaining the relief granted to be paid to them; otherwiſe, ſo far from taking order for their better relief in part or in all, the pariſh may in ſome caſes be more burthened by the expence of obtaining the order than by the maintenance of the child. However, as my Lord and my Brothers have no doubt upon the ſubject, it muſt be preſumed that they have put the right conſtruction on the ſtatute.

LAWRENCE J. I agree with my Lord in the conſtruction he has put upon the ſtatute of *Elizabeth*: it recites two miſchiefs; the one, that the baſtards are left to be kept at the charges of the pariſh where they are born; the other, the evil example and encouragement of lewd life: and it directs that the juſtices ſhall take order as well for the puniſhment of the parents, as alſo for the *better relief* of the pariſh. Now theſe latter words being general, we muſt collect what relief the Legiſlature intended by adverting to the miſchief before recited, which

was

1807.

The KING *againſt* SWEET.

was that the pariſh was left burthened with the charges of keeping the child: this cannot include the coſts to be afterwards incurred in obtaining the order of filiation and maintenance. But if the words were more doubtful than they are; yet after ſo great a lapſe of time ſince the paſſing of the act, without any caſe having put ſo extended a conſtruction on the words in queſtion, and coſts not having till now ever been ordered to be paid by the juſtices; it would be going too far at this time of day to ſay that they have the power of awarding coſts. With reſpect to the caſe of *The King* v. *Nelſon*, it is clear that the coſts there ſpoken of meant the coſts incurred in this court: the report in *Ventris* points to the coſts of ſuing out the certiorari. This Court has no original juriſdiction to make an order of filiation: they could only quaſh or confirm the order of the juſtices below. But if they confirmed the order, and thought that it had been vexatiouſly removed hither by certiorari, they might very well order the defendant to pay the coſts incurred in this court.

LE BLANC J. This is a new attempt to give the juſtices below a power of awarding coſts in this caſe, which they never exerciſed before, and in my opinion never had under the ſtatute of *Elizabeth*. The power conferred on the juſtices of giving relief to the burthened pariſh, in part or in all, muſt be confined to relief againſt the miſchief before recited, that of maintaining the child born in ſuch pariſh, and cannot be applied to the ſubſequent expence of procuring an order of filiation and maintenance. And this I think would be the proper conſtruction of the words, even if they were found in a recent act of parliament, which was now to have a conſtruction

1807.

The KING *againſt* SWEET.

put upon it for the firſt time. But ſuch it appears has always been conſidered to be the true conſtruction of the act: and a ſtrong argument is to be drawn from the caſe of *The King* v. *Moravia*, where the very ground on which the Court confirmed the order for the payment of a groſs ſum, "for the maintenance of the child and other *incident* charges and expences," was becauſe they conſidered thoſe other incident charges and expences as confined to charges and expences attending the maintenance of the child: conſidering that, unleſs ſo confined, the order would have been bad. So much, therefore, of the order as directs the payment of coſts muſt be quaſhed; but it muſt be confirmed for the reſt, the order itſelf having ſeparated the ſums to be paid.

Order quaſhed as to the payment of the coſts.

1807.

TIMSON and Others *againſt* MERAC and Another. *Friday, Nov.* 13th.

THE firſt ſpecial count of the declaration ſtated, that on the 1ſt of *September* 1806, at *London*, &c. a diſcourſe took place between the plaintiffs and defendants, concerning the purchaſe, ſale, and ſhipment of 250 puncheons of brandy for the plaintiffs by Meſſrs. *Gordon* and Company, then being in parts beyond the ſeas; but the plaintiffs not being ſatisfied with the reſponſibility of *Gordon* and Co., it was agreed between the plaintiffs and defendants, that the latter ſhould guarantie to the former the ſhipment of the brandy on their account: and thereupon, in conſideration of the premiſes, and that the plaintiffs at the defendants' requeſt would agree that *Gordon* and Co. ſhould purchaſe for them, the plaintiffs, and that they would buy from *Gordon* and Co. the brandy, on the terms and conditions after mentioned, the defendants promiſed that *Gordon* and Co. ſhould purchaſe for them 250 puncheons of *Cogniac* brandy, by bills of exchange to be drawn for the ſame on ſhipment of ſuch brandies, and forwarding in due courſe the bill of lading and invoices thereof; the ſaid brandies to be purchaſed forthwith, and a veſſel chartered in the defendants' names at a

The ſtat. 43 *G.* 3. *c.* 153. *ſ.* 15. having enabled the king by order in council to licenſe the importation of certain goods, being *Britiſh* or neutral property, from the enemy's country, in neutral ſhips, a contract made by *A.* and *B.*, *Britiſh* ſubjects, (the plaintiffs) for the purchaſe of brandy from a houſe of trade in *France* (an enemy,) to be ſhipped from thence in a neutral, on account of *A.* and *B*; which contract was made *in contemplation of obtaining a licence* for that purpoſe; which licence was accordingly obtained ſoon after the making of

ſuch contract and before it was begun to be executed; is a legal contract, and may lawfully be guarantied in the firſt inſtance by *C.* and *D.* other *Britiſh* ſubjects (the defendants). And after ſuch licence obtained the guarantees are liable in damages for the non-ſhipment of the goods by the houſe in *France* on board a neutral ſent there for that purpoſe.

Though it were objected to the licence legalizing ſuch trade, that it was not made out to *A.* and *B.* *by name*, but only to *C.* and *D.* *and other Britiſh merchants*; and that neither *C.* and *D.* nor even *A.* and *B.* had any property in the goods; whereas the licence required the goods to be imported to be *the property of the ſaid perſons or ſome of them*; and until ſhipment the property continued in the houſe in *France*.

For neither the act of parliament nor the king's licence required the owners of the property to be *individually named*; and even if the licence were to be ſo conſtrued, as it only required the goods imported to be the property of "the ſaid perſons or ſome of them, as "*may be ſpecified in their bills of lading*;" and as no bills of lading were made out, which might have been made in the names of *C.* and *D.*, and if ſo, would have conveyed to them a legal or ſpecial property in the goods; the defendants *C.* and *D.* were ſtill liable to anſwer in damages, upon their guarantie, as for the non-performance of a legal contract.

1807.

TIMSON *againſt* MERAC.

freight agreed upon by the plaintiffs, viz. for the purpoſe of bringing the brandies from parts beyond the ſeas to this kingdom. And the plaintiffs averred that they accepted the ſaid agreement, &c. on the terms and conditions aforeſaid: and that on the 6th of *September* 1806, at *London*, &c. a veſſel was chartered by the defendants for the purpoſe of bringing home the ſaid brandies: which veſſel on the 10th of *September* ſailed from *London* to parts beyond the ſeas for that purpoſe, and on the 17th of *September* arrived at parts beyond the ſeas where *Gordon* and Co. were to ſhip the brandies, and that the maſter gave notice thereof to *Gordon* and Co., and requeſted them to ſhip the brandies; and that the plaintiffs were always willing to accept and pay for the ſame: yet that the defendants did not perform their promiſe; nor did they, or *Gordon* and Co., though requeſted, purchaſe for the plaintiffs ſuch brandy, and ſhip the ſame; but refuſed and neglected ſo to do: wherefore the veſſel was obliged to return to this kingdom without the brandy: and ſuch brandy having ſince greatly increaſed in value, the plaintiffs have thereby loſt divers gains which otherwiſe would have accrued to them from the performance of the defendants' promiſe. There was another ſpecial count on a ſimilar agreement and guarantie for the purchaſe and ſhipment abroad, by *Gordon* and Co., of 50 puncheons more, in addition to the 250 puncheons, of *Cogniac* brandy to be ſent to the plaintiffs in this kingdom: and there were alſo the common money counts. The defendants pleaded the general iſſue; and at the trial at *Guildhall* a verdict was found for the plaintiffs, with 6000*l.* damages, ſubject to the opinion of the Court on the following caſe.

Previouſly

1807.

TIMSON *againſt* MERAC.

Previouſly to making the contract ſtated in the firſt count it was in the contemplation of the parties that *Gordon* and Co., then being *French* merchants reſiding at *Pons* in the *French* dominions, ſhould purchaſe for and ſell to the plaintiffs 250 puncheons of brandy, to be ſhipped by *Gordon* and Co. for the plaintiffs, merchants in this country; but the terms on which the brandies were to be purchaſed were firſt ſtated in a letter received from the defendants in the following words: "Meſſrs. *Timſon*, *Wright* and Co. *London*, *Sept.* 1ſt, 1806. Gent. We engage that Meſſrs. *Gordon* and Co. of *Pons* ſhall purchaſe for you 250 puncheons of good and genuine *Cogniac* brandy not exceeding 105 francs p. 27 velts, firſt coſt, to be drawn for the ſame direct at three uſances on ſhipment, and forwarding in due courſe the bill of lading and invoices; the brandies to be purchaſed forthwith, and a veſſel chartered in our name at a freight agreed upon by you." (Signed) *T. Merac* and Co. On the receipt of this letter, the plaintiffs, having agreed to the terms, after having copied them verbatim, wrote underneath ſuch terms the following anſwer, which they ſent to the defendants. "Meſſrs. *T. Merac* and Co. 1ſt *Sept.* 1806. Above we hand you a copy of your engagement with us for the purchaſe of 250 puncheons beſt good genuine *Cogniac* brandy for our account, guarantied by you, and which is hereby confirmed by this our written acceptance for the ſame." (Signed) *Timſon* and Co. A ſhort time afterwards the defendants offered to enter into ſimilar engagements with the plaintiffs for *Gordon* and Co.'s ſhipping 50 other puncheons of brandy; which offer the plaintiffs accepted by another letter of the 6th of *Sept.* 1806, "under the terms and conditions of your (the defendants') former guarantie;" which letter alſo directed

1807.

TIMSON *against* MERAC.

certain marks to be put on the puncheons: and this was acknowledged and acceded to by the defendants in another letter to the plaintiffs of the 8th of *Sept.* 1806. Under these contracts a vessel was chartered at such freight and for such purpose as are stated in the first count; which vessel proceeded to *Charente* in *France*, where the brandies were to be shipped; and there the master applied to *Gordon* and Co. for the shipment of them according to the contracts; the plaintiffs having always insisted on their performance; but no brandies were shipped, as agreed upon, and the vessel returned home without them. The price of such brandy afterwards rose, and the plaintiffs lost the benefit of the rise of the market. The contracts were made in time of war between this country and *France*; but by the stat. 43 *Geo.* 3. *c.* 153. *s.* 15., reciting that since the commencement of the present hostilities an order of council had been made for granting licences, which had accordingly been granted, to permit the importation of certain goods, being *British* or neutral property, contrary to the laws then in force; which importations were necessary during hostilities, and ought to be justified by law: and that it was expedient that his majesty by order of council should be authorized to permit during the continuance of hostilities, &c. the importation in neutral ships of any goods from any port or place of the enemy: it is enacted, that every importation of goods made by virtue of any such order and licence, &c. should be deemed to be good in law, notwithstanding any other act of parliament to the contrary. And by *s.* 16. his majesty is empowered by order in council from time to time to permit during the continuance of hostilities, &c. any such goods as should be specified in any such order in council to be imported from any port or place of

1807.

TIMSON *againſt* MERAC.

the enemy, in neutral ſhips. Under this act the king by order in council of the 14th of *September* 1803 licenſed the importation of brandy, (amongſt other things,) being neutral property, or the property of *Britiſh* ſubjects duly licenſed, from any port or place of the enemy in any neutral ſhip; in which order there was a proviſo that nothing therein contained ſhould extend to authorize any *Britiſh* ſubject to trade from any port or place belonging to an enemy without licence for that purpoſe duly obtained. On the 16th of *September* 1806 the following licence was duly obtained for the importation of a cargo as therein mentioned, by the *American* ſhip *Sarah*, a neutral. "*George* Rex, &c. To all commanders of our ſhips of war, &c. Our will and pleaſure is, that you permit *Theo. Merac* and Co. *and other Britiſh merchants*, on board the *American* ſhip *Sarah*, *J. S.* maſter, to import one cargo without moleſtation from any port of *France*, &c. to any port of the United Kingdom, either directly or circuitouſly, ſalted proviſions of all ſorts, ſeeds, ſaffron, &c. (enumerating various articles,) *and brandy; being the property of the ſaid perſons, or ſome of them, as may be ſpecified in their bills of lading*; provided the ſame ſhall be ſhipped as aforeſaid. This licence to remain in force for ſix months from the date, &c. Provided alſo, that any perſon who ſhall claim the benefit of the licence hereby granted ſhall take and have the ſame upon condition, that if any queſtion ariſes in any of our Courts of Admiralty or elſewhere, whether ſuch perſon or perſons hath or have in all points conformed thereto, in all caſes whatever the proof ſhall lie on the perſon or perſons uſing this our licence, or claiming the benefit thereof. Given at our Court, &c. the 16th of *Sept.* 1806, &c. (Directed) *Theo. Merac* and Co. et al. Licence to

1807.

TIMSON *againſt* MERAC.

import." *Charente* is a port of *France* to which the licence extended. If the plaintiffs were entitled to recover; the verdict was to ſtand: if not, a nonſuit was to be entered.

Lawes, for the defendants, contended that this was only a licence to *Merac* and Co. to trade; and they having no property in the goods, but only having guarantied the performance of the contract by *Gordon* and Co. abroad, the owners were not properly deſcribed, as required in the licence; which was therefore void, and the trading illegal; and if ſo, the contract of guarantie could not be enforced (*a*). The ſtat. 43 *Geo.* 3. *c.* 153. *ſ.* 15. enabling the king in council to grant licences to trade with the enemy in certain caſes, recites the expediency of ſuch licences to permit the importation of certain goods being *Britiſh or neutral property* from the enemy's ports; and the licence granted is confined to the importation of ſuch property; and the onus probandi laid on the party claiming the benefit of the licence. It ought therefore to appear on the face of the licence itſelf to whom the property belongs; though it may not be neceſſary under the terms, "*and other Britiſh merchants*," to name every individual who is entitled to a ſhare of the adventure. But here the only perſons named are *T. Merac* and Co., who have no property whatever in it. But admitting that the plaintiffs might claim any property of theirs obtained through the licence, under the general deſcription of *Bri-*

(*a*) The purchaſing goods in an enemy's country to be ſent here is illegal without the king's licence. *Potts* v. *Bell*, 8 *Term Rep.* 548. and *Vandyck* v. *Whitmore*, 2 *Eaſt*, 475. But it was admitted that if the trading were legalized by the licence, the contract of guarantie of ſuch trading was incidentally legalized alſo; according to *Kenſington* v. *Inglis*, 8 *Eaſt*, 273.

tiſh

1807.

TIMSON *againſt* MERAC.

tiſh merchants, it does not appear that even they had any property in the brandy at the time of the licence obtained or down to the preſent moment. Until the brandy was actually purchaſed the property remained in the enemy's ſubjects, and nothing has happened to transfer it from them to any *Britiſh* or neutral ſubject: it was not therefore the proper ſubject of a licence, merely becauſe the plaintiffs or any other perſons anſwering that deſcription might eventually acquire a property in it.

Holroyd obſerved ſhortly, that the act of parliament looked only to the property of the goods to be licenſed at the time of their importation, and legalized the trading proſpectively, without which it could not be carried on at all. The licence was to permit *T. Merac* and Co. *and other* Britiſh *merchants* (which included all others of that deſcription) to *import* one cargo of the goods ſpecified, being the property of ſome of the ſaid perſons, *as may be ſpecified in their bills of lading*, &c. Now here there were no bills of lading; and therefore it could not be told that the bills would not ſpecify the perſons who had the property in the goods; nor can it be preſumed that every thing required by the act of parliament and the king's licence would not have been performed: but it is enough in this caſe that the contract of guarantie made by the defendants was lawful, being made in contemplation of a lawful licence

Lord ELLENBOROUGH C. J. It is not neceſſary to argue the caſe further. The trading in this caſe, in contemplation of which the contract of guarantie was made, was not abſolutely and at all events illegal, but legal ſub modo, that is, provided the parties obtained a licence from

1807.

TIMSON against MERAC.

from the crown, under the order of council to import the goods; which licence, when obtained, would legalize the contract in *France* for the purchase of such goods. The end being legitimate, the means necessary to its completion must be so too. In contemplation of the licence, *Merac* and Co., who appear to have been the correspondents of *Gordon* and Co. then residing in *France*, contracted with the plaintiffs for the supply of a quantity of brandy by *Gordon* and Co. on certain terms, and *Merac* and Co. guarantied to the plaintiffs the shipment of it by *Gordon* and Co. from *France*, on account of the plaintiffs, on the terms agreed upon. A licence was then obtained for "*Merac* and Co. *and other* British *merchants*," to import in an *American* ship the brandy; being, as it is stated, *the property of the said persons* or *some of them, as may be specified in their bills of lading.* And the question now is, whether the licence be void, because it does not specify the names of the plaintiffs, whose property this would have been upon the shipment and importation into this kingdom. If the licence had only extended to cover the property of *Merac* and Co. and they had had no other interest in the goods than appears upon the statement of this case, it might have been contended not to be sufficient to cover this adventure; but it includes *other* British *merchants*; and it afterwards says, "being the property of the said persons *or some of them.*" It might indeed have been a more certain means of avoiding fraud if the names of the persons really interested were specified in the licence; but the act of parliament does not require this; and it appeared at the trial that the licence in question was in the common form. The articles, however, licensed to be imported are specified, together with the ship, and the time; and there could be

no

1807.

TIMSON *againſt* MERAC.

no more than that ſhip could contain in one cargo; and theſe checks ſeem to have been thought ſufficient for the purpoſe in view, without greater particularity. There being then no vice in the original contract, there is no reaſon why the plaintiffs ſhould not recover againſt theſe defendants upon the contract of guarantie which they entered into for the due performance of the original contract, which the perſons abroad have failed to perform.

GROSE J. declared himſelf of the ſame opinion.

LAWRENCE J. The circumſtances of the caſe ſhew that the contract was entered into by theſe parties in contemplation of acquiring a licence to make the trading legal; which was accordingly obtained: and the contract being lawful, the defendants are neceſſarily liable on their guarantie for the non-performance of it.

LE BLANC J. The queſtion turns on the legality of the contract, which muſt have been made before the licence was obtained. There exiſted, however, before the contract was made an act of parliament enabling the king in council to make orders and to grant licences for trading with the enemy. Then the contract in queſtion was made in contemplation of ſuch a licence, which was in fact afterwards obtained. The licence is to *Merac* and Co. *and other* Britiſh *merchants* to import the brandy, "being the property of the ſaid perſons, or ſome of them, *as may be ſpecified in their bills of lading.*" Now ſuppoſing it were neceſſary to have named in the licence the particular perſons to whom the property was conſigned, it does not appear but that *Merac* and Co. might have had the bills of lading made out to them if the contract had been executed, which would have given them the legal property

1807.

TIMSON *againſt* MERAC.

property in the goods. So that the legality of the contract, the performance of the defendants have guarantied, ſtands clear of all objection.

Poſtea to the Plaintiffs.

Saturday, Nov. 21ſt.

Ex parte JOHN CARUTHERS.

The ſtat. 13 *G.* 2. *c.* 28. *ſ.* 5. exempting from the impreſs ſervice any harpooner, &c. or *ſeaman* in the *Greenland* fiſhery trade, is impliedly repealed by the ſtat. 26 *G.* 3. *c.* 41. *ſ.* 17. which exempts ſuch harpooner, &c *whoſe name ſhall be inſerted in a liſt*, required to be delivered on oath by the owner of the veſſel to the collector of the cuſtoms; and which alſo exempts any *ſeaman* entered on board any ſhip intended to proceed on the ſaid fiſhery in the following ſeaſon, *whoſe name ſhall be inſerted in a liſt to be delivered as aforeſaid*, and who ſhall have given *ſecurity*, &c. to proceed, and ſhall proceed accordingly: for the latter ſtatute ſuperadds the inſertion of the ſeaman's name in ſuch liſt as a condition precedent to the exemption.

THIS was the caſe of an impreſſed ſeaman on board his majeſty's ſhip *Texel*, for whoſe liberation a writ of *habeas corpus* had been ſued out before a Judge at Chambers, grounded upon an affidavit, ſtating, that by an agreement in writing, under ſeal, dated the 11th of *March* 1807, between the maſter and part owner of the ſhip *Experiment*, then bound on a voyage to the *Greenland* ſeas, &c. and the officers and ſeamen of the ſaid ſhip, the latter agreed to go on the ſaid voyage in that ſhip. That *Caruthers* executed the agreement as a carpenter and ſeaman, and entered on and performed the voyage, and on the 30th of *July* laſt was impreſſed from on board the *Experiment*, at ſea, on her return home (*a*) from *Greenland*, and carried on board the *Texel*. That he did not enter into the king's ſervice, nor receive the bounty. And it concluded by claiming for him an exemption from being impreſſed until the voyage was completed. A rule niſi was obtained in this term for quaſhing the writ quia improvide emanavit, when it appeared to have been granted upon the ſtat. 13 *Geo.* 2. *c.* 28. *ſ.* 5. relating to the *Greenland* trade; which enacts, "that no

(*a*) This was afterwards admitted to be while the ſhip was on her voyage home.

1807.

Ex parte CARUTHERS.

" harpooner, line manager, boat ſteerer, or ſeaman, who " ſhall be in or belonging to any veſſel in the *Greenland* " fiſhery trade, ſhall be impreſſed from the ſaid ſervice; " and that any ſuch harpooner, &c. or ſeaman may, " during the time of the year that he or they are not " employed in the ſaid fiſhery, ſail in the colliery trade, " upon giving ſecurity to the ſatisfaction of the com- " miſſioners of the cuſtoms that he or they will proceed " in the ſaid veſſel to *Greenland*, &c. on the whale fiſhery " the next ſeaſon." Then the ſtat. 26 *Geo.* 3. *c.* 41. *ſ.* 17. enacts, " that no harpooner, line manager, or boat " ſteerer, who ſhall be in or belong to any veſſel in the " *Greenland* fiſhery trade, and *whoſe name* (diſtinguiſhing " the capacity in which he is to act) *ſhall be inſerted in a* " *liſt*, (which is hereby required to be delivered on oath " by the owner of ſuch veſſel to the collector of the " cuſtoms, &c.) ſhall be impreſſed from the ſaid ſervice: " and that any ſuch harpooner, &c. may, during the " time of the year that he is not employed in the ſaid " fiſhery, ſail in the colliery trade; upon giving ſecurity " to the ſatisfaction of the commiſſioners of the cuſtoms " that he will proceed in the ſaid veſſel to the *Greenland* " ſeas, &c. the next ſeaſon: and that every *ſeaman* or " *common mariner* who after the firſt of *February* in any " year ſhall be entered to ſerve on board any ſhip which " ſhall be intended to proceed on the ſaid fiſhery in the " following ſeaſon, *whoſe name ſhall be inſerted in a liſt* " *to be delivered as aforeſaid, and who* ſhall have given *ſe-* " *curity* to the ſatisfaction of the commiſſioners of the " cuſtoms to proceed, *and* ſhall proceed accordingly, *ſhall* " *be privileged and exempt from being impreſſed* from or " out of the ſaid ſervice from the ſaid 1ſt of *February* " until after the expiration of the then next ſeaſon for " the

1807.

Ex parte CARUTHERS.

"the ſaid fiſhery, and until the voyage home from thence "ſhall be fully complete and ended, *and no longer;* any "law, &c. to the contrary notwithſtanding." Then the ſtat. 26 *Geo.* 3. *c.* 50. repeals part of the ſt. 15 *Geo.* 3. *c.* 31. and the ſtat. 16 *Geo.* 3. *c.* 47. and every act and part of an act repealed by either of them (not including the ſtat. 13 *Geo.* 2. *c.* 28.) and regulates the *Greenland* trade; and provides by *ſ.* 25. "that no harpooner, line manager, or "boat ſteerer," (omitting *ſeamen*) "belonging to any "veſſel fitted out on the aforeſaid fiſhery, ſhall be im- "preſſed from the ſaid ſervice, but ſhall be and is here- "by privileged and exempt from being impreſſed, ſo "long as he ſhall belong to and be employed on board "any veſſel whatever in the fiſhery aforeſaid." The ſtat. 28 *Geo.* 3. *c.* 20. makes ſome further regulations as to the trade. And, laſtly, the ſtat. 35 *Geo.* 3. *c.* 92. repeals the ſtat. 26 *Geo.* 3. *c.* 50. and 28 *Geo.* 3. *c.* 20. and every act and part of an act repealed by either them; and after regulating the trade, re-enacts the 25th ſect. of the ſtat. 26 *Geo.* 3. *c.* 50. in totidem verbis (*a*).

Marryat, in ſhewing cauſe againſt the rule, contended that the ſtat. 13 *Geo.* 2. *c.* 28. *ſ.* 5., extending the protection to ſeamen generally, in the *Greenland* trade, remained unrepealed; not being inconſiſtent with the proviſion in the 17th ſect. of the ſtat. 26 *Geo.* 3. *c.* 41. which went to exempt the ſeaman whoſe name was inſerted in the liſt there deſcribed from being impreſſed, as well *before*, as during the continuance of the ſervice: and here the man was preſſed during the actual ſervice. But if

(*a*) Vide alſo the ſtat. 42 *G.* 3. *c.* 22. *ſ.* 2. protecting a certain number of harpooners, line managers, and ſteerſmen, in proportion to the tonnage, from being impreſſed.

ſuch

1807.

Ex parte CARUTHERS.

ſuch inſertion of his name in the liſt, as required by the latter ſtatute, were a condition precedent to his right of exemption; (an opinion which the Court had before intimated;) then he argued that the act being to be done by another perſon, and not by the party himſelf, the omiſſion of it ought not to prejudice the latter.

The Attorney-General and *Jervis* were to have ſupported the rule; and ſtated further that the party had not given any ſecurity, as required by the act. But

The Court were clearly of opinion that the inſertion of the ſeaman's name in the liſt was by the expreſs terms of the clauſe made a condition precedent to the exemption; and that the act of the 26 *Geo.* 3. *c.* 41. *ſ.* 17. repealed by implication (*a*) the general proviſion of the ſtat. 13 *Geo.* 2. *c.* 28. *ſ.* 5. by requiring ſomething more to be done than the mere act of entering on board a *Greenland* veſſel, in order to protect the ſeaman from being impreſſed: and therefore they made the rule abſolute for quaſhing the writ of habeas corpus; and remanded the party to his former ſtation on board the king's ſhip. And Lord *Ellenborough* C. J. intimated that if he had been deprived of his privilege by the default of any other perſon, he might have his remedy of another ſort againſt him.

Rule abſolute.

(*a*) The rule, as laid down by *Eyres* J. in *Harcourt* v. *Fox*, 1 *Show.* 520. is, "that ſtatutes introductive of a new law, penned in the affirmative, do always repeal former ſtatutes concerning the ſame matter, as implying a negative."

1807.

Saturday, Nov. 21ſt.

KNIGHT *againſt* CRIDDLE.

The Court will not order the ſheriff to retain, in ſatisfaction of a preſent writ of fi. fa. iſſued by the plaintiff againſt the defendant, *money* or *bank notes*, which the ſheriff had before received for the uſe of the defendant, in diſcharge of an execution levied by the defendant againſt another, and which the ſheriff had not paid over.

THE preſent defendant had recovered judgment and ſued out execution againſt one *S. H.* for his debt and coſts; and in diſcharge of that execution *S. H.* paid into the hands of the ſheriff of *Hants* 60*l.* in bank notes: and before that money was paid over, the preſent plaintiff recovered judgment and ſued out his writ of fieri facias for 33*l.* 10*s.* debt and coſts againſt the defendant, which was delivered to the ſame ſheriff. And now, upon an affidavit of theſe facts by the ſheriff's officer, and that he had in purſuance of the ſheriff's warrant levied the debt and coſts in this cauſe out of the 60*l.* in bank notes remaining in the ſheriff's hands, and that he could not find any other goods and chattels of the defendant whereof to levy the ſaid debt and coſts;

Gaſelee moved for a rule to ſhew cauſe why the ſheriff of *Hants* ſhould not pay over to the plaintiff the amount of his debt and coſts in this cauſe out of the ſum received by him on account of the defendant, as before mentioned; and in the mean time retain the ſaid ſum in his hands. And he cited *Armiſtead* v. *Philpot* (*a*), where a ſimilar rule was made abſolute, without oppoſition, except ſo far as to ſecure the attorney's lien for his bill. But by

Lord ELLENBOROUGH C. J. We ought not to force the defendant to come here to ſhew cauſe againſt a rule founded on the aſſumption, that money (and bank notes for this purpoſe are the ſame) may be taken in execution.

(*a*) *Dougl.* 230.

It

1807.

KNIGHT *againſt* CRIDDLE.

It is an innovation on the law, which ought not to be admitted. The caſe in *Douglas* was by conſent. The other Judges concurred in refuſing to grant a rule to ſhew cauſe (*a*).

(*a*) Upon the ſame principle that money cannot be taken in execution, this Court, in *Fieldhouſe* v. *Croft*, 4 *Eaſt*, 510. refuſed to ſtay in the ſheriff's hands even the ſurplus of a former execution againſt the defendant's goods at the ſuit of the ſame plaintiff, for the purpoſe of ſatisfying a new execution.

TAYLOR *againſt* LENDEY.

Tueſday, Nov. 24th.

IN aſſumpſit for money had and received, &c. a verdict was taken for the plaintiff at the laſt aſſizes at *Exeter*, for 5*l.* 5*s.*, ſubject to the opinion of the Court on this caſe. Mr. *Tucker*, a juſtice of the peace for the county of *Devon*, had directed a conſtable and his aſſiſtant to take a man, who had been charged before him with an unnatural crime, to a public houſe, and there keep him in cuſtody while his commitment was making out. The plaintiff an innkeeper, and one *Hill*, who were waiting to ſee the magiſtrate on buſineſs, were in the ſame room. The magiſtrate came to the door of the public houſe with the commitment, and both the conſtable and his aſſiſtant went out to him; and while they were out, the priſoner, who was left in the room with *Hill* and the plaintiff, (who knew he was in cuſtody,) made his eſcape; but was ſhortly after retaken, and repreſented to the magiſtrate that the plaintiff had encouraged him to run away; which the plaintiff and *Hill* denied. The plaintiff and *Hill* were ſummoned before the magiſtrate the next morning, when the priſoner was examined, and ſwore to his

One who had voluntarily offered to pay a ſum of money for the uſe of the poor of the pariſh, in order to avoid a proſecution by a magiſtrate upon a charge of having inſtigated the eſcape of a priſoner in cuſtody for a miſdemeanor, which offer was conſented to by the magiſtrate, and the money accordingly paid by the party to the maſter of the work-houſe for the uſe of the poor; may at any rate countermand the application of the money before it is ſo applied; and may recover it back in an action for money had and received.

1807.

TAYLOR *againſt* LENDEY.

former aſſertion, which was denied by the plaintiff and *Hill.* The magiſtrate ſaid that ſome notice muſt be taken of this; and the plaintiff ſaid he was ready to anſwer any charge which was brought againſt him. The plaintiff being much agitated in conſequence of this charge againſt him, became dangerouſly ill, and was confined to his bed; when his brother, after conſulting with the plaintiff's wife, applied to the magiſtrate, ſtated the plaintiff's ſituation, deſired him to relieve his brother's mind, and ſaid that he would pay any ſum the magiſtrate ſhould think proper to get rid of the charge. The magiſtrate in conſequence of this repreſentation ſaid, that he thought reparation would be made to the public if the plaintiff paid five guineas to the defendant, who is governor of the poor houſe at *Axminſter*, for the uſe of the poor of *Axminſter*: and that if that were done, he would not go on with any proſecution againſt the plaintiff. This was acceded to, and the money paid to the defendant by the plaintiff's brother, on his behalf; and nothing more has been done in the proſecution againſt the plaintiff. The plaintiff, when he recovered, was diſſatisfied with what had been done, and applied to the defendant to have his money back again, which was then remaining with the defendant; but this was refuſed; and this action was thereupon brought. If the plaintiff were entitled to recover, the verdict was to ſtand; if not, a nonſuit was to be entered.

Lens Serjt. for the plaintiff, contended, that the defendant being in the nature of a ſtakeholder, having received the plaintiff's money without conſideration, and having had notice to return it before it was paid over to the poor, for whoſe uſe it was ſo received, was liable to the plaintiff in this action. The money was paid to the defend-

ant

ant without conſideration, or upon one that was illegal; for it was paid on the ſuppoſition that the plaintiff had been guilty of a public miſdemeanor, and in order to redeem him from proſecution. If it had been paid by the plaintiff voluntarily, there might have been a difficulty in his recovering it back; though ſtill the ſituation of the defendant as a ſtakeholder would have made his authority revocable while it was executory; but the caſe ſhews that the money was paid under a threat of proſecution, and in order to avoid it. If the plaintiff were really guilty of the offence with which he was charged, the proſecution ought not to have been ſtopped on account of his paying a ſum of money for a purpoſe wholly collateral to the tranſaction: if innocent, as he inſiſted that he was, then the money was illegally extorted from him under a threat of a proſecution, to redeem himſelf from the expence and vexation of which it was paid; and was therefore paid under dureſs. His guilt or innocence was not put in queſtion. If the act in reſpect of which the payment was made were in itſelf illegal, and the parties in pari delicto, the money could not have been recovered back again: but here the parties were not in pari delicto, but it was paid by the plaintiff to relieve himſelf from the vexation and expence of a proſecution, and may therefore be recovered back. As in *Williams* v. *Hedley* (*a*), money paid by the plaintiff to the defendant, in order to compromiſe a qui tam action for uſury, was held to be recoverable back; conſidering that the prohibition and penalties of the ſtat. 18 *Eliz. c.* 5. only attached upon the compounding informer, and not upon the party paying the compoſition, who was therefore not in pari

(*a*) 8 *Eaſt*, 378.

1807.

TAYLOR *againſt* LENDEY.

delicto. And the Court would not in that ſhape enter into the conſideration whether the plaintiff had been guilty of the uſury with which he was charged. But even if this payment had been made upon an illegal conſideration; yet the defendant ſtanding in the ſituation of a middleman or ſtakeholder, it was competent for the plaintiff to revoke his authority before the money was actually paid over and applied to the uſe of the poor: as in *Cotton* v. *Thurland* (*a*), where money depoſited with a ſtakeholder, upon a wager on the event of a battle to be fought by the parties to the wager, was recovered back even after the battle was fought; notice having been given by the plaintiff to the ſtakeholder, before it was paid over, not to pay it.

Lord ELLENBOROUGH C. J. then called upon the counſel for the defendant to diſtinguiſh this, if he could, from the caſe of the ſtakeholder, having received notice to pay back money depoſited before it had been applied: and intimated that the defendant was to be conſidered as an agent for the party paying the money to be applied to the uſe of the poor; and being an agent, his authority was revocable, and was actually revoked before the money was paid over.

Diſney, for the defendant, denied that the money had been paid by the plaintiff under dureſs; he was not in cuſtody at the time; nor was he threatened with the proſecution if he did not pay it: but the payment was propoſed to be made voluntarily on his behalf, upon an implied admiſſion of the offence imputed to him, and as a ſatisfaction to the public for it. And he contended

(*a*) 5 *Term Rep.* 405.

that

that the defendant was entitled to retain the money ſo paid, either on the ground that the tranſaction was legal, and that it was competent to the magiſtrate to agree to forego the proſecution upon the ſubmiſſion and confeſſion of the plaintiff, and his paying the five guineas for the uſe of the poor, as a public ſatisfaction for the offence; in which caſe the plaintiff had a ſufficient conſideration for the payment: or on the ground that if the tranſaction were illegal, the plaintiff was in pari delicto, and therefore could not recover back the money ſo paid: or that ſuppoſing both parties to have miſtaken the law, in this reſpect, yet that money paid under ſuch miſtake cannot be recovered back. This, he ſaid, was diſtinguiſhable from *Collins* v. *Blantern* (*a*); for there the proſecution, which was for perjury, had proceeded to trial, and the agreement was corruptly made for the benefit of the proſecutor, who on that account forbore to appear and proſecute: but here no benefit was reſerved to any individual, but only to the public; and there was no corrupt ſtipulation to ſtifle juſtice, but all the parties acted bonâ fide.

Lord ELLENBOROUGH C. J. This argument might have applied to a caſe where the defendant had paid the money over to the uſe of the poor for whom it was received, before notice; but how can you make it bear upon this caſe, where, whether the purpoſe were legal or illegal, the money ſtill remained in the hands of an agent, acting under a countermandable authority, whoſe authority was actually countermanded by his principal before the money was applied? Take it, that the money

(*a*) 2 *Wilſ.* 341. 347.

1807.

TAYLOR *againſt* LENDEY.

had been paid by the plaintiff to the defendant for a charitable purpoſe, but before the defendant had made any application of it, the plaintiff countermanded the payment: was there not then an end of the authority; and could the agent perſiſt in applying it againſt the direction of his principal? The queſtion therefore is reduced to the caſe of a countermanded agent. If the maſter of the workhouſe had applied it before any countermand, it would have been too late for the countermand to have operated, and the caſe muſt have reſted upon the general argument; but there is no pretence for ſaying that the payment to him for the uſe of the poor was for this purpoſe a payment to the poor. The caſe of *Cotton* v. *Thurland* is oppoſed to that argument.

Diſney then ſaid that he had no authorities to meet the argument againſt him on this point.

Lord ELLENBOROUGH C. J. The principal queſtion meant to be agitated does not ariſe in this caſe. We may aſſume, for the purpoſe of the argument, that it would have been a legal payment, and could not have been recovered back again if the money had been paid over before the countermand; and ſtill the plaintiff would be entitled to recover the money back, on the ground of the countermand.

The other Judges aſſenting,

Poſtea to the Plaintiff.

1807.

JONES, Aſſignee of the Sheriff of CUMBERLAND, *againſt* STORDY.

Tueſday, Nov. 24th.

The Same *againſt* BLAIN.

THESE were actions of debt by the aſſignee of the ſheriff on bail bonds, wherein the plaintiff declared that on the 2d of *April* 47 *Geo.* 3. he ſued out of the Court of *K. B.* againſt one *W. Moore* a ſpecial teſtatum capias writ directed to the ſheriff of *Cumberland*, by which writ the king commanded the ſaid ſheriff to take the ſaid *W. M.* &c. "ſo that he might have his body before our "ſaid lord the king in 15 days of *Eaſter*, *whereſoever* "*our ſaid lord the king ſhould then be in* England, to "anſwer" the plaintiff in a plea of treſpaſs on the caſe on promiſes, &c.; which writ was indorſed for bail for 173*l.* and before the return thereof was delivered to the ſheriff to be executed; by virtue of which the ſheriff arreſted *Moore*, &c.; and took bail for his appearance, according to the form of the ſtatute, at the return of the writ. And that the defendant *Stordy*, on the 11th of *April* 1807, executed the bail bond to the ſheriff, (the date whereof is by miſtake the 11th of *March* 1807), conditioned "that if the ſaid *W. Moore* ſhould appear "before our ſaid lord the king *at Weſtminſter* in 15 days "of *Eaſter* then next following to anſwer" to the ſaid plaintiff, &c. then the obligation to be void. The plaintiff then averred that *Moore* did not appear before our ſaid lord the king *at Weſtminſter* in 15 days of *Eaſter* in the condition mentioned according to the exigency of the ſaid writ, whereby the bail bond became forfeited.

Where the writ was to appear before the king *wherefoever he ſhould then be in* England, and the ſheriff took a bail bond for the party's appearance before the king *at Weſtminſter* on the day named in the writ; held to be a ſubſtantial compliance with the ſtat. 23 *H.* 6. *c.* 9. ſo as to entitle the aſſignee of the ſheriff to recover on ſuch bond.

1807.

JONES against STORDY.

And that the money not being paid, the ſheriff aſſigned the bond to the plaintiff according to the form of the ſtatute, &c. by reaſon whereof, &c.

To this the defendant demurred, and ſhewed for ſpecial cauſes, that it appears by the declaration that the writ of ſpecial teſtatum capias commanded the ſheriff to take *W. Moore*, &c. ſo that he might have his body before the king at a certain day therein mentioned *wheresoever our ſaid lord the king ſhould then be in* England, by virtue of which writ *Moore* was arreſted; and that the bail bond taken by the ſheriff on that arreſt was conditioned for the appearance of *Moore* "before our ſaid lord the king *at Weſtminſter*," and is therefore void. And alſo for that the ſaid writ is a proceſs by original, and the bail bond is taken on a proceſs by bill, and is therefore void and null by the ſtatute, &c. Joinder in demurrer. There were the like pleadings in the cauſe againſt the other bail.

Walker, in ſupport of the demurrer, relied upon the variance between the writ and the condition of the bond, the latter of which does not follow the writ, as required by the ſt. 23 *H.* 6. *c.* 9., prohibiting ſheriffs from taking any bail bonds "but by the name of their office, and upon "condition written, that the priſoners ſhall appear at the "day contained in the ſaid writ, and in ſuch *places* as "the ſaid writs, &c. ſhall require." Then as the ſtat. 28 *Ed.* 1. *c.* 5. directs the juſtices of his Bench to follow the king wherever he may be; and all original proceſſes returnable into this court are made returnable coram nobis ubicunque fuerimus in *Angliâ* (*a*), it might happen, if the place of the ſitting of this Court were

(*a*) *Co. Lit.* 71. *b.*

removed

removed from *Weſtminſter*, that a performance of the condition of the bond would not anſwer the exigency of the writ: and if the bond were void for this reaſon at the time it was given, the continuance of this Court at *Weſtminſter*, at the return of the writ, will not make the bond good: and conſequently it is immaterial to the validity of it in law, that in fact the party did comply with the condition, and did put in ſpecial bail. In *Burton* v. *Lowe* (*a*) the condition of the bond was to appear on ſuch a day in Cancellaria apud *Weſtmonaſterium* ubicunque fuerit; and on demurrer it was holden ill for the variance. And *Rolle* C. J. ſaid that "neither the Upper Bench nor the Chancery are fixed courts; and therefore the defendant ought not to be bound preciſely to appear at *Weſtminſter*; and then to add ubicunque fuerit is a material variance, and makes the bond naught." In a ſubſequent caſe indeed, of *Lawſon* v. *Haddock* (*b*), ſimilar to the preſent, where the former caſe was cited, it was ſaid that of later times the Courts had not been ſo ſtrict upon the wording of bail bonds: but the Court came to no deciſion upon it, and ordered it to be further ſpoken to at the bar. And ſince then, in *Samuel* v. *Evans* (*c*), where the writ was returnable on *Monday next after* the morrow of *All Souls*, (the 6th of *November*), and the ſheriff on the 4th of *November* arreſted the defendant and took a bail bond conditioned for his appearance on *the morrow* of *All Souls* (3d of *November*); after verdict in an action by the ſheriff's aſſignee the judgment was arreſted, becauſe it was impoſſible that any appearance according to the condition of the bond could have anſwered the purpoſes of the writ,

(*a*) *Sty.* 234. (*b*) 2 *Ventr.* 237. (*c*) 8 *Term Rep.* 569.

Lawes,

1807.

JONES *against* STORDY.

Lawes, contrà, was ſtopped by the Court.

Lord ELLENBOROUGH C. J. If any inconvenience could have enſued to the party from his being deceived by the ſheriff's taking the bond with a condition in this form, we might have corrected it on motion. But this is a bond taken in all its eſſential parts according to the ſtatute. There is a day named in the writ, but no certain place: and the condition of the bond is rightly taken to appear on the day named: and inſtead of requiring the party's appearance wherever the king ſhall then be in *England*, *Weſtminſter* is mentioned in terms, which, according to the common underſtanding of every body at this day, (conſidering that this Court has been invariably held here for many centuries, except only when it was removed for a ſhort period to *Oxford* in 1665 (*a*).) is the place meant by the more general deſcription in the writ. The variance in this caſe is certainly not greater than in *Shuttleworth* v. *Pilkington* (*b*), where the writ was returnable coram domino rege ubicunque tunc fuerit in *Angliâ*, and the bail bond was conditioned to appear coram domino rege generally; which was held ſufficient; for the Court ſaid they would underſtand an appearance "before *the king*" to mean "before *the king in his court*," and not before him *in perſon*.

Per Curiam, Judgment for the Plaintiff (*c*).

(*a*) Vide 4 *Blac. Com.* 265. (*b*) 2 *Stra.* 1155.

(*c*) See all the caſes collected in Mr. Serjt. *Williams*'s Note to *Foſter* v. *Hanſon*, 2 *Saund.* 59. *a.* &c.

1807.

DOE, on the Demiſe of RICHARD OTLEY, *againſt* CATHARINE MANNING, Widow, and S. GOOM.

Wedneſday, Nov. 25th.

IN ejectment for certain meſſuages and premiſes at *St. Mary Magdalen, Bermondſey*, in *Surry*; a verdict was found for the defendants, ſubject to the opinion of the Court on the following caſe. *Thomas Clendon*, being ſeiſed in fee of the premiſes in queſtion, by his will of the 6th of *March* 1750, duly executed and atteſted, demiſed the premiſes (amongſt others) to his nephew *William Clendon* for life; remainder to truſtees during *W. C.*'s life to preſerve contingent remainders; remainder to the firſt and other ſons of *W. C.* ſucceſſively in tail male; remainder to the teſtator's nephew, *Owen Manning*, for life; remainder to truſtees during *O. M.*'s life to ſupport contingent remainders; remainder to the firſt and other ſons of *O. M.* ſucceſſively in tail male; remainder to his own right heirs for ever: and gave the uſual powers of leaſing, in poſſeſſion, at rack rents, for 21 years; and alſo power to each of the deviſees, when in actual poſſeſſion, to ſettle upon ſuch perſon as he ſhould marry, for her jointure, *premiſes of the yearly value of 80l. for every 1000l.* he ſhould receive with ſuch wife. The teſtator died ſeiſed of the premiſes in 1751; and *Wm. Clendon*, his nephew, died in *March* 1764, without iſſue, whereby the eſtate deſcended to *O. Manning*, the next tenant for life, in remainder. By indenture of bargain and ſale of the 25th of *Nov.* 1782, duly inrolled in C. B., between *Owen Manning* and *George Owen Manning*, his eldeſt ſon, of the 1ſt part, *T. Green* of the 2d part, and *P. Wilſon* of the 3d part, *Owen Manning* and *George*, his ſon, ſold and conveyed

A *voluntary* ſettlement of lands made *in conſideration of natural love and affection* is void as againſt a ſubſequent purchaſer for a *valuable conſideration*; though with notice of the prior ſettlement before all the purchaſe money was paid or the deeds executed; and though the ſettlor had other property at the time of ſuch prior ſettlement, and did not appear to be then indebted, and there was no fraud in fact in the tranſaction; for the law, which is in all caſes the judge of fraud and covin ariſing *out of facts and* intents, infers fraud in this caſe, upon the conſtruction of the ſtat. 27 *Eliz.* c. 4.

1807.

Doe dem. OTLEY against MANNING and Another.

veyed the premiſes to *Green* in fee, to the intent that he might become tenant thereof, for the purpoſe of ſuffering a recovery, to the uſe of *O. Manning* and his aſſigns for life; remainder to the ſaid *G. O. Manning* in fee: and a recovery was accordingly ſuffered in *Hil.* term 23 *Geo.* 3. On the 15th of *March* 1783 *G. O. Manning* died inteſtate and without iſſue; whereby the reverſion in fee deſcended to *John Manning* his brother and heir at law. By indentures of leaſe and releaſe of the 11th and 12th of *April* 1783, between *Owen Manning*, who was then in poſſeſſion, of the firſt part, the ſaid *John Manning* of the ſecond part, and *W. Gill* and *H. S. Gill* of the third part; reciting the former indenture of bargain and ſale, and the recovery, and the death of *G. O. Manning*, and that divers other meſſuages, &c. having in like manner deſcended to the ſaid *John Manning*, he was deſirous of making ſome ſettlement and proviſion for the benefit of his mother, in caſe ſhe ſhould ſurvive *Owen Manning*, and of his ſiſters and younger brother; it was witneſſed, that in conſideration of the natural love and affection which *John Manning* bore towards *Catherine Manning* his mother, and *Jane*, *Catherine Matilda*, *Ann*, and *Matilda Manning*, his ſiſters, and *Charles Manning*, his brother, and for making proviſion for them for their reſpective lives, and of 10*s.* &c.; *Owen Manning* and *John Manning* conveyed to *W.* and *H. S. Gill* in fee, amongſt others, all the ſaid premiſes, habendum, &c. to the uſe of *Owen Manning* for life, ſans waſte; remainder to the uſe of the truſtees, during the life of *O. M.*, in truſt to preſerve contingent remainders; remainder to the uſe of *Cath. Manning* for life, ſans waſte; remainder to the truſtees and their heirs, upon truſt, during the lives of *Jane*, *Catherine Matilda*, *Ann*, *Matilda*, and *Charles Manning*, and the ſurvivor of them,

1807.

Doe dem. OTLEY against MANNING and Another.

them, to receive the rents, &c., and pay the ſame equally amongſt his ſaid ſiſters and brother, and to the ſurvivor of them; remainder to *John Manning* in fee: with the like power of leaſing as is contained in *Clendon*'s will; and a power for *Owen Manning*, during his life, and *Catherine* his mother, during her life, with the privity and conſent of *John Manning* and the truſtees, or the ſurvivor, his heirs or aſſigns, teſtified as therein mentioned; and for *John Manning*, after his father's and mother's deceaſe, with the like privity of the truſtees, or the ſurvivor, his heirs or aſſigns, teſtified as aforeſaid; to execute like leaſes for 99 years. *Owen Manning* died the 9th of *Sept.* 1801. By indentures of leaſe and releaſe of the 16th and 17th of *May* 1805, between *John Manning* of the firſt part, *R. Otley* of the ſecond part, and *H. Otley* of the third part; reciting the indenture of bargain and ſale of the 25th of *Nov.* 1782, and the deaths of *George Owen Manning* and *Owen Manning*, and that *John Manning* had contracted with *R. Otley* for the abſolute ſale of the premiſes; it was witneſſed, that in conſideration of 1800*l.* to *John Manning* paid, he conveyed to *R.* and *H. Otley* in fee all the ſaid premiſes for which this ejectment was brought, being part of the premiſes in the laſt-mentioned deed; habendum to ſuch uſes as *R. Otley* ſhould appoint; and in the mean time, and ſubject thereto, to the uſe of *R. Otley* in fee. The conſideration for the conveyance to the leſſor of the plaintiff was paid thus; by a book debt from *John Manning* to the leſſor of plaintiff 417*l.* 2*s.* 9*d.* By caſh at ſundry times 1382*l.* 17*s.* 3*d.* The book debt was contracted, and 150*l.* of the conſideration money paid, at the date of the purchaſe contract, and 387*l.* 5*s.* 6*d.* at a ſubſequent period, but before the execution of the conveyance of 1805, and before the leſſor of

the

1807.

Doe dem. OTLEY *againſt* MANNING and Another.

the plaintiff had notice of the deed of 1783. The reſidue of the conſideration was paid, and the deeds executed, ſubſequent to ſuch notice. *John Manning* did not diveſt himſelf of all his property by the conveyance of the 12th of *April* 1783. There was no fraud in the laſt-mentioned conveyance, unleſs fraud is to be implied by conſtruction or operation of law. The queſtion for the opinion of the Court was, Whether the leſſor of the plaintiff were entitled to recover againſt the defendant *Manning?* If the Court ſhould be of opinion that he was, a new trial was to be had, or an iſſue granted, as the Court ſhould direct, between the plaintiff and the defendant *Goom*, to try the validity of his leaſe. If the verdict on ſuch new trial or iſſue ſhould be found againſt *Goom*, a verdict was to be entered againſt both the defendants. But if the Court ſhould be of opinion that the leſſor of the plaintiff was not entitled to recover againſt the defendant *Manning*, the verdict taken for the defendants was to ſtand.

This caſe, which firſt came before the Court upon a motion for a new trial, being afterwards put into its preſent form by the deſire of the Court, was elaborately argued in laſt *Eaſter* term by *Lawes* for the plaintiff, and *Beſt* Serjt. for the defendants; and again, in *Trinity* term laſt, by *Marryat* for the plaintiff, and *Shepherd* Serjt. contrà: and in the courſe of the arguments all the authorities bearing upon the queſtion of the validity of voluntary conveyances upon *good* conſideration, ſuch as that of *blood*, or of *natural affection*, as contra-diſtinguiſhed from conveyances for *valuable* conſideration to purchaſers, with or without notice of the prior conveyance, were cited and accurately diſcuſſed. But as the leading arguments

and authorities were all brought in review and weighed by the Court in the deliberate judgment pronounced upon the caſe in this term, it would be needleſs to repeat them.

Lord ELLENBOROUGH C. J., after ſtating the facts—On this caſe, as it is found that there was no fraud in fact in the conveyance of the 12th of *April* 1783, the only point for the conſideration of the Court is, whether a voluntary conveyance, without any valuable conſideration, be not according to the legal conſtruction of the ſtat. 27 *Eliz. c.* 4. fraudulent againſt a ſubſequent purchaſer for a valuable conſideration: or, in other words, whether in ſuch caſe the law do not preſume fraud, without admitting ſuch preſumption to be contradicted. The caſes in which the conſtruction of the ſtatute of the 27 of *Eliz.* has come on to be conſidered have been numerous; and in ſeveral of thoſe which aroſe neareſt the time of paſſing the ſtatute the Judges ſeem to have thought that a voluntary ſettlement was only primâ facie fraudulent againſt a purchaſer, according to the language of the Court in Sir *Ralph Bovy*'s caſe, *Ventris* 193.; where it is ſaid, (Lord *Hale* being Chief Juſtice) "that though every voluntary conveyance carries an *evidence of fraud*; yet it is not upon "that account only *always* to be reckoned fraudulent, or "to be avoided by a purchaſer for a valuable conſideration." And in *Jenkins* v. *Kemiſhe* or *Kemis*, which is to be found in *Hardreſs*, 398. and in 1 *Lev.* 150. in *Lavender* v. *Blackſtone*, in 2 *Lev.* 146. and in *Garth* v. *Mois*, 1 *Keb.* 486.. the ſame doctrine is diſtinctly laid down; and in *Style*, 446. it is ſtated to have been ſaid on a trial at bar, (Lord *Rolle* being then Chief Juſtice) "that a voluntary conveyance upon conſideration of natural

1807.

Doe dem. OTLEY against MANNING and Another.

"tural affection hath no badge of fraud, unleſs he who "makes it be indebted at the time or in treaty for the "ſale of the lands:" which caſe Chief Baron *Gilbert* adopts, and ſupports by reaſoning of his own, in his *Law of Evidence*, 235 (*a*). And in addition to theſe printed caſes, Sir *Robert Eyre*, then Chief Juſtice of *C. P.*, according to a MS. Note formerly belonging to Mr. Juſtice *Clive*, in a caſe of *Standon* v. *Charlwood*, tried before him at the *London* Sittings after *Trinity* term 1732, laid it down, that a voluntary ſettlement, made upon marriage by Sir *Richard Anderſon*, was not fraudulent *quia voluntary*; but the queſtion was, Whether it was not made with an intend to defraud: and the jury ſo found it. And with this doctrine other of the caſes which were cited by the counſel for the plaintiff may well agree, in which it is ſtated, "that conveyances were decided, *on evidence given at the bar*, to be fraudulent;" or, "that a jury were directed *on evidence*:" though it muſt be recollected that theſe caſes are not ſo ſtrong as thoſe I have alluded to, as they are not inconſiſtent with the poſſibility of juries having been directed, what ought to be their *concluſion in point of law*, from the facts given in evidence, if the jury ſhould find them to be true; for *fraud and covin is always a queſtion of law*; it is *the judgment of law on facts and intents*. In a more modern caſe, where the queſtion was upon the ſtat. 13 *Eliz.*, that of *Cadogan* v. *Kennet*, in *Cowper*, 434. Lord *Mansfield* ſaid, obiter, "the ſtat. 27 *Eliz. c.* 4. does not go to voluntary conveyances, merely as being *voluntary*; but to ſuch as are *fraudulent*." And in a late caſe, of *Doe* v. *Routledge*, in the ſame book, p. 705. where the queſtion aroſe on the

(*a*) P. 201. in the edition of 1801.

1807.

Doe dem. OTLEY *againſt* MANNING and Another.

ſtatute now under conſideration, Lord *Mansfield*, in conſidering one point in the caſe, whether the ſettlement there under all its circumſtances were fraudulent and covenous, ſtated, "that in the ſtatute there was not a word that impeached voluntary ſettlements, merely as being *voluntary*, but as *fraudulent and covenous*;" and noticed the 3d ſection, which ſubjects parties to ſuch fraudulent grants, who ſhould attempt to defend them, to forfeiture and impriſonment, as if ſuch practices were a crime; in which light no perſon making a mere voluntary ſettlement, by way of proviſion for his family, was ever conſidered to ſtand. This ſection furniſhes moſt unqueſtionably a very ſtrong argument in favour of that conſtruction; and had theſe caſes not been oppoſed by many others of great weight and authority, there would have been but little doubt in our minds as to this conſtruction being the right one; but we have to deal with a claſs of caſes full as numerous, decided by Judges of the greateſt eminence, which have given this ſtatute a different conſtruction, and have held that a conveyance without a *valuable* conſideration is by the ſtatute made void, as fraudulent, againſt a ſubſequent purchaſer for *ſuch conſideration*. The earlieſt caſe in which this is diſtinctly laid down is *Woodie*'s caſe, cited by *Tanfield* in *Colvile* v. *Parker*, *Cro. Jac.* 158. as far back as *Eaſt.* 5th of *Jac.* 1., where it was adjudged, "that an aſſignment of a leaſe of lands by one quaſi in jointure to his wife, he taking the profits, and afterwards ſelling it without notice, was within the ſtatute; though not made in truſt to be revoked, nor with any clauſe of revocation; becauſe it was a voluntary conveyance at firſt, and ſhall be intended fraudulent at the beginning." In this caſe, though the perſon making the

1807.

Doe dem. CTLEY *againſt* MANNING an. Another.

conveyance continued in poſſeſſion and took the profits, it will be obſerved that there was no badge of fraud; as ſuch poſſeſſion accompanied and followed the deed: but the Judges might very well apprehend that ſubſequent purchaſers might be continually defrauded by ſuch ſecret conveyances, if they ſhould be held good; and that when the queſtion was between one, who had paid a valuable conſideration for an eſtate, and another, who had given nothing, it was a juſt preſumption of law, that ſuch voluntary conveyance, founded only in conſiderations of affection and regard, if coupled with a ſubſequent ſale, was meant to defraud thoſe, who ſhould afterwards become purchaſers for a valuable conſideration; and that a different conſtruction would have ſo narrowed the operation of the ſtatute as to leave the perſons meant to be protected by it ſubject to almoſt all the miſchiefs intended to be guarded againſt: and it certainly is more fit, upon the whole, that a voluntary grantee ſhould be diſapointed, than that a fair purchaſer ſhould be defrauded. In *Prodgers* v. *Langham*, 1 *Sid.* 133. a conveyance made by a man in truſt for his daughter till marriage, for her maintenance, and then in truſt to raiſe a portion for her, was held to be a voluntary conveyance in its origin, and void by the ſtat. 27 of *Eliz.* againſt purchaſers for valuable conſideration: this was in the 15th of *Car.* 2. In *White* v. *Huſſey*, *Precedents in Chancery*, 14, in the beginning of King *William*'s reign, in the caſe of a conveyance, where the fraud, if any, was only from its being voluntary, the commiſſioners of the great ſeal were all of opinion that they might decree a conveyance fraudulent merely from being voluntary, and that, without any trial at law. In *Gardiner* v. *Painter*, *Caſ. temp. King*, C. p. 65. Lord *King* ſaid it could never be a queſtion, whether

1807.

Doe dem. OTLEY *againſt* MANNING and Another.

whether a voluntary ſettlement be good againſt purchaſers. This was in the year 1726; and in the next year, in *Tonkins* v. *Ennis*, 1 *Eq. Caſ. Abr.* 334., a voluntary ſettlement was conſidered as being made void againſt a purchaſer by the ſtat. 27 of *Eliz.* And this could only have been ſo held from ſuch ſettlement being in point of law conſidered as fraudulent. In *White* v. *Sanſom*, 3 *Atk.* 412., though Lord *Hardwicke* is ſtated to have ſaid, that he had heard it ſaid in that court, that there are reaſonable voluntary conveyances, which that Court will not interfere to diſturb, upon the conſtruction of theſe ſtatutes; yet, according to the ſame caſe, he ſaid, "he hardly knew an inſtance where a voluntary conveyance had not been held fraudulent againſt a ſubſequent purchaſer." And in *Lord Townſend* v. *Windham*, 2 *Veſ.* 10. he ſaid, "on the 27th of *Eliz.* every voluntary convey-"ance made, where afterwards there is a ſubſequent con-"veyance made for valuable conſideration; *though no* "*fraud* in that voluntary conveyance, nor the perſon "making it at all indebted; yet the determinations "are that *ſuch mere voluntary conveyance* is void at law "by the ſubſequent purchaſe for valuable conſider-"ation." In *Roe* v. *Mitton*, 2 *Wilſ.* 356. Lord Ch. J. *Wilmot* ſtated the queſtion to be, Whether there were a *good and valuable* conſideration to ſupport the limitation therein to *Thomas Hammerton*, the father of the leſſor of the plaintiff; or whether the limitation were *merely voluntary* under the ſtat. 27 of *Eliz.*, and bad againſt a purchaſer for valuable conſideration? And the Court held it good; as the mother giving up her charge of an annuity on the whole of the eſtate, and taking it on a part, was conſidered as a *valuable* conſideration. And Lord C. J. *De Grey*, in *Goodright* v. *Moſes*, in 2 Sir *W. Black.*

1807.

Doe dem. OTLEY *againſt* MANNING and Another.

Rep. 1019., laid it down, "that the deed in queſtion "was only a *voluntary* conveyance within the true mean- "ing of the ſtat. 27th of *Eliz.*; being founded only on a "*good*, and not on a *valuable*, conſideration; and *therefore* "could not be ſet up againſt a bonâ fide purchaſer." And the obſervation on this caſe made by the counſel for the defendant, that it ſeemed that Lord C. J. *De Grey* had been miſled by a caſe in 2 *Vern.* 326., which he referred to; and which was ſaid not to have been decided, and on which he was ſuppoſed to have relied; does not weaken the authority of the caſe in *Blackſtone*; for Lord C. J. *De Grey* referred to it, not to ſupport the opinion of the Court on the point now before us; but to ſhew that a leſſée for years was a purchaſer for a valuable conſideration. Lord *Manſfield* himſelf (whoſe opinion in *Doe* v. *Routledge*, and whoſe dictum in *Cadogan* v. *Kennet*, have been much relied on,) held in the caſe of *Chapman* v. *Emery*, *Coup.* 280. that a *voluntary* conveyance after marriage by a man on his wife and children was *void* by the ſtat. 27th of *Eliz.* againſt a ſubſequent mortgagee, whom he held to be a purchaſer. And with reſpect to the caſe of *Doe* v. *Routledge*, it may be obſerved that Lord *Manſfield* ſeems to have ſupported his opinion by caſes, which were not conſidered as caſes of *voluntary* ſettlements; but as caſes where the ſettlements had for their foundation *valuable* conſiderations: ſuch was the caſe of *Newſtead* and *Searles*, in 1 *Atk.* 268. which he mentioned by name: for Lord *Hardwicke* in that caſe ſtated "the queſtion to be, Whether the articles of the 30th of *April* 1709 were for a *valuable* conſideration, and binding, or ought to be conſidered as *voluntary* and fraudulent, with reſpect to ſubſequent creditors and purchaſers?" And afterwards he ſaid, "I think the ſettlement *no voluntary*

"agree-

1807.

Doe dem. OTLEY *againſt* MANNING and Another.

" agreement, but a binding one; the ſtatutes of the 13th " and 27th of *Eliz.*, that make conveyances fraudulent, are " voluntary conveyances made againſt purchaſers for a " valuable conſideration, or bonâ fide creditors; but it " would be difficult to ſhew that ſuch a limitation, as in " the preſent caſe, has been held fraudulent and void " againſt ſubſequent purchaſers and creditors. The pre- " ſent is a ſtronger caſe; for here are *reciprocal conſider-* " *ations*, both on the part of the huſband and wife, *by* " *the proviſions under the articles for the ſecond marriage.*" And I believe, if it were neceſſary to go into the examination, it would be found that in moſt, if not in all of the caſes cited by the defendant, there were reciprocal conſiderations; ſome benefit acquired by the perſons making the ſettlement, which might fall under the denomination of a valuable conſideration; though perhaps other perſons derived a benefit from the ſettlement, who were not the principal objects of it. As in *Jenkins* v. *Keymys*, where the conſideration of a marriage and marriage portion was held to run through all the eſtates raiſed by the ſettlement on the marriage; though the marriage was not concerned in them. And it muſt be further recollected, with reſpect to *Doe* v. *Routledge*, that upon the ſtrength of the voluntary ſettlement in that caſe *a marriage was had*; which was noticed by Lord *Manſfield*. And according to the caſe of *Prodgers* v. *Langham*, 1 *Sid.* 133. a voluntary conveyance, fraudulent againſt a ſubſequent purchaſer, was held to be *made good by a ſubſequent marriage*. And it will be further recollected, that in *Doe* v. *Routledge* there was *no bonâ fide purchaſer*. Subſequently to the caſe of *Chapman* v. *Emery*, the caſes of *Evelyn* v. *Templar*, 2 *Bro. Chan. Caſ.* 148. and *Doe ex dem. Bothell* v. *Martyr*, 1 *Boſ. & Pull.*

1807.

Doe dem. OTLEY *againſt* MANNING and Another.

New Reports, 332. have been determined: in the laſt of which it was laid down, "that it cannot now be held "that a prior voluntary conveyance ſhall defeat a con- "veyance to a purchaſer for a valuable conſideration, "without overturning the ſettled and decided law." And in the firſt of them (*i. e.*) *Evelyn* v. *Templar*, it was ſaid by Lord *Thurlow*, *that ſo many eſtates ſtand upon the rule, that it cannot be ſhaken.* And ſo late as *Mich.* term 1804, in the caſe of *Doe d. Lewis* v. *Hopkins*, the Court of Exchequer held; where after marriage a man covenanted to ſtand ſeiſed of an eſtate to the uſe of himſelf for life, remainder to the uſe of his wife for life, remainder to the heirs of the body of the wife begotten by the huſband; that ſuch ſettlement was void, as being voluntary againſt a leſſee of the huſband for 31 years; the ſon of the ſettlor claiming the eſtate after his father's death againſt the leſſee. To the authority of theſe caſes may be added the caſe of *Nunn* v. *Wilſmore*, 8 *Term Rep.* 528. where Lord *Kenyon* ſaid, "if this deed were either "actually fraudulent, or *voluntary*, *from whence the law* "*infers fraud*, the conſequence inſiſted on by the plain- "tiff would follow; and I admit that if this deed were "a *voluntary* deed, *the law ſays it is fraudulent.*" Thus ſtand the authorities on both ſides of the queſtion; and the weight, number, and uniformity of thoſe which eſtabliſh the point contended for on behalf of the plaintiff, do in our opinion very much preponderate: and as many eſtates depend upon the rule, it ought not, we conceive, to be ſhaken. It appears from the MS. note I have cited, formerly belonging to Mr. Juſt. *Clive*, that Mr. *Horſman* in the year 1713 adviſed the making a mortgage of the eſtate ſettled in ſtrict ſettlement by Sir *R. Anderſon* after his marriage; thinking it voluntary and fraudulent as againſt a pur-

1807.

Doe dem. OTLEY *againſt* MANNING and Another.

a purchaſer, and the like advice as that which he gave nearly a century ago, probably had been given before: and that it has been given ſince, and acted on, we cannot doubt; as Lord *Thurlow* was not likely to have expreſſed himſelf, as he did in *Evelyn* v. *Templar*, unleſs he had known that ſuch had frequently been the caſe. Feeling ourſelves preſſed with theſe authorities and conſiderations, we think ourſelves bound to give judgment for the plaintiff. Much property has, no doubt, been purchaſed, and many conveyances ſettled upon the ground of its having been ſo repeatedly held, that a voluntary conveyance is fraudulent, as ſuch, within the ſtat. 27th of *Eliz.*: and it is no new thing for the Court to hold itſelf concluded in matters reſpecting real property by former deciſions upon queſtions, in reſpect of which, if it were res integra, they probably would have come to very different concluſions. And if the adhering to ſuch determinations is likely to be attended with inconvenience, it is a matter fit to be remedied by the Legiſlature, which is able to prevent the miſchief in future, and to obviate all the inconvenient conſequences which are likely to reſult from it, as to purchaſes already made. And we cannot but ſay, as at preſent adviſed, and conſidering the conſtruction put on the ſtatute, that it would have been better if the ſtatute had avoided conveyances only againſt purchaſers for a valuable conſideration, *without notice of the prior conveyance.* Our opinion being with the plaintiff, the conſequence is that there muſt either be a new trial, or an iſſue between the plaintiff and the defendant *Goom* to try the validity of his leaſe.

1807.

Wednesday, Nov. 25th.

GODSALL and Others *againſt* BOLDERO and Others.

A creditor may inſure the life of his debtor to the extent of his debt: but ſuch a contract is ſubſtantially a contract of indemnity againſt the loſs of the debt; and therefore, if, after the death of the debtor, his executors pay the debt to the creditor, the latter cannot afterwards recover upon the policy; although the debtor died inſolvent, and the executors were furniſhed with the means of payment by a third party.

THIS was an action of debt on a policy of inſurance made the 29th of *Nov.* 1803, under ſeal of the defendants, as three of the directors of the Pelican Life Inſurance Company, on behalf of the company; which recited that the plaintiffs, coachmakers in *Long-acre*, being intereſted in the life of the Right Hon. *William Pitt*, and deſirous of making an inſurance thereon for 7 years, had ſubſcribed and delivered into the office of the company the uſual declaration ſetting forth his health and age, &c. and having paid the premium of 15*l.* 15*s.* as a conſideration for the aſſurance of 500*l.* for one year from the 28th of *Nov.* 1803, it was agreed that in caſe Mr. *Pitt* ſhould happen to die at any time within one year, &c., the funds of the company ſhould be liable *to pay and make good* to the plaintiffs, their executors, &c. within three months after his demiſe ſhould have been duly certified to the truſtees, &c. the ſum of 500*l.* And further, that that policy might be continued in force from year to year until the expiration of the term of 7 years, provided the annual premium ſhould be duly paid on or before the 28th of *November* in each year. The plaintiffs then averred, that *at the time of the making of the ſaid aſſurance, and from thence until the death of Mr.* Pitt, they were intereſted in his life to the amount of the ſum inſured; and that they duly paid the annual premium of 15*l.* 15*s.* before the 28th of *Nov.* 1804, and the further ſum of 15*l.* 15*s.* before the 28th of *Nov.* 1805; and that after that day, *and while the aſſurance was in force*, and *before the exhibiting the bill of the plaintiffs*, viz.

on

1807.

GODSALL *againſt* BOLDERO.

on the 23d of *Feb.* 1806, Mr. *Pitt* died; that his demiſe was afterwards duly certified to the truſtees, &c.; ſince when more than three months have elapſed before the commencement of this ſuit, &c.; but that the 500*l.* has not been *paid or made good to* the plaintiffs. There were alſo counts for ſo much money had and received by the defendants to the plaintiffs' uſe, and upon an account ſtated. To this the defendants pleaded, 1ſt, nil debent. 2dly, That the plaintiffs, at the time of making the aſſurance, and from thence until the death of Mr. *Pitt*, were not intereſted in his life in manner and form as they have complained, &c. 3dly, As to the firſt count, that the intereſt of the plaintiffs in the policy, and thereby intended to be covered, was a certain *debt* of 500*l.* at the time of making the policy, due from Mr. *Pitt* to the plaintiffs, and no other; and that the ſaid debt afterwards, and *after the death of Mr.* Pitt, and *before the exhibiting of the plaintiffs' bill*, to wit, on the 6th of *March* 1806, *was fully paid to the plaintiffs* by the Earl of *Chatham* and the Lord Biſhop of *Lincoln*, *executors* of the will of Mr. *Pitt*. Iſſues were taken on the two firſt pleas: and as to the laſt, the plaintiffs; proteſting that their intereſt in the policy thereby intended to be covered was not the ſaid debt mentioned in that plea to be due to them from Mr. *Pitt*, and no other; replied, that the ſaid debt was not afterwards, and after the death of Mr. *Pitt*, and before the exhibiting of their bill, fully paid to them by the Earl of *Chatham* and the Lord Biſhop of *Lincoln*, executors of Mr. *Pitt*, in manner and form as alleged, &c.: on which alſo iſſue was joined.

The

1807.

GODSALL *againſt* BOLDERO.

The defendants paid 31*l.* (*a*) into court upon the firſt count: and on the trial of the cauſe before Lord *Ellenborough* C. J. at *Guildhall*, it was agreed that a verdict ſhould be entered on the ſeveral iſſues, according to the direction of the Court, on the following caſe reſerved.

The policy mentioned in the declaration was duly executed, and the premiums thereon were regularly paid. Mr. *Pitt*, mentioned in the policy, died on the 23d of *January* 1806; which event was duly certified in *February* 1806 to the truſtees of the Pelican Life Inſurance Company. The defendants, before *Trinity* term laſt, were ſerved with proceſs iſſued in this cauſe on the 3d of *June* 1806. Mr. *Pitt* was indebted to the plaintiffs at the time of the execution of the policy, and from thence up to and at the time of his death above 500*l.*, and died inſolvent. On the 6th of *March* 1806 the executors of Mr. *Pitt* paid to the plaintiffs out of the money granted by parliament for the payment of Mr. *Pitt*'s debts, 1109*l.* 11*s.* 6*d.*, as in full for the debt due to them from Mr. *Pitt*. The caſe was argued in the laſt term by

Dampier, for the plaintiffs, who contended that they were entitled to recover upon this policy, notwithſtanding the payment of the debt to them by Mr. *Pitt*'s executors out of the money granted by parliament for that purpoſe. It is clear that a creditor has an inſurable intereſt in the life of his debtor, and the amount of the debt is the mea-

(*a*) There was ſome diſcuſſion in the courſe of the argument as to the ſufficiency of the ſum paid into court, in reſpect of the premiums received; the grounds of computing which did not diſtinctly appear. The defendant's counſel, however, denied the neceſſity of paying any thing into court, the riſk having once commenced; and ultimately no opinion was given by the Court on this point.

1807.

GODSALL *againſt* BOLDERO.

ſure of that intereſt; and ſo far the exiſtence and legality of the debt (*a*) is neceſſary to the validity of the inſurance in point of intereſt under the ſtat. 14 *Geo.* 3. *c.* 48.; but it is not the *debt*, quà *debt*, which is inſured, but the *life* of the debtor: it is only neceſſary that the intereſt ſhould exiſt at the time of the inſurance made, and continue up to the time of the death of the debtor, as it did in this caſe: and the ſum inſured having then become due, and the debtor's eſtate inſolvent, the fact of payment of the debt afterwards by a third party cannot be material; ſuch payment being altogether gratuitous. The validity of the inſurance depends upon its agreement with the ſtat. 14 *Geo.* 3. *c.* 48., which was made to prevent "inſur-"ances on lives or other events wherein the aſſured ſhall "have no intereſt:" and for this purpoſe it enacts (*ſ.* 1.) "that no inſurance ſhall be made by any perſons on the life of any perſon, &c. wherein the perſons for whoſe uſe, benefit, or on whoſe account ſuch policy ſhall be made, ſhall have no intereſt, or by way of gaming or wagering:" and it avoids every aſſurance made contrary to the true intent and meaning thereof. The 2d ſection prohibits the making any policy on the life of any perſon, without inſerting in it the perſon's name intereſted therein. And the 3d ſect. provides that "in all caſes "where the inſured hath intereſt in ſuch life, &c. no "greater ſum ſhall be recovered from the inſurers than "the amount or value of the intereſt of the inſured in "ſuch life," &c. Now here it cannot be diſputed but that all the requiſites of the act have been complied with. The only queſtion which can be made is upon the third ſection, as to the neceſſity of the intereſt continuing be-

(*a*) *Dwyer* v. *Ellie*, *London* Sittings after *Hil.* 1788. *Park on Inſur.* 2d ed. 491. and 2 *Marſh. on Inſur.* 675.

yond

1807.

GODSALL *against* BOLDERO.

yond the time of the event happening on which the inſurance is ſtipulated to be paid, and to the commencement of the action. But the intereſt need only continue up to the happening of the event inſured, when the cauſe of action ariſes; and that is the uſual averment in actions of this ſort: and the defendants by their third plea admit that it continued beyond that time; for they allege that the debt was paid *after* Mr. *Pitt*'s death, though before the action commenced. But if it had been neceſſary that the intereſt ſhould endure up to the time of the action brought, that ſhould have been averred; which has not been uſual; and for want of which the judgments in former caſes might have been arreſted. The hazard was run, for which the premium was received, during Mr. *Pitt*'s life; and as he died inſolvent, there was then as it were a total loſs: then the underwriters' liability cannot be adeemed by the voluntary payment of a third party, though through the hands of the debtor's executors. The very payment of the premium gave the plaintiffs an intereſt in the policy; and it could not have been in the contemplation of the Legiſlature when they granted the money for the payment of Mr. *Pitt*'s debts to adeem the riſk of underwriters. In the caſe of inſurances againſt fire, it never was conceived that the inſurers could avail themſelves pro tanto of charitable donations collected for the benefit of the ſufferers. In the caſe of a life inſurance, the premium is not calculated upon the riſk of the inſolvency of the perſon whoſe life is inſured, but ſolely on the probability of the duration of the life. But if the defendant's objection be well founded, every caſe of this ſort will be reſolved into an examination of the aſſets; of which the inſurers will avail themſelves pro tanto, after having had the benefit of the whole premium: and this too, at any

1807.

GODSALL *againſt* BOLDERO.

diſtance of time when aſſets may be forth-coming after the payment of the loſs. But, ſecondly, by the payment of money into court the defendants admit a continuance of the plaintiffs' intereſt on the policy beyond the amount of the bare debt; for it was paid in after the liquidation of the debt, and after the action commenced. And therefore the plaintiffs would be entitled to recover ſomething. And it does not appear how the premiums received have been reduced to the amount paid into court.

Marryat, contrà, ſaid that he ſhould not now diſpute the propoſition, that a creditor might inſure the life of his debtor ſince the ſtatute; though it might have been doubted at firſt, whether ſuch an intereſt as that in the life of another were within the contemplation of the Legiſlature. There was an inception of the riſk on the policy; and therefore the premium was properly paid; and no queſtion can ariſe on the amount of it; this being an inſurance on a preciſe ſum, like a valued ſea policy. The only queſtion is, whether in the event the plaintiffs have been damnified, and can call upon the aſſurers for any indemnification. To purſue the metaphor; the ſhip inſured has been wrecked, but there has been a ſalvage, which the underwriters were entitled to, and out of which the aſſured have been indemnified: notwithſtanding which they ſtill claim as for a total loſs; contrary to the very nature of the inſurance, which is only a contract of indemnity. Admitting that the general form of the declaration in theſe caſes may have been ſuch as is ſtated; ſtill it is competent for the underwriters to ſhew that a ſalvage has been received by the aſſured to the whole extent of their loſs: and in no caſe can an aſſured recover double

ſatis-

1807.

GODSALL *againſt* BOLDERO.

ſatisfaction whether from the ſame or any other perſon; as in the caſe of a double inſurance: and therefore it is immaterial in this caſe from what hand the firſt ſatisfaction came. This principle was fully admitted in the caſe of *Bird* v. *Randall* (*a*), where it was applied to a caſe much ſtronger than the preſent. For there a ſervant having entered into articles to ſerve his maſter for a certain time under a penalty, and the ſervant having left his ſervice before the time by the procurement of the defendant, this Court, in an action by the maſter to recover damages againſt the ſeducer, held that the maſter's having before ſued the ſervant and recovered the penalty againſt him before the action brought againſt the ſeducer (though in fact the penalty recovered was not received till after the ſecond action commenced, but before trial,) was a bar to ſuch further remedy; conſidering the amount of the penalty as ample compenſation for the injury received; and that no further ſatisfaction could be received from any other quarter. [Lord *Ellenborough* C. J. I never could entirely comprehend the ground on which that caſe proceeded. It was aſſumed that the ſum taken as the penalty from the ſervant was the extreme limit of the injury ſuſtained by the maſter: but there is the doubt: for the penalty might have been ſo limited, becauſe of the inability of the ſervant to undertake to pay more; and yet it might have been very far from an adequate compenſation to the maſter for the injury done to him by another who ſeduced his ſervant from him. I remember however a ſimilar caſe tried at the ſittings in the court of Common Pleas before Mr. Juſtice *Wilſon*, ſitting for the Chief Juſtice, who ruled the ſame point upon the dry authority of the former deciſion; but, as it ſeemed to me at the time,

(*a*) 3 *Burr.* 1345. 1 *Blac.* 373. 387.

with

1807.

GODSALL *against* BOLDERO.

with conſiderable doubt upon his mind as to the propriety of it. *Lawrence* J. I ſuppoſe the Court proceeded upon the ground that the penalty was by the expreſs ſtipulation of the parties made an equivalent for the loſs of the ſervice. Lord *Ellenborough*. That is ſo as between the parties themſelves; but it may admit of doubt, whether that were the fair way of conſidering it as againſt a ſtranger, a wrong doer.] A voluntary payment of another's debt, if accepted as ſuch, will protect the debtor: and if ſo, it will equally protect an inſurer, under the ſtatute. For the object of that was to prevent wager policies: but if this policy may be enforced, notwithſtanding payment of the debt, every creditor may gamble upon the life of his debtor by way of inſurance, though without any reaſon to doubt of his ſolvency; and upon his death he would be entitled to double ſatisfaction of his debt. If a payment out of the debtor's affets would have been a bar to this action, it cannot enter into the merits of the caſe to inquire by whoſe aſſiſtance the executors have been enabled to make the payment. The money was paid by them, and received by the plaintiffs, as for the *debt* of Mr. *Pitt*. Then, 2dly, the payment of money into court on the firſt count only admits the contract declared on. It admits that the plaintiffs had an intereſt in the policy up to the death of Mr. *Pitt*, but not at the time of the action brought: and where a demand is illegal on the face of it, payment of money into court does not admit it (*a*). [It was afterwards ſtated by the Court, and agreed on all hands, that the payment of money into court on the firſt count only admitted the *facts* ſtated in that count.]

(*a*) *Cox* v. *Parry*, 1 *Term Rep.* 464. and *Ribbans* v. *Crickett*, 1 *Boſ. & Pull.* 264.

Dampier,

1807.

GODSALL *against* BOLDERO.

Dampier, in reply, on the principal queſtion, ſaid that the facts of the caſe ſhewed that this was not a wagering policy; but that the plaintiffs had an intereſt in it up to the extent of the ſum inſured. And denied that the ſubſequent payment of the debt out of the grant of parliament was like the caſe of ſalvage on a marine policy: for that was an advantage calculated upon by the underwriters in fixing the amount of the premium; but here the ſolvency of the debtor formed no baſis of the calculation, but only the probable duration of his life. In *Bird* v. *Randall*, (beſides the doubt of the ſoundneſs of that deciſion) the penalty was conſidered as liquidated damages to the full extent of the injury: and the judgment recovered was conſidered as a ſatisfaction in law. If in this caſe the plaintiffs, after recovering judgment againſt the underwriters, had attempted to ſue Mr. *Pitt*'s executors, the caſes would have been more like. This ſtands as the caſe of a *gratuitous* payment by third perſons of the debt of another, and not as the ſatisfaction of a legal demand, nor upon a ſtipulation to receive it as ſatisfaction of the preſent claim. It is moſt like the caſe of a charitable donation to ſufferers by fire who were partially inſured.

Curia adv. vult.

Lord ELLENBOROUGH C. J. now delivered the judgment of the Court.

This was an action of debt on a policy of inſurance on the life of the late Mr. *Pitt*, effected by the plaintiffs, who were creditors of Mr. *Pitt* for the ſum of 500*l.* The defendants were directors of the Pelican Life Inſurance Company, with whom that inſurance was effected. [His Lordſhip, after ſtating the pleadings and the caſe, pro-

1807.

GODSALL against BOLDERO.

proceeded—] This assurance, as every other to which the law gives effect, (with the exceptions only which are contained in the 2d and 3d sections of the stat. 19 *Geo.* 2. *c.* 27.) is in its nature a contract of *indemnity*, as distinguished from a contract by way of *gaming* or *wagering*. The interest which the plaintiffs had in the life of Mr. *Pitt* was that of creditors; a description of interest which has been held in several late cases to be an insurable one, and not within the prohibition of the stat. 14 *Geo* 3. *c.* 48. *s.* 1. That interest depended upon the life of Mr. *Pitt*, in respect of the means, and of the probability, of payment which the continuance of his life afforded to such creditors, and the probability of loss which resulted from his death. The event, against which the indemnity was sought by this assurance, was substantially the expected consequence of his death as affecting the interests of these individuals assured in the loss of their debt. This action is, in point of law, founded upon a supposed damnification of the plaintiffs, occasioned by his death, existing and continuing to exist at the time of the action brought: and being so founded, it follows of course, that if, before the action was brought, the damage, which was at first supposed likely to result to the creditors from the death of Mr. *Pitt*, were wholly obviated and prevented by the payment of his debt to them, the foundation of any action on their part, on the ground of such insurance, fails. And it is no objection to this answer, that the fund out of which their debt was paid did not, (as was the case in the present instance,) originally belong to the executors, as a part of the assets of the deceased: for though it were derived to them aliundè, the debt of the testator was equally satisfied by them thereout; and the damnification of the creditors, in respect of which their action upon the

1807.

GODDALL *againſt* BOLDERO.

aſſurance contract is alone maintainable, was fully obviated before their action was brought. This is agreeably to the doctrine of Lord *Mansfield* in *Hamilton* v. *Mendes*, 2 *Burr.* 1210. The words of Lord *Mansfield* are, "The "plaintiff's demand is for an *indemnity:* his action then "muſt be founded upon the nature of the *damnification*, "as it really is at the time the action is brought. It is "repugnant, upon a contract for indemnity, to recover "as for a total loſs, when the event has decided that the "damnification in truth is an average, or perhaps no loſs "at all." "Whatever undoes the damnification in the "whole, or in part, muſt operate upon the indemnity "in the ſame degree. It is a contradiction in terms, to "bring an action for *indemnity*, where, upon the whole "event, *no damage* has been ſuſtained." Upon this ground, therefore, that the plaintiffs had in this caſe no ſubſiſting cauſe of action in point of law, in reſpect of their contract, regarding it as a contract of *indemnity*, at the time of the action brought, we are of opinion that a verdict muſt be entered for the defendant on the firſt and third pleas, notwithſtanding the finding in favour of the plaintiffs on the ſecond plea.

Wedneſday, Nov. 25th.

HARRIS *againſt* JAMES, one, &c.

The certificate of a bankrupt, allowed after the filing of the plaintiff's bill, and before plea pleaded, is evidence to ſupport the general plea in bar given by the ſtat. 5 *Geo.* 2. *c.* 30. *ſ.* 7. viz. that before the exhibiting the plaintiff's bill the defendant became a bankrupt, and that the cauſe of action accrued before he became a bankrupt.

THE plaintiff filed his bill as of *Trinity* term 46 *G.* 3. in aſſumpſit on a promiſſory note, made and given on the 4th of *Auguſt* 1798, by the defendant to the plaintiff, for 71*l.* 12*s.* 8*d.*, with intereſt at 4 per cent, on

demand;

1807.

HARRIS *againſt* JAMES.

demand. There were alſo the common money counts in the bill. To this the defendant pleaded in *Mich.* term laſt, that the plaintiff ought not *to have or maintain* his aforeſaid action thereof againſt him; becauſe he ſays that after the making of the ſeveral promiſes in the declaration mentioned, and before the exhibiting the bill of the plaintiff, (to wit) on the 12th of *June* 1804, he, the defendant, became a bankrupt within the intent and meaning of the ſeveral ſtatutes, &c.: and that the ſeveral cauſes of action in the declaration mentioned accrued before ſuch time as he, the defendant, became a bankrupt: and concluded to the country. On which iſſue was joined. And at the trial at *Launceſton*, before *Sutton* B. a verdict was given for the plaintiff for 60*l.* 8*s.* 3*d.* ſubject to the opinion of this Court on the following caſe:

The plaintiff's bill was filed on the 5th of *September* laſt, as of the preceding *Trinity* term. The defendant pleaded the above plea on the 21ſt of *November* in *Michaelmas* term laſt. The defendant at the trial produced and proved his certificate, dated the 7th of *October* 1806, under the hands and ſeals of the commiſſioners named in a commiſſion of bankrupt againſt him on the 12th of *June* 1804, by virtue of which he was in due manner declared a bankrupt on that day. The certificate was allowed by the Lord Chancellor on the 20th of *November* laſt.

Burrough for the plaintiff. The queſtion is, Whether the bankrupt be entitled under the circumſtances to the plea of bankruptcy in the general form given by the ſtat. 5 *Geo.* 2. *c.* 30. *ſ.* 7.: but the benefit of that defence is only given to a bankrupt who obtains his certificate be-

1807.

HARRIS *againſt* JAMES.

fore the action brought: it is given to him ſolely on the ground of his *conformity* to the ſtatute: and for the purpoſe of entitling him to the certificate of ſuch his conformity many things are required by the 10th ſection; which ought properly to have preceded the 7th in its place in the ſtatute. The diſcovery of the bankrupt's eſtate and effects is to be of no avail, unleſs the major part of the commiſſioners certify, that he has made a full diſcovery and conformed himſelf in all things according to the directions of the act, and that they have no reaſon to doubt of the truth of the diſcovery: and ſuch certificate muſt be ſigned by 4-5ths in number and value of the creditors for above 20*l.*, who have proved their debts under the commiſſion; and the commiſſioners muſt have proof by affidavit of ſuch ſigning, &c.; which affidavit, &c. muſt be laid before the Lord Chancellor with the certificate: and the bankrupt muſt alſo make oath that the certificate and conſent of the creditors were obtained without fraud: and then the certificate muſt be allowed by the Lord Chancellor: and after all, any of the creditors may be heard againſt it. All theſe things ought to be completed before the action brought; for how elſe can the certificate be pleaded in bar of the action, as in this caſe? If the plaintiff had a complete cauſe of action at the time of commencing his ſuit, and the defendant at that time had no defence, it is contrary to juſtice and legal analogy that any matter ariſing ex poſt facto ſhould be a bar to the action. The only inſtance to the contrary is in the caſe of executors who may plead judgments confeſſed by them after the action brought in bar of it: but there the *fund* is ſued, and not the party (*a*).

(*a*) Vide *Le Fret* v. *Papillon*, 4 *Eaſt*, 507, 8.

And

1807.

HARRIS *againſt* JAMES.

And though in *Sullivan* v. *Montague* (*a*), and *Reynolds* v. *Beerling* (*b*), it was conſidered that actio non, &c. went to the time of plea pleaded, and not to the commencement of the action; yet that was afterwards over-ruled in *Evans* v. *Proſſer* (*c*). But the wording of the 7th ſection, which gives the plea, ſhews plainly that the full bar to the action was only meant to be given in this caſe where the certificate was obtained before the action brought; becauſe after diſcharging the bankrupt, who ſhall in all things have conformed to the act, from all debts due at the time he became bankrupt; (and till the certificate obtained and allowed it cannot be told whether he have ſo conformed or not;) it proceeds, "and in caſe "any *ſuch* bankrupt (that is, one who has ſo conformed) "ſhall *afterwards* be arreſted, proſecuted, or impleaded "for any debt due before ſuch time as he became bank-"rupt, he ſhall be diſcharged upon common bail; and "ſhall and may plead in general that the cauſe of ſuch "action did accrue before ſuch time as he became bank-"rupt," &c. and then it makes the certificate and allowance evidence of the bankruptcy, &c. It is clear that the general plea is only given in caſes where the action commenced *after* the *bankruptcy* (*d*); but the word *afterwards* applies as well to the *conformity* of *ſuch* bankrupt as to his *bankruptcy*. And in *Langmead* v. *Beard*, at the *Middleſex* ſittings after *Mich.* term 1792, Lord *Kenyon* C. J. held that a certificate granted after plea pleaded, but before the trial, would not avail at law. The words are "afterwards arreſted, proſecuted, or impleaded:" but *impleaded*, which is the moſt general word, muſt mean the

(*a*) *Dougl.* 106.

(*b*) *M.* 25 *G.* 3. *B. R. ib.* 111. 2d edit. and 3 *Term Rep.* 188. n.

(*c*) 3 *Term Rep.* 186. (*d*) *Tower* v. *Cameron*, 6 *Eaſt*, 413.

1807.

HARRIS against JAMES.

original impleading in the action. The only object of the Legiſlature in giving the general plea was to avoid the expence and prolixity of pleading all the ſpecial matter, which before that act a bankrupt who ſought to avail himſelf of his certificate was obliged to do, in anſwer to an action by a creditor whoſe debt accrued before the commiſſion; viz. the trading, act of bankruptcy, petitioning creditors' debt, the commiſſion, and all other the previous proceedings requiſite by the 10th ſection to a valid certificate: but it never meant to give a different defence from what the bankrupt had before, or to give a more extended legal effect to the general than to the ſpecial form of pleading. Then as in order to conſtitute a legal bar to the action all the matter neceſſary to conſtitute a legal defence, if pleaded ſpecially, muſt have been alleged to have occured before the action brought; ſo under this general form of pleading, the certificate neceſſary to ſubſtantiate it at the trial ought to be ſhewn to have exiſted antecedent to the action. [*Lawrence* J. There is no clauſe which ſays that the certificate ſhall be pleaded in bar to the action: it is the conformity to the ſtatutes which gives the diſcharge, of which the certificate is only the evidence. The ſtatute only ſays that "in caſe any *ſuch* bankrupt (that is, who ſhall have conformed in all things, as ſtated in the preceding part of the clauſe) ſhall be arreſted, &c. for any debt due before his bankruptcy, he ſhall be diſcharged on filing common bail, &c. and then it gives the general bar. The 10th ſection merely ſtates the evidence of the conformity. Lord *Ellenborough* C. J. Suppoſing no general plea had been given, the queſtion would ſtill have been the ſame, whether the conformity did not give the diſcharge? The latter part of the clauſe only gives a compendious

form

1807.

HARRIS *againſt* JAMES.

form of pleading the diſcharge.] No other evidence of conformity than the certificate could be admitted: it was therefore intended to be of the ſubſtance of the diſcharge; and muſt have been ſpecifically alleged in pleading, but for the general form allowed; and if it did not exiſt before the action brought, it could not by the general rule of law have been pleaded as a bar to the action, but only as a bar after the laſt continuance, or after the action commenced.

Dampier, contrà. The bankruptcy of the party after the debt accrued, and his ſubſequent conformity, conſtitute the ſubſtantial defence to the action given by the ſtatute: but the Legiſlature has required certain evidence of that conformity, which if obtained any time before the trial, and ready to be produced then, is ſufficient. The neceſſity of conformity is ſtated in the 1ſt ſection, and is enforced by the penalty of death: the conformity therefore precedes the other ſteps to be taken. Then the 7th ſection ſays that every bankrupt who ſhall conform as by the act is directed ſhall be *diſcharged* from all debts *due or owing at the time he became bankrupt:* and then, after giving the general plea, it ſays that the *certificate* and allowance ſhall be ſufficient *evidence* of the trading, bankruptcy, commiſſion, and *other proceedings precedent to the obtaining ſuch certificate.* It is plain, therefore, that the conformity is the defence, and the certificate is merely evidence of the prior proceedings. The 10th ſection no otherwiſe applies to this ſubject than as it ſhews what guards the Legiſlature have thrown about the obtaining the certificate, which is to be evidence of ſuch conformity, in order to prevent fraud. An argument ariſes upon the common form of the certificate, which con-

1807.

HARRIS against JAMES.

cludes with ſtating that the bankrupt finiſhed his examination; and therefore ſuppoſes the conformity to end with the laſt examination; and not with the allowance of the certificate; which in fact forms no part of the conformity. If no general plea had been given, it would have been ſufficient to have ſtated the trading, bankruptcy, &c. examination, and the conformity; and it would not have been neceſſary to have ſtated the allowance of the Lord Chancellor. Great inconvenience and oppreſſion would enſue if a bankrupt were liable to the coſts of all the actions which might be commenced againſt him after the commiſſion iſſued, which certainly could not have been intended by the Legiſlature, while they were taking all his property from him. There is another exception to the general rule, beſides the caſe of executors, where matter ariſing after the action brought is pleadable in bar of it; namely, the outlawry of the plaintiff; as in *Moor* v. *Green* (*a*). But in no event could this have been pleaded as a plea puis darrein continuance, becauſe no continuance had in fact intervened between the bill filed and the plea: *Theſ. Dig. b.* 14. *c.* 3. *ſ.* 10. It could only be pleaded as an original plea in bar; as in *Price* v. *Kenrick* (*b*), in the caſe of a releaſe after the action brought. [Lord *Ellenborough* C. J. obſerved that the caſe of a general releaſe did not apply, as that might releaſe the coſts incurred after the action brought, as well as what happened before.]

Burrough, in anſwer to the caſe of outlawry, ſaid, that the plea went to the very cauſe of action, which de-

(*a*) *Salk.* 178. But ſee for the general rule *Le Bret* v. *Papillon*, 4 *Eaſt* 502.

(*b*) *Fort.* 338.

veſted

1807.

HARRIS *againſt* JAMES.

veſted the plaintiff of his property and right to ſue, and transferred them to the crown. As to the principal queſtion, he argued that the certificate was ſo much of the ſubſtance of the defence, that if pleaded ſpecially, the plaintiff might have traverſed its exiſtence, or replied per fraudem, or any of the circumſtances mentioned in the 12th ſection which go to invalidate the certificate: but the Legiſlature would hardly have made ſo many diſtinct proviſions for invalidating the effect of mere evidence. Again, if the certificate were merely evidence, the Lord Chancellor by his order, or this Court by mandamus, would, upon ſufficient proof of the conformity, compel the commiſſioners to certify it: but ſuch applications have always been refuſed (*a*); as being a matter entirely within the diſcretion and judgment of the commiſſioners. The juſtice of the caſe is alſo with the plaintiff, who by this form of pleading will be debarred of his coſts by matter ariſing after his action was well brought: whereas by another form of pleading, viz. that pending the action the certificate was granted, and therefore that the plaintiff ought not *further* to proceed in his action, the defendant will ſtill have the benefit which the certificate was meant to give, that of protecting him from the payment of the debt, but not of the coſts before incurred.

This caſe was argued in the laſt term, and ſtood over for conſideration till now, when

Lord ELLENBOROUGH C. J. delivered the opinion of the Court,—This was an action of aſſumpſit, to which the defendant had pleaded his bankruptcy, in the form preſcribed by the ſtat. 5 *Geo.* 2. *c.* 30. *ſ.* 7. The facts were, that the plaintiff's bill was filed againſt the de-

(*a*) Vide Ex parte *John King*, 7 *Eaſt*, 92.

fendant,

1807.

HARRIS *againſt* JAMES.

ſendant, an attorney, on the 5th of laſt *September* as of the preceding *Trinity* term. The defendant pleaded the above plea of bankruptcy on the 21ſt of *November* in *Michaelmas* term laſt: and at the trial produced and proved his certificate, dated the 7th of *October* 1806, under the commiſſion of bankrupt, iſſued againſt him on the 12th of *June* 1804, and under which he was duly declared a bankrupt on the 12th of *June* 1804. The certificate was allowed by the Lord Chancellor on the 20th of *November* laſt, the day before the plea was pleaded. It was contended on the part of the plaintiff, that the matter of the defendant's diſcharge, having ariſen after the filing of the plaintiff's bill, ſhould have been pleaded as a plea after the laſt continuance. To which it was, on the part of the defendant, anſwered, that if even the matter of the diſcharge grew by the allowance of the certificate, and was not merely to be proved in evidence by it; yet that even ſo; and if the allowance of the certificate were ſpecially pleaded; it could not be pleaded in terms as a plea *after the laſt continuance*, inaſmuch as no continuance had in fact intervened between the time of the bill filed and of the plea pleaded. It was further argued, on the part of the plaintiff, that this plea, and the general bar ariſing out of it, was only given by the ſtatute in favour of perſons conforming to the directions of the ſtatute, who ſhould "*afterwards* (that is, after "they had ſo conformed) be arreſted, proſecuted, or im- "pleaded, for any debt due before ſuch time as he, ſhe, "or they might become bankrupt:" and it was contended that the word "*afterwards*," by reference to the antecedent matter, applied only to caſes in which the action was commenced after the bankrupt had *already conformed*, and obtained his certificate in proof of ſuch his con-

conformity. But it appears to us, on reference to the different proviſions of the act, to have been the object of it, that every bankrupt who had obtained his certificate of conformity, and which had been duly allowed, ſhould be thereupon, (that is, upon pleading ſuch plea, and producing ſuch his certificate) "*diſcharged from all his debts due or owing at the time that he did become bankrupt,*" for which he ſhould have been impleaded *after* his bankruptcy; and that the diſcharge given him was meant to be a bar to all remedy by ſuit againſt him, commenced after his bankruptcy for debts due antecedent to his bankruptcy. The form of the plea given by the ſtatute accords with this ſuppoſed intention and object of the Legiſlature, inaſmuch as it alleges merely "that the cauſe "of ſuch action accrued before the time he became a "bankrupt." This ſuppoſed intention of the Legiſlature in favour of the bankrupt, in part inferred from the language of the 7th ſection, is however further confirmed by adverting to the proviſions contained in the 13th ſection: for by that ſection, a bankrupt having obtained his certificate, duly allowed, is, *if taken in execution for any debt due before his bankruptcy*, by reaſon that *judgment was obtained before his certificate was allowed*, entitled to be diſcharged out of execution, (*i. e.* generally as to *both debt and coſts*) upon the production of his certificate before a judge. Whereas upon the principle contended for on the part of the plaintiff, the Legiſlature could only have conſiſtently directed his diſcharge out of execution as to the *principal debt*; leaving him ſtill liable for the *coſts* of the action, at leaſt for ſo much of them as had been incurred between the bringing of the action and the time of obtaining his certificate. Another argument in favour of the defendant ariſes from the 13th

ſection

1807.

HARRIS *againſt* JAMES.

ſection providing only for the relief of the bankrupt whoſe certificate ſhall be obtained *after* judgment: ſo that a bankrupt who ſhall obtain his certificate, after action brought and *before* judgment, would have no advantage of ſuch certificate if the conſtruction contended for by the plaintiff's counſel were to prevail. But we cannot ſuppoſe that it was the intention of the Legiſlature, that the certificate of a bankrupt ſhould prevent his creditor recovering againſt him if his certificate were obtained before the commencement of the action; or having perſonal execution againſt him if obtained after the judgment; and that he ſhould ſtill remain liable to his debts if he obtained his certificate after the commencement of the action, and before judgment. As we ſee no poſſible reaſon for ſuch a diſtinction being intended, we think that the intention of the Legiſlature, as collected from the act, muſt be taken to be, that the bankrupt ſhould be diſcharged wholly from debt and coſts, if he obtained his certificate in time to plead it in bar of the action: and that as nothing is provided to the contrary, that ſuch bar ſhould have the uſual effect of entitling the defendant, upon its being found for him, to his coſts. And that if he obtained his certificate after judgment, and too late to plead it, that it ſhould ſtill be available for his diſcharge out of execution for the debt and coſts: ſo that in neither caſe the defendant ſhould be ſubject to coſts: but that if he obtained his certificate in time to ſupport his plea, his plea ſhould have the common effect of all other pleas in bar which are found for a defendant.

Judgment for the Defendant.

1807.

ROBERTS, one, &c. *againſt* CAMDEN.

Wedneſday, Nov. 25th.

IN an action on the caſe for ſlander, the plaintiff, after ſtating by way of introduction, that at the time of the ſlanderous words ſpoken, he was a practiſing attorney of the Court of Great Seſſions for the county of *Flint*, and had conducted himſelf with integrity, &c. declared in the third count that the defendant *intending to injure and aggrieve* the plaintiff in his *good name*, character, &c. *and profeſſion*, and *to cauſe it to be believed that the plaintiff was guilty of perjury, and that a proſecution for the crime of perjury was about to be commenced againſt him*, afterwards, &c. in a certain diſcourſe, &c. falſely and maliciouſly, &c. ſaid and publiſhed theſe falſe, ſcandalous, and malicious words following, of and concerning the plaintiff, viz. "He (meaning the plaintiff) is under a charge of a proſecution for perjury. *G. Williams* (meaning one *G. W.* an attorney) had the Attorney-General's directions (meaning the directions of his Majeſty's Attorney-General for the county palatine of *Cheſter*) to proſecute (meaning to proſecute the plaintiff) for perjury. By reaſon whereof the plaintiff was injured and prejudiced in his good name, &c. and profeſſion, and loſt great gains which he would otherwiſe have acquired by his profeſſion of an attorney." There was a 4th count for a written libel.

After a general verdict with joint damages on the whole declaration, *Burrough* moved in laſt *Trinity* term,

The rule of conſtruction as to ſlanderous words is to conſtrue them in their plain and popular ſenſe, ſuch in which an ordinary hearer would have underſtood them at the time they were ſpoken. And therefore the defendant ſaying of the plaintiff, that "he "was *under a* "*charge of a* "*proſecution for* "*perjury*; and "that *G. W.* "(an attorney "of that name) "had *the Attor-* "*ney-General's* "directions to "proſecute the "plaintiff *for* "*perjury*," is actionable. For after verdict (by which the jury who are to judge of the intent of the ſpeaker, muſt be taken to have *negatived* that he meant to ſpeak of a proſecution for a perjury which the plaintiff had *not* committed,) the words, not having been juſtified, muſt be taken to be *falſe*; and being unqualified by any context, and unexplained by any occaſion to warrant them, the law infers *malice* from the *falſehood* of an accuſation which, in the common acceptation of the words, imputes *perjury* to the plaintiff.

Where new matter introduced by an innuendo, without any antecedent colloquium to which it can refer to ſupport it, is not neceſſary to ſuſtain the action, it may be rejected as ſurpluſage. And therefore an innuendo, that *the Attorney-General* ſpoken of meant the Attorney-General for the county palatine of *Cheſter*, was ſo rejected.

in

1807.

ROBERTS *against* CAMDEN.

in arreſt of judgment, and afterwards argued the caſe, together with *Topping*, for the defendant; and the *Attorney-General* and *Scarlett* were heard againſt the rule for arreſting the judgment. The caſes cited for the plaintiff, to ſhew that the words were in themſelves actionable, were *Haley* v. *Stanton*, *W. Jones* 299. and *Cro. Car.* 268. *Heynes* v. *Sprot*, *Cro. Jac.* 247. *Showell* v. *Hayman*, *ib.* 154. *Gainford* v. *Tuke*, *ib.* 536. And his counſel contended, that at any rate, if the third count were bad, the Court would not arreſt the judgment, but only award a venire de novo to have the damages ſevered by another jury. On the other hand were cited *Holt* v. *Scholefield*, 6 *Term Rep.* 691. *Steward* v. *Biſhop*, *Hob.* 177. *Powell* v. *Wind*, *ib.* 305. 327. *Bayly* v. *Churington*, *Cro. Eliz.* 279. *Weaver* v. *Cariden*, 4 *Rep.* 16. to ſhew that the words were not actionable, as not conveying any opinion of the ſpeaker upon the truth of the charge. And the innuendo, as to the Attorney-General of *Cheſter*, was objected to as not warranted by any antecedent colloquium. This caſe ſtood over for conſideration till this term; when

Lord ELLENBOROUGH C. J. delivered judgment.

This was a motion in arreſt of judgment in an action for words, in which a general verdict was found, with joint damages, upon the whole of the declaration. One of the counts, (the 3d) which it contained, has been argued on the part of the defendant to be bad on two grounds; 1ſt, that the words therein ſtated are not actionable, as not imputing to the plaintiff with ſufficient certainty the crime they point at, namely, that of perjury: and 2dly, becauſe as there is no colloquium reſpecting the Attorney-General of *Cheſter*, the innuendo, ſtating that

1807.

ROBERTS *againſt* CAMDEN.

that "the Attorney-General" meant the Attorney-General for that county, vitiates the count, as being introductive of new matter. But we think that there is nothing in this laſt objection; for admitting moſt clearly, that new matter cannot be introduced by an innuendo, but that it muſt be brought upon the record in another way, when neceſſary to ſupport the action; yet where ſuch new matter is not, as here, neceſſary to ſupport the action, an innuendo, without any colloquium, may well be rejected as ſurpluſage; as it can have no effect in enlarging the ſenſe of the words uſed. If then the innuendo be ſtruck out of this count; as for the reaſon above given we think it may; the foundation of the ſecond objection is removed. The firſt objection turns upon the meaning of the words ſpoken of the plaintiff by the defendant. The words are theſe; "He is under a charge "of a proſecution for perjury. *Griffith Williams* (meaning an attorney of that name) has the Attorney-General's directions, (meaning the Attorney-General of the "county palatine of *Cheſter*) to proſecute (meaning to "proſecute the plaintiff) for perjury:" As it has been ſettled ever ſince the caſe of *Underwood* v. *Parkes*, 2 *Stra.* 1200. that the truth of the words cannot be given in evidence upon not guilty, but muſt be ſpecially pleaded; the words, not having been ſo juſtified, muſt be aſſumed to be falſe: and the words not being accompanied by any qualifying context, nor appearing to be ſpoken on any warrantable occaſion; as in a courſe of duty, or the like; ſo as to rebut the malice which is neceſſarily to be inferred from making a *falſe* charge of this kind; provided the charge itſelf is to be conſidered as a charge of the crime of *perjury*, the queſtion amounts ſimply to this, whether the words amount to ſuch charge; that is, whether they

1807.

ROBERTS *against* CAMDEN.

are calculated to convey to the mind of an ordinary hearer an imputation upon the plaintiff of the crime of perjury. The rule which at one time prevailed, that words are to be underſtood in *mitiori* ſenſu, has been long ago ſuperſeded; and words are now conſtrued by courts, as they always ought to have been, in the plain and popular ſenſe in which the reſt of the world naturally underſtand them. What then is the plain and popular ſenſe of theſe words; and what is the imputation meant to be conveyed by a perſon ſpeaking them *untruly* of another? They muſt mean, that he was ordered by the Attorney-General to be proſecuted; (and it is immaterial for this purpoſe, whether the Attorney-General of the county palatine or of *England* were meant;) either for a perjury which he had committed; or, which he had not committed; or, which he was ſuppoſed only to have committed. In the firſt ſenſe they are clearly actionable. In the ſecond, they cannot poſſibly be underſtood conſiſtently with the context. And if the defendant had uſed the words in the laſt ſenſe, the jury might have acquitted him, according to the doctrine in the caſe of *Oldham* v. *Peake*, both in the court of Common Pleas (*a*), and in this court (*b*); in which caſe when in the Common Pleas Mr. Juſtice *Gould* laid it down, "that what was the defendant's meaning was a fact for the jury to decide upon." And Lord *Mansfield* afterwards, when that caſe was brought into this court, by error, ſaid, "if (the words had been) ſhewn to be "innocently ſpoken, the jury might have found a verdict "for the defendant; but they have put a contrary con- "ſtruction upon the words as laid." And certainly, if the ſenſe of the defendant, in ſpeaking theſe words, had

(*a*) 2 Sir *W. Blackſtone*, 962. (*b*) *Cowp.* 278.

varied

1807.

ROBERTS *againſt* CAMDEN.

varied from that aſcribed to them by the plaintiff, he might by ſpecially pleading have ſhewn them not actionable, had he not choſen to have reſted his defence merely on the general iſſue. It appears therefore that theſe words muſt fairly be underſtood in the firſt of theſe three ſenſes; namely, that he was ordered to be proſecuted for a perjury *which he had committed*; and, ſo underſtood, they are unqueſtionably actionable. Theſe words are not leſs ſtrong in effect than the words which were held actionable in one of the later caſes, that of *Carpenter* v. *Tarrant*, *Rep. temp. Hardw.* 339. viz. "*Robert Carpenter* was "in *Wincheſter* gaol, and tried for his life; and would "have been hanged had it not been for *Leggat*, for "breaking open the granary of farmer *A.*, and ſtealing "his bacon." And without adverting to the long bead roll of conflicting caſes which have been cited on both ſides in the courſe of this argument, it is ſufficient to ſay, that theſe words, fairly and naturally conſtrued, appear to us to have been meant, and to be calculated, to convey the imputation of perjury actually committed by the perſon of whom they are ſpoken; and that, therefore, the rule niſi for arreſting the judgment muſt be diſcharged.

The KING *againſt* the Inhabitants of BRADFORD.

Wedneſday, Nov. 25th.

AN order was made on the 7th of *July* 1807, by two juſtices of the peace for the county of *Wilts*, for the removal of *Sarah Spires*, a pauper, from *Bradford* to

By the ſtat. 35 *G.* 3. *c.* 101. *ſ.* 2. the party aggrieved by an order of juſtices, directing payment, to the amount of above 20*l.* of the charges and coſts of the ſuſpenſion of an order of removal, on account of the illneſs of the pauper, may appeal to the next Seſſions, in like manner as againſt an order of removal, though he omit to give notice of ſuch his appeal within three days after the demand of ſuch charges and coſts; by which he makes himſelf liable to a diſtreſs for the amount. And if on appeal the former order be vacated, or the amount of the charges to be paid be reduced, the ſurplus, if before levied by diſtreſs, muſt be refunded.

1807.

The KING *againſt* The Inhabitants of BRADFORD.

Melkſham in the ſame county; and the juſtices at the ſame time made another order ſuſpending the execution of the firſt, by reaſon of the ſickneſs and infirmity of the pauper, purſuant to the ſtat. 35 *Geo.* 3. *c.* 101. *ſ.* 2.; and on the 16th of *Sept.* following they made a third order, directing the firſt order to be executed, and the ſum of 41*l.* 14*s.* 9*d.*, expence which had been incurred by the ſuſpenſion of it, to be paid by *Melkſham* pariſh to *Bradford.* On the 17th of *Sept.* the pauper was carried to *Melkſham*, and delivered to the pariſh officers there; and on the 1ſt of *Oct.* a notice of appeal was given by *Melkſham* to *Bradford*; and a motion was made at the *Michaelmas* ſeſſions following to enter and adjourn an appeal againſt the laſt order for the payment of the expences incurred by the ſuſpenſion of the order of removal, under the before mentioned ſtatute; which was agreed to by the Court; but they ſtated theſe facts ſpecially, and reſerved the queſtion for the opinion of this Court, whether by the ſtat. 35 *Geo.* 3. *c.* 101. *ſ.* 2. any appeal were allowed to the quarter ſeſſions, the appellants not having given notice of appeal *within three days* after the removal of the pauper to the reſpondent pariſh, as mentioned in that clauſe of the act; or whether the appellants were not concluded by their neglecting to give ſuch notice from afterwards entering and proſecuting their appeal.

Caſberd, in ſupport of the juriſdiction of the ſeſſions to hear the appeal, notwithſtanding the want of notice within three days after the removal of the pauper, was ſtopped by the Court, who intimated that the words of the ſecond clauſe giving the ſame power of appeal, as againſt an order of removal, were concluſive on the queſtion.

W. Williams,

1807.

The KING *againſt* The Inhabitants of BRADFORD.

W. Williams, contrà, relied on the prior words of the clauſe, which directs that in caſe the pariſh officers to whom an order of removal has been directed, which had been ſuſpended, and certain charges incurred in conſequence of ſuch ſuſpenſion, " ſhall, upon the removal or " death of ſuch poor perſon ordered to be removed, re- " fuſe or neglect to pay the ſaid charges *within three days* " after demand thereof, and ſhall not *within the ſame time* " give notice of appeal, *as is hereinafter mentioned*," it ſhall be lawful for a juſtice of the peace to grant a warrant of diſtreſs to levy the charges and coſts. It is true that the clauſe goes on to ſay, that if the charges and coſts exceed 20*l.*, the parties aggrieved by ſuch order " may appeal to the next ſeſſions againſt the ſame, *as they may do againſt an order for the removal* of poor perſons *by any law now in being*:" but it never could have been intended that the appeal ſhould be made after the charges had been actually levied by diſtreſs, when it before required notice of appeal *as thereinafter mentioned* to be given *within three days* after the demand made; but the ſubſequent general words muſt be conſtrued with reference to the prior reſtriction as to the time of giving notice of appeal: and it muſt be underſtood altogether as directing, that if notice of appeal be given within the three days after the demand, and the ſum exceed 20*l.*, then the parties aggrieved may appeal againſt it, as they might do againſt an order of removal. The words, *as hereinafter mentioned*, are nugatory unleſs the proviſo giving the appeal be connected with the antecedent notice of appeal, which is required to be given within three days. Beſides, the clauſe goes on to direct, that if the Seſſions, on the appeal, be of opinion that a leſs charge ought to have been paid, they are to amend the order, and direct that the amended or-

1807.

The KING *againſt* The Inhabitants of BRADFORD.

der ſhall be *carried into execution* by the juſtices by whom the original order was made, &c. This again ſhews that the Legiſlature did not contemplate that there was to be any appeal after the original order had been already executed, and the larger ſum levied by diſtreſs for want of the notice of appeal within three days after the demand: nor has it made any proviſion for ordering the ſurplus levied on ſuch diſtreſs, beyond the reduced ſum directed to be levied by the Seſſions, to be refunded.

Lord ELLENBOROUGH C. J. The only conſequence to be deduced from the words of the clauſe, from the not giving notice of appeal againſt the charges within three days after the demand of them, is, that the party not giving ſuch notice within the time ſubjects himſelf to the inconvenience of a diſtreſs. But the ſubſequent proviſo giving the appeal is conceived in the moſt general terms, that the parties aggrieved may appeal to the next ſeſſions againſt ſuch order as they may do againſt an order of removal by any law in being. And it is not diſputed but that the preſent appeal was duly made, if it is to be regulated by the rules which govern appeals againſt orders of removal. But it is ſaid, that by reaſon of the antecedent words, "as hereinafter mentioned," referring to the appeal given by the latter part of the clauſe, we ought to import into that latter part words of reference to the former: but that would be to alter, and not to interpret the clauſe as it now ſtands; the meaning of which appears plainly to be this; if the party aggrieved by the order, and intending to appeal againſt the amount of the charges, will give notice of appeal within three days after demand made, he ſhall be relieved from the inconvenience of a diſtreſs; but though he neglect to do ſo, he

1807.

The KING *againſt* The Inhabitants of BRADFORD.

only ſubjects himſelf to that inconvenience; but his right of appeal, which is afterwards given, is not thereby taken away: and if he afterwards think proper to appeal within the time allowed by law for appeals againſt orders of removal, he is expreſsly empowered to do ſo. Then if the order ſhould be wholly quaſhed, or the ſum to be paid be reduced upon the appeal, no injuſtice will follow; for it is a conſequence of law that the money paid upon an order which was afterwards vacated in whole or in part ſhould be refunded by thoſe who have received it; and if it were not repaid, an action for money had and received would lie to recover it back again.

Per Curiam, Order of Seſſions confirmed.

The KING *againſt* The Inhabitants of EVERDON.

Wednesday, Nov. 25th.

AN order was made by two juſtices of the peace on the 19th of *June* 1805 for the removal of *Sarah Ares*, a pauper, from *Everdon* to *Wappenham*, both pariſhes in the county of *Northampton:* and at the ſame time the juſtices made another order by virtue of the ſtat. 35 *Geo.* 3. *c.* 101. *ſ.* 2. to ſuſpend the execution of the firſt, on account of the ſickneſs and infirmity of the pauper, until it ſhould be made appear to them that it could be ſafely executed: and by a ſubſequent order of the 3d of *December* 1806, reciting the death of the pauper, and that 20*l.* 8*s.* 6*d.* expence had been incurred by the ſuſpenſion of the order of removal, the ſame magiſtrates directed the pariſh officers of *Wappenham* to pay that ſum to *Everdon* on demand. Againſt this laſt order

Under the ſtat. 35 *G.* 3. *c.* 101. *ſ.* 2. an order of juſtices, ſuſpending their order made for the removal of a pauper to his place of ſettlement, on account of ſickneſs, may be made, though he were not *brought before the juſtices* at the time of ſuch orders made: the plain intent and preciſe object of the ſtatute being to extend the power of ſuſpenſion to all caſes where orders of removal may be made; and orders of removal may be made though the paupers to be removed be not brought perſonally before the magiſtrates; however fit that is to be done where it may be done.

1807.

The KING *againſt* The Inhabitants of EVERDON.

an appeal was lodged at the enſuing ſeſſions, when the order was quaſhed, ſubject to the opinion of this Court upon a caſe ſtating, That the order for the removal of the pauper was made upon the examination of her father only, who ſwore *that the pauper from exceſſive infirmity and ſickneſs was unable to be brought before the juſtices* who made the original order *for examination*; and that the ſaid juſtices at the ſame time made the order for ſuſpenſion. That on the 3d of *Nov.* 1806 the pauper died at *Everdon*, without ever having been removed to *Wappenham*; and that the ſame juſtices afterwards made the order in queſtion for the payment of the 20*l.* 8*s.* 6*d.* charges. And that it was proved on the hearing of the appeal, that the pauper was not preſent before, or examined by, the ſaid juſtices, when they made the order for the ſuſpenſion of the order of removal, nor was ſhe ever before them at all upon the buſineſs. The Seſſions being of opinion that the juſtices had not power to grant the order of ſuſpenſion without having the pauper before them to be examined, or without the juſtices viſiting the pauper themſelves, therefore quaſhed the order for the payment of the money founded thereon.

Dayrell, in ſupport of the order of Seſſions, relied upon the words of the ſtat. 35 *Geo.* 3. *c.* 101., the 2d ſection of which, giving the juſtices juriſdiction to ſuſpend an order of removal made by them, on account of the ſickneſs, &c. of the pauper, is expreſsly confined to caſes where the pauper is *brought before the juſtices* for the purpoſe of being removed. And he alſo argued that the ſtrict conſtruction of the words was required by the evident meaning of the Legiſlature to ſubmit the pauper to the view of the magiſtrates, ſo that they might judge from

1807.

The KING *against* The Inhabitants of EVERDON.

the evidence of their own ſenſes, as well as from other ſources of information, whether he were in a fit condition to be removed; for how elſe can it *appear to them* that he is unable to travel, &c.? Before this act the pariſh officers had a diſcretionary power of executing an order of removal when they thought proper; and the Legiſlature by this act intended to veſt that perſonal diſcretion in the magiſtrates.

Morice and *Sawbridge*, contrà. This is a remedial law, the object of which will be entirely fruſtrated by a literal conſtruction of the words of it. For on the one hand, it would be very inconvenient and burthenſome to require that, if the pauper cannot be brought to the place where the juſtices meet, by reaſon of ſickneſs or infirmity, they ſhould go to the place where the pauper is; and that, however dangerous it might be to them in caſe of contagious diſorders: or on the other hand, that the pauper muſt be brought before them, however unable to be removed without hazard of his life; which would defeat the very end of this humane regulation. The act could never be put in force except in ſlight caſes of illneſs. Neither can it anſwer any uſeful purpoſe, in moſt caſes, to require this perſonal inſpection of the magiſtrates; for unleſs they happened to be medical men, the mere view of the pauper could not afford them ſo much information, as to the real ſtate of his health, as the evidence of medical perſons. And there might be as much danger to the pauper himſelf in bringing him to the place where the juſtices meet, as to the place of his ſettlement. It clearly is not neceſſary, according to *Rex* v. *Bagworth* (*a*), that the pauper ſhould be preſent and exa-

(*a*) *Cald.* 181.

1807.

The KING *againſt* The Inhabitants of EVERDON.

mined for the purpoſe of founding an order of removal; though if it be convenient, it is fit and proper to be done. In ſome caſes, ſuch as infancy and lunacy, it would be uſeleſs to do ſo. Where a literal conſtruction of an act would go beſide the plain meaning and intent of it, there are ſeveral inſtances in the poor laws of a ſtill greater departure from the letter, in aid of the ſpirit, of an act, than that now propoſed. The ſtat. 5 *Eliz. c.* 4. requires the binding of an apprentice for ſeven years; and the 41ſt ſection avoids all indentures, &c. of apprenticeſhip made otherwiſe than according to that law; yet it has been holden (*a*) that indentures for a leſs time are voidable only as between the parties. So the ſtat. 3 *W. & M. c.* 11. *ſ.* 7. ſays that "any unmarried perſon, *not having* "*child or children*," may gain a ſettlement by hiring and ſervice for a year; and yet a widower having children *who have gained ſettlements in their own right* has been deemed competent to gain a ſettlement (*b*), becauſe within the reaſon, though certainly not within the words of the law. So in *Rex* v. *Iſlington* (*c*), the 4th ſection of the act in queſtion, which provides that no perſon who *ſhall come* into any pariſh ſhall gain a ſettlement by being rated to any tenement under 10*l.* a year value, was held to extend to perſons who were in the pariſh at the time of paſſing the act. In order therefore to put a reaſonable and practicable conſtruction upon the words, "in caſe any poor perſon ſhall be *brought before any juſtices of the peace* for the purpoſe of being removed," &c. they muſt be conſtrued to apply to the bringing the caſe of a pauper judicially before the magiſtrates for that purpoſe.

(*a*) *Rex* v. *St. Nicholas*, in *Ipſwich*, *Burr. S. C.* 91.

(*b*) *Antony* v. *Cardenham*, *Fort.* 309. *Foley*, 131. (*c*) 1 *Eaſt's Rep.* 283.

Lord

1807.

The KING *against* The Inhabitants of EVERDON.

Lord ELLENBOROUGH C. J. I hope that the apparent juſtice of the one conſtruction, and the great and manifeſt inconvenience of the other, do not too much warp my mind in coming to the concluſion which I have done: for it would indeed be a grievous conſtruction if we were bound to adopt the literal ſenſe of the words of the ſtatute which have been commented on. But I hope we ſhall do no violence to the words, and I am ſure we ſhall not violate the ſpirit of the act, by conſtruing the words, "in caſe any poor perſon ſhall from henceforth be "brought before any juſtice or juſtices of the peace for "the purpoſe of being removed," to mean, in caſe a queſtion concerning the removal of any poor perſon, or if the caſe of any poor perſon, ſhall be brought before the juſtices of the peace for the purpoſe of his removal, &c. The language of the act adverts to the caſe which moſt generally happens, where the pauper is brought in perſon before the magiſtrates to be examined as to his ſettlement; but that is not neceſſary to be done in all caſes, as appears from what was ſaid by Mr. Juſtice *Buller* in *The King* v. *Bagworth*, who denied that there was any ſuch general rule, as that it was neceſſary for the pauper to be examined; and he inſtanced the caſe of infants of tender years, where it is plainly impoſſible. And he referred to a caſe from *Comberbach*, 478. where Lord *Holt* ſaid that "if it can be, it is fit it ſhould be ſo, but not abſolutely neceſſary." And as it would be uſeleſs in caſes of infancy or lunacy, ſo it might be dangerous to the magiſtrates themſelves, in the caſe of infectious diſorders, to go to the pauper to take his examination in perſon: and to bring him before the magiſtrates would be, in caſes of extreme ſickneſs or infirmity, to expoſe him to the very miſchief which the act was intended to remedy. All therefore

1807.

The KING *against* The Inhabitants of EVERDON.

therefore that the act meant was, not that where any pauper was brought perſonally, but where his caſe was brought judicially before the magiſtrates, for the purpoſe of his removal, that they ſhould have power to ſuſpend the execution of the order of removal, if it appeared to them, that is by due examination of the facts, that from ſickneſs or infirmity of the party the removal could not then ſafely be made. This is the plain ſenſe and ſpirit of the act, though ſomewhat ſtraining upon the words of it: but no other conſtruction can be put upon them conſiſtently with the general object of the act. And in doing this, we do not go further againſt the letter of the act than was done in the caſe referred to of *Antony* v. *Cardenham*; where the deſcription of a perſon, *not having any child*, was conſtrued to mean not having any child which could be a burden to the pariſh where the father was hired and ſerved.

GROSE J. The letter of the ſtatute is ſufficiently plain according to the common underſtanding of the words; but that would militate ſo ſtrongly againſt the ſpirit and object of it, that we cannot be governed by the letter without entirely defeating this very wholeſome law. In many caſes where it might be neceſſary to aſcertain the ſettlement of a poor perſon, the removal of him from a ſick bed to be carried before the magiſtrates for that purpoſe might even occaſion his death; when it was the profeſſed object of the law to guard againſt any riſk of his perſonal ſafety, by enabling the juſtices to ſuſpend the execution of the order of removal till it could be done without danger to the party.

LAW-

1807.

The KING *against* The Inhabitants of EVERDON.

LAWRENCE J. The drawer of the act probably conceived that a poor person was always carried before the magistrates at the time of the order of removal made: it is usual indeed so to do; but it is not necessary, as appears from the cases which have been cited. But having assumed that to be the constant practice, then the object of the provision was, that in *all* cases of orders of removal made, the magistrates should exercise their discretion whether the paupers were in a fit condition to be removed at the time without danger to them: and if not, to enable the magistrates to suspend the execution of the order till they were satisfied that it might safely be executed. The letter of the act to be sure is confined to the case of any poor person *brought before* the magistrates for the purpose of being removed; but so to construe the act would be to draw poor persons in many instances from the bed of sickness; and in case of dangerous accidents happening at a distance from the place where the magistrates met, to prevent them from having the benefit of the act at the very time when they stood most in need of it. By construing, therefore, the act in the way we now do, we give effect to the plain intention of it, though the words used are not the most apt to express that intention.

LE BLANC J. I agree with the rest of the Court in the construction they have put upon the act: for a contrary construction would give effect to the letter by the repeal of the very object of the statute. Though I cannot agree that every case where a construction has been put upon a statute, in some instances directly contrary to the words of it, is a fit precedent to be followed by us. In the present case, it is quite clear what

1807.

The KING *against* The Inhabitants of EVERDON.

what the object of the Legiſlature was. Poor perſons were before this act liable to be removed on being only *likely to become chargeable:* that proviſion was repealed, and they were only ſubject to be removed upon becoming *actually chargeable.* But it was foreſeen that the very circumſtance which would moſt probably render them chargeable was ſickneſs: therefore when the Legiſlature authorized their removal when actually chargeable, it guarded againſt the improper exerciſe of it in caſe of ſickneſs or other infirmity by enabling the magiſtrates to ſuſpend the execution of the order of removal, under ſuch circumſtances, till they were of opinion that it could be ſafely executed. Then this intention of the Legiſlature would be entirely defeated if we were to hold, that in the very inſtances to which they looked as improper for poor perſons to be removed, and in which they authorized the magiſtrates to ſuſpend the execution of the order, the parties ſhould not have the benefit of the proviſion unleſs they were brought before the magiſtrates.

Order of Seſſions quaſhed.

1807.

The KING *againſt* The Commiſſioners of Sewers for the County of SOMERSET.

Thurſday, Nov. 26th.

A Writ of mandamus iſſued to theſe commiſſioners, reciting that at a court of ſewers holden at *Bridgewater* on the 29th of *June* 1799, before *Jefferys Allen*, and other commiſſioners there named, they made a certain order and decree under their hands and ſeals, whereby, after reciting that it appeared to them, as well on a ſpecial view and ſurvey taken by the ſaid *J. A.* &c. of the place in the pariſh and Level of *Huntſpill* in the ſaid county where a ſea wall (deſcribing it) lately ſtood; as by the preſentment *of the jurors of the ſaid pariſh of* Huntſpill duly ſworn before the ſaid commiſſioners aſſembled at the ſaid court, and which preſentment was returned to the ſaid court; that a new ſea wall of different ſize and dimenſions was become neceſſary to protect the Level from inundations of the ſea: and that it further appeared from the ſaid preſentment that the late ſea wall was in good repair before a violent ſtorm which happened on the 10th

The ſtat. 23 *H.* 8. c. 5. *ſ.* 17. having directed that "*Laws, acts*, "DECREES, "*and ordi-*"*nances*" made by commiſſioners of ſewers ſhall ſtand good and be put in execution *ſo long time as their commiſſion endureth, and no longer*, except "the ſaid laws "and ordi-"nances" be engroſſed in parchment, and certified under the ſeals of the commiſſioners into Chancery, and have the Royal aſſent; and the ſtat. 13 *Eliz. c.* 9. having directed all commiſſions of ſewers to continue in force *for* 10 *years*, unleſs ſooner determined by ſuperſedeas or any new commiſſion; and that all *Laws, ordinances, and conſtitutions*," made by force of ſuch commiſſion, *being written in parchment, indented, and under ſeals*, &c. ſhall, without ſuch certificate, or Royal aſſent, continue in force notwithſtanding the determination of the commiſſion by ſuperſedeas, until repealed or altered by new commiſſioners; and that all ſuch *Laws, ordinances, and conſtitutions*, written *in parchment, indented, and ſealed*, &c. ſhall, without certificate or Royal aſſent, continue in force *for one year* after the expiration of ſuch commiſſion by lapſe of 10 years from its teſte: held,

1. That the *Laws, acts, decrees, and ordinances*, mentioned in the ſtat. of *Hen.* 8. mean the ſame as the *Laws, ordinances, and conſtitutions*, mentioned in that of *Elizabeth.* And,

2. That a *decree* made by commiſſioners under a former commiſſion which had expired by lapſe of 10 years, directing a ſea wall to be refounded, which had been deſtroyed by a violent tempeſt and inundation, and the ſums neceſſary for its conſtruction to be advanced by thoſe who were before bound to ſuſtain it ratione tenuræ, (and who did advance the money accordingly), and that a rate ſhould be made on the Level for their reimburſement; (although ſuch decree had been written *in parchment, indented, and ſealed*; which this was not,) could not be enforced by commiſſioners under a *new* commiſſion, iſſued more than a year after the expiration of the former commiſſion; as to ſo much of it as remained unexecuted: though good to the extent to which it had been executed: and therefore this Court refuſed a mandamus to the new commiſſioners to direct a rate to be levied on the Level for the reimburſement directed by the decree.

of

1807.

The KING *againſt* The Commiſſioners of Sewers for SOMERSET.

of *Sept.* 1798, which threw down and deſtroyed it on that day and on other days between that and the 1ſt of *December* following, without any default of the Marquis of *Buckingham*, *R. Jeffery*, &c. who before then were bound to repair it in certain proportions, by the extreme and unuſual violence of the winds and ſea: and that the breach made in the land was daily increaſing, &c.; it was by the commiſſioners ſo aſſembled ordered and decreed, that a new wall of larger ſize and dimenſions and upon a different principle ſhould be conſtructed, ſufficient to protect the Level, &c. as near as might be on the line of the old wall; and that all perſons who held any lands, &c. within the Level, who had or might have any loſs or diſadvantage by inundations of the ſea for want of a ſufficient wall there, or who had or might have any benefit by preventing ſuch inundations, ought to be charged with erecting the new wall, &c. And by the ſame decree the commiſſioners deputed *C. C.* to ſurvey the Level, &c.; and further ordered, that the Marquis of *Buckingham*, *R. Jeffery*, &c. (and the others who were before bound to the repair) ſhould from time to time advance to the collector in the order named 3000*l.* 1*s.* 10*d.* which the commiſſioners adjudged to be neceſſary for the conſtruction of the new ſea wall; and which ſum was to be repaid to the ſame perſons out of the ſum to be raiſed by a rate or aſſeſſment thereafter to be made. And by their decree they alſo appointed *R. Symes* to be collector of the rate, and *T. Dean* expenditor of the money ſo to be advanced in building the wall, to whom *R. Symes* was to pay over the money collected by the rate. The mandamus then further reciting, that a great part of the new wall had been conſtructed in purſuance of the ſaid order and decree, and 1900*l.* expended upon it, advanced by the Marquis

1807.

The KING *againſt* The Commiſſioners of Sewers for SOMERSET.

quis of *B.*, *R. Jeffery*, &c. in obedience thereto: and that in *Eaſter* term 43 *Geo.* 3. a mandamus iſſued to the *ſaid late commiſſioners* of ſewers for the ſaid county, commanding them to make a rate on the Level for repaying to the ſaid Marquis of *B.*, *R. Jeffery*, &c. the ſums ſo expended and advanced by them; and that the ſaid *late* commiſſioners had due notice of the ſaid writ; and that certain proceedings afterwards had before them, reſpecting the making ſuch rate, were quaſhed by the Court of K. B. for illegality: and reciting the complaint of the Marquis of *B.*, *R. Jeffery*, &c. that they had required the *now* commiſſioners (the defendants) to make a rate on the ſaid Level for reimburſing the complainants, which the *now* commiſſioners had refuſed to do: therefore the writ commanded them to make a rate on all perſons having or holding meſſuages, lands, tenements, or hereditaments within the ſaid Level of *Huntſpill* who had or might have hurt or diſadvantage by inundations of the ſea for want of a ſufficient ſea wall there, or who had or might have benefit by preventing ſuch inundations, for repaying to the Marquis of *B.*, *R. Jeffery*, &c. the money advanced by them to the collector beyond their proportions of the expenditure in making the new ſea wall.

To this writ the now commiſſioners made a ſpecial return; ſtating that they were appointed by virtue of a commiſſion under the Great Seal, dated the 15th of *April* 1806, and that the former commiſſioners (naming them, amongſt whom were many of the preſent commiſſioners) acted under a commiſſion dated the 13th of *April* 1795, which expired on the 13th of *April* 1805, according to the form of the ſtatute. That within the Level of *Huntſpill* there are and have been as far back as can be traced ſeveral diſtricts or diviſions, of known boundaries,

(amongſt

1807.

The KING *againſt* The Commiſſioners of Sewers for SOMERSET.

(amongſt others the diſtrict of *Huntſpill*) for each of which there has always been, as far back as can be traced, what is called a *ſtanding jury*, conſtituted thus: on the iſſuing of a new commiſſion of ſewers for the county, the commiſſioners iſſue their precept to the ſheriff to ſummon juries for the different diſtricts within the ſaid Level; and the ſheriff thereupon ſummons ſuch perſons reſiding in or near the reſpective diſtricts, to ſerve as jurors for the ſame reſpectively, as have the beſt local knowledge and information reſpecting the matters which may fall under their cognizance; and ſuch jurors are in each diſtrict more or leſs numerous according to its extent. That the jurors ſo ſummoned appear at the next ſeſſions of ſewers, and ſeverally nominate one of thoſe ſummoned out of each diſtrict for the foreman of the jury of that diſtrict. That at ſuch ſeſſions the ſeveral juries are ſworn before the commiſſioners (*a*). That every juryman ſo returned and ſworn uſually continues for life, unleſs diſcharged by the commiſſioners for good cauſe; in which caſe ſome other perſon is in like manner ſummoned and ſworn into and upon the ſame jury. That at the times after mentioned *T. Dean*, *R. Jeffery*, &c. (18 in number) were *the ſtanding jury for the ſaid pariſh of* Huntſpill, one of the ſaid diſtricts, and were all of them reſident in or near that pariſh, and were called *the Huntſpill jury*, of which *T. Dean* was the *foreman*. That at a ſeſſions of ſewers held at *Bridgewater* on the 21ſt of *June* 1799 before *Jefferys Allen*, &c., then commiſſioners, it was ordered that the clerk of the ſewers ſhould iſſue a precept and ſummons thereon to *T. Dean*, foreman of the *Huntſpill* jury, to appear at a ſeſſions of ſewers at *Bridgewater* on the 29th

(*a*) The form of the oath which was here ſet forth is the ſame as is noted in 7 *Eaſt*, 72. (*a*).

of

1807.

The KING *againſt* The Commiſſioners of Sewers for SOMERSET.

of *June* 1799, to make their preſentments: and that the ſaid late commiſſioners did at the ſame ſeſſions iſſue a precept under their hands and ſeals to the ſheriff of the county, requiring him "forthwith to iſſue his warrants and cauſe to be ſummoned the *ſeveral juries of ſewers* and other perſons fit to ſerve on ſuch juries belonging to the weſtern diviſion of the ſaid county, perſonally to appear at a ſeſſions of ſewers at *Bridgewater* on the 29th of *June* 1799, to make preſentments of and return on oath all impediments, &c. within their reſpective views, and alſo through whoſe default they have happened, and by whom they ought to be reformed," &c.; which precept was delivered to the ſheriff on the 21ſt of *June* 1799, who on the ſame day iſſued the following precept: "*Somerſet*, to wit. *J. B.*, ſheriff of the ſaid county, to Mr. *Thomas Dean*, *foreman of the* Huntſpill *jury of ſewers*, greeting. By virtue of a precept to me directed under the hands and ſeals of ſix commiſſioners of ſewers, &c., theſe are to give you notice, that you do appear *with the reſt of your jury* at a ſeſſions of ſewers at *Bridgewater*, &c. on the 29th of *June* inſtant, &c. to make returns of and preſent on your oaths the ſeveral impediments, &c., and that you make a return of your precept," &c. Dated 21ſt of *June* 1799: which precept was on the ſame day delivered to the ſaid *Thomas Dean*, *ſo being foreman of the ſaid jury*; and that *no other precept or ſummons whatſoever was iſſued either by the then commiſſioners of ſewers, or by the ſheriff, his under-ſheriff or deputy, to ſummon any jury of the body of the county, or any jury whatſoever, for any purpoſe whatſoever*, at the ſaid ſeſſions of ſewers, held at *Bridgewater* on the 29th of *June* 1799, except as abovementioned. That *Thomas Dean*, as ſuch foreman, did in purſuance of the ſheriff's precept *ſummon the reſidue of*

1807.

The KING *againſt* The Commiſſioners of Sewers for SOMERSET.

ſuch ſtanding jury for the pariſh of Huntſpill to appear at the ſaid ſeſſions on the 29th of *June* 1799; and at that ſeſſions before *Jefferys Allen*, &c. then commiſſioners of ſewers for the county, *Thomas Dean* appeared with the ſheriff's precept, and the ſaid (jurymen, by name,) having been ſummoned by *T. Dean*, but by no other perſon whatſoever, *as the ſtanding jury for the pariſh of* Huntſpill; and they were then and there ſworn before the ſaid then commiſſioners, and took the oath before-mentioned; and thereupon preſented, &c. [Here the preſentment was ſet out, deſcribing it to be by *the jurors of the pariſh of* Huntſpill; and ſtating in ſubſtance what was ſet out in the mandamus.] Whereupon the then commiſſioners, on ſuch preſentment made by the jury ſo ſummoned, did at the ſame ſeſſions make the order and decree in the writ mentioned: but that *no preſentment was made to the ſaid ſeſſions of ſewers by any jury ſummoned and returned from the body of the county of* Somerſet, nor was any ſuch jury for that purpoſe ſummoned and returned out of the body of the county; nor any other preſentment made by any perſon, except as above ſet forth. For which reaſon the commiſſioners (defendants) ſuggeſt that the preſentment ſo made was invalid in law, and cannot ſafely be proceeded upon by them, and that they ought not to make any rate as they are commanded by the writ.

Several objections were taken to this return on the part of the proſecutors. 1ſt, That the decree of the 29th of *June* 1799, founded upon actual ſurvey by the commiſſioners, and the preſentment of the ſtanding jury, was the judgment of a court of record, and that the defect of ſummons of ſuch jury could not now be inquired into. 2dly, That the jurymen had all been originally ſelected by the ſheriff, ſummoned by him, and ſworn upon the

1807.

The KING *againſt* The Commiſſioners of Sewers for SOMERSET.

the ſame jury: and that it appears by the return that they were, in conſequence of the ſheriff's precept delivered to the foreman, by him ſummoned to appear before the commiſſioners at the court of ſewers by which the decree was made. 3dly, That the appearance of all the jurors cured the defect of formal ſummonſes by the ſheriff, if in fact there were any ſuch defect.

But on the firſt day when this caſe came on to be argued in laſt *Trinity* term, *The Court* intimated great doubt upon a preliminary point; whether, as the decree of the 29th of *June* 1799 was not fully executed and carried into effect during the exiſtence of the former commiſſion under which it was made, which expired on the 13th of *April* 1805 by lapſe of time, according to the proviſions of the ſtat. 13 *Eliz. c.* 9. limiting the duration of every ſuch commiſſion to 10 years; or at leaſt within one year afterwards in reſpect to ſuch proceedings as are mentioned in the 2d ſection of that act; ſuch decree were now capable of being executed by the new commiſſioners, whoſe commiſſion is dated the 15th of *April* 1806; the ſtat. 23 *Hen.* 8. *c.* 5. having directed that ſuch laws, acts, *decrees*, and ordinances, as ſhall be made by the commiſſioners, ſhall ſtand good and be put in execution *ſo long as their commiſſion endureth, and no longer.* And they directed that the caſe ſhould ſtand over till the next Crown Paper day, in order to give the counſel an opportunity of conſidering this objection. When

Burrough for the proſecution argued (*a*), that the obligation to provide, repair, and maintain ſufficient defences

(*a*) Only ſo much of the argument on either ſide is noticed as applies to the preliminary point ſuggeſted by the Court; on which alone the judgment ultimately turned.

1807.

The KING *againſt* The Commiſſioners of Sewers for SOMERSET.

againſt the inundations of the ſea over the different Levels expoſed to its ravages, aroſe at common law, and not upon the ſtatute of *H.* 8. The decree, the validity of which cannot for the reaſons before ſtated be now impeached, is only referred to as *evidence* of the obligation of the Level to repair in this particular inſtance, and merely inducement to the mandatory part of the writ. And this decree having in all material points been already carried into execution; and the money having in virtue of it been paid and laid out by the parties named; the law infers an obligation that they ſhall be reimburſed by a rate on the Level, which has been ſo found to be benefited by it. It appears all through *Callis*'s Treatiſe, by writs in the Regiſter (*a*), by ſeveral caſes in Lord *Coke*'s Reports (*b*), and even by the ſtat. 23 *H.* 8. *c.* 5. that the general onus of repairing ſea banks, &c. was not laid by that ſtatute, but aroſe out of the ancient prerogative of the Crown. For at common law the King was bound to ſave and defend the realm from the dangers of the ſea as well as againſt enemies; and commiſſions of inquiry were uſed to be granted for this purpoſe. And in caſe of damage by extraordinary tempeſt, which ſuperſeded the obligation of individuals to repair, it ſeems that the Crown uſed to make the repairs, and afterwards the expences were levied upon the Level by a rate. The regulations therefore of the ſtatute of *H.* 8. do not affect the operation of this decree; becauſe the thing decreed has been done; the decree remains concluſive evidence on record of the obligation of the perſons, having lands &c. in the Level, to repair the wall in queſtion; and the

(*a*) Theſe are referred to in 10 *Rep.* 141. *b.* 142. *Regiſter*, 127, 8.

(*b*) Vide *Keighley*'s caſe, 10 *Rep.* 140. The caſe of the *Iſle* of *Ely*, *ib.* 141. and others there referred to.

ending

1807.

The KING *againſt* The Commiſſioners of Sewers for SOMERSET.

ending of one commiſſion cannot do away the right of another to enforce the obligation. Aſſuming therefore for the preſent argument, that the validity of that decree cannot now be controverted for any of the cauſes returned by the defendants, the obligation itſelf ſtands admitted, and there is nothing further for the commiſſioners to inquire of. The reaſon why the ſtatute of *H.* 8. and other ſtatutes were paſſed was becauſe new powers were given from time to time to the King's commiſſioners, which they had not at common law; amongſt others, that of making general ſtatutes and ordinances from time to time, to operate proſpectively: ſuch alſo is the power given to them to inquire by the oaths of a jury by whoſe default the damage happened, and what perſons have lands which might be hurt by the inundation, or benefited by the banks, &c. The 7th ſect. of the ſtat. 23 *H.* 8. gives the commiſſioners power to make, and ordain *laws*, and *ordinances*, and *decrees*; which word "*decrees*" muſt be there conſtrued ſynonimouſly with *laws* and *ordinances*; i. e. ſuch *decrees* as are of a general nature, containing matter of public regulation, like the by-laws of a corporation. For the ſtatute goes on to give them power to amend or repeal the *ſame laws and ordinances*; which never could be intended to include *decrees* made in particular cauſes, whether executed in whole or in part: and *Callis* (*a*) conſiders that a *decree* once given is final; unleſs indeed reverſed for error; or, according to the more modern practice, by a commiſſion of review. Then the 17th ſection provides "that ſuch laws, acts, "*decrees*, and ordinances" (ſeeming to conſider them all in the nature of *general* laws, &c.) "made by the com-"miſſioners," ſhall ſtand "good and effectual and be put

(*a*) *Call. on Sew.* 287. and vide *ib.* 216, 217.

1807.

The KING *againſt* The Commiſſioners of Sewers for SOMERSET.

" in due execution *ſo long time as their* commiſſion en-
" dureth, and no longer: except *the ſaid laws and ordi-*
" *nances* be made and ingroſſed in parchment, and cer-
" tified under the ſeals of the ſaid commiſſioners into the
" Court of Chancery, and then the king's royal aſſent be
" had to the ſame." The latter part of the clauſe ſhews that the laws, &c. intended to be put in parchment and to be ſanctioned by the king, were ſuch as being of a general nature required publicity, and could not be intended of particular *decrees*, which are there uſed ſynonimouſly with *ordinances*. By that act the commiſſion was only to endure for three years; but it was extended to 10 years by the ſtat. 13 *Eliz. c.* 9. *ſ.* 1.: and that enacts, " that all ſuch laws, ordinances, and *conſtitutions*," (omitting *decrees*) as ſhall be made by force of any ſuch commiſſion, " and written in parchment indented, and under " the ſeals of the commiſſioners, &c. ſhall, without any " certificate thereof to be made into Chancery, and with-
" out the Royal aſſent, continue in full force, notwith-
" ſtanding any determination of any ſuch commiſſion by
" ſuperſedeas, until the ſame *laws, conſtitutions*, and *ordi-*
" *nances* ſhall be altered, repealed, or made void by the
" commiſſioners after to be aſſigned," &c. Some of theſe laws, &c. might affect ſtrangers to the Level; and therefore ſuch a power could only be given by act of parliament. The laws and cuſtoms of *Romney* Marſh are referred to by the ſtat. of *H.* 8. as a model; which laws and cuſtoms appear to be coeval with the common law; and probably thoſe or ſimilar cuſtoms prevailed in other Levels ſubject to the ſame danger. The miſchief and inconvenience of extending theſe ſtatutable proviſions, as to the duration of general laws, &c. to particular decrees, would be exceedingly great; for the perſons who advanced their money upon the faith, and under the order, of the decree

1807.

The KING *against* The Commiſſioners of Sewers for SOMERSET.

decree in queſtion, acted under a competent authority at the time, and might have been puniſhable for diſobedience: but if the decree be not final and binding on the Level, or if it be even optional in the new commiſſioners whether or not they will now enforce it; thoſe perſons may be left without protection for the acts they have done by virtue of the decree, and without remedy for their reimburſement. How can they be prepared to go before a new jury, and originate all theſe proceedings again after the lapſe of ſo many years, and with the probability of many of their witneſſes being dead? By the ſame rule it might be neceſſary to juſtify acts done under former commiſſions half a century ago. The aſcertainment of the right or obligation on the Level, and the amount of the ſum to be expended on the repair, are the eſſential parts of the decree; and theſe are executed. The latter part of it, directing the reimburſement by a rate on the Level, is merely a legal conſequence of the other.

Dampier, contrà; after premiſing, that if there were any failure of juriſdiction the new commiſſioners would be expoſed to actions of treſpaſs by every perſon on whom the rate was attempted to be levied; contended in ſupport of the preliminary objection, that the decree of the 29th of *June* 1799 could not be enforced by them after more than a year from the expiration of the old commiſſion under which that decree was made. The words of the ſtatute of *Hen.* 8. are very preciſe; that "the laws, acts, *decrees*, and ordinances made by the "commiſſioners, &c. ſhall ſtand good, &c. and be put "in due execution *ſo long time as their commiſſion endureth*, "*and no longer.*" There is no reaſon for putting a dif-

1807.

The KING *againſt* The Commiſſioners of Sewers for SOMERSET.

ferent interpretation upon the word *decrees*, as it there ſtands, than its ordinary ſenſe imports; and ſo it is conſidered by *Callis* (*a*): for, from the ſubject-matter of theſe decrees affecting the whole Level, they partake of the nature of general laws and ordinances. And though ſome inconveniences may enſue from limiting their effect to the duration of the commiſſion; yet there is an obvious advantage on the other hand in ſtimulating the commiſſioners to carry their decrees into ſpeedy execution, and finiſh their proceedings within the term of their commiſſion; in order that thoſe for whoſe immediate benefit the burthen is impoſed may be the perſons to bear it, and not leave it to be borne by others ſucceeding to them, who may be more remotely benefited by the works. But at any rate a method is provided of preventing the failure of juſtice in any particular caſe, by ingroſſing the decree in parchment, and certifying it into Chancery under the ſeals of the commiſſioners, and procuring the king's aſſent to it. The 1ſt ſect. of the ſtat. 13 *Eliz. c.* 9. only diſpenſes with the certificate and royal aſſent to ſuch laws, ordinances, and conſtitutions, *where the commiſſion is determined by ſuperſedeas*, until altered or repealed by the ſubſequent commiſſioners: and the 2d ſect. only provides that after the end of 10 years from the teſte of any commiſſion, all ſuch laws, ordinances, and conſtitutions as were made by virtue of it, and written *in parchment, indented, and ſealed*, as before mentioned, without certificate or the royal aſſent, ſhall continue in force for one year next enſuing the end of the 10 years: and during that year power is given to the juſtices of peace to execute the powers of the former commiſſioners, un-

(*a*) *Callis*, 284, 5, 6.

leſs

1807.

The KING *against* The Commissioners of Sewers for SOMERSET.

leſs in the mean time a new commiſſion iſſue: which was to enable the juſtices in caſes of particular urgency to finiſh what might have been left undone for want of time under the expired commiſſion. But as this caſe is not ſhewn to be within the latter ſtatute, it muſt be governed by the general proviſion of that of *Hen.* 8. The authority of *Callis* (*a*) is expreſs, that "all other laws and ordinances of ſewers which are but made and writ in paper; or which be but in parchment, and not indented; or which be indented alſo, if not ſealed; continue in force no longer than that commiſſion continueth by the power whereof they were made." Beſides, here was a diſcontinuance in point of time between the expiration of the juſtices' year and the iſſuing of the new commiſſion. Then the miſchief ſuggeſted of making perſons treſpaſſers by relation could not happen; for whatever was done under a valid decree, while the commiſſion under which it was made continued in force and for one year afterwards, would be always juſtifiable; but nothing remaining afterwards to be done could be juſtified under a new commiſſion: and here the moſt important part of all, namely, the levying the money by a rate on the Level remains ſtill to be done.

Lord ELLENBOROUGH C. J. ſaid that this was a point of great importance and novelty, and they would conſider of it. The caſe accordingly ſtood over till this term, when his Lordſhip delivered the judgment of the Court.

This came before the Court on a return made by the commiſſioners of ſewers to a writ of mandamus command-

(*a*) *Callis*, 286.

ing

1807.

The KING *againſt* The Commiſſioners of Sewers for SOMERSET.

ing them to make a rate on all perſons holding meſſuages, lands, tenements, and hereditaments within the Level of *Huntſpill*, which have or may have hurt or damage by inundation of the ſea for want of a ſufficient ſea wall, or who may have benefit by preventing ſuch inundation; for repaying to the Marquis of *Buckingham*, *John Tynte* Eſq. *Henry Gould* Clerk, *Robert Jeffery*, and *Joſeph Hanbury*, the ſums of money reſpectively expended and paid by them to the collector, beyond their proportions of the expenditure in making a ſea wall or bank. On the face of the return it appears, that a former commiſſion of ſewers iſſued under the great ſeal, dated the 13th of *April* 1795. That the commiſſioners acting under that commiſſion, at a court of ſewers held on the 29th of *June* 1799, did make and ordain a certain order and decree under their hands and ſeals, whereby they ordered, decreed, directed, and appointed, that a new ſea wall ſhould be built, and that all and every perſon and perſons who had or held any meſſuages, lands, tenements, and hereditaments, within the Level of *Huntſpill*, which had or might have any hurt, loſs, or diſadvantage by inundations of the ſea there, for want of a ſufficient wall there, or which had or might have any benefit by preventing ſuch inundations, ought to be charged with the erecting and building ſuch wall. And the commiſſioners, at the ſaid court, did by their ſaid decree further order, that the Marquis of *Buckingham*, and the other perſons named in the order, ſhould pay to the collector the ſum of 3000*l.* 1*s.* 10*d.* which they adjudged to be the expence of erecting the ſaid wall, in certain ſpecified proportions; which ſums were to be repaid to them out of the ſums to be raiſed by virtue of a rate or aſſeſſment to be thereafter made. That, in

pur-

1807.

The KING *againſt* The Commiſſioners of Sewers for SOMERSET.

purſuance of that order and decree, great part of the new ſea wall had been built, and great part of the ſaid ſum of 3000*l.* 1*s.* 10*d.* has been laid out about the building it. That the former commiſſion of ſewers, under which the commiſſioners made the above order and decree, expired on the 13th of *April* 1805, according to the proviſions of the ſtatute. That a year after its expiration a new commiſſion of ſewers iſſued, dated 15th of *April* 1806, appointing the defendants commiſſioners; and that the order and decree, or that part of it which directed all perſons who had meſſuages, lands, tenements, and hereditaments, within the Level, which might have loſs by inundation, or benefit by the wall, to be charged with the erecting it, had not been carried into execution during the 10 years continuance of the commiſſion, or during the year which elapſed between the expiration of that commiſſion and the iſſuing of the preſent commiſſion. Upon theſe facts, ſo appearing on the writ and return, the queſtion is, Whether the commiſſioners under the preſent commiſſion have authority to carry into execution or enforce the order and decree of the late commiſſioners, by making a rate on the ſeveral perſons holding lands, &c. within the Level, as required by the writ of mandamus? And we think they have not. The ſtat. 23 *H.* 8. *c.* 5., directing the form of the commiſſion of ſewers, and the powers of the commiſſioners, provides by ſect. 17. that ſuch *laws*, *acts*, *decrees*, and *ordinances*, as ſhall happen to be made by the ſaid commiſſioners, ſhall ſtand good and effectual, and be put in due execution, *ſo long time* as their commiſſion endureth, *and no longer*; except the ſaid laws and ordinances be made and engroſſed in parchment, and certified under the ſeals of the ſaid commiſſioners into the King's Court of Chancery,

1807.

The KING *againſt* The Commiſſioners of Sewers for SOMERSET.

and then the king's royal aſſent be had to the ſame. The ſtat. 23 *H.* 8. *c.* 5. was made to endure for 20 years only. the ſtat. 3 & 4 *Ed.* 6. *c.* 8. makes the ſtat. of *Hen.* 8. perpetual; adding thereunto, that every commiſſion of ſewers therafter to be awarded ſhall continue for the term of 5 years next after the teſte of ſuch commiſſion, unleſs the ſame commiſſion ſhall otherwiſe be diſcharged within the ſame time by ſuperſedeas. Then came the ſtat. 13 *Eliz.* *c.* 9., which enacts that all commiſſions of ſewers ſhall ſtand and continue in force for 10 years next enſuing the date of every ſuch commiſſion, unleſs the ſame be repealed or determined by reaſon of any new commiſſion in that behalf made, or by ſuperſedeas. And all ſuch laws, ordinances, and conſtitutions, as ſhall be duly made by force of any ſuch commiſſion, according to the effect and tenor limited in any former ſtatute touching commiſſioners of ſewers, *and being written in parchment indented*, and under the ſeals of the ſaid commiſſioners, or ſix of them, ſhall without any certificate to be made into the Court of Chancery, and without the royal aſſent, ſtand and continue in full force and effect, notwithſtanding any determination by ſuperſedeas, until ſuch time as the ſame laws, conſtitutions, and ordinances ſhall be altered, repealed, or made void by the commiſſioners after to be appointed. Sect. 2. provides, that, after the end of 10 years from the teſte of a commiſſion of ſewers, all ſuch laws, ordinances, and conſtitutions, as were made by virtue of ſuch commiſſion, *and written in parchment indented, and ſealed*, as aforeſaid, without certificate thereof, or royal aſſent had, ſhall continue in force for one year, notwithſtanding the determination of the commiſſion by the expiration of 10 years; and the juſtices of peace ſhall during that year have power to execute

execute the ſame. Provided, that if a new commiſſion iſſue, the power of the juſtices ſhall ceaſe. In the preſent caſe the commiſſion of ſewers, under which the commiſſioners acted who made the order or decree in queſtion, and which is attempted to be enforced by this writ of mandamus, continued in force for the ſpace of 10 years from the date of it; viz. from the 13th of *April* 1795 to the 13th of *April* 1805: and after its expiration a year intervened before the date of the new commiſſion, 15th *April* 1806. So that under the above ſtat. of the 13th of *Eliz.* all laws, ordinances, and conſtitutions, though written in parchment indented and ſealed, (which was not the caſe of the order in queſtion,) had ceaſed, and were no longer in force at the time of iſſuing the preſent commiſſion. Is then the order and decree of the 29th of *June* 1799, made and ordained by the late commiſſioners as ſtated in the writ and returns, an "*act, decree, law, ordinance, or conſtitution,*" within the meaning of the ſeveral acts of parliament above referred to? The ſtatute of *Hen.* 8. uſing the terms *laws, acts, decrees,* and *ordinances;* and the ſtatute of *Eliz.* uſing the words *laws, ordinances,* and *conſtitutions.* On the part of the proſecutors of the writ it has been argued, that *decrees, laws,* and *ordinances,* mentioned in the ſtatutes, mean laws of *general regulation,* and not *orders* and *decrees,* ſuch as the one in queſtion, which is in the nature of a judgment. That to conſtrue it otherwiſe, and to hold that the order and decree is no longer binding after the expiration of the commiſſion, would be to ſubject all who have acted under ſuch order and decree to actions againſt them, in which they could not juſtify under ſuch expired order. But we do not find any authority cited for this diſtinction. The acts of parliament mean to expreſs the ſame things by the

1807.

The KING *againſt* The Commiſſioners of Sewers for SOMERSET.

different words uſed: the *laws*, *acts*, *decrees*, and *ordinances* mentioned in the act of *H.* 8. muſt mean the ſame things as *laws*, *ordinances*, and *conſtitutions*, mentioned in the act of Queen *Elizabeth*; and nothing is to be found in the acts of parliament to reſtrain the generality of the expreſſions. And it does not ſeem as if any danger were to be apprehended, that thoſe perſons who had acted under the decrees of the commiſſioners, during the exiſtence of the commiſſion, or while the decrees continued in force, would be ſubjected to actions: for they would be in the ſituation of perſons who had acted under the authority of a law while it was in force, which had ſince expired; but which was of force to protect them during the time they had acted, and required its protection. As to ſo much therefore of the decree as has been acted upon and carried into execution during the time of the late commiſſioners, it is effectual; and what has been done under it has been done under a competent authority: ſuch part of it as has not been carried into execution cannot now be enforced on the foot of that order or decree, becauſe it has ceaſed to have any authority; and application muſt therefore be made to the new commiſſioners to re-enact it. For theſe reaſons we are of opinion that the return to the mandamus is good and muſt be allowed.

1807.

The KING *againſt* The Inhabitants of ST. GEORGE, MIDDLESEX.

Thurſday, Nov. 26th.

A Rate was made and allowed on the 30th of *May* 1806 for the relief of the poor of the pariſh of *St. George*, in the county of *Middleſex*, in which the *London* Dock Company were aſſeſſed for warehouſes and erections within the ſcite of the *London* Docks, and for the docks, in the ſum of 975*l.*, being a rate of 1*s.* 3*d.* in the pound upon an annual value of 15,000*l.*; from which rate the *London* Dock Company appealed to the Seſſions, who allowed the appeal, and amended the rate, by reducing the aſſeſſment on the company to 139*l.* 8*s.* 7*d.*, ſubject to the opinion of this Court on the following caſe:

In purſuance of the ſtat. 39 & 40 *Geo.* 3. *c.* 47. a baſon, a large dock, and an extenſive quay, have been conſtructed, and ſeveral warehouſes erected, within the limits mentioned in that act. On the 11th of *January* 1805 three of the Lords Commiſſioners of the Treaſury certified, that the *ſeveral works* following, viz. the baſon at *Bell* Dock, the dock communicating therewith, the tobacco warehouſe, and certain other warehouſes, vaults and quays particularly enumerated, all ſituated within the premiſes belonging to the company, were then *ſo far completed* as to be fit and proper in every reſpect for the reception

By the conſtruction of the ſtat. 39 & 40 *G.* 3. *c.* 47. the *London* Dock Company are liable, even during the firſt 12 years of their eſtabliſhment, to be rated for the fair annual value of their *warehouſes* and other works which are finiſhed and productive, though all the works directed by the act be not completed. But ſuch completed works muſt under ſuch circumſtances be rated for their value at the rate of 8½*d.* in the pound; ſuch being the rate calculated upon by the Legiſlature to raiſe 139*l.* 8*s.* 7*d.* per quarter upon 3966*l.* the average rental for 10 years preceding the act of parliament on the premiſes deſtroyed by the company in making their works; and which quarterly ſum the company were at all events bound to pay to the pariſh during the 12 years, or until the works were completed, whether thoſe works were productive or not. But when productive beyond that ſum, the ſurplus is to be taken in the firſt inſtance by the company in order to reimburſe themſelves what they may have advanced to the pariſh, to make good the deficiencies, before any ſuch productive ſurplus exiſted, until the company ſhall be reimburſed.

Therefore until theſe purpoſes are effected, a rate made on the increaſed real value of the dock premiſes at more than 8½*d.* in the pound, or a rate of 8½*d.* in the pound on the old average value of the premiſes before the erection of the company's works, and below the increaſed value of the new works, is in either caſe bad.

1807.

The KING *againſt* The Inhabitants of ST. GEORGE, MIDDLESEX.

reception of tobacco, rice, wine, brandy, geneva, and other ſpirits; which certificate was publiſhed in the *London Gazette*, and in two morning papers uſually circulated in *London*, on the following day. On the 29th of *May* 1805 a ſimilar certificate was made, and duly publiſhed on the following day, relative to the warehouſe No. 3., on the north ſide of the dock. On the 17th of *May* 1805 a ſimilar certificate was made, and duly publiſhed on the following day, relative to the warehouſes No. 2. and 5. on the north ſide of the dock, and the vaults underneath, &c., and the quay in front of the ſame. And on the 1ſt of *June* 1805 a ſimilar certificate was made, and publiſhed on the following day, relative to the warehouſe No. 4. on the north ſide of the dock, the vault underneath it, and the quay in front of the ſame. On the 31ſt of *January* 1805 the principal dock and outer baſon was opened for the reception of ſhipping; and from that time down to the making of the rate, ſhips were received in the dock and baſon, and their cargoes unloaded on the quays, and great part ſtowed in the warehouſes; and the rates preſcribed by the ſtatute for dockage, quayage, wharfage, &c. were paid there to the *London* Dock Company. In *January* 1806 a dividend, purſuant to the ſtatute, of two and a half per cent., and property tax thereon, was declared and paid. The capital upon which that dividend was paid exceeds 1,200,000*l.* On the 1ſt of *Sept.* 1804 a warehouſe for tobacco, being part of the ſaid warehouſes, was agreed to be let by the *London* Dock Company for 15,600*l.* per ann. groſs rent; the company paying all taxes: ſuch rent to commence from the 1ſt of *Feb.* 1805: and the company received the ſaid rent from the laſt-mentioned date until the making of the ſaid rate. The ſaid tobacco warehouſe, and the dock

1807.

The KING *againſt* The Inhabitants of ST. GEORGE, MIDDLESEX.

dock and quay, and the ſaid warehouſes Nos. 1, 2, 3, 4, and 5. on the north ſide of the dock, and the baſon, are all within the pariſh of *St. George*, and are of a higher annual value than the ſum at which the company are aſſeſſed for the ſame. The act of parliament empowers the company to purchaſe a very large extent of ground, compriſing about 96 acres; of which about 50 only are yet uſed, and it is intended to uſe the remainder. Various works are now in their progreſs, and carrying into execution with as much expedition as the nature of the caſe will allow. Of 19 warehouſes within the pariſh of *St. George*, begun before the date of the rate, ſix only (including the tobacco warehouſe) were then finiſhed, and in uſe. Another entrance to the dock at the Hermitage remains to be made; and the company are now treating with the proprietors of the land adjoining for the purchaſe of the ſame. From *Midſummer* 1801 until the making of the rate appealed againſt, the *London* Dock Company paid the pariſh of *St. George* 139*l.* 8*s.* 7*d.* quarterly; the ſame being calculated, purſuant to the directions of the ſtatute, on an average of the produce of the poor's rate for 10 years preceding on the premiſes deſtroyed by the company. It was afterwards added to the caſe, that the pariſh has not yet reimburſed the company any part of the ſums advanced by the company to the pariſh in reſpect of the deficiencies in the aſſeſſments for the poor rates. And the company has not paid either the rate in queſtion or any ſubſequent rate.

The caſe was argued in laſt *Trinity* term by *Beſt* Serjt., *Garrow*, *Holroyd*, *Pooley*, and *Boſanquet*, for the company; and by *The Attorney-General*, *Gurney*, and *Gleed*, for the pariſh. And now

1807.

The KING *againſt* The Inhabitants of ST. GEORGE, MIDDLESEX.

Lord ELLENBOROUGH C. J. delivered the opinion of the Court. This matter comes before the Court on a motion to quaſh an order of ſeſſions, allowing an appeal of the *London* Dock Company againſt a rule made for the relief of the poor of the pariſh of *St. George, Middleſex*, by which the company were aſſeſſed for warehouſes and erections within the ſcite of the *London* docks, and for the docks, in the ſum of 975*l.*; being a rate of 1*s.* 3*d.* in the pound upon an annual value of 15,600*l.*; and reducing the rate on the company to 139*l.* 8*s.* 7*d.*, ſubject to the opinion of this Court upon a caſe ſtating, among others, the following facts; to which it is ſufficient to advert in giving the judgment of the Court. In purſuance of the ſtat. 39 & 40 *Geo.* 3. *c.* 47. a baſon, a large dock, an expenſive quay, and ſeveral warehouſes, having been erected within the limits mentioned in the act, three of the Lords Commiſſioners of the Treaſury on the 12th of *Jan.* 1805, and on the 24th of *May* in the ſame year, made certificates, that a baſon, certain docks, quays, and warehouſes, mentioned in thoſe certificates, were ſo far completed as to be fit and proper for the reception of certain commodities therein mentioned; which certificates were publiſhed in the *London Gazette*. That, ſubſequent to theſe certificates, ſhips had been received into the docks, their cargoes unloaded on the quays, ſtowed in the warehouſes, and the rates preſcribed by the ſtatute for the dockage, quayage, wharfage, &c. paid to the company. That various works are now in their progreſs, and carrying into execution with as much expedition as the nature of the caſe will allow. That of nineteen warehouſes begun before the making the rate, ſix only were then finiſhed and in uſe; and that another entrance dock at the Hermitage remains to be made. And that from

1807.

The KING *againſt* The Inhabitants of ST. GEORGE, MIDDLESEX.

Midſummer 1801, until the making the rate appealed againſt, the company have paid the pariſh 139*l.* 8*s.* 7*d.* quarterly; the ſame being calculated purſuant to the directions of the ſtatute on the premiſes deſtroyed by the ſaid company; being at the rate of 8½*d.* in the pound per quarter upon 3966*l.*, the average rental calculated upon the ten years preceding the act of parliament; and the rate appealed againſt being at the rate of 15*d.* in the pound upon a rental of 15,600*l.* And it is further ſtated, by an addition to the caſe, that the pariſh has not yet reimburſed the company any part of the ſums which have been advanced by them to the pariſh in reſpect of the deficiencies in the aſſeſſments for the poor's rates.

Upon this caſe two queſtions have been made, 1ſt, Whether, during the ſpace of 12 years from the paſſing the ſtat. 39 & 40 *Geo.* 3., the company are exempted from paying a larger ſum than the average produce of the poor's rate from *Lady-day* 1790 to *Lady-day* 1800, if all the works directed by the act be not compleated; though others of the works ſhould be finiſhed, and be productive. And, 2dly, Although the company during ſuch period, and under ſuch circumſtances, may not be liable to pay a larger ſum for the *docks* and *quays*; whether they be not liable to pay, on account of the *warehouſes* they have built, a further ſum beyond ſuch average rate. And with reſpect to this laſt queſtion, we think that the docks, quays, and warehouſes ſtand on the ſame footing; for the 59th ſection of the act, which gives the company a power to receive rates and duties, gives them a duty for every article of merchandize, *which ſhall be landed within the dock premiſes*, not exceeding the rate or charge theretofore uſually paid in the port of *London*, for landing, loading, *and houſing* every ſuch article, during the year 1798: from

1807.

The KING *againſt* The Inhabitants of ST. GEORGE, MIDDLESEX.

whence it may be fairly inferred, that the Legiſlature meant that there ſhould be buildings or warehouſes, in which goods might be *houſed* on their being landed; and that warehouſes for ſuch purpoſe were conſidered by the Legiſlature as a part of, and comprehended within, the deſcription of *the dock premiſes*. As to the firſt queſtion; that depends on the conſtruction of the 106th ſection; it is in ſubſtance as follows. That during the term of 12 years, or until the works directed by the act ſhould be compleated, the company ſhould be liable to the extent of the average ſum raiſed for the laſt 10 years preceding the paſſing the act, to make good the deficiency occaſioned by the alterations, or making the docks, *and other works and premiſes which ſhould belong thereto*. And that when, after the act ſhould be carried into execution, the produce of the ſeveral aſſeſſments for all and ſingular ſuch houſes, lands, and hereditaments, as ſhould be ſtanding upon, or be part of the lands purchaſed for making the ſaid docks and other works, ſhould at the ſame rate per pound, (that is, at the rate at which ſuch average ſum was calculated) raiſe a larger ſum than the aſſeſſments from *Lady-day* 1790 to *Lady-day* 1800, in reſpect to the houſes and lands to be purchaſed by the company, raiſed within that period; that then the ſurplus ſhould, in the firſt place, be applied from time to time to reimburſe the company what they ſhould have paid for or in reſpect of the deficiencies occaſioned by the alterations cauſed by making the docks and other works, until the company ſhould be wholly reimburſed and repaid all the monies they ſhould have paid on account of the deficiencies. From this ſtatement of the ſection it appears that its firſt object was to indemnify the ſeveral pariſhes, within which the dock works were carried on, from the deficiencies in the rates

which ſhould be created by the alterations made by the company; which alterations it was foreſeen would render a great deal of property unproductive for a time, and not the ſubject of an aſſeſſment. And the means by which it provided for this object was the impoſing on the company an obligation to pay any deficiency to the extent of an average aſſeſſment for the preceding ten years. And had the act had nothing elſe in its contemplation than making, as was contended, a bargain by which the company ſhould be bound to pay, and the pariſh to receive, for 12 years, or until the works were finiſhed, a certain ſum, the clauſe would have ſtopped at the proviſo: inſtead of which it proceeds to provide for its ſecond object, by directing what ſhall be done with the ſurplus, when, after the act ſhould be carried into execution, a larger ſum ſhould be raiſed at the ſame rate per pound than the produce of the ſeveral aſſeſſments on the houſes and lands purchaſed by the company. This ſecond object was the reimburſing the company the ſums they ſhould have paid, on account of the deficiencies: and this reimburſement was to be effected by paying ſuch ſurplus to them. But as it is clear that there could be no ſurplus, unleſs the ſum raiſed at the ſame rate per pound could increaſe, it follows that the intention of the Legiſlature was, that the docks, quays, and other new works, made by the company, ſhould be aſſeſſed; and not that a ſum equal to the deficiencies, calculated on an average for the 10 years before the paſſing the act, ſhould be paid for the ſpace of 12 years, or until the works directed by the act ſhould be compleated. We therefore think the intent of the Legiſlature was, that as ſoon after the act ſhould have been carried into execution, and the docks became ſo productive as, at the ſame rate per pound as that by

1807.

The KING *againſt* The Inhabitants of ST. GEORGE, MIDDLESEX.

which the ſum of 139*l.* 8*s.* 7*d.* per quarter was raiſed, ſay at 8½*d.* in the pound, to raiſe a larger ſum; that the docks and other productive works ſhould be aſſeſſed at that rate, according to their rental or other rule obſerved in making rates. But as it appears in this caſe, that the rate appealed againſt was a rate of 1*s.* 3*d.* in the pound; whereas the rate by which the 139*l.* 8*s.* 7*d.* was raiſed was at 8½*d.* in the pound; the aſſeſſment appealed againſt is bad, as having been made at a higher rate than the act directs. And on the other hand, as the Seſſions have reduced the ſum to what a rate of 8½*d.* in the pound would produce upon a rental of 3966*l.*, inſtead of reducing it to what a rate 8½*d.* in the pound would produce on a rental of 15,600*l.* (which we aſſume to be the fair rental of the productive works,) their order is wrong, and muſt be quaſhed, and a new rate be made: for we think, that it is evident from the recital of the 1ſt ſection of the ſtat. 43 *Geo.* 3. and the ſtatement of the facts in this caſe, that the works directed by the ſtat. 39 & 40 *Geo.* 3. have not yet been compleated; and till then, or the expiration of the 12 years mentioned in the ſtatute, and (while there is any thing remaining to be paid to the company,) the operation of the 106th ſection, on which the goodneſs of the rate depends, is to continue.

1807.

O'CALLAGHAN and FAGAN, surviving Executors of WM. STOPFORD, *againſt* Sir JOHN INGILBY, Bart.

Thurſday, Nov. 26th.

THE plaintiffs declared in debt on two bonds to the teſtator, one of them dated the 8th of *April* 1794, in the penal ſum of 3600*l.*, conditioned for payment to him of an annuity of 200*l.* during the life of the defendant; the other dated 7th of *June* 1794, in the penal ſum of 1800*l.* The condition of the firſt bond, ſet forth on oyer, recited an indenture tripartite, of the ſame date as the bond, made between the defendant of the firſt part, *W. Morland* and *T. Hammerſley*, bankers and partners, of the ſecond part, and the teſtator *W. Stopford* of the third part; reciting that *Morland* and *Hammerſley*, in purſuance of the truſts of that indenture, and with the defendant's privity, had contracted with *Stopford* for the ſale of an

1. Where tenant for life conveyed eſtates to truſtees for 99 years, if he ſhould ſo long live, in truſt to raiſe money by the grant of annuities for his life; and afterwards he and the truſtees granted an annuity to one by deed, reciting the former conveyance to the truſtees; it is not neceſſary by the annuity act 17 *Geo.* 3. *c.* 26. to inrol a memorial of the truſt deed; it not being "a deed, inſtrument, or aſſurance *whereby any annuity is granted*," but only a deed of conveyance to thoſe who afterwards granted the annuity, and conſtituting their title to the eſtate charged therewith.

2. Where the memorial of a bond, conditioned to ſecure an annuity, recited in the condition an indenture between the ſame parties, and part of the ſame aſſurance, which ſtated the annuity to be granted "for the price of 1800*l.*, which ſaid ſum of 1800*l* *was paid by* "*the grantee to the grantors by his draft* on *R* and Co. his bankers *at or before* the ſealing and "delivery of the ſaid indenture and bond;" and the memorial of the ſaid indenture ſtated that the indenture witneſſed that "in conſideration of 1800*l* to the grantors, *in hand paid* "by the grantee, and which was *paid to them by his draft* on *R*. and Co his bankers, &c. *the* "*payment and receipt of which ſaid* 1800*l. the grantors did thereby acknowledge*," the annuity was granted: this does ſufficiently import, *that the conſideration-money was actually received by the grantors*, through the medium of the draft, *before* the execution of the deeds granting the annuity; ſo as to diſpenſe with the neceſſity of ſetting out in the memorial the particulars of ſuch draft, with the time of payment.

3. The annuity act does not require that the eſtates charged with the annuity ſhould be ſpecifically ſet forth in the memorial: and therefore it is no objection that the memorial only ſtated the annuity to be charged on all the grantor's eſtates in the county of *York* and all other his premiſes conveyed to certain truſtees.

4. It is no objection to the memorial of the deed granting the annuity, that it ſtated it, in general terms, to contain "powers of diſtreſs and entry, as ſtated in the deed;" for the annuity act does not require ſuch powers to be ſtated, except ſo far as they create a truſt, which brings them within the branch of the act relating to truſtees. Nor,

5. Is the memorial required to ſtate the covenants of the grantors for the due payment of the annuity.

1807.

O'CALLAGHAN *againſt* INGILBY.

annuity of 200*l.* to him during the defendant's life, and to be ſecured in the manner therein mentioned, for 1800*l.*, which *Stopford* paid to *Moreland* and *Hammerſley* by his draft on *Ranſom* and Co. his bankers, at or before the ſealing and delivering of the ſaid indenture and of this bond, to be by them applied upon the truſts, mentioned in the ſame indenture; the defendant then pleaded, 1ſt, non eſt factum. 2dly, That *there was no memorial* of the bond inrolled in the Court of Chancery purſuant to the annuity act 17 *Geo.* 3. *c.* 26. 3dly, That by indenture of the 11th of *March* 1794, between the defendant, and *Morland* and *Hammerſley*; after reciting that the defendant was ſeiſed of divers lands, &c. in the county of *York*, in the indenture particularly deſcribed, for his life; remainder to truſtees to preſerve contingent remainders, with divers remainders over; ſubject to certain incumbrances therein mentioned: and further reciting, that the defendant had granted to ſeveral perſons named in a ſchedule thereunder written, during his life, the ſeveral annuities ſpecified in the ſaid ſchedule, amounting together to 1680*l.* per ann.; and that ſeveral of the annuitants had agreed to accept their purchaſe money and ſurrender their reſpective annuities, ſo that the ſame might be merged and extinguiſhed; and that others had agreed to deliver up their then ſecurities, and to accept of other ſecurities in lieu thereof, upon *Morland* and *Hammerſley* guarantying the payment during the defendant's life: ſo that all the annuities ſubſiſting and to be granted ſhould not exceed 2500*l.* per annum. And after further reciting, that the defendant had applied to *Morland* and *Hammerſley* to aſſiſt him, and to enter into the neceſſary ſecurities with him to guaranty the payment of ſuch annuities; and in order to indemnify them from

Pleas.
1ſt, Non eſt factum.
2d, No memorial of the bond.
3d, Indenture of 11th March 1794, raiſing truſts in Morland and Hammerſley.

That ſeveral prior annuitants had agreed to reſell and ſurrender their annuities;

and others to release, &c. and accept new ſecurities.

1807.

O'CALLAGHAN *againſt* INGILBY.

from all riſk and expence thereby, the defendant had agreed to grant and demiſe to them the ſeveral premiſes therein-before mentioned, upon the truſts therein-after expreſſed; which *Morland* and *Hammerſley* had agreed to: the indenture witneſſed that the defendant, for the conſiderations therein expreſſed, conveyed and demiſed to *Morland* and *Hammerſley*, and their executors, &c. the aforeſaid lands, &c. for the term of 99 years, if the defendant ſhould ſo long live, upon the ſeveral truſts, &c., and ſubject to the powers, &c. therein declared, &c. viz. upon truſt that *M.* and *H.*, or the ſurvivor, &c. ſhould raiſe money by granting annuities, ſo as the ſame ſhould not be leſs than eight years purchaſe, nor exceeding in the whole, with the former ſubſiſting annuities, 2500*l.* per ann., payable during the defendant's life, &c., and to be iſſuing out of and charged upon the ſaid lands, &c. thereby granted and demiſed, and to be ſecured by the *uſual* and proper powers, remedies, and eſtates; with powers of redemption. And it was thereby agreed that *M.* and *H.* ſhould ſtand poſſeſſed of and intereſted in the ſaid demiſed premiſes, and of all ſums raiſed under the ſaid indenture in truſt, (1ſt,) to retain all their reaſonable charges and expences: (2dly,) To re-purchaſe and diſcharge ſo many of the ſaid ſcheduled annuities, and to pay the ſeveral debts due from the defendant as aforeſaid, in ſuch manner as the defendant ſhould think proper and expedient, and direct or appoint: and after ſuch deductions and payments, upon truſt; (3dly) to pay the ſurplus of the monies raiſed to the defendant, or ſuch perſons as he ſhould direct, for his and their own uſe: (4thly,) Out of the rents, iſſues, and profits of the ſaid lands, &c. to pay the ſeveral annuities, which during the continuance of the truſts ſhould be charged upon the premiſes: (5thly,)

Demiſe to Morland *and* Hammerſley *for* 99 *years if* Ingilby *ſo long lived.*

upon truſt to raiſe money by granting annuities.

Truſts of the monies to be raiſed.

1. *To retain expences of the truſts.*

2. *To re-purchaſe ſuch annuities and pay debts as* Ingilby *ſhould think proper or appoint.*

3. *To pay the ſurplus to* Ingilby.

4. *Out of rents and profits to pay annuities to be granted.*

1807.

O'CALLAGHAN *againſt* INGILBY.

5. *If truſtees ſhould covenant to pay annuities, then to retain out of rents and profits 5l. per cent. on the amount ſo covenanted for.*

6. *To retain expences of collecting rents, &c. and conveyances, &c.*

7. *To pay the reſidue of rents and profits to* Ingilby.

(5thly,) upon truſt that if *M.* and *H.* ſhould enter into any covenant or agreement for the payment of any annuities ſo to be granted by them, &c., it ſhould be lawful for them, ſo long as the ſaid annuities ſhould continue payable, to retain and deduct out of the ſaid rents and profits 5*l.* per cent. upon the ſum ſo covenanted to be paid by them: and (6thly,) from time to time to pay all expences incident and appertaining thereunto, and all charges and expences which they, *M.* and *H.*, ſhould be put to in or about the collecting and receiving the rents and profits of the premiſes, or in preparing the neceſſary conveyances for ſecuring payment of the annuities directed to be granted, or otherwiſe relating to the truſts thereby created: (7thly,) To pay the reſidue of the rents, iſſues, and annual profits of the premiſes to the defendant, for his own uſe. And it was thereby further declared, that all deeds and aſſurances to be executed by *M.* and *H.* or the ſurvivor, &c. in purſuance of the ſaid truſts, ſhould to all intents and purpoſes whatſoever be as valid in law, although the defendant ſhould not execute the ſame, as if he had joined therein, &c.; and that the receipts of *M.* and *H.* ſhould be an effectual diſcharge to all perſons paying them, &c. without being accountable for their miſapplication. Which ſaid indenture of the 11th of *March* 1794 was duly executed by the defendant, *Morland*, and *Hamerſley*, in the preſence of *W. S.* and *J. S.* The plea then ſtated, that after the paſſing of the ſtat. 17 *Geo.* 3. *c.* 26., and after the making of the laſt-mentioned indenture, the defendant on the 8th of *April* 1794 executed the bond in the firſt count mentioned with the condition as aforeſaid; and that the defendant and *Morland* and *Hammerſley* did alſo execute the ſaid indenture tripartite mentioned in the ſaid condition, and bearing the ſame

1807.

O'CALLAGHAN *againſt* INGILBY.

ſame date with the bond: by which laſt-mentioned indenture, after reciting as herein-before and in the ſaid indenture of the 11th of *March* 1794 is recited; and further reciting ſeveral other matters in that indenture contained; and alſo that *Morland* and *Hammerſley*, in purſuance of the truſts in the indenture of the 11th of *March* 1794, and with the privity and approbation of the defendant, teſtified by his being a party thereto, contracted with *W. Stopford*, (the teſtator) for the ſale of a clear annuity to him of 200*l.* during the term of 99 years, if the defendant ſhould ſo long live, and to be ſecured in manner aftermentioned, for the price of 1800*l.*; and after further reciting that for ſecuring payment of the ſaid annuity the defendant had given his bond for 3600*l.* in the firſt count mentioned, conditioned to be void upon payment of the ſaid annuity: the indenture witneſſed, that in performance of the ſaid agreement, and in conſideration of the ſaid 1800*l.* to *Morland* and *Hammerſley* at or before the ſealing and delivery of the ſaid indenture in hand well and truly paid by *Wm. Stopford*, to be by them *M.* and *H.* applied upon the truſts of the above recited indenture of demiſe; the payment and receipt of which ſaid 1800*l.* they, the defendant, *Morland* and *Hammerſley*, did by the ſaid indenture acknowledge, and from the ſame did acquit *Stopford*; and for the better ſecuring the payment of the ſaid annuity purſuant to the condition of the ſaid bond, and alſo in conſideration of 10*s.* to the defendant paid at or before the ſealing and delivery, &c., they the ſaid *Morland* and *Hammerſley*, in purſuance of the truſts of the above-recited indenture of demiſe, and with the conſent of the defendant, teſtified by his being party thereto, &c., and alſo he the defendant, and each of them, by his indenture did grant and confirm unto *Stopford*

Deed of 8th April 1794, *reciting as before in indenture of 11th* March, *&c. That truſtees, in purſuance of truſt, had agreed with* Stopford *for annuity of* 200*l.*

and that, for ſecuring it, Ingilby *had given his bond;*

witneſſed, that in conſideration of 1800*l. to be applied upon the truſts declared in indenture of demiſe.*

Grant of the annuity by truſtees and Ingilby,

1807.

O'CALLAGHAN *againſt* INGILBY.

Stopford for 99 years, if the defendant ſhould ſo long live, an annuity of 200*l.* iſſuing out of and charged upon the aforeſaid lands, &c. deſcribed in and granted and demiſed by the above-recited indenture of demiſe unto *M.* and *H.* as aforeſaid, to be paid to *Stopford* quarterly at the banking-houſe of Meſſrs. *Ranſom*, *Morland*, and *Hammerſley*, in *Pall-Mall*, without any deduction or abatement whatſoever for or in reſpect of any taxes, charges, &c. or aſſeſſments whatſoever then or at any time thereafter to be impoſed, &c. on the ſeveral premiſes, &c. or on the ſaid *Stopford* in reſpect of the annuity, &c. The deed alſo contained covenants by *Morland* and *Hammerſley* for their own acts, and by the defendant for his own acts and theirs, and againſt the acts and deeds of all other perſons; and that if the annuity ſhould be in arrear for 21 days, it ſhould be lawful for *Stopford* to enter and diſtrain, &c.; and that if the annuity ſhould be in arrear for 40 days, it ſhould be lawful for him to enter upon and hold the ſaid lands thereby charged, and take the rents and profits until all arrears, &c. ſhould be ſatisfied, without impeachment of waſte. And the defendant, *Morland*, and *Hammerſley*, jointly and ſeverally covenanted with *Stopford* to pay him, his executors, &c. the annuity of 200*l.* ſecured by the ſaid bond and indenture, clear of all deductions. The indenture alſo contained a clauſe of redemption on re-payment of 1800*l.* and the arrears. It alſo contained a covenant by the defendant, that he and *Morland* and *Hammerſley*, or ſome or one of them, had a right to grant the ſaid annuity of 200*l.*, and to charge the premiſes therewith: and alſo a covenant for further aſſurance: and alſo a joint and ſeveral covenant by the defendant, *M.* and *H.*, that no act had been done by them to prevent them from granting the annuity. The plea then

iſſuing out of the premiſes,

without deduction of taxes, &c.

Covenants.

Power of entry and diſtreſs if annuity in arrear for 21 days. If for 40 days, then to enter and receive rents and profits.

Covenant by truſtees to pay annuity.

Proviſo for re-purchaſing.

Covenant that Ingilby *and truſtees had power to grant.*

No memorial of the indenture of

1807.

O'CALLAGHAN *againſt* INGILBY. 11th March 1794.

then ſtated, that no memorial of the indenture of the 11th of *March* 1794, and of the truſts therein mentioned, was inrolled in the Court of Chancery, purſuant to the ſtatute. 4thly, The defendant pleaded alſo to the firſt count, that no memorial of the indenture tripartite of the 8th of *April* 1794, mentioned in the condition to the bond, was inrolled, &c.

4th plea, No memorial of indenture tripartite:

The plaintiff by his replication took iſſue on the plea of non eſt factum; and to the 2d and 4th pleas pleaded, that a memorial of the bond in the firſt count mentioned, and of the condition, and of the indenture tripartite of the ſame date mentioned in the condition of the bond, containing the day of the month and the year when the ſame was dated, and the names of all the parties thereto, and for whom any of them were truſtees, and of all the witneſſes thereto, and ſetting forth the annual ſum to be paid, and the name of the perſon for whoſe life the annuity was granted, and the conſideration of granting the ſame, was within 20 days of the execution of the bond and indenture tripartite, viz. on the 26th of *April* 1794, inrolled, &c. according to the form and effect of the act, &c.; which memorial is as follows; viz.—A memorial to be inrolled purſuant to an act, &c. of a bond dated the 8th of *April* 1794, under the hand and ſeal of Sir *John Ingilby* of, &c. whereby he became bound to *W. Stopford* of, &c. in the penal ſum of 3600*l.* with a condition, &c.; reciting, amongſt other things, an indenture tripartite bearing even date with the ſaid bond, and made between Sir *J. I.* of the firſt part, *Morland* and *Hammerſley*, bankers, of the ſecond part, and *W. Stopford* of the third part; and that *M.* and *H.*, in purſuance of the truſt repoſed in them by the ſaid indenture, had with the privity and approbation of Sir *J. I.* contracted and agreed with *Stopford* for

Replication to 2d and 4th pleas.

Memorial of bond ſet forth.

1807.

O'CALLAGHAN *against* INGILBY.

for the ſale to him of a clear annuity of 200*l.* to be paid, &c. during the term of 99 years, if Sir *J. I.* ſhould ſo long live, *and to be ſecured in the manner therein mentioned* for the price of 1800*l.*; *which ſaid ſum of* 1800*l. was paid* by *Stopford* to *M.* and *H. by his draft on Meſſrs.* Ranſom *and Company, his bankers, at or before the ſealing and delivery of the ſame indenture and of the ſaid bond.* And the condition of the ſaid bond was, &c. (ſetting it out as before expreſſed) which ſaid bond was duly executed by Sir *J. I.* in the preſence of, &c. (ſetting out the names, &c. of the witneſſes.) The replication alſo ſet out the memorial of an indenture of three parts, dated the 4th of *April* 1794, between Sir *J. I.* of the 1ſt part, *Morland* and *Hammerſley* of *Pall Mall*, bankers, of the 2d part, and *W. Stopford* of the 3d part; *the ſaid* M. *and* H. *being truſtees as well for the ſaid Sir J. I. as the ſaid* W. Stopford; whereby after reciting, amongſt other things, that *M.* and *H.* in purſuance of the truſt repoſed in them by a certain indenture of demiſe, dated 11th of *March* then laſt and therein recited, had with the privity and approbation of Sir *J. I.* teſtified as therein mentioned, agreed with *W. Stopford* for the ſale of a clear annuity of 200*l.* to be paid to *W. S.* his executors, &c. during the term of 99 years, if Sir *J. I.* ſhould ſo long live, and to be ſecured in manner thereinafter mentioned for the price of 1800*l.*; and that for ſecuring the ſaid annuity Sir *J. I.* by his bond of the ſame date, with the indenture of which this writing purports to be a memorial, had become bound to *W. S.* in 3600*l.*, conditioned to be void on payment by Sir *J. I.* to *W. S.* during the term of 99 years if Sir *J. I.* ſhould ſo long live, an annuity of 200*l.* on the days, &c. mentioned; it was by the indenture now memorialized witneſſed, that *in conſideration of* 1800*l.* to *Morland* and *Ham-*

Memorial of indenture tripartite of 4th April 1794.

For whom M. *and* H. *truſtees.*

Conſideration-money, how paid.

1807.

O'CALLAGHAN *againſt* INGILBY.

Hammerſley in hand paid by W. S., *and which was paid to them by his draft on Meſſrs.* Ranſom *and Co. his bankers*, to be *by them* M. *and* H. *paid and applied upon the truſts and for the intents and purpoſes* declared by the ſaid indenture of demiſe of the 11th of *March* (the payment and receipt of which ſaid 1800*l.* they, Sir *J. I. Morland* and *Hammerſley* did thereby acknowledge): and for better ſecuring the payment of the ſaid annuity *Morland* and *Hammerſley*, in purſuance of the truſts repoſed in them by the ſaid indenture of demiſe, and with the conſent of Sir *J. I.* and alſo Sir *J. I.* did, and each of them did grant and confirm to *W. S.* during the term of 99 years, if Sir *J. I.* ſhould ſo long live, an annuity of 200*l.* to be iſſuing out of and charged upon all and every the manors, lands, &c. of Sir *J. I.* in the county of *York*, and all and ſingular other the premiſes of him Sir *J. I.* mentioned and deſcribed in and granted and demiſed by the ſaid indenture of demiſe of the 11th of *March* laſt, to have and take the ſaid annuity unto *W. S.* &c. during the term, &c. and to be paid to the ſaid *W. S.* by four quarterly payments, &c. at the banking-houſe of Meſſrs. *Ranſom*, *Morland*, and *Hammerſley*, in *Pall Mall*, without any deduction or abatement whatſoever on account of taxes or otherwiſe howſoever: *with ſuch powers and remedies by diſtreſs and entry* on the ſaid premiſes for the recovery of the ſaid annuity as therein are contained: and in which ſaid indenture is contained a proviſo that Sir *J. I.* ſhall be at liberty to re-purchaſe the ſaid annuity on giving *W. S.* &c. three calendar months' notice, and on payment of 1800*l.* &c.: and this indenture was duly executed by Sir *J. I.*, *W. Morland*, and *T. Hammerſley*, in the preſence of *J. S.* of, &c. and *E. G.* &c. To the third plea the plaintiff demurred generally. And the

How to be applied.

Annuity granted jointly and ſeverally.

Out of what premiſes.

Without deduction.

Proviſo of redemption.

Demurrer to 3d plea.

1807.

O'CALLAGHAN *against* INGILBY.

the defendant demurred to the plaintiff's replication to his 2d and 4th pleas: and there were similar pleas, replications, and demurrers to the second count on the other bond.

This case was argued at considerable length by *Holroyd* for the plaintiffs, and *Wetherell* contrà; and a great many objections were taken to the grant of this annuity, as well for the want of a memorial of the deed of the 11th of *March* 1794, conveying the defendant's estates to *Morland* and *Hammersley* in trust to raise money for him by way of annuity; and of the several trusts therein contained; as for the several defects of the memorials of the bonds and conditions of the deed of the 8th of *April* 1794, granting the annuity. The objections arising from the want of a memorial of the several trusts contained in the deed of the 11th of *March* 1794 became eventually unnecessary to be considered; and the other objections were distinctly stated and answered by the Court in giving the judgment; which was now delivered by

Lord ELLENBOROUGH C. J. This case comes before the Court on a demurrer pleaded by the plaintiffs to the defendant's third plea, and on demurrers pleaded by the defendant to the plaintiffs' replications to the defendant's second and fourth pleas. The plaintiffs declare in debt on a bond executed by the defendant to the plaintiffs' testator, *W. Stopford*, conditioned for payment of an annuity of 200*l.* per ann. during the life of the defendant, Sir *John Ingilby*. The condition of the bond recited an indenture tripartite, dated 8th of *April* 1794, between the defendant, Sir *J. Ingilby*, of the first part, *Morland* and *Hammersley*, bankers, of the second part, and the said *Stopford*

1807.

O'CALLAGHAN *againſt* INGILBY.

Stopford of the third part; reciting that the bankers, in purſuance of the truſts repoſed in them by that deed, had contracted with *Stopford* for the ſale to him of one annuity of 200*l.* per annum during the life of Sir *J. Ingilby*, for 1800*l.*, which ſum *W. Stopford* paid to *Morland* and *Hammerſley* by his draft on *Ranſom* and Co., his bankers, at or before the ſealing and delivering of the ſaid indenture and bond. The defendant then pleads, 1ſt, Non eſt factum. 2d, That there was not any memorial of the ſaid bond inrolled purſuant to the ſtatute. 3d, That by indenture of the 11th of *March* 1794 Sir *J. Ingilby* conveyed to *Morland* and *Hammerſley* certain eſtates in *Yorkſhire*, of which he, Sir *J. Ingilby*, was tenant for life; to hold to *Morland* and *Hammerſley*, their executors, adminiſtrators, and aſſigns, for 99 years, if Sir *J. Ingilby* ſhould ſo long live, upon truſt to raiſe ſuch ſums of money as they ſhould be able, by granting annuities for the life of Sir *J. Ingilby* not exceeding 2500*l.* per annum. That afterwards he, Sir *J. Ingilby*, executed the bond; and that he, and *Morland* and *Hammerſley*, executed the deed of the 8th of *April* 1794 in the condition of the bond mentioned, being the deed granting the annuity to *Stopford*, (which is ſtated at length in the plea:) and then the defendant pleads that a memorial of the deed of the 11th of *March* 1794, (being the conveyance of Sir *J. Ingilby*'s eſtate to *Morland* and *Hammerſley*,) and of the truſts therein mentioned to be repoſed in *Morland* and *Hammerſley* by that deed, was not inrolled purſuant to the ſtatute. 4th, That no memorial was inrolled of the deed of the 8th of *April* 1794 mentioned in the condition of the bond, (being the deed granting the annuity to *Stopford*.) To theſe pleas the plaintiff replies; taking iſſue on the non eſt factum: and to the 2d plea he in his replica-

1807.

O'CALLAGHAN *againſt* INGILBY.

tion ſets out the memorial of the bond and condition. To the 3d plea the plaintiff demurs. To the 4th plea he ſets out the memorial of the deed of the 8th of *April* 1794. The defendant by way of rejoinder demurs to the replications to the 2d and 4th pleas, which ſtated the memorials of the bond and condition, and of the deed of the 8th of *April* 1794, (the deed granting the annuity.) So that the queſtions are, 1ſt, Whether under the annuity act 17 *Geo.* 3. *c.* 26. a memorial ought to have been inrolled of the deed of the 11th of *March* 1794, by which Sir *J. Ingilby* conveyed his eſtates to *Morland* and *Hammerſley*, in truſt to raiſe money by grants of annuities: for if a memorial ought to have been inrolled of that deed, inaſmuch as none has been inrolled, judgment ought to be for the defendant. 2dly, Whether the memorial of the bond and condition which has been inrolled, and which memorial is ſtated at length in the plaintiff's replication to the defendant's ſecond plea, be or be not a ſufficient memorial within the ſtatute. 3dly, Whether the memorial of the deed of the 8th of *April* 1794 (being the deed granting the annuity) which has been inrolled, and which is ſtated at length in the plaintiff's replication to the defendant's 4th plea, be or be not a ſufficient memorial of that deed within the ſtatute.

A variety of objections have been taken on behalf of the defendant, Sir *J. Ingilby*, to the validity of this annuity. The ten firſt objections apply to the want of a memorial of the deed of the 11th of *March* 1794, being the deed by which Sir *J. Ingilby* conveyed his eſtates to *Morland* and *Hammerſley*, particularizing the ſeveral parts of that deed, which the counſel for the defendant contends ought to have been ſtated in a memorial. But as the Court is of opinion that that deed is not within the true

1807.

O'CALLAGHAN *againſt* INGILBY.

true intent and meaning of the annuity act, "a deed, "inſtrument, or aſſurance, *whereby an annuity is granted*," it is not neceſſary to enter into that ſet of objections more particularly. It is not a deed *whereby the annuity is granted*; but a deed conveying the eſtates to *Morland* and *Hammerſley*, who *afterwards grant the annuity* to the plaintiff. It might never have been followed by the grant of any annuity at all, or not till after a long interval; and until ſome annuity ſhall be granted, it cannot be neceſſary to inrol a memorial of it: but before that time ſhall arrive the period may have expired within which by the terms of the annuity act a memorial of ſuch deed is required to be inrolled; as was the caſe with reſpect to the preſent annuity. The act requires a memorial to be inrolled within 20 days of the execution of ſuch deed; which ſhews that the Legiſlature had in contemplation ſuch deeds only as formed the grant or aſſurance of the particular annuity, and not ſuch as conſtituted the title of the grantor. On this ground therefore the plaintiff will be entitled to judgment on his demurrer to the defendant's third plea. The defendant has alſo taken ſeveral objections to the memorials inrolled of the bond and indenture of the 8th of *April* 1794, which is the deed granting the annuity to the plaintiff; which memorials are ſet forth in the replications to the ſecond and fourth pleas; to which replications the defendant has demurred. Theſe objections are, 1ſt, That the memorial of the deed of the 8th of *April* 1794 does not ſet forth the draft by which the conſideration money was paid. 2. That it does not ſet forth the eſtates charged with the annuity. 3. That it does not ſet forth the exemption of the annuity from parliamentary and other taxes. 4. That it does not ſet forth ſufficiently the powers of entry and diſtreſs.

1807.

O'CALLAGHAN *against* INGILBY.

5. That it does not ſet forth the covenants of Sir *John Ingilby*, and of *Morland* and *Hammerſley*, for the due payment of the annuity. Of theſe five objections the firſt had moſt weight with us; (viz.), That ſuppoſing it to appear upon the memorial that the conſideration was not paid in money, but by a draft; which draft had not been converted into money before the execution of the deeds; the particulars of the draft are not ſet forth. Becauſe it has been determined by ſeveral caſes, that where the conſideration was not paid in money, but by a draft, the particulars of that draft muſt be ſet forth: as in *Rumball* v. *Murray* (*a*), *Berry* v. *Bentley* (*b*), *Poole* v. *Cabanes* (*c*). And it is equally clear, that if paid by a draft converted into caſh before the execution of the deeds, the particulars of the draft need not be ſtated. It becomes material therefore to advert to the terms in which the payment of the conſideration is ſtated in the different inſtruments as they appear in the memorial ſtated on the record. The indenture *recited in the condition of the bond* ſtates the conſideration thus—"at or for the price or ſum of 1800*l.*; "which ſaid ſum of 1800*l.* *was paid* by the ſaid *Wm.* "*Stopford* to the ſaid *Wm. Morland* and *Thomas Ham-* "*merſley* by his draft on Meſſrs. *Ranſom* and Co., his "bankers, *at or before* the ſealing and delivery of the "ſaid indentures and bond." The annuity deed *as ſtated in the memorial of that deed* ſtates the conſideration thus—"in conſideration of the ſum of 1800*l.* of lawful money "of *Great Britain* to the ſaid *Wm. Morland* and *Thomas* "*Hammerſley in hand paid* by the ſaid *W. Stopford*, and "which was paid to them by his draft on Meſſrs. *Ran-* "*ſom* and Co., his bankers," to be by them the ſaid *W.*

(*a*) 5 *Term Rep.* 298. (*b*) 6 *Term Rep.* 690. (*c*) 8 *Term Rep.* 328.

Morland

1807.

O'CALLAGHAN *againſt* INGILBY.

Morland and *T. Hammerſley* paid and applied upon the truſts and for the intents and purpoſes declared by the abovementioned indenture. And the queſtion is, whether theſe ſtatements neceſſarily import that at the time of executing the deeds *the money* had not been paid to *Morland* and *Hammerſley*, but only the *drafts*: and we think that they do not ſo neceſſarily import, that *only* the *draft* was *paid* to them; but that it may fairly be underſtood that the *money* was *paid*. The ſtatements both aver payment of the money; viz. *which ſum of* 1800*l. was paid at or before* the ſealing and delivery of the deed and bond; and the ſtatement adds the means by which the money was paid, viz. by a draft of the ſaid *Wm. Stopford* on his bankers. It muſt be recollected that the part of the annuity act on which this objection is founded is the firſt ſection, which requires the memorial to ſet forth "the conſideration or conſiderations of granting the annuity:" and the third clauſe, which requires that "in "every deed, whereby an annuity is granted, the conſi- "deration really and bonâ fide ſhall be fully and truly "ſet forth:" and if the fact were that the *money* was not paid to or received by *Morland* and *Hammerſley* before the deeds were executed, but only a *draft*, the defendant might have ſo pleaded the fact; which he has not done; and therefore the Court may well conſtrue the words of the memorial as averring that the money had been paid by the means of a draft previouſly given; which conſtruction the words ſeem fully to juſtify. The other four objections made to the memorial of the indenture of the 8th of *April* 1798 appeared at the time of the arguments not to be ſupported by the annuity act, or by the fact. The eſtates charged with the annuity are not by any clauſe of the act required to be ſtated; and in

1807.

O'CALLAGHAN *againſt* INGILBY.

fact the memorial ſtates the annuity to be charged on and iſſuing and payable out of all the eſtates of Sir *J. Ingilby* in the county of *York*, and all other the premiſes of Sir *J. Ingilby* granted to *Morland* and *Hammerſley*. The objection that the memorial does not ſtate that the annuity is exempted from parliamentary and other taxes is anſwered by the fact; the memorial ſtating the annuity to be paid without any deduction or abatement whatſoever on account of taxes or otherwiſe howſoever. The objection that the memorial does not ſufficiently ſet forth the powers of entry and diſtreſs is anſwered by the fact of the memorial ſtating, "with powers of diſtreſs and entry, as ſtated in the deed;" and the annuity act does not require ſuch powers of entry and diſtreſs to be ſtated, except ſo far as they create a truſt which brings them within the branch of the act relative to truſtees. And the laſt objection, that the covenants of Sir *J. Ingilby*, and of *Morland* and *Hammerſley*, for the due payment of the annuity, are not ſtated in the memorial, fails; inaſmuch as ſuch covenants are not required to be ſtated; and it does appear that they are the grantors of the annuity. The conſequence of this opinion which the Court has formed on the ſeveral objections made on the part of the defendant to theſe memorials is, that the plaintiff is alſo entitled to judgment on the demurrers pleaded by the defendant to the plaintiff's replications to the ſecond and fourth pleas.

FIELD *againſt* JONES, Marſhal of the King's Bench Priſon.

Thurſday, Nov. 26th.

A day-rule, when made, covers, by relation back, the liberation of a priſoner who had ſigned the petition, but had gone out of the priſon before the ſitting of the Court on the ſame day; though the marſhal were ſued for the eſcape before the ſitting of the Court.

THIS was an action for an eſcape againſt the marſhal, and the proof was that the priſoner, *Serres*, who was in execution in the marſhal's cuſtody at the ſuit of the plaintiff was ſeen at large about 11 o'clock on the firſt day of *Michaelmas* term 1806. The defence was that *Serres* was out upon a day-rule granted by the Court on the ſame day; and by the ſtat. 8 & 9 *W.* 3. *c.* 27. *ſ.* 1. that could only have been granted at the ſitting of the Court, which in fact did not ſit till after the time when he was at large. And it further appeared that the plaintiff had actually filed his bill againſt the marſhal in this action before the ſitting of the Court on the ſame day. The petition of the priſoners in the marſhal's cuſtody and the day-rule were admitted at the trial, without formal proof; but were afterwards ſhewn to be in this form. The petition—"To the Rt. Hon. Lord Chief Juſtice "and the reſt of the Judges of His Majeſty's Court of "King's Bench, *Weſtminſter*—The humble petition of "ſeveral priſoners in actual cuſtody of the marſhal of "this court, whoſe names are hereunto ſubſcribed: "ſheweth, that your ſaid petitioners having this day "occaſion to treat with their ſeveral creditors, adviſe "with their counſel, and follow their ſeveral ſuits at "law, in order to their diſcharge, humbly pray that they "may have leave *to go out of the priſon this day* for the "purpoſes aforeſaid, *and to return again the ſame day.* "And your petitioners ſhall ever pray," &c. (Signed by the ſeveral priſoners.) The day-rule runs thus—

1807.

FIELD against JONES.

"*Thurſday* next after the morrow of *All Souls*, in the "47 year of king *George* the 3d—*England*—Upon read- "ing the petition of *J. T. Serres*, and others, priſoners "in the cuſtody of the marſhal of the Marſhalſea of this "Court, this day preſented to this Court; thereby pray- "ing that the ſaid *J. T. Serres* might have leave to go "out of the ſaid priſon for the purpoſes in the ſaid peti- "tion ſet forth; it is ordered that the ſaid *J. T. Serres* "*have leave to go out of the ſaid priſon*, he returning "again into the cuſtody of the ſaid marſhal on this day. "By the Court." On the part of the marſhal, it was contended that the day-rule when granted was a juſtifi- cation to him for the liberation of the priſoner on the whole of the day, by relation back; and that there was no fraction of the day in this caſe; and that ſuch had been the invariable practice in this reſpect, which had been recognized by Lord Ch. J. *Lee* upon a ſimilar occaſion. Lord *Ellenborough* C. J., before whom this cauſe was tried at the ſittings at *Weſtminſter* after the laſt term, was of this opinion: but it was agreed that the plaintiff ſhould take a verdict with nominal damages; reſerving leave to the defendant to move to enter a nonſuit if the opinion of the Court ſhould be with him.

The Attorney-General (with whom were *Garrow* and *Topping*) accordingly obtained a rule niſi for this purpoſe at the beginning of the term; when he referred to Sir *Thomas Tipping*'s caſe, cited in an anonymous caſe in 1 *Stra.* 503. where it appears that a ſuperſedeas was granted on the motion of a priſoner taken on an eſcape warrant, who, having ſigned the petition for a day rule in the morning, had gone out before the Court ſat: and they held that being entitled to a rule, that rule would pro-

tect

1807.

FIELD *againſt* JONES.

tect him the whole day, and they could make no fraction of a day; though the Court in the principal caſe refuſed the ſuperſedeas, becauſe the priſoner had not ſigned the petition till after he was taken up.

Park and *Pell*, in ſhewing cauſe againſt the rule, relied on the ſtat. 8 & 9 *W.* 3. *c.* 27. *ſ.* 1. which directs that if the marſhal, &c. or any other keeper of a priſon, ſhall ſuffer any priſoner to go at large, except by virtue of ſome rule of Court, "which ſhall not be granted but "by motion made or petition read in open court," every ſuch going out, &c. ſhall be deemed an eſcape: and argued that this proviſion was inconſiſtent with the practice which had prevailed. That the principal caſe in *Strange* ſeemed to overrule Sir *T. Tipping*'s caſe there cited; for otherwiſe, after the rule was once granted, which that caſe ſuppoſes it to have been, it would have related back to the beginning of the day, as well whether the priſoner had ſigned the petition before, as after, he went out: yet the Court there refuſed the ſuperſedeas. They alſo referred to *Smallcomb* v. *Buckingham* (*a*) and *Combe* v. *Pitt* (*b*) to ſhew that the Court noticed the fraction of a day in caſes of proceſs.

Lord *Ellenborough* C. J. It would entirely fruſtrate the benefit of the day-rule to the parties, if the Court were to conſtrue it thus narrowly and ſtrictly: for if it were firſt to be moved, and then to be drawn up, and afterwards ſerved upon the marſhal, before the party could avail himſelf of it, he would have the benefit of a very ſmall portion of the day, conſidering how late the Court uſually commence their ſitting on the firſt day of

(*a*) *Salk.* 320. (*b*) 3 *Burr.* 1434.

term,

1807.

FIELD *againſt* JONES.

term. We will conſider, however, that the rule was only granted, as legally it could only have been, when the Court ſat on the firſt day; but when granted, it was a liberty for that day, and covered the antecedent part of the day; becauſe, generally ſpeaking, there is no fraction of a day, unleſs where it is neceſſary to look to it in order to anſwer the purpoſes of juſtice. We need not, therefore, call in to our aid the caſe of Sir *Tho. Tipping*, cited in *Strange*, though it appear to warrant our opinion; becauſe that opinion is founded on the general rule of law. And as to the principal caſe cited in the book, it is no contradiction of the other; becauſe the day-rule is only to be granted by motion made or petition read in open court; and the rule when made would not extend to one who had not ſigned the petition at the time.

Per Curiam, Rule abſolute for entering a nonſuit.

Friday, Nov. 27th.

A priſoner under criminal proceſs in the Houſe of Correction cannot be brought up by habeas corpus ad reſpondendum, for the purpoſe of being charged with a declaration on a bailable writ, and recommitted to his former cuſtody ſo charged.

BRANDON and Others *againſt* DAVIS.

SCARLET moved for a habeas corpus ad reſpondendum, directed to *Aris* the keeper of the houſe of correction in *Cold Bath Fields*, (which priſon is under the direction of the juſtices of the peace, and not of the ſheriff,) to bring up the body of *Davis*, who was in that priſon under ſentence for a miſdemeanor; the term of his impriſonment not being to expire till the 17th of next *January*: in order that he might be committed to the cuſtody of the marſhal, and then charged with a declaration upon a bailable writ iſſued againſt him ſubſequent to his impriſonment, at the ſuit of *Brandon* and others, and an affidavit to hold him to bail for 2000*l.*; after which

1807.

BRANDON and Others *againſt* DAVIS.

which it was propoſed that he ſhould be remanded back to his former cuſtody, charged with ſuch action. He referred to *Keach*'s caſe (*a*), and to *Coppin* v. *Gunner* (*b*), in which latter caſe the Court gave leave to charge a felon in gaol with civil proceſs. And in another caſe of *Lawrence and another* v. *Laidler* (*c*), one under ſentence for a miſdemeanor in *Newgate* was brought up in cuſtody of the gaoler, and committed to the cuſtody of the marſhal,

(*a*) *Salk.* 351.

(*b*) 2 *Stra.* 873. 2 *Ld. Ray.* 1572. and vide the caſe of the bail of *Peter Vergen*, 2 *Stra.* 1217.

(*c*) This was read from a MS. Note Book of Practice furniſhed by Mr. *Short*, the Clerk of the Rules on the civil ſide. "*Lawrence and Another* v. *Laidler*, 13th *Nov.* 1758. The defendant being brought into court in cuſtody of the keeper of his majeſty's gaol of *Newgate*, by writ of habeas corpus; and the defendant being charged by the return to the ſaid writ, that he, having pleaded not guilty to an indictment againſt him for a miſdemeanor, was committed to the ſaid gaol for want of ſureties to proſecute his traverſe at the next ſeſſions of oyer and terminer for the county of *Middleſex*; and alſo on reading another writ of habeas corpus directed to the Judges of the Palace Court, &c., and the return thereto; whereby it appears that the defendant was taken on the 31ſt of *October* laſt within the juriſdiction of their court to anſwer to the plaintiff 15*l.*; and the defendant having put in bail in the ſaid cauſe on the return of the ſaid writ; and the ſaid bail having this day ſurrendered the defendant in their diſcharge into the cuſtody of the marſhal; it is ordered that the defendant be recommitted into the cuſtody of the keeper of the gaol of *Newgate* to anſwer to his ſaid offence, *and to the ſaid action*; to be by him kept in ſafe cuſtody until he ſhall be from thence diſcharged by due courſe of law.

Lawrence and Another v. *Laidler*. } The defendant being this day rendered in court in diſcharge of his bail, it is ordered that he be committed into the cuſtody of the marſhal, &c. and that an exoneretur be entered upon the recognizance (1) of bail in this cauſe. 13th *Nov.* 1758."

There is another precedent in the ſame book, where the like was done in the caſe of a priſoner brought up in the cuſtody of the keeper of the *Savoy*. *Bond* v. *Iſaac*, *E.* 30 *Geo.* 2. 1757.

(1) If the action be by bill, the order is that an exoneretur be entered upon the bail-piece filed in this cauſe. *M.* 32 *Geo.* 2.

in

1807.

BRANDON and Others *againſt* DAVIS.

in order to be ſurrendered by his bail; and was afterwards remanded to his former cuſtody charged with the action. [The Court ſaid, that that had only been done in caſes where the party was in cuſtody, on criminal proceſs, of the ſheriff or gaoler of the Court; but not as in this caſe where he was in the cuſtody of one who was not an officer of the Court.] The ſtatute placing houſes of correction under the cognizance of the juſtices of peace for the impriſonment of offenders could not mean to defeat civil juſtice by privileging ſuch offenders from being ſued till after the term of their impriſonment there expired. It is the acknowledged common practice to have priſoners brought up from ſuch places by writs of habeas corpus to be ſurrendered by their bail; and there is no reaſon why it ſhould not alſo be done in order to charge them with a declaration.

Lord ELLENBOROUGH C. J. The conſequence of charging this party with a declaration will be to make the gaoler of the houſe of correction liable to the plaintiffs in caſe of an eſcape. But the Maſter has mentioned a caſe to us, where the Court in Lord *Mansfield*'s time refuſed an application of this ſort to bring up a perſon in the cuſtody of the keeper of Bridewell; ſaying that this Court had no power to make a gaoler of ſuch priſons liable for the eſcape of a priſoner on civil proceſs. The only inconvenience from the law, as it ſtands, is that during a priſoner's confinement in theſe places he cannot be ſued, when probably a plaintiff could derive no fruit from his ſuit: and the plaintiff may prevent the ſtatute of limitations running upon his demand by ſuing out his writ and entering continuances.

Per Curiam, Rule refuſed.

1807.

PURCELL *againſt* MACNAMARA.

Friday, Nov. 27th.

In an action on the caſe for a malicious proſecution, it is not material for the plaintiff to prove the exact day of his acquittal as laid in the declaration, ſo that it appears to have been before the action brought; and therefore a variance in that reſpect between the day laid and the day ſtated in the record, which was produced to prove the acquittal, is not material; the day not being laid in the declaration as part of the deſcription of ſuch record of acquittal.

IN an action on the caſe for a malicious proſecution, the declaration, after ſtating that on the 13th of *Jan.* in the 46 *Geo.* 3. at the *Middleſex* ſeſſions of oyer and terminer, the defendant indicted the plaintiff for perjury alleged to be committed in an affidavit ſworn, exhibited, and filed by the plaintiff on the 10th of *December* 46 *Geo.* 3. in a cauſe then depending in Chancery between theſe parties; the record of which indictment was ſet forth; and that the ſame was removed by certiorari into this Court; proceeded to allege that the defendant "proſecuted the ſaid indictment againſt the plaintiff, "until afterwards, to wit, *on the morrow of the* Holy "Trinity *in the 46th year aforeſaid*, at *Weſtminſter*, &c. "in the Great Hall of Pleas there before Lord *Ellen-* "*borough* C. J. &c. the plaintiff was in due manner, &c. "acquitted of the premiſes charged upon her in and by "the ſaid indictment," &c. At the trial before Lord *Ellenborough* C. J. at the ſittings after laſt term at *Weſtminſter*, the copy of the record of the indictment being given in evidence, it appeared by the poſtea, that the trial and acquittal took place "*on* Tueſday *next after the end of* "*the* [Eaſter] *term*," which was the day of niſi prius, before the Lord Chief Juſtice: whereupon the variance was objected to as fatal; and the caſe of *Pope* v. *Foſter* (*a*) adduced as in point: and on the authority of that caſe the plaintiff was nonſuited.

But early in this term *Gurney* moved to ſet aſide the nonſuit, on the ground that the particular day of acquittal

(*a*) 4 *Term Rep.* 590.

was

1807.

PURCELL against MACNAMARA.

was not material to be proved as laid, ſo that it was prior to the bringing of the action, which it appeared to be from the memorandum of the declaration on the niſi prius record compared with the record of acquittal. And that the declaration did not affect to ſet out the record of acquittal, according to its tenor; but the day was laid under a videlicet. And he cited a caſe of *The King* v. *Payne* (*a*) tried before Lord *Kenyon* C. J. at the ſittings at *Weſtminſter* after *Mich.* term 29 *Geo.* 3. where an indictment for perjury ſtated that "heretofore, to wit, *on* Monday *the* "3*d day of* December in the 28th year, &c. the cauſe "came on to be tried," &c. And it appeared by the niſi prius record, that the jury were reſpited until, &c. unleſs the juſtices, &c. ſhould firſt come *on* Thurſday *the* 29*th of* November, &c. Whereupon it was objected, that the proof varied from the indictment; as the cauſe muſt be taken to have been tried on the day mentioned in the niſi prius record. But Lord *Kenyon* overruled the objection; for the day, being ſtated under a videlicet, was not neceſſary to be proved exactly as laid. He alſo cited *Buſby* v. *Watſon* (*b*), where the declaration was for maliciouſly indicting the plaintiff at the General *Quarter* Seſſions, &c.; and the proof being of an indictment at the *General Seſſions*, &c. the variance was held immaterial. *Rex* v. *May* (*c*), where an indictment for perjury unneceſſarily ſet out a prior indictment for an aſſault on which the ſuppoſed perjury was committed: but not being ſet out according to the *tenor*, but only *in manner and form*, videlicet, &c. the proſecutor was held not to be tied down to ſtrict proof of an immaterial allegation in it, as laid. Alſo *King* v. *Pippet* (*d*), where a variance in ſtating a pre-

(*a*) This was read from a note taken by Mr. *Holroyd*.

(*b*) 2 *Blac. Rep.* 1050. (*c*) *Dougl.* 193. (*d*) 1 *Term Rep.* 235.

cept

cept to the ſheriff; and *Frith* v. *Gray* (*a*), where the *county* in which a certain agreement was to be performed was miſtated; were alſo held to be immaterial. And other caſes cited in *King* v. *Pippet*, particularly *Rex* v. *Lookup*, where the objection taken and overruled was that an indictment for perjury upon a bill in Chancery ſtated the bill to be directed to *Robert* Lord *Henley*, &c.; whereas, it was directed to Sir *Robert Henley*, Knt. &c.; which was contended to be a much ſtronger caſe than the preſent.

The Attorney-General, *Garrow*, *Jekyll*, and *Abbott*, in ſhewing cauſe againſt the rule, relied principally on *Pope* v. *Foſter* (*b*) as in point to the preſent objection; which, they obſerved, was ſubſequent to the caſe of *Rex* v. *Payne*; and therefore Lord *Kenyon*, who does not appear to have diſſented from the reſt of the Court in *Pope* v. *Foſter*, muſt have changed his former opinion. And they alſo referred to *Green* v. *Rennett* (*c*), where in an action againſt an attorney for negligence in not proſecuting a debtor of the plaintiff 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.; the variance was held fatal; though the day of the return was laid in the declaration under a videlicet. And they contended that the acquittal, being a material fact, was neceſſary to be proved as laid, and could only be proved by the record: and that the rule, as to matters of proof by record, had always been held very ſtrictly; for otherwiſe there might be two records.

(*a*) Cited in 4 *Term Rep.* 561. (*b*) 4 *Term Rep.* 590.
(*c*) 1 *Term Rep.* 656.

Topping

1807.

PURCELL *againſt* MACNAMARA.

Topping and *Gurney*, in ſupport of the rule, denied that the *day* of the acquittal was material, though the acquittal itſelf was: it was enough if it appeared to be before the action commenced: if it had only been alleged that *afterwards* (i. e. after the indictment) the party was acquitted, that would have been ſufficient. In *Green* v. *Rennett*, the variance was material; becauſe otherwiſe the negligence of the attorney did not appear; and on that ground only the Court decided the caſe. The ſtrictneſs of the rule, as to proof by matter of record, only applies where the *tenor* of the record is undertaken to be ſet out: but here the ſubſtanee only of it is alleged: and the very day cannot be material; becauſe the record itſelf does not ſtate the fact truly in this reſpect. They again relied on the caſes formerly cited.

Lord ELLENBOROUGH C. J. This nonſuit proceeded on the authority of *Pope* v. *Foſter*: if that caſe be law, the nonſuit ought to ſtand; if it be not, both that caſe and this nonſuit muſt fall together. There are two ſorts of allegations; the one of matter of ſubſtance, which muſt be ſubſtantially proved; the other of deſcription, which muſt be literally proved. The queſtion is, whether this be an allegation of the former ſort. The allegation is, that the plaintiff was proſecuted "until afterwards, to "wit, on the morrow of the *Holy Trinity*, in the 46th "year aforeſaid, &c. ſhe was in due manner acquitted." The ſubſtance of the allegation is no more than that the plaintiff was acquitted upon that proſecution: and to ſupport this action it muſt alſo appear that ſhe was acquitted *before* the action was brought. The day of acquittal is not alleged with a prout patet per recordum: the averment is, that the acquittal took place on *the morrow*

1807.

PURCELL *againſt* MACNAMARA.

of the Holy Trinity, when the record produced ſtates that it took place *on* Tueſday *next after* Eaſter *term:* and certainly there would be a repugnancy between the allegation and the proof, if it were to be conſidered as a ſpecific allegation of time: but if it be only taken as a ſubſtantial allegation of the fact of the acquittal, as of a time which is ſhewn to have been before the action brought; then the repugnancy is immaterial, and the proof in ſubſtance ſupports the allegation. And ſo it appears to me to do. If it had gone on to ſtate that the acquittal was on a certain day *as appears by the record;* that might have been conſidered as deſcriptive of the record, and then the variance would have been fatal. The ground therefore on which I conſider that the caſe of *Pope* v. *Foſter* ought not to bind us, as having been decided againſt principle, is, that this is an allegation of ſubſtance and not of deſcription. And this diſtinguiſhes it from *Green* v. *Rennett*, which was a caſe of deſcription: it deſcribed the writ in terms; when ſued out, and when returnable; and the return of the writ was part of the deſcription of the thing alleged, and could only be proved by the production of a writ ſo returnable. That caſe therefore was rightly decided: and ſo it appears to me was that of *The King* v. *Payne*; where a better opinion was delivered than in *Pope* v. *Foſter*, which paſſed without diſcuſſion.

GROSE J. I remember the caſe of *Pope* v. *Foſter*, which was not argued, but on the firſt ſtatement at the bar Lord *Kenyon* and my Brother *Buller* conceived that there was no ground for a new trial. It appears now that Lord *Kenyon* not long before had been of a different opinion in *The King* v. *Payne*; and upon principle I think that that caſe is the moſt fit and convenient to be adhered to.

1807.

PURCELL *againſt* MACNAMARA.

The good ſenſe and ſubſtance of the allegation is, that the acquittal took place at ſuch a time as to give the plaintiff her cauſe of action.

LAWRENCE J. I think that the caſe of *Pope* v. *Foſter* was wrongly decided. Where the day laid is made part of the deſcription of the inſtrument referred to, which inſtrument is neceſſary to be proved, the day laid muſt be proved as part of that inſtrument. But where the day laid is not material in itſelf, and need not have been proved as laid, ſuppoſing the proof to have been by parol; if the fact proved will ſupport the declaration, I ſee no ground for any diſtinction between making ſuch proof by matter of record or by parol. The caſe of *Pope* v. *Foſter* is certainly in point to the preſent objection; but it ſeems to have proceeded on ſome miſunderſtanding, as if there had been an attempt to introduce evidence of the real day of the trial and acquittal in order *to contradict the record*, which proved them to have been on a different day. But that was not the true ſtate of the caſe. The material fact which the plaintiff had to prove was his acquittal before his action commenced: in order to prove the acquittal, the record was produced: on reading which, the objection was made on the part of the defendant, that it ſtated the acquittal on a day different from that laid in the declaration. But if the acquittal appeared to have been on a day prior to the bringing of the action, that was all which it was neceſſary for the plaintiff to prove; and therefore there was no contradiction of the record. It was no more neceſſary to prove the preciſe day of the acquittal, as laid in the declaration, than it is, upon an indictment for murder, or in a declaration upon promiſes, to prove the preciſe day laid of committing the murder,

murder, or of making the promiſe. The caſe of *Green* v. *Rennett* turned upon the materiality of the *return day* of the writ, as deſcribed in the declaration. On the production of the writ it appeared to have been ſued out and returnable on different days from thoſe laid in the declaration. It was firſt objected that the day of ſuing it out was material; but that was overruled at the trial by Mr. Juſtice *Buller*: but he ſaid that the return day was material, and therefore nonſuited the plaintiff on the variance in that reſpect. Now the return day was material there, becauſe it was part of the deſcription of the writ ſtated in the declaration, which could only be proved by the production of a writ ſo returnable. Then the caſe of *The King* v. *Payne* is as much in point, in anſwer to the objection, as that of *Pope* v. *Foſter* is in ſupport of it. And the former was not mentioned when the latter was decided. And in *The King* v. *Lookup* the variance was much ſtronger than in this caſe: but yet it was thought ſufficient that the complainant had preferred a bill before the perſon who held the great ſeal, whether he were ſtyled Lord *Henley* or Sir *Robert Henley*. It is ſufficient however to diſpoſe of the objection in this caſe, that the day is not alleged as part of the deſcription of the record of acquittal. The acquittal might have taken place on that or on any other day prior to the plaintiff's action; which it was proved to have been; and that was all which it was material for him to prove in reſpect to time.

1807.

PURCELL *againſt* MACNAMARA.

LE BLANC J. We have been preſſed with the caſe of *Pope* v. *Foſter*; and if that had been ſolemnly diſcuſſed, and a rule of evidence there laid down which had been acted upon ever ſince, the Court might have found them-

1807.

PURCELL *againſt* MACNAMARA.

ſelves diſtreſſed by that authority, and it would have been difficult to have gotten rid of it. But it appears that a different rule of evidence had been before that time laid down by the ſame learned Lord who preſided here when *Pope* v. *Foſter* was determined; and no reference was then made to the former deciſion; but the latter caſe paſſed without diſcuſſion: and the queſtion ſeems to have been brought before the Court embarraſſed a little, as it ſeems, with the idea that evidence had been offered to contradict the record as to the day of the acquittal. But that was not ſo; for the only material part of the allegation in the declaration was, that the plaintiff was acquitted before the action brought; and it was immaterial on what day before: and the record was only produced to prove the acquittal. And I cannot ſee any reaſon why, where a fact is not material to be alleged on the exact day, and need not be proved exactly as laid, and the allegation of the day is not particularly deſcriptive of the record referred to; that it ſhould become material, becauſe it appears by matter of record inſtead of by parol evidence.

Rule abſolute.

1807.

MANNING and Others *againſt* The Commiſſioners of Compenſation under the WEST INDIA Dock Act.

Saturday, Nov. 28th.

THE ſtat. 39 *Geo.* 3. *c.* 69., eſtabliſhing the *Weſt India* Dock Company, and enabling them to make wet docks and build warehouſes and other works in the *Iſle of Dogs*, to which the *Weſt India* trade and ſhipping were to be removed from the quays, wharfs, and warehouſes higher up the river, which were before frequented by the trade; by *ſ.* 121. reciting that in conſequence of the works intended by the act, "ſome of the preſent legal quays, "&c. and certain warehouſes, docks, and divers other "tenements and hereditaments in or adjoining the port "of *London*, ſome of which warehouſes were known by "the name of *Up Town* warehouſes, and uſed for the "reception of *Weſt India* produce and other goods "landed, *might perhaps become leſs valuable*, by means of "the trade or buſineſs of the ſame reſpectively being in "part diverted, *than the ſame reſpectively are at preſent*; "and divers *owners and occupiers* of, and other perſons "intereſted in, &c. ſuch legal quays, &c. warehouſes, "docks, and other tenements, &c. *may thereby ſuſtain* "*loſs or damage*; and the *yearly and other receipts* of the "Governors of *Chriſt*'s Hoſpital in the city of *London*, for "on or account of the car-rooms, or figures for uſing "free carts within the ſaid city, &c. *may alſo thereby* "*happen to be leſſened*;" enacts, "that in caſe ſuch legal

The compenſation clauſe, *ſ.* 121. of the ſtat 39 *Geo.* 3. *c.* 69. directing that in caſe any warehouſes, &c. (uſed for holding *Weſt India* produce before that act) ſhould be rendered *leſs valuable* by reaſon of the *W. I.* trade being diverted therefrom by the then intended *W. I* docks and works, than they were *before the paſſing of the act*; or in caſe the *yearly or other receipts* of *Chriſt*'s Hoſpital ſhould be thereby leſſened; the owners of ſuch warehouſes, &c. and the Governors of the Hoſpital ſhould be compenſated; (thereby putting ſuch owners and governors on the ſame footing) muſt be conſtrued with reference to the *yearly* profits made of the premiſes *antecedent* to the paſſing of the act; and the *value* of ſuch warehouſes cannot be evidenced by the yearly profits made between the paſſing of the act and the opening of the docks, by which latter the loſs was occaſioned.

1807.

MANNING and Others *againſt* The Commiſſioners of COMPENSATION, &c.

" quays, warehouſes, &c. or any of them, ſhall by rea-
" ſon of the ſaid intended works, &c. be rendered *leſs*
" *valuable* by reaſon or means of the trade thereof being
" diverted therefrom *than they reſpectively were before the*
" *paſſing of this act*; or any owners or occupiers of the
" ſame legal quays, *warehouſes*, &c. ſhall by reaſon of
" any of the ſame works ſuffer loſs or damage; or the
" *yearly* or other receipts or income of the Governors
" of *Chriſt*'s Hoſpital aforeſaid, for or on account of
" car-rooms, ſhall by reaſon of any of the ſame works
" happen to be leſſened, the Commiſſioners of Compen-
" ſations (appointed by the act) ſhall make ſuch juſt and
" liberal compenſation or ſatisfaction, &c. to the owners
" or occupiers, &c. of the ſame legal quays, warehouſes,
" &c. *ſo rendered leſs valuable* reſpectively, and to the
" Governors of *Chriſt*'s Hoſpital, &c. as ſhall be agreed
" upon between the ſaid commiſſioners and ſuch re-
" ſpective owners," &c. And by *ſ.* 122. If any perſon claiming compenſation ſhall not agree with the commiſſioners as to the amount of it, and ſhall perſiſt in their claim, the commiſſioners are to iſſue a precept to the the ſheriffs of *London* or of the county, &c. where the premiſes lie; who are to return a jury at the time and place appointed; which jury is to award the amount of the compenſation, and their verdict is to be final; and by *ſ.* 127. it is to be entered amongſt the records of the General or Quarter Seſſions, &c. The ſtat. 46 *Geo.* 3. *c.* 132. further regulates the trial of claims for compenſation, which are to be before the juſtices at ſeſſions. And by *ſ.* 9. reciting that queſtions of doubt and difficulty may ariſe as well concerning the title of claimants to compenſation as the amount of the ſum claimed, the juſtices are enabled " to reſerve any point of law ariſing

" upon ſuch trial for the conſideration of the Court of " *K. B.* upon motion to be made in the ſame court, in " the ſame manner as if ſuch point had been reſerved by " the Lord Chief Juſtice at niſi prius," &c.

The plaintiffs were the owners of a warehouſe, which had been uſed by them for the purpoſe of receiving *Weſt India* produce before the paſſing of the act in queſtion, and for which a conſiderable rent was received; and this rent had progreſſively increaſed, owing principally to the increaſing importation of colonial produce into the port of *London*, and the conſequent increaſed demand for warehouſe-room, from a period of about four years before the paſſing of the act in 1799 till the opening of the docks in 1802, when their profits ceaſed, in conſequence of the removal of the trade to the company's docks and warehouſes. And the Commiſſioners of Compenſation having rejected their claim for compenſation for this loſs by reaſon of the dock works, it came on to be tried in the form directed by the act before the Recorder of *London*, and a jury, at the adjourned Quarter Seſſions for the city, holden at the *Guildhall*; when the claimants' title to ſome compenſation being eſtabliſhed in evidence, a queſtion of law aroſe reſpecting the time from which the average of the *value* of the premiſes, in reſpect of which compenſation was claimed, ſhould be calculated back; viz. whether in eſtimating ſuch *value* the jury were confined to take an average upon the *actual profits* made of ſuch premiſes for one or more years *prior* to the 12th of *July* 1799, when the *Weſt India* Dock act, 39 *Geo.* 3. *c.* 69. *paſſed*; or whether in eſtimating ſuch value, it were lawful for the jury to take into their conſideration the then *value* of the premiſes *evidenced by the actual profits* made *ſubſequent* to the paſſing of the act? The Recorder

1807.

MANNING and Others *againſt* The Commiſſioners of COMPENSATION, &c.

inſtructed the jury not to take into their conſideration any evidence of the *profits* made of ſuch premiſes *ſubſequent* to the paſſing of the act, but to confine their attention to the conſideration of the *profits* made of them *prior* to that act. The jury calculated the compenſation according to this direction, and aſſeſſed the plaintiffs' damages at *l.* Early in this term a rule niſi was obtained for ſetting aſide the inquiſition and having a new aſſeſſment of damages; upon an affidavit of the plaintiffs' claim and of the trial had, and that the queſtion of law above ſtated had been reſerved by the Court, as permitted by the act of parliament. And afterwards the Recorder made his report of the queſtion of law reſerved in the terms above-mentioned.

The caſe was argued by *The Attorney-General*, *Garrow*, *Dampier*, and *Roe*, againſt the rule for a new inquiſition; and by *Beſt* Serjt. *Park*, *Eaſt*, and *Watſon*, in ſupport of it. And two days after

Lord ELLENBOROUGH C. J. delivered the opinion of the Court.

This was a motion for a new aſſeſſment of damages, upon the ground of a ſuppoſed miſdirection of the Recorder of *London* in reſpect of the conſtruction of the compenſation clauſe in the *Weſt India* Dock act, 39 *G.* 3. *c.* 69 *ſ.* 121, 122. (After ſtating *ſ.* 121.) Upon conſidering the terms of this clauſe, we think there is no reaſon to ſuppoſe that the Legiſlature meant to put the Governors of *Chriſt*'s Hoſpital, therein mentioned, and any other owners of property and perſons entitled to compenſation under this ſection, for loſs or damage ſuſtained in reſpect of the other deſcriptions of property therein alſo

alſo mentioned, upon a different footing. The Governors of *Chriſt*'s Hoſpital are under this ſection entitled to no compenſation, unleſs their *yearly receipts*, (which muſt be underſtood as their *yearly receipts before the paſſing of that act*) ſhould be diminiſhed. However they might increaſe between the time of paſſing the act, and however they might fall off afterwards; unleſs it ſhould have the effect of producing a diminution of the receipt, ſo as to reduce it below the ſum they *produced at the time of paſſing the act*; they could have no claim. From hence it appears to follow that, as the Governors of *Chriſt*'s Hoſpital could have no compenſation on account of the proſpective increaſe of their receipts or income, and their ſubſequent diminution; the owners of quays, wharfs, warehouſes, &c. put on the ſame footing with them, can alſo have no compenſation, on account of the proſpective increaſe of value in their property. And that the words of the act, "*leſs valuable*," muſt therefore be underſtood as meaning the ſame as the words "*leſs productive*." If the ſubſequent profits are allowed to be calculated upon, it will in effect be to adopt and proceed upon a calculation of the value *at the time of the claim*, inſtead of the value as taken before the paſſing of the act; which is the ſtandard of valuation expreſsly adopted and referred to by the act itſelf. Nor does the poſtponement of the period for making or admitting claims for compenſation, (under ſect. 128.) "until the expiration of three years after notice of the docks and dock premiſes being ready for uſe," appear to us at all to warrant, as has been argued, a contrary conſtruction of the act; the obvious purpoſe of this proviſion being only to allow a ſufficient interval for the accumulation of the fund out of which the compenſations allowed by the act ſhould be made.

1807.

MANNING and Others *againſt* The Commiſſioners of COMPENSATION, &c.

made. It appears to us, therefore, that the direction given to the jury by the Recorder has been correct in point of law, and that there is no ground for granting a new inquiſition.

Rule diſcharged.

Friday, Nov. 20th.

JOSIAH PERRIN and MARIA PERRIN, Infants, by JOSEPH PERRIN, their Father and next Friend, *againſt* THOMAS LYON, W. D. EVANS, JOSEPH PERRIN, WM. GEDDES, and ARCHIBALD GEDDES.

AND

THO. LYON *againſt* WM. GEDDES, ARCHIBALD GEDDES, MARIA PERRIN, JOSIAH PERRIN, W. D. EVANS, and JOSEPH PERRIN.

J. P deviſed real and perſonal eſtate to truſtees, to pay thereout an annuity to his wife for life, and out of the reſidue to pay ſufficient for the maintenance, education, and ſupport of his only daughter, *until ſhe ſhould attain the age of 21 years, or marry*; and when ſhe ſhould attain 21, or marry, then to her in fee: but in caſe his daughter ſhould *die under age and unmarried*, then the eſtates to go to his wife for life; and, after her deceaſe, *to the two children of his nephew*, as tenants in common in fee:—with a proviſo, that if either his wife or daughter ſhould *marry a Scotchman*, then his wife or daughter *ſo marrying* ſhould *forfeit* all benefit under his will, and the eſtates given to ſuch his wife or daughter as ſhould ſo marry *ſhould deſcend to ſuch perſon or perſons as would be entitled under his will in the ſame manner as if his wife or daughter were dead.* Held that ſuch partial reſtraint of marriage was legal; and that the daughter having while under age married a *Scotchman* and died, leaving a ſon; ſuch ſon could not inherit, nor her huſband be tenant by the curteſy; but that the limitation over (the teſtator's wife being alſo dead) to the two children of the teſtator's nephew (which nephew was ſtill living) took effect immediately on ſuch marriage; they being the perſons deſignated by the will to take in the event which had happened; the teſtator having conſidered ſuch prohibited marriage the ſame as the death of his daughter under age unmarried.

ON the hearing of theſe cauſes before the Lord Chancellor, his Lordſhip directed a caſe to be ſtated for the opinion of this Court, in ſubſtance as follows:

Joſiah Perrin, of *Warrington* in the county of *Lancaſter*, being ſeiſed in fee of a conſiderable real eſtate, by

his

1807.

PERRIN and Others *againſt* LYON and Others. And LYON *againſt* GEDDES and Others.

his will dated the 22d of *Oct.* 1795, duly executed and atteſted to paſs real eſtates; after directing his debts, &c. to be paid by his executors, and bequeathing to his wife the ſhare in the glaſs-houſe concern which he had in her right, and alſo all his houſehold goods, &c. deviſed as follows: "I give, deviſe, and bequeath unto my exe- "cutors hereinafter named, their heirs, executors, &c. "all and every my real and perſonal eſtates whatſoever "and whereſoever not hereinbefore diſpoſed of, upon "truſt in the firſt place to pay unto my wife one annui- "ty of 100*l.* during her life, &c. in full of all dower, "&c. And upon further truſt to ſtand poſſeſſed of the "reſidue of the rents, iſſues, and profits of my ſaid real "and perſonal eſtates, and put out the ſame to intereſt, "&c., and pay thereout to my niece *Mary Falkner* "200*l.*, to be paid and applied for her uſe by my exe- "cutors in ſuch manner as they ſhall think proper; and "to ſtand poſſeſſed of the reſidue of my effects, and pay "thereout for the maintenance, education, and ſupport "of my daughter *Sarah Perrin* ſuch ſums of money as "ſhall be ſufficient for that purpoſe; conſidering the "fortune ſhe will be by this my will entitled to; *until* "*my ſaid daughter ſhall attain the age of* 21 *years, or marry,* "which ſhall firſt happen. And *when* my ſaid daughter "ſhall attain her ſaid age of 21 years, or marry, *then* I "give, deviſe, and bequeath all and every my ſaid real "and perſonal eſtates, charged with the ſaid annuity to "my ſaid wife as aforeſaid, unto my ſaid daughter, her "heirs, executors, &c.: *but in caſe my ſaid daughter ſhall* "*depart this life under age, and unmarried,* then I give, "deviſe and bequeath all and every my real and perſonal "eſtates, charged as aforeſaid, unto my wife, during the "term of her natural life; and after her deceaſe, unto

"the

1807.

PERRIN and Others *againſt* LYON and Others. And LYON *againſt* GEDDES and Others.

" the two children of my nephew *Joſeph Perrin*, their " heirs, executors, and adminiſtrators, equally as tenants " in common, and not as joint-tenants. Provided al- " ways, and it is my expreſs will and deſire, and I do " hereby ſolemnly order and declare, that *if either my* " *ſaid wife or daughter ſhall intermarry with any perſon* " *born in that part of* Great Britain *called* Scotland, *or* " *born of* Scotch *parents*, then and from thenceforth *my* " *ſaid wife or daughter, ſo marrying*, ſhall *forfeit* all benefit " and advantage under this my will; and my ſaid real and " perſonal eſtates, or ſuch part thereof as ſhall be given " to ſuch of my ſaid wife or daughter as ſhall ſo marry, " ſhall *deſcend to ſuch perſon or perſons as would be entitled* " *under this my will, in the ſame manner as if my ſaid wife* " *or daughter were dead*; any thing herein contained to " the contrary notwithſtanding." The teſtator appointed his wife and *Thomas Lyon* his executors, and guardians of his daughter during her minority; and died in *May* 1796; leaving *Sarah Perrin* his daughter and only child and heir at law, who was then 12 years old, and *Cath. Perrin* his widow, and *Joſiah Perrin* the younger, and *Maria Perrin*, the plaintiffs in the firſt-mentioned cauſe, the only children of his nephew *Joſeph Perrin*; who were living when the teſtator made his will. On the 13th of *July* 1802 *Sarah Perrin* (the daughter) being then under the age of 19 years, intermarried with the defendant *Wm. Geddes* of *Warrington*, merchant, who was born in *Scotland* and of *Scotch* parents. *Catherine Perrin* (the widow) died on the 5th of *February* 1803. *Sarah* (the daughter) died on the 5th of *July* 1803, and before ſhe attained the age of 21 years; leaving the defendant *Archibald Geddes* her only child and heir at law; who upon her death became the heir at law of the teſta-

tor

1807.

PERRIN and Others *againſt* LYON and Others. And LYON *againſt* GEDDES and Others.

tor *Joſiah Perrin*: but in caſe ſhe had never been married, or had not had any iſſue, *Joſeph Perrin* the defendant would be her heir at law, and on her death would have become the heir at law of the teſtator *Joſiah Perrin*. The queſtion was, Who, under the circumſtances, was entitled to the real eſtates of the ſaid *Joſiah Perrin?*

Littledale, for the plaintiffs in the firſt cauſe, contended that the infant children of *Joſeph Perrin* were entitled under the will to the real eſtate; it being given over to them in the event which had happened of the teſtator's daughter having married a *Scotchman*. Firſt, as to the legality of the proviſo in reſtraint of ſuch a marriage: though by the civil and canon laws reſtraints of marriage are in general diſcouraged and held void; yet even thoſe laws admit of exceptions to the general rule (*a*); as if the condition be only temporary, as not to marry before the age of twenty; or if it only exclude marriage with particular perſons, as a widow, or a certain perſon by name; or in a particular place, as in *York*; or if one be made executrix with a certain benefit, ſo long as ſhe remains unmarried. All the principles and caſes applicable to pecuniary legacies in our law, as derived from the civil law, are fully illuſtrated in the caſe of *Harvey* v. *Aſton* (*b*); and theſe and other partial exceptions are ſhewn to have been allowed; eſpecially where there is a deviſe over in the event of the prohibited marriage. But reſtraints of marriage have always been admitted by the law of *England* in deviſes of real eſtate, and à fortiori where there is a deviſe over, as in this caſe. As in *Williams d. Porter* v. *Fry* (*c*), *Booth* v. *Booth* (*d*),

(*a*) *Swinb. part* 4. *ſec.* 12. (*b*) *Com. Rep.* 726. 735. &c.

(*c*) 1 *Mod.* 86. 300. 1 *Chan. Caſ.* 142. or 2 *Chan. Rep.* 26. 2 *Lev.* 21. *T. Ray.* 236. 1 *Ventr.* 199. (*d*) 2 *Chan. Caſ.* 109.

Harvey

1807.

PERRIN and Others *againſt* LYON and Others. And LYON *againſt* GEDDES and Others.

Harvey v. *Aſton* (*a*), *Reymiſh* v. *Martin* (*b*), *Scott* v. *Tyler* (*c*), and *Stackpole* v. *Beaumont* (*d*): all which caſes eſtabliſh the diſtinction, that reſtrictions of marriage upon pecuniary legacies are governed by the rule of the civil and canon law, which in general repels ſuch reſtrictions: but upon deviſes of land, or even charges on land, they follow and are upheld by the law of *England*: It cannot be ſaid, as in ſome former caſes, that the prohibition of marriage with a *Scotchman* was merely in terrorem; for that argument has never been admitted where there is an immediate deviſe over; though where the deviſee over was not to take till a certain age, and the firſt deviſee married before the other arrived at that age, in the caſe of *Doe* v. *Freeman* (*e*), the firſt deviſee was held to take an abſolute eſtate, notwithſtanding her prohibited marriage, until the deviſee over attained to the ſpecified age. There are, however, many authorities in our books, which ſupport a general prohibition of marriage to different perſons upon pain of forfeiting their eſtate. As in 14 *Vin. Abr.* 16. tit. *Gavelkind*, (D), *pl.* 4. and *Co. Lit.* 30. *a.* note 1. If a wife ſeiſed of gavelkind land die without iſſue by her huſband, he ſhall be tenant by the curteſy of half the land *ſo long only as he ſhall continue unmarried.* So a rent may be granted to determine upon marriage. *Co. Lit.* 180. *b.* So fellowſhips of colleges are avoided upon marriage; though ſome of theſe, ſuch as *Emanuel* and *Sydney* colleges, have been founded ſince the Reformation; and this reſtriction depends on the wills of the founders. *Co. Lit.* 234. *b.* commenting on the words *durante* and *dum*, ſays, they are properly words

(*a*) 1 *Atk.* 361. *Caſ. temp. Talb.* 212. *Com. Rep.* 726. *Willes*, 83.
(*b*) 3 *Atk.* 330.
(*c*) 2 *Bro. Ch. Caſ.* 431. and 2 *Dickens's Rep.* 712.
(*d*) 3 *Veſ. jun.* 89.
(*e*) 1 *Term Rep.* 389.

of

1807.

PERRIN and Others *againſt* LYON and Others. And LYON *againſt* GEDGES and Others.

of limitation, as where an eſtate is granted durante viduitate or virginitate; or where a leaſe is made dum ſola fuerit, or dum ſola et caſta vixerit. and ſo is 1 *Roll. Abr.* 418. *Condition* X, *pl.* 6. In *Robinſon* v. *Comyns* (*a*), the deviſe was on condition that the deviſee married the teſtator's grand-daughter; and no doubt was entertained of the validity of it; though Lord *Talbot* thought that the grand-daughter refuſing to marry the deviſee was a diſpenſation of the condition. In *Scott* v. *Tyler* (*b*) Lord *Thurlow* enumerates many reſtrictions which were even allowed by the civil law: the accuracy of which liſt, as far as it goes, was confirmed by Lord *Loughborough* in *Stackpole* v. *Beaumont* (*c*). Lord C. J. *Willes*, in *Harvey* v. *Aſton* (*d*), even ſeems to conſider that the law of *England* admits of a deviſe under a general reſtriction of marriage; and inſtances that a deviſe of an eſtate durante viduitate is certainly good. And in *Fry* v. *Porter* (*e*), and *Booth* v. *Booth* (*f*), a condition in reſtraint of marriage generally, without conſent, with a limitation over, was clearly conſidered to be valid. But it is not neceſſary to contend that a deviſe on condition of a general reſtraint of marriage is good: it is enough that all the caſes agree in ſupport of a reaſonable reſtriction of that kind; and there is nothing unreaſonable in the reſtriction in queſtion. There can be nothing unlawful in reſtraining the object of a teſtator's bounty from marrying with particular perſons by name, or with the inhabitants of ſuch a town, even in his own country; for bonds in reſtraint of trading or carrying on any buſineſs in a particular town or diſtrict have been held good (*g*). A re-

(*a*) *Caſ. temp. Talb.* 164. 2 *Eq. Caſ. Abr.* 215. 393.
(*b*) 2 *Dickens*, 721. (*c*) 3 *Veſ. jun.* 97. (*d*) *Willes*, 94.
(*e*) 1 *Mod.* 300. (*f*) 2 *Chan. Caſ.* 109.
(*g*) *Davis* v. *Maſon*, 5 *Term Rep.* 118. and *Dunn* v. *Guy*, 4 *Eaſt*, 190.

ſtraint

1807.

PERRIN and Others *againſt* LYON and Others. And LYON *againſt* GEDDES and Others.

ſtraint then of marrying any foreigner of a particular country is at leaſt as reaſonable; or againſt marrying one of a different religion: and this will apply as well to *Scotland*, the eſtabliſhed religion of which is different from the church of *England*, and the country governed by a different law, though united under the ſame crown. Secondly, the condition in queſtion is good on another ground; for the deviſe to the daughter was when ſhe ſhould *attain* 21 *or marry*: therefore as ſoon as ſhe had attained 21, the eſtate would have become abſolute in her in fee, and not liable to be deveſted by any marriage ſhe might ſubſequently have contracted: the reſtraint of marriage therefore with a *Scotchman* only operated upon her till 21; and all the authorities agree that ſuch a reſtraint is good. That the eſtate would have veſted in her abſolutely at 21, if ſhe had not married before, appears from *Deſbody* v. *Boyville* (*a*), where a legacy was to be paid to a daughter when ſhe ſhould attain 21 or be married with the conſent of *A.* and *B.*; but in caſe ſhe married without ſuch conſent, the executors were only to pay her the dividends during her life; and after her death to transfer the ſtock to her children, &c.: and it was held that the condition determined at 21: and the ſame point was ruled in *King* v. *Withers* (*b*), and *Pullen* v. *Ready* (*c*). Thirdly, in the event of the prohibited marriage the eſtate is directed to "*deſcend* to ſuch perſon or perſons as would be entitled *under his will* in the ſame manner as if his daughter were *dead*." Now in caſe of the deceaſe of his daughter "*under age and unmarried*," (by which latter muſt neceſſarily be underſtood *unmarried to any perſon not prohibited by him*) the teſtator had before expreſsly de-

(*a*) 2 *Pr. Wms.* 547. (*b*) 1 *Eq. Caſ. Abr.* 112. *Prec. in Chan.* 348.
(*c*) 2 *Atk.* 587.

1807.

PERRIN and Others *againſt* LYON and Others. And LYON *againſt* GEDDES and Others.

viſed the eſtate over to the two children of his nephew *Joſeph Perrin*, as tenants in common, in fee. He evidently conſidered his daughter's marriage with a *Scotchman* as equivalent to her death unmarried: otherwiſe that which was to give effect to the limitation over would be made to defeat it: it would be felo de ſe. In caſe of the natural death of the daughter without iſſue, it would deſcend at common law to *Joſeph* the father of the infants; but the teſtator has expreſſed what deſcent he meant, namely, that pointed out *under his will*, which is to his infant great nephews.

Park, on behalf of *Joſeph Perrin*, (who would have been the teſtator's heir, if his daughter had died without iſſue,) argued that he would take if the limitation over were good; which he alſo contended that it was; and referred to *Pulling* v. *Reddy* (*a*), where the rule is laid down that if a legacy be deviſed on condition of marriage with conſent, and there be no deviſe over in caſe the party marry without conſent; this is only conſidered in terrorem: but if there be a deviſe over, it ſhall go to ſuch deviſee. But if the portion ariſe out of land, where there is no deviſe over, it ſhall go to the heir. Now the words of this will are that in caſe the daughter ſhall ſo marry, (*i. e.* a *Scotchman*,) the real and perſonal eſtate "ſhall *deſcend* to ſuch perſon or perſons as would be entitled under this my will, in the ſame manner as if my daughter were dead." But it was only given over before to the infant children of *Joſeph Perrin* in caſe the daughter ſhould die *under age and unmarried*;" both thoſe events muſt concur; and in order to ſatisfy thoſe words Mr. *Littledale* is obliged to add (unmarried) "within the meaning of my will," *i. e.* "to any other than a

(*a*) 1 *Wilſ.* 21.

1807.

PERRIN and Others *againſt* LYON and Others. And LYON *againſt* GEDDES and Others.

Scotchman:" whereas conſtruing the words uſed in their plain and grammatical ſenſe, without addition or ſubtraction, the perſon to whom the eſtate would *deſcend* if the daughter had died *under age and unmarried* would be *Joſeph Perrin*, who would then have ſtood in the place of heir at law to the teſtator and to his daughter. And by this conſtruction an effect is given to every word; for the eſtate would deſcend to *Joſeph Perrin under the will*, and, in no other way, ſince the prior claims of the teſtator's daughter and her children are by that alone put out of the way of his claim *by deſcent*.

Holroyd, for the defendants, contended that *William Geddes*, the father, was entitled as tenant by the curteſy for his life, with remainder in fee to his ſon *Archibald*: or, if not, that the whole fee veſted preſently in the ſon. Firſt, the teſtator's daughter took a veſted eſtate in fee, and it did not remain contingent until her marriage or age of 21: nor was there any condition precedent, to prevent the fee veſting in her until the condition was ſatisfied. It is a deviſe to truſtees of real and perſonal eſtate, in the firſt place, to pay an annuity to his wife; next, to pay for the maintenance and education of his daughter until her age of 21 or marriage; and *when* ſhe attained 21 or married, then to her in fee: but if ſhe died under age *and unmarried*, then he gave it over. A deviſe to one *if* or *when* he attains ſuch an age veſts immediately, though the eſtate be deviſed over if he die before. But here there is alſo a deviſe of maintenance to the daughter out of the eſtate until her age of 21 or marriage; the truſtees therefore merely took the management of the eſtate in the mean time as guardians. *Stoker* v. *Edwards* (*a*), *Edwards* v. *Hammond* (*b*), *Man.*

(*a*) 2 *Show.* 391. (*b*) 3 *Lev.* 132.

field

1807.

PERRIN and Others *againſt* LYON and Others. And LYON *againſt* GEDDES and Others.

field v. *Dugard* (*a*), *Goodtitle* v. *Whitby* (*b*), *Denn* v. *Satterthwaite* (*c*), *Doe* v. *Underdown* (*d*), and *Bromfield* v. *Crowder* (*e*), all ſhew that the fee veſted in the daughter in the firſt inſtance, liable only to be deveſted if ſhe died before 21 and unmarried, or on the happening of any other *legal* condition which the teſtator might afterwards impoſe: which is very different from the caſe where the eſtate is only given to the deviſee upon the happening of a particular event; as if the daughter married *A. B.*: there the marriage, or other event, on which the eſtate is ſo given, is a condition precedent, which, however illegal in itſelf, muſt take place before the eſtate can veſt in the party. This diſtinction will explain what was ſaid by Lord *Thurlow* in *Scott* v. *Tyler* (*f*), as to the difficulty of reconciling all the caſes. As where an eſtate is given to a widow durante viduitate; if ſhe marry again, the Court cannot give her the eſtate any longer, becauſe the condition of her widowhood is the only tenure by which ſhe holds the eſtate. The ſame diſtinction will apply to the caſes, cited, of gavelkind, and of fellows of colleges. Admitting, therefore, the diſtinction which has been taken between the civil and canon law, and the law of *England*; that the former avoids in general all reſtraints of marriage; and that the law of *England* has adopted that rule only with reſpect to pecuniary legacies, but not as to real property; (though it is obſervable here that the deviſe of the perſonal is joined with that of the real eſtate,) ſtill if the eſtate once veſted, as the authorities

(*a*) 1 *Eq. Caſ. Abr.* 195.
(*b*) 1 *Burr.* 228.
(*c*) 1 *Blac. Rep.* 519.
(*d*) *Willes*, 293.
(*e*) 1 *New Rep.* 313.
(*f*) 2 *Bro. Ch. Caſ.* 488.

1807.

PERRIN and Others *againſt* LYON and Others. And LYON *againſt* GEDDES and Others.

ſhew, in the daughter, the Court will not ſuffer it to be deveſted upon an illegal condition: and Lord C. J. *Wilmot*, in *Low* v. *Peers* (*a*), takes the ſame diſtinction, while he condemns generally all reſtraints of marriage as contrary to the policy of the law: and he ſhews that the caſe in the Year-book 43 *Ed.* 3. 6. *a.* from whence the dictum in 1 *Rol. Abr.* 418. is taken, is againſt the legality of the reſtraint; and refers to the opinion of Lord *Hale* in *Fry* v. *Porter* (*b*) for the reaſon given by him for ſupporting conditional limitations, (founded on prohibitions of marriage without conſent,) "becauſe the party is not thereby bound from marriage." The queſtion then is whether the reſtraint in queſtion, which applies both to the wife and daughter, be void, as being too general? This is not at all affected by that claſs of caſes legalizing covenants in reſtraint of trade in particular diſtricts; for they are founded upon adequate conſideration commenſurate with the reſtraint; namely, the proportionate benefit of the covenantee in the ſame trade or calling: and it is indifferent to the public whether *A.* or *B.* exerciſe their buſineſs in any particular place. But this is a reſtraint extending to a whole nation, and that too forming an integral part of the kingdom. If the reſtraint went to every perſon in *England*, it would clearly be void upon general principles of policy, as laid down by Lord C. J. *Wilmot* in *Low* v. *Peers*. Then why ſhould not the ſame principles extend to *Scotland?* The fact of the teſtator's having reſided in *England* cannot affect the queſtion of policy. Suppoſe that the daughter had married a perſon whom ſhe had reaſonable ground to believe

(*a*) *Wilmot*, 369, 370, 4. (*b*) 1 *Mod.* 308.

was

1807.

PERRIN and Others *againſt* LYON and Others. And LYON *againſt* GEDDES and Others.

was born of *Engliſh* parents in *England*; yet if in fact he were a *Scotchman*, though unknown to her, the forfeiture would ſtill be incurred however innocently: which ſhews the unreaſonableneſs of ſo general a reſtraint. The reſtraints which have been ſupported in particular caſes, ſuch as having the conſent of parents or guardians, &c. were conſidered more as regulations to prevent improvident marriages: but this goes to reſtrain marriage whether provident or improvident; which is unreaſonable, and on that account injurious to the intereſt of the public, which is concerned to promote provident marriages, or at leaſt not to prohibit them. The caſe of reſtraining marriage with a perſon of a different religion is diſtinguiſhable, not as a reſtraint, but as a regulation of marriage: the difficulty of determining in what faith the children are to be brought up, and the domeſtic diſputes conſequent thereupon, may claſs this under the latter head. There may alſo be a diſtinction on the ground of public policy between prohibitions of marriage with a foreign nation, and with a nation forming part of the kingdom. On theſe grounds this condition would be void; and *William Geddes* would be entitled as tenant by the curteſy. But if not, ſecondly, the eſtate is not given over to *Joſeph Perrin* as heir at law, (ſuppoſing the teſtator's daughter had in fact died unmarried) nor to his children; for it is only given over in the event of the daughter's marrying a *Scotchman*, &c. and then it is to "*deſcend* to ſuch per-"ſon or perſons as would be entitled under my will in "the ſame manner as if my wife or daughter were *dead*; "any thing herein contained to the contrary notwith-"ſtanding." The daughter therefore having left a child, it muſt deſcend to that child. This being the caſe of a for-

1807.

PERRIN and Others *againſt* LYON and Others. And LYON *againſt* GEDDES and Others.

forfeiture, the condition muſt be taken ſtrictly. In a MS. common place book of Judge *Dodderidge* (*a*) it is ſaid, "conditions that go in deſeazance ſhall be taken ſtrictly, for they are odious." It is alſo to be taken ſtrictly as being in reſtraint of marriage, according to the opinion of Lord *Mansfield* in *Long* v. *Dennis* (*b*). The conſtruction contended for will alſo diſinherit the heir at law, which can only be by expreſs words or neceſſary implication. The eſtate is directed *to deſcend* as if the daughter were dead: this can only be to her ſon, who is her heir; and it cannot *deſcend* to any perſon except as heir of the perſon laſt ſeiſed; and no heir can take by deſcent in the life of his anceſtor. [Lord *Ellenborough* C. J. The word *deſcend* cannot be taken here in its ſtrict ſenſe, becauſe it is applied to perſonalty as well as realty. The teſtator only meant that the eſtate ſhould go over to the hæres factus in the event which he provided for.] Then being limited over as if the *wife* or *daughter* were dead; as applied to the daughter, it would go to her ſon. But the words "entitled *under this my will*" are relied on as referring to the limitation antecedently expreſſed: but that was only to take place in caſe his daughter ſhould die *under age and unmarried.* Now the condition of dying *under age* could not apply to the wife, who was above age when the will was made; as to her therefore it could only operate as a condition *in terrorem:* then why ſhould not the other condition of dying *unmarried* operate in terrorem alſo as to the daughter. Taken in the ſtrict ſenſe of the words, the event has not happened on which

(*a*) Cited in *Scott* v. *Tyler*, 2 *Bro. Chan. Caſ.* 456
(*b*) 4 *Burr.* 2055.

the

1807.

PERRIN and Others *againſt* LYON and Others. And LYON *againſt* GEDDES and Others.

the eſtate was to go over; for the daughter did not die "under age *and unmarried.*"

Littledale in reply contended that the eſtate never veſted in the daughter, but was in the truſtees, who were to pay the widow's annuity out of it; to raiſe 200*l.* for the niece; and to provide for the education and maintenance of the daughter till ſhe attained 21 or married; and the ſums neceſſary for the latter purpoſes were to be eſtimated by the truſtees conſidering the fortune ſhe *would be* entitled to: therefore till 21 or marriage the teſtator did not conſider his daughter as entitled to any thing. But if the eſtate did veſt in her in the firſt inſtance, it was liable to deveſt if ſhe died *under age and unmarried;* and then as the prohibited marriage with a *Scotchman* operated by the neceſſary conſtruction of the will as a death, by the expreſs direction of the teſtator; it follows that the eſtate was deveſted out of her, as upon her dying under age and unmarried, in which event the limitation over to the children of *Joſeph Perrin* was to take effect. And then the only queſtion is upon the legality of the condition; which is not like caſes of contracts between parties ſtipulating againſt the marriage of one of them, ſuch as *Low* v. *Peers*; but turns on the power which every man has to annex what condition he pleaſes to his bounty. And this is as much a regulation of marriage as any of the caſes, admitted to be law, where deviſes on condition of marrying with conſent have been held binding.

Lord ELLENBOROUGH C. J. ſaid, that the Court would certify their opinion; but he ſaw no ground for holding this condition to be void, as being in general reſtraint of

1807.

PERRIN and Others *againſt* LYON and Others. And LYON *againſt* GEDDES and Others.

marriage. And afterwards the following certificate was ſent:

"Having heard this caſe argued by counſel, and conſidered it, we are of opinion, that under the circumſtances of the above caſe *Joſiah Perrin* and *Maria Perrin*, the two children of the teſtator's nephew *Joſeph Perrin*, are entitled to the real eſtates of the ſaid teſtator *Joſiah Perrin*.

23d *January* 1808.

ELLENBOROUGH.
N. GROSE.
S. LAWRENCE.
S. LE BLANC."

END OF MICHAELMAS TERM.

CASES

ARGUED AND DETERMINED

1808.

IN THE

Court of KING's BENCH,

IN

Hilary Term,

In the Forty-eighth Year of the Reign of GEORGE III.

KINGSMILL, Bart. and Another *againſt* BULL and Another.

Monday, Jan. 25th.

IN treſpaſs for taking the plaintiffs' horſes, the defendants pleaded ſeveral juſtifications of the taking, as ſervants to the Earl of *Caernarvon*, lord of the manor of *Ecchinſwell* in the county of *Southampton*, for heriots due on the death of Sir *Robert Kingsmill*, Bart. the plaintiffs' teſtator, in reſpect of certain cuſtomary tenements of the manor, of which he died ſeized. And as to the ſeizing

Where a plea of juſtification in treſpaſs for taking two horſes as heriots, ſtated a cuſtom in the manor that the lord *from time immemorial, until the diviſion* of a certain tenement into moieties,

had taken and been accuſtomed to take a heriot upon the death of every tenant dying ſeized; and *ſince the diviſion* the lord had taken and been *accuſtomed* to take on the death of every tenant dying ſeized of either of the moieties a heriot for each moiety: this muſt be taken to be one entire cuſtom, and not two diſtinct cuſtoms, the one applicable to the tenement *before*, and the other *after* the diviſion of it: and being laid to be an *immemorial* cuſtom, it is diſproved by evidence that the diviſion was made within memory.

1808.

KINGSMILL, Bart. *againſt* BULL.

of two of the horſes, they alleged by their 21ſt plea, that at the death of Sir *R. K.* the laſt tenant, the Earl of *Caernarvon* was and ſtill is lord of the manor of *E.*; that one meſſuage, &c. *from time immemorial until the diviſion thereof into moieties*, was parcel of the manor, and a cuſtomary tenement thereof demiſed and demiſable by copy, &c. according to the cuſtom of the ſaid manor; and that continually from the diviſion thereof into moieties each of the ſaid moieties hath been and ſtill is parcel of the ſaid manor, and demiſed and demiſeable by copy, &c. The plea then ſtated the following cuſtom, upon the manner of ſtating which the queſtion aroſe. "That within the ſaid manor there now is, and from time whereof, &c. hath been an ancient cuſtom there uſed and approved, viz. that the lord of the ſaid manor for the time being, *from time whereof the memory of man is not to the contrary until the ſaid diviſion of the laſtmentioned cuſtomary tenement into moieties*, hath ſeized and taken, and been uſed and accuſtomed to ſeize and take, and during all that time of right ought to have ſeized and taken, upon the death of every tenant dying ſeized, &c., for and in reſpect of ſuch tenement; *and ſince the ſaid diviſion* the lord of the ſaid manor for the time being hath ſeized and taken, and been *accuſtomed* to ſeize and take, and ſtill ought to ſeize and take, after the death of every tenant dying ſeized of the ſaid moieties, or either of them, *in reſpect of each ſuch moiety* whereof he hath ſo died ſeized, one of the beaſts which were of ſuch tenant at the time of his death, ſo and in the name of a heriot cuſtom," &c. The plea then ſtated the admiſſion of the laſt tenant, his death, and the ſeizure of the two horſes as heriots. Replication—de injuriâ ſuâ propriâ, and traverſing the cuſtom in the words of the plea. At the trial before *Thomſon* B. at the laſt aſſizes

1808

KINGSMILL, Bart. *againſt* BULL.

aſſizes at *Wincheſter* it appeared in evidence upon the 21ſt plea, that the *diviſion* of the tenement therein mentioned was made *ſince the time of legal memory;* and the queſtion made at the trial upon the conſtruction of that plea was, whether it confined the diviſion of the tenement to time beyond legal memory, or not? And a verdict was taken by the Judge's direction for the defendants on this, as well as upon certain other pleas; and for the plaintiffs upon the reſt; with liberty for the plaintiffs to move to enter a verdict for them on the iſſue in queſtion, and to add 41*l.* 10*s.* (the agreed value of the two horſes) to the damages found for them on the other pleas, if the Court ſhould be of opinion with them upon the conſtruction of the 21ſt plea. The motion was accordingly made, and a rule niſi granted in the laſt term for this purpoſe; againſt which

Lens Serjt. and *Gaſelee* now ſhewed cauſe, and contended that the evidence ſupported the ſubſtance of the plea; which did not neceſſarily import that the diviſion of the tenement was before the time of legal memory; but it might be read either way. And they pointed the attention of the Court to the different manner in which the cuſtom was laid as uſed and approved *before* the diviſion of the tenement, and *ſince:* the allegation of its exiſtence *from time whereof*, &c. only applied to it *before* the diviſion; for the words *from time whereof*, &c. were not repeated in the allegation of its exiſtence *ſince the ſaid diviſion*, &c.; but it was only alleged that *ſince the diviſion* the lord had (in fact) ſeized and been accuſtomed to ſeize, &c.

But *the Court* (ſtopping *Burrough* and *Dampier* in ſupport of the rule) ſaid, that the whole was ſtated as one

1808.

KINGSMILL, Bart. *againſt* BULL.

immemorial cuſtom; which was diſproved by ſhewing the diviſion to have taken place within time of memory: and therefore made the rule abſolute.

Monday, Jan. 25th.

PITT *againſt* GREEN.

A variance in ſetting out one of ſeveral covenants in a leaſe, on which breaches were aſſigned, viz. the *Cellar-beer* field, inſtead of the *Aller-beer* field; being conſidered as part of the deſcription of the deed declared on; though the plaintiff waved going for damages on the breach of that covenant; is fatal.

IN covenant, the declaration ſet forth, that by indenture the defendant demiſed to the plaintiff a meſſuage at *Star Croſs*, with the garden and four ſeveral fields belonging to the dwelling houſe, to hold for 21 years, at the rent of 150*l.*; and that the defendant thereby covenanted with the plaintiff, that he would repair all the premiſes; and under-ground-gutter the *Cellar-Beer* field; and ſet up a proper hedge to fence out the plot of ground on *Warborough*: and the declaration aſſigned breaches on all thoſe covenants. The defendant pleaded non eſt factum, and ſix other pleas negativing the breaches of covenant; upon which iſſues were joined. At the trial before *Thomſon*, B. at *Exeter*, on proving the leaſe, an objection was taken by the defendant's counſel, that there was a fatal variance between that and the leaſe declared on; the covenant in the leaſe produced being to under-ground-gutter the *Aller-Beer* field, inſtead of the *Cellar Beer* field, as ſtated in the declaration: and the point being reſerved, the cauſe went on; and a verdict was found for the plaintiff on ſome of the iſſues on other breaches of covenant than that relating to the *Aller-Beer* field; with leave to the defendant to move to enter a nonſuit if the Court thought the objection well founded.

Pell now ſhewed cauſe againſt a rule obtained in laſt *Michaelmas* term for entering a nonſuit. He ſaid it was a

1808.

PITT *againſt* GREEN.

mere clerical miſtake; which in *Rolleſton* v. *Smith* (*a*) was held not to vitiate a certificate of regiſtry. And if, as was ſaid, in *Dundas* v. Lord *Weymouth* (*b*), it be only neceſſary to ſet out the ſubſtance of the covenant on which a breach is aſſigned, a variance in an immaterial part ſet forth, (and here the plaintiff waved proceeding on the breach of that part of the covenant) cannot be fatal. [*Le Blanc* J. The danger there ſtated was in ſetting out unneceſſary parts of the indenture, becauſe the plaintiff was liable to fail in his action if there were a variance in ſetting out even an immaterial part.] He then referred to *King* v. *Pippet* (*c*), and *Cuming* v. *Sibley* there cited (*d*), and *Warre* v. *Harbin* (*e*), where variances in ſetting out precepts were held immaterial: and to *Williams* v. *Ogle* (*f*), where the wrong ſpelling of a name, *Segrave* for *Seagrave*, in ſetting out a record, was ſaid to be idem ſonans, and no material variance. And ſuch, he contended, was *Cellar-Beer*, for *Aller-Beer*. And that this was not like the variance in *Wilſon* v. *Gilbert* (*g*), between the pariſh *St. Ethelburg* and *St. Ethelburga*; which the Court of *C. B.* thought might deſignate two different ſaints of different ſexes.

Lens Serjt. and *Dampier* contrà, were ſtopped by the Court.

Lord ELLENBOROUGH C. J. The counſel cannot argue with a greater deſire to get rid of the objection than the Court had in the firſt inſtance; and therefore, we wiſhed to compare the record with the deed, in order to ſee whether the word as written in the one would admit

(*a*) 4 *Term Rep.* 161. (*b*) *Cowp.* 665. (*c*) 1 *Term Rep* 235.
(*d*) *Ib.* 239. (*e*) 2 *H. Blac.* 113 (*f*) 2 *Stra.* 889.
(*g*) 2 *Boſ. & Pull.* 281.

1808.

PITT *againſt* GREEN.

of being read as it appears in the other: but in the one it is ſo diſtinctly written *Cellar-Beer*, that we cannot read it *Aller-Beer*, as it diſtinctly appears written in the other: neither can we ſay they are the ſame word in ſound. And being a ſenſible word as it ſtands in the record, we cannot reject it as ſurpluſage. Then taking it as part deſcription of the deed declared on, the variance is fatal.

Per Curiam, Rule abſolute.

Tueſday, Jan. 26th.

CARDWELL *againſt* MARTIN.

A. and *B.* having exchanged their acceptances of bills drawn by each on the other at ſo many days date; held that the delivery of the reſpective bills for acceptance, and the re-delivery of the ſame by the acceptors to the reſpective drawers, was a negotiation of the bills; and that ſuch bills could not, after they had been ſo exchanged for valuable conſideration (as the exchange of acceptances is) for 20 days, be poſt-dated without a new ſtamp, as upon new bills; although during all that time each had remained in the hands of the original drawer.

THE plaintiff declared as indorſee of a bill of exchange againſt the acceptor; and it appeared that the bill in queſtion which was drawn by *Giles* and Co. on the 3d of *June* 1807, payable to their own order, and accepted by the defendant at three months' date, was exchanged by him with *Giles* and Co. for their acceptance of a bill drawn by the defendant for the ſame ſum at 85 days, payable to his order; the object being that *Giles* and Co. ſhould put the defendant in caſh before his acceptance became due. On the 23d of *June*, before *Giles* and Co. or the defendant had paſſed the reſpective ſecurities to any other perſon, it was agreed to procraſtinate the payment of the bills by poſt-dating them the 23d of *June*, inſtead of the 3d. And the queſtion at the trial was, whether ſuch an alteration could be made under theſe circumſtances without a new ſtamp? Lord *Ellenborough* was of opinion, at the trial at the laſt ſittings at *Guildhall*, that it could not; and nonſuited the plaintiff: but it was agreed that the jury ſhould aſſeſs the damages; and if the Court thought that a new ſtamp was not neceſſary,

ceſſary, the plaintiff had leave to move to enter a verdict for ſo much. Which

1808.

CARDWELL *againſt* MARTIN.

The *Attorney General* now moved for accordingly; contending that it was competent to the original parties, by whom the ſecurities were framed, to make any alteration in them before they were negotiated; each of the bills having remained, till after the alteration on the 23d of *June*, in the hands of its reſpective drawer. If this be not ſo, it ſeems difficult to ſupport the determination of this Court in *Lowe* v. *Waller* (*a*); where a bill of exchange in the hands of an innocent indorſee was avoided on account of an uſurious conſideration as between the indorſers and the acceptor, in whoſe hands it was placed by the drawer and payee for the purpoſe of raiſing money; though there were no uſurious conſideration ſtated as between the original drawer and payee and the acceptor. The Court therefore muſt have conſidered that while the bill remained in the hands of the firſt taker, and before it was negotiated, it was liable to the taint of uſury attached by the ſtat. 12 *Ann. ſt.* 2. *c.* 16. upon any *contract made* upon an uſurious conſideration. Though the general rule is, that if the bill be valid in its inception, an indorſee for a valuable conſideration, without notice, is not affected by any uſurious conſideration for paſſing the bill through the hands of intermediate holders (*b*).

The Court however were all of opinion in this caſe, that the objection was well founded. The delivery of the bill by the drawer to the acceptor, and the re-delivery of it to the drawer for a valuable conſideration, ſuch as the exchange of acceptances has been held to be ſince *Cowley* v.

(*a*) *Dougl.* 736. (*b*) Vide *Parr* v. *Eliaſon*, 1 *Eaſt.* 92.

1808.

CARDWELL *againſt* MARTIN.

Dunlop (*a*), was a negotiation of the bill. The ſeveral drawers were mutual purchaſers of each other's acceptances. And while the bill in queſtion was in this courſe of negotiation, and after it had continued ſo 20 days, during which time it was in the power of the drawer and payee to have paſſed it to any third perſon, the alteration was made. This was in effect drawing a new bill.

Rule refuſed.

(*a*) 7 *Term Rep.* 565.

Tueſday, Jan. 25th.

BUCHANAN *againſt* RUCKER.

The law will not raiſe an aſſumpſit upon a judgment obtained by default in one of the colonies againſt a party, who upon the face of the proceedings appeared only to have been *ſummoned* "by nailing up a copy of the declaration at the Court-houſe door;" it not appearing that he had ever been preſent in the colony, or ſubject to the juriſdiction of the Colonial Court at the time of the ſuit commenced or afterwards: although by a law of the colony if a defendant be *abſent from the iſland*, and have no attorney, manager, or overſeer there, ſuch mode of ſummoning him ſhall be deemed good ſervice: for the *abſence* thereby intended is of one who had been *preſent* and ſubject to the juriſdiction; though even if it had been meant to reach ſtrangers to the juriſdiction, it would not have bound them.

THE plaintiff declared in aſſumpſit for 2000*l.* on a foreign judgment of the Iſland Court in *Tobago*; and at the trial (*b*) before Lord *Ellenborough* C. J. at *Guildhall*, produced a copy of the proceedings and judgment, certified under the hand writing of the Chief Juſtice and the Seal of the iſland, which were proved; which, after containing an entry of the declaration, ſet out a ſummons to the defendant, therein deſcribed as "*formerly* of the city of "*Dunkirk*, and now of the city of *London*, merchant," to appear at the enſuing Court to anſwer the plaintiff's action; which ſummons was returned "ſerved, &c. *by* "*nailing up a copy of the declaration at the Court-houſe door*," &c. on which judgment was afterwards given *by default*. Whereupon it was objected, that the judgment was obtained againſt the defendant, who never appeared to have been within the limits of the iſland, nor to have had any

(*b*) Vide 1 *Campbell's Ni. Pri. Caſ.* 63.

attorney

1808.

BUCHANAN *againſt* RUCKER.

attorney there; nor to have been in any other way ſubject to the juriſdiction of the Court at the time; and was therefore a nullity. And of this opinion was Lord *Ellenborough*; though it was alleged, (of which however there was no other than parol proof), that this mode of ſummoning abſentees was warranted by a law of the iſland, and was commonly practiſed there: and the plaintiff was thereupon nonſuited. And now

Taddy moved to ſet aſide the nonſuit, and for a new trial, on an affidavit verifying the iſland law upon this ſubject; which ſtated "That every defendant againſt whom any action ſhall be entered, ſhall be ſerved with a ſummons and an office copy of the declaration, with a copy of the account annexed, if any, at the ſame time, by the Provoſt Marſhal, &c. ſix days before the ſitting of the next Court, &c.; and the Provoſt Marſhal is required to ſerve the ſame on each defendant in perſon. But if ſuch defendant cannot be found, and is not *abſent from the iſland*; then it ſhall be deemed good ſervice by leaving the ſummons, &c. at his moſt uſual place of abode. And if the defendant be *abſent from the iſland*, and hath a power of attorney recorded in the ſecretary's or regiſtrar's office of *Tobago*, and the attorney be reſident in the iſland, or any manager or overſeer on his plantation in the iſland, the ſervice ſhall be either upon ſuch attorney perſonally, or by leaving it at his laſt place of abode, or upon ſuch overſeer or manager perſonally, or by leaving it *at the houſe upon the defendant's plantation where the overſeer or manager uſually reſides*. But if *no ſuch attorney, overſeer, or manager; then the nailing up a copy of the declaration and ſummons at the entrance of the Court-houſe* ſhall be held good ſervice,

Lord

1808.

BUCHANAN *againſt* RUCKER.

Lord ELLENBOROUGH C. J. There is no foundation for this motion even upon the terms of the law diſcloſed in the affidavit. By perſons *abſent from the iſland* muſt neceſſarily be underſtood perſons who have been preſent and within the juriſdiction, ſo as to have been ſubject to the proceſs of the Court; but it can never be applied to a perſon who for aught appears never was preſent within or ſubject to the juriſdiction. Suppoſing however that the act had ſaid in terms, that though a perſon ſued in the iſland had never been preſent within the juriſdiction, yet that it ſhould bind him upon proof of nailing up the ſummons at the court door; how could that be obligatory upon the ſubjects of other countries? Can the iſland of *Tobago* paſs a law to bind the rights of the whole world? Would the world ſubmit to ſuch an aſſumed juriſdiction? The law itſelf however, fairly conſtrued, does not warrant ſuch an inference: for "*abſent from the iſland*" muſt be taken only to apply to perſons who had been preſent there, and were ſubject to the juriſdiction of the Court out of which the proceſs iſſued: and as nothing of that ſort was in proof here to ſhew that the defendant was ſubject to the juriſdiction at the time of commencing the ſuit, there is no foundation for raiſing an aſſumpſit in law upon the judgment ſo obtained.

Per Curiam, Rule refuſed.

1808.

RAINE *againſt* BELL.

Tuelday, Jan. 26th.

THIS was an action on a policy of inſurance "on the ſhip *Rio Nova*, and freight, from her loading port or ports on the coaſt of *Spain* to *London*, with liberty to touch and ſtay at any port or place whatever, without being deemed a deviation." The plaintiff declared on a loſs by the perils of the ſea. It appeared in evidence at the trial at *Guildhall*, that by the long continuance of the voyage from port to port in *Spain*, and the difficulty of obtaining proviſions on the coaſt at that time, the ſhip's proviſions had run very ſhort, and ſhe was obliged to put into *Gibraltar* to lay in a ſufficient ſtock before her departure for *London*. But it alſo appeared, that while the ſhip lay at *Gibraltar* for that purpoſe the Captain received on board ſome cheſts of dollars on freight: and ſome queſtion was at firſt attempted to be made whether the true object of going there was not to take on board theſe dollars; but the weight of the evidence was againſt this ſuppoſition: and finally Lord *Ellenborough* C. J. left it to the jury to ſay, whether the going into *Gibraltar* were of neceſſity in order to obtain a proper ſtock of proviſions; and if ſo, whether the ſtay there were longer than was neceſſary for that purpoſe; telling them that in either caſe the policy would be avoided. The jury however affirmed the neceſſity of the ſhip's touching and ſtay at *Gibraltar* in order to lay in her proviſions: and the loſs of the ſhip being proved to have happened by the perils of the ſea off the coaſt of *Cornwall* in her homeward-bound voyage, they found a verdict for the plaintiff for the amount of the defendant's inſurance. But a queſtion of law

It is not an implied condition in a common marine policy on ſhip and freight that the ſhip ſhall not trade in the courſe of her voyage, if that may be done without deviation or delay or otherwiſe increaſing the riſk of the inſurers: and therefore where a ſhip was compelled in the courſe of her voyage to enter a port for the purpoſe of obtaining a neceſſary ſtock of proviſions, which ſhe could not obtain before in the uſual courſe by reaſon of a ſcarcity at her lading ports, and during her juſtifiable ſtay in the port ſo entered for that purpoſe ſhe took on board bullion there on freight, which the jury found did not occaſion any delay in the voyage; it was held not to avoid the policy.

1808.

RAINE against BELL.

law was raiſed, whether the taking in the additional cargo of dollars at *Gibraltar*, which was ſaid to be a *breaking bulk* in the courſe of the voyage at a place where there was no liberty to trade, did not avoid the policy; as increaſing or having a tendency to increaſe the riſk of the underwriters beyond the terms of the policy: and this it was contended by the defendant to do, on the authority of Lord *Kenyon* in *Stitt* v. *Wardell* (*a*), and of Lord *Ellenborough* in *Sheriff* v. *Potts* (*b*). And in order to diſcuſs this point, a rule niſi was obtained in the laſt term for ſetting aſide the verdict, and for a new trial; againſt which

The Attorney-General, *Park*, and *Dampier*, now ſhewed cauſe, and denied the application of the caſes cited to the preſent, as well as the reaſoning on which they were ſaid to be founded. The queſtion of deviation by going into *Gibraltar* is wholly removed by the finding of the jury, juſtifying the neceſſity of it. The only principle on which the *breaking of bulk*, properly ſo called, in the courſe of the voyage inſured, that is, the unſhipping of any part of the original cargo for the purpoſe of trading, can be deemed to avoid the policy, is on account of the delay thereby occaſioned, which increaſes the riſk of the underwriters, unleſs a liberty to ſtay and trade at the particular place be ſtipulated for. But that cannot apply to a caſe where the whole ſtay of the ſhip was covered by a juſtifiable neceſſity: and where not even the diſpoſition of any part of the original cargo could be altered by taking in a few cheſts into the cabin. In the caſe of *Stitt* v. *Wardell* there was

(*a*) Tried at the Sittings after *Michaelmas* term 38 *Geo.* 3. at *Guildhall*, 2 *Eſp. Ni. Pri. Caſ.* 609. and *Park on Inſur.*

(*b*) Sittings after *Michaelmas* term 44 *Geo.* 3. 5 *Eſp. Ni. Pri. Caſ.* 96.

an

1808.

RAINE *againſt* BELL.

an actual breaking of bulk in the courſe of the voyage: for the ſhip having been driven by ſtreſs of weather into *Dublin* harbour, ſhe continued there no leſs than three weeks, and during that time unloaded part of her cargo of coals and ſold them. It does not appear by the report of the caſe, that the neceſſity which firſt brought the veſſel into *Dublin* continued during the whole three weeks; nor is it probable that it ſhould, as it does not appear that ſhe was under repair during the time: and Lord *Kenyon*'s opinion turned upon the liberty *to touch* at any port not extending to a liberty of *trading* there. Beſides, that was a caſe of the firſt impreſſion; and can only be ſupported on the principle of the act done operating to increaſe the underwriter's riſk; for there is nothing in the terms of the policy itſelf which prohibits even the unloading a part of the cargo, or the taking in other goods: ſuch acts are only prohibited by implication, as they may occaſion delay in the proſecution of the voyage inſured: and if no delay be in fact occaſioned, it ſeems difficult to ſay how the mere act of unloading part of a ſhip's cargo can increaſe the riſk of the underwriters on the ſhip. [In anſwer to a queſtion from the Court, they diſclaimed any right to cover the freight of the dollars ſo taken in at *Gibraltar*: only contending that the taking them in did not avoid the policy on the ſhip or the freight of the original cargo inſured.] The caſe of *Sheriff* v. *Potts* was ruled on the authority of the former caſe; with this additional circumſtance, which was relied on by Lord *Ellenborough*, that there was a ſpecial liberty reſerved "to touch and *diſcharge* goods at *Liſbon*" in the courſe of the voyage from *Guernſey* to *Gibraltar*; which was conſidered to be a virtual excluſion of the liberty of *taking in* a new cargo at *Liſbon*. They alſo reaſoned by analogy from the

caſe

1808.

RAINE *againſt* BELL.

caſe of hypothecation. Where a ſhip is driven into a foreign port by diſtreſs, and is obliged to repair, not only is it warrantable to unſhip the whole cargo for the purpoſe of the repair; but as the captain may hypothecate the cargo (*a*) as well as the ſhip for the expence of the repair, ſo he may unload and ſell a part of the cargo for that expreſs purpoſe.

Garrow and *Marryat* contrà. It is no anſwer to the objection that the policy does not expreſsly prohibit any alteration of the cargo in the courſe of the voyage by unloading part or taking in other goods, or as it is commonly and technically called the *breaking bulk*; which includes goods ſtowed in the cabin as well as under the hatches. There are many implied ſtipulations in favour of the underwriters, ſuch as that a ſhip ſhall be properly documented; that ſhe ſhall be ſea-worthy; and have a ſufficient complement of men and ſtock of proviſions, &c. One of theſe is, that ſhe ſhall not *trade* in the courſe of the voyage: and there is no diſtinction in this reſpect between a greater and leſs degree of trading; between unloading or taking in a ſingle bale or package, or a hundred: any partial alteration of the cargo in the courſe of the voyage may affect the whole: it may or it may not in a particular inſtance occaſion delay in the proſecution of the voyage: that will depend upon a variety of minute circumſtances and conſiderations, which it is uſually impoſſible for an underwriter to trace: but any degree of trading has a neceſſary tendency to create delay; it holds out a continual temptation to deviate from and delay the voyage: and it is on account of this neceſſary tendency, and the difficulty of diſcriminating how much delay is to

(*a*) Caſe of the *Gratitudine*, 3 *Rob. Adm. Rep.* 240.

be

1808.

RAINE against BELL.

be attributed to neceſſity and how much to the trading, that the policy of the law raiſes an implied engagement in the aſſured, that the ſhip ſhall not trade at all in the courſe of the voyage, unleſs permiſſion to do ſo be expreſsly reſerved: and the very reſervation of ſuch expreſs permiſſion in certain caſes ſhews the underſtanding of the mercantile world that it is prohibited in all others. The caſes of *Stitt* v. *Wardell*, and *Sheriff* v. *Potts*, have judicially eſtabliſhed the implied prohibition againſt breaking bulk or trading in the courſe of the voyage: and it is better for all parties to abide by the plain broad rule of an entire prohibition, than to introduce a dubious queſtion into every caſe, how far the trading tended to delay. [*Lawrence* J. obſerved, that the facts reported in *Stitt* v. *Wardell* did not ſupport the reaſon ſaid to be given by Lord *Kenyon* for avoiding the policy, namely, that the holding the underwriters liable would be to make them *inſure a voyage not in their contemplation*; for there was no deviation in that caſe from the courſe of the voyage; but the ſhip was forced by ſtreſs of weather into *Dublin*.] If the liberty of trading be allowed at all, it will not be difficult to frame pretences of neceſſity from weather and accident to run into ports, or to protract a ſhip's ſtay there when really forced in for ſhelter.

Lord ELLENBOROUGH C. J. If the taking in the dollars at *Gibraltar* materially varied the riſk of the underwriters, they would be diſcharged by it; but that it did not vary the riſk by occaſioning any delay of the voyage was expreſsly found by the jury to whom the queſtion was left, and who were of opinion that the whole period of the ſhip's ſtay there was covered by the neceſſity which originally

1808.

RAINE *against* BELL.

nally induced the captain to go into *Gibraltar*. I have turned it in my mind whether the risk might not have been increased by the particular kind of cargo, namely, treasure, taken in there: if that were known at the time to an enemy, it might hold out an additional temptation to him to seek for and attack the ship. But I do not know that a mere temptation of this sort has ever been held a sufficient ground to avoid a policy if the original act itself were lawful. This, it must be remembered, is the case of a policy on ship and freight: I reserve giving any opinion as to the operation of a change in the state of the cargo in the case of a policy on *goods*; because the taking in of other goods in the course of one entire voyage, where it is not provided for, may be contended to constitute a different adventure from that on which the ship started with her original cargo. But here no part of the original cargo was taken out, as in *Stitt* v. *Wardell*; nor any narrower liberty reserved, as in *Sheriff* v. *Potts*, which might operate as a virtual exclusion of taking in other goods. But this case stands on its own ground: where something has been superadded to the original cargo while the ship was delayed from necessity in a port into which she was obliged to go; and the jury having negatived that any delay was occasioned by the taking in of the additional goods.

His Lordship, after the other judges had delivered their opinions, added, that nothing said by the Court would justify the taking in any cargo in the course of the voyage which would in any manner enhance the risk of the underwriters.

GROSE J. The good sense of the thing, in ascertaining whether or not the act done avoided the policy, is to know

know whether it did or did not increaſe the riſk of the underwriters. Now here the jury having negatived any deviation from or delay in the voyage on account of taking in the dollars at *Gibraltar*, there ſeems no reaſon for ſaying that the riſk of the underwriters was thereby increaſed; and therefore I will not diſturb the verdict. 1808.

RAINE *againſt* BELL.

LAWRENCE J. I agree that the verdict is right. There is nothing in the terms of the policy to reſtrain the captain from taking in dollars: no additional riſk was incurred to the ſhip by the nature of the cargo, from the laws of the country where it was taken in; which might have altered the caſe: but the jury have found that the ſhip went into *Gibraltar* on a neceſſary occaſion, and did not ſtay there longer than that neceſſity juſtified. If *Gibraltar* had continued a port of *Spain*, there is no doubt but that the dollars might have been taken on board without vitiating the policy: but the objection is that becauſe *Gibraltar* is not a port of *Spain* the taking them in there avoids the policy, although it be found by the jury that no delay in the voyage was thereby occaſioned. This is not like a deviation; for that alters the riſk inſured; but here the riſk was not in fact altered. Then it is ſaid that it holds out a *temptation* to deviate. But if an *intention* to deviate, not carried into effect, will not avoid a policy; ſtill leſs can a temptation to deviate; as in *Moſs* v. *Byrom* (*a*). If the doing of a thing do not alter the riſk of the underwriter, and be not expreſsly prohibited to be done; I cannot ſay that it vitiates the policy as upon the breach of an implied condition. The caſe of *Stitt* v. *Wardell* paſſed at niſi prius, and was not afterwards brought in review before

(*a*) 6 *Term Rep.* 379.

1808.

RAINE against BELL.

the Court; and though it was the opinion of a moſt eminent judge; yet the greateſt are liable to error in delivering their opinions on the ſudden. And if the ſame queſtion ſhould occur again, I think it will deſerve further conſideration: for unleſs it can be ſhewn that the underwriters' riſk is varied by taking out part of a cargo in the courſe of the voyage, as at preſent adviſed, I do not underſtand how it can avoid the policy.

LE BLANC J. I am of the ſame opinion. Two caſes have been relied on to ſhew that the mere fact of taking out and ſelling part of the cargo, or the taking in other goods in the courſe of the voyage, will avoid the policy: but thoſe were deciſions at niſi prius, which were never brought before the Court, and might have turned on the particular circumſtances of thoſe caſes. But now the queſtion is fairly raiſed and brought before the Court, we muſt decide it according to the principle by which marine policies of inſurance are governed in reſpect of implied conditions. It is ſaid, that becauſe liberty is ſometimes expreſsly reſerved for a ſhip to touch, ſtay and trade in the courſe of the voyage, it is impliedly excluded in every policy in which it is not ſo reſerved: but the reaſon of the expreſs reſervation is in order to juſtify *the delay* in trading; the ſtaying at a place for the very purpoſe of trading there: but if a ſhip touch at a port which is allowed, and ſtay there for any reaſon which is allowable within the intent and meaning of the policy, and no additional riſk to the underwriters be incurred by her trading there during ſuch her ſtay for an allowed or juſtifiable cauſe, I can ſee no reaſon why ſuch a trading ſhould in itſelf avoid the policy. It is ſaid however, that the giving liberty to trade at all will be a temptation to the maſter to deviate from and to de-

1808.

RAINE *againſt* BELL.

lay the voyage with that view, and that it will be difficult for the underwriters to detect it: but that muſt neceſſarily be a queſtion for the jury to decide, as in other caſes of fraud, whether the deviation or delay aroſe from neceſſity or from the trading; and wherever the caſe was doubtful upon the evidence, it would generally turn the verdict againſt the aſſured who would have to account for the delay or deviation. But where it is found that no delay was occaſioned by the trading, I ſee no reaſon why we ſhould imply a condition which the parties themſelves have not made, in order to avoid the policy as for a breach of it. Neither do I think it would be generally convenient to increaſe the number of ſmall circumſtances unconnected with the occaſion of the loſs which will relieve the underwriters from their engagement to indemnify the aſſured, by the introduction of new implied conditions which the parties do not expreſs in the policy.

Rule diſcharged.

The KING *againſt* The Inhabitants of the Townſhip of ST. BEES Quarter, in the Pariſh of ST. BEES.

Wedneſday, Jan. 25th.

TWO Juſtices by an order removed *Sarah Tidyman* widow, and her four children by name, from the pariſh of *Egremont* to the townſhip of *St. Bees*, both in the county of *Cumberland*; which order was confirmed by the Seſſions on appeal, ſubject to the opinion of the Court on the following caſe;

Payment by one who was aſſeſſed to a church rate upon *houſeholders* only, and not upon the pariſhioners at large, will nevertheleſs gain him a ſettlement for it is not leſs a *public tax* becauſe laid too narrowly; and it is *charged and paid* within the pariſh, which is all that is required by the ſtat. 3 *W.* 3. *c.* 11. *ſ.* 6.

The pauper *Sarah*, 26 years ago, married *John Tidyman*, who was ſettled at *St. Bees*, and went from thence to reſide with him in *Egremont*; and they occupied a

1808.

The KING *againſt* The Inhabitants of ST. BEES.

houſe there till his death, two years ago. A year after they occupied the houſe, *J. Ponſonby*, a churchwarden of *Egremont*, called at the houſe for an aſſeſſment, (generally called in the pariſh a *couple ſeſs*, but which the pauper *Sarah* underſtood to be a *church ſeſs*,) and told her that her huſband was aſſeſſed; and ſhe paid 1*s*. 2*d*. as the ſum aſſeſſed. Fifteen years ago *D. Saunderſon*, another churchwarden of the pariſh, alſo called at the houſe for an aſſeſſment, and told the pauper that her huſband was aſſeſſed, and ſhe paid him 1*s*. A ſimilar demand for an aſſeſſment was alſo made in 1791, by two churchwardens; and the pauper again paid 1*s*., which latter aſſeſſment was in this form:

"1791.

"An aſſeſſment upon the houſeholders in the pariſh of *Egremont* at 1*s*. per couple for the ornaments and repairs of the pariſh church.

	s.	
× *John Tidyman* . . .	0	1 0

"We whoſe names are hereunto ſubſcribed (being of the church veſtry) do allow of this as a regular aſſeſſment; as witneſs our hands, the 28th of *March* 1791."

(Signed by the miniſter and 8 other perſons, including the two churchwardens.)

The names of 132 other houſeholders of the pariſh, beſides *John Tidyman*, were included in the aſſeſſment, and the × oppoſite his name denoted that his aſſeſſment had been paid. It appeared from the churchwardens' accounts of that year, entered in the veſtry book, that the ſums received under that aſſeſſment were in part laid out on the repairs and ornaments of the church, and the reſt in payment of a debt due to the preceding overſeers. But that aſſeſſment not being ſufficient, another was made in the ſame year, in aid of it, upon the landholders of

1808.

The KING *against* The Inhabitants of ST. BEES.

the pariſh, who were never aſſeſſed but when the aſſeſſment upon the houſeholders proved inſufficient. And it was frequently the practice for the ſelect veſtry of the pariſh to make out theſe aſſeſſments in the form of a liſt of the names of the inhabitants liable to pay; charging the married houſeholders at 1*s.* each; and widowers and widows, houſeholders, at 6*d.* each; which aſſeſſments were afterwards ſubmitted to and approved by the general pariſh veſtry. The Seſſions adjudged that the pauper's huſband had not gained a ſettlement in *Egremont* by the above ratings and payments.

Topping, in ſupport of the order of Seſſions, contended that the rate was clearly bad on the face of it. It was made upon the *houſeholders* only, and not upon the *pariſhioners* at large: and therefore no ſettlement could be gained by being aſſeſſed to and paying it. He admitted that a mere irregularity in the manner of rating would not preclude one from gaining a ſettlement who paid under it; as in *St. Giles, Cripplegate*, and *St. Mary, Newington* (*a*): but he urged that this was no rate at all, but a mere nullity; in which caſe, according to *Rex* v. *Edgbaſton* (*b*), no ſettlement could be gained by payment of it.

Lord ELLENBOROUGH C. J. The ſettlement is given by the ſtat. 3 *W.* 3. (*c*) to any perſon inhabiting any town or pariſh, who ſhall be charged and pay his ſhare towards the public taxes or levies of the town or pariſh. Now if a public tax be laid too narrowly, is it leſs a public tax on that account? This was a *tax*, and it was

(*a*) 19 *Vin. Abr.* 386. and 1 *Seſſ. Caſ.* 22. (*b*) 6 *Term Rep.* 540.
(*c*) *C.* 11. *ſ.* 6.

1808.

The KING *againſt* The Inhabitants of ST. BEES.

public, and it was *charged* and *paid* within the pa riſh What elſe is required to meet the act of parliament? Suppoſe a particular chapelry within the pariſh had been omitted in the rate, it would not have been leſs a public tax on the reſt of the pariſh.

LE BLANC J. The objection, puſhed a little further, would go to invalidate every ſettlement under a rate wherein one perſon was improperly omitted.

Per Curiam, Order of Seſſions quaſhed.

Park and *Littledale* were to have argued againſt the order.

Wedneſday, Jan. 27th.

The KING *againſt* The Inhabitants of NORTON, JUXTA KEMPSEY.

A deſerter from the king's marine ſervice cannot gain a ſettlement under a hiring and ſervice for a year; not being ſui juris, nor competent *lawfully* to *hire* himſelf within the ſtat. 3 *W. & M.* *c.* 11. *ſ.* 7.

TWO juſtices by an order removed *Sophia* the wife of *Edward Lea*, a marine, and their infant child *William*, from the hamlet of *Overſley* to the pariſh of *Norton*, both in the county of *Worceſter*. The Seſſions, on appeal, confirmed the order, ſubject to the opinion of this Court on the following caſe.

Edward Lea, being legally ſettled at *Norton*, was duly enliſted as a private into his majeſty's marine forces, from which he deſerted, and then hired himſelf for a year to Mr. *Shayle* of *Overſley*, and ſerved a year under that hiring. After the determination of this ſervice he was taken up for deſertion, tried by a court martial, and convicted of the ſame. The queſtion for the opinion of the Court was, whether he gained a ſettlement in *Overſley* (which

1808.

The KING *againſt* The Inhabitants of NORTON.

(which maintains its own poor) by virtue of ſuch hiring and ſervice.

Reader and *B. Morice*, in ſupport of the order of Seſſions, contended that a ſoldier who had deſerted from the king's ſervice was not ſui juris, and could not within the words and meaning of the ſtat. 3 *W. & M. c.* 11. *ſ.* 7. be *lawfully* hired. He could not contract the relation of ſervant to any other maſter, the duties of which were inconſiſtent with thoſe which he owed to the king. Upon the ſame principle it has been determined in ſeveral caſes (*a*) that an apprentice, not being ſui juris, cannot contract himſelf as a ſervant to a third perſon, nor gain a ſettlement under a hiring and ſervice. The caſe of the ſoldier is even ſtronger than that of an apprentice; for the former is guilty of a crime by deſerting the king's ſervice; whereas the latter is only liable civiliter: and the policy of the law is much ſtronger againſt the power to contract a ſecond engagement for ſervice in the one caſe than in the other.

Reynolds and *Birch*, contrà, endeavoured to diſtinguiſh this from the caſe of an apprentice, which, they ſaid, turned altogether upon the reſtrictive force of the indenture, and could not therefore apply to any caſe of a previous engagement by parol to ſerve another. In the caſe of a general hiring, if the ſervant depart before the ſtipulated time of ſervice, the only remedy by the maſter is by an action on the contract; but it never was diſputed

(*a*) *Buckington* v. *Shepton Bechamp*, 2 *Conſt's Bott*, 570. 2 *Ld. Ray.* 1352. and 1 *Stra.* 582. *Rex* v. *Auſtrey*, *Burr. S. C.* 441. *Rex* v. *Eccleſal Bierlow*, *ib.* 562. *Rex* v. *Harberton*, 1 *Term Rep.* 139. and 2 *Conſt's Bott*, 576. *Rex* v. *Sandford*, 1 *Term Rep.* 281. *Rex* v. *Hindringham*, 6 *Term Rep.* 557.

1808.

The KING *againſt* The Inhabitants of NORTON.

but that if the ſervant immediately after made a new contract of hiring for a year, and ſerved under it, he would gain a ſettlement: and the firſt maſter could not maintain an action againſt the ſecond for the wages or work and labour of the ſervant. But it is otherwiſe in the caſe of an apprentice, for the recompence for whoſe work and labour as a ſervant the original maſter, and not the apprentice himſelf, may maintain an action againſt the ſecond maſter after notice. It is true that the king might have interfered, and defeated the ſervice to the maſter by taking the pauper away; but the contract would ſtill have been binding on both the parties to it; and as on the one hand, if the ſervice were thus interrupted, the maſter would have had a remedy for the breach of contract againſt the ſervant; ſo on the other hand, where the ſervice was in fact performed, the ſervant has his remedy upon the contract for the ſtipulated wages. The word *lawful*, in the ſtatute of King *William*, means a contract of hiring and ſervice lawful in the terms of it, and not within the exceptions of any of the ſtatutes relating to ſervants. It has been held in *Rex* v. *Weſterleigh* (*a*), and *Rex* v. *Winchcomb* (*b*), that a *militiaman* might gain a ſettlement by hiring and ſervice, though he were abſent part of the time on duty; the term of his abſence having been ſtipulated for by him: and yet the ſame objection would have applied to him, that he was not ſui juris; for he might have been called out on duty the whole time.

Lord ELLENBOROUGH C. J. That was the caſe of a lawful contract with a juſt exception. The public had a

(*a*) *Burr. S. C.* 753. (*b*) *Dougl.* 391.

claim

1808.

The KING *againſt* The Inhabitants of NORTON.

claim upon the militiaman's ſervice for a certain time; and ſubject to that claim he might lawfully contract to ſerve his maſter. If this caſe were perfectly res integra, there might have been great doubt whether the word *lawfully* in the ſtatute of King *William* were not to be narrowed in its conſtruction to a contract in *the terms of it lawful*: and if the contract were lawful in its form, it might have afforded an argument whether the party ſerving under it could be diſabled from gaining a ſettlement under it, by reaſon of his having before contracted an engagement with another perſon inconſiſtent with it. But a variety of caſes have occurred which have decided the queſtion in the caſe of an apprentice: and this, not on the ground of its being an excepted caſe, or as ſtanding upon any occult efficacy in the indenture of apprenticeſhip; but upon the broad principle that one, who has contracted a relation which diſables him from ſerving any other without the conſent of his firſt maſter, is not ſui juris, and cannot lawfully bind himſelf to ſerve ſuch ſecond maſter, ſo as to gain a ſettlement by ſerving for a year under ſuch ſecond contract. In reaſon and principle it cannot make any difference whether he be originally bound by a contract of apprenticeſhip, or by any other contract equally obligatory upon him, which diſables him from binding himſelf to ſerve a ſecond maſter. The objection is, that he cannot give the maſter a control over his ſervice for the whole period which the maſter ſtipulates for and has a right to require by the contract. The king's officers might at any time have reclaimed him, and taken him out of the ſervice in which he was engaged; he cannot therefore be ſaid to have been *lawfully* hired into it. The remedy which the maſter might in that caſe have had againſt him is another queſtion: and the very want

1808.

The KING *against* The Inhabitants of NORTON.

want of power to bind himſelf, as he aſſumed, without authority, to do, might have founded a cauſe of action againſt him by the maſter. But a ſoldier is at leaſt as much bound to the ſervice of the king, as an apprentice is to that of his maſter: and nothing is to be inferred from the meaſured language of the Court in the caſe of an apprentice, in not laying down the principle broader than the matter in judgment required: but nothing was ſaid by the Court in any of the caſes intimating an opinion that the rule there laid down was confined to the ſingle caſe of an apprentice; and therefore we muſt look to the reaſon and principle of thoſe deciſions when we are called upon to apply the rule to ſimilar caſes.

GROSE J. The words of the ſtatute have been conſidered, and a conſtruction put upon them in the inſtance of an apprentice; and I cannot diſtinguiſh this caſe in principle from that.

LAWRENCE J. The deciſions referred to have concluded the preſent queſtion, if they were not made upon any ground peculiar to the caſe of an apprentice: but, as I underſtand them, they proceeded upon the ground that an apprentice was not ſui juris, and could not therefore ſubject himſelf to the control of a ſecond maſter for a whole year under a contract of hiring. And that principle will equally govern the preſent caſe.

LE BLANC J. The prior caſes have decided this. The principle of them is, that if the party cannot make ſuch a contract for his ſervice, of which the maſter may avail himſelf for the whole year according to the contract, no ſettlement can be gained under it.

Orders confirmed.

1808.

The KING *againſt* The Inhabitants of STOW-MARKET.

Wedneſday, Jan. 27th.

JOHN EDWARD KING, a pauper, and his wife were removed by an order of two juſtices from *South Lopham* in *Norfolk* to *Stowmarket* in *Suffolk*. The Seſſions, on appeal, confirmed the order, ſubject to the opinion of this Court on the following caſe:

A poor boy ſent out of the houſe of induſtry at 14 years of age to the pariſh officers, and by them *allotted* to a pariſhioner, who handed him over to another perſon, by whom the boy was told that he was to ſtay with him a year, and ſhould have clothes, &c.; to which the boy made no objection; conceiving himſelf obliged to accept the ſervice; but made no agreement for wages or concerning the nature or duration of his ſervice, nor was conſulted upon the ſubject; does not gain a ſettlement by ſerving under this ſuppoſed obligation for a year; for neither did he conſider himſelf, nor was he conſidered by the other parties, as a free agent; and ſuch only can contract, or adopt a contract made by others.

J. E. King, the pauper, being ſettled by birth in *Stowmarket*, was in the year 1801 a poor boy, at the age of fourteen, in the houſe of induſtry for the poor of the incorporated hundred of *Stow*. In this hundred the directors and acting guardians of the ſaid houſe are empowered by the act incorporating the hundred to apprentice poor children for ſeven years. It does not appear that they ever exerciſed this power: but inſtead of binding the children apprentices when of ſufficient age, they were ſent out of the houſe to their reſpective pariſhes; and the pariſh officers allotted them during three years to particular pariſhioners, either to retain them in their own, or to provide them with other ſervices. Some time before *Michaelmas* 1801 the pauper *J. E. King* was ſent by the directors and acting guardians of the houſe to Mr. *Reynolds* of *Stowmarket*, to whom he had been previouſly allotted by the officers of that pariſh. Mr. *Reynolds*, not having employment for the pauper, told him that he (Mr. *Reynolds*) had procured a ſervice for him with Mr. *J. Fox* of *Coddenham*. The pauper made no objection to go, conceiving that he had no diſcretion on the ſubject. On the day after *Michaelmas* the pauper went to Mr. *Fox*, who received him, and told him that he would give him

1808.

The KING *against* The Inhabitants of STOWMARKET.

him cloaths, and that he was to ſtay with him a year. Nothing further paſſed between the pauper and Mr. *Reynolds*, or Mr. *Fox*, reſpecting wages, or the nature or duration of the ſervice. The pauper continued in Mr. *Fox*'s ſervice as a farming ſervant till the following *Michaelmas*; receiving his cloaths and maintenance, and now and then a little pocket money. On the 25th of *September* 1802 the pauper was ſent for by Mr. *Stutter* of *Stowmarket*, to whom he had been allotted (in the ſame manner as he had been in the former year to Mr. *Reynolds*) for the following year. On the enſuing *Michaelmas* day the pauper went to Mr. *Stutter*, who gave him a holiday on that and the following day; and having no occaſion for his ſervice, Mr. *Stutter* told the pauper that he had procured him a ſervice with a relation, Mr. *Froſt*, of *Brent Eleigh*. The pauper went to Mr. *Froſt*, without making any application to the directors and acting guardians, or to the pariſh officers, and continued with Mr. *Froſt* till *Michaelmas* 1803, in the ſame ſituation as he had done before with Mr. *Fox*. The pauper himſelf made no agreement with Mr. *Fox*, or with Mr. *Froſt*, reſpecting wages, or the nature and duration of his ſervice with them; nor was he conſulted on the ſubject either by Mr. *Reynolds*, or by Mr. *Stutter*, to whom he had been previouſly allotted; but conceived himſelf obliged to accept theſe ſervices, as being under the control and juriſdiction of the houſe of induſtry and of the pariſh officers of *Stowmarket*, where the directors and acting guardians had firſt ſent him.

Wilſon and *Hulten*, in ſupport of the orders, inſiſted that there was no contract of hiring at all, and of courſe the pauper could gain no ſettlement by his ſervice

1808.

The KING *againſt* The Inhabitants of STOWMARKET.

vice with either of the maſters to whom he was, in the language of the caſe, *allotted*. And the Court called on the counſel for the appellant pariſh to proceed.

Nolan and *Frere*, contrà, contended that though the boy himſelf had made no contract with either of the maſters whom he ſerved, yet that by his ſervice he muſt be taken to have acceded to the terms made on his behalf by the guardians of the poor, or thoſe who ſtood in their place, and therefore to have adopted the contract of hiring made by them on his behalf. In the caſe of *The King* v. *Rickinghall Inferior* (*a*) the relation of maſter and ſervant did not ſubſiſt at all, but the pauper was only placed out by the pariſh officers to lodge and board: but here he was expreſsly taken by the maſter to ſerve him as a ſervant; and the pauper aſſented to this by performing the ſervice and receiving his cloathing and maintenance. Then the pauper's miſapprehenſion of the effect of his contract has often been determined not to be material.

Lord ELLENBOROUGH C. J. All the parties ſeem to have acted under the idea that the boy was a pariſh ſlave, who might be handed over from one to another and diſpoſed of as they pleaſed. But there was no agreement by him to either of the ſervices in which he was engaged: he ſubmitted to them becauſe he thought himſelf obliged to do whatever they bid him. If we were to hold this ſufficient to give a ſettlement, we ſhould eſtabliſh a new head of ſettlement *by allotment*. The law gave theſe directors of the houſe of induſtry a certain power to apprentice out poor children; and inſtead of executing that

(*a*) 7 *Eaſt*, 373.

power

1808.

The KING *against* The Inhabitants of STOWMARKET.

power in a proper manner as the act directs, they assume to themselves a power to hand these children over to the officers of their respective parishes; who again hand them over to others; and so they are shifted from one to another. And now because the boy has done the work which he was made to do, and eat the meat and worn the clothes which were provided for him, it is argued that he has adopted so many contracts of hiring to which he was no party, and which were made without any consideration of his will and consent. But the adoption of a contract must be the act of a free agent: and at what period of time is he found by the case to have consented or contracted at all? On the contrary it is stated that when told by *Reynolds* that he had procured a service for him with *Fox*, the pauper made no objection to go, *conceiving that he had no discretion on the subject.* And again it is stated that *the pauper made no agreement with* Fox *or* Frost, *respecting wages, or the nature and duration of his service with them:* nor *was he consulted on the subject by either of the persons to whom he had been allotted; but considered himself obliged to accept these services, as being under the control* of others. Then can a person who is considered as a slave, and conceives himself to be such, be considered as having *adopted* the acts of his masters? It is against common sense so to construe his involuntary acquiescence. In the cases alluded to, where the pauper's misapprehension of the contract of hiring has been held not to vary the legal effect of it, the pauper meant to exercise a contracting power, though he mistook the legal effect of the contract which he had made.

The other Judges assented; and *Le Blanc* J. added that he hoped the consequence of this decision would put an

an end to the improper practice which the directors of the houſe of induſtry had adopted in ſending the children out of the houſe to the reſpective pariſh officers to place out, inſtead of providing for them in the manner pointed out by the act.

1808.

The KING *againſt* The Inhabitants of STOWMARKET.

Orders confirmed.

ELIZABETH HORN, Executrix of JOHN HORN, *againſt* BAKER and Another, Aſſignees of WM. HORN and RD. JACKSON, Bankrupts.

Friday, Jan. 29th.

THIS was an action to recover in damages the value of the intereſt which the plaintiff claimed in certain ſtills, vats, and utenſils, which the firſt count of the declaration

A., *B.*, and *C.*, partners and diſtillers, occupied certain premiſes leaſed to *A.* and another, and uſed in common in the trade the ſtills, vats, and utenſils neceſſary for carrying it on, the property of which ſtills, &c. afterwards appeared to be in *A.* On the diſſolution of the partnerſhip, which was a loſing concern, it was agreed that *C.* and one *J.* ſhould carry on the buſineſs on the premiſes; and by deed between the two laſt and *A* it was covenanted and agreed, that *A.* ſhould withdraw from the buſineſs, and permit *C.* and *J.* to uſe, occupy, and enjoy the diſtill houſe and premiſes, paying the reſerved rent, &c. and the ſeveral ſtills, vats, and utenſils of trade ſpecified and numbered in a ſchedule annexed, in conſideration of an annuity to be paid by *C.* and *J.* to *A.* and his wife and the ſurvivor; with liberty for *C.* and *J.* on the deceaſe of *A.* and his wife to purchaſe the diſtill-houſe and premiſes for the remainder of *A.*'s term, and the ſtills, vats, &c. mentioned in the ſchedule: and *C.* and *J.* covenanted to keep the ſtills, vats, and utenſils in repair, and deliver them up at the time, if not purchaſed: and there was a proviſo for re-entry if the annuity were two months in arrear. Under this, *C.* and *J.* took poſſeſſion of the premiſes, with the ſtills, vats, and utenſils, and carried on the buſineſs as before; and made payments of the annuity, which afterwards fell in arrear more than two months; but *A.*'s widow and executrix who ſurvived him did not enter, but brought an action for the arrears, which was ſtopped by the bankruptcy of *C.* and *J.* who continued in poſſeſſion of the ſtills, vats, and utenſils on the premiſes.

On a queſtion, Whether ſuch ſtills, vats, and utenſils, ſo continuing in poſſeſſion of *C.* and *J.* the new partners, and uſed by them in their trade in the ſame manner as they had been by the former partners, of whom *A.* the owner was one, paſſed under the ſtat. 21 *Jac.* 1. *c.* 19. *ſ.* 10 & 11. to the aſſignees of *C.* and *J.*, as being in the *poſſeſſion, order, and diſpoſition* of the bankrupts at the time of their bankruptcy as *reputed owners?* and nothing appearing to the world to rebut the preſumption of true ownerſhip in the bankrupts ariſing out of their poſſeſſion and reputed ownerſhip, (of which reputed ownerſhip the jury are to judge from the circumſtances;) held,

1. That the ſtills which were fixed to the freehold did not paſs to the aſſignees under the words *goods and chattels* in the ſtatute.

2. That the vats, &c. which were not ſo fixed, did paſs to the aſſignees, as being left by the true owner in the poſſeſſion, order and diſpoſition (as it appeared to the eye of the world) of the bankrupts, as reputed owners.

3. That the caſe would have admitted of a different conſideration if there had been a uſage in the trade for the utenſils of it to be let out to the traders; as that might have rebutted the preſumption of ownerſhip ariſing from the poſſeſſion and apparent order and diſpoſition of them.

1808.

HORN against BAKER.

claration ſtated that ſhe was entitled to, ſubject to the uſe thereof by the defendants during her life; and that being ſo entitled, and the defendants well knowing the ſame, they wrongfully and injuriouſly broke and deſtroyed part, and ſold and diſpoſed of the reſt. The ſecond count was in trover for the ſame goods: to which the defendants pleaded not guilty; and upon the trial before Lord *Ellenborough* C. J. at the *Middleſex* Sittings after the laſt term, a verdict was found for the plaintiff for 1000*l.* ſubject to the following caſe.

The plaintiff is the widow and executrix of her deceaſed huſband *John Horn*, who before and at the time of making the indenture of the 20th of *March* 1801, after mentioned, was a diſtiller in *Southwark*. The defendants are the aſſignees of *Wm. Horn* and *R. Jackſon*, who ſucceeded *John Horn* in the buſineſs of a diſtiller, and carried on the ſame until they became bankrupts, as after mentioned. At the time of making the ſaid indenture *John Horn* held the principal part of the meſſuages, buildings, and lands, whereon he had carried on the buſineſs of a diſtiller in partnerſhip with *Robert Horn* and *William Horn*, and whereon there had been erected a rectifying diſtill-houſe, under a leaſe granted to him and *R. Jackſon*, (ſince dead,) for a term which expired on the 30th of *Dec.* 1804: and he held other parts of the premiſes under another leaſe granted to him and the ſaid *Richard Jackſon*, ſince deceaſed, for a term which expired on the 24th of *June* 1805: and he and the ſaid *Richard Jackſon*, now deceaſed, had before held other parts of the premiſes under a leaſe for a term which expired on the 25th of *Dec.* 1799. The abovementioned partnerſhip, which was a loſing concern, expired before the making of the indenture hereinafter mentioned; and *William Horn*, at the time of making that indenture, and

at

1808.

HORN *againſt* BAKER.

at the death of *John Horn*, was and now is indebted to the eſtate of *John Horn* in 500*l.* in reſpect of their partnerſhip. By indenture dated the 20th of *March* 1801, between *John Horn* of the one part, and *Wm. Horn* and *Rd. Jackſon* (the bankrupts) of the other; after reciting the ſaid ſeveral leaſes, and that at the time of making the laſt leaſe, the ſaid *Rd. Jackſon* (deceaſed) was in partnerſhip with *John Horn*; and that *John Horn* had lately entered into partnerſhip with *Wm.* and *Robert Horn* for a term then expired; and that ſince the expiration of the laſt-mentioned leaſe the premiſes therein compriſed had been uſed and occupied by *John*, *Robert*, and *Wm. Horn* as yearly tenants; and that the partnerſhip between *John*, *Robert*, and *Wm. Horn* had before the execution of that deed been diſſolved by mutual conſent; and that it had been agreed between *John Horn* of the one part, and *Wm. Horn* and *Rd. Jackſon* of the other part, that *John Horn* ſhould withdraw from the buſineſs as from the 1ſt of *March* then inſtant, in favour of *Wm. Horn* and *Rd. Jackſon*, and permit them to uſe, occupy, and enjoy the ſaid diſtill-houſe and other the premiſes mentioned in the indentures of leaſe, *and the ſeveral vats, ſtills, and utenſils of trade therein or thereon*, and which vats, ſtills, and utenſils were ſpecified in the firſt ſchedule written under that indenture, in conſideration of an annuity of 600*l.* to be paid to *John Horn*, his executors, &c. during the life of himſelf and *Elizabeth* his wife (the now plaintiff) and the life of the ſurvivor, ſubject to terms and conditions thereinafter expreſſed: and reciting farther, that it had been agreed that the debts due to *John*, *Robert*, and *Wm. Horn*, as late copartners, and alſo all the horſes, carts, drays, and caſks of the late copartnerſhip (*except the vats, ſtills, and utenſils* mentioned in the ſaid firſt ſchedule,)

1808.

HORN against BAKER.

should be valued, and purchased by *Wm. Horn* and *Rd. Jackson*; and that a valuation had been made accordingly; by which it appeared that such debts, and the value of such horses, &c. amounted to 1815*l.*; for payment of which a bond had been given by *Wm. Horn* and *Rd. Jackson* to *John Horn*; and that *Wm. Horn* and *Rd. Jackson*, by another bond, had been bound to *John Horn* in 5000*l.*, conditioned for payment of the annuity of 600*l.* per annum to *John Horn* for the lives of himself and his wife, (the plaintiff,) and the survivor: he, *John Horn*, in pursuance of the agreement, and in consideration of the two bonds and the covenants and agreements after contained on behalf of *Wm. Horn* and *Rd. Jackson*, for himself, his heirs, executors, &c. covenanted and agreed with *Wm. Horn* and *Rd. Jackson*, their executors, administrators, and assigns, that they, *well and truly paying the rents reserved* by the several recited leases, *and performing all and singular the covenants and agreements therein contained* on the lessees' and assignees' parts, and also *duly and regularly paying the said annuity* so secured as aforesaid, should and lawfully might *peaceably and quietly have, hold, use, occupy, possess, and enjoy the said messuage*, tenement, distill-house, and premises thereby demised and mentioned in a certain deed-poll indorsed on the said first lease, and *also the said stills, vats, and things, specified in the first schedule*, during the lives of *John Horn* and *Elizabeth Horn*, or the survivor, without any let, suit, &c. of *John Horn*, his executors, &c. or any person lawfully claiming from him, &c. *Wm. Horn* and *Rd. Jackson*, by the indenture of agreement, covenanted to pay the rent reserved by the leases, and to perform the covenants. There was also a proviso in that indenture, that *in case the annuity should be in arrear for two calendar months*, John Horn, *his executors*,

1808.

HORN against BAKER.

executors, &c. might re-enter the diſtill-houſe and premiſes, and the ſame with all and every the ſtills, vats, and things mentioned in the ſaid ſchedule have again, re-poſſeſs, and enjoy as in his former eſtate, &c. There was alſo a covenant, that upon the deceaſe of the ſurvivor of *John* and *Elizabeth Horn*, *Wm. Horn* and *Rd. Jackſon* ſhould be at liberty to purchaſe the diſtill-houſe and premiſes for the remainder of the term in the leaſes, and the ſtills, vats, and things mentioned in the ſaid ſchedule. And another covenant that *Wm. Horn* and *Rd. Jackſon* ſhould keep the ſaid ſtills, vats, and utenſils in repair; and in caſe they ſhould not purchaſe the ſame, that they ſhould at the end of the agreement deliver them up to *John Horn*, his executors, &c. in good condition, reaſonable uſe and wear excepted. [Then followed the ſchedule referred to of the different ſtills and vats, numbered in order, and deſcribing the quantity in gallons which each would contain.] The caſe further ſtated, that *Wm. Horn* and *Rd. Jackſon* took poſſeſſion of the premiſes immediately on the execution of the indenture of agreement, and carried on the trade of diſtillers; and from time to time paid the intereſt on the bond and the annuity to *John Horn*, who died about four years ago, and who by his will gave all his property to his wife, the plaintiff, and appointed her ſole executrix. Since (*a*) the death of *John Horn* neither the annuity nor the intereſt of the bond for 1815*l.* have been regularly paid; but the plaintiff, as ſhe from time to time was in want of money, and notwithſtanding the annuity and intereſt might not be then due, applied to *Wm. Horn* and *Rd. Jackſon*, who

(*a*) What follows down to letter *b* was added by conſent to the caſe after the firſt argument.

1808.

HORN *againſt* BAKER.

paid her different ſums on account of ſuch annuity and intereſt; and alſo by her order occaſionally paid ſums to various perſons for her uſe, and ſupplied her with liquors and ſpirits as ſhe from time to time ordered any; ſo that there was a running account between them and the plaintiff. The following memorandum was ſigned by *John Horn*, and indorſed on that part of the deed in the poſſeſſion of *Wm. Horn* and *Rd. Jackſon*; viz. "I the within-named *John Horn* do hereby undertake and agree to accept and take 500*l.* by equal quarterly payments inſtead of 600*l.* for the firſt year's annuity within referred to." To this memorandum there was no date, nor did it appear when it was made. The following indorſement or receipt was alſo written on the ſaid deed, and ſigned by the plaintiff as executor of *John Horn*; viz. "*March* 1ſt, 1802. Received of the within-named *Wm. Horn* and *Rd. Jackſon* 500*l.*, being one year's annuity due from them this day for the purpoſes ſpecified herein." There was alſo the following indorſement on the ſame deed ſigned by *Elizabeth Horn*. "*March* 1ſt, 1803. Received of the within-named *Wm. Horn* and *R. Jackſon* 600*l.*, being one year's annuity due from them this day for the purpoſes ſpecified therein." The firſt memorandum appeared to be in the hand-writing of the ſolicitor who drew the deed: the two laſt receipts were in the hand-writing of *Rd. Jackſon*. For many months previous to the bankruptcy of *Wm. Horn* and *Rd. Jackſon* the plaintiff found great difficulty in obtaining money from them; and ſhe permitted the annuity and intereſt to run in arrear; and *notwithſtanding the ſame were more than two months in arrear*, the plaintiff did not make any claim to *re-enter* the premiſes, as by the deed ſhe had the power to do; but in *May* 1806 brought an action in this court againſt

Wm.

1808.

HORN *againſt* BAKER.

Wm. Horn and *Rd. Jackſon* to recover the arrears of the annuity, as alſo to obtain payment of the bond for 1815*l.* and intereſt; to which action they pleaded eight ſeveral pleas, upon ſeven of which iſſue was joined: and to the eighth plea *Elizabeth Horn* demurred; which demurrer was argued, and judgment given for *Elizabeth Horn*; and notice of trial of the ſaid iſſues had been given at the time of the bankruptcy; but in conſequence thereof that cauſe was not further proceeded in; and there was due for the arrears of the annuity and intereſt on the bond for 1815*l.*, at the time of the bankruptcy, about 600*l.* (*b*). In *April* 1805 *the plaintiff*, after her huſband's death, *renewed the leaſes of the ſeveral premiſes*. *Wm. Horn* and *Rd. Jackſon* occupied the premiſes, with the ſtills, vats, and utenſils thereon, and carried on the trade of diſtillers from the time of executing the indenture of the 20th of *March* 1801 to their bankruptcy. A commiſſion of bankrupt iſſued againſt *Wm. Horn* and *Rd. Jackſon* on the 26th of *July* 1806, and they were duly adjudged bankrupts on the 28th; and the meſſenger under the commiſſion immediately took poſſeſſion of the demiſed premiſes, and alſo of the vats, ſtills, and utenſils then being thereon. The defendants were afterwards choſen aſſignees, and an aſſignment of all the eſtate and effects of *Wm. Horn* and *Rd. Jackſon* was duly made to them; upon which notice was given by the plaintiff to the defendants that the ſeveral vats, ſtills, and utenſils were the property of the plaintiff, ſubject to the ſuppoſed intereſt of the bankrupts therein. The things mentioned in the deed, and compriſed in the firſt ſchedule, conſiſt of ſtills

(*b*) See note (*a*), p. 219.

1808.

HORN *againſt* LAKER.

and vats. The (*a*) ſtills, five in number, were ſet in brick-work, and let into the ground. Three vats or worm-tubs were ſupported by and reſted upon brick-work and timber, but were not fixed in the ground. Sixteen other vats ſtood on horſes or frames made of wood, which were not let into the ground, but ſtood upon the floor (*b*). The vats were of wood, bound round with iron: the ſtills were of copper; and connected with ſome of the vats: others of the vats were alſo connected and communicated with each other by conductors or pipes. Three ſtills and vats were in the rectifying diſtill-houſe. There were alſo a great number of other vats under the rectifying diſtill-houſe; ſome of which were ſtanding on brick and timber, and others on horſes or frames as above; and which were connected with the vats and ſtills in the rectifying diſtill-houſe. Others of the vats ſtoods on horſes or frames, as above deſcribed. All the vats in the rectifying diſtill-houſe ſtood on their ends; as as did nine of thoſe under the diſtill-houſe: the other vats under the diſtill-houſe lay on their ſides or bilge. The defendants contending, that the vats, ſtills, and utenſils, in the ſaid firſt ſchedule contained, belonged to the bankrupts at the time of their bankruptcy, have ſold them as part of the eſtate and effects of the bankrupts. The plaintiff, contending that the ſame belong to her as executrix of her late huſband, by virtue of his will (ſubject to the the uſe thereof by the aſſignees in right of the bankrupts during her life,) has brought this action to recover in damages the value of her intereſt therein. The queſtion was, Whether the plaintiff were entitled to recover? it

(*a*) What follows down to letter *b* was added by conſent to the caſe after the firſt argument.

being

1808.

HORN against BAKER.

being agreed that if the plaintiff were ſo entitled, the amount of the damages ſhould be ſettled out of court.

This caſe was argued in *Michaelmas* term laſt by *Burrough* for the plaintiff, and *Dampier* contrà; and again in this term by *Williams* Serjt. for the plaintiff, and *The Attorney General* for the defendants. The additions to the caſe which have been noticed were made between the firſt and ſecond argument.

For the plaintiff, (after ſtating that the queſtion turned on the ſtat. 21 *Jac.* 1. *c.* 19. *ſ.* 10 & 11.) the attention of the Court was called to the preamble to the 11th ſect. ſet forth in the concluſion of the 10th; though it was admitted that the modern caſes had put a conſtruction upon the enacting clauſe beyond the particular miſchief recited. The ſtatute reciting "that it often falls out that "many perſons before they become bankrupts do convey "*their* goods to *other* men upon good conſideration, yet "ſtill do keep the ſame, and *are reputed the owners thereof*, "and *diſpoſe the ſame as their own*;" for remedy enacts, "that if any perſon ſhall become bankrupt, and, at ſuch "time as they ſhall ſo become bankrupt, ſhall, by the "conſent and permiſſion of the true owner and proprietary, have in their *poſſeſſion, order, and diſpoſition*, any "goods or chattels whereof they ſhall be *reputed owners*, "and *take upon them the ſale, alteration, or diſpoſition, as* "*owners*;" in every ſuch caſe the commiſſioners ſhall have power to ſell and diſpoſe the ſame for the benefit of the creditors, &c. Giving effect to the words of the preamble, the true object was to deprive particular creditors of their ſpecific lien on goods, which having been the property of the bankrupt had been ſecretly conveyed by him to ſuch creditors, who ſuffered him ſtill to continue in poſſeſſion and appear to the world

1808.

HORN against BAKER.

as the owner. That proviſion was made in the caſe of bankrupts in order to avoid the doubt which had ariſen upon the ſtat. 13 *Eliz. c.* 5. againſt fraudulent conveyances to defeat and delay creditors in general, (and which doubt ſtill exiſts on the ſtatute of *Elizabeth*) whether it were not confined, as at common law it certainly was, to avoid the conveyance as againſt thoſe only, who were creditors of the party at the time. Wherefore the ſtatute of *James* extended the proviſion to all the creditors, as well thoſe who became ſuch afterwards, as thoſe who were ſuch at the time of the conveyance. But ſtill conſtruing the two ſtatutes together, as made in pari materia, many great lawyers have conſidered that the preamble in the 10th ſect. of the ſtat. 21 *Jac.* 1. *c.* 19. controlled the enactment in the 11th ſect. and confined the operation of the ſtatute to caſes where the property conveyed to a particular creditor was before that time the property of the bankrupt himſelf. Of this opinion was Lord C. J. *Holt* and the Court of *K. B.* in *L'Apoſtre* v. *Le Plaiſtrier* (*a*), and Lord C. B. *Parker*, and Lord *Hardwicke*, in *Ryall* v. *Rolle* (*b*): though the contrary has ſince been held in *Mace* v. *Cadell* (*c*). Still, however, the Court will not go further than the latter caſe; nor ſay that the ſtatute ſhall attach in every inſtance where a trader is in poſſeſſion of another man's goods at the time of his bankruptcy, if he were not held out to the world as the oſtenſible owner by the real proprietor, as in that caſe the bankrupt had been; the true owner having there held out the bankrupt as her huſband, and having obtained a licence for the public houſe where they lived in his

(*a*) *Mich.* 1708, cited 1 *P. Wms.* 318.

(*b*) 1 *Atk.* 175. 182. and 1 *Veſ.* 365. 371. (*c*) *Cowp.* 234.

name,

1808.

HORN *againſt* BAKER.

name. But taking the preamble not to control the operation of the enacting clauſe, ſtill, in order to bring the caſe within that clauſe, the bankrupts muſt not only have ſuch goods in their *poſſeſſion, order, and diſpoſition* at the time *by the conſent and permiſſion of the true owner*, according to the firſt part of the clauſe, but they muſt alſo have taken upon them the *ſale, alteration*, and *diſpoſition* of them, as owners, by the ſame *conſent and permiſſion*; for theſe words run through both parts of the ſentence: and it muſt appear either by the terms of the contract between the bankrupts and the true owner, or by evidence dehors of the nature of the property, or of the place or circumſtances of the poſſeſſion, that the owner truſted the bankrupts with the *power* of *ſelling, altering, or diſpoſing of the goods, as owners*; or that having the poſſeſſion, order, and diſpoſition of the goods under ſuch circumſtances as might induce the world to believe that they had ſuch a power, the bankrupts did *actually ſell, alter, or diſpoſe* of them, *as owners*. In *Walker and Others, Aſſignees of Bean*, v. *Burnell* (*a*), houſehold goods and furniture, which were left by the aſſignees under the firſt commiſſion ſo long as ſeven years in the bankrupt's poſſeſſion; yet having been ſo left for a ſpecial bonâ fide purpoſe, in order to aſſiſt the bankrupt in ſettling his affairs, and getting in his effects for the creditors; and the bankrupt not having the diſpoſition of the goods ſo as to ſell them; were decided not to be within the ſtatute of *James*. It was admitted even in *Mace* v. *Cadell* that every inſtance of a poſſeſſion of goods of another by a bankrupt at the time of his bankruptcy was not within the ſtatute; but it was ſaid that the caſes of factors, executors, truſtees, &c. were *excepted* caſes: but the words of the 11th clauſe, if not reſtrained by the preamble, are general, and

(*a*) *Dougl.* 317.

would

1808.

HORN against BAKER.

would include thoſe which are called *excepted* caſes, as well as any others: they are not, therefore, excepted by the ſtatute itſelf in terms, but only by conſtruction, as not falling within the reaſon of it: the ſtatute only attaching on the poſſeſſion of goods by the bankrupt when ſuch poſſeſſion is fraudulent; where the true owner has truſted the bankrupt with the power of ſelling, altering, or diſpoſing of the goods, as owner. And though perhaps the bare fact of the poſſeſſion of chattels may be primâ facie evidence that the poſſeſſor is the true owner, and has the power of ſale, &c. as owner; yet the contrary may be ſhewn, and that the poſſeſſion of the bankrupt was bonâ fide, and conſiſtent with the right of the true owner. A factor is intruſted with the higheſt power over the goods, the power of ſale; but becauſe it is not *as owner*, but *as factor*, which is conſiſtent with his poſſeſſion and with the rights of the true owner, the caſe is not within the ſtatute. The ſame may be ſaid of truſtees and executors. So here, the bankrupts had "the poſſeſſion, order, and diſpoſition" of the goods under the indenture, *as leſſees*, and not *as owners*; and they had not the *ſale* or *alteration* of them at all, nor the *diſpoſition* of them, *as owners*, ſo as to affect the property in any way, but only the bare uſe of them. In ſome caſes the circumſtances attending the poſſeſſion may carry an appearance to the world that the poſſeſſor has the ſale, alteration, or diſpoſition of the goods, as owner; as where goods uſually ſold in a ſhop or warehouſe are expoſed to view there; and from thence a power to ſell, &c. by the conſent of the owner who permits this to be done may be fairly implied: but no ſuch inference can ariſe here, where ſome of the vats, &c. were actually fixed to the freehold, and others apparently ſo, and the reſt were uſed

in

1808.

HORN *againſt* BAKER.

in like manner as thoſe which were fixed, and all of them were numbered. In this caſe the poſſeſſion was at leaſt equivocal, ſo as let in the truth of the ownerſhip. It was juſt as likely by the mere view of the things that they belonged to the owner of the premiſes as to the traders who were in poſſeſſion. They all formed one entire apparatus for diſtilling, part of which was actually fixed to the freehold; and therefore the bare poſſeſſion and uſe of them carried no greater evidence of title than the poſſeſſion of the premiſes themſelves. And on this ground *Buller* J. in *Walker* v. *Burnell* (*a*), held that the furniture of the houſe left in the poſſeſſion of the bankrupt did not paſs under the ſtatute. Wherever the contract between the bankrupt and the true owner, to whom the goods originally belonged, has been bonâ fide, and not made for the purpoſe of giving him a falſe credit, and the bankrupt's poſſeſſion and mode of uſing the property was conſiſtent with ſuch contract, the caſe has never been held to be within the ſtatute. In *Copeman* v. *Gallant* (*b*), though Lord *Cowper* conſidered that the preamble did not reſtrain the enacting words of the clauſe; yet he held the caſe not to be within it, in regard that the aſſignment, which was for payment of the debts of the aſſignor, was with an *honeſt intent*. In *Ryall* v. *Rolle* (*c*) the property, which originally belonged to the *bankrupt*, was by him mortgaged and conveyed at different times to ſeveral perſons; he continuing all the time in poſſeſſion. That was a fraud directly within the expreſs words of the law. In *Mace* v. *Cadell* (*d*) there was direct evidence of fraud on the part of the true owner; ſhe herſelf having taken out a licence for the public houſe, where the goods were,

(*a*) *Dougl.* 320. (*b*) 1 *P. Wms.* 320, 2.
(*c*) 1 *Atk.* 165. and 1 *Veſ.* 349. (*d*) *Cowp.* 232.

1808.

HORN against BAKER.

in the name of the bankrupt, to whom ſhe ſaid ſhe was married; and having at firſt claimed the goods under a bill of ſale from him. *Bryſon* v. *Wylie* (*a*) was decided altogether upon the ground of trick and fraud. There was an open ſale of a dyer's plant to the bankrupt, and afterwards a private re-ſale by him; notwithſtanding which he ſtill continued to keep poſſeſſion upon payment of a pretended rent. *Gordon* v. *The Eaſt India Company* (*b*) was the caſe of goods inveſted by the true owner *in the name* of an officer of one of the Company's ſhips, as *his* privilege; whoſe property they appeared to the world to be; and which was therefore calculated to deceive his creditors. So in *Lingham* v. *Biggs* (*c*), a creditor, having taken in execution the furniture of a coffee-houſe-keeper, permitted him to remain in poſſeſſion of it under a rent; who therefore appeared to the reſt of the world to continue the owner of it in the ſame manner as before; there being nothing done to notify the change of property; which was clearly fraudulent even within the preamble of the ſtatute. But in that caſe Lord C. J. *Eyre*, ſpeaking of *Bryſon* v. *Wylie*, ſaid that, notwithſtanding that deciſion, he could ſuppoſe that a dyer might be in poſſeſſion of a plant without being the reputed owner. And he alſo ſupported the deciſion in *Collins* v. *Forbes* (*d*), which had been queſtioned (*e*). But admitting that there were ſome circumſtances of fraud in the laſt-mentioned caſe, the principle there eſtabliſhed,

(*a*) *Hil.* 24 *Geo.* 3. *B. R.* cited in note (*a*) 1 *Boſ. & Pull.* 83.

(*b*) 7 *Term Rep.* 228. (*c*) 1 *Boſ. & Pull.* 82. (*d*) 3 *Term Rep.* 316.

(*e*) By *Lawrence* J. in *Gordon* v. *The Eaſt India Company*, 7 *Term Rep.* 237. who now again intimated great doubts of that caſe, as did alſo Lord *Ellenborough*. The former referred to Mr. *Cullen's Obſervations* on that caſe, which he ſaid were very ſenſible. *Cull. Principles of the Bankrupt Laws*, 318.

which

1808.

HORN *againſt* BAKER.

which has not been queſtioned, was, that where the bankrupt was in poſſeſſion of the goods at the time of his bankruptcy, with the conſent of the true owner, bonâ fide, for a ſpecial purpoſe, beyond which he had not the right of alteration or diſpoſition, it is not within the ſtatute. The caſe of *Darby* v. *Smith* (*a*) was conſidered as an abſolute ſale of the goods by the truſtees of the wife and children to the huſband, whom they ſuffered to continue in poſſeſſion till the day before his bankruptcy without his paying the ſtipulated inſtalments. It would have been uſeleſs to have diſcuſſed any of theſe caſes if the bare act of poſſeſſion of the goods of another by a bankrupt at the time of his bankruptcy were ſufficient to bring a caſe within the ſtatute. Now here by the terms of the deed the bankrupts had no power over the vats, ſtills, and utenſils in their poſſeſſion, except the uſe and repair of them as leſſees: they had not the general, but only a ſpecial *order* and *diſpoſition* of them by the conſent of the true owner: and they had no power of *ſale*, *alteration*, or *diſpoſition* of them at all, *as owners*. But if the conſent or permiſſion of the true owner mentioned in the firſt part of the 11th clauſe be not carried to the "*ſale*, *alteration*, *or diſpoſition*" mentioned in the latter part; at leaſt thoſe words muſt be intended of an *actual ſale*, *alteration*, *or diſpoſition* of the things by the bankrupt, in order to bind the true owner; for the words of the act are "*and take upon them* (the bankrupts) the ſale, &c. "as owners;" which is not pretended to have been done by the bankrupts in this caſe. Conſiſtently with the deed the leſſees could not even have removed theſe goods from the premiſes demiſed to any other place, without an implied breach of covenant, to be collected from the

(*a*) 3 *Term Rep.* 81.

whole

1808.

HORN against BAKER.

whole deed; for they were all ſcheduled and numbered, and let as an entirety; and if diſplaced, it could not be told how the numbers applied, and the object of numbering them would be defeated.

It was alſo objected to the plaintiff's title, that the poſſeſſion of the leſſees at the time of their bankruptcy was not conſiſtent with the deed; becauſe they were only to hold ſo long as they performed the covenants and paid the annuity reſerved; and there was a proviſo for re-entry in caſe ſuch annuity was in arrear for two months: and no re-entry had been made, though the annuity was in arrear for a longer time. To this it was anſwered that the words of the indenture whereby *John Horn* covenanted that the leſſees "performing all and ſingular "the covenants and agreements therein contained, &c. "and alſo *duly and regularly paying the annuity*, &c. "ſhould quietly poſſeſs and enjoy, &c. the premiſes, "and alſo the ſtills, vats," &c. were not words of condition, on the breach of which the leſſees were no longer to hold over, but in law were only words of covenant on the part of the leſſees, for the breach of which a remedy lay upon the covenant; as was determined in *Hays* v. *Bickerſtaffe* (*a*). Then, though there was an expreſs power of re-entry in caſe of ſuch arrear, yet it could not have been executed under the circumſtances; for there was a running account between the parties; the plaintiff having received money on account of the annuity from time to time, and the bankrupts having alſo paid bills for her; and this account was not liquidated. But to warrant a re-entry there muſt be a demand of the preciſe ſum due, which could not be told by the plaintiff at the

(*a*) 2 *Mod.* 34, 5.

time

1808.

HORN *against* BAKER.

time. Beſides, as in caſe of rent reſerved quarterly, when two quarters have elapſed, the leſſor cannot re-enter for the firſt quarter, but only for the laſt; having ſlipped his opportunity for the other, after another quarter has become due: ſo here the plaintiff could only have re-entered for the laſt payment in arrear. But ſuppoſing in ſtrictneſs that the plaintiff might have re-entered, yet as it would not have been prudent to do ſo, ſhe will ſtand excuſed for waving the exerciſe of an odious right of forfeiture, againſt which a court of equity would of courſe have relieved the leſſees, on payment of the arrears: and this, even ſince the ſtat. 4 *Geo.* 2. *c.* 28. *ſ.* 2. if the application for relief were made within ſix months (*a*).

For the defendants, it was contended that the poſſeſſion of the bankrupts was not conſiſtent with the deed; for by that, in the event which happened of the annuity falling into arrear, the plaintiff was entitled to enter and take poſſeſſion of the goods in queſtion; inſtead of which ſhe left them in the poſſeſſion of the traders, and brought an action for the arrears, which was defeated by their bankruptcy. As to the difficulty of making a demand for the preciſe ſum before re-entry, the ſtrictneſs of law in that reſpect only applies to caſes of re-entry for non-payment of rent where the demand muſt be on the land, and not to the re-poſſeſſion of goods for non-payment of an annuity for which they were a ſecurity, in which caſe the demand may be made any where. However, if a previous demand of the preciſe ſum were neceſſary, the difficulty of aſcertaining it, occaſioned by the act of the annuitant herſelf, would be no reaſon why as between theſe parties ſhe ſhould be excuſed for not having made it. If ſhe were entitled to poſſeſſion under the deed in

(*a*) *Doe* v. *Lewis*, 1 *Burr.* 619.

the

1808.

HORN against BAKER.

the event which happened, and by taking the neceſſary meaſures, whatever they might be, would have been in poſſeſſion, the ſubſequent poſſeſſion of the bankrupts was againſt the ſtipulations of the deed: and this brings the caſe within *Darby* v. *Smith* (*a*), which is very like the preſent in its circumſtances; for there the truſtee had a right to enter and re-poſſeſs himſelf of the goods, if the ſtipulated payments were not made; and having neglected to do ſo, after default made in all but the firſt inſtalment, the poſſeſſion of the bankrupt was held to be within the ſtatute; though as between the parties to the contract the tranſaction was bonâ fide, and no fraud in fact intended. But admitting that the poſſeſſion of the bankrupts was in purſuance of the deed, it does not follow that their poſſeſſion was not within the ſtatute. If this were ſo, every caſe of this ſort might be taken out of the ſtatute. The poſſeſſion of a mortgagor of goods is not inconſiſtent with his title, and yet it has never been doubted ſince *Ryall* v. *Rolle* (*b*) that it was within the ſtatute. It is the *reputed ownerſhip* of the goods in the poſſeſſion of the bankrupt which brings the caſe within the expreſs words of the ſtatute, the avowed object of which was to defeat thoſe ſecret conveyances, by which perſonal property is ſecured to particular creditors, while to the eye of the world it is left in the *poſſeſſion, order, and diſpoſition* of the bankrupt who by means of it obtains a falſe credit. It is now fully ſettled ſince the caſe of *Mace* v. *Cadell* (*c*) that the preamble does not control the enacting words of the 11th clauſe of the act. But it is argued, that the bankrupt muſt not only have the *poſſeſſion, order, and diſpoſition* of the goods, with the conſent of the true owner, but alſo the power of *ſale, alteration, and diſpoſition* by the ſame *conſent*. Certainly the bankrupt need not

(*a*) 8 *Term Rep.* 82. (*b*) 1 *Atk.* 165. (*c*) *Cowp.* 232.

have

1808.

HORN against BAKER.

have actually ſold and delivered the goods; for then the queſtion would never ariſe, as was obſerved by *Eyre* C. J. in *Lingham* v. *Biggs* (*a*); for the act only gives the aſſignees of the bankrupt power to appropriate goods *in his poſſeſſion*. But the ſame learned Judge ſays, that "if the man be *reputed owner* of the goods, and *appear* to have the *order and diſpoſition* of them, he muſt be underſtood to have taken upon himſelf the *ſale, alteration, and diſpoſition* within the meaning of the ſtatute." Neither could it be the meaning of the ſtatute that the bankrupt ſhould be the true owner of the goods, becauſe, as Lord *Hardwicke* ſaid in *Ryall* v. *Rolle* (*b*), the Legiſlature has explained its ſenſe by putting the words *true owner* in oppoſition to the *reputed owner*. Nor could it mean that the bankrupt ſhould have the *power of ſale*, &c. by the *conſent of the true owner;* for then his ſelling or otherwiſe diſpoſing of them would be no breach of the private contract between them. In every caſe where any queſtion can ariſe, the reputed ownerſhip of the bankrupt muſt be limitted, as between him and the true owner, by ſome ſecret ſtipulation abridging the general right of diſpoſition: and it was the very object of the act to prevent the operation of ſuch ſecret engagements, which enabled traders to obtain a falſe credit by means of the apparent or reputed ownerſhip which their viſible poſſeſſion of the goods of others gave them. It is no queſtion therefore in theſe caſes what is the real contract in the deed; for that could not be known at the time to third perſons who were dealing with the trader. The only queſtion which can be made, conſiſtently with the words and object of the ſtatute, is, whether the trader in poſſeſſion at the time of his bank-

(*a*) 1 *Beſ. & Pull.* 87. (*b*) 1 *Atk.* 183.

1808.

HORN against BAKER.

ruptcy had the apparent order and diſpoſition of the goods? if to the eye of the world he appeared to be the owner of them, or was, as the ſtatute calls him, the *reputed owner*, the caſe is within the ſtatute; though in truth there was a ſecret conveyance or agreement by which the property was made over or ſecured to another. This, as was ſaid by *Buller* J. in *Walker* v. *Burnell* (*a*), muſt always be more a queſtion of fact than of law. When the fact of the reputed ownerſhip is clearly aſcertained, the law follows of courſe. Every man, ſays *Eyre* C. J. in *Lingham* v. *Biggs* (*b*), who can be ſaid to be the *reputed owner*, has incidentally the order and diſpoſition of goods: and if he be reputed owner, and appear to have the order and diſpoſition of them, he muſt be underſtood to have *taken upon himſelf* the *ſale, order, and diſpoſition*, within the meaning of the ſtatute. And if the real owner do not take ſuch means as may be in his power to prevent the public being impoſed upon by ſuch falſe appearance, that is the very miſchief meant to be remedied by the act; and the bankrupt muſt be taken to have the poſſeſſion, order, and diſpoſition of the goods by conſent of the owner: and the being in poſſeſſion under ſuch circumſtances from whence the order and diſpoſition of the goods may be reaſonably inferred makes the reputed ownerſhip. Now here every circumſtance of notoriety tended to ſhew that the bankrupts were the true owners of the goods, whether conſidering the poſſeſſion before the indenture of the 30th of *March*, the time and circumſtances under which the bankrupts took poſſeſſion under that deed, the avowed purpoſe for which it was made, or the conti-

(*a*) *Dougl.* 317. and vide this noticed by *Eyre* C. J. in *Lingham* v. *Biggs*, 1 *Boſ. & and Pull.* 89.

(*b*) 1 *Boſ. & Pull.* 87.

nued

1808.

HORN *againſt* BAKER

nued poſſeſſion and apparent ownerſhip of the bankrupts after the transfer in the ſame manner as before. *William Horn*, one of the bankrupts, had been in partnerſhip with *John Horn*, the teſtator, before the transfer: they carried on buſineſs jointly upon the ſame premiſes, and had a joint uſe of the vats, ſtills, &c., and to the eye of the world at leaſt the property belonged to the partnerſhip, however it might be as between themſelves. *Rd. Jackſon* had alſo an intereſt with *John Horn* in the leaſe. The buſineſs was a loſing concern; and *John Horn*, wiſhing to get out of it, appeared to the world to withdraw himſelf from it; and *Wm. Horn* appeared to continue in poſſeſſion of the premiſes and of the vats, ſtills, and utenſils for carrying on the buſineſs, together with *Rd. Jackſon*, and to exerciſe the ſame acts of ownerſhip as he had done before when in partnerſhip with *John Horn*. But in fact *John Horn* had ſecretly conveyed this property to *Wm. Horn* and *Rd. Jackſon*, ſaddled with the annuity to himſelf and his wife, which was likely to ruin the trade more rapidly than before. But there was no notice of the change to other perſons dealing with the partnerſhip; the deed was kept ſecret from them; the object of all the parties being, that the trade might be carried on by the exiſting partners with the ſame apparent capital as the old firm, and that the credit of the new partnerſhip might not be leſſened by the general knowledge of the fact, that the goods in queſtion were not their property. The ſecrecy of the transfer was as much for the benefit of *John Horn* as of the continuing partners; for if their credit were ſhaken, they would be leſs able to pay the ſtipulated annuity. In fact the bankrupts did gain a falſe credit by the poſſeſſion of the goods in queſtion. There is no fact of notoriety to reſiſt the concluſion that theſe

1808.

HORN against BAKER.

were the goods of the bankrupts: and the only fact relied on to ſhew that the property was not theirs is the ſecret indenture of the 20th of *March* 1801, by which a prior claim on the goods was ſecured to *John Horn*; but ſuch a ſecret transfer is of the very ſpecies of fraud which the ſtatute meant to guard againſt. The caſe of *Bryſon* v. *Wylie* (*a*) cannot be diſtinguiſhed from this in principle. The bankrupt there had the poſſeſſion of the dyer's plant, but he had not paid for it; he therefore agreed to aſſign it to the creditor, and to take it again on leaſe from him. There was no mala fides or fraud in the tranſaction as between thoſe two; and if the intereſt of no other perſon had been concerned, it was only juſt and reaſonable that the creditor ſhould have had his ſecurity: yet that was avoided by the operation of the ſtatute, as fraudulent in law againſt the creditors in general. The caſe of *Darby* v. *Smith* (*b*) is ſtrong to the ſame point. The caſe of *Walker* v. *Burnell* (*c*) turned as it ſeems on the notoriety of the goods which were left in the bankrupt's poſſeſſion continuing the property of the aſſignees under the firſt commiſſion: but that is a very doubtful caſe. The honeſty of the intent of the true owner cannot be ſufficient to protect the goods; for according to the report of *Copeman* v. *Gallant* in 7 *Vin. Abr.* 89. Lord *Cowper* ſaid, "if poſſeſſion and diſpoſition be given to a perſon who becomes bankrupt, *though no intent of fraud appear*; yet, if it give a falſe credit, there is the ſame inconvenience as if fraud were intended, &c.; and it matters not whether it were by fraud, or only by neglect, or out of a humour." And this was admitted in *Bucknell* v. *Royſton* (*d*) in the caſe of a bankruptcy.

(*a*) *Hil.* 24 *Geo.* 3. *B. R.* cited in 1 *Boſ. & Pull.* 83.

(*b*) 8 *Term Rep.* 82. (*c*) *Dougl.* 317. (*d*) *Prec. in Chan.* 287.

In

1808.

HORN *againſt* BAKER.

In the courſe of the argument *Groſe* J. aſked whether there were any uſage in the trade for diſtillers to hire or leaſe vats, ſtills, &c. with their premiſes? To which it was anſwered by the defendant's counſel, that no ſuch uſage appeared; and unleſs it were expreſsly found by the caſe, the preſumption would be, that things neceſſary to carry on the trade were provided by the traders themſelves: and that the poſſeſſion of ſuch things, which were of great value, muſt naturally give more credit to the diſtillers than the mere view of the ſpirits diſtilled, which often belonged to others. Lord *Ellenborough* C. J. alſo obſerved at the concluſion of the argument, that nothing had been ſaid with reſpect to the diſtinction between ſuch of the vats and ſtills as were affixed to the freehold, and thoſe that were moveable, and would be the ſubject of trover; between which, he ſaid, the Court thought that there was a material diſtinction; the words of the ſtatute of *James* being *goods and chattels*. And upon aſking *The Attorney-General* whether he meant to inſiſt upon the right of the aſſignees to ſuch of the articles as were fixed to the freehold; and referring to in *Ryall* v. *Rolle*; and being anſwered in the negative; his Lordſhip ſaid that if the reſt of the Court agreed with him in opinion as to the right of the aſſignees to ſuch of the articles as properly fell under the denomination of goods and chattels, it would be better to leave it to a referee to aſcertain out of court the difference of the value for which the verdict ſhould be entered.

Lord ELLENBOROUGH C. J. then proceeded.—The true object of the ſtatute 21 *Jac.* 1. *c.* 19. *ſ.* 10 & 11, was to make the *reputed* ownerſhip of goods and chattels in the poſſeſſion of bankrupts, at the time of their bankruptcy,

1808.

HORN *againſt* BAKER.

the *real* ownerſhip of ſuch goods and chattels, and to ſubject them to all the debts of the bankrupt: conſidering that ſuch reputed ownerſhip would draw after it the real ſale, order, alteration, and diſpoſition of the goods. The ſtills, it appears, were fixed to the freehold; and as ſuch, we think, would not paſs to the bankrupt's aſſignees under the deſcription of goods and chattels in the ſtatute. But as to the vats and utenſils, there is nothing in the caſe to rebut the reputed ownerſhip following the poſſeſſion of the bankrupts after the diſſolution of the old firm, when the buſineſs was continued to be carried on by the bankrupts alone in the ſame manner as it followed the poſſeſſion of the antecedent partnerſhip when the trade was carried on by *John*, *Robt.* and *Wm. Horn*. Before the deed of the 20th of *March* 1801, though *John Horn* might have had a priority of claim to the ſtills, vats, and utenſils, as between him and his partners; yet to the eye of the world the apparent ownerſhip of them was in the partners, *John*, *Robert*, and *William Horn*. After the deed *John* demiſed theſe things to *Wm. Horn* and *Richard Jackſon*, who continued to carry on the trade after he had retired from it, finding it to be a loſing concern; and inſtead of reſerving a rent, he reſerved an annuity payable to himſelf and his wife and the ſurvivor of them, with a liberty to the new partners to purchaſe theſe articles on the death of ſuch ſurvivor. Under this agreement *Wm. Horn* and *Richard Jackſon* continued in poſſeſſion of the property, carrying on the trade in the ſame manner as was done before; and to the eye of the world the property of theſe goods appeared to be veſted in them in the ſame manner as it appeared to be in the former partnerſhip. As between the parties to the contract, the new partners could not indeed ſell, alter, order, or diſpoſe,

1808.

HORN *againſt* BAKER.

poſe of the property but according to the proviſions of that deed: but as to the world in general they appeared to have the ſame right over it which the former partners had. Had they not then the *reputed* ownerſhip? If, as in ſome manufactories, where the engines neceſſary for carrying on the buſineſs are known to be let out to the ſeveral manufacturers employed upon them, there had been a known uſage in this trade for diſtillers to rent or hire the vats and other articles uſed by them for the purpoſe of diſtilling, the poſſeſſion and uſe of ſuch articles would not in ſuch a caſe have carried the reputed ownerſhip. But in the abſence of ſuch a uſage, there is nothing ſtated in the caſe which qualifies the reputed ownerſhip ariſing out of the poſſeſſion and uſe of the things in their trade. The world would naturally give credit to the traders on their reputed property; and the perſon who permitted them to hold out to the world the appearance of their being the real owners ought to be anſwerable for the conſequences, and was ſo intended to be by the ſtatute. For ſome time it was vexata queſtio whether the preamble controlled the enacting words, ſo as to confine the operation of the ſtatute to caſes where the bankrupt was the original owner of the property conveyed by him to the particular creditor; but the enacting words have been long held not to be ſo controlled. Here, in fact, the bankrupts were only leſſees of theſe goods; but that was a ſecret known only to the parties themſelves; and nothing appeared to teach the world that the bankrupts could not bind the property to the full extent of it. This is a caſe then which comes within the fair conſtruction of the enacting words. The caſe of *Bryſon* v. *Wylie* bears ſtrongly on the preſent; for that was not the caſe of a mortgagor keeping poſſeſſion of goods, as

1808.

HORN against BAKER.

might be ſuppoſed from the note of what was ſaid by Lord *Mansfield*: but the plaintiff, who was the original owner of the plant, finding that *Simpſon*, to whom he had ſold it on the ſecurity of two promiſſory notes, was not able to pay the notes when due, agreed to take back the plant and give up the notes, and to let the plant to *Simpſon* at a rent: under which agreement *Simpſon* continued in poſſeſſion of it up to the time of his bankruptcy. Mr. Juſtice *Buller* there diſtinguiſhed the caſe from that of a banker or factor who by the courſe of trade muſt have the goods of other people in his poſſeſſion; and therefore it did not hold out a falſe credit to the world. He meant therefore to ſay that where the poſſeſſion did hold out a falſe credit to the world, there the ſtatute would follow it, and attach upon the goods. And the caſes of *Mace* v. *Cadell*, and *Lingham* v. *Biggs*, are authorities to the ſame purpoſe. The principle to be deduced from all of them is, that where the reputed ownerſhip of the goods in the trader is permitted to be held out to the world, it ſhall, with reſpect to the world, be conſidered as the real ownerſhip. I do not enter into the queſtion, whether the bankrupts' poſſeſſion were conſiſtent with the deed; becauſe that would only apply to the time after which the plaintiff might have re-entered for non-payment of the annuity. Her not doing ſo might perhaps be argued as more diſtinctly ſhewing her intention to exhibit the apparent ownerſhip of the bankrupts to the world: but I lay no ſtreſs on it; for in my view of the caſe, however conſiſtent their poſſeſſion might have been with the deed, it would only have ſhewn that the deed itſelf was the fraud which the ſtatute meant to guard againſt. The principle is, that in all caſes where, by the conſent and permiſſion of the true owner of goods, a trader

a trader in poſſeſſion has the apparent ownerſhip, and incidental to that the order and diſpoſition of them; and no other circumſtance appears to control ſuch apparent ownerſhip, and ſhew that the trader was not the real owner; the true owner permitting the trader to exhibit this appearance does it at his peril. 1808.

HORN against BAKER.

GROSE J. The caſe of *Mace* v. *Cadell* has put a conſtruction upon the ſtatute, which has ever ſince ſettled, that where the real owner of goods ſuffers a trader to have the reputed ownerſhip, ſo as to have the apparent order and diſpoſition of them, and the trader becomes bankrupt, the ſtatute gives the property to the aſſignees for the benefit of the creditors. I only doubted whether the ſtills which were fixed to the freehold would paſs under this ſtatute; but it is now agreed that they do not. But with reſpect to the other articles, it is impoſſible to diſtinguiſh this caſe in principle from the current of thoſe which have been decided, which have gone upon the ground, that where the real owner enables a trader to acquire credit by having the poſſeſſion, and apparent order and diſpoſition of goods with reſpect to the world, he does in effect permit ſuch trader to take upon himſelf, and he has with reſpect to the world, the apparent ſale, alteration, and diſpoſition of the goods, within the meaning of the ſtatute.

LAWRENCE J. The queſtion in theſe caſes, as was obſerved by Mr. Juſtice *Buller* in *Walker* v. *Burnell*, is rather a queſtion of fact than of law. And therefore it ſeems more proper in ſuch caſes to leave it to the jury to ſay whether, under the circumſtances, the bankrupt had the reputed ownerſhip of the goods at the time; for if the

1808.

HORN against BAKER.

the true owner ſuffer a trader to have the reputed ownerſhip of goods left in his poſſeſſion, and he become bankrupt, the ſtatute ſays that the property ſhall go to his aſſignees. In this caſe therefore we are rather called upon to conſider, as upon a motion for a new trial, what concluſion a jury ſhould have drawn from this evidence, than to conſider a dry queſtion of law. The facts ſtated are, that one partner upon retiring from buſineſs leaſes to others who continue it, (one of whom had been in partnerſhip with him before,) certain ſtills, vats, and utenſils proper for carrying on the buſineſs, and which had been uſed by the former partners. The new partners become, in conſequence, to the world the apparent owners of the property. It may happen from the courſe of certain trades, that maſſes of machinery are let out by the owners to the mechanics engaged in them, and the notoriety of ſuch a uſage in the trade may rebut the preſumption of ownerſhip which would otherwiſe ariſe from the poſſeſſion; but in general the poſſeſſion of utenſils of trade muſt be taken to be by the owners of them. And I agree, that nothing turns upon the queſtion whether or not the poſſeſſion of the bankrupts in this caſe were conſiſtent with the deed under which they claimed from *John Horn*: for the very object of the ſtatute was to prevent the true owner from enabling another to hold himſelf out to the world as ſuch, and thereby gain a falſe credit: and this being a ſecret deed, the world could know nothing of its contents. It was preſſed in the courſe of the firſt argument, that the reputed ownerſhip mentioned in the ſtatute muſt be underſtood where there was a power of ſale conſided to the bankrupt by the true owner; and reference was made to the words of Lord *Mansfield* in *Mace* v. *Cadell*, that the ſtatute did not extend to all poſſible

1808.

HORN against BAKER.

ſible caſes where one man had another man's goods in his poſſeſſion, as the caſe of factors, &c. who have the poſſeſſion as truſtees, &c. *to ſell for the uſe of their principal:* "but the goods muſt be ſuch as the party ſuffers the trader *to ſell as his own.*" But this laſt expreſſion was evidently uſed in contradiſtinction to the caſe of factors, &c. who ſold for other perſons and not for themſelves. And he could not have meant to lay it down generally; for that was not the caſe of a ſale; but the facts there were, that the owner let the bankrupt into her houſe, where he paſſed as her huſband: but ſhe never gave him the power of ſelling the goods, and he never had ſold them: yet by treating him as her huſband ſhe had given him the reputation of being the owner of the goods; which was held to bring the caſe within the ſtatute. As to the caſe of *Bryſon* v. *Wylie*, on which my Lord has obſerved, Lord *Mansfield* certainly conſidered the whole as a trick and contrivance to evade the ſtatute: and what was ſaid by Mr. Juſtice *Buller* goes the whole length of our opinion in this caſe; that a factor, who muſt in the courſe of his buſineſs have other perſon's goods in his poſſeſſion, does not thereby gain a falſe credit; but that where the conduct of the true owner enables another in whoſe hands the goods are to hold out to the world the reputation of ownerſhip, he thereby gives that other a falſe credit to the extent of the property ſo confided; for which the ſtatute meant to make him reſponſible. It is often a queſtion of fact whether the poſſeſſion of goods do hold out a reputed ownerſhip in the poſſeſſor, as in the caſe of furniture in lodgings. In the preſent caſe, the opinion which we have formed from the facts ſtated will make it neceſſary to inquire which of theſe articles are fixtures, and which are not: and for the

value

1808.

HORN against BAKER.

value of the fixtures when aſcertained, and beyond that, for the damage which may have been done to the houſe in removing the fixtures, the plaintiff will be entitled to recover.

LE BLANC J. The queſtion is, whether the bankrupts having obtained the reputed ownerſhip of the moveable utenſils of the trade by poſſeſſion of them before and at the time of the bankruptcy, acquired the real ownerſhip by the ſtatute for the benefit of their creditors? I lay out of conſideration the queſtion of re-entry of the plaintiff; for I do not think that it makes any difference in this caſe. This deciſion will only be an authority for a caſe where the bankrupts were in poſſeſſion of utenſils neceſſary for carrying on their trade under a leaſe; and where there was no uſage of the trade for the trader to have ſuch utenſils let to him on hire. Wherever ſuch a uſage of trade may prevail, the caſe may deſerve another conſideration. I muſt take it upon the facts here diſcloſed, that *John Horn* was the owner of the utenſils in queſtion before the deed of *March* 1801; though that fact is very clumſily ſtated in the caſe: the Court however conſiders that by ſome means or another, which do not diſtinctly appear, theſe utenſils were the property of *John Horn*; and he demiſed them to the bankrupts, who were to carry on the trade after he withdrew from it; and without theſe articles they could not have carried on the trade; and there is no uſage in the trade for letting ſuch utenſils. The queſtion then is, whether, under theſe circumſtances, the bankrupts had the poſſeſſion, order, and diſpoſition of the goods by the conſent of the true owner? I think they had. For though there are many exceptions, as in the caſe of factors, bankers, lodgers, and others who

are

1808.

HORN *against* BAKER.

are known to have the goods of other perſons in their poſſeſſion; none of which, it is true, are expreſsly excepted in the ſtatute; yet the ground of all the exceptions has been, that the poſſeſſion of ſuch and ſuch deſcriptions of perſons did not carry to the underſtanding of the world the reputed ownerſhip. The ſame rule might extend to furniture let with a houſe, and perhaps even to furniture let without the houſe to be uſed there, where ſuch lettings were uſual; and by a parity of reaſon to utenſils of trade uſually let to the traders; becauſe poſſeſſion in ſuch caſes would not carry the reputed ownerſhip of the property, and would not impoſe on the world a falſe appearance of property in the poſſeſſor.

The verdict to be entered for the plaintiff for the value of the fixtures only, and the damage done in removing them.

1808.

Monday, Feb. 1ſt.

The KING *againſt* COURTENAY.

The charter of *Saltaſh* empowers the mayor, juſtice of the peace, and the reſt of the aldermen (ſeven in all), or the major part of them, of whom the mayor and juſtice to be two, when it ſhall ſeem to them *convenient and neceſſary*, to elect as many free burgeſſes as ſhall pleaſe them, *and to the ſame free burgeſſes ſo elected to adminiſter an oath*, &c. The defendant was elected a free burgeſs in *Oct.* 1804, and in *Dec.* 1806, at a meeting of ſix out of the ſeven aldermen, in conſequence of a mandamus to them to fill up the vacant place of alderman, and which meeting the mayor *ſaid* was held for that ſole purpoſe, the defendant tendered himſelf to be ſworn in; againſt which three aldermen proteſted, one of whom immediately left the aſſembly; but before the other two proteſters withdrew, the mayor, with the aſſent of two other aldermen, adminiſtered the oath of office to the defendant. Held,

AN information in nature of a quo warranto was filed againſt the defendant, calling upon him to ſhew by what authority he claimed to be a free burgeſs of the borough of *Saltaſh*; which ſtated that *Saltaſh* is an ancient borough, incorporated by the name of the mayor and free burgeſſes of the borough, &c.; that there is an indefinite number of free burgeſſes; and that the defendant, on the 18th of *December* 47 *Geo.* 3. uſed and exerciſed, and uſurped the office of a free burgeſs of the borough, and ſtill doth, &c. without any legal warrant. The defendant in his plea ſet forth a charter granted by his preſent majeſty, in the 14th year of his reign, whereby he incorporated the village of *Saltaſh* by the name of the mayor and free burgeſſes of the borough of *Saltaſh*; and thereby granted that one of the aldermen, to be elected in the manner therein mentioned, ſhould be the mayor; that there ſhould be ſix other free burgeſſes *of the inhabitants* of the borough, to be elected as therein mentioned, beſides the mayor for the time being; viz. ſeven

1. That the ſwearing in of the burgeſs might well be at a time ſubſequent to the election; he having had a preſent legal capacity to be ſworn in at the time of his election; and therefore not like the caſe of an infant elected.

2. That the act of ſwearing in, being merely miniſterial, may be done by the mayor, as preſiding officer, in the preſence of the majority of the mayor and aldermen, by whom ſuch act was required to be done, whenſoever and howſoever aſſembled, and without any previous ſummons for this purpoſe; there being no diſſent by the majority at the time when the oath was ſo adminiſtered.

3. Though three, an equal number of thoſe firſt aſſembled, *proteſted* againſt the defendant's being ſworn in when he firſt tendered himſelf to take the oath, yet one of the proteſters having withdrawn, it was competent to the majority who remained to adminiſter the oath; no vote having been come to by the major part at firſt aſſembled to preclude the body from doing the act at that meeting.

4. Quære, Whether, if it be found againſt a defendant in quo warranto, that, though duly elected, he was not duly ſworn in, there can be any other judgment againſt him than of ouſter abſolute; there being no inſtance of a judgment of ouſter quouſque.

capital free burgeſſes of the inhabitants of the borough in the whole, who ſhould be the aldermen and council. That the mayor of each preceding year ſhould be a juſtice of the peace until a new mayor ſhould in due manner be elected and ſworn. That it ſhould and might be lawful for the mayor and juſtice of the peace, and the reſt of the aldermen for the time being, or the major part of them, (of whom the mayor and juſtice of the peace were to be two,) from time to time, and at all times thereafter, when and ſo often as to them it ſhould ſeem *convenient and neceſſary*, to *nominate*, elect, and prefer, ſo many and ſuch perſons to be free burgeſſes as ſhould pleaſe them; and to the ſame free burgeſſes ſo elected *to adminiſter an oath* faithfully to execute all things which in the place of a free burgeſs belonged to be done; and this without any commiſſion or further warrant to be obtained from the king, &c. The plea then ſtated the acceptance of the charter: and that afterwards, on the 1ſt of *October* 1804, *John Buller* Eſq. then being mayor, *John Cleveland* Eſq. juſtice of the peace, and *R. Hickes*, *R. Thomas*, *James Buller*, and *J. Gaborian* Eſqs. aldermen, aſſembled at the *Guildhall* of the borough to nominate and elect free burgeſſes, did nominate and elect the defendant a burgeſs; and that being ſo elected the defendant afterwards, and before his uſer or claim of the ſaid office, on the 18th of *December* 1806, at the *Guildhall*, before the *ſaid James Buller*, then being mayor, the *ſaid John Buller*, then being juſtice of peace, and *S. Drew* Eſq. and the *ſaid R. Hickes*, *J. Cleveland*, and *J. Gaborian*, then being aldermen of the borough, was *duly ſworn* into the ſaid office of a free burgeſs, and took the oaths preſcribed by the charter; by virtue whereof the defendant claimed to be a free burgeſs of the borough.

The

1808.

The KING against SORETENAT.

The replication took iſſue on ſeveral facts ſtated in the plea; 1ſt, that the ſaid *John Buller*, *J. Cleveland*, *R. Hickes*, *R. Thomas*, *James Buller* (the alderman), and *J. Gaborian*, did not *duly aſſemble to nominate and elect free burgeſſes* in manner and form as pleaded. 2dly, That they did not nominate and elect the defendant into the office of a free burgeſs, in manner and form, &c. 3dly, That the defendant was not *duly ſworn* into the ſaid office in manner and form, &c. 4thly, That the mayor, and juſtice of the peace, and the reſt of the aldermen for the time being, or the major part of them, (the mayor and juſtice of the peace being two) did not adminiſter ſuch oath to the defendant, nor was the defendant ſworn, as by the charter is required. On all which facts iſſues were joined.

At the trial at *Bodmin* the firſt and ſecond iſſues, upon the due aſſembling of the mayor, juſtice, and aldermen for the election of the defendant as a free burgeſs, and the fact of his election by the ſame perſons in manner and form as alleged in his plea, were found for him.

As to the 3d and 4th iſſues, upon the fact and the regularity of the defendant's having been *ſworn* into the office of a free burgeſs, the jury found a ſpecial verdict to the following effect: That on the 18th of *December* 1806, the place of one of the aldermen being vacant, *James Buller*, the mayor, *John Buller*, the juſtice of peace, *R. Hickes*, *J. Cleveland*, *S. Drew*, and *J. Gaborian*, aldermen of the borough, (being the two quorum officers and ſix out of the ſeven aldermen,) and divers free burgeſſes, were aſſembled in the *Guildhall* of the borough, on due notice, in obedience to a writ of mandamus iſſued out of *B. R.* commanding them to proceed to the election and ſwearing in of an alderman of

1808.

The KING *againſt* COURTENAY.

the borough, in the room of *R. Thomas*, deceaſed. That at ſuch meeting the defendant came and offered himſelf to be ſworn into the office of a free burgeſs, and to take the uſual oaths; grounding ſuch claim on his election thereto of the 1ſt of *October* 1804; the mayor having before that time *ſaid* that the meeting was for the ſole purpoſe of electing an alderman. That *R. Hicks*, *S. Drew*, and *J. Gaborian*, (three of the aldermen,) on the defendant's ſo offering himſelf to be ſworn in, *proteſted* againſt his being ſworn in, and againſt doing *any thing* at that meeting *except* electing and ſwearing in an alderman; for which, as they alleged, the meeting was held; and delivered to the mayor a written proteſtation as follows—"we hereby proteſt againſt every proceeding of "the Court this day unconnected with the election of "an alderman. 18*th December* 1806. (ſigned) *R. Hicks*, "*J. Gaborian*, *S. Drew*," (together with the names of 16 free burghers, and directed) "To the mayor of *Saltaſh*, "the juſtice, the aldermen, and free burgeſſes of the ſaid "borough." That the three aldermen, *R. Hicks*, *S. Drew*, and *J. Gaborian*, then roſe to leave the room; but the mayor proceeded to adminiſter to the defendant the oaths uſed and required at the ſwearing in of a perſon duly elected into the office of a free burgeſs; *which oaths were ſo adminiſtered to the defendant after* R. Hicks (one of the three proteſting aldermen) *had withdrawn, and before* S. Drew *and* J. Gaborian (the two other proteſting aldermen) *left the room; which they did immediately afterwards.* But whether the defendant were under thoſe circumſtances duly ſworn into the ſaid office of a free burgeſs, as alleged by him in his plea; or whether the mayor, juſtice of peace, and the reſt of the aldermen, or the major part of them (the mayor and juſtice being two)

1808.

The KING *againſt* COURTENAY.

did adminiſter ſuch oath to the defendant, and the defendant were ſworn, as by the charter is required, and by the plea is ſuppoſed, the jury prayed the advice of the Court in point of law.

This caſe was argued in the laſt term, when

Adam jun. for the proſecutor contended that the defendant was not duly ſworn into the office of a free burgeſs on three grounds; 1. becauſe the ſwearing in was not at the ſame time as the election. 2. Becauſe the defendant was ſworn in at a corporate meeting ſummoned for a different ſpecific purpoſe, and there was not the conſent of the whole body to the act at the time, ſo as to cure the defect of ſummons for this purpoſe. 3. Becauſe he was not ſworn in by the mayor, juſtice of peace, and the reſt of the aldermen, or the *major part* of them. Firſt, The election and ſwearing in muſt be ſimul et ſemel. This was ſo conſidered in the *King* v. *Carter* (*a*), where the words of the charter of *Portſmouth* were in ſubſtance the ſame as in this caſe. [Lord *Ellenborough* C. J. The queſtion in judgment there was, whether the corporation could elect an *infant* into an office who was *incapable* of taking it at the time.] Some of the Judges, particularly *Aſton* J., went upon the ground that by the true conſtruction of the charter the ſwearing in was intended to be done at the ſame time as the election, as if it were one continuing act. And the ſame intention is to be collected from the direction in this charter to elect free burgeſſes when it ſhould ſeem "*convenient and neceſſary*" to the corporation. For if at any time it is *neceſſary* to elect, it muſt be equally neceſſary

(*a*) *Cowp.* 220—7.

that

1808.

The KING *againſt* COURTENAY.

that the perſons elected ſhould immediately take upon themſelves the office and be ſworn in; otherwiſe the ſwearing in at a future time will not be ſuch as will ſupply the neceſſity: and the corporation are accordingly directed in the ſame ſentence to adminiſter the oath to the burgeſſes ſo elected, without adding when it ſhall be convenient; the charter contemplating that the power of filling the office ſhould be completely executed at one and the ſame time. The general convenience of the thing is alſo in favour of this conſtruction; for if the ſwearing in be left to any future time at the pleaſure of the perſons elected, the corporation, having no means of compelling them to come in and be ſworn, might be diſſolved in the mean time for want of ſufficient numbers: and at a great diſtance of time doubts might ariſe as to the identity of the perſons ſo nominated. 2dly, The corporation having been aſſembled for the ſpecific purpoſe of electing an alderman, and which was declared by the mayor to be the ſole purpoſe of their meeting, could not do any other act unconnected with that purpoſe, without the concurrence of the whole body. For which he cited *Machell* v. *Nevinſon* (*a*), *Rex* v. *Wake* (*b*), *Rex* v. *Carliſle* (*c*), and *Rex* v. *Theodorick* (*d*): and in anſwer to an obſervation from the Bench, that theſe were caſes of elections; he argued that there was a diſtinction in principle between proceeding to an election, and to a ſwearing in, where the corporation was ſummoned for another diſtinct purpoſe. And the objection, he ſaid, applied with peculiar force to a corporate meeting aſſembled to do a ſpecific act in obedience to a writ of mandamus, where the ſwearing in of the defendant interrupted the proceeding which

(*a*) 2 *Ld. Raym.* 1355.
(*b*) 1 *Barnard.* 80.
(*c*) 1 *Stra.* 385. and vide 8 *Eaſt*, 544.
(*d*) 8 *Eaſt*, 543.

1808.

The KING *againſt* COURTENAY.

it was the duty of the aſſembly to diſpatch, and thereby endangered its continuance. 3dly, And principally, he objected, that the defendant was not ſworn in before the mayor, juſtice and aldermen, or the major part of them, as required by the charter, being the ſame body who have power to elect. The conſent of the body by whom the ſwearing in is required to be is neceſſary to its validity; and therefore in *Rex* v. *Ellis* (*a*), the ſwearing in was held

(*a*) 2 *Stra.* 994. The following Report of this caſe, from Mr. *Ford*'s Notes, is more full than that in *Strange*.

REX *v.* ELLIS, *M.* 8 *G.* 2. *B. R.*—Quo warranto to try his right to be mayor of *New Romney*; one iſſue ſent to trial was, if duly *elected*; this was found for the defendant. Another was, if duly *ſworn*; and this was found for the king. And the defendant moved for a new trial upon a ſuppoſition, that *Eyre* C. J., who tried the cauſe, had given a wrong direction to the jury. The evidence was, that after the election Mr. *Ellis* came to be ſworn, but the old mayor refuſed him: however, in the preſence of the mayor, who ſtill diſſented, the town clerk, the uſual officer to adminiſter the oath, gave the book to the defendant, who repeated the oath after him: and the charter requiring the new mayor to be ſworn *before* the old one, the queſtion was, if this were not a good ſwearing in within the charter?

Strange urged that the charter was, "*before*" and not "*by* the mayor:" ſo that the ſwearing in agreed with the words of the charter; and, as this fact is, was alſo agreeable to the intent of it: for the defendant being fairly elected, the crown could never deſign to enable the perſon who is to adminiſter the oath of office to exclude him: but as the election is the foundation of the party's right, whenever that is indiſputable, the mayor ought to ſwear in the party elected; and conſequently, upon refuſal to do his duty, the mayor elect, if he can procure himſelf to be ſworn within the words of the charter, is fairly and legally ſworn. And it was urged that, if the Court ſhould be of another opinion, mayors or other officers who are ill-diſpoſed will for the future meet with encouragement to tranſgreſs their duty in this point: when it comes to be known that the officer has it in his power to reject or to admit the party elected, there will be people enough ready to engage in a piece of dirty work.

Lord

1808.

The KING *againſt* COURTENAY.

held to be bad, becauſe the mayor before whom it was to be done, though preſent, was not aſſenting: and it was there ſaid that there was no difference between a ſwearing in *by* and *before* the mayor. The ſame objection prevailed in the caſe of the Duke of *Bedford* (*a*), to whom the oath of office of governor of the *Bedford* Level was adminiſtered by the regiſtrar, in the preſence indeed of the ſix bailiffs by whom it was required to be adminiſtered, but not by their conſent; for they endeavoured to go away, but the door of the room was ſhut on them, and they were compelled to remain while the Duke was ſo ſworn in. Now, though it be ſufficient if a majority of each integral part aſſemble, and a majority of thoſe ſo aſſembled conſent to the ſwearing in; yet here was no ſuch conſenting majority; for out of the ſix aldermen aſſembled three were not conſenting to the act: and theſe were only preſent

Lord HARDWICKE C. J. The title to every office is grounded on two things; the election of the party, and his being ſworn into the office: there is no difference in the world between a ſwearing in *by* and *before* the mayor: in either caſe the mayor is equally entruſted with the ſwearing in of his ſucceſſor; and if he deny to ſwear him in, though ever ſo fairly elected, he cannot have any right to his office. The adminiſtration of the oath by the town clerk againſt the commands of the mayor was as void an act, as if, in caſe this court were the proper place to adminiſter the oath in, one of our officers had wilfully given the oath againſt the order of the Court: it is the conſent of the Court that eſtabliſhes or makes void the act of ſwearing. As to the encouragement this opinion may give to preſiding officers, I apprehend it can be of no effect; they all know that they are ſtill ſubject to the power of this Court, which will by mandamus compel an execution of their duty. The defendant ſhould have brought his mandamus, and not have relied on ſuch a ſwearing in; and then he might have been legally ſworn in. As it is, the direction was right, and the iſſue is well found: ſo there is no reaſon for a new trial; with which the other Judges agreed. So it was denied.

(*a*) 1 *Barnard.* 242. 280.

1808.

The KING *againſt* COURTENAY.

by the compulſion of the mandamus for another purpoſe, and proteſted againſt the defendant's being ſworn in. But it may ſaid, that after one of the three had withdrawn, there was a competent meeting of five out of the ſeven aldermen, of which three, the major part of the five, were competent to conſent to the act. But when the defendant offered himſelf to be ſworn in, all the ſix were preſent; and then the propoſal was in effect negatived; and the act was only done after all the three proteſting members had riſen to go out of the room, though in fact, before two of them had actually quitted it: but the whole muſt be taken together, as done uno flatu; and then either there was not a majority of thoſe preſent conſenting, or there was not a majority of the integral part in effect preſent when the oath was adminiſtered, but it was done by ſurprize and fraudulently; and eſpecially as no previous notice had been given of a meeting for this purpoſe.

Another point was made in argument, upon which however no judgment was given; whether, ſuppoſing the ſwearing in of the defendant to have been invalid, there ſhould be judgment againſt him of ouſter *abſolutely*, or only *quouſque* he ſhould be legally ſworn in. And *Adam* contended, that the judgment ſhould be of ouſter abſolute; and this as well upon the words of the ſtat. 9 *Anne c.* 20. *ſ.* 5. which ſays, that the Court ſhall proceed as well to give judgment of ouſter againſt, as to *fine*, any perſon found guilty of uſurping an office; and wherever there is judgment to fine, there muſt be judgment of ouſter abſolute: as alſo upon the want of any precedent or authority for entering up a judgment *quouſque* in ſuch a caſe, where a defendant has ſet up a title to an office, which has been found againſt him. And he referred to *Rex* v. *The*

The Mayor of Penryn (*a*), and *Rex* v. *Hearle* (*b*); and obſerved, that though *Reynolds* J. ſo far differed from the reſt of the Court in *Hearle*'s caſe as to conſider it no new thing to meet with inſtances of judgments quouſque; yet it was plain, that he muſt have confounded judgments of *ſeizure* quouſque, which were frequent enough, with judgments of *ouſter* quouſque, of which none of the other judges had ever heard. And he muſt have been afterwards ſatisfied of his miſtake; for in *Rex* v. *Reek* (*c*), upon a trial at bar before the ſame judge as one of the Court, it having been found on the 4th iſſue, that the defendant was not ſworn and admitted into the office of burgeſs; the Court agreed, that though the other iſſues were found for him, yet there muſt be judgment of ouſter on the authority of the *King* v. *Pinder*, mayor of *Penryn*. And that is in point; for though the iſſue on his due election to the office was found for him, yet the ſecond iſſue on the ſwearing in being found againſt him, judgment of ouſter abſolute was pronounced, which was affirmed by the Houſe of Lords. He alſo obſerved, that there was no precedent of a judgment of ouſter quouſque in the records of the Crown Office; and that ſuch a judgment would be wholly inoperative; for it would only ſuſpend the party from the exerciſe of his function, which the law, without any ſuch judgment, would do, until he choſe to come in and be ſworn; but ſtill the corporation could not compel him to be ſworn, nor elect any body elſe into his office, as if vacant.

Dampier, contrà, in anſwer to the firſt objection to the defendant's title, that the election and ſwearing in of the defendant were not *ſimul et ſemel*, founded on what was

(*a*) 1 *Sra.* 582. (*b*) *Ib.* 625.

(*c*) 2 *Ld. Ray.* 1447. Vide 2 *Stra.* 952. *Rex* v. *Buddle and Taylor.*

1808.

The KING *againſt* COURTENAY.

ſaid by *Aſton* J. in *Rex* v. *Carter* (*a*), diſtinguiſhed this caſe, where the perſon elected had a preſent capacity of being ſworn in, and of perfecting his title at the time, from that, where the election was of an infant only five years old, who was then incapable of being ſworn in and of executing the office. And it was there admitted by Lord *Mansfield*, that abſentees, who of courſe could not be immediately ſworn in, might be elected. Such a conſtruction would in effect confine the choice of *burgeſſes* to the *inhabitants* of the borough; which the charter has not done; though the choice of magiſtrates is ſo confined. As to the ſecond objection, that the corporate meeting having been called for another purpoſe, the conſent of the whole body was neceſſary to legalize the ſwearing in; this rule has only been applied to acts of judgment and diſcretion, and not to mere miniſterial acts, ſuch as the ſwearing in of one before elected, which this Court would compel to be done by mandamus abſolute in the firſt inſtance. The declaration of the mayor that the meeting was only for the purpoſe of electing an alderman, would not invalidate the ſwearing in, if the defendant had a right to require it. As to the third objection, that the majority of the body before whom the oath is to be adminiſtered did not aſſent to the ſwearing in; ſuppoſing ſuch aſſent to be neceſſary where the act is merely miniſterial, and may be performed any where within the borough, and was performed by the principal officer preſent, who was the proper perſon to adminiſter the oath; at any rate, the Court would require the moſt expreſs and formal diſſent, where it was the obvious duty of thoſe preſent to do the act, and which this Court would have compelled them to do. Now the proteſt of the three aldermen was againſt all acts unconnected with the

(*a*) *Cowp.* 227.

election

election of an alderman: (The Court obſerved, that it did not appear whether the ſwearing in of the defendant were unconnected with ſuch election.) Even if it were, the effect of the proteſt could only operate while the proteſting parties remained; and when one of them (*Hicks*) went away before the meeting broke up, he could not leave his vote behind him. His proteſt was only a ſignification of what he meant to do, namely, to vote againſt the ſwearing in of the defendant whenever it was propoſed to be done; but which he went away without doing. To make his oppoſition effectual he ſhould have ſtayed and voted againſt the act; for, on his retiring, three became a majority of the five who remained. In *Oldknow* v. *Wainwright* (*a*), and *Rex* v. *Withers* there cited (*b*), elections of officers by the minority of thoſe preſent; the majority not voting againſt the candidates nominated, nor for any other candidates, but only proteſting againſt any election; were held good. If the ſwearing in were a deliberate act, *Hicks* ought to have ſtayed and aſſigned his reaſons againſt it; in order if right, to convince his brethren; or to have been convinced by them, if wrong: the reſt might have ſatisfied him that it was a mere miniſterial act, and that he was bound to complete the title which he had helped to confer.

Upon the form of the judgment to be entered, if againſt the defendant, whether of ouſter abſolute, or quouſque; he ſaid that the caſes cited againſt the latter were of *annual* officers: but where a right to the freedom of a corporation may be gained by election, by birth, or apprenticeſhip, it ſeems ſtrange and unjuſt to ſay, that becauſe the party happened unwarily to be ſworn in at a meeting improperly convened or conſtituted, he ſhould

(*a*) 2 *Burr.* 1017. (*b*) *Ib.* 1020.

loſe

1808.

The KING *againſt* COURTENAY.

loſe his former privilege for ever, if afterwards ouſter by quo warranto. All the caſes were conſidered in *Rex* v. *Clarke* (*a*), who, having been ill ſworn in, had afterwards diſclaimed upon an information filed againſt him for uſurping the office: and though having ſubmitted to a judgment of complete ouſter, he was held to be concluded from ſetting up again his original right; yet Lord *Kenyon* intimated that there might have been a judgment quouſque only againſt him; and referred to *Rex* v. *Biddle* (*b*), as turning on that diſtinction. He admitted, however, that the latter caſe did not come up to the point for which it was referred to in *Clarke*'s caſe; for in *Biddle*'s caſe the defendant only confeſſed the uſurpation of the office for the former part of the time ſtated in the information.

Adam in reply, as to the laſt point, obſerved, that there could not have been judgment of ouſter in *Biddle*'s caſe; becauſe it appeared on the whole record, that at the time of the judgment to be pronounced, he had a good title to the office. That *Reek*'s caſe was not that of an annual officer. And that the opinion thrown out by Lord *Kenyon*, in *Rex* v. *Clarke*, was extrajudicial. Upon the firſt point, he ſaid, that the reaſoning of the judges in *Carter*'s caſe was general, and not confined to the caſe of infants. As to the ſecond, that the ſwearing in here was part of the election, and no more miniſterial than the nomination. That acts might intervene which would juſtify the body in refuſing to ſwear in the party nominated to the office by a majority of votes. As to the third and principal point; that the proteſt was againſt the very act of ſwearing in the defendant, and therefore operated as a direct negative of that act, and not like a general

(*a*) 2 *Eaſt*, 75. 84. (*b*) 2 *Stra.* 952.

proteſt

proteſt againſt the acts of the aſſembly, or againſt any election at the time required by the charter. The caſe ſtood over till this term, when

Lord ELLENBOROUGH C. J. delivered the judgment of the Court. After ſtating the pleadings and ſpecial verdict.

The only queſtion ariſing upon this ſpecial verdict for our conſideration is, Whether, under the circumſtances ſtated, the defendant were duly *ſworn* into the office of a free burgeſs: the validity of his *election* as a free burgeſs is not diſputed. The facts, ſtripped of form are theſe: the defendant was elected a free burgeſs on the 1ſt of *October* 1804: from that time to the 18th *December* 1806 he does not appear to have offered himſelf to be ſworn in. On that day, when the mayor, juſtice, and aldermen, being the two quorum officers, and ſix out of the ſeven aldermen, were aſſembled, in obedience to a mandamus of this Court, to elect an alderman, in the place of one who was dead; the mayor having before that time *ſaid*, that the meeting was for the ſole purpoſe of electing an alderman; (but when, and to whom, and whether to any of the aldermen or not, he had ſo ſaid; and whether at or before the time of ſuch their aſſembling any of the aldermen knew him to have ſo ſaid; or whether, after having ſo ſaid, he might not have declared to the contrary; does not appear:) but the mayor having, at ſome time before the meeting, ſaid to ſomebody, that the meeting was for the ſole purpoſe of doing the corporate act required by the mandamus to be done: all the exiſting aldermen being aſſembled, and the whole of the body under the charter; except the only one whoſe vacancy was then to be filled up: upon the defendant's offering himſelf to be ſworn in, three aldermen, out of the ſix preſent,

1808.

The KING *againſt* COURTENAY.

ſent, *proteſted* againſt the doing any thing at that meeting, except the buſineſs required by the mandamus: whereupon, after one of the three had withdrawn, and before the other two had withdrawn, and whilſt five out of ſeven, (the whole body) and five, out of the exiſting number of ſix, who had all met, and ſtill continued together, (though two were in the act of departing,) he was ſworn in, ſuch *previous proteſt* of three of the ſix notwithſtanding. It cannot be diſputed but that the number and deſcription of perſons aſſembled were competent to have ſworn in the defendant, if they had choſen ſo to do; and it is equally clear, (unleſs there be ſome foundation in law for the firſt of the points made in argument, on the part of the proſecution; viz. that the ſwearing in muſt be immediately conſequent upon the election, or *ſimul* and *ſemel*, as it was contended it ſhould be;) that this Court would, upon their refuſal to ſwear him in, have by mandamus compelled preciſely the ſame body as was then aſſembled to have met again for the very purpoſe of ſwearing him in, and of thereby rendering him a complete burgeſs. The points made in argument, on the part of the proſecutor of this information, and upon which the defendant's title as a free burgeſs was endeavoured to be impeached, were three: firſt, the one juſt alluded to; viz. that his ſwearing in and election did not take place at the ſame time, or rather the one immediately after the other: ſecondly, that the defendant could not be duly ſworn in at a meeting of the mayor and aldermen *called for a different purpoſe*: and, thirdly, that he was not ſworn in, as the charter required, by the mayor, juſtice, and aldermen, or the major part of them.

As to the firſt objection to the defendant's title, that he was ſworn in at a time different from that of his election;

tion; it is reſted on what was ſaid by *Aſton* Juſtice in the caſe of *The King* v. *Carter*, *Cowp.* 220. viz. that "in "reſpect of the oath, the *election* and *ſwearing in* are "clearly intended to be *ſimul* and *ſemel*." That was the caſe of an election to the office of burgeſs in the borough of *Portſmouth*, under a charter authoriſing the mayor and aldermen, "when and as often as it ſhould appear to them "to be fit and neceſſary, to name ſo many and ſuch perſons "to be burgeſſes as they ſhould pleaſe; and to the ſaid "burgeſſes ſo choſen, to adminiſter an oath for their "faithfully executing the ſaid office of burgeſs." It appeared by the pleadings on record that the defendant, when an infant under ſix years of age, had been elected a burgeſs, and ſworn in after he had attained his age of 21. And the queſtion was, Whether an infant, ſo elected, were duly elected according to the terms of the charter? which turned upon this, whether the king had by that charter given the corporation a power to grant inchoate rights to *infants*, who were, as ſuch, under *a preſent incapacity* of being ſworn, and which rights were to be put into execution upon their attaining the age of 21. So far from maintaining the neceſſity of an immediate ſwearing in, Lord *Mansfield* adverts to the *Cambridge* caſe, lately decided in that court, in which a perſon abſent in *America* had been choſen mayor: and Lord *Mansfield* recognizes the right of a corporation to chooſe abſent members, if it be done fairly and conſiſtently with the charter, and not fraudulently and colluſively, as was done in the *Cambridge* caſe. According to Lord *Manſfield*, therefore, a perſon *capable of being ſworn*, if preſent, may be elected, if abſent, (and where, on that account, a ſwearing in could not immediately take place,) if he were in other reſpects eligible. Lord *Mansfield* therefore

1808.

The KING *againſt* COURTENAY.

only, "that the mayor had before that time *ſaid* that the "meeting was for the ſole purpoſe of electing an alder-"man:" and ſuppoſing it to have been diſtinctly alleged, that the meeting was in fact called, and had aſſembled, for that ſpecial purpoſe only; yet even ſo, it appears to us that, however true this propoſition may be as applied to corporate buſineſs of a deliberative or judicial nature, the *merely miniſterial* buſineſs of ſwearing in an officer, antecedently well elected, might be proceeded upon by the mayor, in the preſence of the majority of the mayor and aldermen, *whenſoever, and howſoever aſſembled;* if ſuch majority did not, at the very time, expreſsly diſſent from the doing of that act which the mayor was immediately engaged in performing. Giving the fulleſt effect to the antecedent proteſt of the three aldermen, it could amount to no more than a diſſent on their part to the ſwearing in at that preciſe time when the defendant was actually offering himſelf to be ſworn in; or at moſt to his being ſworn in during ſuch time as they continued to make a part of that aſſembly; but it could not prevent the majority of a competent number remaining aſſembled from afterwards, at any time, doing or aſſenting to the miniſterial act proteſted againſt, in reſpect of the ſame perſon, if they choſe ſo to do. And the ſubſequent doing that act by the mayor, (when the aldermen and majority of the whole body, when the quorum officers, as a part thereof, were preſent, without any actual diſſent being expreſſed by any,) muſt be taken to have been done with the tacit aſſent at leaſt of the majority of thoſe who remained and had not objected. On this occaſion no queſtion was ſubmitted to the aſſembly, which, having been conſidered and voted on, can be treated as having bound and concluded thoſe who had aſſembled from

ſwearing in the defendant till ſome future time: and we have only to conſider what is the effect of three members of this aſſembly wrongfully, as far as appears in this ſpecial verdict, objecting to the defendant's being ſworn into his office, though legally entitled, and afterwards quitting the aſſembly, with ſuch interval of time as to leave a competent number to aſſent to the mayor's act of ſwearing in the defendant. Had they all remained with the others ſo long as they continued aſſembled; or had they all gone away before the oath was adminiſtered; the wrong they intended might have been effected: but it is not to be expected that the Court ſhould not prevent, if it be poſſible, the defendant from being deprived of a franchiſe to which he was legally entitled, by a practice contrary to the duty of thoſe who were concerned in it. This is ſaid upon a ſuppoſition that ſuch aſſent was ſtrictly neceſſary; and that what is laid down in *The King* v. *Ellis*, 2 *Stra.* 994. is law, *i. e.* that a ſwearing *before*, &c. is the ſame as a ſwearing *by*, &c.; and that as it was to be the act (in that caſe, of the mayor,) in this caſe, of the mayor and aldermen; that *the aſſent of the party before whom*, &c. *muſt go along with it*; which, in reſpect to an aggregate body having no deliberative or judicial function to perform on the ſubject, nor, as far as appears, any thing more to do upon the occaſion, than for a majority of them to afford their perſonal attendance, may admit of ſome queſtion; unleſs indeed that caſe is to be underſtood as being concluſive on the point.

The third objection (the diſcuſſion of which has been in part anticipated by what has been ſaid, as to the effect of the aſſent of the body called for a different purpoſe,) is, that he was not ſworn in *by the mayor, juſtice, and aldermen, or the major part of them.* And the caſe of *The*

1808.

The KING *againſt* COURTENAY.

King v. *The Duke of Bedford and Others*, 1 *Barnard.* 280. has been principally relied upon in ſupport of this objection. But the facts of that caſe are widely different from thoſe of the preſent. In that caſe, the ſtatute required that the ſix bailiffs, or one of them, *ſhould adminiſter* the oath to the governor after he was elected; inſtead of which the oath was adminiſtered by none of them to the duke, as governor, but by the regiſtrar, in the preſence of the ſix who had been ſhut into the room after an ineffectual attempt on their part to eſcape from it: and not only without any conſent or authority on the part of *any* of them to the adminiſtration of the oath by the regiſtrar, but at a time when their mere preſence, during the time of ſwearing, was enforced by an act of immediate dureſs upon their perſons. In the caſe now before the Court, the oath was adminiſtered by the preſiding member of a competent aſſembly for the purpoſe; in which act the majority of thoſe who remained, being a ſufficient number to make ſuch aſſembly, virtually acquieſced; according to what was ſaid by Lord *Mansfield* in *Oldknow* v. *Wainwright*, 2 *Burr.* 1021.; as no diſſent was expreſſed by any; and the act being ſuch an one as, if not done, this Court would have preſently afterwards, upon application for the purpoſe, by mandamus, have compelled them to re-aſſemble for the purpoſe of performing, and to have performed accordingly. We are of opinion therefore that the ſwearing in of the defendant, under the circumſtances ſtated, was a due ſwearing in of the defendant as a free burgeſs by the mayor, juſtice, and major part of the aldermen, as alleged in his plea, and as required by the charter.

The Court being of opinion that the defendant was well elected and ſworn in; the remaining queſtion made

in

1808.

The KING *againſt* COURTENAY.

in argument, as to the nature of the judgment which it would have been proper for us to have given if we had been of a different opinion; namely, whether it ſhould have been a judgment of abſolute ouſter, or of ouſter quouſque, does not ariſe. If it had ariſen, it is enough for us to ſay, that after diligent ſearch, we can find no precedent of a judgment of ouſter quouſque upon the files of this Court.

Judgment for the Defendant.

RIGHT, on the Demiſe of JOHN ALLEN COMPTON and Others, *againſt* THOMAS COMPTON.

Monday, Feb. 1ſt.

THIS was an ejectment for a farm and lands called the *Lower part* of the *Lain Farm*, in the pariſh of *Amport* in the county of *Hants*, on the demiſe of *John Allen Compton* on the 27th of *March* 1806. The defendant, *Thomas Compton*, defended only for three-fourths of the premiſes: and the leſſor of the plaintiff having

Where there is no connexion by grammatical conſtruction or direct words of reference, or by the declaration of ſome common purpoſe, between diſtinct deviſes in a will, the ſpecial terms of one deviſe cannot be drawn in aid of the conſtruction of another, although in its general terms and import ſimilar, and applicable to perſons ſtanding in the ſame degree of relationſhip to the teſtator; and there being no apparent reaſon, other than the different wording of the clauſes, to preſume that the teſtator had a different purpoſe in view.

Therefore, where the teſtator having a ſon married, and ſix grandſons and three grand-daughters, and three farms, deviſed *all* his lands to his ſon *for life*; and after his death gave to his eldeſt grandſon *Thomas* (the defendant) the *north ſide* of *Down Farm*, and to his grand-daughter *Frances* the *ſouth ſide* of the ſame farm: and to his grandſons *George* and *Edmund*, and his grand-daughter *Elizabeth*, "the *upper part* of *Lain Farm*, equally between "them, ſo long as they ſhould remain ſingle; but if either married, then to have *paid by* "*the other two* 10*l.* a-year for his or her life;" and to his grandſons *Edward* and *John*, and his grand-daughters *Mary* and *Ann*, "the *lower part* of *Lain Farm*, equally between "them (which made them tenants in common) ſo long as they remained ſingle; but if "either married, then 10*l. a-year* (not ſaying to be *paid by the others*) for his or her "life:" and then gave the third farm to another grandſon: held that on the marriage of *Edward*, *Mary*, and *Ann*, their co-deviſee of the lower part of the *Lain Farm*, *John*, who remained ſingle, could not recover the 3-4ths of the farm forfeited by their marriage, as upon the ſuppoſition that the 10*l.* a-year for life to each of the deviſees ſo marrying was to be paid *by him* who remained ſingle; as in the correſponding deviſe of the other part of the *Lain Farm*: but the 3-4ths may be chargeable with the annuities of 10*l.* a-year to each in the hands of the heir at law, who was entitled to thoſe ſhares.

Neither could the grandchildren take a fee by implication in the ſhares ſo deviſed to them generally, without words of limitation, merely from the circumſtance that an expreſs eſtate *for life* was firſt given to the teſtator's ſon and heir at law.

1808.

RIGHT ex dem. COMPTON *againſt* COMPTON.

taken judgment for the other fourth againſt the caſual ejector, the cauſe was tried as to the three-fourths before *Chambre* J. at the ſpring aſſizes 1807, at *Wincheſter*, when a verdict was found for the plaintiff, ſubject to the opinion of the Court on this caſe. *Thomas Compton* the grandfather of the defendant, being ſeiſed in fee of the premiſes, and of ſeveral other farms and lands in *Amport* on the 9th of *May* 1806, by his will deviſed as follows. "I give unto my ſon *Thomas Compton*, all my lands for his life. I give unto my grandſon *Thomas Compton*, after the death of his father; all the north ſide of my *Down Farm*, being about 250 acres. I give unto my grand-daughter *Frances*, the wife of *John Weeks*, all the ſouth part, being about 240 acres after the death of her father. I give unto my grandſons *George* and *Edmund*, and my grand-daughter *Elizabeth*, *the upper part* of the *Lain Farm*, being about 200 acres, after the death of their father, *equally* between, *as long as they ſhall remain ſingle*; but if *either* of them *marry*, *then to have paid by the other two* 10*l. a-year for his or her life*. I give *Edward* and *John* and my grand-daughters *Mary* and *Ann*, all that *lower part* of the *Lain farm*, being about 240 acres, after the death of their father, *equally* between, *as long as they ſhall live ſingle*; but if *either* of them marry, *then* 10*l. a-year for his or her life*. I give unto my ſon's wife, if (ſhe) ſhould outlive him 5*l. a-year out of each of the farms during her life*; and alſo the intereſt of 700*l. Eaſt India* ſtock of three per cent. annuities, and at her death to be equally divided among her children. I give unto my daughter *Mary*, the wife of *George Jennings*, the intereſt of 1400*l.* in the three per cent. *Eaſt India* ſtock; and at her death the money to be divided equally between her ſon *George* and her daughter *Patty*. I give unto my grandſon *Harry*, after his father, the farm called *Old Lodge*. I do make my ſon executor."

The

1808.

RIGHT ex dem. COMPTON *againſt* COMPTON.

The teſtator died in 1791: all the deviſees ſurvived him, as did *Frances* the wife of *Thomas Compton* the ſon. *John Allen Compton*, the leſſor of the plaintiff, is the perſon called in the will *John*. *Thomas Compton*, the ſon, after his father's deceaſe, entered into the ſeveral lands deviſed to him, and was poſſeſſed thereof till his death in 1795. *Frances Compton*, his wife, ſurvived him; and ſo did her children, *Thomas Compton*, the defendant, *George*, *Edmund*, *Edward*, and *John Allen*, the leſſor of the plaintiff. *Elizabeth*, *Mary*, and *Ann*, are ſtill alive. *Thomas Compton* the defendant, who is the heir at law of the teſtator, and of *Thomas Compton* the ſon, took poſſeſſion of the premiſes in queſtion, on the death of his father, and ſtill holds them. *Frances Compton*, the widow of *Thomas* the ſon, is ſtill alive, and has been regularly paid the annuities given to her by the will, ſince her huſband's death. *Edward*, *Mary*, and *Ann*, all married before the day of the demiſe in the declaration. *J. A. Compton* is ſtill ſingle. The queſtion was Whether *J. A. Compton* took any and what eſtate in the three-fourths of the *lower part* of *Lain* farm, upon the marriage of his brother *Edward* and his ſiſters *Mary* and *Ann*? and if the plaintiff were entitled to recover the three-fourths, or any part thereof, the verdict was to ſtand; if not, a nonſuit was to be entered.

This caſe was argued in *Michaelmas* term laſt by *Dampier* for the plaintiff, who mentioned *Andrews* v. *Southouſe*, 5 *Term Rep.* 292. as being moſt like the preſent caſe: and by *Pell* for the defendant, who referred to *Doe* v. *Child*, 1 *New Rep.* 345. where Lord C. J. *Mansfield* mentioned as the reſult of all the caſes, that an heir at law was not to be diſinherited unleſs by words of limitation, or by expreſſions which directly or by inference beyond all doubt ſhew an intention to give an eſtate in fee to the deviſee.

1808.

RIGHT ex dem. COMPTON against COMPTON.

Lord ELLENBOROUGH C. J. now delivered the opinion of the Court.

The queſtion in this caſe depends on the conſtruction of a very ill drawn will, from which if it be in the power of the Court to collect the intent of the teſtator, without any rational ground of doubt, it will be its duty to give it effect; but on the contrary, if the Court can only form conjectures of his intent, the title of the heir at law muſt prevail. From what is ſtated in this caſe it appears, that the teſtator, *Thomas Compton*, who was the grandfather of the defendant, having, at the time he made his will, a ſon living, who was married to a woman, who has ſurvived him; and being ſeiſed of three farms, one called the *Down farm*, another called the *Lain farm*, the third called the *Old Lodge*; and being poſſeſſed of conſiderable perſonal property in the funds; and having ſix grandſons, and three grand-daughters; deviſed to his ſon all his lands expreſsly for his life, and made him his executor. And after the death of his ſon he divided his lands among his grand-children in the following manner; that is to ſay, to his grandſon *Thomas*, the defendant, who, on the death of his ſon, became his heir at law, he gave the *north ſide* of his *Down farm*, without uſing any words of limitation; the *ſouth ſide* of the *ſame farm*, he gave in like manner to his grand-daughter *Frances Weeks*; the diviſion ſo made being nearly an equal one. To his grandſons *George*, and *Edmund*, and to his grand-daughter *Elizabeth*, he gave the *upper part* of his *Lain farm*, equally between them, *ſo long* as they ſhould remain *ſingle*; but if either of them *marry*, then to have paid them by the other two 10*l.* a-year during his or her life. He then gave "to his two grandſons *Edward* and *John*, and his "grand-daughters *Mary* and *Ann*, the *lower part* of the "*Lain*

1808.

RIGHT ex dem. COMPTON *againſt* COMPTON.

"*Lain farm* equally between them, *ſo long* as they ſhould "remain *ſingle*; but if either of them marry, then 10*l.* "a-year for his or her life:" and to his ſon's wife, in caſe ſhe ſhould outlive him, 5*l.* a-year out of each of the *farms* during her life. And after making ſome pecuniary bequeſts, he gave to his grandſon *Henry*, after the death of his father, the farm called the *Old Lodge*. The caſe then ſtates the death of the deviſor, without altering his will, and that of his ſon, who ſurvived him. That his grandſon *Edward*, and his grand-daughters *Mary* and *Ann*, have *married*; but that his grandſon *John Allen Compton*, the leſſor of the plaintiff, remains *ſingle*; and that the defendant has entered upon the *lower part* of the *Lain farm*, to recover which *John Allen Compton* has brought this ejectment. And the queſtion is, Whether *John Allen Compton*, the leſſor of the plaintiff, took any and what eſtate in the 3-4ths of the *Lower Lain Farm* upon the marriage of his brother *Edward* and his ſiſters *Mary* and *Ann*? It will be obſerved, that by this will the teſtator gave to his ſon all his lands expreſsly *for life*, and repeating the words, "*after his death*," in every one of the ſubſequent deviſes, divides thoſe lands among his grandchildren, without uſing any words of limitation, or in any way deſcribing the period during which it was his intention that they ſhould enjoy them. From whence a perſon, not converſant with the rules laid down for the conſtruction of inſtruments, would probably be led to infer that he meant the grandchildren ſhould in ſome way take the whole intereſt in the ſeveral parts reſpectively deviſed to them; and that his purpoſe was completely to diſpoſe by his will of the whole of his lands; not meaning that any thing ſhould be claimed by his heir in that character. And it is by no means improbable but that

1808.

RIGHT ex dem. COMPTON *againſt* COMPTON.

ſuch was his intent. But, Mr. *Dampier*, who argued for the plaintiff, felt that the mere circumſtance of reſtricting the intereſt given to the ſon *to his life*, and the giving the remainder to the grandchildren, generally, without ſuch reſtriction, would not be ſufficient; and therefore he endeavoured to ſhew that the defendant was not entitled to the 3-4ths of the land in queſtion from other parts of the will: relying particularly on the deviſe of the *upper part* of the *Lain Farm*; which provides that if either of the deviſees of that part ſhould marry, they ſhould have paid *by the other two* 10*l.* a-year *during his life*; contending that the words, "*to have paid them by the others*," uſed in the clauſe reſpecting the *upper part* of the *Lain Farm*, and omitted in the deviſe in queſtion, *muſt be ſupplied in that deviſe*; as there could be no plauſible reaſon aſſigned for ſuppoſing that the teſtator meant to make a different diſpoſition of one part of the ſame farm to certain of his grandchildren, from that which he had made of another part of the ſame farm to others of his grandchildren; inſiſting on a maxim, well known as applicable to the moral character of man, "*noſcitur a ſociis*," as a rule to be adopted in the interpretation of wills. That the expoſition of every will muſt be founded on the whole inſtrument, and be made ex antecedentibus et conſequentibus is one of the moſt prominent canons of teſtamentary conſtruction; yet where between the parts there is no connexion by grammatical conſtruction, or by ſome reference expreſs or implied; and where there is nothing in the will declarative of ſome common purpoſe, from which it may be inferred that the teſtator meant a ſimilar diſpoſition by ſuch different parts; though he may have varied his phraſe, or expreſſed himſelf imperfectly; the Court cannot go into one part of a will to determine

1808.

RIGHT ex dem. COMPTON *againſt* COMPTON.

termine the meaning of another, *perfect in itſelf*, and *without ambiguity*, and not militating with any other proviſion reſpecting the ſame ſubject-matter; notwithſtanding that a more probable diſpoſition for the teſtator to have made may be collected from ſuch aſſiſted conſtruction. If a man ſhould deviſe generally his lands, after payment of his debts and legacies, his truſt (*a*) eſtates would not paſs: for in ſuch caſe "noſcitur a ſociis" what the land is which the teſtator intended to paſs by ſuch deviſe; it is clear he could only mean lands, which he could ſubject to the payment of his debts and legacies. But from a teſtator having given perſons in a certain degree of relationſhip to him a fee ſimple in a certain farm, no concluſion, which can be relied on, can be drawn, that his intention was to give to other perſons, ſtanding in the ſame rank of proximity, the ſame intereſt in another part of the ſame farm. Where the words of the two deviſes are different, the more natural concluſion is, that as his expreſſions are varied, they were altered becauſe his intention on both caſes was not the ſame. (His Lordſhip here referred to what Lord C. J. *Wilmot* ſays on this ſubject in his Reports, p. 233.) And, if it be neceſſary to cite them, there are not wanting authorities to ſhew, where clauſes in a will are independent, that the one ſhall not govern the other, in caſes where it is full as probable, as in this caſe, that the ſame intereſt was intended in both. If a deviſe be in theſe words, "I deviſe *Black-acre* to *J. S.*" Item, "I deviſe *White-acre* to *J. S. and his heirs*:" per *Coke* C. J. this is only an eſtate for life in *Black-acre*; for the item has no dependance on the firſt clauſe, but is diſtinct and ſeveral. 1 *Rol. Rep.* 369. *pl.* 23. So, where a man deviſed "to

(*a*) *Roe* v. *Read*, 8 *Term Rep.* 118.

his

1808.

RIGHT ex dem. COMPTON *againſt* COMPTON.

his ſon *Henry* and his heirs the houſe in which he dwelt. Item, to his ſon *Henry* his houſe in *J.* Item to his ſon *Henry* his houſes in the tenure of *J. S.* Item *his paſtures called* Southfields. Item all bargains, grants, and covenants, which he had from *Nicholas Webb*, his ſon *Henry* ſhould enjoy and *his heirs for ever*, and for *lack of heirs of his body* to *remain to his ſon* Francis *for ever.*" It was held that *Henry* took only an eſtate for life in the *Southfields*; and that the words were too ambiguous to diſinherit an heir at law. *Spirt* v. *Bence*, *Cro. Car.* 368. In the caſe of *Counden* v. *Clerke*, *Hob.* 33. Lord *Hobart* ſays, "what "warrant is there, when the deviſor ſpeaks ſenſibly and "certainly, *to enlarge* his gift, for ought appeareth, *beyond* "*his meaning*; which is as great an injury as *to abridge* "*his meaning.*" In the late caſe of *Doe ex dem. Child* v. *Wright* (*a*), the deviſe was in theſe words: "I deviſe "to my *grandſon* James Wright all my lands, freehold, "copyhold, and leaſehold, in the county of *Eſſex*. Alſo "I deviſe to *James Wright* all my *eſtate*, freehold and "copyhold, at *Ellington*, in the county of *Huntingdon*. "Alſo I give to my *grandſon* John Wright all my *eſtate* "lands, &c. known by the name of the *Coal-yard*, in "*St. Giles's*. Alſo I give to my *grandſon* James Cam-"per (who was his heir at law) the houſe I now live in, "and all my houſes known by the name of the *Caſtle-*"*yard* in *Holborn*, in the tenure of *G. O.*" This Court, and afterwards in the Court of Common Pleas three of the Judges, were of opinion, that this deviſe gave only a life-eſtate to *James Wright* in the lands in *Eſſex*; notwithſtanding the other deviſe, which gave him a fee in the lands in *Huntingdon*; and notwithſtanding *John Wright* had a fee in the lands given him; and notwith-

(*a*) 8 *Term Rep.* 64. 1 *New Rep.* 335. and 7 *Eaſt*, 259.

ſtanding

1808.

RIGHT ex dem. COMPTON *againſt* COMPTON.

ſtanding *James Camper*, the heir at law, would take a fee in what was deviſed to him. And in that caſe, as in this, the argument was preſſed, that it could not but be ſuppoſed that the teſtator meant to give the ſame intereſts in the different eſtates deviſed to his three grandſons. The reaſoning in thoſe caſes applies to that now under our conſideration. The clauſes here are diſtinct and independent: there are no words of reference to connect them; and, without connecting them, no ſuch clear, unambiguous intention can be collected from implication, as is neceſſary to diſinherit the heir at law. For the teſtator might mean, that the 10*l.* a-year ſhould be a charge on the lands in the hands of his heir, in caſe of his grandchildren marrying: and if the words be not ſufficient to create ſuch charge in the hands of the heir, they will not be ſufficient of themſelves to give over the eſtate, and create ſuch charge upon it in the hands of another. And if, according to Mr. *Dampier*'s argument, on the marriage of the ſeveral deviſees, their ſhares ſhould be held to go over in fee to thoſe who ſhould remain ſingle, and in no event to the heir at law; that deviſee who remained longeſt ſingle, though he ſhould ultimately marry, would take a fee in the ſhares of all the others, notwithſtanding his having done that which determined the eſtates of his brother and ſiſters: which the teſtator hardly could have intended. And though there may be reaſons for thinking it improbable that he meant to charge his perſonalty with theſe ſums; yet it has not been denied, but that the words are ſufficient to charge the perſonalty, if there be no other funds on which theſe annual ſums can be thrown. But if that be not ſo, it is poſſible that a perſon, ſo ill adviſed as this teſtator appears to have been, may not have had any diſtinct fund or perſon in his contemplation,

1808.

RIGHT ex dem. COMPTON *againſt* COMPTON.

templation, on whom he meant to lay the charge; and it is only from the Court's ſeeing it was his intent to charge thoſe deviſees who ſhould remain ſingle, that it could ſay, that it was the intent of the teſtator that the plaintiff ſhould take the ſhares of thoſe who ſhould marry. Another argument for the conſtruction inſiſted on for the plaintiff has been taken from the charge of 5*l.* per ann. in favour of the teſtator's ſon's wife, if ſhe ſhould outlive him. But it muſt be obſerved that here is no *perſonal* charge on the deviſees, nor a charge on the *eſtates given to them*, which might furniſh an inference that the intent of the teſtator was, that the unmarried deviſees ſhould take the ſhares of thoſe who might marry, from the improbability of his meaning being, that a burthen ſhould be thrown on thoſe who might remain ſingle, by the conduct of the others in marrying. But the charge is ſimply a charge of 5*l.* a-year *on each of the farms*; a charge which will of courſe affect each of the farms into whoſeſoever hands they may go. Had the words uſed by the teſtator permitted us to conſtrue the deviſe in queſtion as creating a joint-tenancy, it is poſſible that, by ſo doing, his intent, as contended for, might have been effectuated: but after the ſeveral determinations (vide *Denn* v. *Gaſkins*, *Cowp.* 660.) as to the effect in deviſes of the words "*equally to be divided*," and of the word "*equally*," without any thing to control their meaning; it is impoſſible to ſay, (and ſo it was admitted at the bar,) that the deviſe in queſtion does not make a tenancy in common. And, after full conſideration, we are of opinion that *John Allen Compton*, the leſſor of the plaintiff, took no eſtate in the 3-4ths of the *lower part* of the *Lain farm*; and that the poſtea muſt be delivered to the defendant.

1808.

TOWNSEND, Clerk, *againſt* WATHEN.

Tueſday, Jan. 26th.

THE plaintiff declared, in caſe, and ſtated that on the 1ſt of *April* 1800, and on divers other days, &c. the defendant, wrongfully intending to catch, maim, and deſtroy the plaintiff's dogs at *B.* &c. placed and procured to be placed divers traps, &c. in and about a certain wood called *Catteſwood*, there ſituate, and near to divers public highways and footways, and alſo near to divers grounds of the plaintiff, and of other perſons there ſituate, and procured to be placed pieces of fleſh and other ſtrong ſmelling things in and about the ſaid traps, &c., and continued the ſaid traps and pieces of fleſh, &c. for a long time, &c.; and continued the ſame there in the day time, &c. and alſo on the ſeveral days and times procured to be trailed pieces of fleſh and other ſtrong ſmelling things along the ground about the ſaid traps, &c. ſo laid as aforeſaid, and from the ſaid highways, footways, and grounds, towards and into the ſaid traps, &c. By reaſon of which premiſes on the ſeveral days, &c. at *B.* aforeſaid, divers dogs of the plaintiff, then and there lawfully going along the ſaid public ways, &c. and others of the plaintiff's dogs, then and there lawfully being in his ſaid grounds, and others of them in the ſaid grounds of other perſons, were by the ſcent of the ſaid fleſh and other things ſo placed and trailed, enticed from the ſaid highways, footways, and grounds reſpectively, to the ſaid traps, &c. and were caught therein, and greatly wounded, &c.

If a man place dangerous traps, baited with fleſh, in his own ground, ſo near to a highway, or to the premiſes of another, that dogs paſſing along the highway, or kept in his neighbour's premiſes, muſt probably be attracted by their inſtinct into the traps; and in conſequence of ſuch act his neighbour's dogs be ſo attracted, and thereby injured, an action on the caſe lies.

After a verdict for the plaintiff at the trial at *Glouceſter* before *Macdonald* C. B. it was objected by *Williams* Serjt. on

1808.

TOWNSEND *againſt* WATREN.

on a motion for a new trial, that there was no evidence of any malicious intention againſt the plaintiff's dogs, or that the traps were ſet for the purpoſe of catching dogs in general; and that this was neceſſary to ſuſtain the action; the traps having been ſet in the defendant's own ground, on which the plaintiff's dogs muſt have been treſpaſſing at the time they were taken; and the defendant having a right to ſet the traps there. And a rule niſi was granted for ſetting aſide the verdict as againſt evidence: but the Court refuſed another rule which was alſo prayed, for arreſting the judgment: Lord *Ellenborough* C. J. ſaying that the count having charged that the traps were wrongfully ſet for the purpoſe of catching the *Plaintiff's* dogs, though ſet in the defendant's own ground, no doubt that the action was maintainable.

Upon reading the Chief Baron's report of the evidence, in this term, it appeared, that the plaintiff and defendant lived near each other in the country. The defendant was the owner of a wood called *Catteſwood*, about a mile in length, one end of which adjoined the plaintiff's grounds, within 150 yards of his dwelling houſe where he had reſided for about two years laſt paſt. Some time before the plaintiff went to reſide there, the defendant had procured half a dozen traps to be made much larger and ſtronger than thoſe uſually ſet for catching vermin, which he ſtated at the time to be intended for foxes, or any thing that came in the way; and in fact a ſheep had been caught in one, and a deer of the defendant's own in another of them. Some of theſe traps were ſet in *Catteſwood* by day and by night, and baited ſometimes with freſh, ſometimes with ſtinking fleſh. The wood was interſected by ſeveral public highways and paths; but the traps were ſo ſet near blind tracks in the wood made by perſons or by

ſheep. The defendant's gamekeeper alſo trailed ſheeps' paunches, rubbed with annis ſeed, by a ſtring, at ſome diſtance round about the traps, (but this did not appear to have been done from the highways, or after the plaintiff came to reſide at his houſe,) in order to draw animals to them; and the defendant allowed 2*s.* 6*d.* for every fox or badger, and 1*s.* for every dog which was killed. In one year ſeven dogs had been taken and killed, which the defendant was proved to have known and approved of. *Catteſwood* was not a preſerve for game; nor did the whole of it belong to the defendant; nor was any board put up there to warn perſons of the traps: and the witneſſes ſtated their opinion, that the traps could not ſafely be ſo baited and ſcented in the day time when dogs were commonly paſſing with their owners through the wood; and that a dog, on account of the ſcent, could not paſs along the public paths without danger of being drawn by his inſtinct to the traps. All this, which had paſſed before the plaintiff came to reſide at his houſe, was continued afterwards; and at different times within the laſt two years ſeveral of his dogs had been caught in the traps which were baited with fleſh; by which ſome of them had been much injured and others entirely ſpoiled: and ſome of the traps were ſet in the wood ſo near to the plaintiff's houſe, that the baiting and the annis ſeed might be ſcented by his dogs which were kept there.

Dauncey and *Abbott* were heard very ſhortly in ſupport of the verdict; the Court being deſirous of hearing the grounds of objection againſt it.

The Attorney General, *Garrow*, (and *C. F. Williams*,) in ſupport of the rule, after obſerving that the time of the trailing

1808.

TOWNSEND *againſt* WATHEN.

trailing round the traps was not diſtinctly marked in the report: and that in fact it had happened a long time before the plaintiff's dogs were caught (which was not denied;) and that there was no evidence that the traps were purpoſely ſet to catch the plaintiff's dogs; contended the defendant had a right to ſet the traps in his own ground, and to bait them, for the purpoſe of catching vermin; and that he was not anſwerable if the dogs of other perſons unlawfully treſpaſſing on his grounds were caught in the traps. The owners of dogs had only a right that the dogs ſhould paſs along the highways, with ſome perſon to attend them and reſtrain them, if ſuch was their inſtinct, from hunting the woods in queſt of game. If indeed the defendant had placed the traps ſo near any of the public paths that a dog going along there with his maſter muſt, notwithſtanding reaſonable care of the maſter, in all probability be drawn into them, the defendant would be liable; and ſo he would if he uſed means for the purpoſe of decoying them to the trap: but here the traps were ſet for the lawful purpoſe of catching vermin in the defendant's own ground; and if the owner of a dog likely to traverſe a wood in queſt of game will carry him, or ſuffer him to treſpaſs, there, without reſtraint, he muſt take the conſequences.

Lord ELLENBOROUGH C. J. It appears by the evidence reported, that the traps were placed ſo near to the plaintiff's court yard where his dogs were kept, that they might ſcent the bait, without committing any treſpaſs on the defendant's wood. Every man muſt be taken to contemplate the probable conſequences of the act he does. And therefore when the defendant cauſed traps ſcented with the ſtrongeſt meats to be placed ſo near to the plaintiff's

1808.

TOWNSEND *against* WATKEN.

tiff's houſe as to influence the inſtinct of thoſe animals and draw them irreſiſtably to their deſtruction, he muſt be conſidered as contemplating this probable conſequence of his act. That which might be taken as general evidence of malice againſt all dogs, coming accidentally within the ſphere of the attraction which he had placed there, muſt ſurely be evidence of it againſt thoſe in particular which were placed neareſt to the ſource of attraction and within the conſtant influence of it. What difference is there in reaſon between drawing the animal into the trap by means of his inſtinct which he cannot reſiſt, and putting him there by manual force? If a man knowingly keep a dog accuſtomed to bite, and any perſon coming by chance in his way be bitten, an action lies againſt the owner, though he had no malice againſt the particular individual. Here there is evidence that the defendant's purpoſe in ſetting the traps was to catch dogs in general, as well as vermin; for he afterwards recompenſed his ſervant for dogs taken in the traps. The rule therefore, omnis ratihabitio retro trahitur et mandato æquiparatur, applies to this caſe. Without, therefore, conſidering what had happened before the plaintiff came to his reſidence in the defendant's neighbourhood; when he did come, he came to a place where the miſchief exiſted and continued to operate within the ſphere where he might lawfully have his dogs, and which, in fact, did afterwards operate upon them to the plaintiff's prejudice.

GROSE J. I think there is evidence that the defendant meant to ſet the traps for dogs as well as other animals; becauſe when dogs were caught in them, he rewarded his gamekeeper at the rate of ſo much a head. This

1808.

TOWNSEND against WATHEN.

therefore was fit evidence to be left to the jury of his intention to catch the plaintiff's dogs as well as others. It is true that the traps were set in his own ground; but a man must not set traps of this dangerous description in a situation to invite his neighbour's dogs, and as it were to compel them by their instinct to come into the traps.

LAWRENCE J. There is no evidence of the defendant's having trailed round the traps while the plaintiff was residing at his house near the wood; but there is evidence of the traps having been baited after he came to reside there; and this, so near to the plaintiff's house as to draw his dogs to them by their scent. The very object of baiting traps is to draw animals towards them by their instinct from the course they are pursuing: when therefore the defendant placed his traps so baited in a situation so near to the plaintiff's house, as that his dogs kept there might scent the bait, he must be taken to have contemplated the natural consequence. He did, therefore, in the words of the declaration, entice the plaintiff's dogs, &c.

LE BLANC J. The only question now is whether the evidence sustains the verdict. If a man will put traps baited in places so near the highway as that dogs passing along there will probably be attracted by the scent into the traps; that is evidence that he does the act for the purpose of catching any dogs that may happen to pass along there. When the evidence is that before the plaintiff came to reside at his house, the defendant's gamekeeper used to trail meat rubbed with annis seed round about the traps; it is plain, that the intent was to attract

1808.

TOWNSEND *againſt* WATHEN.

all animals whoſe inſtinct was governed by the ſcent into the traps. Then, after the plaintiff came to reſide at his houſe, the placing theſe baited traps ſo near to the plaintiff's premiſes where he kept his dogs as to attract them by the ſcent, muſt be evidence to go to the jury, that the traps were placed there for that purpoſe.

Rule diſcharged.

BARKER *againſt* BLAKES.

Monday, Feb. 1ſt.

THIS was an action on a policy of inſurance on a quantity of oil by the ſhip *Hannah*, at and from *New York* to *Havre de Grace*, dated the 4th of *Auguſt* 1803; which was tried before Lord *Ellenborough* C J. at the ſittings at *Guildhall* after *Hilary* term 1807, when a verdict was found for the plaintiff for 45*l.* 2*s.* 8*d.*, ſubject to the opinion of this Court on the following caſe:

The inſurance was effected on behalf of the plaintiff, an *American* citizen reſident in *America*, and the proprietor of the oil. The defendant ſubſcribed the policy for 100*l.* The oil was of greater value than the amount of

1. It is no breach of neutrality for a neutral ſhip to carry enemy's property from its own to the enemy's country; the voyage and commerce not being of a hoſtile deſcription, nor otherwiſe expreſsly or impliedly forbidden by the law or policy of this country; though the neutral thereby ſubject his ſhip to be detained and carried into a *Britiſh* port for the purpoſe of ſearch. And therefore a *Britiſh* underwriter, after condemnation of the enemy's goods found on board, and liberation of the ſhip and the reſt of the cargo, is liable to the neutral owner of goods inſured in the ſame ſhip whoſe voyage was ſo interrupted; either as for a total loſs, if notice of abandonment upon the loſs of the voyage be given in reaſonable time; or for an average loſs if ſuch notice be given out of time.

2. Where a neutral ſhip bound from *America* to *Havre* was ſo detained and brought into a *Britiſh* port; and pending proceedings in the Admiralty the king declared *Havre* in a ſtate of blockade, by which the further proſecution of the voyage was prohibited; this was held a total loſs of the voyage, which entitled the neutral aſſured to abandon. But

3. The blockade of *Havre* having been publicly notified here on the 6th of *September*, and no notice of abandonment given till the 14th of *October*, nor any excuſe ſubſtantiated for not giving it ſooner for want of competent authority before, nor any new authority ſhewn for giving it then; held that the notice was out of time: and this, though the plaintiff's agents in this country had no notice till the 17th of *October* of the decree for reſtoration of the ſhip and goods in queſtion, which had been pronounced on the 8th of *October*.

1808.

BARKER against BLAKES.

all the insurances made upon it. The ship *Hannah* was an *American* ship, duly documented, and sailed from *New York* on the voyage insured on the 4th of *July* 1803, with the oil on board; and on the 17th of *August* following was arrested in latitude 49 degrees North, longitude 8 degrees West, (being in the course of the voyage,) by *The True Blue*, a *British* privateer, and sent into *Bristol*, where she arrived on the 30th of the same month. *Havre de Grace* is in latitude 49 degrees North, longitude six minutes East. On the 21st of *June* 1803 the following decree was issued by the *French* Government, "That "from thenceforth there shall not be received into any "of the ports of the *French* republic any colonial com- "modity coming from *English* colonies, nor any goods "coming directly or indirectly from *England*." "Con- "sequently all goods and merchandize of *English* ma- "nufacture, or coming from *English* colonies, shall be "confiscated." On the 6th of *Sept.* 1803 the *British* Government declared the port of *Havre* to be in a state of blockade; and such blockade has continued ever since. The ship and cargo were libelled in the Court of Admiralty by the captors: and on the 8th of *October* following the ship and the oil in question, and the rest of the cargo, were, by a sentence of that Court, ordered to be restored to the use of the owners; subject to the payment of freight and expences, but without costs or damages; except one box of books, which was condemned as *French* property; and 53 hogsheads of bark, and 3646 pounds of whalebone, which were then reserved for further proof, and were afterwards condemned as lawful prize by the following sentence. "*Hannah, Augustus Ryan*, 9th "*Nov.* 1804. No further proof having been exhibited "of the property of 53 hogsheads of bark, and 3646 lb.

"of

1808.

BARKER *againſt* BLAKES.

"of whalebone; and the Judge, at the petition of *Bog*, "on motion of counſel, by interlocutory decree, con- "demned the ſaid goods as good and lawful prize to *Ed-* "*ward Vincent Paul*, commander of the private ſhip of "war *True Blue*, in ſight of his majeſty's ſhip of war "*Phœnix*, *Wm. Baker* Eſq. commander." On the 14th of *October* 1803 the plaintiff's agents in this country, who had effected the policy, abandoned the oil in queſtion to the defendant and the other underwriters, in proportion to their reſpective intereſts. The agents of the plaintiff were appriſed of the detention of the veſſel, and of the ſuit in the Court of Admiralty, ſoon after they reſpectively took place; but were not parties to the ſuit, and did not know of the reſtoration of the veſſel and cargo until the 17th of *October*, three days after the abandonment. The plaintiff's agents afterwards applied to the captain of the ſhip *Hannah* to reload the oil and convey it to *Havre*, which he poſitively refuſed to do, and declared that he ſhould ſail directly to *New York*. The ſhip *Hannah* cleared out at *Briſtol* on the 20th of *December* 1803 for *New York*, and in *January* 1804 ſailed for that place, leaving the oil in queſtion at *Briſtol*. The oil was afterwards ſold in this country by agreement, without prejudice to the queſtion between the aſſured and underwriters, to the beſt poſſible advantage; and the loſs amounted in the whole to 45*l.* 2*s.* 8*d.* per cent., of which the freight and expences of reſtoration, paid under the ſentence of the Court of Admiralty, amounted to 20*l.* 19*s.*; that is, the freight alone to 12 per cent., the expences to 8*l.* 19*s.* per cent. The queſtion for the opinion of the Court was, Whether the plaintiff were entitled to recover the whole, or any and which of the ſaid ſums?

1808.

BARKER *againſt* BLAKES.

If the Court ſhould be of opinion that he was entitled to recover any thing, the verdict was to be entered accordingly: otherwiſe a nonſuit was to be entered. The caſe was argued in laſt *Michaelmas* term, when

Abbott for the plaintiff contended, firſt, that the inſurance was lawful at the time it was made, being upon a neutral ſhip, for a voyage from the neutral's country to a port in *France*, which it was lawful for the neutral to make, though *France* was at enmity with us; and ſuch a voyage was not in contravention of any law of this country. 2dly, That the loſs of the voyage, which entitled the aſſured to abandon, was derived from the original act of detention, without which the ſhip and cargo would not have come within the prohibition of the *French* decree of the 28th of *June* 1803; nor would the blockade of *Havre* by the *Britiſh* Government on the 6th of *September* have operated upon the voyage inſured. Then even admitting that it was lawful for a *Britiſh* ſhip to bring the *American* into a *Britiſh* port in order to ſearch for enemy's goods, yet it was not unlawful for a *Britiſh* underwriter to inſure the neutral againſt the loſs and expences conſequent on ſuch injurious detention, after the ſhip and the goods in queſtion were reſtored by the ſentence of the Court of Admiralty. The neutral owner is in no fault becauſe his goods are embarked in a ſhip in which enemy's goods are alſo loaded. If there had been *Engliſh* goods on board the ſame ſhip, and a *French* cruiſer had ſtopped the *American* and taken her into another port, where the *Engliſh* goods were ſeized and condemned, and the others liberated, it cannot be diſputed but that the underwriters would have been liable to indemnify the expences incurred

1808.

BARKER against BLAKES.

curred by the neutral. The cases of *Furtado* v. *Rodgers* (*a*), *Kellner* v. *Le Mesurier* (*b*), and *Gamba* v. *Le Mesurier* (*c*), which were insurances of enemies' property, do not apply: and in *Lubbock* v. *Potts* (*d*), the Court seemed to think that an insurance against *British capture, seizure, and detention*, generally, must be construed as extending only to cover *unlawful* capture, &c.; or that even extending it to *temporary lawful detention*, without any fault of the assured, it would be good. 2dly, He contended that the abandonment was in time. The ship and cargo were not ordered to be restored till the 8th of *October*, and on the 14th the plaintiff's agents abandoned the goods insured to the underwriters, three days before they knew of the decree for restoration. That the voyage was lost is clear; and unless it were necessary for the assured to abandon immediately after notice of the detention, or of the blockade of *Havre* by our Government on the 6th of *September*, there seems no reason why the election should not be open to his agents while they still remained ignorant of the event.

Scarlett, contrà, contended, first, that at any rate the plaintiff could only recover for a partial, and not for a total loss; the abandonment being out of time. The principle to be collected from all the cases is, that where the voyage is lost, but the property is saved, the owner must abandon, if at all, in the first instance; and cannot wait to see whether he can prosecute the voyage to advantage, and afterwards elect to abandon when he finds he cannot. And therefore in *Anderson* v. *The Royal Exchange Company* (*e*), where notice of abandonment was

(*a*) 3 *Bos. & Pull.* 191. (*b*) 4 *East*, 396. (*c*) *Ib.* 407.
(*d*) 7 *East*, 451. (*e*) *Ib.* 38.

1808.

BARKER against BLAKES.

not given till 18 days after notice of the loſs by the agent of the aſſured, it was held too late. Now here the veſſel was detained on the 17th of *Auguſt*; and taking that to have put an end to the voyage, and to have entitled the plaintiff's agents to abandon, they did not abandon till nearly two months after. But if the blockade of *Havre* on the 6th of *September* be the event to be looked to as putting an end to the voyage; that was an act of our own Government, againſt which the underwriters cannot be taken to have inſured, according to *Hadkinſon* v. *Robinſon* (*a*). Neither can the *French* decree of the 21ſt of *June* 1803 be conſidered as a peril inſured againſt. The queſtion muſt therefore reſt on the ground of the original detention; and if that put an end to the voyage, the aſſured ſhould, without waiting for events, have given immediate notice of abandonment. At any rate, if the blockade by our Government on the 6th of *September* be conſidered as a new contingency which defeated the voyage, on which a new right of abandonment attached, notice of abandonment ſhould have been given immediately afterwards; and it came too late after the decree for reſtoration of the goods on the 8th of *October*. But, 2dly, The loſs did not happen from any riſk within the policy. The detainer of the ſhip was clearly lawful, and ſome of the goods found on board were actually condemned as prize: and the policy does not extend to indemnify the aſſured againſt the conſequences of a legal detention by a *Britiſh* captor. The law knows no diſtinction in this reſpect between the owner of the ſhip and the owner of goods on board it. The latter muſt take the fate of the ſhip owner with reſpect to inſurance. If a ſhip be not ſea-worthy, or be warranted neutral and do

(*a*) 3 *Boſ. & Pull.* 388.

any

1808.

BARKER *againſt* BLAKES.

any act to break its neutrality; though the owner of goods on board have no control over the acts of the ſhip, and be in no fault, his inſurance is equally avoided. *Furtado* v. *Rodgers* (*a*), was the caſe of an inſurance from *Bayonne* to *Martinique* and back again, made during peace; and on the breaking out of the war with *France* afterwards, the ſhip was captured at *Martinique*: but the ground of the deciſion there was, that where a *Britiſh* ſubject inſures againſt capture generally, there is an implied exception of capture by the authority of our own government, though ſubſequently given. *Kellner* v. *Le Meſurier* (*b*), followed upon the ſame ground. The capture of any neutral can only be juſtified by the ſubſequent condemnation; and the captor acts at the peril of diſproving the neutrality, or ſhewing ſome juſt ground whereby the privilege is forfeited by an act done in prejudice of the belligerent. If a neutral ſhip act in aid of the enemy by protecting his goods, and it be lawful for a *Britiſh* ſhip to ſeize the neutral and bring her into port for the purpoſe of ſearch, and the event juſtify the ſeizure; it is as much againſt public policy to ſuffer a *Britiſh* ſubject to inſure againſt ſuch ſeizure and the neceſſary conſequences of it, as to inſure againſt the capture of an enemy's ſhip. This queſtion did not occur in *Lubbock* v. *Potts* (*c*), and what fell from the Court incidentally in the courſe of the argument muſt be taken with reference to the caſe in judgment, which was that of a *Britiſh* ſhip inſured againſt *Britiſh* detention, &c. by which the Court ſeemed inclined to underſtand illegal detention; or at leaſt legal detention, which was only temporary, but which might occaſion the loſs of the market.

(*a*) 3 *Boſ. & Pull.* 191. (*b*) 4 *Eaſt*, 396. (*c*) 7 *Eaſt*, 451.

1808.

BARKER against BLAKES.

Abbott in reply. As to the queſtion of timely abandonment; there is no preciſe period for it; the law only requires it ſhould be made within a reaſonable time. Now till the 6th of *September* when *Havre* was declared to be blockaded, the aſſured might have intended to purſue the voyage when the ſhip and cargo were liberated: but the blockade was a new and unforeſeen occurrence ariſing out of the detention of the ſhip; and the queſtion is whether it were unreaſonable to wait after that till the 14th of *October* before the notice to abandon was given: for as to the French decree, it was then doubtful whether it would be deemed to apply to a neutral who was *forced* into an enemy's port. As to the laſt and principal point, *Kellner* v. *Le Meſurier* was certainly decided on the ground of its being enemy's property; for the plaintiff declared on a loſs by capture as *prize by the King*; and this was relied on in the judgment there given (*b*). And all the caſes where the objection has been ſuſtained in the caſe of a neutral were founded upon unlawful acts done by the neutral; which diſtinguiſhes thoſe caſes from the preſent. Suppoſe the enemy was blockading a port of this kingdom, and a neutral in attempting to force the blockade was taken; though the loſs would be by his own act, yet a *Britiſh* underwriter would be liable. If the objection were to prevail on the general ground in this caſe, it would in effect be declaring, that any inſurance of neutral goods from a neutral to an enemy's country, though in a neutral ſhip, was illegal.

The Court, from the extenſive conſequences involved in the determination of the general queſtion, wiſhed to have had the caſe argued again; but underſtanding that

(*b*) 4 *Eaſt*, 402.

the

the value of the property was inconſiderable, and that the parties were diſinclined to incur any further expence, they ſaid they would conſider of it, and give their opinion another time. And now,

1808.

BARKER *againſt* BRAKES.

Lord ELLENBOROUGH C. J. delivered judgment.

This was an action on a policy of inſurance, dated the 4th of *Auguſt* 1803, on a quantity of oil belonging to an *American* proprietor, ſhipped on board an *American* ſhip, the *Hannah*, on a voyage at and from *New York* to *Havre de Grace*. [After ſtating the caſe, his Lordſhip proceeded.]

The whole amount of loſs claimed on the part of the plaintiff is 45*l.* 2*s.* 8*d*, conſiſting of 20*l.* 19*s.*, the freight and expences paid under the ſentence of the Court of Admiralty, and 24*l.* 3*s.* 8*d.* the difference, I preſume, between the invoice value of the oil in *America*, and the proceeds of the ſale here. The defendant contends, that the plaintiff is at any rate not entitled to recover the latter item of loſs; his claim thereto being merely founded on an abandonment which was not made, as the defendant inſiſts, in due time. But he further contends, that the plaintiff cannot by law recover at all, even to the extent of the average loſs of his freight and expences, under this policy; and that to allow of ſuch a recovery would be to allow of an indemnity being afforded, through the medium of *Britiſh* inſurance, to neutrals, acting in contravention of the intereſts and policy of *Great Britain*, in the carrying of the goods of its enemies. That in ſo doing the neutral had, in effect, violated the duties of his neutrality, and aſſumed a hoſtile character in reſpect to this country. But it does not appear to us that this general objection to the plaintiff's right to recover is well

founded.

1808.

BARKER against BLAKES.

founded. The *American* was at liberty to purſue his commerce with *France*, and to be the carrier of goods for *French* ſubjects; at the riſk indeed of having his voyage interrupted by the goods being ſeized; or of the veſſel itſelf, on board of which they were, being detained, or brought into *Britiſh* ports, for the purpoſe of ſearch: but the mere act of carrying ſuch enemies' goods on board his veſſel conſtituted no violation of neutrality on the part of the *American*; nor did the arreſt and detention of his veſſel, for the purpoſe of ſearch and eventual condemnation of the goods which might be found on board belonging to the enemy, form any breach of our duty towards the *American*. The indemnity ſought under the policy in this caſe is not an indemnity to an enemy or to a neutral forfeiting his neutrality by an act hoſtilely done by him againſt the intereſts of *Great Britain*; but an indemnity to a neutral, as ſuch, againſt the conſequences of an act innocently and allowably done by him in the exerciſe of his own neutral rights; and as innocently and allowably to a certain degree controlled and interrupted on our part, in the exerciſe of our rights, as belligerents, againſt enemies' property found on board the ſhip of a neutral. Theſe rights, though they are in a degree adverſe to each other, do not, therefore, in the exerciſe of them, neceſſarily place either party in the ſituation of an enemy to the other. The various competitions for commercial advantage and ſuperiority, which take place between different nations; their mutual excluſions of each other by their reſpective municipal regulations; are ſo many acts of adverſe policy and conflicting rights, exerciſed towards each other; but they occur without producing any breach of national amity. And it has never yet, in any inſtance, that I am aware of, been held

a breach

1808.

BARKER *against* BLAKES.

a breach of implied duty in the ſubjects of either ſtate to lend their aſſiſtance by inſurance or otherwiſe to ſuch rival or excluſive commerce or intereſts of the other. Caſes of expreſs public prohibition, and that degree of aſſiſtance to enemies which conſtitutes a ſociety in war againſt any particular ſtate, fall of courſe under a different conſideration, and are neceſſarily to be underſtood as interdicted ſubjects of inſurance in every country to which this ſpecies of contract is known. The voyage and commerce, therefore, in the courſe of which the veſſel carrying the goods inſured was in this caſe engaged, not being either of a hoſtile deſcription, nor in any other way expreſsly or impliedly forbidden by the law or policy of this country, the general objection to the plaintiff's recovering at all under this policy of aſſurance falls to the ground. Which brings the caſe under our conſideration to this point, Whether the plaintiff be entitled, under the circumſtances, to recover as for a total loſs, or for the freight and expences adjudged by the Court of Admiralty to be paid, as an average loſs only.

In order to entitle himſelf to recover as for a total loſs, the plaintiff muſt eſtabliſh two things: Firſt, That *a loſs of the voyage* (the only deſcription of loſs which can be contended for in this caſe, as the goods themſelves have been ordered to be reſtored, and are capable of being ſo,) *was occaſioned by the detention in queſtion*, which continued until and after the blockade took place, which rendered the proſecution of the voyage to *Havre* no longer practicable: and, ſecondly, (ſuppoſing a loſs ſo occaſioned to be a total loſs, "by detention," within the policy;) that the *abandonment* of the goods was made *in due time*. And thinking, as we do, that the impoſſibility of proſecuting the voyage to the place of deſtination, which aroſe during

and

1808.

BARKER against BLAKES,

and in conſequence of the prolonged detention of the ſhip and cargo, may be properly conſidered as a loſs of the voyage; and ſuch loſs of voyage, upon received principles of inſurance law, as a total loſs of the goods which were to have been tranſported in the courſe of ſuch voyage; provided ſuch loſs had been followed by a ſufficiently prompt and immediate notice of abandonment. We are of opinion, however, upon the authority of the caſes adverted to in the argument, that this abandonment which was made on the 14th of *Oct.* 1803, above five weeks after the blockade of *Havre* had been publicly notified; the lateſt event to which the loſs of voyage is capable of being referred; was not made within thoſe reaſonable and convenient limits of time which the law allows for this purpoſe. And it is to be obſerved, that no excuſe for the lateneſs of the abandonment is offered on the ſcore of any want of competent powers in the parties making the abandonment: as they do not appear to have been furniſhed with any other powers for this purpoſe at laſt, than what they muſt be ſuppoſed to have originally poſſeſſed, if they ever had any. The loſs in queſtion muſt, therefore, for want of a timely notice of abandonment, be regarded merely as an average loſs; and the verdict muſt of courſe be reſtricted to the ſum of 20*l.* 19*s.* the amount of the freight and expences to which the aſſured was ſubjected by the ſentence of the Court of Admiralty. Judgment for that ſum, and no more, muſt be given accordingly.

1808.

The KING *againſt* The Inhabitants of RIPON.

Wedneſday, Feb. 3d.

THE ſeſſions, on appeal, quaſhed an order of juſtices, for removing *Elinor Forton*, a pauper, from the township of *Ripon* in the *Weſt Riding* of the county of *York*, to the pariſh of *Darlington* in the county of *Durham*; ſubject to the opinion of this Court on the following caſe:

An indenture binding an adult as an apprentice, which was not executed by herſelf, but only by her father-in-law and the maſter, though with her conſent, does not conſtitute her an apprentice; and conſequently no ſettlement can be gained by her under ſuch indenture.

The pauper *Elinor Forton*, being 23 years of age, was put apprentice by her father-in-law with her own conſent, to one *Huſbands* in *Hunton*. She was preſent at the making of the agreement; but the indenture was only executed by the maſter and her father-in-law, but not by herſelf: neither was it ever tendered to her for that purpoſe, though ſhe lived under it with her maſter for nearly 12 months in *Hunton*. The Seſſions were of opinion that ſhe gained a ſettlement in *Hunton*. But when the caſe was called on

The Court aſked whether it were poſſible to maintain this to be a competent binding of an adult who was no party to the indenture? The relation of maſter and apprentice did not exiſt.

Park and *Hullock* who were to have argued in ſupport of the order of ſeſſions admitted that they could not ſupport it.

Dampier and *Scarlet* contra.

Order of ſeſſions quaſhed.

1808.

Monday, Feb. 1ſt.

ROBINSON qui tam *againſt* GARTHWAITE.

A captain in the militia receiving his pay and contingent allowances, before his qualification was properly authenticated, is not *executing any power* directed by the militia act of the 42 *G.* 3. *c.* 90 to be executed by captains, ſo as to bring him within the penalty of the 14th clauſe; the receipt of ſuch pay and allowances not being provided for by that ſtatute, even if any other than acts of military diſcipline were intended to be ſo prohibited.

Though a penal action be removed out of the proper county into another for trial, yet the cauſe of action muſt ſtill be proved to have happened within the proper county where the venue is laid.

IN debt for penalties of 100*l.* alleged to have been incurred by the defendant under the militia act of the 42 *Geo.* 3. *c.* 90. *ſ.* 14. the 4th count of the declaration, on which the plaintiff took a verdict, ſtated that the defendant, a captain in the 2d royal *Surrey* regiment of militia, executed certain powers directed by the ſtatute to be executed by captains, viz. by *acting as a captain* in the ſaid militia, without having delivered in ſuch ſpecific deſcription of his qualification as is required by the ſtatute, whereby, &c. The venue was laid in the county of the town of *Kingſton* upon *Hull*, and the cauſe was tried at *York* before *Chambre* J. when it appeared that the defendant was duly qualified to hold his commiſſion as a younger ſon of a perſon ſeiſed of an eſtate of above 600*l.* a-year, but in the firſt deſcription of his qualification ſent into the clerk of the peace, as required by *ſ.* 6. and 12. of the act, there was a defect in omitting to ſtate the pariſhes wherein the eſtate was ſituated, which was afterwards rectified by ſending in a proper deſcription of them. The plaintiff however proved, that prior to the miſtake being rectified, the defendant had acted as captain upon the parade, and at the guard-houſe, and had alſo ſat as preſident of a court martial; but it appearing afterwards that theſe acts were all done in the county of *York* where the trial was had under the ſtat. 38 *Geo.* 3. *c.* 52. and not within the county of *Hull* where the venue was laid, the learned Judge held that they could not be received in evidence: for though as to the latter inſtance, the ſentence of the court martial was afterwards read and executed

1808.

ROBINSON qui tam *againſt* GARTHWAITE.

cuted at the citadel in *Hull*, yet the defendant was not proved to have been preſent there upon the occaſion. The only act proved to have been done by the defendant in *Hull* previous to the completion of his qualification, and which was contended to be the execution of a power directed by the ſtatute (*a*), to be executed by captains, was *the receipt of his pay and contingent allowances*, as captain, at a banking houſe in *Hull*. And on this a verdict was taken for the plaintiff on the 4th count, with liberty to the defendant to move to enter a nonſuit.

Park in the laſt term moved for a rule for entering a nonſuit, on the ground that the receipt of the defendant's pay and contingent allowances was not the execution of any *power* directed by the ſtatute, as no proviſion was therein made for any ſuch payment; even if the act of receiving money could be conſidered as the exerciſe of a *power*. He alſo moved in arreſt of judgment, becauſe it was not ſtated in the declaration in what way the defendant had *acted as captain*; ſo that he had no notice what he was to anſwer; and this too in a penal action. A rule niſi was granted on both points; which came on now to be diſcuſſed; when, after hearing *Topping* and *Richardſon*, who ſhewed cauſe againſt the rule,

The Court (*b*) were clearly of opinion that the rule for entering a nonſuit ſhould be made abſolute. This being

(*a*) Sect. 14. enacts, "That if any perſon ſhall execute any of the "powers hereby directed to be executed by captains, not being qualified "as aforeſaid, or without having delivered in ſuch ſpecific deſcription "of his qualification as before required, &c. he ſhall forfeit 100*l.*" &c.

(*b*) *Lawrence* J. was abſent on this day, aſſiſting the Lord Chancellor on the hearing of a cauſe in the Court of Chancery.

1808.

ROBINSON qui tam *againſt* GARTHWAITE.

a penal action, the clauſe giving the penalty ought not to be extended by conſtruction beyond the plain words of it, which confined the offence to the executing any of the powers directed by the act, without the qualification required. The receipt of the pay and contingent allowances of a captain was admitted not to be provided for by the act in queſtion, and therefore at any rate ſuch receipt was no execution of any power directed by the act to be executed by captains; even if any thing more were intended by that clauſe than to ſubject unqualified officers to the penalty if they executed any act of military diſcipline; which Lord *Ellenborough* inclined to queſtion.

Rule abſolute for entering a nonſuit.

Wedneſday, Feb. 3d.

PHILLIPS *againſt* BACON.

In an action on the caſe againſt the ſheriff for negligent and wrongful conduct in conducting the ſale of the plaintiff's goods under a writ of fieri facias, by which they were ſold much under value, where, in ſtating the ſubſtance of the writ, the count alleged that the ſheriff was commanded to levy 80*s.* awarded to *J. C.* for his *damages* ſuſtained *by occaſion of the detaining the debt*, that is proved by the writ which ſtated that the 80*s.* were awarded to *J. C.* for his *damages* ſuſtained *as well* by reaſon of *detaining* the *debt* as for his *coſts*, &c.; for *coſts* are in legal ſenſe included in the word *damages*.

THE firſt count of the declaration ſtated, that on the 25th of *April* 1806 a non omittas fieri facias writ iſſued out of *B. R.* directed to the ſheriff of *Glamorgan*, by which writ the king commanded the ſaid ſheriff that of the goods and chattels of the plaintiff in his bailiwick he ſhould cauſe to be levied as well a certain debt of 254*l.* which *J. Cameron* in the ſaid court had lately recovered againſt him, as alſo 80*s.* which were awarded to the ſaid *J. C.* for his *damages* which he had ſuſtained *by occaſion of the detaining the ſaid debt*, whereof the plaintiff was convicted; and that the ſheriff ſhould have that money before the king's juſtices, &c. on a certain day therein mentioned,

1808.

PHILLIPS *againſt* BACON.

mentioned, and long ſince paſſed, to render to the ſaid *J. C.* for his debt and damages, and ſhould have there then that writ: which writ afterwards, and before the return thereof, to wit, on the 29th of *April* 1806, was delivered to the defendant, who then and until after the return thereof was ſheriff of *Glamorgan*, to be executed in due form of law; by virtue of which writ the defendant, as ſuch ſheriff, before the return, ſeized and took into his poſſeſſion divers cattle, goods, and chattels of the plaintiff, of the value of 1200*l.*; and proceeded to the ſale thereof, and ſold the ſame under and by colour and pretence of the ſaid writ for prices amounting in the whole to a ſmall ſum, to wit, 200*l.* And the defendant, not regarding his duty in that behalf, as ſuch ſheriff, but wrongfully intending to injure and prejudice the plaintiff in this reſpect, wrongfully and injuriouſly conducted himſelf ſo negligently, deceitfully, fraudulently, and improperly in the ſame proceeding to the ſale of and ſelling the ſaid cattle, goods, and chattels, upon that occaſion, that by reaſon of ſuch his neglect, deceitful, fraudulent, and improper conduct, the ſame were ſold for much leſs than the real value thereof, and than the ſame might and ought to have been ſold for by him, had he conducted himſelf with due care and diligence, and uprightly and properly in that behalf, viz. at prices amounting in the whole to 1000*l.* leſs than the real value, or leſs than they might or ought to have been ſold for. There were other ſpecial counts to the like effect: and there was a fifth count, in trover, for ſo many horſes, &c. and pipes of wine. Plea not guilty.

The caſe was tried before *Macdonald* C. B. at *Hereford*; and by the words of the writ when produced the ſheriff was commanded to cauſe to be levied of the plain-

1808.

PHILLIPS against BACON.

tiff's goods, &c. "as well a certain debt of 25*l.* which "*J. C.* in the said Court had recovered against him, as "also 80*s.* which in our same Court were awarded to "the said *J. C.* for his damages which he had sustained "*as well* by reason of detaining the said *debt*, as for his "*costs* and charges by him about his suit in that behalf "expended, whereof the said *R. M. P.* (the plaintiff) "is convicted," &c. In the result, the case did not go to the jury on the count in trover, but only on the special count; between which and the writ it was objected that there was a material variance; the writ declared on stating the 80*s.* to be awarded to *J. C.* "for his "*damages* sustained by occasion of the detaining the said "debt;" the writ proved stating the 80*s.* to be awarded "for his *damages as well* by reason of detaining the said "debt, as for his *costs* and charges, &c." The Chief Baron reserved the question, but let the case go to the jury, who found a verdict for the plaintiff for 500*l.* damages; and the defendant had leave to move to set aside the verdict and enter a nonsuit; for which he obtained a rule nisi in the last term.

Dauneey, *Bevan*, *Clifford*, *Abbott*, and *Peake*, now shewed cause against the rule. The very words of the writ, which was only inducement to the action, and not the gist of it, need not and are not affected to be stated in the count, but it was sufficient to state the substance and legal effect of it (*a*). This differs the case from *Baynes* v. *Forrest* (*b*),

(*a*) Per *Buller* J. in *Gwinnet* v. *Phillips*, 3 *Term Rep.* 646. and in *Angerstein* v. *Clarke*, 4 *Term Rep.* 616. *King* v. *Pippett*, 1 *Term Rep.* 235. *Hendrey* v. *Spencer*, *ib.* 238. *Cuming* v. *Sibley*, *ib.* 239. and *Warre* v. *Harbin*, 2 *H. Blac.* 113.

(*b*) 2 *Stra.* 892.

Coy

1808.

PHILLIPS against BACON.

Coy v. *Hymas* (*a*), and other caſes where the record declared on was the giſt of the action; and alſo from *Briſtow* v. *Wright* (*b*), and other caſes of declarations on contracts, for the like reaſon. The *coſts* are a part of the *damages* ſuſtained by the detention of the debt, and the word *damages* is ſufficiently large to comprehend *coſts*. This appears from the old entries. *Cliff's Entr.* 850. *pl.* 43. *Raſt. Entr.* 194. *pl.* 4. *Co. Entr.* 147. 150, 151, 2. So in *Co. Lit.* 257. *a.* where *Littleton* mentions *damages* Lord *Coke* ſays, that *coſts* are included: and in 2 *Inſt.* 288. he ſays, coſts are in law ſo coupled together as they are accounted parcel of the damages. The very writ of fieri facias in debt (*c*), ſo conſiders them; for after commanding the ſheriff to levy for the damages and coſts, it directs him to have that money before the king at *Weſtminſter* to render to the plaintiff for his debt *and damages* aforeſaid. They alſo cited for the ſame purpoſe *Pilfold*'s caſe (*d*), *Wentworth* v. *Squibb* (*e*), *Aſhmore* v. *Rypley* (*f*), *Grenville* v. *Sandwich* (*g*), and *Witham* v. *Hill* (*h*).

There was another point made in argument, whether, ſuppoſing the variance to be fatal the plaintiff might not reſort to his general count in trover, upon the ground that the ſale having been groſsly fraudulent, and the conduct of the officers highly culpable; being founded, as was alleged in a conſpiracy to deſpoil the plaintiff of his property; it avoided the protection of the writ to the ſheriff, under which it was pretended to be made. But as it became unneceſſary in the reſult for the Court to give any opinion on this point, the facts on which it was raiſed

(*a*) 2 *Stra.* 1171. and *Barnes* v. *Conſtantine*, *Yelv.* 46.
(*b*) *Dougl.* 665. (*c*) 2 *Imp. Pract.* 465, 6. (*d*) 10 *Co.* 115. *b.*
(*e*) 1 *Lutw.* 640. (*f*) *Cro. Jac.* 420.
(*g*) 7 *Vin. Abr.* 295. *pl.* 12. and 2 *D'Anvers*, 462. (*h*) 2 *Wilſ.* 91.

1808.

PHILLIPS against BACON.

are not ſtated. The authorities referred to were the ſix carpenters' caſe (*a*), where it was reſolved that where entry, authority, or licence is given to any one by the law, and he abuſes it, he ſhall be a treſpaſſer ab initio. *Freeman* v. *Blewitt* (*b*), and 20. *Vin. Abr.* 501. *pl.* 16.

The Attorney General, *Jervis*, *Wigley* and *Hall*, contrà, inſiſted upon the variance between the count and the writ proved; the latter of which ſtated that the damages were given for two things, the detention of the debt, and the coſts of ſuit; whereas the writ ſet forth in the count only alleged the damages to have been given for the detention of the debt. It was neceſſary for the plaintiff in charging the ſheriff with negligence and improper conduct in the execution of a particular writ to ſet out that writ; and the variance, it was ſaid, was in matter of deſcription, which is fatal, according to the rule lately laid down in *Purcell* v. *Macnamara* (*c*). They obſerved that in *Pilfold*'s caſe (*d*) before cited, the word *damna* was admitted to have two ſeveral ſignifications in law; the one proper and general, which included *coſts*; the other relative and ſtrict, which excluded them: and that damna pro injuria illata, et pro expenſis litis, were two diſtinct things: and this diſtinction is an anſwer to all the other authorities cited, where the word damna or damages was uſed in its general ſignification. But in the writ proved it is plain, that the word *coſts* is uſed in contradiſtinction or ſuperaddition to *damages* for the detention of the debt; and therefore the word *damages* muſt there be taken in its relative and ſtrict ſenſe. If

(*a*) 8 *Co.* 146. (*b*) *Salk.* 409. and 1 *Ld. Ray.* 632.
(*c*) Ante, 157. (*d*) 10 *Co.* 116. *b.* 117. *a.*

the

1808.

PHILIPS *againſt* BACON.

the declaration had merely ſtated, that the plaintiff had recovered ſo much for his damages; that might have been ſufficient; but going on to ſtate that the damages awarded were for detaining the debt; the allegation was diſproved by the writ. The caſes of *King* v. *Pippet*, *Cuming* v. *Sibley*, *Hendray* v. *Spencer*, and *Warre* v. *Harbin*, were conſidered, whether rightly or not, as allegations of ſubſtance, and not of deſcription. But in *Raſtall* v. *Stratton* (*a*), a declaration on a judgment for coſts, ſtating the action to have been brought againſt one defendant only, when it was againſt two, was held to be fatal: and yet the other defendant having been outlawed (*b*), judgment for the coſts could only have been recovered by the one who ſued on the judgment; and therefore in ſubſtance it was the ſame thing. So in *Savage* v. *Smith* (*c*), in debt againſt a bailiff on the ſtat. 28 *Eliz.* for extorting illegal fees in executing a fieri facias; even aſſuming that the plaintiff need not have ſet out the judgment on which the writ was founded; yet having ſet it out, he was held bound to ſtrict proof of it as ſtated.

Lord ELLENBOROUGH C. J. Two points have been made, one of which it is not neceſſary to decide; becauſe if the judge did not leave the caſe to the jury upon the count in trover, no queſtion can ariſe on it. But if the queſtion had ariſen, as at preſent adviſed, I ſhould have inclined very ſtrongly from the argument I have heard to have held, that if the ſheriff, or his officers acting for him, depart ſo entirely and ſcandalouſly from their duty in making a mock ſale of the goods in the manner which has been repreſented to us, it could not be conſidered as

(*a*) 1 *H. Blac.* 49. (*b*) Vide S. C. 2 *Term Rep.* 366.
(*c*) 2 *Blac. Rep.* 1101.

1808.

PHILLIPS *againſt* BACON.

a ſale in obedience to the writ of fieri facias, but rather a conſpiracy to deſpoil the plaintiff of his property, and would bring the caſe within the principle of the ſix carpenters' caſe, and make the ſheriff a treſpaſſer ab initio. To be ſure the inſtances there put are, with one exception, where the officer acts under a general warrant of law, and not by a particular mandate (*a*), as here; but one inſtance is that of a purveyor taking cattle by force of a commiſſion for the King's uſe; where the ſelling of them afterwards in the market made the firſt taking wrongful. This point however is now withdrawn from the conſideration of the Court. With reſpect to the other point, on the variance, I adhere to the diſtinction which was taken in *Purcell* v. *Macnamara* (*b*), between allegations of matters of ſubſtance and of deſcription. If the plaintiff had undertaken to ſet out the writ in ipſis verbis, or with a prout patet, &c. it would have fixed him to prove it exactly as he had deſcribed it: but here all that he undertakes to do is to ſtate the ſubſtance of it, and he does this by ſtating that the writ was to levy 254*l.* for the debt and 80*s.* for the *damages* occaſioned by the detention of the ſaid debt: and this is ſubſtantially proved. The objection is that by the writ itſelf it appears that the 80*s.* was awarded for the damages which the plaintiff had ſuſtained as well for detaining the debt as for *coſts*. But *coſts* are a conſequence by the ſtatute of *Glouceſter* of detaining the debt, and are part of the *damages*. In contemplation of law the word *damages* emphatically includes *coſts*. It is ſo conſidered by Lord *Coke*, and in the various authorities which have been cited. *Coſts* therefore properly fall under the nomen

(*a*) Vide Caſes collected in 20 *Vin. Abr.* Treſpaſs. 501, 502.
(*b*) *Ante*, 160.

generale

1808.

PHILLIPS *againſt* BACON.

generale of *damages*; and the whole 80*s*. may properly be ſtated as awarded to be levied for damages ſuſtained by occaſion of the detaining of the debt; though if it were neceſſary to come to a ſpecification of the component ſum of 80*s*. it would appear that part of it was for the coſts. The detention of the debt is the cauſe of *damages* both in the peculiar ſenſe of the word, and in reſpect of the coſts. In the caſe of *Grenville* v. *Sandwich* the error imputed was only repelled on the ground that the damages included the coſts.

GROSE and LE BLANC, Juſtices, aſſented (*a*). The latter obſerved, that it was admitted that if the allegation had been general, that the 80*s*. were awarded to the plaintiff for his *damages*, that would have done. Then what difference does it make when it is ſaid for his damages "ſuſtained by occaſion of the detaining the ſaid debt;" the coſts being a conſequence of ſuch detention, and the law coupling them together under the general name of *damages*. The ſubſtance only of the writ being ſet out, the allegation was ſubſtantially proved.

Rule diſcharged.

(*a*) Mr. Juſtice *Lawrence* was abſent.

1808.

Friday, Feb. 5th.

GOODRIGHT, on the Demiſe of ANN HOSKINS, *againſt* THOMAS HOSKINS.

By a bequeſt of leaſehold to *R. until his* (eldeſt) *ſon T.* ſhall *attain* 21, *and no longer*; but *in caſe* T. *ſhall die in minority, then* to *J.* or *O.* (his younger brothers) or either ſurviving or attaining 21, as aforeſaid; with a deſire *that* R. *would quit and deliver up the premiſes as aforeſaid*, and *confirming* the bequeſt of them to *R.*'s family on his relinquiſhment of a certain claim, which he did relinquiſh: held that *T.* on his attaining 21 took the eſtate by neceſſary implication; though there was a deviſe of the reſidue to *N.* the younger brother of *R.*

THIS was an ejectment for a meſſuage and lands, called *Roſkief*, in the pariſh of *Saint Allen* in the county of *Cornwall*, and the demiſe was laid on the 13th of *March* 1805. At the trial at *Bodmin*, before *Graham* B. a verdict was found for the plaintiff, ſubject to the opinion of this Court on the following caſe:

John Hoſkins was poſſeſſed of the premiſes in queſtion for a term of 99 years, ſtill ſubſiſting, and alſo of other leaſehold premiſes, called *Boſwellack*. On the 17th of *March* 1800, having two ſons, *Richard* and *Nicholas*, and *Richard* having nine children, of whom *Thomas*, *John*, *Richard*, and *Dorothy*, were four; *John Hoſkins* made his will, in which, after giving to his wife, *Ann Hoſkins*, an annuity of 10*l.* for her life, payable out of his intereſt in the leaſehold premiſes of *Boſwellack*, and 20*l.* worth of ſuch articles of houſehold furniture as ſhe ſhould ſelect, are theſe words; "I alſo give and bequeath unto "my beloved ſon *Richard Hoſkins* 5 *guineas*, and deſire that "he may, as ſoon as may be, be paid his wife's diſtributive ſhare out of *Boſwellack*, as the ſame was ſettled "by bond made previous to my marriage with my ſaid "wife *Ann*. I likewiſe give and bequeath unto my ſaid ſon "*Richard* the leaſehold premiſes of *Roſkief* in *Saint Allen* "aforeſaid, to hold the ſame unto my ſaid ſon *Richard* "*until his ſon* Thomas *ſhall attain his age of* 21 *years, and* "*no longer*: but *in caſe the ſaid* Thomas Hoſkins *ſhall die* "*in minority*, then my will is, and I do hereby give and "bequeath the ſaid leaſehold premiſes of *Roſkief* unto

"*John*

1808.

GOODRIGHT dem. HOSKINS against HOSKINS.

" *John*, or *Richard*, ſons of the ſaid *Richard Hoſkins*, or " either of them ſurviving or attaining their age of 21 " years as aforeſaid. And I deſire *the ſaid premiſes of* " Roſkief *may be quitted and delivered up as aforeſaid by* " *my ſaid ſon* Richard Hoſkins *accordingly*. My will and " meaning further is, and I do hereby particularly order " and direct, that in caſe my ſaid ſon *Richard Hoſkins* " do charge my executor, or claim or demand any in- " tereſt, or compenſation for the ſame, for the ſum " which may appear to be his wife's diſtributive portion " out of *Boſwellack*, as aforeſaid; or any way attempt to " defeat the purpoſes of my will; I do then and in that " caſe revoke the ſaid bequeſt of *Roſkief*, and all other " the legacies given him or his family, and do give him " the ſaid *Richard Hoſkins*, my ſon, five ſhillings only. " But if, on the contrary, my ſaid ſon *Richard* do quit " all claim to the ſaid intereſt on his wife's diſtributive " portion as aforeſaid, and in every other reſpect abide " by the purpoſes of this my will; I do fully *ratify and* " *confirm* the ſaid bequeſt of *Roſkief in manner and form* " *as aforeſaid*, and the *other* legacies hereinafter given to " *his family*" He afterwards gave ſome ſmall pecuniary legacies to different relatives; and, amongſt others, three guineas to each of his grandchildren, and ſeven guineas in addition to his grand-daughter *Dorothy*; and made his ſon *Nicholas* reſiduary legatee and executor; and alſo directed him to provide decent maintenance for his brother *Richard* during his life. *John Hoſkins* the teſtator died on the 12th of *December* 1804, poſſeſſed of the ſeveral premiſes mentioned in his will; leaving *Ann* his widow, the leſſor of the plaintiff, *Richard* his ſon, and his three grandchildren, *Thomas*, *John*, and *Richard*, ſurviving him; all

1808.

GOODRIGHT dem. HOSKINS *againſt* HOSKINS.

all of whom are now living. *Nicholas*, the teſtator's ſon, whom he made his reſiduary legatee and ſole executor, died in his lifetime. Adminiſtration with the will annexed, and adminiſtration of all goods, &c. undiſpoſed of by the ſaid will was granted to *Ann Hoſkins*, the leſſor of the plaintiff, before *March* 1805. *Thomas Hoſkins*, the grandſon of the teſtator, who is about 25 years of age, entered upon the premiſes in queſtion on the death of the teſtator, and has been in poſſeſſion of the ſame ever ſince. It is agreed that the want of aſſent by the adminiſtratrix ſhall not operate to the prejudice of *Thomas Hoſkins'* claim. *Richard Hoſkins*, the teſtator's ſon, never did any of thoſe things, upon the doing of which the bequeſts to him and his family were revoked. If the plaintiff were entitled to recover, the verdict was to ſtand: if not, a nonſuit was to be entered.

Dampier, for the plaintiff, ſaid that the only queſtion was, Whether by neceſſary implication *Thomas Hoſkins*, the defendant, the teſtator's grandſon, muſt take the eſtate of *Roſkief*, as certainly there was no bequeſt of it to him in terms: and he denied the neceſſity of ſuch an implication; the teſtator having given the reſidue of his property, not otherwiſe diſpoſed of, to his ſon *Nicholas*, whom he made his executor, and charged with the maintenance of another relation for his life. The eſtate is given to the teſtator's ſon *Richard* until *Thomas* came of age; but there is no bequeſt of it at that period to *Thomas* himſelf; though it is given over to his brothers if he ſhould die before he was of age. It is probable that the teſtator meant to have given it to *Thomas*, when he came of age; but he has omitted to do ſo, and the

Court

1808.

GOODRIGHT dem. HOSKINS *against* HOSKINS.

Court cannot ſupply that omiſſion, as was held in *Chapman* v. *Brown* (*a*), where the limitation to the ſecond ſon of the brother's family who were the objects of the teſtator's bounty was by miſtake omitted. Moſt of the caſes where implications of this ſort have been raiſed are, where the deviſe was of an eſtate of inheritance which was given over to the heir at law of the teſtator after the death, &c. of another; in which caſe that other muſt by neceſſary implication take, as the intention of the teſtator is expreſſed that his heir ſhall not have the eſtate till the event has happened. But here in the events which have occurred, the leaſehold in queſtion will fall into the reſidue as undiſpoſed of. And he referred to *Rayman* v. *Gold* (*b*), and *Horton* v. *Horton* (*c*).

Eaſt, contrà, mentioned the caſe of *Roe d. Bendall* v. *Sommerſet* (*d*) as in point, which called in queſtion the two laſt mentioned caſes; and alſo referred to the opinion of *Croke* J. in *Roberts* v. *Roberts* (*e*). But he was not called upon to argue the caſe;

The Court being clearly of opinion with the defendant.

And Ld. ELLENBOROUGH C. J. ſaid, We are glad to find ourſelves warranted by authority in putting a conſtruction upon the words of the will which it was manifeſtly the intention of the teſtator to expreſs in favour of his grandſon *Thomas*. For he firſt leaves the eſtate to his ſon *Richard*, the father of *Thomas*, until his eldeſt ſon

(*a*) 3 *Burr.* 1634. (*b*) *Moore*, 635. (*c*) *Cro Jac.* 74.
(*d*) 5 *Burr.* 2608. and 2 *Blac. Rep.* 692.
(*e*) 2 *Bulſtr.* (123) 113 and vide *Goodright* v. *Goodridge*, *Wilſes*, 369. and *Coſen's* caſe, *Owen*, 29.

1808.

GOODRIGHT dem. HOSKINS *againſt* HOSKINS.

Thomas comes of age: and in the event of *Thomas* dying in his minority, he gives it to his younger brothers. But he deſires that the premiſes may be *quitted and delivered up, as aforeſaid*, by his ſon *Richard*; that is, when *Richard*'s ſon *Thomas* came of age, to *Thomas*; for to whom elſe could *Richard* deliver up the poſſeſſion in that event? and if *Richard* did what by the will he was directed to do, and which he is found to have done, the bequeſt of *Roſkief* was confirmed to his family. To be ſure there is a ſtrong implication from the words of the will that the teſtator meant that *Thomas* ſhould have *Roſkief* when he came of age, though it is not ſo expreſſed in terms: and the the authorities bear out this conſtruction.

Per Curiam, Judgment of nonſuit to be entered.

Monday, Feb. 8th.

SOULSBY *againſt* NEVING.

After a landlord has recovered in ejectment againſt his tenant, he may maintain debt upon the ſtat. 4 *Geo.* 2. *c.* 28. for double the yearly value of the premiſes, during the time the tenant held over after the expiration of the landlord's notice to quit.

THE defendant, after having held of the plaintiff a farm at *Hallington* in *Northumberland* for 14 years, received a regular notice to quit on the 12th of *May* 1806, and the poſſeſſion was then demanded of him; but he refuſed to deliver it up, and held over till the 7th of *Feb.* 1807; whereupon the plaintiff brought his ejectment againſt the defendant, and recovered poſſeſſion; and afterwards brought this action of debt (*a*) upon the ſtatute 4 *Geo.* 2.

(*a*) The declaration was in the uſual form; alleging the demiſe to and holding by the defendant; the demand of poſſeſſion and notice in writing to deliver up the premiſes at the end of the term, on the 12th of *May* 1806; the ſubſequent refuſal of the defendant, and his wilfully holding over for three quarters of a year after the 12th of *May*; and the annual value of the premiſes. Vide *Cobb* v. *Stokes*, 8 *Eaſt*, 358.

c. 28.

1808.

SOULSBY *againſt* NEVING.

c. 28. for *double the yearly value* of the premiſes in the interval between the expiration of the notice to quit, (which was the day of the demiſe in the ejectment), and the time of recovering poſſeſſion under the ejectment. And theſe facts being proved at the trial at *Appleby* before *Chambre* J., it was objected on the part of the defendant, that the plaintiff having before recovered the premiſes by ejectment, and thereby treated the defendant as a *treſpaſſer*, this action of debt upon the ſtatute, in which, as it was ſaid, the defendant was proceeded againſt as *tenant*, could not be maintained: the learned judge, however, overruled the objection, and the jury gave a verdict for 440*l.* as for the proportion of the double yearly value: the defendant having leave to move the Court to enter a nonſuit, if the direction were wrong. A rule niſi for this purpoſe was obtained in *Michaelmas* term laſt, againſt which

Park and *Burrel* now ſhewed cauſe, and obſerved that the ground laid for obtaining the rule was that after the plaintiff had recovered in the ejectment againſt the defendant, and thereby treated him as a treſpaſſer, it was not competent to him to bring the preſent action; which was ſtated to be founded on contract, and in which the relation of landlord and tenant was recognized: but this they denied; and contended that the double value given to the landlord by the ſtatute 4 *Geo.* 2. *c.* 28. upon the wilful holding over of a tenant after due notice was by way of *penalty*, and ſo it was noticed in the ſtatute, conſidering the tenant as a wrong-doer; and therefore not inconſiſtent with the action of ejectment in which the recovery was had againſt him as a treſpaſſer. In this action the demand was not as for *rent*, but for the double

1808.

SOULSBY *against* NEVING.

value of the premiſes wrongfully held over. The ſtatute of the 4 *Geo.* 2. is differently worded (*a*) from that of the 11 *Geo.* 2. *c.* 19. *ſ.* 18. upon the ſame ſubject, and which latter directs that if a tenant, after giving notice to his landlord to quit, hold over, he ſhall pay double *rent*. This the Legiſlature thought ſufficient when the landlord is ſatisfied with the continuance of the tenant, but the notice to quit proceeds only from the tenant. But where the tenant wilfully holds over againſt the landlord's notice to quit, the Legiſlature by the former ſtatute have given the *double value*, by way of *penalty*, and not as *rent*; for in many inſtances the double *rent* would be no compenſation to the landlord, for being kept out of poſſeſſion of the land, and it might ſtill be advantageous to the tenant to hold over at that rate. As to the caſe of *Wright* v. *Smith* (*b*), it was clearly not determined, as ſtated in the marginal note of the report, on the ground that the action for the double value did not lie after a recovery by the landlord in ejectment; but on the ground that the ſtatute, which was meant to give a *penalty* againſt the contumacy of tenants, did not extend to a caſe where, without fraud or contumacy, the tenant had held over upon the faith of a leaſe granted bonâ fide under a power, which turned out to be invalid.

Raine and *Hullock*, in ſupport of the rule, contended that the Legiſlature by the ſtat. 4 *Geo.* 2. only meant to give the landlord an election either to conſider the tenancy as continuing, and to recover the proportion of double the annual value by way of rent; or conſidering

(*a*) *Timmins* v. *Rawlinſon*, 3 *Burr.* 1603.

(*b*) Exchequer, *Eaſter* term 1805, reported in 5 *Eſp. Ni. Prl. Caſ.* 203.

the

1808.

SOULSBY *againſt* NEVING.

the tenancy at an end, and the tenant a treſpaſſer, to proceed by ejectment, and the ſubſequent action for the meſne profits; and in *Cutting* v. *Derby* (*a*) the Court conſidered this action as ſtanding in the place of an ejectment. But this is an attempt to confound the two remedies, and to recover double the yearly value of the farm as upon a continuing implied tenancy, after having treated the tenant as a treſpaſſer during the ſame period, and ejected him upon that ground. If the ſtatute had ever been conſidered as ſubſtituting this remedy in the place of the action for meſne profits, recourſe would always have been had to it, as the more beneficial remedy for the landlord; and the abſence of all precedent to warrant it after a recovery in ejectment affords a ſtrong argument againſt it. Though, in one ſenſe, the giving the double value was meant to operate as a penalty, yet it is not ſtrictly ſo; for by the ſtatute the tenant may be held to bail for the amount; which is never allowed in penal actions. The count in debt for the double value may be joined with other counts upon contracts.

Lord ELLENBOROUGH C. J. There is no incongruity in the landlord's bringing this action for the double value after a recovery in ejectment: and the deciſion of the Court of Exchequer in *Wright* v. *Smith* evidently proceeded on the ground that the ſtatute 4 *Geo.* 2. only meant to apply to the caſe of a wilful and contumacious holding over by the tenant, after notice to quit, and not to a bona fide holding over by miſtake. The Legiſlature conſidered that the ſingle value might not in many caſes be a compenſation to the landlord for having been kept

(*a*) 2 *Elec. Rep.* 1077.

1808.

SOVERBY against NEVING.

out of poſſeſſion by the miſconduct of the tenant, and therefore they gave him double the value. It has no reference to any antecedent remedy which the landlord had to recover poſſeſſion by ejectment, but is cumulative. The two actions are brought diverſo intuitu: the ejectment is in order to get poſſeſſion of the premiſes wrongfully withheld; the action of debt for the double value is in order to indemnify the landlord for the wrong. Then came the ſtatute 11 *Geo.* 2. *c.* 19., in which, where the tenant gives the notice to quit, and ſtill holds over, the Legiſlature thought it was ſufficient to give the landlord double rent, to be levied, ſued for, and recovered in the ſame manner as the ſingle rent was; giving the landlord therefore a right to diſtrain for it, which is a remedy applicable only to the relation of landlord and tenant. And the ſame ſtatute recognizes the party by the name of tenant, which the firſt ſtatute does not. Upon the latter ſtatute, therefore, there may be ſome incongruity in applying the remedy for double rent after the remedy by ejectment, which treats the perſon in poſſeſſion as a treſpaſſer; but there is no incongruity in this caſe. And as to the form of this action being in debt; that is not confined to caſes of contract; for it is the form in which penalties on the game laws, &c. are recovered.

The other Judges agreed that there was no inconſiſtency in bringing this action after the recovery in ejectment: and *Lawrence* J. referred to Lord *Mansfield*'s opinion in *Doe d. Cheney* v. *Batten* (*a*), which ſeemed to import as much.

Rule diſcharged.

(*a*) *Cowp.* 245. The printed report inadvertently ſpeaks of the landlord's being entitled to double *rent* by the ſtat. 4 *Geo.* 2. *c.* 28., inſtead of

of double *value:* with this correction the paſſage will apply more ſtrongly. I have a MS. note of the ſame caſe by Mr Juſtice *Buller* in which Lord *Manſfield* is made to ſay, "If both parties intended" (*i. e.* by the landlord's receipt of the ſingle rent for a quarter which became due after the time of the demiſe laid in the declaration;) "that the tenant ſhould continue in poſſeſſion, there is an end of the plaintiff's title: but if not; if it were meant merely by both that the landlord ſhould only take the rent inſtead of the *double penalty*, that would not bar his remedy by ejectment." The ſame inadvertency, however, which has been noticed in the printed report ſeems afterwards to have occurred in the MS., which runs thus: (by Lord *Manſfield*) "There was another caſe at *Launceſton*, when Mr. Juſtice *Gould* was at the bar, where an objection was taken that the plaintiff had brought an action for uſe and "occupation for rent accruing due after the time of the demiſe, and which action then ſtood ready for trial: and it was ſaid that that was an action founded on promiſes on a ſuppoſed permiſſion of the plaintiff to occupy, which was a waver of the notice. But the objection was overruled; and the plaintiff recovered in the ejectment, and afterwards in the action for uſe and occupation. And it was holden that one of the remedies was not a waver of the other. Why? Becauſe they were brought for ſeveral demands, to both of which the plaintiff was entitled: and one did not wave the other, *becauſe after the poſſeſſion was recovered, the plaintiff had a right to double* rent, *if he had thought fit to ſue for it.*" I ſuſpect that by the "double *rent*" here ſpoken of was meant double *value*; for the act of the 4 *Geo.* 2. is ſpecifically referred to in other parts of the caſe, and no mention made of the 11 *Geo.* 2.: and with that alteration (which is beſides confirmed by what fell from the Court in the caſe in judgment) this opinion is an authority in point.

1808.

Wednesday, Feb. 10th.

BRASWELL *againſt* JECO.

Order to amend writs of ſcire facias on a judgment, and declaration thereon, conformably to the judgment roll.

THE *Court*, after hearing *Lawes* againſt a rule obtained by *Eſpinaſſe*, directed the two writs of ſcire facias iſſued upon a judgment (*a*), and the declaration in ſcire facias thereon, to be amended, by ſtating the judgment and proceedings in the original action to have been againſt the defendant as a common perſon, and not as an attorney, conformably to the judgment roll.

Rule abſolute (*b*).

(*a*) In drawing up the rule niſi the judgment was improperly ſtated to be ſigned *in this cauſe*; but as no judgment had been ſigned in the cauſe now before the Court, thoſe words were rejected as ſuperfluous.

(*b*) Vide *Perkins, Adminiſtrator*, v. *Petit*, 2 *Boſ. & Pull.* 275. and the caſes there cited.

Wednesday, Feb. 10th.

The KING *againſt* The Sheriff of LONDON.

The ſheriff cannot relieve himſelf from an attachment for not bringing in the body, by payment of the debt ſworn to and indorſed on the bailable writ ſince the ſtat. 43 *G.* 3. *c.* 46. *ſ.* 2., having neglected to take the money at the time of the arreſt as directed by that act; but muſt pay the whole debt and coſts.

THE defendant in the original action was arreſted on bailable proceſs indorſed for 60*l.*, and was liberated without giving any bail bond, or paying the debt ſworn to and coſts into the hands of the ſheriff under the ſtat. 43 *Geo.* 3. *c.* 46. *ſ.* 2.: and bail not having juſtified in time, and the ſheriff being attached, a rule was obtained on a former day, calling on the plaintiff in the original action to ſhew cauſe why the writ of attachment ſhould not be ſet aſide with coſts, upon payment of the ſum ſworn to and indorſed on the writ, with coſts up to the time when the ſame was tendered by the ſheriff; which tender

1808.

The KING *againſt* The Sheriff of LONDON.

was made before the attachment. And in ſupport of this rule *Gurney* relied on the late ſtatute, which enabled a party arreſted on meſne proceſs, in lieu of giving bail to the ſheriff, to depoſit in his hands the amount of the debt ſworn to and indorſed on the writ, together with 10*l.* to anſwer the coſts then incurred; on payment of which the party arreſted is to be diſcharged. This ſum the ſheriff is directed to pay into Court at or before the return of the writ; and if the defendant do not put in and perfect bail, the money is to be paid over to the plaintiff. This rule, he contended, was calculated to put the plaintiff in the ſame condition as he would have been in if the money had been originally paid to the ſheriff. But,

Garrow contrà, objected that the ſheriff, not having done his duty in the firſt inſtance by taking the amount of the debt ſworn to and coſts, as directed by the ſtat. 43 *Geo.* 3. *c.* 46. ſtood in the ſame ſituation of delinquency, as he would have done before that ſtatute by liberating the party arreſted without taking a bail bond; and in that caſe the Court never relieved the ſheriff from an attachment regularly obtained, unleſs upon the terms of paying the whole debt (*a*) and coſts. And he ſuggeſted that the plaintiff's demand was for 150*l.*

And of this opinion were *the Court*, who referred it to the Maſter to ſee what was due to the plaintiff, and directed the attachment to ſtand as a ſecurity for what the Maſter ſhould find to be due and for the coſts.

(*a*) He referred to *Rex* v. *The Sheriff of Surrey*, 7 *Term Rep.* 239. and *Heppel* v. *King*, *ib.* 370.

1808.

Wedneſday, Feb. 10th.

The KING *againſt* DAVIS.

In the Cauſe of *Morrow* againſt *Davis.*

The coſts of a ſuit in Chancery directed to be paid by an award made before the bankruptcy of the defendant, but which coſts were not taxed till after he became bankrupt, cannot be proved under the commiſſion, but the bankrupt remains liable to be attached for the amount under the award made a rule of Court.

ON the 10th of *March* 1807, the plaintiff and defendant in the action entered into arbitration bonds for 500*l.* which, reciting that a bill in Chancery had been filed againſt the defendant at the ſuit of the plaintiff concerning a partnerſhip account between the defendant and the plaintiff's late huſband, on which certain proceedings were had, and that a conſiderable ſum was claimed to be due to the plaintiff, and that to aſcertain the balance, it was agreed to refer the matter to an arbitrator; were conditioned to abide by and perform the award concerning all matters and differences between the parties, and all coſts incurred by ſuch ſuit, ſo that the award ſhould be ready to be delivered before the 1ſt of *May* next. The arbitrator on the 30th of *April* awarded 205*l.* to be paid to the plaintiff *on the 30th of May*, as the balance due on the account, and a moiety of the expences of the award, and that the defendant ſhould pay all *the coſts and charges of the ſuit in Chancery.* On the 14th of *May* the defendant became bankrupt, and a commiſſion iſſued againſt him; and the commiſſioners allowed the debt awarded to be proved under the commiſſion, but not the coſts of the ſuit in Chancery, which were not then aſcertained. The defendant obtained his certificate on the 13th of *January* 1808, and having refuſed to pay thoſe coſts, an attachment was ſued out againſt him for non-performance of the award, which had been made a rule of Court.

Park,

1808.

The KING *againſt* DAVIS.

Park now ſhewed cauſe againſt a rule for diſcharging the defendant from the attachment; and contended at firſt that a debt awarded to be paid on a future day after the bankruptcy was not proveable under the commiſſion, and therefore the defendant remained perſonally liable to pay it. That the ſtat. 7 *Geo.* 1. *c.* 31., enabling debts on certain ſecurities due at a future day to be proved under the commiſſion, did not help the caſe, as that related only to certain inſtruments or other perſonal ſecurities; and an award was not named amongſt them. In *Baker*'s caſe (*a*) the ſum awarded was due before the bankruptcy, and of courſe the bankrupt was entitled to his diſcharge by the certificate. (As to the debt, *the Court* obſerved, that it was clearly due before the bankruptcy; the award only aſcertained the exact amount of it. The only queſtion was as to the coſts.) He then contended that at any rate the attachment muſt ſtand for the amount of the coſts of the ſuit in equity, which are only conſtituted a debt by the taxation, and are not proveable under the commiſſion, though the order for taxation were made before the bankruptcy; according to the caſe *Ex parte Sneaps* (*b*), on which he relied.

Littledale, contrà, as to the debt, ſaid that it exiſted before the arbitration bonds were entered into: and not only did the bonds recite that a balance was claimed to be due to the plaintiff, the amount of which the arbitrator was to aſcertain; but alſo that coſts had been incurred in the ſuit in Chancery, the payment of which he was to regulate. When therefore the coſts were awarded to be

(*a*) 2 *Stra.* 1152. (*b*) *Co. Bank. Law*, 192. *Cull. B. L.* 107.

1808.

The KING against DAVIS.

paid by the defendant, they became a debt due under the arbitration bond executed by him, for which the penalty was a ſecurity before the bankruptcy; in like manner as if the preciſe amount had been incorporated into the bond. Where authority is given by one inſtrument to do an act, which is afterwards done, it is the ſame as if the particular act were directed to be done by the original inſtrument (*a*). In *Pattiſon* v. *Bankes* (*b*) a bond for payment of an annuity for a term of years was held to be within the ſtat. 7 *Geo.* 1. *c.* 31. though the penalty were not forfeited at the time of the bankruptcy. And as a verdict given before the bankruptcy attaches to it the coſts, though not taxed till afterwards; ſo here the award having aſcertained the right to the coſts in equity before the bankruptcy, they will follow the debt awarded in the ſame manner, though not taxed; and are conſequently proveable under the commiſſion when aſcertained.

The Court inquired whether the caſe *Ex parte Sneaps* had ever been overruled; and being anſwered that it had not, and that the practice ſince that deciſion had always been in conformity to it: Lord *Ellenborough* obſerved that no argument could put the award of the arbitrator higher than the order of the Court of Chancery itſelf: and Lord *Thurlow* having in that caſe held that the coſts taxed after the bankruptcy were not inchoate with the order for taxation made before, this Court could not conſider them as inchoate with the award. Thereupon

(*a*) *Johnſon* v. *Hodgſon*, 8 *Eaſt*, 38. (*b*) *Coup.* 540.

The

1808.

The KING *againſt* DAVIS.

The Court directed, that on payment by the defendant of the coſts in the Chancery ſuit directed to be paid by the award, he ſhould be diſcharged from the attachment.

VANBRYNEN and Others *againſt* WILSON.

Thurſday, Feb 11th.

The Court would not ſtay judgment and execution, on a ſummary application, becauſe the plaintiffs after verdict became alien enemies.

THIS cauſe had been referred by an order at niſi prius to an arbitrator to aſſeſs the plaintiff's damages; which he had done, and the verdict was entered for the ſum awarded; and after an ineffectual attempt on the part of the defendant to impeach the propriety of the arbitrator's calculation, upon a rule which was diſcuſſed on a former day in this term and diſcharged; *Richardſon* now moved that judgment and execution ſhould be ſtayed on bringing the money recovered by the verdict into Court, if the Court ſhould think that neceſſary; upon the ground that the plaintiffs had ſince the verdict become alien enemies. And being aſked by the Court, if he had any caſe to cite where they had ſo interfered in a ſummary way; he anſwered in the negative: but ſaid that in all caſes where an audita querela would lie, the Court were now in the practice of giving ſummary relief, to avoid the expence of that mode of proceeding (*a*).

The Court, however, ſaid that if the defendant had any ſuch remedy by law, he might avail himſelf of it, if ſo adviſed; but that they would not interfere in the manner propoſed, on ſuch an occaſion.

Rule refuſed.

(*a*) Vide *Anon.* 1 *Salk.* 93.

1808.

Thurſday, Feb. 11th.

COLLINS *againſt* PONEY.

In treſpaſs againſt the owner of a houſe adjoining to the plaintiff's in the metropolis for taking down his party-wall and building on it, the defendant ſhewing at the trial that he was authorized in doing the thing complained of under the building act 14 *G.* 3. *c.* 78. is entitled to treble coſts under the 100th ſection, upon a nonſuit.

THE plaintiff brought treſpaſs againſt his neighbour for taking down a portion of his party-wall between their two houſes in the metropolis, and building upon it; but it appearing that the defendant was authorized in what he had done by the proviſions of the building act, 14 *Geo.* 3. *c.* 78., the plaintiff was nonſuited. And the defendant then obtained a rule calling on the plaintiff to ſhew cauſe why a ſuggeſtion ſhould not be entered on the roll, that this action was brought for acts done in purſuance of the ſtatute; and why the maſter ſhould not tax the defendant his treble coſts of the action and the coſts of this application.

Garrow and *Manley* now ſhewed cauſe, and contended that the 100th ſection of the act, which gives treble coſts to the defendant if a verdict be given for him or the plaintiff be nonſuited in any action brought "for any thing done in purſuance of the act," was only intended to protect juſtices of the peace or other public officers, who did any thing by virtue of their offices in the execution of the act; though the words of the clauſe are general, that "no action ſhall be commenced againſt "*any perſon or perſons*, for any thing done in purſuance of "this act," &c.: and it does not extend to private perſons, like the defendant, who take on themſelves to do the act complained of. The firſt forty ſections of the act regulate the mode of building party walls, and point

out

1808.

COLLINS *against* PONEY.

out the manner of ſettling differences in the progreſs of it. The 41ſt ſection regulates the proportion which the owner of the adjoining houſe, deriving benefit from a party-wall when built, ſhall pay towards the expence of it; and gives an action to recover it, if it be not paid, with *double* coſts of ſuit to the plaintiff, if he recover the full ſum claimed. Now there could be no reaſon for giving a plaintiff, when he ſued rightfully for that which the act entitled him to, a leſs rate of coſts than was given to a defendant if wrongfully ſued for any thing done under the ſame act; which ſhews that the 100th clauſe was meant to apply to a different deſcription of perſons. Then follow ſome further regulations as to building from the 41ſt to the 61ſt ſections incluſive. By the 62d ſection ſurveyors are to be appointed, whoſe duties are pointed out: and juriſdiction is given to juſtices of peace for the recovery of penalties by various ſubſequent clauſes: and by ſection 87. diſtreſſes are not to be avoided for want of form: and by ſection 88. no action ſhall lie for any irregularity, if tender of ſufficient amends be firſt made. And it was to protect the juſtices and other ſubordinate officers who were required to do certain acts in the execution of the duties impoſed on them, that the proviſion for treble coſts was made in the 100th ſection.

The Attorney-General, *Park*, and *Marryat*, contrà, inſiſted upon the general wording of the 100th clauſe, which extended to cover *any* perſon for *any thing done in purſuance of the act*; and therefore included this defendant, though neither magiſtrate nor ſurveyor. If the Legiſlature had intended to confine the protection to public officers,

1808.

COLLINS *againſt* PONEY.

officers, it would have uſed the ſame appropriate words of deſcription as are to be found in other acts having ſuch perſons in view. The defendant would have been a treſpaſſer, unleſs for the protection of the act: and if inſtead of pleading the general iſſue, (which is only given by the 100th clauſe) he had pleaded ſpecially, that what he did was done in purſuance of the act, it muſt have been found for him: for if not ſo done, there muſt have been a verdict for the plaintiff.

The majority of *The Court* agreed that the words of the 100th clauſe were too general and ſtrong to be gotten over: and therefore conſidered this caſe as falling within it, eſpecially as the ſame clauſe gives the plea of the general iſſue to any defendant ſued for any matter or thing done in purſuance and by the authority of the act, by which alone the defendant could juſtify what he had done.

LE BLANC J., who thought that the caſe was not within the intention of the Legiſlature in framing that clauſe, admitted that he felt himſelf hampered by the general words of it.

REGULA GENERALIS.

Hilary Term, 48 *Geo.* 3. 1808.

Special bail in trover.

IT IS ORDERED, That from and after the laſt day of this preſent *Hilary* term, no perſon be held to ſpecial bail in an action of trover or detinue, without an order made for that purpoſe by the Lord Chief Juſtice, or one of the Judges of this court.

ANDREWS *againſt* PALSGRAVE.

Friday, Feb. 12th.

In a ſpecial count on a policy, the riſk was ſtated to continue until the ſhip was unloaded, and there were common counts: held that the premium having been paid into court generally was an admiſſion of the contract ſtated in the ſpecial count; and that it was not competent

THE declaration contained a ſpecial count on a loſs by barratry, on a policy of inſurance on the ſhip *Mercurius*, at and from *London* to *Tobago*, continuing the riſk until the ſhip was unloaded; and alſo the common counts. The defendant paid the premium into court generally; and at the trial offered to prove that by the original terms of the inſurance agreed to by the underwriters the riſk was only to continue for 24 hours, and that it was afterwards altered by the broker without their knowledge. But Lord *Ellenborough* C. J. held that the payment of money into court generally was an admiſſion

to the defendant to ſhew that the policy by which the riſk was originally made to ceaſe after the ſhip was moored 24 hours in ſafety was afterwards altered by the broker without the defendant's knowledge. But the defendant having afterwards obtained a rule to amend the rule for paying money into court, by confining it to the money counts, and for a new trial on payment of coſts; and the plaintiff thereupon determining to take the money out of court, and not to proceed further, is entitled to all the coſts of the action, and not merely to the uſual coſts of a new trial.

of

1808.

ANDREWS *againſt* PALSGRAVE.

of the policy as ſtated in the declaration; and the plaintiff had a verdict. The next cauſe in the paper at the ſittings was by the ſame plaintiff againſt *Snart*, another underwriter on the ſame policy; in which the premium had been paid into court upon the count for money had and received: and the broker proving the alteration to have been made, as above ſtated, the plaintiff was nonſuited. The defendant *Palſgrave* in laſt *Michaelmas* term obtained a rule to amend his former rule for paying money into court, by confining it to the count for money had and received; and alſo for a new trial on payment of coſts: upon which the plaintiff determined not to proceed to a new trial, but to take the money out of court; and upon the taxation of coſts contended before the Maſter that he was entitled to the whole coſts of the action: but having admitted, in anſwer to the Maſter's inquiry, that he ſhould have ſtill proceeded to trial, though the premium had been paid into court on the common count alone, the Maſter allowed only the uſual coſts on a rule for a new trial.

Garrow, *Park*, and *Boſanquet* now ſhewed cauſe againſt a rule obtained on a former day for the Maſter to review his taxation; inſiſting that it was right; or that at any rate, if the plaintiff were entitled to more, it could only be the coſts up to the time of the original payment of money into court. But

The Court (ſtopping *The Attorney-General* and *Gaſelee* in ſupport of the rule) ſaid that when the defendant applied to amend the rule for paying money into court,

he

1808.

ANDREWS *againſt* PALSGRAVE.

he applied for a favour, which he could only have upon the terms of paying all the coſts incurred ſince the original rule; and that the plaintiff was by the terms of the original rule entitled to the coſts of the action if he took out the money. They therefore made the rule abſolute to review the taxation.

END OF HILARY TERM.

CASES

ARGUED AND DETERMINED

1808.

IN THE

Court of KING's BENCH,

IN

Eaſter Term,

In the Forty-eighth Year of the Reign of GEORGE III.

MEMORANDUM.

IN the courſe of the laſt Vacation Sir *Giles Rooke*, Knt., one of the Judges of the Court of Common Pleas, died; and was ſucceeded by Mr. Juſtice *Lawrence*, who reſigned his ſeat on the Bench of this Court. And in this Term *John Bayley*, Eſq. Serjeant at Law, was appointed a Judge of this Court, and on *Monday* the 9th of *May* took his ſeat on the Bench, and was afterwards knighted.

1808.

Thurſday, May 5th.

CARRETT *againſt* SMALLPAGE and Others.

By the long eſtabliſhed and recognized practice of the court a writ of capias, with a *non omittas* clauſe, may iſſue in the firſt inſtance, and be executed by the ſheriff within a particular liberty, (ſuch as the honor of *Pontefract* in the county of *York*) the bailiff of which has the execution and return of writs, without a prior writ of latitat firſt iſſued, and a return made by the ſheriff of mandavi baliivo qui nullum dedit reſponſum: and therefore no action on the caſe lies by the bailiff of ſuch liberty againſt the party ſuing out ſuch writ, upon an allegation that it was *wrongfully, injuriouſly, and deceitfully* cauſed to be iſſued by him to the damage of the bailiff in his office, &c.

IN an action on the caſe for an injury to the plaintiff, as bailiff of a franchiſe, the firſt count of the declaration ſtated, in ſubſtance, that the liberty and franchiſe of the honor of *Pontefract* in the county of *York*, from time immemorial, had *the return of writs*, and an office of bailiff, and that the bailiff of right ought to have within the ſame the execution and return of *all* and ſingular writs, precepts, and proceſs, of all and ſingular the courts, juſtices, commiſſioners, and eſcheators of the king and his predeceſſors, with divers fees, &c. ariſing therefrom: which office during all that time has been granted and grantable by the perſon for the time being ſeiſed of the ſaid liberty, &c. That no ſheriff of the county of *York* ought to be commanded by virtue of any writ (*a*) iſſuing out of *B. R.* that he ſhould not omit by reaſon of any liberty in his (the ſheriff's) bailiwick, but that he ſhould enter and take the perſon in ſuch writ named, if he ſhould be found within the ſame, to anſwer, &c. unleſs a common latitat writ ſhould firſt have iſſued out of the ſame court, commanding ſuch ſheriff to take the ſame perſon if he ſhould be found in his (the ſheriff's) bailiwick, and he ſhould have returned, that he had made his mandate to the bailiff of the ſaid liberty to arreſt ſuch perſon named in the ſaid writ, to which the ſaid bailiff had not given any anſwer. The count then ſtated that the king on the 13th of *July* 1801 was and ſtill is ſeiſed in right of his duchy of *Lancaſter* of the ſaid liberty, *&c.* of *Pontefract*, and that by indenture of that date

(*a*) i. e. a ſpecial non omittas capias ad reſpondendum writ.

he

1808.

CARRETT *againſt* SMALLPAGE and Others.

he granted and demiſed to the plaintiff the office of bailiff of the liberty, and the execution and return of *all* and ſingular writs, &c. (as before) with all and every the fees, &c. ariſing therefrom, habendum for 31 years at a certain rent; which indenture was inrolled, &c.; by virtue of which the plaintiff became bailiff of the ſaid liberty, and ſtill is in poſſeſſion of the ſaid office of bailiff, and has the execution of all and ſingular ſuch writs, precepts, and proceſs, within the ſaid honor, &c. and by reaſon thereof lawfully entitled to all and every the fees, &c.: yet that the defendants well knowing the premiſes, and that no writ of latitat at the ſuit of the defendant *Smallpage* againſt *M. Dormer* had firſt iſſued out of *B. R.* to the ſheriff of *Yorkſhire;* but intending to prejudice and aggrieve the plaintiff, as ſuch bailiff, and to deprive him of the fees, &c. of his ſaid office; afterwards, on the 23d of *July* 1806, *wrongfully, injuriouſly, and deceitfully cauſed and procured* to be iſſued out of *B. R.* againſt the ſaid *M. D.* a certain writ of the king called a non omittas capias (*a*), teſted the 25th of *June* in *Trinity* term then laſt paſt, according to the uſage and practice of the ſaid court, directed to the ſheriff of *Yorkſhire,* by which he was commanded that he ſhould not omit by reaſon of *any* liberty in his bailiwick, but that he ſhould enter the *ſame,* and take the ſaid *M. D.* &c., to anſwer to the defendant (*Smallpage*) of a plea of treſpaſs, &c. according to the cuſtom of the ſaid court of *B. R.* &c.; which ſaid writ of non omittas capias the defendants afterwards and before the return thereof, viz. on the 30th of *July* 1806, *wrongfully, injuriouſly, and deceitfully* cauſed to be delivered to the ſheriff of *Yorkſhire* to be executed; by

(*a*) This was incorrectly called a non omittas latitat writ in the declaration.

1808.

CARRETT *againſt* SMALLPAGE and Others.

virtue of which writ the ſaid ſheriff, without the licence and againſt the will of the plaintiff, afterwards, and before the return thereof, to wit, on the 9th of *Auguſt* 1806, entered into the plaintiff's ſaid liberty, and cauſed the ſaid *M. D.* to be taken within the plaintiff's ſaid liberty, to anſwer to the defendant *Smallpage* according to the exigency of ſuch writ: whereby the plaintiff loſt and was deprived of divers fees, &c. which would have accrued and of right belonged to him as ſuch bailiff if he had been commanded to take the ſaid *M. D.*, and had cauſed him to be taken within his ſaid liberty to anſwer, &c. The 2d count ſtated that the plaintiff was lawfully poſſeſſed of the office of bailiff of the ſaid liberty, &c. and lawfully entitled to the execution of *all* writs, &c. *for the taking* of any defendant at the ſuit of any perſon in any action iſſuing out of *B. R.* to be executed within the ſaid liberty, and to all fees, &c. ariſing therefrom, unleſs a return ſhould have been made to the court by the ſheriff, &c. upon a former writ iſſued out of the ſame court, at the ſuit of ſuch perſon, againſt ſuch defendant, to warrant the iſſuing of a ſpecial writ called a non omittas, commanding ſuch ſheriff, &c.: yet that the defendants well knowing the premiſes, and that no return had been made to *B. R.* upon any writ iſſued out of the ſame court at the ſuit of the ſaid defendant *Smallpage* againſt *M. D.* by any ſheriff of *Y.* to warrant the iſſuing of ſuch ſpecial non omittas writ; but intending to prejudice and aggrieve the plaintiff as ſuch bailiff, and to deprive him of his fees, &c. on the 28th of *July* 1806 *wrongfully, injuriouſly, and deceitfully* cauſed and procured to be iſſued out of *B. R.* a non omittas capias writ, &c. (as before.) Plea, the general iſſue.

The

1808.

CARRETT *againſt* SMALLPAGE and Other.

The cauſe was tried before *Chambre* J. at *York*, and on the part of the plaintiff ſeveral charters* made in the reigns of *Ed.* 3. and *Hen.* 4. were read from an ancient book belonging to the duchy of *Lancaſter*, called the Great Coucher Book, to prove the immemorial exiſtence of the liberty, and the title of the crown to it, as part of the duchy. The grant of the office to the plaintiff was alſo proved, reciting a former grant to *Robert Parker;* and four counterparts of leaſes were produced in 1749, (reciting one in 1704) 1750, 1765, and the laſt in 1786 to *Parker:* all which correſponded with the plaintiff's leaſe, as ſet forth in the declaration, in the deſcription of the office, and of the execution and return of writs, &c. The execution of the office was proved by bail bonds taken in the name of the chief bailiff of the liberty for the time being from 1738 downwards; by mandates from the ſheriff as far back as 1765; and by parol teſtimony of the execution of many ſuch mandates every year in other liberties in the county as well as in the liberty in queſtion. But moſt of the witneſſes alſo proved, upon croſs-examination, a very general practice to iſſue and execute writs of non omittas capias within the liberty in the firſt inſtance. It alſo appeared that there was a priſon within the liberty kept up by the chief bailiff, whoſe fee upon an arreſt was one guinea. That the writ in queſtion was executed within the liberty; and that the defendant's attorney declared that he had iſſued the non omittas in the firſt inſtance purpoſely to try the right, and that he would indemnify the defendant and his agent. It was then objected on the part of the defendant, that the plaintiff had failed in proving his excluſive right to the execution and return of *all* writs, &c. in the extent in which it was averred in the declaration; and the opinion of Lord

* Charters read from an ancient book of the duchy of *Lancaſter*.

1808.

CARRETT *againſt* SMALLPAGE and Others.

Hale in the caſe of Sir *Robert Atkyns* v. *Clare*, 1 *Ventris*, 406. was referred to, ſhewing certain writs which the ſheriff might execute within a liberty: and on this objection the plaintiff was nonſuited.

Park, *Topping*, and *Holroyd*, in laſt *Michaelmas* term, ſhewed cauſe againſt the rule for ſetting aſide the nonſuit; inſiſting that the allegation in the declaration, that the bailiff in the ſaid liberty had the execution and return of *all* writs, &c. within the ſame, was material, and was laid too largely; inaſmuch as there were ſeveral exceptions known to the law, and recognized in the books; ſuch as writs of quo minus out of the Exchequer (*a*), writs of waſte (*b*), of deliverance by replevin (*c*), of reditſeiſin (*d*), of all writs to which the King is party (*e*), or to which the bailiff of the particular franchiſe is himſelf a party (*f*); ſo of writs of inquiry (*g*), and of diſtringas juratores (*h*); all of which muſt be executed and returned by the ſheriff to whom they are directed, whether within liberties or without. [Lord *Ellenborough* C. J. obſerved that in the caſe of Sir *Robert Atkyns* v. *Clare*, in *Vidian's Entries* 55. the declaration was in the ſame general form as this; and no ſuch objection was taken; though, as it appears from the report in *Ventris*, that caſe was very much canvaſſed and conteſted. And he aſked whether the general allegation of the bailiff's having the execution and return of *all* writs, &c. muſt not be under-

(*a*) Sir *Robert Atkyns* v. *Clare*, 1 *Ventr.* 399 406.
(*b*) *Ibid* and ſtat. 13 *Ed.* 1. *c.* 14.
(*c*) Stat. *Weſtm.* 1. *c.* 17. *Gilb. Hiſt. of C. B.* 28. (*d*) *Ibid.*
(*e*) *Plowd* 216. 243. 5 *Co.* 91. *b.* 92.
(*f*) By analogy to the rule of the common law in like caſes.
(*g*) 5 *Com. Dig. Retorn.* D. 3. cites *Heb.* 83.
(*h*) *Ibid.* and 19 *H.* 6. 67. *a.*

Wood

ſtood of all writs whereof ſuch bailiffs may have the return by law.] To this they anſwered that the bailiff of this franchiſe might have had the return of *all* writs by private act of parliament; and after verdict it would have been taken that he had proved his allegation by any mean by which it could have been proved. But ſuppoſing the allegation to be confined to all writs returnable by bailiffs, ſtill the claim would be laid too largely; for the plaintiff claims that no non omittas writ ſhould iſſue into his bailiwick until he himſelf has made default to the ſheriff's mandate; whereas it is clear that it may, even according to the more ancient practice of this Court, if the bailiff of any other liberty within the county have received the ſheriff's mandate and made no return.

But if the nonſuit could not be ſuſtained on this ground; ſtill they contended that the Court would not ſend the cauſe to a new trial, if, on principle, the action were not maintainable. And they urged that the practice of the Court, which had exiſted at leaſt ſince the year 1739, of iſſuing non omittas writs in the firſt inſtance, had ſanctioned the right to do it, at leaſt ſo far as to ſecure the party ſuing out ſuch a writ, according to the cuſtom of the Court, from anſwering for it as a wrong doer. In 1739 the biſhop of *Ely* put up a notice in the K. B. office (*a*), warning the officers of the Court againſt iſſuing non omittas writs into his franchiſe of *Ely*, without firſt iſſuing previous proceſs to warrant the ſame; on which a mandavi ballivo was returned by the ſheriff and filed; and threatening with an action any officer who did the like again: but in fact no action was brought, though the practice continued as before. It was always conſidered (*b*) that if a fieri facias or capias were awarded to

(*a*) Vide *Rules and Orders of K. B. Trin.* 1739. (*b*) *Co.* 92.

1808.

CARRETT *againſt* SMALLPAGE and Others.

the ſheriff, and he made his mandate to the bailiff of a liberty having return of writs, who made no anſwer, another writ might iſſue to the ſheriff with a clauſe of non omittas propter aliquam libertatem, by virtue of which he might ſeize the goods or arreſt the body of the debtor not only within that liberty the bailiff of which had made default to the mandavi ballivo, but alſo within any other liberty in the county; though the bailiff of ſuch other liberty had made no ſuch default. The ſame is ſtated to have been practiſed in K. B. in *Gilbert's Hiſt. of C. B.* 29.: though in C. B. it is otherwiſe; for there the non omittas proceſs recites the common capias, and the ſheriff's return of mandavi ballivo qui nullum dedit reſponſum, and then it empowers the ſheriff to enter that liberty. The practice, however, of iſſuing the non omittas proceſs in the firſt inſtance, has been long eſtabliſhed, and is recognized in all the modern books of practice (*a*); and was lately confirmed by the Court (*b*), upon an application by the bailiff of this very liberty to reſtrain the iſſuing of non omittas writs in the firſt inſtance; which was refuſed: and ſuch practice, being in furtherance of juſtice and to prevent delay, ought not now to be overturned after the experience of near a century in its favour. The iſſuing of the writ is in ſome reſpect the act of the Court, though at the ſuggeſtion of the party; and if it were irregularly iſſued, the party grieved ſhould rather have applied to the Court to quaſh it, quia improvide emanavit, than bring an action againſt the party who ſued it out, thereby treating him as a wrong doer. For at leaſt the proceſs is legal, otherwiſe the party arreſted under it might maintain treſpaſs; which clearly he cannot do. It is not a void proceſs, like a teſtatum writ iſſued without a prior writ to warrant

(*a*) Vide 1 *Tidd's Pract. ch.* 4. *Imp. New Inſtr. Cler.* 7th edit. 178. *Lilly's Pract. Reg.* tit. *Non Omittas.* (*b*) Vide the next page.

it,

1808.

CARRETT *againſt* SMALLPAGE and Others.

it, which would make the party executing it a treſpaſſer; though the Court on application in ſuch a caſe would afterwards order ſuch prior writ to iſſue antedated, in order to authoriſe the teſtatum writ.

Lord ELLENBOROUGH C. J. at the concluſion of the argument of the defendant's counſel on ſhewing cauſe in the laſt term, addreſſing himſelf to the plaintiff's counſel upon this laſt ground of objection, ſaid, If this action can be maintained, I ſee no reaſon why an action may not lie againſt a party for iſſuing a writ of latitat without a prior bill of *Middleſex* to warrant it; for what elſe but the practice of the Court has made the latitat iſſuable in the firſt inſtance: but time has run upon the one practice and the other, and has legitimated them both. The caſe of the latitat is even ſtronger than this of the non omittas writ; for that contains a ſuggeſtion of facts which are not true, namely, the iſſuing of the former proceſs, and its return, &c. The maſter has furniſhed us with his note of what paſſed on the application to this Court, in *Mich.* 37 *Geo.* 3. which has been alluded to. ["*M.* 37 *Geo.* 3. Mr. *Erſkine* applied to the Court, on behalf of Mr. *Lang*, officer of the liberty of *Pontefract*, to reſtrain the officers of this Court from iſſuing non omittas latitats, without having a previous writ directed to and returned by him. The Court, on the application to the maſter, finding it had been an univerſal practice to iſſue the non omitas writs in the firſt inſtance, and as no precedent could be produced to ſupport the application refuſed to interfere."] Now if the Court, after having refuſed an application of this ſort, ſhould ſuffer an action like the preſent to be maintained, we ourſelves ſhall be the wrong-doers. After an acknowledged practice for above 70 years at the leaſt, recogniſing the courſe purſued

1808.

CARRETT *against* SMALLPAGE and Others.

purſued by this defendant, and after an application on behalf of the bailiff of the franchiſe to correct the practice; on which the Court refuſed to interfere when the queſtion of its legality was brought directly home to their attention; how can a ſuitor who has ſued out the accuſtomed proceſs of the Court be treated as a wrong doer? How can he be ſaid, in the words of the declaration, to have "wrongfully, injuriouſly, and deceitfully" cauſed that to be done, which the Court have authorized in practice for ſo long a period, and againſt which they poſitively refuſed to interfere when called upon eleven years ago? It would be making the deciſion of the Court a ſnare to parties.

Walton and *Littledale*, in ſupport of the rule for a new trial, admitting that the modern practice had prevailed as ſtated, ſaid that this action was brought in order to try the legality of it: for if it were well founded, the value of the franchiſe would be entirely loſt. And as to the late caſe referred to, it ought not to conclude the queſtion; for the Court often refuſed relief on ſummary application, which might be had in a more regular way; referring the applicant to his legal remedy if he had any: and that is now ſought by the preſent action. But as this was a new point, which they ſaid they had not had ſo full an opportunity as they wiſhed of conſidering, the Court adjourned the argument till this term; when it was reſumed by the plaintiff's counſel.

As to the firſt objection, to the generality of the allegation, at any rate it does not apply to the ſecond count, which does not claim for the bailiff the return of *all* writs generally, but only of all writs of *capias* out of *B. R.*: neither does that count require that there ſhould have

1808.

CARRETT *againſt* SMALLPAGE and Others.

been a previous mandate to the particular bailiff of this franchiſe with a nullum reſponſum from him; but a mandavi ballivo to any bailiff of a franchiſe within the county, and nullum reſponſum returned, would be ſufficient to ſuſtain the ſecond count. The only objection, if any, which can in ſtrictneſs apply to that count is that it does not except writs in which the bailiff is a party; but this, as well as the reſt, is open to the anſwer which has already been ſuggeſted by the Court, that the claim of the return of *all* writs muſt be underſtood of all writs returnable by the bailiffs of franchiſes. For as an allegation of law need not be made, and, if made, need not be proved; ſo where the law allows an exception, it is not neceſſary to notice it in the allegation of a general claim. Even a miſtake in alleging matter of law will not hurt, if ſufficient be ſtated, without that, to maintain the action (*a*). In one ſenſe too the bailiff may be ſaid to have the execution of writs to which he himſelf is a party; for *Dalton's Office of Sheriff* 463., ſays that he may make another bailiff for that purpoſe; which is in effect doing it by deputy. They alſo contended that this general mode of pleading, claiming the return of all writs, &c. was warranted by the precedents. *Vidian's Entr.* 55., The caſe of the hundred of *Glouceſter*. *Thompſ. Entr.* 42. *Brownl. Red.* 49. *Reg. Brev.* 82. *a.* 104. and *Herne's Pleader* 224. and *Cary* v. *Bacchus* 1 *Show.* 17, 18. They alſo referred to Lord *Coke's* comment (*b*) on the ſtatute of *Weſtminſter* 2. *c.* 39.; who ſays that this branch, concerning the non omittas, is in affirmance of the common law; and refers to *Bracton lib.* 5. *fo.* 442. *a.*, where the ſheriff is commanded quod non omitteret propter liber-

(*a*) By *Jones* and *Doderidge Js.* in *Drope* v. *Thaire*, *Latch*, 127. and *Williamſon* v. *Alliſon*. 2 *Eaſt*, 450.

(*b*) 2 *Inſt.* 453.

tatem

1808.

CARRETT *againſt* SMALLPAGE and Others.

tatem *talem*, quin, &c.; and to *Fitz. N. B.* 74. *a.*, where the form is that the ſheriff is commanded that he do not omit becauſe of the liberty aforeſaid, &c.: though it had been long agreed, and was not now diſputed, that a non omittas writ might iſſue into any *bailiwick* in the county after a mandavi ballivo, &c. to any one, and nullum reſponſum returned. And they ſhewed a precedent in 19 *H.* 6. 67. *a.* where the Court amerced the ſheriff for returning a mandavi ballivo, qui nullum dedit reſponſum, to a writ of diſtringas juratores, on account of the great inconvenience of ſuch a practice.

As to the principal objection, which goes to the right of action, all the precedents of actions againſt ſheriffs and under-ſheriffs by the owners of independent liberties for executing non omittas writs there, without a prior writ and mandavi ballivo, &c. returned, proceed upon the ground that it is an injury which the law notices: for the bailiff of the franchiſe thereby loſes the fees which he would otherwiſe have for executing the proceſs: and power being given to him by the royal grant to return all writs within the liberty, in excluſion of any other officer, it is the ſame as if the liberty were taken out of the county for that purpoſe. It is a legal right or privilege paramount to any practice of the court, and cannot be governed by it. The practice therefore which has of late years prevailed, of iſſuing non omittas writs into theſe liberties in the firſt inſtance, is not analogous to the practice of iſſuing a latitat, without a prior bill of *Middleſex* to warrant it; for the bill of *Middleſex* is only a *precept* of the court (*a*), and not a *writ;* it has no direction or teſte; and therefore it is purely within the diſcretion of the court to iſſue or omit it: the practice therefore may

(*a*) 1 *Tidd's Pract.* 35. 41.

well

well warrant the omiſſion of it. But in the caſe of *writs*, the iſſuing of them is a matter of right eſſential to the juriſdiction of the court, and cannot therefore be omitted by any practice even if it were of longer ſtanding than it is: but it appears by the *Inſtructor Clericalis* publiſhed in 1727 that it was not then eſtabliſhed, as at preſent; for the uſual practice is there ſtated to be, to ſue out a common latitat and a non omittas writ at the ſame time: though that itſelf was a recent encroachment, as appears by the older authorities. The mere circumſtance of the writ iſſuing by the authority of the court will not protect either the plaintiff or his attorney from anſwering in damages as wrong-doers, if it be iſſued illegally; for thoſe who ſet the power of the court in motion are anſwerable for the conſequences. As in *Barker* v. *Braham* and *Norwood* (*a*), where Mrs. *Braham* having obtained judgment in a former action againſt Mrs. *Barker*, as adminiſtratrix of her deceaſed huſband, upon a bond debt of the inteſtate; after levying part of the ſum recovered out of the aſſets in her hands, ſued out by *Norwood* her attorney a capias ad ſatisfaciendum againſt Mrs. *Barker*, without any ſuggeſtion of a devaſtavit, under which ſhe was taken and impriſoned: and both Mrs. *Braham* and her attorney *Norwood* were holden liable in treſpaſs at the ſuit of *Barker*. [Lord *Ellenborough* C. J. There was no record there which warranted the iſſuing of a writ of capias ad ſatisfaciendum againſt the party; and therefore thoſe who ſued it out could not juſtify under it: but here there was a legal writ under which the party ſuing it out could have juſtified in treſpaſs. That the arreſt itſelf under a non omittas writ is not illegal is ſhewn by the caſe of *Fitzpatrick* v. *Kelly* (*b*). *Le Blanc* J. The queſtion in

(*a*) 3 *Wilſ.* 368. (*b*) Cited in 3 *Term Rep.* 740.

1808.

CARRETT *against* SMALLPAGE and Others.

the caſe in *Wilſon* was whether the defendants who had cauſed the plaintiff to be arreſted, and were therefore primâ facie treſpaſſers, could juſtify the caption under the writ of execution which they had ſued out: and the writ itſelf being unwarranted by any judgment, their juſtification neceſſarily failed.] The caſe of *Fitzpatrick* v. *Kelly* admits that the party making the arreſt is liable to anſwer to the owner of the franchiſe thereby violated: and this alſo appears from 20 *H.* 7. *fo.* 7. *a.* All the authorities too agree that an action lies by the owner of the franchiſe againſt the ſheriff or officer who invades his liberty, and makes the arreſt there without legal authority. And in *Grant* v. *Bagge* (*a*) it was held that a writ of fieri facias directed in the firſt inſtance to the bailiff of the royal franchiſe of *Ely*, out of this court, (inſtead of to the ſheriff of *Cambridgeſhire*, who ſhould have iſſued his mandate to the bailiff,) was erroneous and void, and that the bailiff executing it was guilty of a treſpaſs againſt the party whoſe goods were taken under it: and upon the ſame principle, it muſt lie againſt the party who illegally ſues out a non omittas proceſs in the firſt inſtance. [Lord *Ellenborough*. That does not follow: every ſheriff or other officer is bound to know the limits of his juriſdiction: or if the caſe be doubtful, he may apply to the court and ſtate the ſpecial circumſtances. In the caſe of *Grant* v. *Bagge* one who was no officer of the court took upon him to execute proceſs illegally directed to him, there being no practice to warrant it; but here the defendant has done no more than follow the uſual practice of the court long eſtabliſhed: and can we ſuffer him to be treated as a wrong-doer for that? It might have been a different queſtion if he had made any falſe ſuggeſtion

(*a*) 3 *Eaſt*, 128.

or

1808.

CARRETT *againſt* SMALLPAGE and Others.

or repreſentation to our officer to induce him to iſſue a non omittas writ, without which another ſort of proceſs would have iſſued in courſe.] It is no objection that this is the firſt inſtance of an action of the kind brought ſince the practice has prevailed, (if the fact be ſo); for during all this period the bailiffs of franchiſes appear to have exerciſed their rights, and taken their accuſtomed fees; and while they were ſtill deriving profit from their offices, it was not worth while to incur the riſk and expence of an action in a particular inſtance. But now that the queſtion is at length raiſed, if the court hold that no action will lie for the violation of the franchiſe, it will in effect aboliſh the franchiſe itſelf.

Lord ELLENBOROUGH C. J. There might be ſome queſtion whether the preſent ground of nonſuit can be ſuſtained; whether the plaintiff could claim the execution and return of *all* writs, &c. when there are various exceptions, ſuch as writs of waſte, re-diſſeiſin, caſes in which the king is party, or in which an informer ſues as well for the king as for himſelf, and others which have been mentioned, in which the proceſs is to be executed by the ſheriff. And though ſeveral precedents have been ſhewn in favour of this general mode of declaring, particularly that in *Vidian*, touching the liberty in queſtion; yet the authority of Lord *Hale* in the latter caſe cannot well be urged in confirmation of it, becauſe the frame of the declaration was not conſidered by him at all, though he went very fully into the other parts of the caſe. But independent of the particular ground of the nonſuit, it would be frivolous to ſend down the caſe to a ſecond trial, if it appear to us, as it does, that the plaintiff would not be able to ſuſtain a material allegation in his declaration,

1808.

CARRETT *againſt* SMALLPAGE and Others.

tion, namely, that the defendant "*wrongfully, injuriouſly, and deceitfully*" cauſed and procured the writ in queſtion to be iſſued. How can we ſay, in a caſe where the court, at leaſt as far back as 1727, has been in the practice of iſſuing the non omittas writ, without firſt iſſuing a common latitat, and waiting for the return from the ſheriff of a mandavi ballivo with qui nullum dedit reſponſum; and after Lord C. B. *Gilbert* has recognized that practice as exiſting in his time; and when we know that objections were made to the practice of taking out non omittas writs in the firſt inſtance ſo far back as 1739, and actions threatened, but ſtill it continued, and is recognized as the uſual practice in all the books on the ſubject ſince that time; and no inſtance can be produced during all this time of any action brought againſt a party ſuing out ſuch a writ: how can we ſay that the plaintiff can be conſidered as a wrong-doer for iſſuing ſuch a writ, according to this long eſtabliſhed practice of the Court. If this may be done, I know not what proceſs may not be ſhaken: for, as I before obſerved, the iſſuing of a latitat without a previous bill of *Middleſex* ſtands only on the practice of the Court; and that inſtance is the ſtronger, becauſe the latitat contains a falſe recital of facts on which it profeſſes to be grounded. [His Lordſhip referred to *Style's Prac. Reg.*] The ſubject however has not paſſed wholly ſub ſilentio; for in 1796 an application was made to ſet aſide a non omittas writ iſſued in the firſt inſtance into this very liberty; which the Court refuſed. Is it then to be expected that after the queſtion has been brought directly to the notice of the Court, and they have refuſed to reſtrain the iſſuing of ſuch a writ on the ground of its illegality, a party ſuing is to be wiſer than the Court in diſcovering the illegality of its proceſs: and if he be not, that he is

to

1808.

CARRETT *againſt* SMALLPAGE and Others.

to be treated as a wrong-doer for having iſſued a proceſs, the iſſuing of which the Court when called upon refuſed to recal or condemn. It is clear therefore that the plaintiff muſt fail in proving a ſubſtantive and material allegation in his declaration; and therefore it is needleſs to ſet aſide the nonſuit.

GROSE J. It is not neceſſary to inquire into the preciſe ground of the nonſuit, becauſe, upon the general objection taken by my Lord, it would be uſeleſs to grant a new trial. For the practice has long prevailed and is now clearly eſtabliſhed, that a capias with a non omittas clauſe may be taken out in the firſt inſtance: and the caſe which occurred in 1796 fortifies the old practice, and was a recognition of it by the Court. It would therefore be in vain to ſend the record down to a ſecond trial, when the plaintiff muſt again be nonſuited on this objection.

LE BLANC J. In ſhewing cauſe againſt this rule an objection has been taken to the action itſelf: and if the action be not maintainable, it is unneceſſary to enter into the other objection, which is only to the form of the declaration. And it appears to me that the action does not lie; for the defendant is charged with having *wrongfully*, &c. ſued out the non omittas writ. But it does not appear to have been iſſued by the officer upon any falſe ſuggeſtion of the party ſuing: on the contrary it was iſſued according to the regular practice of the Court, which has ſubſiſted for a long period; and in the only inſtance which has been ſhewn of any attempt made to ſet aſide ſuch a writ as irregular, the Court refuſed the application. Therefore when it appears that there

1808.

CARRETT *against* SMALLPAGE and Others.

was no falſe ſuggeſtion of the party to obtain the writ, and that the iſſuing of it was not irregular, how can we ſay that the party is a wrong-doer in ſuing out ſuch proceſs. This differs the preſent caſe from thoſe which have been cited, where a party ſuing out a writ may yet be a treſpaſſer; for he, as well as the officer who executes the writ, may be a treſpaſſer, unleſs he can juſtify under it; which could not be done in the caſe of *Barker* v. *Barham* and *Norwood*, becauſe there was no judgment to warrant the taking the perſon of the adminiſtratrix in execution. But there was a very good reaſon for not bringing an action of treſpaſs in this caſe, becauſe the writ would have juſtified both the party who ſued it out, and the officer who executed it. The plaintiff was therefore driven to the experiment of bringing an action on the caſe, in which however it is ſtated that the party *wrongfully* ſued out this proceſs: and it now appearing that the writ was ſued out according to the long eſtabliſhed practice of the Court, confirmed in the only inſtance in which it was attempted to be impeached for irregularity, we cannot ſay that the party ſuing it out is a wrong-doer.

Rule diſcharged.

SCOTT *againſt* LIFFORD (*a*).

Friday, May 6th.

THIS was an action by the indorſee of a bill of Exchange againſt the drawer. It appeared that the bill had been drawn on the 1ſt of *March* 1806 by the defendant on one *Moſes Agar*, payable three months after date: and the plaintiff, having become the holder of it, had placed it in the hands of his bankers, *Down* and Co. On the 4th of *June*, when the bill became due, a clerk of *Down* and Co. preſented it for payment; and it was diſhonored. On the 5th they returned it to the plaintiff, who by letter, put into the two-penny poſt on the 6th, gave notice to the defendant of the diſhonor; the plaintiff living in *London*, and the defendant at *Shadwell*. The caſe was left to the jury on the queſtion, whether the notice of the diſhonor had been given in reaſonable time; and the jury, being of opinion that it had, found a verdict for the plaintiff. And on motion by *Wigley* for a new trial on the ground that due diligence had not been uſed;

Where the indorſee of a bill of Exchange lodged it with his bankers who preſented it for payment on the 4th, when it was diſhonored, and on the 5th they returned it to the indorſee, who gave notice to the drawer of the diſhonor on the 6th by the two-penny poſt held ſuch to be reaſonable.

Lord ELLENBOROUGH C. J. ſaid, I cannot ſay that the holder on the return of the bill diſhonored to him is bound, omniſſis omnibus aliis negotiis, to poſt off immediately with notice: if reaſonable diligence has been uſed, it is ſufficient.

GROSE J. Whether due diligence has been uſed is a queſtion of law; but judges may take the opinion of a

(*a*) Ex relatione Mr. Selwyn.

1808.

SCOTT *againſt* LIFFORD.

jury as to what is convenient in the manner of giving notice.

LE BLANC J. It cannot be contended that a banker ought to give notice of the diſhonor to any but his cuſtomer for whom he held the bill: and I cannot rule that the holder of a bill may not avail himſelf of the conveyance by the two-penny poſt.

Rule refuſed.

Friday, May 6th.

A guarantie in writing to pay for any goods which the vendor delivers to a third perſon is good within the 4th ſect. of the ſtat. of frauds, as containing a ſufficient deſcription of the *conſideration* of the promiſe, namely, the delivery of the goods when made) as of the *promiſe* itſelf; both of which are included in the word *agreement* required by that ſection to be reduced into writing, &c.

STADT *againſt* LILL.

THIS was an action on the caſe for the breach of a guarantie in not paying the value of goods delivered by the plaintiff to one *Nichols*. The defendant gave a written guarantie ſigned by him in this form: "I guarantee the payment of any goods which *J. Stadt* delivers to *J. Nichols*." It was objected at the trial before Lord *Ellenborough* C. J. at *Guildhall*, that this guarantie was void by the 4th ſect. of the ſtatute of frauds 29 *Car.* 2. *c.* 3. which avoids any promiſe to anſwer for the debt of another unleſs the *agreement* be in writing, &c.: and in *Wain* v. *Warlters* (*a*), recognized in *Egerton* v. *Matthews* (*b*) it was held that the word *agreement* included the conſideration for the promiſe as well as the promiſe itſelf: and here there was no conſideration ſtated for the promiſe. But Lord *Ellenborough* was of opinion that the ſtipulated delivery of the goods to *Nichols* was a conſideration appearing on the face of the writing, and when the delivery took place the conſideration attached: and he directed the jury accordingly; who found for the plaintiff: but he

(*a*) 5 *Eaſt* 10. (*b*) 6 *Eaſt* 307.

gave

gave leave to the defendant to move to enter a nonſuit if this direction were wrong. 1808

STARR *againſt.* LILL.

The Attorney-General now moved accordingly, and ſtated the objection, and the caſes on which it was founded.

But *the Court* were ſatisfied that the direction was right, for the reaſon before given by Lord *Ellenborough*, which his Lordſhip now repeated as above ſtated.

Rule refuſed.

HANDS *againſt* BURTON.

Friday, May 6th.

THE declaration ſtated that in conſideration that the plaintiff would buy of the defendant a horſe for 31*l.* 10*s.* to be paid by the plaintiff to the defendant, the defendant promiſed that the horſe was ſound: and that the plaintiff did buy of the defendant the horſe *for that price, and did pay to the defendant the ſaid* 31*l.* 10*s.*; and then alleged as a breach that the horſe was unſound. The proof, at the trial before *Graham* B. at *Oxford*, was that the defendant agreed to diſpoſe of his horſe, which he warranted ſound, to the plaintiff for 30 guineas; but agreed at the ſame time that if the plaintiff would take the horſe at that value, he, the defendant, would purchaſe of the plaintiff's brother another horſe for 14 guineas, and that the difference only ſhould be paid to the defendant. The witneſs deſcribed it as *one deal* between the parties, and that but for the latter conſideration he did not believe that the bargain would have been made.

Proof that the defendant agreed to ſell his horſe warranted ſound to the plaintiff for 31*l.* 10*s.* and at the ſame time agreed that if the plaintiff would take the horſe at that value, he, the defendant, would buy another horſe of the plaintiff's brother for 14*l.* 14*s.* and that the difference only ſhould be paid to the defendant: will ſupport a count charging only that in conſideration that the plaintiff would buy of the defendant a horſe for 31*l.* 10*s.* the defendant promiſed that it was ſound, and that in fact the plaintiff did buy the horſe *for that price, and did pay to the defendant the ſaid* 31*l.* 10*s.*

1808.

HANDS *againſt* BURTON.

It was therefore objected that the proof varied from the contract as laid, and ſhewed rather a contract for the exchange of horſes, paying the difference only in money, than an entire money payment for the horſe in queſtion. The learned judge however refuſed to nonſuit the plaintiff, but reſerved the point; and the plaintiff recovered on proof of the unſoundneſs of the horſe.

W. E. Taunton now moved to ſet aſide the verdict, and enter a nonſuit, on the variance ſtated. But by

Lord ELLENBOROUGH C. J. The parties agreed to conſider the brother's horſe as 14 guineas in their mode of reckoning the payment for the defendant's horſe; but ſtill the conſideration for the latter was 30 guineas, and the defendant received 30 guineas in money and value.

GROSE and LE BLANC Juſtices, concurred. The latter obſerved that the agreement was in effect this: the plaintiff ſays, I will buy your (the defendant's) horſe for 30 guineas, and you ſhall buy my brother's horſe for 14 guineas, and the 14 guineas which you are to pay ſhall be reckoned as part of the 30 which you are to receive.

Rule refuſed.

FRENCH *againſt* PATTON.

Friday, May 6th.

THIS was another action on the ſame policy of inſurance, on which *Hill*, as agent, before ſued this defendant, and which is reported under the name of *Hill* v. *Patton* (*a*). The plaintiff there declared as on a policy on *ſhip and goods* (*b*); and it then appeared that the policy, which, as it ſtood in the printed part of it was on *ſhip and goods*, had been reſtrained by a written note in the margin to *ſhip and outfit*, in conſequence of a miſunderſtanding by the broker of the inſtructions of his principal, in which ſtate it was ſubſcribed by the underwriters in *September* 1804; and that on a ſubſequent application to them by the broker made long after the ſailing of the ſhip, they had agreed to alter it, by the following memorandum, inſerted in the body (*c*) of the policy, upon a blank ſpace between the printed parts; againſt which the underwriters wrote their initials. "It is hereby agreed "that the intereſt in this policy of inſurance ſhall be on "*ſhip and goods*, inſtead of *ſhip and outfit*, as originally "declared. *London*, 13th *March* 1805."

The Court were of opinion in the former caſe that though the alteration were agreed to by the underwriters, yet as it

A policy of inſurance originally underwritten on "ſhip *and outfit*" was after the ſhip ſailed declared by conſent of all parties, to be on "ſhip *and goods*," by a memorandum written on a blank ſpace in the body of the policy; but without any new ſtamp: and it having been before decided that for want of the ſtamp the plaintiff could not recover as upon a policy on ſhip *and goods*, as declared by the memorandum; it was now held that he could not recover on the policy in its original ſtate, as an inſurance on "ſhip *and outfit*," by reaſon of the alteration apparent upon the face of the inſtrument itſelf, and which was made by parties intereſted.

(*a*) 8 *Eaſt*, 373. (*b*) The beginning of the former report inadvertently ſtates that action to have been brought on a policy of inſurance on "ſhip *and outfit*," inſtead of "ſhip *and goods*:" but the error is manifeſt both from the marginal notes, and the whole context of the report.

(*c*) Upon the former occaſion the memorandum was ſaid to be indorſed on the policy; but by a fac ſimile of the policy now ſhewn in Court it appeared to have been made in the manner above ſtated.

1808.

FRENCH *againſt* PATTON.

eſſentially varied the riſk inſured, it could not be made effectual without a new ſtamp; and therefore they ſet aſide the verdict which had been obtained by the plaintiff upon proof of a total loſs. And now the aſſured brought a new action in his own name, and declared as upon a policy on *ſhip and outfit*, being the form in which it was originally ſubſcribed by the underwriters, and which remained legible in the ſame ſtate as before. But Lord *Ellenborough* C. J. was of opinion that the alteration having been made by one who had competent authority to bind his principal, though made by conſent of the underwriters, avoided the policy as it was before, and therefore it could not be declared upon in its original ſtate without a new ſtamp. The caſe now came on in the peremptory paper upon a rule obtained in a former term for ſetting aſide the nonſuit, and having a new trial: againſt which

The Attorney General and *Garrow* were now to ſhew cauſe; but they thought the ground of the nonſuit ſo clear, as ſtated by his Lordſhip, that they waved adding any thing by way of argument in ſupport of it.

Park and *Marryat*, in ſupport of the rule, argued to this effect: There is no alteration or erazure of the original inſtrument, which remains, as it was at firſt ſubſcribed, a policy of inſurance on "ſhip *and outfit*;" and this was at one time binding on the parties. But they afterwards contemplated to vary the agreement, and to make it a policy on ſhip *and goods*; and this was attempted to be done, not by any ſpoliation of the original inſtrument, which would have raiſed the queſtion whether it were thereby avoided, though done without fraud, and for a purpoſe which had failed; but by a diſtinct memorandum, bearing a different date from the original policy,

1808.

FRENCH *against* PATTON.

and therefore the ſame for this purpoſe as if made on a different piece of paper, agreeing that the policy ſhould ſtand, as it originally did, (meaning in the printed part) on ſhip *and goods*. Now, either that memorandum was or was not effectual to do away the original contract between the parties and ſubſtitute a new one. This Court in the former caſe of *Hill* v. *Patton* held that it was not effectual, and could not be received in evidence without a new ſtamp, and therefore that the plaintiff, who had declared as upon a policy on ſhip *and goods* according to the memorandum, could not recover. It follows then that the original contract, unaffected by any legal evidence of a different contract ſubſequently entered into, muſt remain in force. The facts only ſhew that there was an ineffectual attempt to alter it. If the Court cannot look at the memorandum for the purpoſe of ſuſtaining the original frame of the policy in its printed form, neither can they look at it in order to overturn it as it ſtood when ſubſcribed. A perfect contract muſt be ſubſtituted before a former perfect contract can be ſuperſeded. To ſhew that, independent of any objection ariſing on the ſtamp laws, an alteration made, bonâ fide, by conſent, and in order to correct a miſtake, would not vitiate a policy, they cited *Bates* v. *Grubham* (*a*) as in point: which was ſupported in principle by *Motteux* v. *The London Aſſurance Company* (*b*). So in *Zouch* v. *Claye* (*c*), the adding by conſent the name of a ſecond obligor to a bond after the execution of it by the firſt obligor was held not to avoid it. Lord *Hale* there referred to a caſe in *Moor* (*d*) as confirmatory

(*a*) *Salk.*, 444. (*b*) 1 *Atk.* 545. (*c*) 2 *Lev.* 35. and 1 *Ventr.* 185.

(*d*) In the report in *Levinz* the reference is to *Moor*, pl. 738. which is a miſprint for pl. 1730. See alſo *Moor* 835. pl. 1125. where the plaintiff ſued

on

1808.

FRENCH *against* PATTON.

confirmatory of this doctrine; which he says had been before adjudged to the contrary in *Cro. Eliz.* 626 (*a*). The avoiding of the instrument was part of the penalty annexed by the common law to the fraudulent alteration of it. Then in the late case of *Henfree* v. *Brom-*

---

on an obligation, which the jury found specially to have been interlined, after the execution of it by the defendant, with the words *Vicecomiti comitatus Oxon*, without the privity of the plaintiff; but they did not find by whom it was done: and because the interlining was not in a material place, nor with the privity of the plaintiff, the Court gave judgment for him: but they said that if it had been in a material place, or with his privity, *without the assent of the obligor himself*, it would have avoided the deed.

(*a*) This refers to the case of *Markham* v. *Gonaston* in *Tr.* 40 *Eliz. Rot.* 212. It appears by *Croke*'s Report (*Cro. Eliz.* 626.) that *Markham* had brought debt in *C. B.* upon an obligation against *Fox*, who pleaded the filling up of the blank spaces in the bond after the sealing and delivery, and therefore that it was not his deed; which was held to be a good cause of avoiding the bond: wherefore issue was taken that they were not filled up *after* the sealing and delivery; and it being proved at Nisi Prius that they were so filled up, the plaintiff was nonsuited. The plaintiff then brought an action on the case, (which is the one reported in *Cro. El.* and *Moor* 547.) against the defendant *Gonaston* for having afterwards fraudulently filled up certain blanks, &c. in the bond, without the assent or notice of the plaintiff, and in order to avoid the bond: on which the plaintiff recovered judgment; the opinion of the Court as there stated being, that the bond was avoided by the material alterations made in it, though for the benefit of the obligor, and by his assent. But the report in *Moor* notes, that afterwards the plaintiff brought a new action upon the bond against *Fox*, who pleaded the special matter, and concluded that it was not his deed; to which *Markham* replied that the blanks were filled up *with his assent*: and on demurrer it was adjudged for the plaintiff in *B. R.* And this explains what was said by *Hale* in *Zouch* v. *Claye*, 2 *Lev.* 35. Lord *Ellenborough* C. J., in this part of the argument, asked whether these cases were not all considered in *Master* v. *Miller*, 4 *Term Rep.* 320.: to which no answer was given from the bar: but 13 *Vin. Abr.* tit. *Faits*, T. & U. were referred to as collecting all the cases. It appears however upon reference to that case, that though many other authorities were mentioned, these were not; though much in aid of Mr. Justice *Buller*'s argument, who differed from the rest of the Court.

ley,

1808.

FRENCH *against* PATTON.

ley (*a*), this Court held, that an award, which was altered by the umpire after his authority had expired, though void for the increaſed ſum directed to be paid, was yet good for the original ſum awarded, which ſtill continued legible.

Lord ELLENBOROUGH C. J. In that caſe the act of the umpire in altering the award, after his authority had expired, was taken to be the ſame as the act of a mere ſtranger. But here the broker had a continuing authority to bind his principal by the alteration of the policy; and the alteration was effectual to bind all the parties if a new ſtamp had been affixed on the inſtrument. The new agreement was complete as far as the will of the parties could make it ſo; and it only wanted a circumſtance which the law requires to give it its full legal effect. But though ineffectual as an inſtrument to ſue on, it ſeems effectual to do away the former agreement which was thereby abandoned. If this were otherwiſe, would it not operate as a fraud on the revenue. I am glad however that this caſe comes before us on a nonſuit, becauſe the plaintiff will not be concluded by our preſent opinion. I have turned the queſtion in my mind again and again with great anxiety. In the firſt action the plaintiff inſiſted on the alteration as made agreeably to the real intentions of the parties, and that the policy as it was firſt ſubſcribed was contrary to the inſtructions of the broker and by miſtake. But now he deſires us to conſider that it was not altered, becauſe it was not effectually altered for want of a new ſtamp to the memorandum. But is it not

(*a*) 6 *Eaſt*, 309. and vide *Irvine* v. *Elnon*, 8 *Eaſt*, 54.; which was alſo referred to as confirmatory of the other caſe.

made

1808.

FRENCH *against* PATTON.

made a different policy by the memorandum, by which a different contract is ſubſtituted by the act of the parties in lieu of the former one, which they abandon? Is it leſs effectual to ſhew the intention of the parties becauſe it is a fraud in law againſt the revenue. The plaintiff's own act has made, as far as he can make, the policy ſpeak a different language from what he now inſiſts that it does, and he muſt take the conſequences. I cannot therefore ſay that the policy is not ſo altered as to have loſt its original identity, though the circumſtance of a ſtamp be wanting to give full effect to the inſtrument ſo altered: and I do not think that the plaintiff can recur to it again in its original ſtate. If however he ſhall be adviſed to queſtion our opinion, I am glad that the opportunity will ſtill be open to him.

GROSE J. This is an action brought upon a contract which was once perfect, till it was ſuperſeded by another contract which was alſo perfect, as far as the will of the parties was declared; but it could not be put in ſuit for want of the ſtamp which the law requires. Still it appears upon the face of the former contract that it has been altered and vacated, and this has been done by the act of the parties who were competent to do ſo. Whatever reluctance I may feel, I muſt declare the law as it appears to me.

LE BLANC J. We muſt give the rule of law in this caſe, as far as we are compelled to do it, with reluctance, becauſe it is againſt a party who perhaps meant to do no wrong at the time: but can the Court enforce an agreement after the parties themſelves have upon the very face of

1808.

FRENCH *againſt* PATTON.

of the ſame inſtrument declared that it is not their agreement, and have actually written another and a different agreement in the place of it. And I cannot ſay that it is the ſame thing as if the memorandum had been written on a different inſtrument; for it is inſerted in the body of the original agreement, and makes it ſpeak a different language. It ſhews an entire alteration in the minds of the contracting parties. Then finding that the ſubſtituted agreement cannot be enforced becauſe of an objection ariſing upon the ſtamp laws, the plaintiff now wiſhes to reſort back to that which he has declared was not his agreement. There is another reaſon why this ſhould not be permitted to him, becauſe it is againſt the policy of the revenue laws: for it would hold out encouragement to break theſe laws, and to try alterations of this ſort, if after an attempt made to alter a contract without a new ſtamp, it ſhould be held that though the attempt were ineffectual as to the new contract of the parties, they could recur back again to the original agreement and ſet that up again.

Rule diſcharged.

1808.

Saturday, May 7th.

The KING *againſt* PEARSE.

Though it be proper for a magiſtrate in drawing up a conviction on the ſtat. 5 *Ann. c.* 14. to ſtate the particular evidence of the fact on which his judgment is founded, and not merely the legal effect of it in the words of the ſtatute, yet a conviction in the latter form is valid in law: but the magiſtrate ſubjects himſelf to an information if he endeavour to ſhelter himſelf from detection by miſ-ſtating ſuch legal reſult when the evidence would not warrant it.

ABBOTT moved for a certiorari to bring before the Court a conviction on the ſtat. 5 *Ann. c.* 14. *ſ.* 4. drawn up according to the precedent in *Burn's Juſtice*, followed in the caſe of the *King* v. *Thompſon* (*a*), though diſapproved by all the Court, wherein the depoſition of the witneſs to the fact was ſtated in the words of the ſtatute; namely, that the defendant on the day and place mentioned "*did keep and uſe a certain engine called a gun, to kill and deſtroy the game;*" without ſetting forth the particular evidence of the fact. The ſame form had been adopted before in *Rex* v. *Hartley* (*b*), and was afterwards purſued in *Rex* v. *Lovet* (*c*); but in the latter caſe the Court greatly diſapproved of it; and granted a rule calling on the convicting magiſtrate to ſhew cauſe why a criminal information ſhould not go againſt him for not ſtating all the evidence given; and after hearing the affidavits on both ſides the rule was finally diſcharged only on the ground that the magiſtrate had not acted corruptly, and might have been miſled by the precedent in *Rex* v. *Thompſon*: but they expreſſed their opinion in ſtrong terms, that it was the duty of magiſtrates in all caſes to ſtate the whole of the evidence and not merely the reſult of it. And in the *King* v. *Clarke* (*d*), where the particular evidence of the fact of killing the game was ſet forth, the Court expreſſed their approbation of it; and recommended it as a precedent to be followed in future; and expreſſed

(*a*) 2 *Term Rep.* 18.
(*b*) *Cald.* 175.
(*c*) 7 *Term Rep.* 152.
(*d*) 8 *Term Rep.* 220.

themſelves much diſſatisfied with the general mode of ſtating the evidence, in the terms of the act of parliament, which had been practiſed in theſe caſes. He therefore moved for the certiorari in this caſe, with a view to ſettle the queſtion in future. But by

Lord ELLENBOROUGH C. J. all the arguments againſt this form of conviction were diſcuſſed and conſidered in the *King* v. *Thompſon*; and though the Court diſapproved of it, ſtill they held themſelves bound by former precedents to ſupport it. The point therefore having been decided again and again, we cannot have it diſcuſſed any more.

LE BLANC J. If a magiſtrate endeavour to ſhelter himſelf from detection by merely ſtating the fact of the offence in the terms of the act of parliament, as if it were the legal effect of the evidence, when the evidence itſelf would not warrant the concluſion, he ſubjects himſelf to a criminal information, upon a proper caſe laid before the Court.

Per Curiam, The writ denied.

1808.

Saturday, May 7th.

DERBY CANAL Company *againſt* WILMOT, Bart.

Though the affixing of the common ſeal to the deed of conveyance of a corporation be ſufficient to paſs the eſtate, without a formal delivery, if done with that intent; yet it has no ſuch effect if the order for affixing the ſeal be accompanied with a direction to their clerk to retain the conveyance in his hands till accounts were adjuſted with the purchaſer.

IN ejectment for lands in the county of *Derby* Sir *Robert Wilmot*, the defendant, claimed by conveyance from the company, which is incorporated by act of parliament, under their ſeal. It appeared at the trial at *Derby*, that the defendant had purchaſed the land in queſtion from the company, to whom he had ſold other land, and there were accounts ſubſiſting between them which were not ſettled. That upon the occaſion when the company's ſeal was affixed to the conveyance in queſtion, their managing committee (which had authority for this purpoſe) was ſitting at an inn in the town, and the conveyance having been brought to them, they directed their clerk to affix the ſeal to it, but not to part with it till the accounts were adjuſted: the company's clerk accordingly ſent his clerk with the conveyance to the houſe where the ſeal was uſually kept in the town, in order to affix the ſeal to the inſtrument, but with a direction not to part with it, but bring it back to him; which was done accordingly. *Wood*, B. thought that the conveyance under theſe circumſtances was not complete to paſs the legal eſtate, and therefore the plaintiffs recovered a verdict; which

Vaughan, Serjeant now moved to ſet aſide, upon the authority of 2 *Rol. Abr.* 23. *l.* 50., which cites the caſe of the Dean and Chapter of *Fernes*, *Dav. Rep.* 44. *b.* that the deed of a corporation needs no delivery, but the affixing of the common ſeal gives it perfection without delivery. But

Lord

1808.

DERBY CANAL COMPANY *againſt* WILMOT.

Lord ELLENBOROUGH C. J. anſwered, and the reſt of the *Court* agreed, that in order to give it effect, the affixing of the ſeal muſt be done with intent to paſs the eſtate; otherwiſe it operates no more than a feoffment would do without livery of ſeiſin: whereas here, though the ſeal was directed to be and was affixed to the inſtrument for form, yet it was with a reſervation of any preſent effect to paſs the title out of the company, as they did not chuſe to deliver over the poſſeſſion of the conveyance till the accounts were ſettled between them and the purchaſer.

Rule refuſed.

PURCELL *againſt* MACNAMARA.

Saturday, May 7th.

AT the ſecond (*a*) trial of this cauſe, which was an action for a malicious proſecution againſt the defendant for having indicted the plaintiff of perjury; aſſigning the perjury on an affidavit made by the plaintiff ſwearing to words uttered by the defendant; the proof on the part of the plaintiff in addition to the formal proof of the record of acquittal was, that after the indictment found was ready for trial, the proſecutor (the preſent defendant) was called and did not appear; on which the verdict of acquittal paſſed: without proceeding to give any further evidence of malice than what, it was contended, aroſe from the abſence of any proof of probable cauſe. But Lord *Ellenborough*, C. J. who tried the cauſe, thought that this was not ſufficient to ſupport

It lies on the plaintiff in an action for a malicious proſecution to give evidence of malice in the defendant, either expreſs, or to be collected from circumſtances ſhewing plainly the want of probable cauſe; and the malice is not to be implied from the mere proof of the plaintiff's acquittal for want of the proſecutor's appearing when called.

(*a*) See the Report, ante 157, on the firſt trial.

1808.

PURCELL against MACNAMARA.

the action, without evidence of expreſs malice, or at leaſt of circumſtances evincing ſuch entire want of probable cauſe from whence malice was to be preſumed: and therefore he nonſuited the plaintiff.

Gurney now moved to ſet aſide the nonſuit; and admitted that the doctrine laid down by his Lordſhip was ſupported by the authority of *Savil* v. *Roberts* (*a*): but this, he ſaid, had been overruled in the caſe *Parrot* v. *Fiſhwick* (*b*), *London* ſittings after *Trinity* Term 1772, mentioned in *Bull.* N. P. 14, in which it is ſtated to have been ruled, that "where the facts lie in the "knowledge of the defendant himſelf, he muſt ſhew a "probable cauſe, though the indictment be found by "the Grand Jury; or the plaintiff ſhall recover without "proving expreſs malice." And here he contended,

(*a*) *Salk.* 13. 1 Lord *Ray.* 374. 5 *Mod.* 410. 12 *Mod.* 211.

(*b*) The generality of the poſition laid down in the printed note of the caſe is ſcarcely warranted by the MS. note of the caſe, from whence it was probably taken; which was this. *Parrott* v. *Fiſhwick*, *London* ſittings after *Trin.* 1772. "In an action for a malicious proſecution in preferring and proſecuting an indictment for perjury, where the bill of indictment was found, and the plaintiff acquitted by verdict; Lord *Mansfield*, in ſumming up, ſaid, it was not neceſſary to prove *expreſs* malice; for *if it appeared* that there was *no probable cauſe*, that was ſufficient to prove an *implied* malice, *which was all that was neceſſary to be proved to ſupport this action.* For in this caſe all the facts lay in the defendant's own knowledge; and if there were the leaſt foundation for the proſecution, it was in his power and incumbent on him to prove it. Verdict for the plaintiff 50l." A marginal note adds, that "the indictment was for perjury committed on the trial of an action for uſe and occupation brought by the defendant againſt the plaintiff's maſter."

It is quite conſiſtent with this ſumming up, that the plaintiff ſhould have given primâ facie evidence at leaſt of the want of probable cauſe, from whence, if unexplained, malice might be collected.

that

that the fact on which the perjury was assigned, namely, the words sworn to have been uttered by the defendant, being necessarily a fact within his own knowledge, might, if not true, have been disproved by him on the prosecution of the indictment. [Lord *Ellenborough*, C. J. the rule by which I was governed does not stand upon the authority of *Savil* v. *Roberts* alone: the same point was ruled by Lord *Kenyon*, in *Sykes* v. *Dunbar* (*a*), that it was not sufficient for the plaintiff to shew his acquittal in order to sustain the action, without going further and giving evidence of malice in the defendant.] In that case, *Dunbar* was the only witness upon the indictment; but here there were other witnesses besides the prosecutor on the indictment.

Lord ELLENBOROUGH, C. J. The question comes in fact to this, whether proving an acquittal for want of prosecution be primâ facie evidence of malice to support an action for a malicious prosecution: the contrary of which has been always held. The want of probable cause may indeed be so strong and plain as to amount to evidence of malice; but that must be shewn by the plaintiff.

GROSE J. It is necessary for the plaintiff to give evidence of malice in the defendant, in order to support the action.

LE BLANC J. An action for a malicious prosecution cannot from the very nature of it be maintained without proof of malice, either express or implied:

(*a*) Sittings after *Michaelmas* Term, 40 *Geo.* 3.

1808.

PURCELL *againſt* MACNAMARA.

and malice may be implied from the want of probable cauſe; but that muſt be ſhewn by the plaintiff.

Rule refuſed. (*a*)

(*a*) Vide *Johnſtone* v. *Sutton*, in error, 1 *Term Rep.* 545.

Saturday, May 7th.

WELLER *againſt* TOKE.

One magiſtrate committing the mother of a baſtard to cuſtody for not filiating the child is yet entitled to the previous notice of action required by the ſt. 24 *G.* 2. *c.* 44. though by the ſtat. 18 *Eliz c.* 3. §. 2. juriſdiction over the ſubject matter is committed to *two* magiſtrates.

THE defendant, a juſtice of peace for the county of *Kent*, being ſued in an action of treſpaſs and falſe impriſonment, for having, without the concurrence of any other magiſtrate, committed the plaintiff to cuſtody for not filiating her baſtard child, upon a ſummons to appear before himſelf; from which impriſonment ſhe was afterwards diſcharged by his order; it was objected at the trial at *Maidſtone*, before the Chief Baron, that the tranſaction had taken place twelve months before the action brought, and that no previous notice of the action had been given, as required by the ſtat. 24 *Geo.* 2. *c.* 44.; on which the plaintiff was nonſuited.

Garrow now moved to ſet aſide the nonſuit, on the ground that the defendant, having acted wholly without juriſdiction in aſſuming to himſelf authority to commit the mother for not filiating a baſtard child, when the ſtatute 18 *Eliz. c.* 3. §. 2. only gives juriſdiction in ſuch matters to *two* juſtices of peace, which muſt be exerciſed by them together (*a*), was not entitled to the notice required by the ſtatute; inaſmuch as the act could not be

(*a*) *Billings* v. *Prinn* and another. 2 *Blac. Rep.* 1017.

ſaid to have been done in the execution of his office; and the ſtatute only intended to protect magiſtrates acting irregularly or erroneouſly in caſes where they had juriſdiction in themſelves of the ſubject matter. And he cited *Alcock* v. *Andrews* (*a*), where Lord *Kenyon* is ſaid to have taken the diſtinction between a conſtable acting *colore officii*, and *virtute officii*: that he was not protected by the ſtatute in acting *colore officii*, where his office gave him no authority to do the act; but only when acting within the limits of his official authority, he exerciſed that authority improperly, or abuſed the diſcretion placed in him.

Lord ELLENBOROUGH C. J. It is not denied that the defendant had authority to act as a magiſtrate upon the ſubject matter of the complaint brought before him, though he could not act alone. Though the act of commitment, therefore, cannot be ſaid to have been done by virtue of his office, yet the ſubject matter was within his juriſdiction, and he intended to act as a magiſtrate at the time, however miſtakenly. The very object of the legiſlature in requiring the notice to be given was to enable the magiſtrate to tender amends as for the wrong done, contemplating him as a wrong-doer. If this had been an act wholly aliene to his juriſdiction, I ſhould have ſaid that he acted without the protection of the law.

Per Curiam, Rule refuſed (*b*)

(*a*) Sittings after *Michaelmas* Term, 1788. 2 *Eſp. Ni. Pri. Caſ.* 542.

(*b*) Vi. *Milton* v. *Green*, 5 *Eaſt*, 233.

1808.

Tueſday, May 10th.

DENN, on the Demiſe of JAMES WILKINS, *againſt* KEMEYS and Another.

Under a deviſe to *A.* for life, remainder to *B.* and her heirs; but if *B.* die before *A.*, *or* if ſhe die without heirs of her body, then to *C.* and his heirs, &c: held that the deviſe over to *C.* after *B.* could only take effect if *B.* died before *A and* without iſſue; for that unleſs *or* were read as *and*, the deviſee over would take if *B.* died before *A.*, although *B.* left iſſue; which would clearly be againſt the apparent intent of the deviſor, which was to prefer the iſſue of *B.* to *C.*

It ſeems that *freehold* may paſs by a will giving the eſtate a local deſcription and name, though it be miſtakenly called *leaſehold*; there being no other property anſwering to the name and deſcription.

AT the trial of this ejectment for a meſſuage, ſtable, coach-houſe, garden, orchard, and two acres of land in *Tiddenham*, in the county of *Glouceſter*, a verdict was taken for the plaintiff, ſubject to the opinion of this Court on the following caſe.

William Philpot being ſeiſed in fee of the premiſes in queſtion by indenture of feoffment of 29th *April* 1641, conveyed the ſame to *William Jones* in fee. *William Jones*, by indenture of the 25th *September* 1678, between him and *Ann* his wife, of the one part, and *William Wilkins* (the great grandfather of the leſſor of the plaintiff) of the other part, in conſideration of 16*l.* demiſed the premiſes to *W. Wilkins* his executors, &c. for 999 years: and by indenture of releaſe of the 26th *September* 1678, gave, granted, remiſed, and releaſed, and for ever quitted claim to *W. Wilkins*, in his poſſeſſion being, and to his heirs and aſſigns for ever, "all the eſtate, right, title, intereſt, "claim, and demand whatſoever which he the ſaid "*William Jones* then had, or ever had, or which his "heirs, executors, adminiſtrators, or aſſigns, at any time "or times hereafter ſhould or might or could have or "claim of in or to the ſaid premiſes; to hold unto the "ſaid *W. Wilkins* his heirs and aſſigns, to the only proper uſe and behoof of him the ſaid *W. Wilkins* his "heirs and aſſigns for ever," with general releaſes, and warranty. The laſt deed was duly executed and atteſted by the ſame ſubſcribing witneſſes as atteſted the execution of the next preceding deed. *W. Wilkins* occupied the

1808.

DENN dem. WILKINS *againſt* KEMEYS.

the premiſes, and died poſſeſſed thereof in 1736, leaving his widow *Catherine* in poſſeſſion, and leaving a ſon *Joſeph*, and three daughters, *Ann*, *Sarah*, and *Eleanor*. By indenture of *March* 18th, 1728, between *W. Wilkins* and *Catherine* his wife, of the firſt part, and *Ann Anderſon* of the ſecond part; reciting the deed of the 25th of *September* 1678; *W. Wilkins* and *Catherine* his wife did *grant, bargain, ſell, aſſign, and ſet over*, the premiſes to *Ann Anderſon* for the reſidue of the term of 999 years created by the deed of the 25th of *September* 1678, as a ſecurity for the repayment of 25*l.* and intereſt: with a proviſo that if *Wilkins* and his wife, or their or either of their *heirs*, executors, &c. ſhould pay to *Anderſon*, her executors, &c. the principal and intereſt on the 17th of *September* then next, the indenture ſhould be void. By indenture of the 19th of *September* 1732 between the ſame parties, the premiſes were further conveyed to *Anderſon* for ſecuring a further ſum of 5*l.*, with a like proviſo on payment of 30*l.* on the 18th of *March* then next. By indenture of the 30th of *September* 1736, between *Catherine Wilkins* of the one part, and the ſaid *Joſeph Wilkins* of the other part, *Catherine*, in conſideration of 5*s.* bargained and ſold the meſſuages with one piece of ground, then in her poſſeſſion, containing by eſtimation about one acre, in *Teddenham*, &c. to *Joſeph Wilkins* in fee (*a*). *Catherine* died in 1740 in poſſeſſion of the premiſes, leaving *Joſeph Wilkins*, the eldeſt ſon and heir at law of the ſaid *William* and *Catherine*, and their three daughters, *Ann*, *Sarah*, and *Eleanor*, her ſurviving. *Joſeph Wilkins* after-

(*a*) It was admitted that this deed of the 30th of *September* 1736 operated nothing in reſpect of the caſe in judgment; *Joſeph Wilkins* having had the fee by deſcent before, ſubject only to the dower of *Catherine* his mother.

1808.

DENN dem. WILKINS *againſt* KEMEYS.

wards died, leaving one only ſon, *John*, mentioned in the will of *Ann Jones* hereafter ſtated; which *John* died in 1788, leaving the leſſor of the plaintiff his only ſon. On the death of *Catherine Wilkins* in 1740 her daughter, *Ann*, entered upon the premiſes and kept poſſeſſion adverſely againſt her brother *Joſeph* until her death, without iſſue, in 1779. *Ann* married *Reece Jones*, who by his will, dated 12th *January* 1763, bequeathed to his ſaid wife *Ann*, whom he appointed executrix, all his real and perſonal eſtate; and ſoon afterwards died; and on 16th *June* 1768 ſhe proved his will at *Glouceſter*. By indenture of the 28th of *Feb.* 1770, between *Selwyn James*, ſole executor of the ſaid *Ann Anderſon*, widow, of the one part, and the ſaid *Ann Jones*, widow, deviſee and ſole executrix of *Reece Jones* of the other part; reciting the abſtracted indentures of mortgage or aſſignment of the 18th of *March* 1728, and 19th of *September* 1732, and that default was made in payment of the principal ſum of 30*l.* and intereſt there mentioned, and that there was due to *Ann Anderſon* 50*l.* for principal and intereſt, which *Reece Jones* in his life time had paid to her; but that no aſſignment was ever made by her of her eſtate and intereſt in the premiſes by virtue of thoſe indentures to *Reece Jones*; and that *Ann Jones*, being entitled under his ſaid will to take an aſſignment thereof, had requeſted *James*, in whom ſuch term eſtate and intereſt was then veſted, as executor of *Ann Anderſon*, to aſſign the ſame to her, *Ann Jones*, which he had conſented to do; *James* therefore aſſigned the premiſes to *Ann Jones* her executors, &c. for the reſidue of the ſaid term of 999 years. *Ann Jones* by her will of the 11th of *September* 1771, duly executed and atteſted to paſs real eſtate, deviſed as follows; "I give and bequeath unto *Thomas Cooper* for life, all my *leaſehold* eſtate ſituated

1808.

DENN dem. WILKINS against KEMEYS.

situated on *Tutshill*, commonly called the *Star*, consisting of one dwelling house and stable, one piece of meadow, orchard, and garden. I also give unto the said *T. Cooper* all my household goods, beds, &c. and all utensils of brewing, and other my *goods* and *chattels*, moveable and unmoveable, together with all such sums of money as may be due to me at the time of my decease. And after his decease I give and bequeath unto *Jane Prickett* all the above *leasehold* estate, with all such furniture as shall remain after *T. Cooper*'s decease, to her and to her *heirs* and assigns for ever. But if *Jane Prickett* die before *T. Cooper*, *or* if she die without *heirs from her body* lawfully begotten, then I will my leasehold estate only unto *John Wilkins*, son of *Joseph Wilkins*, to him his heirs and assigns for ever. But if *John Wilkins* die before he comes to *lawful* possession of it, or die without issue of his body lawfully begotten, I will it descend unto *S. Tovey*, his heirs and assigns for ever. And after the decease of *Tho. Cooper* and *Jane Prickett*, and on the accession of *John Wilkins* to my leasehold estate, that my household goods shall be equally divided between *Catherine* and *Martha Tovey*." And she appointed *Tho. Cooper* her executor; who after her death duly proved the will, and took possession of the premises in question. The premises described in the said will as *leasehold* are those now in question. *Jane Prickett* married *James Williams*; and by indenture dated 20th of *August* 1788 *Cooper* demised the premises to *Williams* and his wife for 21 years, if he, *Cooper*, should so long live, at the yearly rent of eleven guineas. By indenture tripartite of the 10th of *March* 1789, between *Thomas Cooper*, administrator with the will annexed of *Ann Jones*, of the first part, *James Williams* and *Jane* his wife, formerly *Jane Prickett* of the second part, and *J. Seys* of the third

1808.

DENN dem. WILKINS against KEMEYS.

third part; reciting the indenture of the 28th of *February* 1770, therein taking notice of the indenture of mortgage of the 18th of *March* 1728, in which are recited the indentures of the 25th of *September* 1768 and 19th of *September* 1732, and the other matters therein recited; and reciting the death of *Ann Jones*, and her ſaid will, and the ſaid indenture of leaſe dated the 20th of *Auguſt* then laſt paſt; and that *James Williams* and *Jane* his wife having occaſion to borrow 40*l.* *John Seys* had agreed to lend the ſame, with the approbation of *T. Cooper*, upon mortgage of the ſaid abſtracted premiſes; *Cooper*, *Williams* and wife, did thereby grant, bargain, ſell, and aſſign to *Seys* all the ſaid premiſes, and all the eſtate, &c. to hold to *Seys* his executors, &c. for the reſidue of the ſaid term of 999 years, ſubject to a proviſo that on repayment of the 40*l.* with intereſt on the 10th of *September* then next, *J. Seys* his executors, &c. would ſurrender or aſſign ſo much of the ſaid term as ſhould be unexpired to *Williams* and wife, their executors, &c. The 40*l.* mortgage money not being paid, *Williams* and wife by indenture of the 20th of *February* 1790, reciting the laſt abſtracted deed, in conſideration thereof, and of a further ſum then paid to them, making in the whole 100*l.*, aſſigned the ſaid premiſes to *Seys* for the reſidue of the term abſolutely, and without any proviſo for redemption, ſubject to the payment of the rent of eleven guineas a year to *Cooper* reſerved in the leaſe of the 20th of *Auguſt* 1788. *J. Seys* took poſſeſſion of the premiſes, and conſiderably improved them; and from him the term was regularly, by indenture of the 25th of *March* 1795 (reciting the indenture of the 25th of *September* 1678, and the other matters before mentioned,) aſſigned to *S. Stephens*, who on the 2d of *July* 1797 made the defendants his executors, and died,

died, and they are now in poſſeſſion. *Tho. Cooper* died in 1791; and *Jane Prickett* died, without iſſue, in 1793. *James Wilkins* the leſſor of the plaintiff is the eldeſt ſon and heir of *John Wilkins*, the deviſee named in the will of *Ann Jones*, and is alſo the heir at law of *William Wilkins* the grantee in the indentures of the 25th and 26th of *September* 1678, and of *Ann Jones* the teſtatrix. The releaſe of the 26th of *September* 1678, and the deed of the 30th of *September* 1736 were produced by the leſſor of the plaintiff. The other conveyances ſtated were in the poſſeſſion of and produced by the defendants. If the Court were of opinion that the leſſor of the plaintiff was entitled to recover the premiſes in queſtion the verdict was to ſtand: otherwiſe a nonſuit was to be entered.

This caſe firſt came on to be argued in the laſt term, when it was ordered to be amended; and afterwards in the ſame term it was argued by *Wigley* for the plaintiff, and *Gaſelee* for the defendant, when ſeveral points were made;

1ſt, Whether the mortgage term of 999 years created by the indenture of leaſe of the 25th of *September* 1678 were merged in the fee granted to *W. Wilkins* by the indenture of releaſe of the 26th of *September*: againſt which *Shep. Touch.* 324. was cited. 2dly, If merged, whether the old term were not revived and aſſigned by the deed of the 18th of *March* 1728, noticing it as an exiſting term, and conveying it as ſuch from *W. Wilkins* and *Catherine* his wife to *Ann Anderſon*, as a mortgage ſecurity: or whether the words "*grant, bargain, ſell, aſſign, and ſet over*," though purporting to be an aſſignment of the old term, would not, if that were merged, operate as a new grantor re-creation of the term, by reference to the former, for the reſidue

of

1808.

DENN dem. WILKINS against KEMEYS.

of the years to come: and this ſeemed to be conceded. 3dly, Whether upon the death of *Catherine* the ſurvivor of *W. Wilkins* in 1740, and the rightful fee having at all events deſcended to *Joſeph* the eldeſt ſon and heir at law of *Catherine Wilkins*; his ſiſter *Ann*, who then entered and kept poſſeſſion adverſely againſt her brother until her death without iſſue in 1779, did not thereby acquire a tortious fee by diſſeiſin, (as in *Lit. ſ.* 411.) notwithſtanding the exiſtence of the outſtanding mortgage term to *Ann Anderſon*, to whom *Ann Wilkins* continued to pay the intereſt on the mortgage, and therefore, it was ſaid, muſt be taken to have continued in poſſeſſion with the aſſent of the mortgagee, and during which term the brother could not have recovered in ejectment. 4thly, Whether, if ſhe did acquire ſuch tortious fee by diſſeiſin in 1740, the aſſignment of the outſtanding mortgage term to her (then called *Ann Jones*) in 1770 by *Selwyn James*, the executor of *Ann Anderſon* the mortgagee, did not merge the term in the fee; as the term and the fee could not, it was argued, exiſt together in the ſame perſon in their own right. And in *Co. Lit.* 338. *b.* it is ſaid that a man cannot have a term for years in his own right, and a freehold in auter droit, to conſiſt together; but he may have a freehold in his own right and a term in auter droit. Or, 5thly, whether a rightful term could merge in a wrongful fee. Or, 6thly, whether *Ann Jones* having a rightful and a wrongful title to the poſſeſſion, ſhe might not have elected to hold, and may therefore now be preſumed to have held, by her rightful title; more eſpecially as by her will ſhe deſcribes the premiſes as leaſehold, which was according to her right in them.

But ultimately it became unneceſſary to decide theſe points: for the caſe was reſolved into this; either the

eſtate

1808.

DENN dem. WILKINS *againſt* KEMEYS.

eſtate in *Ann Jones* at the time of her death was leaſehold or freehold. If leaſehold, it was agreed that the defendants were entitled, claiming under thoſe who were competent to convey it as ſuch. If freehold, the queſtion turned on the deviſe over in the will of *Ann Jones* to *John Wilkins* (the father of the leſſor of the plaintiff) *if* Jane Prickett *died before* Thomas Cooper (the firſt taker for life under *Ann Jones'* will), *or* if ſhe died *without heirs of her body*. And *Jane Prickett* having died without iſſue in 1793, but having ſurvived *Thomas Cooper*, who died in 1791, the principal queſtion was whether that deviſe over took effect: and which depended upon another queſtion, whether the word *or* were to be read *and*: in other words, whether both the events, of *Jane Prickett* dying before *Tho. Cooper*, *and* of her dying without iſſue, muſt happen before the remainder over to *John Wilkins*, could veſt? In reſpect to which *Lawrence* J. in the laſt term referred to *Fairfield* v. *Morgan* (*a*) in the Houſe of Lords, where, in a deviſe nearly ſimilar, *or* was read *and*, and where all the caſes on the ſubject are collected.

Wigley for the leſſor of the plaintiff, (aſſuming for the purpoſe of the argument, that the old mortgage term for 999 years, created by the deed of demiſe of the 29th of *September* 1678, was merged in the fee releaſed to *Wm. Wilkins* by the indenture of the 26th of *September*; or if it were revived, or a new mortgage term created by the deed of the 18th of *March* 1728 for the benefit of *Ann Anderſon* the mortgagee, that upon the aſſignment of it by her perſonal repreſentative in 1770 to *Ann Jones*, who had then acquired a tortious fee by diſſeiſin of her brother

(*a*) 2 *New Rep.* 38.

30 years

1808.

DENN dem. WILKINS *againſt* KEMEYS.

30 years before, that term was again merged, and therefore that at the time of *Ann Jones* making her will ſhe was ſeiſed in fee of the premiſes unincumbered by any outſtanding term;) contended, 1ſt, that though the premiſes were deſcribed in the will as *leaſehold*, yet the deviſor having nothing but this *freehold* eſtate which is locally deſcribed, they would paſs under this miſtaken deſcription; rejecting the word *leaſehold* as ſurpluſage; according to the rule in *Knotsford* v. *Gardiner* (*a*). 2dly, That the word *or*, in the deviſe over to *John Wilkins*, was to be read in its proper disjunctive ſignification; and that one of the events having happened, namely, the dying of *Jane Prickett without iſſue*, the deviſe over took effect. The caſe of *Fairfield* v. *Morgan* was a deviſe to the teſtator's brother of all his real and freehold eſtates: but in caſe his brother "ſhould die before he attained the age of 21 years, or without iſſue living at his death," then to his mother in fee. And he endeavoured to diſtinguiſh the preſent from that caſe by ſaying, that here there was an apparent intent that neither of the deviſees, *Jane Prickett*, or *John Wilkins*, ſhould take any fee abſolutely in the premiſes until they reſpectively came into poſſeſſion. The only reaſon againſt ſuch a conſtruction is founded upon the ſuppoſition of an abſurdity in ſuppoſing that the teſtatrix could intend that if *Jane Prickett* died before *Cooper*, leaving iſſue, ſuch iſſue ſhould not take, but the eſtate go over to *John Wilkins* on *Cooper*'s death: but there is nothing ſo abſurd in ſuch an intention as to render it impoſſible to ſuppoſe that it could exiſt, though the natural ſenſe of the words uſed beſt convey ſuch a meaning. A deviſor may well intend to give an eſtate

(*a*) 2 *Atk.* 450.

1808.

DENN dem. WILKINS *againſt* KEMEYS.

in remainder to one relation, and if ſhe lived to come into poſſeſſion of it, then that her family, if ſhe had any, ſhould alſo have the benefit of it; but that if ſhe never came into the poſſeſſion at all, that it ſhould go over altogether to another relation who was the next more immediate object of perſonal regard. But admitting ſome inconvenience in this conſtruction, the reading *and* for *or* will not get rid of every inconvenience; for then if *Jane Prickett* ſurvived *Cooper*, but without having iſſue, (for in caſe of iſſue, it might be a queſtion whether ſhe would take more than an eſtate tail), ſhe might have ſold the eſtate, and deprived the deviſees over of their ſucceſſion; which was clearly againſt the intention of the teſtatrix.

The Court now thought it unneceſſary to hear *Gaſelee* contrà, on this part of the caſe.

Lord ELLENBOROUGH C. J. This caſe is governed by that of *Fairfield* v. *Morgan*, and the word *or* muſt be read copulatively, as *and*: the apparent intention of the teſtatrix being, that both the events, of *Jane Prickett*'s dying before *Thomas Cooper*, *and* of her dying without iſſue, ſhould concur, before the deviſe over took effect: and both did not concur; for ſhe ſurvived *Cooper*. Taking this therefore either as freehold or leaſehold property in the teſtatrix, the plaintiff is not entitled to recover. As leaſehold, there was a reſuſcitation of a term, by the words *grant*, *bargain* and *ſell*, as well as *aſſign*, in the mortgage deed of *March* 1728, to *Ann Anderſon*, which term afterwards came by aſſignment to *Ann Jones*, through whom a regular title is traced to the defendants. As freehold, conſidering *Ann Jones* to have acquired a tortious fee by an adverſe poſſeſſion ſince 1740, the title is out of the

leſſor

1808.

DENN dem. WILKINS *againſt* KEMEYS.

leſſor of the plaintiff; and the deviſe over to his father in the will of *Ann Jones* never took effect.

GROSE J. concurred in both views of the caſe; and added, that it was neceſſary to read *and* for *or*, in order to give effect to the intention of the teſtatrix; for otherwiſe if *Jane Prickett* had died before *Cooper*, leaving iſſue, the eſtate would have gone over againſt the manifeſt intent of the teſtatrix.

LE BLANC J. The property to be recovered in this ejectment is either freehold or leaſehold: if leaſehold, it is admitted that the leſſor of the plaintiff cannot take it. If freehold, then he claims it as heir at law to *John Wilkins*, the deviſee over in the will of *Ann Jones*. Taking it then to be freehold, though called leaſehold in the will, and that as freehold it would ſtill paſs, being deſcribed by its local name and parts, the teſtatrix firſt gives it to *Thomas Cooper* for life; and after his deceaſe to *Jane Prickett* and her heirs and aſſigns; but if ſhe die before *Cooper*, *or* if ſhe die without heirs of her body, then to *Wilkins* and his heirs. If this deviſe over has taken effect in the event which has happened, then the leſſor is entitled to recover. That depends on the conſtruction of the word *or* in that clauſe; whether it is to be read diſjunctively, or conjunctively, as if the word *and* had been there written; becauſe as *Jane Prickett* ſurvived *Cooper*, and died without iſſue, if the eſtate were intended to go over on the happening of either alternative, it would ſtill go over to *Wilkins*. But there has been a long train of deciſions, ending with the late caſe of *Fairfield* v. *Morgan*, and particularly *Sowell* v. *Garnet* (*Moor* 422.) which is very like the preſent, where the Court have conſtrued

or

1808.

DENN dem. WILKINS *againſt* KEMEYS.

or as *and*; becauſe otherwiſe, if the prior deviſee had iſſue, and died; as in *Sowell* v. *Garret*, before 21; or, as in this caſe, before *T. Cooper*; the iſſue, which was the object of the deviſor's bounty before the deviſee over, would not take at all: and therefore to prevent ſo monſtrous an abſurdity, as that, if *Jane Prickett* died the day before *T. Cooper*, the intention of the deviſor in favour of her children would be defeated, the word *or* muſt be read *and*.

BAYLEY J. agreed that the word *or* muſt be read *and*, in order to effectuate the manifeſt intention of the deviſor. The firſt object of her bounty, after *T. Cooper* to whom ſhe only gave an eſtate for life, was *Jane Prickett*. If ſhe ſurvived *Cooper*, ſo as to live to occupy the property herſelf, the teſtatrix meant ſhe ſhould have the fee: but if ſhe died in *Cooper*'s life time, in which caſe ſhe could not occupy herſelf, but left children, the teſtatrix meant ſhe ſhould have the means of providing for thoſe children, and therefore that in that event alſo ſhe ſhould have a fee. The deviſe over therefore was not to take effect in either event, if ſhe lived to enjoy it herſelf, or if ſhe left children to be provided for: whereas according to the plaintiff's conſtruction, had ſhe died before *T. Cooper*, leaving iſſue, the eſtate would have gone over to the remainder-man, without leaving her the means of providing for her children out of it; which was clearly contrary to what the teſtatrix intended.

1808.

Tueſday, May 10th.

KER *againſt* OSBORNE.

Where money in litigation between two parties has by mutual conſent been paid over to a truſtee, in truſt for the party entitled, it can only be ſued for and recovered from the ſtakeholder by the party entitled to it, and not from the original party who was indebted; though he agreed to wave all objections to form.

ASSUMPSIT for money had and received, and on the other common money accounts, and alſo on a ſpecial count, which ſtated that the plaintiff inſured the defendant's freight of the ſhip *George* on a voyage from *Riga* to *London*, &c. for 150*l.*: that the ſhip being detained at *Riga*, under the *Ruſſian* embargo, the defendant gave notice of abandonment to the inſurers on the freight, and claimed a total loſs: whereupon, in conſideration that the plaintiff accepted the abandonment and agreed to pay a total loſs upon receiving an aſſignment of the freight, the defendant promiſed to aſſign the freight for the benefit of the inſurers thereof. It then ſtated that the plaintiff paid a total loſs to the defendant; that the embargo was afterwards withdrawn, the cargo reloaded, the voyage performed, and the freight paid by the conſignees: and then aſſigned as a breach, that the defendant *before* he abandoned the freight to the plaintiff, had abandoned the ſhip to other underwriters on ſhip, and afterwards aſſigned the ſhip to truſtees as to 7-8ths in truſt for the underwriters on ſhip, and as to the other 8th in truſt for himſelf; whereby the truſtees became entitled to the freight, and the defendant, though demanded, refuſed to aſſign, and became incapable of making any effectual aſſignment of it to the plaintiff. In another ſpecial count the breach was laid to be, that the defendant cauſed the freight to be payable and paid to other perſons, and not to the underwriters on freight; and refuſed to aſſign and was incapable of effectually aſſigning the

1808.

KER against OSBORNE.

the ſame to them. On the trial of the cauſe at the ſittings in *London*, a verdict was taken for the plaintiff for 150*l.* ſubject to the opinion of the Court on a caſe, the ſubſtance of which, ſo far as reſpects the only point on which any opinion was given, is as follows:

The defendant, owner of the ſhip *George*, on the 28th of *June* 1800 chartered the ſhip by writing (not under ſeal) to *Roberts* and *Co.* of *London*, on a voyage to *Riga*, and back again, at a certain rate of freight per lading. On the 8th of *July* the defendant inſured the *ſhip* on the voyage out and home for 6000*l.*; and on the 16th of *July*, he inſured the freight on the ſame voyage for 2500*l.*, of which 150*l.* was underwritten by the plaintiff. The ſhip ſailed on the voyage and arrived at *Riga*, and was there detained under an embargo, after the greater part of her cargo was on board, which was afterwards unſhipped. On the 24th of *February* 1801 the defendant gave written notice of abandonment of the ſhip to the underwriters on ſhip, and demanded a total loſs; and they accepted the abandonment, and by a memorandum on the policy, dated the 27th of *February*, agreed to pay a total loſs, "on receiving from the owner "an aſſignment of 7-8ths of the ſhip," &c. which was equivalent to 7000*l.* the ſum inſured on her, to be paid on the firſt of *April*, by a bill at two months. On the 25th of *February* the defendant gave written notice of abandonment of the freight to the underwriters on freight, and demanded a total loſs; which they agreed to pay in like manner, by a memorandum on the freight policy dated the 27th of *February*, "upon receiving from "the owners an aſſignment of the ſaid freight." The plaintiff accordingly paid the amount of his ſubſcription

1808.

KER against OSBORNE.

to the defendant. On the 21ſt of *March* 1801 the defendant executed an aſſignment, by which he conveyed to *Broadley* and *Moxon* all his property, intereſt, and claims in and to the ſhip, in truſt, as to 7-8ths for the underwriters on ſhip, at their requeſt, and as to the other 8th for himſelf. And on the ſame day he executed to the ſame truſtees an aſſignment of all his right, title, intereſt, and claims, legal and equitable, in and to the freight from *Riga*, &c. in truſt for the underwriters on freight, with their privity and conſent. But it did not appear which of theſe aſſignments was firſt executed. The underwriters on ſhip alſo paid the defendant as for a a total loſs. In *May* 1801 the ſhip was liberated, the cargo reloaded and completed, and ſhe returned home with and delivered the goods to the ſeveral conſignees, who afterwards paid their full freight to *Moxon*, one of the truſtees of the ſhip and freight, who ſtill retains the ſame; *which payment was made to Moxon with the concurrence of each ſet of underwriters.* The plaintiff, at the time when he paid his ſubſcription to the defendant, knew that the defendant had abandoned the ſhip to the underwriters on ſhip, and that he had aſſigned the ſhip to *Broadley* and *Moxon*, in truſt as beforementioned; but it was not proved that he knew theſe facts at the time when he accepted the abandonment of the freight, and when the memorandum before-mentioned was made on the policy on freight. The parties agreed to take no advantage of form on either ſide, but to reſt on the merits of their caſes. The queſtion was, whether the plaintiff were entitled to recover?

Richardſon for the plaintiff, having ſtated the facts of the caſe, was aſked by Lord *Ellenborough*, how, after the

two

1808.

KER *againſt* OSBORNE.

two parties had agreed that the money in diſpute ſhould be paid over to third perſons, ſtakeholders, the plaintiff could ſue for and recover it againſt the defendant who had ſo paid it over with his conſent. This, his Lordſhip ſaid, was a preliminary objection which appeared to be fatal to the action; and which precluded any diſcuſſion upon the merits of the caſe: and that the agreement of the parties to reſt on the merits, and take no advantage of form, could not alter the caſe or bind the Court to give judgment on the merits, when there appeared to be a clear objection to the action itſelf. To this *Richardſon* ſubmitted that though this was a deciſive objection to the count for money had and received, yet it was none to the ſpecial count, which went upon a breach of contract, in not paying the freight over to the underwriters.

LE BLANC J. The ſpecial count is alſo againſt you; for the refuſal to aſſign the freight, as there alleged, is anſwered by the fact of its being aſſigned and afterwards paid to another with the plaintiff's conſent.

Lord ELLENBOROUGH C. J. The queſtion of right to the freight, upon the abandonment, between the underwriters on ſhip, and thoſe on freight, cannot be decided in this action. It is a queſtion of great importance and very proper for diſcuſſion when it comes before us unfettered by any preliminary objection. Perhaps it may be contended in the preſent inſtance that the aſſured is liable upon his engagement to both ſets of underwriters. But the ſubject of this ſuit has by agreement of all parties been taken from the defendant and depoſited in other hands: in thoſe hands therefore it muſt be litigated.

1808.

KER *against* OSBORNE.

The breach of the contract complained of by the plaintiff is the non-assignment or non-payment to him of the freight; but if he agreed that it should be assigned or paid over to another, how can he complain of the breach of that contract. He must proceed against the stakeholder.

BAYLEY, J. The money was paid over by consent of all parties, and with knowledge of all the facts. No new fact is stated, which was kept back at the time from the knowledge of the underwriters. How then can the plaintiff now object to the payment over?

Per Curiam, Postea to the defendant.

Holroyd was to have argued for the defendant.

Tuesday, May 10th.

DOE on the Demise of CHRISTIANA ELLIS *against* ELLIS.

Under a devise of land to the testator's son *Joseph* his *heirs* and *assigns for ever*; but in case his son should *die without issue, then,* to go to the child of which his second wife was ensient; held that *Joseph* took an *estate tail.*

IN ejectment for a messuage in *Leeds*, a verdict was taken, at the trial at *York*, for the plaintiff, subject to the following case. *Jacob Ellis*, being seised in fee (inter alia) of the premises in question, by his will duly executed, dated the 26th of *March* 1804, devised thus: "I give and devise unto my son *Joseph* his heirs and "assigns for ever all that messuage or tenement in *Leeds* "in his own occupation: but in case my said son *Joseph* "shall die without issue, *then* I give and devise the same "messuage unto the child or children with which my "wife is now ensient, his or her heirs and assigns for "ever." A copy of the will was annexed to the case; but no other part of it was considered to be material to the question.

180

Doe, dem. ELLIS, *againſt* ELLIS.

The teſtator had two wives; by his firſt he had his ſon *Joſeph*; by his ſecond he had *Chriſtiana* the leſſor of the plaintiff, with whom his ſecond wife was enſient at the time of making his will. *Joſeph* the ſon ſurvived the teſtator and entered into the premiſes, and died; leaving *Jacob* his ſon and heir him ſurviving; who entered and died without iſſue; leaving *Joſeph Ellis*, his paternal great uncle, his heir at law; who claims the premiſes, and defends the ejectment, in the name of *Mary Ellis* the tenant. *Chriſtiana*, the daughter of the teſtator by his ſecond wife, claims the premiſes under the above deviſe. The queſtion was whether ſhe were entitled to recover? if ſhe were, the verdict was to ſtand; if not, a verdict was to be entered for the defendant.

Littledale for the plaintiff contended that *Joſeph* the ſon, to whom and his *heirs* and aſſigns the eſtate was given, only took an eſtate tail by force of the ſubſequent words in the limitation over, "in caſe my ſaid ſon *Joſeph* ſhall die "*without iſſue*, which reſtrained the word, "*heirs*" to *heirs* "*of the body*." Therefore, on the death of *Joſeph*'s ſon, *Jacob*, without iſſue, the limitation over to the leſſor of the plaintiff, *Joſeph*'s ſiſter of the half blood, took effect. And he referred to *Parker* v. *Thacker* (*a*), *Webb* v. *Herring* (*b*), *Nottingham* v. *Jennings* (*c*), *Tyte* v. *Willis* (*d*), (in addition to which Lord *Ellenborough* mentioned *Brice* v. *Smith*, as reported in *Willes* 1.) and particularly to *Roe* d. *Scott* v. *Smart* (*e*), as being directly in point to the

(*a*) 3 *Lev.* 70. (*b*) *Cro. J.* 415. (*c*) 1 *Pr. Wms.* 23.

(*d*) *Caſ. Temp. Talb.* 1 and vi. *Lewis* v. *Waters*, 6 *Eaſt*, 336.

(*e*) *C. B. Eaſter* 27 *G.* 3. reported in the laſt edition of *Fearne's Exec. Dev.* 203, edited by Mr. *Powell*.

1808.

Doe, dem. Ellis, *againſt* Ellis.

preſent caſe. The teſtator there deviſed different lands to each of his ſons, *James*, *John*, and *Thomas*, to hold to each, his "*heirs and aſſigns* for ever;" and if either of his three ſons ſhould die *without iſſue of his or their bodies*, then the eſtate or eſtates of ſuch ſons to go to the ſurvivors or ſurvivor; and if all his ſons ſhould die without iſſue, then to his four daughters and their heirs and aſſigns for ever. The three ſons ſurvived the teſtator and entered, and *John* died afterwards unmarried: and held that *Thomas* took an eſtate tail, which deſcended to his daughter; and on her death, without iſſue, the eſtate went over to *James*, and not to the heirs of the daughter to whom *James* was only related of the half-blood.

Holroyd, contrà, contended that the limitation to *Joſeph* and his heirs, and in caſe he die without iſſue then over, gave *Joſeph* a fee determinable on a particular event; not on an unlimited failure of iſſue, but on his dying without iſſue at the time of his death; which event did not happen, and therefore, the deviſe over never took effect. This caſe is diſtinguiſhable from all the others but the laſt. In general the caſes have been where after a deviſe to one and his heirs, the limitation over has been, in caſe he died without *heirs*, to one who might be *his heir*; where it was manifeſt that by the word *heirs* was meant *heirs of the body*: but this does not apply where the limitation over is to one of the half-blood, who could not be heir to the firſt taker. Without entering into the diſtinction between real and perſonal property, in conſtruing the words *dying without iſſue*; whether to be taken as a general failure of iſſue, or to be confined to the time of the death; which diſtinction is commented upon by Lord C. J. *Wilmot*

1808.

Doe, dem. Ellis, *againſt* Ellis.

Wilmot in *Keiley* v. *Fowler* (*a*), and by Lord *Kenyon* in *Porter* v. *Bradley* (*b*); it is now ſettled, that even in the caſe of real property any ſlight circumſtance which ſhews an intent in the teſtator not to uſe the words *die without iſſue* in their ſtrict legal ſenſe, as importing a general failure of iſſue at any future time, will reſtore them to their natural ſenſe, as purporting a *dying* without iſſue, *at the time of the death* of the firſt taker. This alſo appears from *Wilkinſon* v. *South* (*c*), and *Hockley* v. *Mawbey* (*d*). Now here the intention of the teſtator clearly was, that *Joſeph* ſhould take a fee if he had iſſue; for he uſes the word *then*, which muſt refer to the time of the death. Again, the deviſe is not merely to him and "his *heirs*," but to him and his heirs *and aſſigns* forever;" giving him, therefore, an *aſſignable* eſtate. Now an eſtate tail is not an *aſſignable* eſtate; for it only endures while there are heirs of the body of the firſt taker. He was to take a fee in all events, except that on which the eſtate was given over, namely, if he had no iſſue living at the time of his death. The only direct authority againſt this is *Roe* d. *Scott* v. *Smart*, of which there does not appear to be any profeſſed note of what paſſed in Court; but the account of the caſe is collected from Mr. *Fearne*'s papers and opinions. It, appears however, that the teſtator was there parcelling out his eſtate amongſt his ſons, and regulating the ſucceſſion from one to another, ſo as to preſerve the whole in the family: and therefore could not intend that they ſhould take the fee.

(*a*) *Wilmot's Rep.* 298.

(*b*) 3 *Term Rep.* 146. and vi. *Roe* v. *Jeffery*, 7 *Term Rep.* 589.

(*c*) 7 *Term Rep.* 555. (*d*) 3 *Bro. Ch. Caſ* 82.

Lord

1808.

Doe, dem. Ellis, *againſt* Ellis.

Lord Ellenborough, C. J. The general rule is clear, that the words "in caſe my ſaid ſon *Joſeph* ſhall die without iſſue," muſt be conſtrued to mean a general failure of iſſue. And according to the opinion of Lord *Thurlow* in *Bigge* v. *Benſley* (*a*), "the general words are to be varied only by circumſtances ariſing on fair demonſtration." Lord *Thurlow* ſaid that there were not leſs than 57 caſes upon this point, and that to call "dying without *leaving* iſſue" the natural ſenſe of "dying *without* iſſue," is againſt all the caſes. And he referred to *Dormer* v. *Beauclerk* (*b*) as deciding that the word *then*, which was merely a word of relation, and not an adverb of time, made no difference. That is extremely deciſive againſt the only word upon which originally any argument could have been built. For as to the word *aſſigns* which follows *heirs*, we cannot collect any different intention from the addition of it, than if the word *heirs* alone had been uſed. Whether an eſtate be given to a man and his heirs, or to him and his heirs and aſſigns, muſt be the ſame thing in legal conſtruction. The eſtate then being at firſt given to *Joſeph*, his heirs and aſſigns for ever, would have given him the fee; but the premiſes however large may be reſtrained by the context; as premiſes, however narrow, may be enlarged by it. Here then the teſtator goes on to ſay that "in caſe *Joſeph* ſhall die *without iſſue*, then," he gives it over to the child which his (the teſtator's) wife is enſeint with; which clearly gives *Joſeph* only an eſtate tail; according to *Brice* v. *Smith*, where all the caſes are collected; among others, *Altham's* caſe (*c*), in which the ſame rule is applied to deeds; as

(*a*) 1 *Bro. Ch. Caſ.* 190. (*b*) *Willis*, 1. (*c*) 8 *Co.* 154. *b.*

"if

1808.

DOE, dem. ELLIS, *againſt* ELLIS.

" if a man give land to one and his heirs, habendum " to him and the heirs of his body, he ſhall have but an " eſtate in tail, and no fee expectant; for the habendum " qualifies the general words precedent." And ſo it was ſaid by Lord Keeper *Wright* in *Bamfield* v. *Popham*(*a*), " that where in the premiſes an eſtate is given by deed " to one and his *heirs*, and if he die *without iſſue*, &c.;" theſe words are ſufficient to reſtrain the former words, and turn the fee into an entail. If ſuch would be the effect of the latter words to reſtrain the former in a deed, I ſee no reaſon why they ſhould not have the ſame effect in a deviſe: and then according to all the caſes, *Joſeph* the ſon took only an eſtate tail; which being now ſpent, the leſſor of the plaintiff is entitled to recover.

GROSE, J. It is impoſſible to read the will without ſeeing, that the teſtator intended that if *Joſeph* had iſſue, that iſſue ſhould take; and that if he died without iſſue, the iſſue of which the ſecond wife was enſeint ſhould take the eſtate: and this intention can only be effectuated by giving *Joſeph* an eſtate tail.

LE BLANC and BAYLEY, Juſtices, concurred in opinion that neither the word *then*, nor the word " *aſſigns*" were ſufficient to ſhew an intention in the teſtator to uſe the words, " in caſe my ſaid ſon *Joſeph* ſhall *die without iſſue*," in any other than their acknowledged general legal ſenſe; or to except this out of the general current of authorities.

Poſtea to the plaintiff.

(*a*) 1 *Pr. Wms.* 57. note.

1808.

Saturday, May 14th.

The KING *againſt* The Inhabitants of TIBBENHAM.

A married woman pregnant in the abſence of her huſband with a child, which when born would by law be a baſtard, is removeable as an unmarried woman under ſect. 6. of ſtat. 35 *G.* 3. *c.* 101. and the preſumption of her being chargeable ariſes by the ſame clauſe from the bare fact of being with child of a baſtard, if no circumſtances be ſtated to ſhew that ſuch preſumption is not applicable to a perſon in the particular ſituation of the party coming within the general deſcription of the clauſe. And the order of removal may charge ſuch a perſon generally as actually chargeable, without ſetting forth in what manner chargeable.

UPON complaint of the pariſh officers of *Diſs* in *Norfolk* "that *Rebecca Knowles*, *wife* of *John Knowles*, lately came to inhabit in *Diſs*, not having gained a legal ſettlement there, "and that the ſaid *Rebecca Knowles* is actually become chargeable to the ſaid pariſh of *Diſs*;" two juſtices "upon due proof made thereof, as well upon the examination of the ſaid *R. K.* upon oath as otherwiſe, and likewiſe upon due conſideration had of the premiſes, adjudged the ſame to be true," and likewiſe adjudged the lawful ſettlement of the ſaid *Rebecca* to be in *Tibbenham* in the ſame county: and ſo they conclude their order of removal in the common form. The Seſſions, on appeal, confirmed the order, ſubject to the opinion of this Court on a caſe, ſtating, that the pauper's huſband *John Knowles*, being ſettled in *Tibbenham*, went to the *Eaſt Indies* four years ago, and has never returned. That at the time of the removal the pauper was reſiding in *Diſs*, and pregnant of a child, which has ſince been born a baſtard in *Tibbenham*. That the pauper never received any relief from *Diſs* pariſh, nor was chargeable in any other manner than as above mentioned.

This caſe was firſt argued by the appellant's counſel in the laſt term, when the Court were agreed in confirming the order: but a queſtion of the like nature having occurred in the caſe of *The King* v. *Diddlebury* (*a*), which was then argued, and directed to ſtand over for conſideration;

(*a*) Vide the next caſe.

the

1808.

The KING *againſt* The Inhabitants of TIBBENHAM.

the Court, upon a ſuggeſtion that a ſimilar queſtion might ariſe upon the face of the order of removal, which by miſtake had not been returned with the caſe, directed this caſe alſo to ſtand over, to be ſpoken to again in this term; and in the mean time that the original order ſhould be regularly returned.

Frere now argued in ſupport of the orders; and referred upon the firſt point to the opinion delivered by the Court in the laſt term; that the pauper, though a married woman, yet being pregnant of a child which by law was a baſtard, was capable of being removed as an *unmarried* woman for this purpoſe, within the proviſion of the 6th ſect. of the ſtat. 35 *Geo.* 3. *c.* 101. And in addition to the caſes after mentioned, he referred to *The King* v. *Luffe* (*a*). The next and principal queſtion, on which the caſe had been directed to ſtand over, was, whether the pauper could be ſaid to have been actually *chargeable* to the pariſh from the mere circumſtance of her having been pregnant with a baſtard at the time. As to which the words of the ſtatute are expreſs, "that every unmarried woman with child ſhall be deemed and taken to be a perſon actually chargeable, within the intent and meaning of the act." The caſe is alſo within the reaſon of the act: for before the paſſing of it ſuch a perſon was removeable as likely to become chargeable, not merely on her own account, but on account of the permanent burthen of maintaining the child, which the law preſumes is likely to become chargeable to the pariſh where it is born (*b*). When the ſtat. 35 *G.* 3. paſſed, which altered the principle of removals, confining them to caſes where the paupers were actually chargeable, the neceſſity of this

(*a*) 8 *Eaſt*, 193. (*b*) *Rex* v. *Matthews*, *Salk.* 478.

proviſion

1808.

The KING *against* The Inhabitants of TIBBENHAM.

proviſion was obvious; otherwiſe the pariſh to which the mother belonged would have relieved her in the pariſh where ſhe reſided until after her delivery, in order to ſettle the baſtard there. In the caſe of *The King* v. *Great Yarmouth* (*a*), which turned on the form of the order, it was not even adjudged that the pauper was chargeable, as a fact; but only that ſhe was with child, which was likely to be born a baſtard, and "that ſhe was *deemed* to be a perſon actually chargeable," &c.; and without negativing her having a certificate; which the Court held to be unneceſſary, as a certificated perſon in that ſituation was liable to be removed under the late act. The caſe of *The King* v. *Alveley* (*b*), which will be relied on, e contrà, is diſtinguiſhable from this in ſeveral reſpects; 1ſt, the order, after ſtating that *J. H. ſingle woman* was with child, and was *therefore* deemed chargeable, &c., adjudged the premiſes to be true; ſtating it, therefore, merely as a concluſion of law, and not as an adjudication of the fact. 2dly, The circumſtances of the caſe rather ſhewed that ſhe was a perſon of ſufficient ſubſtance and ability to provide for herſelf. But, 3dly, the principal ground of the deciſion was, that being in the ſervice of her maſter under a contract of hiring for a year, ſhe was not removeable at all againſt the conſent of the contracting parties; according to the caſes of *Rex* v. *Marlborough* (*c*), *R.* v. *Brampton* (*d*), and *R.* v. *Ozleworth* (*e*). Primâ facie, at leaſt, the circumſtance of a woman being pregnant with a baſtard raiſes a preſumption by the ſtatute that ſhe is actually chargeable, and liable to be removed; and if there be any facts which go to rebut that preſumption, it lies on the appellant pariſh to ſhew them: as where a *wife*,

(*a*) 8 *Term Rep.* 68. (*b*) 3 *Eaſt*, 563. (*c*) 12 *Mod.* 402.
(*d*) *Cald.* 11. (*e*) *Burr. S. C.* 302, 4.

1808.

The KING *againſt* The Inhabitants of TIBBENHAM.

as ſuch, is removed without her huſband, it is not neceſſary for the removing pariſh to ſhew the huſband's conſent; but it lies on the appellants to ſhew his diſſent (*a*).

Bowen, contrà, relied principally upon the caſe of the *King* v. *Alveley* (*b*), where the ſtat. 35 *G.* 3. had been expounded not to extend to make perſons removeable, who were not proper objects of removal before that ſtatute, as being likely to become chargeable; but only to enable the magiſtrates to remove women pregnant with baſtards, as actually chargeable, and therefore removeable within the principle of that law, if in other reſpects fit objects of removal; and that a ſingle woman with child was not *therefore* and neceſſarily to be deemed chargeable, without more. If then the condition of ſuch a perſon only determines her removeability, and not that ſhe ought *therefore* to be removed, it was not incumbent on the appellants in the firſt inſtance to prove her ſubſtance or ability to maintain herſelf, or the like, in order to rebut the preſumption of her being in fact likely to be chargeable; but the onus probandi lay upon the reſpondents in this as in all other caſes, to ſhew that the pauper was a fit object of removal. Here, however, it is expreſsly ſtated, that the pauper *never received relief* from the pariſh, *nor was chargeable in any other manner than as above mentioned*; that is, by being pregnant with a baſtard: which rebuts the preſumption of her being then chargeable otherwiſe than in this qualified ſenſe.

Lord ELLENBOROUGH C. J. The firſt queſtion is whether a married woman, who, in the abſence of her

(*a*) *St. Michael in Bath* v. *Nunny*, 1 *Stra.* 544. (*b*) 3 *Eaſt*, 563.

huſband

1808.

The KING *againſt* The Inhabitants of TIBBENHAM.

huſband abroad, is pregnant under ſuch circumſtances as that the child when born would be deemed by law a baſtard, be liable to be removed under the act of the 35 *G.* 3.? The act indeed ſays, "that every *unmarried* woman with child ſhall be deemed and taken to be a perſon actually chargeable within the true intent and meaning of the act," and removeable: but the legiſlature plainly had in view that every woman pregnant of a child, which was not protected by the matrimony of its parents, but would when born be a baſtard, ſhould be removeable, whether married or unmarried: for though the mother were married, yet if her child would by law be a baſtard, ſhe was in pari jure, within the ſcope of this act, with an unmarried woman who was pregnant. The next queſtion is, whether the order of removal be good in the form of it? It ſtates the complaint of the pariſh officers of *Diſs*, that *Rebecca*, the wife of *John Knowles*, is *actually become chargeable* to their pariſh, &c.; and the juſtices upon due proof made thereof adjudge the ſame to be true. The act ſays, that a woman under the circumſtances I have ſtated "ſhall be *deemed and taken* to be a perſon *actually chargeable*," &c. Have not then the juſtices done enough in ſtating that the pauper was "actually become chargeable to the pariſh?" They are to draw the concluſion whether chargeable or not, and it is enough for them to ſtate that concluſion upon the face of the order, without ſtating the premiſes on which it was founded. If that concluſion be diſputed the party is to appeal; and ſuch appeal having been made and the facts ſtated to us, it is to be ſeen, thirdly, whether the premiſes warranted the magiſtrates in drawing that concluſion. The legiſlature intended that an unmarried woman, or, what is the ſame for this purpoſe, a married woman

1808.

The KING *againſt* The Inhabitants of TREBENHAM.

under the circumſtances I have mentioned, being with child is primâ facie chargeable within the law: it raiſes a preſumption of her being chargeable. But I ſay again, as I ſaid before in the *King* v. *Alveley*, that if it appear that the woman is a perſon of ſubſtance, and that there is no pretence to ſay, that ſhe is likely to bring a burthen upon the pariſh, the act did not intend to make ſuch a perſon liable to be removed. But it is made a preſumptive chargeability, ſo as to put it on the party diſputing it to ſhew that ſhe is a perſon of ſubſtance, or, as in the caſe of the *King* v. *Alveley*, a perſon under a contract of hiring and ſervice with another at the time, ſo as to rebut the preſumption. The only caſes that materially affect the conſtruction of the clauſe in queſtion are, firſt, *Rex* v. *St. Mary Weſtport* (*a*), which was the caſe of a certificated perſon, who under the ſtat. 8 and 9 *W.* 3. *c.* 30. was not removeable till actually chargeable: and it was held that one of the family of the certificated perſon, being pregnant of a child likely to be born a baſtard, was not removeable under that act. The queſtion was again made in the caſe of the *King* v. *Great Yarmouth* (*b*), after the paſſing of the ſtat. 35 *G.* 3., where the reſidence of a perſon ſo circumſtanced under a certificate was held to be no objection to her removal. It is not neceſſary here to affirm or to diſaffirm that caſe, as it related to the certificate act. Then came the caſe of the *King* v. *Alveley*, where the principal point decided was that a ſingle woman being with child did not operate ſuch a diſſolution of the contract of hiring and ſervice, as to make her removeable againſt the conſent of herſelf and her maſter. The Court alſo ſaid, I have no doubt, what is ſtated in the

(*a*) 3 *Term Rep.* 44. (*b*) 8 *Term Rep.* 68.

1808.

The KING *againſt* The Inhabitants of TIBBENHAM.

report, reſpecting perſons of ſubſtance not being within the view of the act of the 35 *Geo.* 3. But there is one obſervation attributed to me with which I cannot charge my recollection, and which at any rate, I am not prepared to abide by, namely, that where the act ſays, that ſuch a perſon *may* be removed; it does not ſay that ſhe *ſhall* be ſo. Now I do not think that the uſe of the word *may* there, as contradiſtinguiſhed from *ſhall*, makes any difference in the ſenſe. If the party come within the true intent and meaning of the clauſe as there deſcribed, I think the true reading of the words "*may* be removed," is that ſhe "*ſhall* be removed." All the ſtatutes reſpecting the removal of the poor form together one ſyſtem of law, and it is a condition precedent, if I may ſo ſay, that the perſons to be ſubjected to their operation ſhould be in the condition of poverty. When therefore the clauſe in queſtion ſays that unmarried women with child ſhall be deemed to be actually chargeable, &c. for the purpoſe of ſubjecting them to be removed, it means that perſons ſo ſituated ſhall primâ facie only be deemed to be chargeable, and it ſtill leaves it open to ſhew that the party is of ſubſtance, ſo as not to be within the ſcope and view of the poor laws. Therefore, whether in the form of the order it be ſaid that the woman ſo circumſtanced is deemed to be chargeable, or is therefore chargeable, or that ſhe is chargeable, it is all alike, and equally good; and ſhe muſt be preſumed to be in the ſituation in which ſhe is conſidered by the legiſlature as being, namely, as actually chargeable to the pariſh where ſhe is inhabiting, and conſequently liable to be removed, unleſs the contrary be ſhewn. Here then it is ſufficiently adjudged in the order that the pauper was actually chargeable, ſo as to make her removeable under the act: and it appearing by

1808.

The KING *againſt* The Inhabitants of TIBBENHAM.

the facts ſtated on the appeal, that though married, yet that her huſband was abroad and could not have been the father of her child; this was a primâ facie caſe to bring her within the 6th clauſe, and to ſhew that ſhe was actually chargeable within the meaning of the act: and nothing being ſhewn to rebut that preſumption, it remains preſumptively eſtabliſhed that the pauper was within the deſcription of perſons liable to be removed.

GROSE J. Looking to the general policy of the poor laws, and to the object of the laſt ſtatute, we can only conſider the being pregnant of a baſtard as a primâ facie preſumption of the woman being chargeable within the meaning of the 6th clauſe. Then I look to ſee whether there be any thing ſtated in the caſe to rebut that preſumption; and nothing of that ſort appearing, it is not inconſiſtent with any of the former deciſions to ſay that this woman was removeable.

LE BLANC J. This queſtion turns on the conſtruction of the 6th clauſe of the ſtat. 35 *Geo.* 3. *c.* 101., and the ſingle point is whether upon the fact ſtated in the order of removal, that *Rebecca* the wife of *John Knowles*, the perſon removed, was actually become chargeable to the pariſh, coupled with the facts ſtated in the caſe, ſhewing in what way ſhe became chargeable, ſhe were liable to be removed. The juſtices by their order adjudge her to be chargeable; and the ſeſſions on appeal ſtate her ſituation to be this, that ſhe was the wife of a man who four years before had gone to the *Eaſt Indies*, from whence he had never returned; and that at the time of the order made ſhe was pregnant of a child, which had ſince been born a baſtard; and they further add, that ſhe had never

1808.

The KING *against* The Inhabitants of TIBBENHAM.

received any relief nor was in any other manner chargeable to the removing pariſh than as before mentioned. The ſeſſions then confirm the order of the juſtices adjudging her to be chargeable, and removing her; and they do not ſtate any thing in their caſe to ſhew that ſhe was not removeable. The ſtat. 35 *G.* 3. was paſſed to prevent perſons in general from being removed until they were actually chargeable; but contemplating the inconvenience which would reſult from the generality of this proviſion in the inſtance of unmarried perſons being with child, where for the moſt part there was every probability of their becoming chargeable to the pariſh in which they were delivered, and which would be burthened with the maintenance of the baſtard when born; they adopted the high degree of probability exiſting in moſt inſtances as a foundation for a general rule; and therefore enacted by the 6th ſection "that every unmarried woman with child ſhould be deemed and taken to be a perſon actually chargeable within the true intent and meaning of the act." The firſt queſtion then is, whether the pauper, who is a married woman, but whoſe huſband, being abſent in the *Eaſt Indies* before and during the time of her pregnancy, could not by poſſibility be the father of her child, come within the deſcription in this clauſe? Literally, ſhe does not: but I think ſhe does come within the meaning of the act, being pregnant with a child, which could not poſſibly have been begotten by her huſband, and which has been ſince born a baſtard: and therefore this is not like a caſe of doubtful iſſue, where it may admit of queſtion whether the child with which a married woman is pregnant will when born be a baſtard; but it is the caſe of a removal of a married woman under circumſtances where by no poſſibility the child with which

1808.

The KING against The Inhabitants of TIBENHAM.

which ſhe was pregnant could be any other than a baſtard. Looking therefore to the meaning of this law, and to former analagous deciſions, I think ſhe was an *unmarried* woman for this purpoſe. Then the only queſtion is, whether ſhe were chargeable? Now I cannot enter into any ſpeculative reaſoning to ſhew that ſhe was not in fact chargeable, when ſhe is ſtated or deſcribed to be ſuch a perſon as the legiſlature have ſaid ſhall be deemed and taken to be actually chargeable. How far facts may be adduced (I will not ſay to rebut the preſumption that ſuch a perſon is chargeable) to ſhew that the perſon to be removed is not an object of the poor laws, as in the caſe of the *King* v. *Alveley*, will be fit to be decided whenever the queſtion ariſes upon a caſe in judgment before us. It is ſufficient to ſay that nothing appears here to ſhew that this woman was not an object of the poor laws.

BAYLEY J. Before the ſtat. 35 *G.* 3. every perſon likely to become chargeable was liable to be removed: that ſtatute altered the law in that reſpect, and provided generally that no perſon ſhould be removeable till actually chargeable: but by the 6th ſection it alſo provided that every unmarried woman with child ſhould be deemed to be a perſon actually chargeable. Now the narroweſt conſtruction which can be put upon thoſe words is that an unmarried perſon likely in fact to become chargeable ſhould be removeable as before; and that the fact of ſuch a perſon being with child was at leaſt intended to be made primâ facie evidence of being chargeable: that preſumption therefore ought to have been, if it could have been, rebutted by the party reſiſting the removal. If the mother had died in child-birth the charge of maintaining the child would have been thrown entirely on the pariſh;

1808.

The KING *againſt* The Inhabitants of TIBBENHAM

for her next of kin would have been entitled to take all her perſonal property. Then conſidering that there is nothing ſtated in the caſe to ſhew that the mother was in a condition to maintain her child, or that any other proviſion was made for it, we cannot come to any other concluſion than that ſhe was chargeable within the meaning of the act. And I alſo agree that ſhe muſt be conſidered as an unmarried woman within the meaning of the ſame clauſe; the child being a baſtard by law, and the huſband not under any obligation to provide for it.

Both orders confirmed.

Saturday, May 14th.

The KING *againſt* the Inhabitants of DIDDLEBURY.

An order of removal founded on the ſtat. 35 *G.* 3. *c.* 101. *ſ.* 6. ſtating that *A. E. ſingle woman* was "*by being pregnant deemed to become chargeable*," &c. is good.

UPON the complaint of the pariſh officers of *Tipton*, in the county of *Stafford*, "that *Ann Evans, ſingle woman*, had come to inhabit in the ſaid pariſh of *Tipton*, not having gained a legal ſettlement there, nor produced any certificate owning her to be ſettled elſewhere, and *is, by being pregnant, deemed to have become chargeable to* the ſaid pariſh of *Tipton*;" two juſtices, "upon due proof made thereof, as well upon the examination of the ſaid *Ann Evans* upon oath, as otherwiſe, and likewiſe upon due conſideration had of the premiſes, did adjudge the ſame to be true, and that the lawful ſettlement of the ſaid *Ann Evans* was in the pariſh of *Diddlebury* in the county of *Salop*," &c. The ſeſſions, on appeal, found, ſpecially, that the pauper *Ann Evans*, being a ſingle woman legally ſettled in *Diddlebury*, and becoming *actually chargeable to* Tipton, within the meaning of the ſtatute (35 *G.* 3. *c.* 101. *ſ.* 6.), *by being pregnant with a child* who had

1808.

The KING *againſt* The Inhabitants of DIDDLEBURY.

had ſince been *born a baſtard*, was removed from *Tipton* to *Diddlebury*; and that the pauper appeared to be *a labourer, without ſubſtance*, the mother of other baſtard children, and not a hired ſervant, was properly removed *as actually chargeable*; therefore they confirmed the order of removal.

This caſe came on to be argued in the laſt term after the caſe of the *King* v. *Tibbenham* (*a*), when *Peake* and *Pettit* were heard in ſupport of the orders, and *Jervis* and *Clifford* againſt them. Theſe latter contended that after the caſe of the *King* v. *Alveley* (*b*), it ought to have been alleged on the face of the order of removal, that the pauper was actually chargeable in fact, and not merely as an inference of law from the fact of her being pregnant; ſince that inference did not ariſe from the mere fact of pregnancy, without other circumſtances ſhewing that the pauper was in ſuch a ſituation as before the act of the 35 *Geo.* 3. would have made her liable to be removed as a perſon likely to become chargeable: and that this defect in the order could not be helped by the finding of the ſeſſions (*c*) in the caſe, that ſhe was a labourer, without ſubſtance, &c. The caſe was then directed to ſtand over for conſideration with the antecedent one; and after the deciſion of that caſe,

Lord ELLENBOROUGH C. J. ſaid that there was little more to add, with reſpect to this, than that the orders ſhould be confirmed. On the facts of the caſe as bringing it within the general policy of the poor laws, and the words of the act of the 35 *G.* 3., there could be no doubt:

(*a*) The laſt caſe. (*b*) 3 *Eaſt*, 563.

(*c*) *Rex* v. *Great Bedwin*, *Burr.* S. C. 163.

1808.

The KING *against* The Inhabitants of DIDDLEBURY.

and with reſpect to the form of the order of removal, the premiſes are ſtated, as in the ſtatute itſelf, from whence the concluſion is drawn; and therefore all is ſtated which the ſtatute requires.

Both orders confirmed.

Tueſday, May 17th.

DOE on Demiſe of WIGHT *againſt* CUNDALL.

Under a deviſe of land to the two children of the teſtator's brother W. when they attained the age of 21 years; but the executor to account to them for the profits until the age of 21, or day of marriage: *but if either ſhould die before* 21, the ſurvivor to be *heir* to the other: Held that the fee paſſed, which would go over to the ſurvivor in caſe one died under 21, and would deſcend or be diſpoſeable if the deceaſed attaining 21: and that a deviſe of other land to the two children of another brother *R. on the ſame conditions as W.'s children*, was governed by the ſame conſtruction.

THIS ejectment was brought for an undivided third part of four houſes at *Weſtham*, in *Eſſex*, mentioned in the bequeſt contained in *Richard Wight*'s will in favour of *Robert* and *Rebecca*, the two children of his brother *Robert Wight*. At the trial a verdict was found for the plaintiff, ſubject to the opinion of this Court upon the following caſe.

Richard Wight, the teſtator, being ſeiſed in fee (*inter alia*) of the ſaid four houſes, by his will duly executed, dated the 6th of *September* 1771, deviſed thus: "Item, I give "and bequeath unto the two children, *Elizabeth* and "*Jemima*, daughters of my brother *William Wight* "deceaſed, the firſt four freehold houſes next my dwell- "ing houſe, built by me in 1770, when they have at- "tained the age of 21 years. But the executor and "executrix ſhall be accountable for the profits of the "ſaid houſes unto the ſaid children, until the aforeſaid "age of 21 years, or the day of marriage. But if either "of them ſhould die before the ſaid age of 21 years, "then the ſurvivor ſhall be *heir* to the other two houſes. "Likewiſe I give and bequeath unto the two children, "*Robert* and *Rebecca*, ſon and daughter of my late brother "*Robert* deceaſed, the next four houſes adjoining to the "ſame, *on the ſame conditions as my brother* William Wight's "*children*." After ſome pecuniary legacies the will contains

1808.

Doe dem. WIGHT ag. inſt CUNDALL.

contains the following reſiduary clauſe. "I give and "bequeath all the reſidue and remainder of my effects or "eſtate of what kind ſoever, both freehold, leaſehold, "caſh, book debts, ſtock in trade, ſtock on the land, ſuch "as horſes, &c. and all and every part of what ſhall be ow-"ing to me at my deceaſe, unto my brother *John Wight*, "my ſiſter *Mary Frument*, and my ſiſter *Jemima Jones*, "equally, ſhare and ſhare alike, between them; leaving "it to their free will whether they will divide the free-"hold and leaſehold eſtate and annuity of *William Berks* "in an equitable manner between them, or to ſell the "ſaid eſtates and divide the money ariſing from the ſale "of the ſame." The teſtator died ſoon after the making his will; leaving *Robert* and *Rebecca* the ſon and daughter of *Robert Wight* the teſtator's brother, who were infants at the time of his death, him ſurviving, but who both lived to attain the age of 21. *Rebecca* intermarried with the defendant *John Cundall*, clerk, had iſſue by him, and died on the 21ſt of *June* 1806, before the day when the demiſe is laid. *Robert Wight* and *Rebecca*, the deviſees of the four houſes in queſtion, entered into the receipt of the rents and profits thereof from the teſtator's death, and continued in ſuch receipt until the death of *Robert*, who died ſome time ſince the inteſtate, leaving *Rebecca*, his ſiſter, his heir at law. After his death, the defendant, *John Cundall*, in right of his wife *Rebecca*, entered into the poſſeſſion of the four houſes, and ſtill continues ſo, claiming to be the tenant thereof by the curteſy. The three reſiduary deviſees named in the will ſurvived the teſtator. *John Wight*, one of them, has ſince died inteſtate; leaving the leſſor of the plaintiff his eldeſt ſon and heir at law. The queſtion for the opinion of the Court was, Whether *Rebecca Wight*, the daughter of the teſtator's brother *Ro-*

1808.

Doe dem. WIGHT *againſt* CUNDALL.

bert, after the death of her brother *Robert*, had an eſtate for life only or in fee in the four houſes above mentioned. The leſſor of the plaintiff inſiſted that ſhe had only a life eſtate; that the reverſion, having paſſed under the reſiduary deviſe, fell in on the death of *Rebecca Cundall*; and that he is now entitled to one third of theſe premiſes as heir at law of *John Wight*.

Wetherell for the leſſor of the plaintiff ſaid, it was agreed that if the two children of the teſtator's brother *Robert*, viz. *Robert* and *Rebecca*, (who were to take *on the ſame conditions*, i. e. eſtates of the ſame nature, as *Wm. Wight's* children, the deviſees of the firſt four houſes,) took only life intereſts, the undiſpoſed reverſion paſſed under the reſiduary clauſe: in which caſe it was alſo agreed that the leſſor of the Plaintiff was entitled to one-third. He then contended, that theſe children took only life eſtates in the premiſes, with a life eſtate in the whole to the ſurvivor, by force of the deviſe that "the ſurvivor ſhall be *heir* to the other." For that wherever the word *heir* is uſed in a will for the purpoſe of carrying over an intereſt which determined on the death of the firſt taker, the ſecond only takes by way of *ſubſtitution*, and therefore only takes the ſame intereſt as the other had; according to *Spark* v. *Purnell* (*a*), and *Gynes* v. *Kemſley* (*b*), in which latter caſe however the queſtion was adjourned. The will too is inartificially drawn; and the word *heir* in its popular ſenſe imports *ſucceſſion*, rather than the degree of intereſt which the perſon takes. It may be ſaid however, that there is a difference where the firſt deviſe is to an infant, and if he die under age, then over to one who would be his heir; that the firſt taker attaining his full age will

(*a*) *Hob.* 75. (*b*) *Freem.* 293.

take

take a fee. But that ſtands only on a dictum of *Saunders* in his report of *Purefoy* v. *Rogers* (*a*), and is contradicted by *Fowler* v. *Blackwell* (*b*), where the point was adjudged otherwiſe.

1808.

Doe dem. WIGHT *againſt* CUNDALL

Marryat, contrà, was ſtopped by the Court.

Lord ELLENBOROUGH C. J. Admitting that the word *heir*, as here uſed, is merely a word of ſubſtitution (an admiſſion which I would not be bound by generally,) ſtill there is enough in the will to indicate an intention in the deviſor, by the deviſe to his brother *Robert*'s children, *on the ſame conditions* as his brother *William*'s children, (by which muſt be underſtood that he deviſed the premiſes to *Robert*'s children in the ſame terms as the preceding deviſe,) namely, when they attained the age of 21 years, and the executors to be accountable to them for the profits in the mean time; and that *if either of them died before* 21, *the ſurvivor ſhould be heir to the party ſo dying*; that the party ſo dying ſhould have a fee, which ſhould go over to the ſurvivor in that event, or ſhould veſt abſolutely in the party attaining 21. Here then *Robert* the nephew, having attained 21, on his death the premiſes deſcended to his ſiſter *Rebecca*, his heir at law. What is ſaid at the concluſion of the caſe of *Purefoy* v. *Rogers*, as far as the opinion of a very learned man goes, is in ſupport of this conſtruction. But it does not reſt on that; for the ſubject was very fully and diſtinctly diſcuſſed in *Frogmorton d. Bramſtone* v. *Holyday* (*c*), where Lord *Manſfield*, commenting on ſimilar words, after a deviſe of pre-

(*a*) 2 *Saund.* 388. *a.* Vide *Moone* v. *Heaſeman*, *Willes*, 143. and *Robinſon* v. *Grey*, ante, 1.

(*b*) *Com. Rep.* 353. (*c*) 3 *Burr.* 1618.

miſes

1808.

Doe dem. WIGHT against CUNDALL.

miſes generally to *J. H.* the deviſor's ſon, charged with the payment of 50*l.* out of the yearly rents; and *if* J. H. *ſhall die in his minority*, then over to her three daughters; ſays that thoſe words, *If he ſhould die under* 21, ſhewed her intention to give a fee: for if he lived to 21, he might then diſpoſe of it himſelf: if he died before, he could not; and then ſhe diſpoſed of it. If *J. H.* was barely to take an eſtate for life, the time of his death muſt be immaterial to the deviſe over. But limiting it over only upon the contingency of his dying in his minority ſhews that ſhe intended to give him an abſolute eſtate in fee, which he might diſpoſe of if he came of age: and unleſs he lived to be of age (when he might diſpoſe of it,) ſhe meant it ſhould go to her daughters. The whole doctrine and effect of theſe words were there ſo fully ſtated, that it is unneceſſary to add any further authority. But Lord *Mansfield* in another caſe (*a*) mentions a caſe of *Tomkins* v. *Tomkins* in *Chan. H.* 17 *G.* 2. where the deviſe was "to his brother in truſt for his eldeſt ſon *B.* till he ſhould attain 21; and if he ſhould die before 21, then a deviſe over." The Court held the age of 21 to be no limitation of *B.*'s *intereſt*, but only a limitation of the *truſt* during his minority, and that *B.* took the whole by implication. There are other authorities which might be cited, that a giving over on a dying before 21 ſhews an intention that if the party attain 21 he ſhould have a fee abſolute.

The other Judges concurring,

Poſtea to the Defendant.

(*a*) *Goodtitle* v. *Whitby*, 1 *Burr.* 234.

ROE on the Demiſe of JOSEPH HUCKNALL and Others *againſt* FOSTER.

Tueſday, May 17th.

THIS was an ejectment for a copyhold in the county of *Lincoln*; and the declaration conſiſted of four counts, one upon the joint demiſe of all the leſſors of the plaintiff, and the others upon the ſeveral demiſes of *Joſeph Hucknall*, *Ann Lealand*, and *Sarah Lealand*. A verdict was taken for the plaintiff, ſubject to the opinion of the Court upon the facts.

The premiſes in queſtion are copyhold of the manor of *Scotter*; of which premiſes, *John Lealand*, being ſeiſed in fee, on the 3d *September* 1682, made the following ſurrender. "*Man. de Scotter*, &c." (after ſetting out the ſtile of the Court held on the 3d of *October* 1682), ad hanc curiam præſentatum eſt per *R. B.* et *T. S.* duos cuſtomarios tenentes domini manerii prædicti, ſuper ſacra, quod *Johannes Lealand* extra curiam, ſcilt. tertio die *Septembris* ult: præterit: venit coram eiſdem *R. B.* et *T. S.* &c. ac per eorum manus ſurſum reddedit in manus domini manerii prædicti, ſecundum conſuetudinem ejuſdem manerii, unum meſſuagium, &c. (deſcribing the premiſes) in *Scotter* predictâ, in tenurâ predicti *Johannis Lealand*, ad opus et uſum *Joſephi Lealand* et *Johannis Lealand ejus filii* pro et durante termino vitarum ſuarum naturalium, et eorum diutius viventis; et poſt eorum deceſſus, ad uſum hæredum de corpore dicti *Johannis Lealand*, *filii Joſephi Lealand* in perpetuum; et pro defectione talium exiſtentium ad uſum rectorum hæredum *dicti Johannis Lealand* in perpetuum: quibus quidem *Joſepho* et *Johanni* dominus

John Lealand ſurrendered a copyhold, in the occupation of him *John Lealand*, to the uſe of *Joſeph Lealand* and *John Lealand his ſon*, for their lives and the life of the ſurvivor; remainder to the heirs of the body of the *ſaid* John Lealand *ſon of Joſeph L.*; remainder to the right heirs of *the ſaid* John Lealand: held that the ultimate remainder was meant for the right heirs of *John* the ſurrenderor; as well becauſe *John* the ſurrenderee is before deſcribed with the addition of *the ſon of Joſeph*; as of the manifeſt futility of giving *John* the ſurrenderee an eſtate tail, and afterwards a fee in ſucceſſion. Though if the conſtruction had been left doubtful, the ultimate remainder would have continued in the ſurrenderor.

1808.

Roe dem. HUCKNALL *againſt* FOSTER.

dominus manerii prædicti per Seneſc: ſuum ibidem conceſſit, &c."

Joſeph Lealand and *John Lealand* the ſurrenderees are both dead without iſſue; *John* having done no act to bar the eſtate tail. The leſſors of the plaintiff, *Mary Hucknall*, *Ann Lealand*, and *Sarah Lealand*, are the right heirs of *John Leland* the ſurrenderor, and have been duly admitted to the premiſes in queſtion. The defendant is the tenant in poſſeſſion under the right heirs of *John Lealand* the ſurrenderee. The queſtion for the opinion of the Court aroſe upon the conſtruction of the ſaid ſurrender; namely, Whether the remainder in fee, after the determination of the eſtate tail of *John Lealand* the ſurrenderee, deſcended to the right heirs of *John Lealand* the ſurrenderor, or to the right heirs of *John Lealand* the ſurrenderee: if to the former, the verdict for the plaintiff was to ſtand: if to the latter, the verdict was to be entered for the defendant.

Reader for the plaintiff contended that the remainder in fee, after the death of *John Lealand* the ſurrenderee, was limited to the right heirs of *John Lealand* the ſurrenderor. The names of the two *John Lealands* occur twice before the ultimate limitation "to the right heirs of *the ſaid John Lealand*;" and on both occaſions the name of *John Lealand* the ſurrenderor is mentioned, as in the ultimate limitation, without any further addition: whereas *John Lealand* the ſurrenderee is both times named with the addition of *filius Joſephi Lealand*; and when he is afterwards mentioned without the addition, he is ſtill coupled with his father, as the ſurrenderees;

in

1808.

ROE dem. HUCKNALL *againſt* FOSTER.

in which place there could be no difficulty as to the perſon meant.

Morice, contrà, relied on the word *ſaid* (to the uſe of the right heirs of the *ſaid John Lealand*) as referring in grammatical conſtruction to the *John Lealand* laſt before named, which was *John Lealand* the ſurrenderee: and cited *Weale* v. *Lower* (*a*): but finding the Court decidedly againſt him on the conſtruction of the ſurrender, he did not urge the argument further.

Lord ELLENBOROUGH C. J. It would be ſufficient for the leſſor's counſel to ſhew that it was quite uncertain on the face of the ſurrender to which of the *John Lealand*'s right heirs the eſtate was ultimately to paſs: for unleſs it were ſhewn diſtinctly to paſs out of the ſurrenderor, it would neceſſarily remain in him. But there is no uncertainty in the words; for the name of *John Lealand* the ſurrenderee no where occurs before without the additional deſcription of him as the ſon of *Joſeph*. Beſides which the ſenſe of the thing ſhews that the ultimate limitation was to the right heirs of *John Lealand* the ſurrenderor; for otherwiſe, there would be a uſeleſs circuity of expreſſion, by the conſtruction contended for by the defendant, in firſt giving *John Lealand* the ſurrenderee an eſtate tail, and then immediately afterwards a fee; when it would have been more direct and obvious to have given him the fee at once, if that had been intended. But if the ſurrenderor meant to give it to his own right heirs, then the words uſed are proper.

(*a*) *Pollex.* 63.

The

1808.

Roe dem. HUCKNALL FOSTER.

The other judges concurred; and LE BLANC J. added, that *John Lealand*, the ſurrenderee, was deſcribed as plainly as if he had had a diſtinct name from the ſurrenderor, being deſcribed as the ſon of *Joſeph*.

Poſtea to the plaintiff.

Tueſday, May 17th.

PAXTON and Others *againſt* Sir HOME POPHAM and MAC ARTHUR.

To debt on bond conditioned for the payment of a ſum of money, which the condition ſtated to have been *taken up, borrowed, and received* by the defendants of the plaintiffs at reſpondentia intereſt, ſecured by a cargo of goods ſhipped from *Calcutta* to *Oſtend*; it is competent to the defendant to plead that the bond was given to ſecure the price of goods ſold by the plaintiffs to the defendants in the *Eaſt Indies*, and illegally prepared by the plaintiffs for ſhipment from thence to beyond the *Cape of Good Hope*, without the licence of the *Eaſt India* Company; without proceeding to ſtate formally, that the condition was colourable, to conceal the illegality of the tranſaction, and to negative that the bond was given for money *taken up, borrowed, and received*, &c. For the ſtatement in the plea is rather explanatory of, than abſolutely inconſiſtent with, the tranſaction ſtated in the condition of the bond; but if it were inconſiſtent with it, the plea would ſtill be good in this form.

THE plaintiffs declared in debt, in their firſt count, upon a bond executed by the defendants (therein deſcribed to be then of *Calcutta*, and the defendant Sir *H. P.* alſo deſcribed to be part owner of the ſhip and cargo of the *Stadt Van Weenen*,) dated the 1ſt of *January* 1789, at *Calcutta*, whereby they bound themſelves to the plaintiffs, deſcribed as of *London*, in the penal ſum of 650*l.* with this agreement and condition: that whereas the defendant had *taken up borrowed and received* of the plaintiffs the full and juſt ſum of 325*o*l. which was to run at reſpondentia on the ſhip *Stadt Van Weenen* from *Calcutta* to *Oſtend*, &c. at the rate of 10*l.* per cent. premium for the voyage, if performed in nine months; in conſideration of which the uſual riſks of the ſeas, &c. to be on account of the plaintiffs: and for the *farther ſecurity* of the plaintiffs, the defendants had agreed to mortgage and aſſign over to them the ſeveral goods laden or to be laden on the ſhip during the voyage, until payment of the principal and premium of that bond: the condition of the bond was

that

that if the defendants ſhould pay to the plaintiffs the full amount of the bond and premium in *London* at the end of nine months after the ſafe arrival of the ſhip at *Oſtend*, or, in caſe ſhe was loſt, the cuſtomary average on the ſalvage, then the bond was to be void. The plaintiffs then averred that the ſhip afterwards ſailed with a cargo of goods from *Calcutta* to *Oſtend*, and on the 25th of *Auguſt* 1789, within the nine months, arrived at *Oſtend*, whereby the defendants became liable to pay in *London*, at the end of nine months after ſuch her arrival, the full amount of the bond and premium amounting to 3575*l.*: and then alleged a breach in nonpayment of that ſum on demand. The ſecond count was on a bond of the defendant's, dated at *London* on the 23d of *March* 1790, (deſcribing the defendant *Popham* as of *Oſtend*, and the other defendant as late of *Oſtend*, then of *London*; and deſcribing the plaintiffs as merchants of *London*;) with this condition; reciting that the defendants had given, at *Calcutta* on the 1ſt of *January* 1789, ſundry bills and a reſpondentia bond in favour of the plaintiffs, of which there remained unpaid a bill of Exchange drawn by *Mac-Arthur* on *Marſh* and *Creed* of *London* (not accepted) for 1041*l.* 13*s.* 4*d.* and the reſpondentia bond (mentioned in the firſt count) for 3250*l.* and the premium, &c.; and that the defendants, deſirous of making good theſe engagements, had taken ſteps for conveying the property of ſuch part of 44 bales of piece goods then in poſſeſſion of *Gregorie and Co.* of *Oſtend*, as had not been paid to the defendants, excluſive of 3000*l.* previouſly aſſigned to *Chornock and Co.* of *Oſtend*; ſo that the plaintiffs might receive remittances from *Gregorie and Co.* for the ſaid goods, deducting the 3000*l.* and 800*l.* already paid to the defendant *Mac-Arthur*; but that being well aware that the ſaid proceeds would not in all probability be adequate to the full diſ-

1808.

PAXTON *againſt* POPHAM.

charge of the ſaid unaccepted bill and the reſpondentia bond; the defendants thereby covenanted jointly and ſeverally to pay all deficiencies that might be found in realizing the remittances ſo directed to be made to the plaintiffs: this bond was therefore conditioned to make good ſuch deficiencies. The plaintiffs then averred that on the 29th of *January* 1792 they received from *Gregorie and Co.* on account of the ſaid goods a remittance of 2000*l.* which was inadequate by 4021*l.* 13*s.* to the full diſcharge of the ſaid unaccepted bill and reſpondentia bond; whereby the defendants became bound to make good the deficiency: and ſo alleged a breach in nonpayment of the laſt mentioned ſum. There was a third ſpecial count, and other common counts, not material to be ſtated. The defendants pleaded non eſt factum to each of the three ſpecial counts, and nil debent to the reſt. 3dly, That the writings obligatory in the ſecond and third counts are the ſame, and that *Gregorie and Co.* made remittances to the plaintiffs on account of the proceeds of the goods there mentioned, to the amount of all the monies due. 4thly, As to the firſt, ſecond, and third counts, that the writing obligatory in the firſt count mentioned, and the reſpondentia bond in the conditions of the writing obligatory in the ſecond and third counts mentioned are the ſame; and that the plaintiffs and defendants before and at the time of the ſale of the goods after mentioned were ſubjects of the King; and that before the making of the ſaid writing obligatory, viz. on the 1ſt of *December* 1788, it was unlawfully agreed between the defendants and the houſe of *Paxton and Co.* of which firm one of the preſent plaintiffs was one, that *Paxton and Co.* ſhould illegally, and againſt the ſtatute, and without the licence or authority of the *Eaſt India* Company, ſell to the defendants,

and

1808.

PAXTON *againſt* POPHAM.

and deliver in the *Eaſt Indies* beyond the *Cape* of *Good Hope*, divers goods for the purpoſe and to the intent that the ſaid goods might illegally and without ſuch licence be conveyed from the *Eaſt Indies* for the purpoſes of trade: and that *Paxton and Co.* in purſuance of that agreement afterwards ſold and delivered the ſaid goods accordingly; they well knowing for what purpoſe and with what intent the goods had been bought: and that they aſſiſted the defendants in preparing the goods for carriage upon ſuch illegal deſign and purpoſe. That the bond in the firſt count, and the bill of Exchange in the condition of the writing obligatory in the ſecond and third counts mentioned, were given towards payment of the price of ſuch goods. There were other ſpecial pleas in ſubſtance the ſame as the laſt. To the fourth and ſubſequent pleas the plaintiffs demurred generally, and iſſues were taken on the others.

Burrough in ſupport of the demurrers, admitting the agreement ſtated in the defendant's pleas to be unlawful, according to the caſe of *Camden* v. *Anderſon* (*a*), inſiſted that there was a material diſtinction between the firſt count, and the ſecond and third; (the two laſt being ſubſtantially the ſame.) The firſt count is on a bond merely for ſecuring the payment of money borrowed: the ſecond and third counts are on a bond given to forward the payment of a bill of Exchange as well as the bond in the firſt count: ſuppoſing then the fourth and ſubſequent pleas to be tenable as to the bill of Exchange; though this would be an anſwer to the ſecond count, if properly pleaded; yet if bad as to the firſt, the pleas, being entire,

(*a*) 6 *Term Rep.* 723. and 1 *Boſ. & Pull.* 272.

1808.

PAXTON *against* POPHAM.

are bad as to the whole. Then taking the pleas as applicable to the firſt count, the bond there ſtated is a common reſpondentia bond: the pleas do not ſtate it to have been colourably given; nor do they allege that the defendants were not indebted to the plaintiffs for the money lent; which muſt therefore be taken as admitted. But if a matter inconſiſtent with the condition of a bond be pleaded, the plea muſt ſhew the ſtatement in the condition to be merely colourable: the rule of pleading being that the party muſt confeſs and avoid: and not being ſo ſtated, the plea is inconſiſtent with the charge in the count, founded upon the admiſſion of the party under ſeal; which is not allowable. The condition of the bond ſtates that 3250*l.* was taken up by the defendants of the plaintiffs to run at reſpondentia intereſt. The pleas ſtate that the plaintiffs ſold goods to the defendants in the *Eaſt Indies* for the purpoſe of trading with them to *Europe*, without the licence of the *Eaſt India* Company, and that the plaintiffs aſſiſted in preparing the goods for carriage, and that the bond in the firſt count and bill of Exchange in the ſecond and third counts were given towards payment of the price. But it is not alleged in the pleas that the goods ſo ſold were the goods put on board the ſhip; nor is the bond ſtated to be in any other way connected with the goods ſold by the plaintiffs to the defendants than by the averment that it was given *in diſcharge of the price of thoſe goods*. The averment then in thoſe pleas is inconſiſtent with the ſtatement of the bond in the firſt count, "that the defendants had *taken up, borrowed, and received* of the plaintiffs the *full and juſt ſum of* 3250*l.*, for which the bond was given, and which is left admitted by the pleas. In *Macrowe*'s caſe (*a*) the condition of the

(*a*) *Godb.* 29.

bond

bond declared on expreſſed it to be made for repayment of money, and the Court gave judgment againſt the defendant, on a plea averring that it was made to ſecure the leaſe of an eccleſiaſtical living, avoided by the ſtat. 13 *Eliz.* agreeably to the rule laid down in *Oldbury* v. *Gregory* (*a*), (which was debt on bond conditioned for the payment of money,) that it is not averrable that the money was to be paid for any other cauſe than what the obligation expreſſes. Admitting, however, that ſince the caſe of *Collins* v. *Blantern* (*b*) this matter might have been well pleaded by proper averments; yet where the matter in the plea is directly inconſiſtent with the matter in the bond and condition, it is not ſufficient ſo to plead it, without averring that what is ſtated in the bond and condition was merely colourable, and traverſing the allegations therein contained; as was done in the laſt mentioned caſe. That was debt on bond conditioned to pay 350*l.* to the plaintiff on a certain day: to which the defendant pleaded, that before making the bond and the note after mentioned two of the obligors ſtood indicted for perjury, and on the day when the traverſes were ready for trial it was corruptly agreed between them, and the plaintiff, and the proſecutor, that the plaintiff ſhould give the proſecutor his note for 350*l.* in conſideration of his not appearing to give evidence againſt the traverſers, and that the latter ſhould give the bond in queſtion to the plaintiff to indemnify him for giving ſuch note. And then the plea proceeded to aver that the bond was given for the ſaid conſideration and no other; which the plaintiff well knew; and denied that the obligors were indebted to the plaintiff at the time in any ſum of money or in any other reſpect whatſoever. To which plea there

(*a*) *Moor*, 564. (*b*) 2 *Wilſ.* 347.

1808.

PAXTON *againſt* POPHAM.

was a demurrer: and on the fourth point there made, whether the plea were properly pleaded in point of form, Lord C. J *Wilmot* in delivering the judgment of the Court ſaid, that the averment pleaded was *not contradictory but explanatory of the condition*: and it was ſaid to be diſtinguiſhable from the caſe of *Lady Downing* v. *Chapman* (*a*), which had been cited, as of *M.* 6 *G.* 2. where three of the Judges had decided againſt a plea of this nature, becauſe they thought it inconſiſtent with the bond. In *Collins* v. *Blantern*,

(*a*) The caſe is not reported, but Mr. *Burrough* ſtated the plea from Mr. Serjeant *Jeffon*'s brief.

Lady DOWNING, Executrix of Sir JACOB GERRARD DOWNING, Baronet, *againſt* CHAPMAN.

To debt on bond dated 6th *September* 1754 for 2678*l.* the defendant craved oyer of the bond and condition; which reciting that the defendant had theretofore become bound to Sir *Jacob* in 2200*l.* by a bond dated 6th *June* 1750, conditioned to pay 1104*l.* 9*s* 3*d.* and intereſt on the 6th of *December* then next, which he had not done; and that upon an account ſtated there appeared to be owing from the defendant to Sir *Jacob* for principal and intereſt 1339*l.* 1*s.* 3*d.*: the bond now in ſuit was conditioned to pay the laſt mentioned ſum and intereſt: and then the defendant pleaded, 1. Non eſt factum. 2dly, That *Dunwich* in *Suffolk* is an ancient borough, having an indefinite number of freemen, and ſending two burgeſſes to parliament; and that the freemen inhabiting within the borough, and not receiving alms, had the right of voting in the election of burgeſſes. That before and at the time of making the bond Sir *Jacob* pretended a right to and had aſſumed the government and direction of the affairs and concerns of the borough, and had declared and cauſed it to be propagated there, that ſuch perſons only as he ſhould approve of ſhould repreſent the borough in parliament: and that the defendant then was and yet is a freeman of the borough, inhabiting there, and not receiving alms, and by reaſon thereof had and yet has a right to vote in the election of burgeſſes: and that the defendant was alſo at the time of making the bond indebted to Sir *Jacob* in 100*l.*; and that having

ſuch

Blantern, the plea, as the Court obſerved, did not contradict the bond, but only ſhewed how the obligation aroſe. So

1808.

PAXTON *againſt* POPHAM

ſuch right to vote, and being ſo indebted, on the 15th of *July* 1751, before the making of the bond, it was unlawfully agreed between him and Sir *Jacob*, that Sir *Jacob* ſhould not demand the ſaid debt of the defendant, and that in conſideration thereof the defendant at all times afterwards ſhould give his vote in the elections of burgeſſes of the borough for ſuch perſons as Sir *Jacob* ſhould from time to time approve of, and none elſe, and ſhould alſo ſerve the other purpoſes of Sir *Jacob* in the borough; and that for ſecuring theſe purpoſes the defendant ſhould give his bond to Sir *Jacob* in the penal ſum of 2678*l.* *with a colourable condition* thereunder written for the payment of 1339*l.* 1*s.* 3*d.* with intereſt; but that Sir *Jacob* ſhould not demand the ſame of the defendant ſo long as he continued to vote for ſuch perſons to be elected burgeſſes, &c. as Sir *Jacob* ſhould from time to time approve, and none elſe, and ſerve the other purpoſes of Sir *Jacob* in the borough. And then the defendant pleaded that in purſuance of that agreement the bond in queſtion was given, and was therefore void in law. The plaintiff by her replication, proteſting that the plea was inſufficient in law, admitted the conſtitution of the borough as ſtated; and that the defendant before and at the time of giving the bond was and yet is a freeman, &c. having a right to vote in the election of burgeſſes; but proteſting that Sir *Jacob* never pretended to or aſſumed any ſuch right to the government and direction of the affairs or concerns of the borough, nor propagated any ſuch notion as in the plea ſtated; and proteſting alſo that the defendant before and at the time of making the ſaid bond was indebted to Sir *Jacob* in more than 100*l.*; and alſo proteſting that no ſuch agreement as mentioned was made between Sir *Jacob* and the defendant, and that the bond was not given on any ſuch conſideration; replied that the defendant before and at the time of making the bond *was juſtly and truly indebted to Sir* Jacob *in the ſaid ſum of* 1339*l.* 1*s.* 3*d.* in the condition mentioned, and that for ſecuring payment thereof the bond in queſtion was given. To this the defendant demurred, and ſtated for ſpecial cauſes, that the plaintiff had in her replication alleged that the ſum mentioned in the condition of the bond was due from the defendant to Sir *Jacob*, and that the bond was given for ſecuring the repayment thereof; which was a different conſideration from that ſtated by the defendant in his plea; and yet the plaintiff had not traverſed the conſideration for giving the bond inſiſted on by the defendant: that the

1808.

PAXTON *againſt* POPHAM.

So in *Pole* v. *Harrobin* (*a*), the plea was not inconſiſtent with the condition of the bond; the bond being conditioned to pay 50*l.* in caſe the defendant did not procure

J. H.

---

repliçation attempted to draw in queſtion a matter immaterial and inconcluſive, and contained no matter on which a pertinent and deciſive iſſue could be taken, but was merely argumentative, &c.

(*a*) *E.* 22 *G.* 3. *B. R.* The following note of the caſe is taken from a MS. book in the hand-writing of the late Mr. *Durnford*, though probably copied by him from the note book of another gentleman then at the bar.

POLE *againſt* HARROBIN, *E.* 22 *G.* 3. *B. R.*

An officer cannot commute for money the ſervices of an impreſſed man, nor let him go for money: and a bond given to ſecure the man's return on non-payment of ſuch money is void, and may be avoided by plea diſcloſing the true tranſaction, and ſhewing that the man was illegally impreſſed.

DEBT on bond for 100*l.* the defendant, after craving oyer of the bond and condition; which laſt was for payment of 50*l.* "in caſe I do not procure *J. H. Cooper*, now *impreſſed*, &c. to appear and deliver himſelf to the plaintiff whenever he ſhall be called upon;" pleaded, 2dly, that *J. H. Cooper* was not liable to be impreſſed by any law, &c., and having been *unlawfully impreſſed*, the plaintiff was unwilling to diſcharge him unleſs he would agree to pay, &c. and would procure the defendant to become bound: and that it was unlawfully agreed that the plaintiff ſhould diſcharge *J. H. C.* and that *J. H C.* ſhould pay, &c. as a gratuity and reward, &c.: that the defendant at the requeſt of the ſaid *J. H. C.* did become bound for ſecuring the payment, &c. corruptly and unlawfully demanded, &c.; by virtue of which ſaid ſeveral premiſes, the ſaid writing obligatory, ſo made as aforeſaid, was and is void in law, &c. To this there was a general demurrer. [And there were alſo queſtions on other parts of the pleadings not material to the preſent purpoſe.]

Wood for the plaintiff, on the demurrer to the ſecond plea. The defendant cannot aver what is inconſiſtent with the condition of the bond. *Jenk.* 166. *Carth.* 300, *Chapman* v. *Downing* C. B., *Mich.* 6 *G.* 2. This laſt was debt on bond for the payment of money; the defendant pleaded, that it was agreed he ſhould not be called upon unleſs he ſhould act contrary to Sir *Jacob Downing*'s directions in voting. Three juſtices were of opinion againſt the plea. *Collins* v. *Blantern*, 2 *Wilſ.* 347. does not impeach *Chapman* v. *Downing*. [*Wallace*, amicus curiæ, ſaid, that the proceedings in *Chapman*

1808.

PAXTON against POPHAM.

J. H. C. then impreſſed, &c. to appear and deliver himſelf to the plaintiff when called upon; and the plea being that *J. H. C.* having been *unlawfully* impreſſed, the plaintiff

---

man v. *Downing* were ſtayed on the authority of the judgment in *Collins* v. *Blantern*.] The defendant is eſtopped from controverting a fact admitted on the deed. *Moor*, 420. *Godb.* 177. *Noy.* 79. *All.* 52. *Sho.* 59. *Stra.* 512. It appears that the party was impreſſed; which means, *legally*, ex vi termini. And as to the defendant it is totally immaterial; for if it be otherwiſe, there is a proper mode to obtain the party's diſcharge: and the defendant who is a third perſon cannot urge the contrary, and aver contrary to the condition.

Law, contrà. Dureſs of the principal is no plea for a ſurety in an obligation; as appears from *Cro. Jac.* 187: but the matter alleged goes to deſtroy the inſtrument itſelf; being either an illegal contract, or a reward for remitting an unlawful reſtraint. *Collins* v. *Blantern* is deciſive. *Impreſſing* means merely *detaining*; and we may ſhew this illegal contract, which is paramount the condition.

Lord MANSFIELD C. J. The ſecond plea is of general conſequence: it is objected to, becauſe it is averring contrary to the condition in the bond; and on this point there is ſome perplexity in the caſes; but there cannot exiſt ſuch an abſurdity as that a man ſhall have a good defence to an action, and not be able to ſhew or take advantage of it either by pleading or in evidence. Whatever is a defence in law, or ground for relief in equity againſt a deed, may be pleaded, and is conſiſtent with the inſtrument. The language is, I did give the inſtrument, but under ſuch circumſtances as make it void. This does not apply to voluntary bonds. The foundation is that you ſhall not by parol impeach a written agreement, and ſay that the agreement was different: but the agreement being admitted, the party may come and ſhew circumſtances to vitiate the whole proceeding. It was ſo determined in *Collins* v. *Blantern*, to avoid the deed. Here the party ſays I was illegally impreſſed (i. e. de facto impreſſed), and entered into the bond to avoid being impriſoned. On the face of the bond itſelf this almoſt ſeems to be illegal. What authority can an officer have to let an impreſſed man go, or to commute his ſervices? How can he know whether the ſervices will be wanted? It is like a ſheriff letting a priſoner go. The demurrer admits the ſecond plea to be true, and it is a good plea.

1808.

PAXTON *againſt* POPHAM.

plaintiff was unwilling to diſcharge him, unleſs he would agree to pay 50*l.* and would procure the defendant to become bound: and thereupon it was unlawfully agreed that the plaintiff ſhould diſcharge *J. H. C.* on the defendant's becoming bound for the payment of that ſum. The condition of the bond there only ſtated that the man was *impreſſed;* whether lawfully or not did not appear: and the plea in ſtating that he was *unlawfully* impreſſed did not contradict but explain the condition. The authority of *Downing* v. *Chapman* was left untouched. Here the pleas ſtate a tranſaction independent of that ſtated in the condition of the bond, and there is a bare averment that the bond and bill were given for an unlawful conſideration ariſing out of ſuch foreign tranſaction, inconſiſtent with that ſtated in the condition of the bond: the one ſtating the conſideration to have been *money borrowed and received by the defendants of the plaintiffs;* the other ſtating it to be for the price of goods illegally agreed to be ſmuggled from our *Eaſt India* ſettlements into *Europe.*

Holroyd, contrà, denied that the conſideration for the bond as ſtated in the plea was inconſiſtent with that ſtated in the condition: but if it were, he ſtill contended the bond would be void, if it appeared to have been given for

---

Wood moved to amend by replying and denying the fact.

BULLER J. This is not a caſe where the Court ought to aſſiſt you. The doctrine in *Downing* v. *Chapman* was that you cannot aver a different condition, but may ſtate a conſideration conſiſtent with the condition, which conſideration is illegal and may prove the inſtrument void.

Judgment for the defendant.

any

1808

PAXTON *againſt* POPHAM.

any illegal conſideration. The condition of the bond ſtates that the defendants had borrowed of the plaintiffs ſo much. The plea ſtates that it was illegally agreed between them, that the plaintiffs ſhould ſell goods to the defendants to be carried from the *Eaſt Indies* to *Europe* illegally, and that the bond was given to recover the price of thoſe goods. Now goods agreed to be taken as money may be declared for as money; according to *Barbe* v. *Parker* (*a*). But ſince the caſe of *Collins* v. *Blantern* (*b*), it has been always conſidered, that whatever the conſideration ſtated in the bond might be, it was competent to the defendant to aver the true conſideration, however inconſiſtent with that ſtated: and indeed unleſs this were ſo, no bond could ever be avoided for an illegal conſideration, as the obligee would always take care to ſtate upon the face of it a conſideration legal in itſelf, but as inconſiſtent as poſſible with the true one. This is done every day in caſes of uſury, gaming, and ſtock-jobbing: yet the true conſideration is always admitted to be ſtated. [*Le Blanc* J. This has frequently occurred in caſes of annuity tranſactions, where, as in caſes of uſury, goods have been given to the obligors inſtead of money, as ſtated in the condition of the bonds.] In *Hayne* v. *Maltby* (*c*) the defendant, having covenanted with the plaintiff to uſe his patent machine and no other, was held not to be eſtopped from pleading in bar, to an action on the covenant, matter which avoided the patent. And in *Lightfoot* v. *Tenant* (*d*), which was debt on bond conditioned for the payment of money, the fourth and ſixth pleas were in the ſame form as theſe in queſtion,

(*a*) 1 *H. Black.* 283. and vide *Hands* v. *Burton*, *ante*, 349.
(*b*) 2 *Wilſ.* 347. (*c*) 3 *Term Rep.* 438.
(*d*) 1 *Boſ. and Pull.* 551.

and

1808.

PAXTON *againſt* POPHAM.

and ſtated that the bond was given to ſecure payment of the price of goods unlawfully agreed to be ſold and delivered in *London* by the plaintiff to the defendant, to be by the latter ſhipped to *Oſtend*, and from thence reſhipped for the *Eaſt Indies*, and there traſficked with clandeſtinely; which was held to be a good bar to the action.

Burrough, in reply, ſaid that there was no queſtion in the laſt caſe as to any inconſiſtency between the matter pleaded and the condition of the bond. And as to the caſes of uſury, &c. where goods had been agreed to be taken as money, and the ſecurity ſtated the agreed value as ſo much money; it might have been taken to be ſo as againſt the party contracting on that baſis; and then the queſtion of inconſiſtency between the conſideration ſtated in the bond and that ſtated in the plea would be avoided. The caſe of the patent turned on the original avoidance of it by force of the ſtat. 21 *Jac.* 1. *c.* 3. becauſe it was not a new invention: as infancy or coverture may be pleaded in bar of an action on a bond, becauſe they evince the incapacity of making the deed.

Lord ELLENBOROUGH C. J. At preſent I cannot entertain a doubt upon the point: but if on further conſideration any doubt ſhould occur to myſelf or my brothers, we will mention it; and the rule for the judgment which we ſhall now pronounce need not be drawn up till the end of the term. I own I do not feel that palpable inconſiſtency which has been ſo much relied on in argument between the conſideration ſtated in the plea and that ſtated in the condition of the bonds. The condition of the firſt bond ſtates that the defendants took up ſo much money

of

of the plaintiffs which was to run at reſpondentia intereſt on the ſecurity of certain goods ſhipped from *Calcutta* to *Oſtend*: the ſecond count is upon a bond conditioned to ſecure the payment of certain bills of Exchange and the money remaining due on the reſpondentia bond before mentioned. The pleas ſtate that the bill and reſpondentia bond were given to cover the price of goods ſold by the plaintiffs to the defendants for the purpoſe of an illegal traffic from the *Eaſt Indies*, and that the plaintiffs knowingly aſſiſted in preparing the goods for carriage upon ſuch illegal voyage. Now upon the adjuſtment of the account after the goods were ſold, the parties might have calculated upon the debt as upon a loan to that amount: and therefore there is no neceſſary inconſiſtency between the two ſtatements; even taking the caſe upon the ſtrict rule of law, as it had been generally conſidered before the caſe of *Collins* v. *Blantern*. But ſince that caſe, to the principle of which I more readily accede than to what was laid down in *Downing* v. *Chapman*, which was always much queſtioned; there can be no doubt upon the ſubject. According to the doctrine of the Chief Juſtice in *Collins* v. *Blantern*, unleſs the obligor were permitted to contravene the condition of the bond by plea ſhewing the truth of the tranſaction, a bond would be made a cover for every ſpecies of wickedneſs and illegality. It would only be neceſſary to have a bond with a condition ſtating the conſideration of it as widely different from the truth as poſſible. That caſe which was decided in 1767 runs on all fours with the preſent, except that the condition there was general for the payment of money. And ſince the caſe of *Pole* v. *Harrobin* in 1782, it has been generally underſtood that an obligor is not tied up from pleading any matter which ſhews that the bond was given

1808.

PAXTON against POPHAM.

given upon an illegal conſideration, whether conſiſtent or not with the condition of the bond. At preſent I ſee no ſuch inconſiſtency: but if I did, I ſhould ſtill be prepared to abide by the principle of *Collins* v. *Blantern*, that the defendant might by his plea introduce a ſtatement of facts inconſiſtent with what appears upon the condition of the bond, in order to ſhew its illegality.

GROSE J. One queſtion made is whether the matter ſet forth in the defendant's plea has been well pleaded; and it is contended not to be ſo, becauſe it is inconſiſtent with what appears on the condition of the bond, and that the matter as ſtated in the condition is not averred to be colourable, nor diſtinctly traverſed. I am rather inclined to think however that there is no abſolute inconſiſtency between them, but that taking the whole tranſaction together as diſcloſed by the condition of the bond and in the pleas, the one may be taken in explanation of the other. And it would tend greatly to defeat the juſtice of the caſe if this mode of pleading were not allowed. The only queſtion then is whether the matter ſo pleaded ſhews the conſideration of the bond to have been illegal and void. Now the plea diſcloſes an illegal agreement between the parties againſt the rights of the *Eaſt India* Company, and that the bonds in queſtion were given in furtherance of that illegal agreement; being given to cover the price of goods ſold and ſhipped for the purpoſe of eluding the Company's charter. This is not incompatible with what is ſtated in the condition of the bond: but if it were, how can a tranſaction of this ſort be got at but by ſtating the true facts? If the obligor were concluded by a colourable tranſaction ſtated in the bond, it would be a recipe for getting rid of any objection to

it

it however illegal the conſideration may have been. I think therefore the rule in *Collins* v. *Blantern* was wiſely introduced, and has been wiſely aſſented to from that time, that wherever the conſideration of a bond was illegal, the defendant may ſhew that by his plea.

1808.

PAXTON *againſt* POPHAM.

LE BLANC J. It is admitted that the tranſaction diſcloſed by the plea is illegal; namely, the ſale by the plaintiffs to the defendants of goods in *India* to be conveyed from thence to *Europe*, without the licenſe of the *Eaſt India* Company; and the plaintiffs having aided the defendants in preparing the goods for ſhipment for that purpoſe: for the price of which goods the ſecurities in queſtion were given. The only objection made is to the form of the pleas: and it is ſaid that becauſe the bond is not conditioned ſimply for the payment of money, but is ſtated to be given for money taken up and borrowed upon reſpondentia, that is inconſiſtent with the ſtatement in the plea that it was given to cover the price of goods ſold and delivered for the illegal purpoſe mentioned: and that therefore the plea ought to have gone on and negatived that the bond was given for money ſo taken up and borrowed, and to have ſhewn that the tranſaction was colourably ſtated in the condition. But after the caſes, breaking in upon the old rule, have determined that though the bond ſtate nothing illegal upon the face of it, the obligor may ſhew by his plea that it was given for an illegal conſideration, they have in effect decided that he may ſhew an illegal conſideration different from the conſideration ſtated in the condition of the bond. And when the plea ſtates that the bond was given to cover the price of goods illegally contracted to be ſold and ſhipped, it does in effect deny that it was

1808.

PAXTON *against* ROTHAM.

given for money borrowed: and it shews that the statement of the transaction in the condition was made colourably in order to cover the illegal agreement.

BAYLEY J. said, that having advised on these pleadings when at the bar, he should not give any opinion upon the case.

Judgment for the defendants.

Tuesday, May 17th.

STOKES *against* MASON.

An attorney of B. R., in pleading his privilege against being sued by original, improperly stated the custom of this Court to be not to compel its attornies to answer an original writ, *unless* first *forejudged from* their *office*, &c. (which is the custom in C. B. but not in this Court:) but held that enough appearing to sustain the plea, the custom which had no foundation here, might be rejected as surplusage.

THE plaintiff sued the defendant as a common person by original, and declared upon a bill of Exchange accepted by the defendant and afterwards indorsed to the plaintiff. The defendant pleaded in abatement, that he ought not to be compelled to answer the said original writ, because he is and was on the day, &c. an attorney of *B. R.*; and that in the same Court there now is and from time immemorial hath been a custom that no attorney of the said Court hath against his will been compelled to answer any person in any personal action prosecuted here by original writ sued out, which hath not concerned the king, unless he hath been first *forejudged* from his office of an attorney of this Court, upon a bill exhibited here to the justices of our Lord the king before the king himself, against such attorney, and filed in the same Court. And then the defendant averred that he hath not been forejudged from his office, &c. and that he is impleaded by the original writ aforesaid against his will, and against the custom aforesaid: and this he is ready to verify; wherefore

1808.

STOKES against MASON.

wherefore as the defendant is and was on the day, &c. an attorney of the ſaid court, &c. he prays his privilege aforeſaid to be allowed and adjudged him, &c. To this the plaintiff demurred ſpecially, becauſe the defendant by his plea had alleged an immemorial cuſtom in this court, that no attorney of the court had againſt his will been ſued by original in any perſonal action, &c. unleſs he had been firſt *forejudged from his office*, &c.: whereas an attorney of this court was not by the practice of the court in that behalf to be *forejudged from his office of an attorney* of this court in manner and form as the defendant had alleged: and whereas the defendant ſhould have pleaded that he ought not contrary to his will to be compelled to anſwer in any manner whatever *except by bill* to be exhibited againſt him as an attorney of this court.

Beſt, in ſupport of the demurrer, ſaid that the defendant, meaning to avail himſelf of his plea of privilege as an attorney of this court, had improperly pleaded it in the form of an attorney of *C. B.*: and this being ſhewn as ſpecial cauſe of demurrer, the Court will not reject it as ſurpluſage (*a*). Pleas in abatement are always conſtrued ſtrictly (*b*); and ſhould ſtate a better proceſs. But ſtating a cuſtom here of forejudging attornies of their privilege is only calculated to miſlead.

Walton, contrà, obſerved that what was unneceſſarily ſtated, in reſpect to the cuſtom of an attorney of *B. R.* being forejudged of his office, went to narrow and not to extend his privilege, and might well be rejected as inſenſible and ſurpluſage; there being no ſuch cuſtom known in *B. R.* But as an attorney of this court was not ſuable at all except by

(*a*) *Barlow* v. *Evans*. 1 *Wilſ.* 99. (*b*) *Roberts* v. *Moor*, 5 *Term Rep.* 483.

1808.

STOKES *againſt* MASON.

bill; and here the defendant was ſued by original; enough appeared, without the ſurplus matter, to ſhew that the defendant was entitled to his privilege.

Lord ELLENBOROUGH C. J. Admitting the general pinciple, that a plea in abatement to the writ muſt give the plaintiff a better proceſs, it is ſufficient for the defendant to plead that he is an attorney of this court, and as ſuch to claim his privilege not to be ſued by original: for we will take notice that an attorney of this court can only be ſued by bill. It is true the plea goes on to ſtate ſomething about a cuſtom in this court of forejudging an attorney of his privilege; of which we know nothing: but enough being ſhewn to ſupport the plea, that which is here added unneceſſarily will not vitiate it; as in *Hopkins* v. *Squibb*, 1 *Ld. Ray.* 702. And in *Routh et Uxor* v. *Weddell*, 2 *Lutw.* 1666. where exception was taken to a plea of privilege by an attorney of *C. B.* that the cuſtom was not ſtated with ſufficient preciſion, the Court ſaid they would take cognizance of the privileges of the attornies of the court, and therefore the cuſtom need not be ſo preciſely alleged as other cuſtoms.

Per Curiam, Judgment for the Defendant.

Tueſday, May 17th.

The maſter of a ſhip has no lien on it for money expended or debts incurred by him for repairs done to it on the voyage.

HUSSEY *againſt* CHRISTIE and Others.

THE Lord Chancellor ſent the following caſe for the opinion of this Court.

On the 28th of *July* 1804 *John Hill*, the owner of the ſhip *Britannia*, engaged by a written contract the plaintiff *Huſſey* as maſter of her, on a voyage to the *South Sea* fiſhery. [The caſe ſet forth the contract, but nothing

1808.

HUSSEY *against* CHRISTIE.

thing turned upon the particular provisions of it. Amongst other things it stated that *Hill* agreed to allow to *Hussey* for his own services and also for providing officers and crew for the voyage one-third of the neat proceeds of the adventure and that *Hussey* should discharge all the lawful demands which the said officers and men might have on the ship and cargo.] The ship being equipped and provided for the voyage, the plaintiff took the command as master, and sailed from *England* in *September* 1804 upon the voyage agreed upon, and prosecuted the same with all due diligence; and, having procured a considerable cargo arrived with the ship at *Port Jackson* in *South Wales* in *June* 1806; but in consequence of her having met with very severe weather and sustained much damage it became impossible to prosecute the voyage further, without considerable repairs at *Port Jackson*. The plaintiff accordingly caused the necessary repairs to be done, and the articles of tackling and furniture wanting to be supplied, and expended a large sum of money for those purposes. But not being able to advance all the money necessary to complete the repairs, he drew several bills of exchange upon *Hill* the owner, for the purpose of raising money to supply the deficiency. Having completed the repairs necessary for bringing the ship and cargo home, the plaintiff set sail from *Port Jackson* for *England*; but in the course of the voyage it became necessary to make further repairs and to procure a new cable; for all which the plaintiff was obliged to draw other bills of exchange on the owner, and also to give his own promissory note. The plaintiff arrived with the ship and cargo in *London* on the 15th of *April* 1807. During his absence on the voyage *Hill* the owner became a bankrupt, and a commission was duly issued against

1808.

HUSSEY against CHRISTIE.

him, and ſome of the defendants were choſen his aſſignees. None of the bills of exchange mentioned have been paid by *Hill* or his aſſignees; and ſome of them have been taken up by the plaintiff, as the drawer, ſince his return with the ſhip. Nor has any part of the money expended by the plaintiff in the repairs of the ſhip and in providing the neceſſary tackling and furniture been repaid to him. The plaintiff intended and endeavoured to retain the ſhip in his poſſeſſion until he had been reimburſed the money expended, and indemnified againſt the debts incurred by him as aforeſaid; but *Hill*'s aſſignees and the other defendants (who claim an intereſt in the ſhip or cargo,) or ſome of them, forcibly took poſſeſſion of the ſhip and brought her into the *London* dock. Whereupon the plaintiff filed his bill in Chancery, amongſt other things, for an injunction to reſtrain the defendants from diſpoſing of the ſhip and cargo until his claim ſhould be firſt ſatisfied: and the defendants having put in their anſwer, the Lord Chancellor directed this caſe to be ſtated for the opinion of this Court upon the following queſtion: Whether the plaintiff had any lien on the ſhip for the money expended or debts incurred by him for the repairs done to her on the voyage?

Scarlett, for the plaintiff, admitting that he had not found any adjudged caſe at law upon the point, ſaid that it was taken for granted in many caſes that the maſter had a lien upon the ſhip for the amount of the neceſſary repairs of it paid or contracted for by him abroad, though not for repairs done in *England*: and he inſtanced *Wilkins* v. *Carmichael* (*a*), *Watkinſon* v. *Barnardiſton* (*b*), and *Ex parte Shank and Others* (*c*). All

(*a*) *Dougl.* 101. (*b*) 2 *Pr. Wms.* 367. In this caſe the Maſter of the Rolls, as it appears by Mr. *Cox*'s note from the regiſtrar's book, held that the money paid to tradeſmen for repairs, &c. by the Captain abroad was not a lien on the ſhip. (*c*) 1 *Atk.* 234.

writers agree that the maſter has a right to hypothecate the ſhip for repairs made abroad; which ſeems to proceed on the principle of his having a lien on it for expences ſo incurred, for which he would be perſonally liable; for he cannot convey a right to another which he had not himſelf. [Lord *Ellenborough*. One may have a power, who has no lien or intereſt in the thing to be conveyed; as an attorney may do an act to bind his principal, without having any intereſt in the ſubject-matter.] This caſe ſtands on the maritime law, by which the maſter would be perſonally liable for repairs ordered by him: and this is recognized by the law of *England* with reſpect to repairs made abroad: which differs this from the ordinary caſe of attornies or agents, who when treating as ſuch, within the ſcope of their authority, are not perſonally liable. [Lord *Ellenborough*. The maſter's liability muſt depend upon his contract. If he gave notice to the ſhipwright abroad before he made the repairs that he was to look only to the ſecurity of the ſhip and its owners, the maſter would not be perſonally liable.] Perhaps the repairs would not be undertaken without the maſter's perſonal ſecurity; and if his duty and the intereſt of his owners oblige him to enter into contracts for their benefit, for which he is perſonally liable, he ought to have a lien on the ſhip to indemnify himſelf; otherwiſe he will not engage in them, and the ſhip and whole adventure may be loſt. Every lien attaches on the poſſeſſion of the thing; but the poſſeſſion is ſtill in the maſter during the repair; and if he pay the tradeſman, it is the ſame as if he made the repair himſelf. Then why ſhould he not have a lien as well as another? [Lord *Ellenborough*. Have you any caſe where an agent has been held to have a lien for work done by others whom he has ſet to work upon the property of his principal? *Le Blanc* J. The agent is not the per-

1808.

HUSSEY *againſt* CHRISTIE.

ſon doing the work.] If the agent undertake perſonally for it, as between him and his employer, he may be ſaid to do the work. [Lord *Ellenborough*. Do you derive the maſter's power to hypothecate from his intereſt in, or his authority over, the ſubject-matter?] The principle on which ſuch a power is founded is to enable the maſter to preſerve the property in caſes of neceſſity, and the ſame principle leads to giving him a lien, to encourage him to pledge his perſonal ſecurity for the ſame purpoſe. He cannot even hypothecate the ſhip if he can raiſe the money wanted without it. The maſter has clearly a lien on the cargo for the freight, and he is liable to the ſeamen for their wages: but if the owner may take ſhip and all from him, there would be an end of his lien.

Marryat contrà. Liens for work done ariſe out of the uſages of trade, and are in derogation of the common law. If the lien in queſtion exiſt at all, it muſt be by the uſage of trade; but that has never been recognized by any adjudged caſe, nor has ever prevailed in practice: and no inference can be drawn in its favour from the diſtribution of aſſets or of bankrupts' eſtates, by a court of equity, for the benefit of the maſter who has laid out money for the uſe of the ſhip abroad, where the ſubject-matter was in the hands of the Court. If the maſter had ever been conſidered as having a lien, it would have been mentioned in the books which acknowledge his right to hypothecate; but the mention of that alone rather excludes any right of lien in himſelf; and there is no inſtance of an hypothecation by a maſter to himſelf. It is clear that the maſter has no lien on the ſhip for his wages (*a*) at common law; and the decree in his favour

(*a*) Vide *Abbott* on merchant ſhips, &c. 2d edit. 421.

in

1808.

HUSSEY *againſt* CHRISTIE.

in that reſpect, in *Watkinſon* v. *Barnardiſton* (*a*), muſt have proceeded upon equitable grounds. Nor does it appear that the Maſter of the Rolls meant to ſay that he had a *lien*, in the ſtrict ſenſe of the word, in any caſe; but only that he had a ſpecific remedy in rem by proceſs in the Admiralty court: for where there was no poſſeſſion, as in that caſe, there could be no *lien*. Beſides, the poſſeſſion of the maſter is in all caſes the poſſeſſion of the owners, and not adverſe to them. So his lien upon the freight is for the benefit of the owners as againſt the conſignees of the goods. The owners therefore, taking poſſeſſion of the ſhip and cargo, take their own lien for the freight at the ſame time: nor can the captain prevent them from receiving the freight; for which they may maintain an action in their own names; though the captain may ſue in his own name for it. To give the maſter a lien on the ſhip would have this bad conſequence, that after every voyage the captain would detain poſſeſſion till his account with his owners was ſettled; and they would be often obliged to ſubmit to improper charges to avoid the inconvenience and coſts of delay.

Scarlett, in reply, ſaid that the law of merchants recognized the principle of the lien in queſtion, and therefore the common law adopted it. The reaſon why the maſter cannot ſue in the Admiralty for wages, as the ſeamen may, is becauſe he has a lien for them on the freight which he is entitled to receive; which lien would be defeated if the ſhip might be taken from him. [*Bayley* J. The reaſon given in the books why the maſter cannot ſue in the Admiralty court for his wages is becauſe he has contracted per-

(*a*) 2 *Pr. Wms.* 367.

1808.

HUSSEY *against* CHRISTIE.

sonally with the owner for them.] Though the poſſeſſion of the ſhip by the maſter be for many purpoſes that of his owners, yet for others he has a diſtinct poſſeſſion from them, and may maintain treſpaſs upon it. In *Juſtin* v. *Ballam* (*a*) it is ſaid that by the maritime law every contract of the maſter implies an hypothecation; though not ſo by the common law, unleſs expreſsly agreed. But many liens, it is well known, have ariſen out of the modern uſages of trade, and each muſt have had a beginning and been adopted in ſome particular caſe.

Lord ELLENBOROUGH C. J. The queſtion ſent for our opinion is Whether in point of law the plaintiff, the maſter, had any lien on the ſhip for money expended or debts incurred by him for repairs done to her on the voyage; and we muſt look into the precedents of the common law to enable us to give an anſwer to it. It is admitted that there is no caſe at law where ſuch a lien has been adjudged to exiſt. And though it be ſaid that there muſt be a beginning in the caſe of liens; yet I diſclaim the right of originating it now: nor can I, in the abſence of all authority, create a lien in a caſe where none has ever been before allowed, and when every caſe of lien is againſt the common law. How then does the law ſtand in this reſpect? If the repairs be done here, the owners are liable; though the maſter may alſo become liable on his own contract, if he do not ſtipulate againſt his perſonal liability, and confine the credit to his owners. If the neceſſary repairs be done abroad, the maſter may hypothecate the ſhip for them, and it is his own fault if he ſubject himſelf to any perſonal liability,

(*a*) *Salk.* 34.

which

1808.

HUSSEY *againſt* CHRISTIE.

which he may renounce. It is ſaid, however, that becauſe he may hypothecate, he may acquire a lien by taking upon himſelf the payment of the repairs: for that the perſons to whom he hypothecates acquire an inchoate lien on the ſhip, inaſmuch as they are entitled by ſuit in the Admiralty court to acquire poſſeſſion of the ſhip itſelf. But it does not follow, becauſe others, through the maſter, and through his hypothecation, may acquire a lien on the ſhip, that therefore he himſelf has ſuch a lien. Liens may be derived through the acts of ſervants or agents, acting within the ſcope of their employment, which they themſelves had not. If a ſervant deliver cloth to a taylor, to make his maſter's liveries, the taylor indeed will have a lien on the cloth for the value of his work; but though the ſervant pay the taylor his charge, that will not give the ſervant a lien on the liveries. As to the caſes in equity, I cannot conſider them as profeſſing to lay down any ſuch rule as that the captain has a lien on the ſhip for repairs done abroad at his charge: the only difference between repairs done here and thoſe done abroad is, that there he may hypothecate, and here he cannot: and the reſult of thoſe caſes is only that, when done abroad, ſteps may be taken for procuring an hypothecation, by which the perſons making the repairs may acquire a lien on the ſhip: but we have no authority, ſitting here, to originate ſuch a lien. The caſe ſent to us involves no queſtion about the maſter's lien on freight, and therefore I ſhall give no opinion upon it. We will certify our opinion to my Lord Chancellor.

On the 30th *May* 1808 the Court certified that they had heard the caſe argued, and were of opinion, that the plaintiff

1808.

HUSSEY *againſt* CHRISTIE.

plaintiff had not any lien on the ſhip for the money expended or debts incurred by him for the repairs done to the ſaid ſhip on her ſaid voyage. (Signed)

ELLENBOROUGH.
N. GROSE.
S. LE BLANC.
J. BAYLEY.

Tueſday, May 17th.

MILLSON *againſt* KING.

Bail above having been put in and exception entered in the vacation, notice of juſtification for the firſt day of the next term muſt be given *within four days after ſuch exception.*

ON a former day a rule niſi was obtained for ſetting aſide proceedings on the bail-bond for irregularity. The writ was returnable on the return day of *Hilary* term. Bail above were put in, and notice ſerved in vacation, on the 15th of *February*, and notice of exception given on the 26th; and no notice of juſtification having been given within four days after, the bail-bond was aſſigned on the 7th of *March*: but on the 2d of *May* notice was ſerved of adding and juſtifying bail on the 4th, being the firſt day of *Eaſter* term: and the bail did then juſtify, but it was after this action was brought on the bail-bond.

Andrews oppoſed the rule, on the ground that where bail above is put in and exception entered in vacation, notice of juſtification for the firſt day of the enſuing term ought to be given within four days after ſuch exception; otherwiſe the bail-bond may be aſſigned. Here therefore the bail-bond was properly aſſigned, and the action being regularly brought, the juſtification of bail was too late.

Lawes

1808.

MILLSON *againſt* KING.

Lawes in ſupport of the rule ſaid, that by the general rule of practice, if the exception were taken in term time, two days notice of adding and juſtifying bail would have been ſufficient(*a*); and it was ſtrange that becauſe the exception was taken in vacation, though the defendant had till the firſt day of the next term given him to juſtify, he ſhould be obliged to give a longer notice. And in *Fowlis* v. *Groſvenor* (*b*), where the exception was in vacation, and the bail were juſtified on the ſecond day of the next term, the Court, in anſwer to an objection that the defendant had not juſtified bail within four days after exception taken, with reference to the rule of *E.* 5 *G.* 2.(*c*), ſaid, that two days notice was ſufficient: and they therefore ſtayed the proceedings on the bail-bond.

The Court ſaid, that the firſt day of the then next term given to the defendant to juſtify his bail, was only given to him ſub modo, if he gave the due notice: and it appeared by a note of the maſter of a caſe determined on the meaning of the rule of *Eaſter*, 5 *G.* 2. that if bail were put in and exception entered in vacation the defendant's attorney muſt *within four days after ſuch exception entered* give notice of juſtification for the firſt day of the next term: and no ſuch notice having been here given, the bail-bond was well aſſigned, and the proceedings regular.

Rule diſcharged.

(*a*) Vide 1 *Tidd's Pract. ch.* 6. of bail.

(*b*) *Barnes*, 101.

(*c*) Vide New Rules and Orders of K. B. 10.

1808.

Wednesday, May 18th.

WOOD *against* O'KELLY.

Where by the rule of reference *the costs* were *to abide the event of an award*, that includes *the costs* of the reference as well as of the *cause*.

UPON a reference under a rule of court, in an action for work and labour, &c., "*the costs* (were) *to abide the event of the award*:" and the master having taxed the costs of the *reference*, as well as of the *cause*, *Bowen* objected, upon shewing cause against a rule for an attachment, that *the costs*, directed to abide the event of the award, meant the costs of the *cause* only, and not of the reference: and upon this he obtained a rule nisi for the master to review his taxation: and mentioned *Tynte* v. *Every* (*a*), *Bracher* v. *Cotton* (*b*), and particularly *Browne* v. *Marsden* (*c*), and *Bradley* v. *Tunstow* (*d*), where the general term *costs* in a rule of reference was considered not to include the costs of the reference. But on this day *The Court*, after hearing *Heath* against the rule, and *Bowen* in support of it, held that the master had done right in including the costs of the reference in his taxation of costs for the plaintiff, in whose favour the award was made. And they considered that the late cases in *C. B.* turned upon the particular terms of the rules of reference.

Rule for reviewing the taxation of costs discharged.

(*a*) *Barnes*, 58. (*b*) *Ibid.* 123. (*c*) 1 *H. Blac.* 223.
(*d*) 1 *Bos. & Pull.* 34.

1808.

The KING *againſt* EMDEN.

Saturday, May 21ſt.

IN *Hilary* term 48 *G.* 3. the defendant was indicted in the county of *Middleſex*, for that he, maliciouſly intending to aggrieve one *G. Witherden*, and to cauſe 1880*l.* to be indorſed on a writ of capias ad reſpondendum iſſued out of *B. R.* with intent to procure *G. W.* to be arreſted to anſwer the defendant, &c. and to compel *G. W.* to find bail for that ſum, on the 20th of *November* 1806, at the pariſh of *St. Andrew, Holborn*, in the county of *Middleſex*, came before one *F. G.* deputy filacer of the ſaid court for the county of *Middleſex* (*a*), *and the deputy of the officer who ſhould iſſue ſuch proceſs as aforeſaid*, and then and there was ſworn before the ſaid *F. G.* (the ſaid *F. G.* having competent authority to adminiſter the oath, &c.): and the defendant being ſo ſworn, falſely, maliciouſly, wilfully, and corruptly ſwore, in ſubſtance, that *G. W.* was indebted to him in 1880*l.* for money had and received, &c.: *upon and at the foot of which ſaid affidavit in writing, as the ſame affidavit was and now remains filed in the ſaid court, &c.* (*B R.*) *at Weſtminſter aforeſaid in Middleſex, is written as follows, viz.* "*Sworn at No.* 15. *Furnival's Inn, London, the* 20*th day of November* 1806, *before Fs. Gordon, Dep. Fil. for Middleſex*;" *whereas in fact the defendant was ſo ſworn and made the ſame affidavit*

One was indicted in *Middleſex* for perjury committed in an affidavit, which indictment, after ſetting out ſo much of the affidavit as contained the falſe oath, concluded with a prout patet by the affidavit filed in the Court of K. B. at *Weſtminſter*, &c. and on this he was acquitted: after which he was indicted again in *Middleſex* for the ſame perjury, with this difference only, that the ſecond indictment ſet out the jurat of the affidavit, in which it was ſtated to have been ſworn in *London*, which was traverſed, by an averment that in fact the defendant was ſo ſworn in *Middleſex* and not in *London*: and held that he was entitled to plead autrefois acquit; for the jurat was not concluſive as to the place of ſwearing, and the ſame evidence as to the real place of ſwearing the affidavit might have been given under the firſt as under the ſecond indictment; and therefore the defendant had been once before put in jeopardy for the ſame offence.

(*a*) Theſe and the ſubſequent words in italics were not in the firſt indictment hereafter mentioned.

in

1808.

The KING *againſt* EMDEN.

in writing before the ſaid F. G. *in the ſaid county of Middleſex, and not in London*: and then the indictment proceeded to negative the truth of the affidavit of debt; and concluded, "and ſo the jurors, &c. ſay that the defendant on the 20th of November 1806 aforeſaid, at the pariſh aforeſaid, in the county of Middleſex aforeſaid, upon his oath aforeſaid, before the ſaid *F. G.* ſo then and there being ſuch deputy filacer as aforeſaid," &c. did falſely, wilfully, and corruptly commit wilful and corrupt perjury.

The defendant, after craving oyer of the indictment, pleaded that the King ought not further to impeach him by reaſon of the premiſes therein contained, becauſe, &c.; and then he ſet out a former indictment preferred and found againſt him on the 7th of *April*, 47 *G.* 3. at the general ſeſſions of oyer and terminer in and for the county of *Middleſex*; which indictment was in all reſpects the ſame as the preſent, except in the omiſſion of the two ſets of words before written in italics, and except that immediately after ſtating the affidavit of debt ſworn to by the defendant before *F. G.* theſe words were added in lieu of the ſecond ſet of words in italics, "as by the ſame affidavit affiled in the ſaid court of our "ſaid Lord the King of the Bench at *Weſtminſter* afore-"ſaid in the county of *Middleſex*, amongſt other things, "more fully appears." The plea then continued to ſet forth the record of the former indictment; that it was removed into *B. R.*; and that the defendant afterwards pleaded not guilty, and was tried before the Chief Juſtice at *Weſtminſter*, &c., and that the jury found the defendant *not guilty* of the premiſes charged upon him *in manner and form, &c. as alleged.* Whereupon, there

was

1808.

The KING *againſt* EMDEN.

was judgment for the defendant: as by the record and proceedings thereof, &c. at *Weſtminſter*, &c. more fully appeared. Which ſaid record ſtill remains in force, &c. And then the plea alleged "that the affidavit in writing ſet forth in the indictment againſt the defendant in this plea mentioned, and therein ſaid to be affiled in *B. R.* at *Weſtminſter* aforeſaid in the ſaid county of *Middleſex*, and whereon the ſuppoſed perjury charged to have been committed by the defendant therein named was aſſigned, and of which he was acquitted as aforeſaid, and the ſaid affidavit in writing ſet forth and contained in the indictment now pending againſt the defendant, now here pleading to the ſame, and therein alſo ſaid to be affiled in the *B. R.* at *Weſtminſter*, &c. and whereon the ſuppoſed perjury by the ſaid now depending indictment charged to have been committed by the defendant now here pleading is aſſigned, *is one and the ſame affidavit, and not other or different:* and that upon and at the foot of the ſaid affidavit in writing in the ſaid indictment in this plea ſet forth and contained as aforeſaid, as the ſame affidavit then was and remains affiled in *B. R.* at *Weſtminſter*, &c., is written as follows, viz. "*Sworn at No.* 15. Furnival's Inn, London, *the* 20*th day of* November 1806, *before* Frs. Gordon, *Dep. Fil. for* Middleſex;" whereas the defendant was ſo ſworn and made the ſame affidavit in writing before the ſaid *F. G.* in the ſaid county of *Middleſex*, and not in *London*. And then the plea alleged the identity of the memorandum at the foot of the affidavit laſt mentioned, with the memorandum at the foot of the affidavit mentioned in the indictment now pending, and that the *Frs. Gordon* mentioned in each is the ſame, and his authority

1808.

THE KING *againſt* EMDEN.

thority to adminiſter the oath the ſame, &c.; and that the ſeveral aſſignments of perjury mentioned in the indictment of which the defendant was before acquitted, and thoſe in the pending indictment, are really and ſubſtantially the ſame aſſignments of perjury, and the offence charged in the former and in the preſent indictment is identically one and the ſame, and that the defendant is the ſame perſon charged in both. Wherefore, &c.

To this plea there was a general demurrer and joinder.

Abbott, in ſupport of the demurrer, argued that there was a material difference between the affidavit ſet forth in the former indictment on which the defendant was acquitted, and that ſet forth in the preſent indictment; and relied on ſuch difference to ſhew that the acquittal on the former proſecution was no bar to this. A former acquittal, he contended, was no bar to a ſubſequent proſecution, unleſs the defendant might have been convicted on the firſt indictment by proof of the facts contained in the ſecond: for which he cited *Vandercom* and *Abbott*'s caſe (*a*) in which all the prior caſes were conſidered. Both the indictments there were in fact founded on the ſame tranſaction; but in the firſt they were charged with breaking and entering the dwelling houſe in the night, and *ſtealing* the goods of *A. B.* and *C.*; and their acquittal of that charge was held to be no bar to another indictment for breaking and entering the ſame dwelling houſe on the ſame night, *with intent to ſteal* the goods of *A.* and *B.* there. And ſo it is ſaid in *Vaux*'s caſe (*b*), that though

(*a*) *Eaſt*'s *P. C.* 522, tit. burglary, *ch.* 25 *ſ.* 29. (*b*) 4 *Co.* 45. *a.*

auterfoits

1808.

The KING *againſt* EMDEN.

auterfoits acquitted or convicted of the ſame offence be a good plea; yet it is intended of a lawful acquittal or conviction: but when the offender is diſcharged upon an inſufficient indictment, there the law has not had its end, &c. Now here the defendant could not have been convicted on the firſt indictment by proof of the facts contained in the ſecond. For the firſt indictment ſtated that he ſwore the affidavit, on which the perjury is aſſigned, in *Middleſex*, and vouched that it would ſo appear by the affidavit itſelf affiled in Court; which, though perhaps unneceſſary to be ſtated, made it neceſſary to prove the allegation by an affidavit which appeared on the face of it to have been ſworn in *Middleſex*. Whereas the affidavit ſtated in the ſecond indictment appears upon the face of it to have been ſworn in *London*, though alleged in fact to have been ſworn in *Middleſex*. But that ſhews that the defendant could not have been convicted upon the former indictment. As in *Reading*'s caſe (*a*), and *Gilchriſt*'s caſe (*b*), in forgery, where the inſtrument was alleged by the indictment to *purport* to be drawn upon *A. B.*, &c. when in fact, though really meant to be drawn upon thoſe perſons, it purported to be drawn in the names of *C. B.*, &c., the priſoners were held entitled to an acquittal. So if a deed were made to *A.* by the miſtaken name of *B.*, if it were alleged in an indictment as a deed to *A.*, it would not be proved by ſhewing a deed to *B.*: but the proper way is to allege that it was made to *A.* by miſtake there called *B.* The ſame in an action on a judgment againſt *A.* by the miſtaken name of *B.*; it muſt be ſo averred. In *Rex* v. *Gilbert Gardner*, which was tried before Lord *Kenyon* at the ſittings at *Weſtminſter*

(*a*) *Eaſt's P. C.* 981. tit. Forgery, c. 19. *ſ.* 56. (*b*) *Ibid.* 982.

1808.

The KING *againſt* EMDEN.

after *Mich.* term 1791, the indictment was for perjury committed on the trial of an action by *A.* againſt *B.*, in which it was averred that *A.* impleaded *B.* for an aſſault upon him when *A.* was riding with *C.*, and *B.* was riding with *D.* Whereas the record produced was of an action by *A.* againſt *B.* for the aſſault generally, without the ſpecial circumſtances: and it was offered to prove thoſe circumſtances by parol: but Lord *Kenyon* would not allow it; ſaying that there might be another record of an aſſault with thoſe ſpecial circumſtances ſtated in it; and therefore he directed an acquittal. So here, there might have been another affidavit anſwering the deſcription in the firſt indictment. In *Purcell* v. *Macnamara* (*a*) Lord *Ellenborough* ſaid, "If it (the allegation in the indictment) had gone on to ſtate that the acquittal was on a certain day, *as appears by the record;* that might have been conſidered as deſcriptive of the record, and then the variance would have been fatal." The words of reference then in this caſe made the allegation deſcriptive of an affidavit which appeared on the face of it to have been ſworn in *Middleſex*, which being different from the true affidavit deſcribed in the ſecond indictment, the acquittal on the firſt indictment is no bar to the indictment pending.

The Common Serjeant (*Knollys*) contrà, ſaid that this differed from *Vaux*'s caſe, and that of *Vandercom* and *Abbott;* in the firſt there was a defective allegation of the crime of murder by poiſoning; in the other, the offences alleged in the two indictments were diſtinct in ſpecie, though of the ſame genus. And in each of the caſes of *Reading* and *Gilchriſt*, the record was at variance with itſelf; ſtating that the inſtrument purported on the face of

(*a*) *Ante*, 161.

it

1808.

The KING *against* EMDEN.

it to be that which it did not purport to be. However, the first indictment was good upon the face of it, and in truth and substance charged the same offence as that included in the second. The material averments in the last are that the affidavit mentioned in the former indictment, and the affidavit set forth in the indictment pending, *are one and the same affidavit, and not other or different*, and that the *memorandum* at the foot of the affidavit mentioned in each indictment is *the same*; that the assignments of perjury in both are really and substantially the same; and the same person and the same identical offence charged in each. On the first indictment it would have been sufficient to have proved that in fact the affidavit was sworn in *Middlesex*: but even if it were otherwise, the burthening the prosecutor with the proof of an unnecessary averment, which failed, would not warrant the putting of a defendant in jeopardy again upon another indictment in the same county and for the same offence in substance. The very object of the stat. 23 *Geo.* 2. *c.* 11. *s.* 1. was to render prosecutions for perjury more easy, by making it sufficient to set forth the substance of the proceedings together with proper averments of the fact: but if by stating more than is necessary of the substance of the proceedings, and failing in the proof of an unnecessary allegation, the prosecutor could institute another indictment for the same offence, the statute would be made an engine of oppression. The plea of autrefoits acquit is not confined to cases where the second indictment is in the same identical *form* as the first. If a prisoner be indicted for the murder of one *unknown*, and be acquitted; to another indictment for the murder of *A. B.*, he may plead his former acquittal, and aver that *A. B.* named in the second indictment was the

1808.

The KING against EMDEN.

perſon before ſaid to be *unknown*. *Dy.* 285. *a.* and *Staunf. P. C.* 105. (*a*). The only new fact alleged in the preſent indictment is that at the foot of the affidavit there was a certain memorandum ſtating it to have been "ſworn at No. 15, *Furnival's Inn, London*," &c. but by whom written, whether by any perſon having competent authority to put it there, does not appear.

The Court, having aſked *Abbott* what anſwer he had to make to the laſt obſervation; and he ſaying that it appeared to be ſo ſtated in the jurat, which was a neceſſary part of the affidavit, of which the Court would take judicial notice; they obſerved that the memorandum was not ſtated to be the *jurat*: it only appears to be written before the affidavit was filed, but it does not appear when that was filed. Neither do the rules of the Court require the *place* where the affidavit is ſworn, but only the names of the deponents, to be ſtated in the jurat; though in fact it is ſtated where the affidavit is ſworn, whether in court, or at the Judge's chambers.

Abbott replied that the Court would take notice of their own practice in ſtating the place where an affidavit is ſworn, though not required by any written rule of Court: and, unleſs the place had been ſtated, he doubted whether any Court would have received the affidavit. *Bayley* J. however ſaid that in a late caſe in *C. B.* it was conſidered that the place where the affidavit was ſworn was not neceſſary to be ſtated in the jurat. And he aſked whether it were meant to be contended that a defendant could not be indicted for perjury committed in an affidavit, without ſtating the jurat: and if not, whe-

(*a*) Vide 2 *Hawk. ch.* 35. *ſ.* 3.

ther

1808.

The KING against EMDEN.

ther the ſtating at the foot of the affidavit, that it was ſworn at a certain place, made the place part of the iſſue? In an action on a bond, it is ſtated that the bond was executed at ſuch a place; but the place is no part of the iſſue. *Abbott* admitted that it was not neceſſary in an indictment for perjury in an affidavit to ſtate the jurat, the ſtat. 23 *Geo.* 2. having made it ſufficient to ſet forth the ſubſtance of the proceedings. But, in anſwer to the other queſtion, he obſerved that in an indictment for perjury the place was material to be laid and proved, which it was not in the caſe of an action on a bond.

Lord ELLENBOROUGH C. J. It appears to me that the jurat is not a neceſſary part of an affidavit to be ſtated in an indictment aſſigning perjury in ſuch affidavit: it is only neceſſary to ſtate ſo much of it as conſtitutes the crime; namely, that which contains the falſe oath, together with the averments proper to ſubſtantiate the perjury. If ſo, there was a ſufficient indictment found in the firſt inſtance, on which the party has been tried and acquitted of the ſame offence as is now charged by the ſecond indictment; and therefore ſuch acquittal is a good plea in bar to the preſent indictment. It is quite a different queſtion whether a party producing an affidavit, which appears on the face of it to have been ſworn in *London*, and proving it to have been ſworn elſewhere, is fit to be believed; that would be a queſtion for the jury: but on the record of the firſt indictment the offence was ſufficiently charged without ſetting forth the jurat, by which it is ſtated to have been ſworn in *London*; and the production of that jurat on the trial of that indictment would no otherwiſe have affected it, than as it affected the credit of the perſon ſwearing to the fact of the affi-

1808.

The KING *against* EMDEN.

davit having been ſworn in *Middleſex* where the trial was had. The whole crime therefore might have been tried on that indictment, and the defendant was in jeopardy upon it, and conſequently his acquittal is a bar to the preſent proſecution.

GROSE J. declared himſelf of the ſame opinion.

LE BLANC J. The firſt indictment was ſufficient in the frame of it, and is the ſame in effect as the indictment now pending, except in not ſtating the jurat: and unleſs the jurat be a neceſſary part of the affidavit to be ſtated in an indictment for perjury aſſigned on ſuch affidavit, which I think it is not, the difference between the two indictments is not material. Then the ſecond indictment ſet forth the jurat, which ſtates that the affidavit was ſworn in *London*, with an averment that the defendant was ſworn and made the affidavit in *Middleſex*, and not in *London*. But that averment does not let in the proof of any fact that might not have been given in evidence on the firſt indictment: how credible, it is not neceſſary to inquire. Therefore the defendant, having been in jeopardy upon that indictment for the offence with which he now ſtands charged, is entitled to plead his former acquittal in bar.

BAYLEY J. The preſent indictment itſelf ſuppoſes that the jurat is not concluſive evidence of the place of ſwearing the affidavit, becauſe it expreſsly avers that it was ſworn in *Middleſex* and not in *London*, as ſet forth in the jurat. Then if the jurat be not concluſive as to the place, the ſame evidence would have ſupported the firſt indictment as would be required to ſupport the ſecond;

and

and therefore the defendant having been once in jeopardy for this offence, his acquittal is concluſive. 1808.

Judgment for the Defendant.

The KING *againſt* EMDEN.

MARSHALL *againſt* CRITICO.

Monday, May 23d.

BURROUGH moved to diſcharge the defendant from an arreſt, on filing common bail, on the ground of his privilege, under the ſtat. 7 *Ann. c.* 12. as being conſul general from the *Porte*, and inveſted with a ſuperintending authority over the *Turkiſh* conſuls in the different ſea-port towns, and not an ordinary conſul or agent for commercial purpoſes; in which reſpect he diſtinguiſhed this from *Barbuit*'s caſe (*a*). But he alſo ſtated from the affidavit, that ſome months previous to the arreſt, the defendant had in fact been diſmiſſed from his employment, and another perſon of the name of *Natali*, who was before reſiding here, had been appointed in his place; but the defendant had then received no official notification of his diſmiſſal, and continued in fact to exerciſe his office here until after the arreſt. And he contended that the defendant's privilege did not ceaſe until notification at leaſt of his diſmiſſal, and reaſonable time to depart the kingdom if he thought fit. It did not however appear that he had had any intention of departing.

One who had been appointed Conſul General from the *Porte*, but was diſmiſſed ſeveral months before from his employment, and another perſon reſident here appointed in his room, is not at any rate privileged from arreſt, though at the time of the arreſt he had not received any official notification of his diſmiſſal, or of the appointment of the other.

Lord ELLENBOROUGH C. J. This is not a privilege of the perſon, but of the ſtate which he repreſents. And

(*a*) *Caſ. temp. Talb.* 281., and vide *Lord Mansfield*'s account of the ſame caſe in *Triquet* v. *Bath*, 3 *Burr.* 1480—1.

1808.

MARSHALL *againſt* CURTEIS.

that ſtate having ſome months before deveſted him of the character in which he claims the privilege, and appointed another perſon here to exerciſe it; there is no juſt reaſon why the defendant ſhould not be ſubject to proceſs as other perſons; nor for the ſtate, by which he had been ſo diſmiſſed from his employment, to take offence at his arreſt.

Per Curiam, Motion denied.

Tueſday, May 24th.

DOE, on the demiſe of BELASYSE and Lady CHARLOTTE WYNN BELASYSE, his Wife, *againſt* The Earl and Counteſs of LUCAN.

One having a *freehold manor* of *Sutton*, and freehold lands there, and having alſo *copyhold* within the *townſhip* of *Sutton*, and within the local ambit of the manor, but held of another manor; and having ſurrendered his copyhold to the uſe of his will; deviſed all his *manor of S.*, and all his meſſuages, *farms*, lands, tenements, and hereditaments, whatſoever, *within the precincts and territories of S.* in the county of *Cheſter*, with their rights, members, and appurtenances, in truſt for his daughter *L*, (having deviſed other eſtates in other counties to two other daughters) and to her children in ſtrict ſettlement: held, 1. That farms, lands, &c. within the *townſhip*, though not within the *manor*, of *Sutton*, paſſed by the deſcription of farms, &c. within the *precincts and territories of S.* 2. That the general words "meſſuages, *farms*, lands," &c. and particularly the word *farms*, were ſufficient to carry *copyhold* as well as freehold in the place deſcribed, if ſuch appeared to be the intent of the teſtator upon the whole will. 3. That ſuch intent was evinced in this caſe by the word *farms*, where it appeared that the teſtator had a farm compoſed of copyhold and freehold, which he had let as one entire ſubject, and which muſt otherwiſe be divided; and alſo by this, that he had charged the property deviſed beyond the annual income of it unleſs the copyhold were included. And that this intent was not rebutted by a power of leaſing for 21 years given to all the tenants for life; nor by power to the truſtees to raiſe portions by grants of long terms of years. 4. That a ſmall copyhold diſtant eight miles, and a ſmall freehold 20 miles from *Sutton*, but within the county of *Cheſter*, did not paſs by that deviſe, but did paſs under a general reſiduary clauſe to another daughter.

IN ejectment for copyhold or cuſtomary lands, part of which are locally ſituated within the townſhip and freehold manor or reputed manor of *Sutton*, and part in the townſhip of *Kettleſhulme*, without the manor of *Sutton*; and all of which copyhold or cuſtomary lands are held of the manor and foreſt of *Macclesfield*; and alſo for

freehold

freehold lands in the parish of *Northwich* in the same county, and not within either of the said manors; a verdict was taken for the plaintiff, at the trial at *Chester*, subject to the opinion of this Court upon the following case.

1808.

Doe dem. BELASYSE against The Earl of LUCAN.

Henry late Earl of *Fauconberg* being seised in fee of the freehold manor of *Sutton*, and of divers freehold lands and premises within the manor; and being also seised in fee of the freehold premises in *Northwich*; and being entitled in fee simple, according to the custom of the said manor and forest of *Macclesfield*, to all the said copyhold or customary premises; which several freehold and copyhold or customary premises formed the whole of his estate in the county of *Chester*: and being also seised in fee of divers other large freehold, but no copyhold, estates, in the counties of *York*, *Durham*, and *Middlesex*: and having no male issue, but having three daughters, viz. Lady *Charlotte Wynn Belasyse*, one of the lessors of the plaintiff, Lady *Anne Wombwell*, wife of Sir *George Wombwell* Bart., and *Elizabeth* Countess of *Lucan* one of the defendants: and having surrendered all his copyhold estates to the uses of his will: by his will duly executed, dated the 26th of *November* 1801, devised certain freehold estates in *Yorkshire* and *Middlesex*, being the bulk of the property, to trustees for a term of years, in trust to raise and pay to Lady *C. W. Belasyse*, for her separate use, an annuity of 1000*l.* per annum for her life; remainder to herself for life; remainder to her first and other sons successively in tail; remainder to her daughters, as tenants in common, in tail; with divers remainders over. And also devised other freehold estates in *Yorkshire* and *Durham*, as follows.—As to all and singular the manors or reputed manors of *Yarm*, *Old Byland*, *Over Silton*,

and

1808.

Doe dem. BELASYSE *againſt* The Earl of LUCAN.

and *Lund*, and all my meſſuages, *farms*, lands, tenements, and hereditaments whatſoever, within the precincts or territories of *Yarm*, *Old Byland*, *Over Silton*, *Nether Silton*, *Leek*, and *Lund*, in the North Riding of the county of *York*, and *Kenknowle* and *Copycrook* in the county of *Durham*, with their reſpective rights, members, and appurtenances, I deviſe the ſame unto Lord Viſcount *Melbourne* and Sir *George Wombwell* Bart. their executors, &c. for 99 years, if Lady *Anne Wombwell* ſhall ſo long live; in truſt out of the rents and profits of the ſaid manors and hereditaments, to raiſe 500*l.* per ann., clear of all deductions, for Lady *Anne Wombwell*, for her ſeparate uſe, &c.; remainder to the ſaid Lady *Anne* for life; with divers remainders over. And alſo deviſed as follows—As to all and ſingular *the manor or reputed manor of* Sutton, and all my meſſuages, *farms*, lands, tenements, and hereditaments whatſoever, *within the precincts or territories of* Sutton in the county of *Cheſter*, with their rights, members, and appurtenances, I give and deviſe the ſame to Lord Viſcount *Melbourne* and Sir *G. W.* Bart., their executors, &c. for 99 years, if Lady *Lucan* ſhall ſo long live; in truſt out of the rents and profits of the ſaid manor, hereditaments and premiſes, to raiſe and pay 500*l.* per ann., clear of all deductions, to Lady *Lucan* for her ſeparate uſe, &c.; remainder to the uſe of Lady *Lucan* for life; remainder to her firſt and other ſons by the Earl of *Lucan* ſucceſſively in tail; remainder to her daughter as tenants in common in tail; and divers remainders over; and the ultimate remainder, as to the whole of the ſaid eſtates, to the uſe of the teſtator's own right heirs. And the teſtator empowered the ſeveral tenants for life, male or female, in poſſeſſion and of age, to limit 500*l.* per ann. for life, clear

of

1808.

Doe dem. BLASYER *againſt* The Earl of LUCAN.

of all deductions, for the uſe of any perſon or perſons with whom they might reſpectively intermarry, to be charged upon the ſaid manors and other hereditaments to them reſpectively deviſed, and ſecured by the uſual powers of diſtreſs and entry, &c. And alſo that ſuch tenants for life ſhould have power to charge all or any part of the manors and other hereditaments to them reſpectively deviſed with portions for younger children, not exceeding 24,000*l.* for the younger children of Lady *C. W. Belaſyſe*, and 10,000*l.* reſpectively, for the younger children of Lady *A. Wombwell*, and of Lady *Lucan*, with intereſt not exceeding 5 per cent., &c. And for this purpoſe to limit or appoint all or any part of the hereditaments ſo to be charged to any perſons for any term of years, without impeachment of waſte. The teſtator alſo directed that the ſeveral tenants for life ſhould have power to limit and appoint the ſaid lands and other hereditaments, or any part thereof, with their appurtenances, by way of leaſe or demiſe for any term or number of years not exceeding 21 years in poſſeſſion, at the beſt rent, &c. And alſo gave power to the ſame to grant building leaſes, &c. for any term not exceeding 99 years in poſſeſſion, at the beſt rent, &c. The teſtator alſo directed that Lady *C. W. Belaſyſe*, and the ſeveral manors and hereditaments firſt limited in uſe for her life, with remainder to her firſt and other ſons, and daughters, in tail, ſhould be ſubject to, and ſhould actually exonerate, the ſeveral other hereditaments, manors, and premiſes ſo as aforeſaid originally limited in uſe to Lady *A. Wombwell* and Lady *Lucan*, and their ſeveral and reſpective ſons and daughters in tail, from land-tax, modus, rent, fee-farm rents, preſcript rents, curates' ſtipends or ſalary, and penſions to poor widows, and all ſuch other incumbrances

1808.

Doe dem. BELASYSE against The Earl of LUCAN.

brances as were then actually charged thereon and payable by him, and also from the salary of the receiver of rent of the said estate devised to Lady *Lucan*. And the testator devised all the rest, residue, and remainder of his real and personal estates whatsoever and wheresoever, except those he held on mortgage or upon any trusts, unto Lady *C. W. Belasyse*, her heirs, &c. and died on the 23d of *March* 1802. The testator was not, at the time of making his said will, seised of any other real estates than those before mentioned. After his death Lord and Lady *Lucan* entered into and continue in possession of all the freehold and copyhold premises for which this ejectment was brought. The case then stated the presentment of Earl *Fauconberg*'s will by the homage at the manor and forest court of *Macclesfield*; and the admission of Lord *Melbourne* and Sir *Geo. Wombwell* to the said copyhold or customary premises locally situated within the townships and freehold manor or reputed manor of *Sutton*, and also to the copyhold or customary premises situate in the townships of *Kettleshulme*, to hold for 99 years if Lady *Lucan* so long lived. That the manor of *Sutton*, and the freehold lands situated within that manor, devised to the defendants, were, at the time of making the will, of the annual value of 800*l.* and upwards; and the copyhold or customary lands at *Sutton* were then also of the annual value of 800*l.* and upwards; and that the freehold lands at *Northwich* were then of the annual value of 19*l.*; and the copyhold or customary lands at *Kettleshulme* were then of the annual value of 39*l.*: and that one modus of 4*l.* per annum, payable to the impropriator of the parish of *Prestbury*, covers as well the freehold lands at *Sutton*, as 700 acres of the copyhold or customary lands there. Part of the above-mentioned

copyhold

1808.

Doe dem. BELASYSE against The Earl of LUCAN.

copyhold or cuſtomary eſtates at *Sutton* and *Kettleſhulme* were purchaſed by the teſtator's father, *Thomas* Lord *Fauconberg*; and they, as well as the freehold eſtates within the manor of *Sutton*, were enjoyed by the teſtator and his father during their reſpective lives. At the time of making the will one *John Grimſditch* held a farm at *Sutton* conſiſting of 261 A. 2R. 8P., of which 200 A. 24R. 0P. are freehold, and 61 A. 1R. 24P. are cuſtomary or copyhold land, under a leaſe granted to him by the teſtator for the term of 21 years from *Lady-day* 1789; but ſince the teſtator's death *John Grimſditch* has ſurrendered the term thereby granted. *Kettleſhulme* is diſtant eight miles, and *Northwich* is diſtant 20 miles from the extremity of the manor and townſhip of *Sutton*. The leſſors of the plaintiff were previouſly to the commencement of this ejectment duly admitted to all the copyhold premiſes compriſed in the ejectment at the manor and foreſt court of *Macclesfield*. There are no copyhold lands held of the manor of *Sutton*. The queſtion for the opinion of the Court was, Whether the leſſors of the plaintiff were entitled to recover the freehold and copyhold eſtates, or any and what part thereof?

Benyon for the plaintiff. The queſtion principally ariſes on the deviſe to truſtees for the benefit of Lady *Lucan* and her iſſue of "all and ſingular the manor or reputed "manor of *Sutton*, and all my meſſuages, farms, lands, "tenements, and hereditaments whatſoever *within the* "*precincts or territories of* Sutton, in the county of *Cheſ*"*ter*, with their rights, members, and appurtenances." The property of the deviſor contended by the defendants to come within the above deſcription is, 1. The manor

1808.

Doe dem. Bellaysse *againſt* The Earl of Lucan.

of *Sutton*, and a freehold eſtate within that manor of about 800*l.* a-year. 2. A copyhold eſtate of the ſame value, locally ſituated within the ambit of the townſhip and manor of *Sutton*, though no part of that manor, but parcel of the manor and foreſt of *Macclesfield*. 3. A ſmall copyhold at *Kettleſhulme*, within the manor and foreſt of *Macclesfield*. And, 4. a ſmall freehold in *Northwich*, not within either of the manors. As to the 1ſt, the leſſors admit that the manor of *Sutton* and the freehold eſtate within that manor paſſed to Lady *Lucan* under the clauſe above mentioned. 2dly, The copyhold eſtate within the ambit of *Sutton*, but parcel of the manor and foreſt of *Macclesfield*, did not paſs by that clauſe; firſt, becauſe it is not "*within the precincts or territories of* Sutton," by which muſt be underſtood the *manor of* Sutton; and therefore not within the deſcription of the thing deviſed. If it had been ſaid "within the precincts and territories of the *manor* of *Sutton*," the meaning would have been clear not to paſs this copyhold, which is no part of that manor, but parcel of the manor and foreſt of *Macclesfield*; according to 2 *Rol. Rep.* 236. and 15 *Vin. Abr.* title *Manor*, C.: and the ambiguity only ariſes, becauſe there is a *townſhip*, as well as a *manor*, of *Sutton*: but in no part of the will does the teſtator allude to the *townſhip* of *Sutton* by name. Under this deſcription nothing can paſs within the *ambit* of *Sutton*, which is not alſo within the *manor*, though the copyhold was occupied conjointly with the freehold: as in *Doe* v. *Greathead* (*a*). [*Le Blanc* J. That was a deviſe of lands confined by the deſcription to one county, which was held not to include other lands in the ſame manor which

(*a*) 8 *Eaſt*, 91.

were

1808.

Doe dem. BELASYSE *against* The Earl of LUCAN.

were in another county. Lord *Ellenborough* C. J. The teſtator in the preceding clauſe of his will ſpeaks of lands, &c. "within the *precincts and territories*" of places diſtinct from the *manors* there mentioned; which ſhews that he meant ſomething unconnected with manors. Can you with effect contend that the copyhold within the ambit of *Sutton* did not paſs?] There is another reaſon why this copyhold did not paſs by the general deſcription of lands, &c. becauſe there is a *freehold* eſtate to anſwer the deſcription; in which caſe the rule of law, as laid down in *Roſe* v. *Bartlett* (*a*), in reſpect of leaſehold applies; namely, that the *freehold* only ſhall paſs under the general words *lands*, &c. And this is confirmed in *Lindopp* v. *Eboratt* (*b*), and in *Thompſon* v. *Lawley* (*c*): and copyhold is of leſs intereſt in law than leaſehold. [*Groſe* J. Where the intention is left doubtful upon the words of the will, that argument would have weight; but not where there is an apparent intention to paſs the copyhold. Lord *Ellenborough*. The teſtator never once mentions copyholds in his will; but only uſes general words: and can we ſuppoſe that in each inſtance he meant to ſeparate his copyhold from his freehold? Does it not appear that he intended every thing to paſs within the ambit of *Sutton*?] The will appears to have been drawn by one who underſtood the legal effect of words: and the teſtator gives power to the truſtees to limit terms of years for raiſing portions; and to the tenants for life, to leaſe for 21 years, &c.; powers which are inapplicable to copyholds. If then the copyhold did not paſs under the firſt clauſe, it paſſed to the

(*a*) *Cro. Car.* 203. (*b*) 3 *Bro. Ch. Caſ.* 188.

(*c*) 2 *Boſ. & Pull.* 303. and 5 *Veſ. jun.* 476. and *vide* the ſame queſtion diſcuſſed as to copyholds in *Doe* v. *Vernon*, 7 *Eaſt*, 20.

1808.

Doe dem. BELASYSE *againſt* The Earl of LUCAN.

leſſor in fee under the reſiduary deviſe; in which general words are ſufficient to paſs copyhold, according to *Doe* d. *Pate* v. *Davy* (*a*), *Car* v. *Elliſon* (*b*), and *Andrews* v. *Waller* (*c*): and for this purpoſe the ſurrender to the uſe of the will was neceſſary. 3dly and 4thly, As to the ſmall copyhold at *Kettleſhulme*, and the ſmall freehold in *Northwich*, it is clear they could not paſs by the firſt clauſe, being without the ambit of *Sutton*; and therefore they paſſed under the reſiduary clauſe.

Richardſon, contrà. The moſt material queſtion is upon the copyhold within the precinct or territory of *Sutton*; which deſcription cannot be confined, as contended, to lands within the *manor* of *Sutton*. Lands within the ambit of one manor may be parcel of another manor: and the knowledge of that circumſtance in the particular inſtance by the teſtator accounts for the generality of the deſcription of the lands, as lying within the *precinct or territory*, inſtead of ſaying the *manor*, of *Sutton*. And this is the ſtronger as he had before named the *manor*. The legal import of any place deſcribed by name, without more, is that it is a *townſhip*. But it is ſaid next, that the general words, *lands*, &c. in the firſt clauſe, there being *freehold* to anſwer the deſcription, will not paſs *copyhold*, even where it has been ſurrendered to the uſe of the will: but the caſes in equity, which were deciſions not merely on equitable points, but on queſtions whether the legal eſtate paſſed, ſhew that the rule is not general; but that where copyhold has been ſurrendered to the uſe of the will, it will paſs as well as freehold by general words: as *Haſlewood* v. *Pope* (*d*); which though it was a

(*a*) *Dougl.* 716. note. (*b*) 3 *Atk.* 73.
(*c*) 6 *Vin. Abr.* 237. *Copyhold*, W. e. *pl.* 12. (*d*) 3 *P. Wms.* 322.

deviſe

1808.

Doe dem. BELASYSE against The Earl of LUCAN.

deviſe for payment of debts, yet the judgment did not turn on that conſideration: and *Tendril* v. *Smith* (*a*), and *Goodwyn* v. *Goodwyn* (*b*), where the point was ruled generally, upon the words "meſſuages, lands, tenements, and hereditaments." In addition to which the will in queſtion has the word *farms*. In *Byas* v. *Byas* (*c*) the copyhold was held not to paſs by general words only, becauſe it was not ſurrendered to the uſe of the will. The ſituation of the teſtator's family, the local ſituation of this property, and the diſpoſition of the reſt of his eſtate, all ſhew his intention to paſs the copyhold in queſtion by the general words uſed to Lady *Lucan*. He had three daughters and no male deſcendant: to the eldeſt he gave the bulk of his eſtates, lying in *Yorkſhire*, and the property in *Groſvenor Square*: to the ſecond, a conſiderable eſtate in *Yorkſhire*, lying at a diſtance from the former, together with another eſtate in *Durham*: to Lady *Lucan*, his other daughter, he gave his eſtates in *Cheſhire*, containing the manor of *Sutton*, and alſo his *farms*, *lands*, &c. within the *precincts or territories* of *Sutton*, with their "rights, members, and appurtenances." The ſubſequent clauſes, charging the property deviſed to the eldeſt daughter with certain payments of land tax, receivers' ſalary, &c., were evidently for the purpoſe of equalizing this diſtribution a little more in favour of the younger daughters: it is therefore highly improbable that when the teſtator made no diſtinction in terms between his freehold and copyhold, which were held and enjoyed by him together as one eſtate, and partly leaſed together, and which were ſubject to the ſame modus and charges; he ſhould ſtill have meant to ſever the copyhold from the freehold in favour

(*a*) 2 *Atk.* 85. (*b*) 1 *Veſ.* 226. (*c*) 2 *Veſ.* 264.

1808.

Doe dem. BELASYSE *againſt* The Earl of LUCAN.

of his eldeſt daughter, to whom he had before given the bulk of his property ſituated at a great diſtance. 3dly, and 4thly, Theſe obſervations will in part apply alſo to the two ſmall farms, in the vicinity of *Sutton*; namely, the copyhold at *Kettleſhulme*, 8 miles off, of the annual value of 39*l.*, and the freehold at *Northwich*, 20 miles off, worth 19*l.* per ann.; which might be conſidered as *appurtenances* to the *Sutton* eſtate, and would certainly be included with it in the charge of the receivers' ſalary, which was thrown upon the property deviſed to the eldeſt daughter, in exoneration of that deviſed to the younger daughters. In *Cro. Eliz.* 113. a deviſe of a tenement, *with the appurtenances*, in which *H. B.* dwelleth in *Ebley*, was held to paſs land appurtenant, though it were out of *Ebley*. [Lord *Ellenborough*. There is nothing ſtated here to ſhew that theſe farms were enjoyed as *appurtenant* to the property in *Sutton*: one was 8, and the other 20 miles apart from it.] The property deviſed to Lady *Lucan*'s truſtees may poſſibly not be ſufficient, without theſe farms to defray the contingent charges upon it, which are 500*l.* a-year clear of all deductions for herſelf, the like annuity for her huſband, and 10,000*l.* for younger children, with intereſt at 5 per cent. [*Le Blanc*]. The intention of the teſtator to include theſe farms may be probable enough; but the difficulty is to find any words in the will capable of carrying them.]

Benyon in reply, as to the great copyhold in *Sutton*, (to which alone his attention was called by what had fallen from the Court) obſerved with reſpect to the caſes in equity, where general words had been held to carry copyhold, that they turned either upon deviſes in favour of creditors; or upon queſtions between heir and deviſee, where

1808.

Doe dem. BELASYSE *againſt* The Earl of LUCAN.

where when the heir elected to take ſomething deviſed to him under the will, a court of equity would oblige him to conform to the general directions of the will in favour of the other deviſees. *Hazlewood* v. *Pope* (*a*) was a deviſe in favour of creditors; in which caſe, a ſurrender ſhall be ſupplied. But in *Lindopp* v. *Eborall* (*b*), Lord Chancellor would not ſupply a ſurrender even in favour of a child which was otherwiſe provided for. It does not appear how the queſtion aroſe in *Tendril* v. *Smith* (*c*); but the generality of the propoſition there ſaid to be laid down is againſt the whole current of authorities. And in *Goodwyn* v. *Goodwyn* (*d*) there were introductory words, ſhewing a general intention in the teſtator to paſs *all* his eſtate. No inference can ariſe of ſuch an intention here in favour of Lady *Lucan* from the ſurrender to the uſe of the will, becauſe that was neceſſary to paſs the copyhold by the reſiduary deviſe. Nor can it ariſe from the charge on Lady *C. W. Belaſyſe* to pay the ſalary of the receiver for Lady *Lucan*; for it does not follow from thence that *all* the property in *Cheſhire* was to paſs to the latter. Then the power of leaſing, &c. affords a much ſtronger argument againſt the teſtator's intention to paſs the copyhold by the firſt clauſe, than that derived from the value of the eſtate deviſed to Lady *Lucan* in ſupport of ſuch intention: for the charges need not all be laid on at once.

Lord ELLENBOROUGH C. J. Sufficient appears upon the face of the will to ſatisfy me, without doubt, of the intention of the teſtator to give to Lady *Lucan* the copyhold within the townſhip of *Sutton*. The teſtator was

(*a*) 3 *P. Wms.* 322. (*b*) 3 *Bro. Chan Caſ.* 188.
(*c*) 2 *Atk.* 85. (*d*) 1 *Veſ.* 226.

1808.

DOE dem. BELASYSE *againſt* The Earl of LUCAN.

ſeized of three principal eſtates, partly freehold, partly copyhold; and had three daughters: and having ſurrendered his copyholds to the uſe of his will, he deviſed the bulk of his property lying in the North Riding of *Yorkſhire*, together with what he had in *Middleſex*, to Lady *Charlotte*. Another eſtate in the North Riding at a diſtance from the firſt mentioned, together with that in *Durham*, he deviſed to Lady *Anne*. He had a third eſtate in *Cheſhire*, the principal part of which is in *Sutton*, and the reſt conſiſted of two detached ſmall farms, the one eight, the other 20 miles from *Sutton*: and he deviſed to Lady *Lucan* and her family "all and ſingular the "manor or reputed manor of *Sutton*, and all my meſ- "ſuages, farms, lands, tenements, and hereditaments "whatſoever *within the precincts or territories* of *Sutton* "in the county of *Cheſter*, with their rights, members, "and appurtenances." The principal queſtion is whether the copyhold within the townſhip, but not parcel of the manor of *Sutton*, paſſed by this deviſe to Lady *Lucan?* For if not, the teſtator having given to Lady *Charlotte* all the reſt and reſidue of his real eſtates, it is clear that the reſiduary clauſe would carry every thing, copyhold as well as freehold, which he had not before deviſed. In conſtruing the deviſe in queſtion I ſhall proceed merely on the teſtator's intention as I collect it from the face of the will; for I am afraid to look at any argument of intention to be derived from the ſurrender to the uſe of his will; though perhaps it may be proper to be regarded even in this court, as it certainly would be in another court: but it is not neceſſary for me to give any opinion upon that point; for I profeſs to determine this caſe upon the intention, as collected from the words of the will only. The words of the clauſe are general, and whatever

1808.

Doe dem. Belasyse *againſt* The Earl of Lucan.

whatever thoſe words may legally comprehend is, and was, I think, meant to be given to Lady *Lucan*. Firſt he gives her his manor or reputed manor of *Sutton*. Then he gives her all his meſſuages, *farms*, lands, tenements, and hereditaments whatſoever, not within the *manor*, but *within the precincts or territories of* Sutton. If the words "lands, tenements, and hereditaments" only had been uſed, I admit that they would be confined to that which has been conſtrued to be the natural and legal ſenſe of thoſe words; namely, freehold, if the intention of the will could be ſatisfied by applying them to freehold only: but if the intention of the teſtator could not be ſatisfied without extending the words to copyhold, then they would comprehend both. Here, however, there are other words; "*farms*," "with their appurtenances." Why may not *farms* include copyhold as well as freehold? But out of all the words uſed I would look to ſee what muſt have been the intention of the teſtator. Upon a freehold eſtate of 800*l.* a-year, it muſt be contended by the plaintiff's counſel, that the teſtator meant to charge 500*l.* a-year for the ſeparate uſe of Lady *Lucan*, and 500*l.* a-year intereſt for younger children's portions, without looking to the contingent additional charge of 500*l.* for her huſband. The fund would then be ſhort and defective for the purpoſes which he had directly in his contemplation. Can ſuch an intention then be reaſonably imputed to the teſtator, and from what words of the will are we to collect it? The words uſed are general; the word *farms*, at leaſt, would include copyhold as well as freehold; and I ſhould think that even *lands, tenements, and hereditaments* might include both, if ſuch a conſtruction were neceſſary to give effect to the apparent intention of the teſtator; and here his intention, as it

1808.

Doe dem. Belasyse *againſt* The Earl of Lucan.

appears from the charges which he has laid upon the property deviſed to Lady *Lucan*'s truſtees, cannot be ſatisfied without giving the word *farms* at leaſt this interpretation. Then I ſee no ground for reſtraining the ſenſe of the general words, "*within the precincts and territories of* Sutton," to the *manor* of *Sutton*. The contrary intention is, I think, to be collected from the teſtator's firſt mentioning the *manor* of *Sutton*, and then extending his deſcription of the property deviſed to *all his meſſuages, farms*, lands, &c. *within the precinct or territories* of *Sutton*. And this is confirmed by the former clauſe of deviſe to Lady *Anne*, where, after mentioning certain manors by name, he goes on to deſcribe other meſſuages, farms, lands, &c. *within the precincts or territories* of places not coming within the deſcription of the manors before mentioned. Therefore conſtruing one part of the will by the other, it appears to me that the deſcription of the *manor* of *Sutton* does not over-ride the whole clauſe, but that by *the precincts and territories* of *Sutton* in the latter part of it, the teſtator meant the *townſhip* of *Sutton*. Founding my opinion, therefore, upon the apparent intention of the teſtator as I collect it from the words of the will, coupled with the facts of the caſe to which thoſe words apply, I think that the copyhold within the townſhip of *Sutton* paſſed by the clauſe in queſtion to Lady *Lucan*. But the two ſmall farms, the one copyhold, the other freehold, lying out of *Sutton*, will paſs by the reſiduary clauſe; not being compriſed within any of the words of deſcription of the prior clauſe. I lay no ſtreſs on the ſubſequent clauſe reſpecting the charge of the receiver's ſalary, or the modus which covers the copyhold as well as freehold land in *Sutton*.

Grose

1808.

Doe dem. Belasyse against The Earl of Lucan.

Grose J. Both from the words of the deviſe, and from the apparent intention of the teſtator on the whole of the will, I think that the copyhold in *Sutton* paſſed to Lady *Lucan*'s truſtees; and that the other ſmall eſtates out of *Sutton* paſſed by the reſiduary clauſe. I do not rely on the ſurrender to the uſe of the will; though I think it would be extraordinary if that were to paſs copyholds to the leſſors of the plaintiff and not the copyhold in *Sutton* to the defendants. But here are words large enough to comprehend the copyhold as well as freehold in *Sutton*, namely, meſſuages, *farms*, lands, &c. within *the precincts and territories* of *Sutton*; and the intention to paſs the copyhold there is quite clear for the reaſons which my Lord has ſtated, and which it is not neceſſary to repeat. And though it has been argued from authorities, that general words in a will ſhall not be conſtrued to carry copyhold where there is freehold to ſatisfy them under the ſame deſcription; yet that muſt be underſtood of caſes where there is no apparent intention to paſs the copyhold; which is clearly otherwiſe in the preſent caſe.

Le Blanc J. As to the ſmall copyhold and ſmall freehold lying out of *Sutton*, whatever one's belief may be as to the teſtator's intention to deviſe them to Lady *Lucan* they cannot paſs to her, becauſe there are no words ſufficient to include them. But as to the copyhold within the townſhip of *Sutton*, the ſituation of the teſtator in reſpect of this property is fit to be conſidered. He had ſurrendered his copyholds to the uſe of his will; and, ſo far, they were deviſeable property. He had let a conſiderable part of the copyhold in *Sutton*, together with the freehold there, to a farmer; and therefore he

1808.

Doe dem. BELASYSE *againſt* The Earl of LUCAN.

was at the time of making his will poſſeſſed of a *farm* in *Sutton*, conſiſting of both copyhold and freehold, let for 21 years. So circumſtanced he deviſes to Lady *Lucan* his manor of *Sutton*, and all his meſſuages, *farms*, lands, within the precincts and territories of *Sutton*, with their rights, members, and appurtenances. Now taking it for granted, for the preſent, that a deviſe, ſimply, of *lands, tenements, and hereditaments*, where there is freehold to anſwer the deſcription, will not paſs copyhold; yet the queſtion is, Whether the Court do not ſee a manifeſt intention of the teſtator in this caſe to paſs the copyhold in *Sutton?* Firſt, he gives to Lady *Lucan* the *manor* of *Sutton*; and then he gives all his meſſuages, farms, lands, &c. within the *precincts and territories* of *Sutton*, not ſaying within the *manor*, &c. We muſt therefore take it that by the change of expreſſion he meant ſomething more than the manor, which muſt be the townſhip of *Sutton*. In addition to that I cannot but think that when, having a farm conſiſting of freehold and copyhold, which latter was within the townſhip, but not within the manor of *Sutton*, he gives all his farms and lands, &c. in *Sutton*, he muſt have meant to paſs both the copyhold and freehold lands within *Sutton*. Then again when it is conſidered that he had only freehold in *Sutton* to the amount of 800*l.* per annum, I cannot think that he meant to deviſe that alone, limited too as it is in ſtrict ſettlement, when he lays ſuch large charges upon it; 500*l.* a-year to Lady *Lucan*, and 10,000*l.* for younger children, with power to her to charge the eſtates with 500*l.* per annum for her huſband. The amount of theſe charges afford a ſtrong argument, when we are conſidering the intention of the teſtator, to ſhew that he meant to include the copyhold as well as freehold in *Sutton*.

BAYLEY

1808.

Doe dem. BELASYSE *againſt* The Earl of LUCAN.

BAYLEY J. If it had been neceſſary to decide whether the general words, "lands, tenements, and hereditaments," would paſs copyhold as well as freehold, without other circumſtances to ſhew an intention to include both, I ſhould have deſired time to look into the authorities; but I think there are circumſtances in this caſe which clearly evince ſuch an intention. For, firſt, the teſtator had an undivided farm conſiſting of freehold and copyhold; and if he did not mean to paſs both, it muſt be divided. Therefore when he uſes the word *farm*, which applies to the entire ſubject, it raiſes a preſumption that he did not mean to divide it. Then the charges which he has laid upon the property deviſed would be greater than the amount of the freehold alone; which is another circumſtance to ſhew his intention to include the copyhold in *Sutton*. As to the ſmaller eſtates of copyhold and freehold lying out of *Sutton*, there are no ſufficient words to paſs them to Lady *Lucan*, and therefore they will paſs to the leſſors under the reſiduary clauſe.

Poſtea to the Leſſors of the Plaintiff as to the ſmall freehold and ſmall copyhold eſtate out of *Sutton*; and to the Defendant as to the reſt of the property.

1808.

Wednesday, May 25th.

The KING *against* YOUNG.

It does not appear that the freemen and liverymen of *London* are exempted from being impressed for the sea service, if in other respects fit subjects for that service.

GARROW moved for a writ of habeas corpus to bring up the defendant, a waterman and lighterman on the *Thames* who had been impressed, for the purpose of his discharge; on affidavits stating that he was a freeman and liveryman of the city of *London*, and as such claimed to be exempted from being impressed by reason of certain charters of *Ed.* 2. and *Ed.* 3. confirmed by act of parliament and by the usage in that behalf. And he referred to the instance of one *Millachip* a freeman and liveryman of *London*, who having been impressed in 1777 applied for a writ of habeas corpus for his discharge on the ground of his privilege; and, pending the inquiry, was discharged by order of the admiralty. And upon a similar application to the Court of C. B. in 1792 from another liveryman who had been impressed, a similar result took place.

The Court, however, after hearing those parts of the charters read which were referred to in the affidavits, and which certainly did not contain any exemption from the service in question in distinct terms, but rather seemed to refer to an exemption of the citizens in those times from being drawn out by the King to serve as soldiers extra civitatem, refused the writ: Lord *Ellenborough* C. J. saying, that there did not appear to be any foundation for the exemption claimed from a service, which this description of persons in every part of the country were equally bound to give in their avocation for the defence of the realm when necessity called for it.

Rule denied.

1808.

The KING *againſt* The Sheriff of SURRY, in the Cauſe of MORRIS *v.* DUFFIELD.

Wedneſday, May 25th.

THE action was by original, and the ſpecial capias iſſued on the 21ſt of *January* laſt, returnable on the firſt return of *Hilary* term, and indorſed for bail 81*l.*, on which the defendant was arreſted and gave a bail bond. And on the 2d of *February* notice of bail was given, and exception taken on the 3d, and a rule on the ſheriff to bring in the body ſerved on the ſaid day, which expired on the 9th; and the bail not having juſtified, the rule for an attachment was obtained on the 11th *February*; but the attachment not being returnable till the firſt day of *Eaſter* term (the 4th of *May*), it was not iſſued till the day before. In the mean time the defendant in the action became bankrupt on the 19th of *March*, and on the 21ſt of *April* ſurrendered in diſcharge of his bail. Whereupon in this term *Marryat*, on behalf of the ſheriff, obtained a rule niſi for ſetting aſide the attachment, upon the ground of the delay in iſſuing it, whereby he was prevented, as it was ſworn, from proving the debt under the commiſſion, as he might have done if the attachment had iſſued before the bankruptcy.

Where the rule for an attachment againſt the ſheriff for not bringing in the body was obtained on the 11th of *February*, which attachment was returnable on the 4th of *May*; and the plaintiff did not iſſue the attachment till the 3d of *May*, and in the mean time the defendant became bankrupt on the 19th of *March*, by which means the ſheriff loſt his opportunity of paying the debt and proving it under the commiſſion; the attachment was ſet aſide for ſuch laches.

Jervis and *Lawes* ſhewed cauſe againſt ſetting aſide the attachment; and ſaid that there was no rule of practice requiring a party to iſſue his writ of attachment againſt the ſheriff immediately after it is obtained: and here the action being by original, the attachment could not be made returnable before the firſt return of this term; before which time it was iſſued. In *Rex* v. *The*

1808.

The KING *against* The Sheriff of SURRY.

Sheriff of Surry (*a*) there was a delay of ſeveral terms in iſſuing the attachment againſt the ſheriff, which was afterwards ſet aſide. In *Rex* v. *Perring* (*b*) the rule for the attachment was obtained on the 19th of *November*, and the attachment was not ſued out till the 9th of *March* following; and the Court of C. B. held that to be too late. But the practice of the two courts differ in theſe caſes: for in C. B., though the rule to bring in the body has expired, yet if the defendant juſtify his bail before the attachment againſt the ſheriff be moved for, it is in time to pre[illegible]ar. it (*c*): but in this court, if the ſheriff be once in cont[illegible]pt for not bringing in the body, it is not purged by the defendant afterwards ſurrendering, though before the attachment be moved for (*d*).

Lord ELLENBOROUGH C. J. There is no occaſion to lay down any general rule with reſpect to the lapſe of time which ſhall be deemed ſufficient to diſcharge the ſheriff from the attachment in theſe caſes; but certainly 80 days excluſive is a long time to lay by after the party is armed with the proceſs of the court againſt the ſheriff: and here in the mean time an important change of circumſtances has taken place by the bankruptcy of the defendant. If there be no eſtabliſhed practice of this court in ſuch caſes, there is at leaſt a rule of right reaſon and juſtice which ought to be applied to the caſe before us; that if a party has a right to enforce payment of his debt againſt the ſheriff, he muſt purſue it within a reaſonable time, and not lay by ſo long as that by his laches the ſheriff ſhall be deprived of his remedy over againſt the debtor. The

(*a*) 7 *Term Rep.* 452. (*b*) 3 *Boſ. & Pull.* 151.
(*c*) *Thorold* v. *Fiſher*, 1 *H. Blac.* 90.
(*d*) *Rex* v. *Sheriff of Middleſex*, 8 *Term Rep.* 29.

mere

1808.

The KING *againſt* The Sheriff of SURRY.

mere time which elapſed in this caſe before the attachment was ſued out does not very much fall ſhort of what occurred in *The King* v. *Perring*: there it was 109, and here it is 80 days; and here the defendant's bankruptcy has intervened.

Per Curiam, Rule abſolute.

The KING *againſt* RICHARDSON.

Friday, May 27th.

The ſtatute 32 *Geo.* 3. *c.* 58. *ſ.* 1. enabling defendants in quo warranto to plead double, is, as well as the ſtat 9 *Ann. c.* 20, confined to corporate officers.

AN information in nature of a quo warranto having been filed againſt this defendant, to ſhew by what authority he claimed to be portreeve (*a*) of the borough of *Penryn* in *Cornwall*, he obtained a rule for pleading double: whereupon,

Burrough moved, on a former day, to diſcharge that rule; ſtating that this was a borough by preſcription, ſending members to Parliament, of which the portreeve was the returning officer, and elected at a preſcriptive court leet; but not being a corporate officer, he contended that the defendant was not within the ſtat. 9 *Ann. c.* 20. allowing double pleading by leave of the Court; which ſtatute had been often held, particularly in *Rex* v. *Wallis* (*b*), where all the prior caſes were conſidered, to be confined to corporate officers; and conſequently that he was not within the ſtat. 32 *Geo.* 3. *c.* 58. *ſ.* 1. which was made in pari materiâ with the former act, and merely limited the time for proſecuting ſuch informations, and muſt therefore receive the ſame conſtruction in this reſpect.

(*a*) Vi. *Rex* v. *Mein*, 3 *Term Rep.* 596. (*b*) 5 *Term Rep.* 375.

1808.

The KING *againſt* RICHARDSON.

The Attorney-General and *Dampier* contrà, on ſhewing cauſe, endeavoured to diſtinguiſh this from the caſe of *The King* v. *Wallis*, becauſe the office in queſtion there was conſtable of *Birmingham*, which is no borough, nor ſends members to Parliament as the borough of *Penryn* does, which properly conſtitutes it a *borough*; and alſo from a late caſe of *The King* v. *Bingham*, where the double plea was diſallowed by *Lawrence* J. in Court, in the caſe of the principal common law officer of *Goſport*, which is not a borough ſending members to Parliament. The words of the ſtatute of *Anne* extend as well to *offices* and *franchiſes* in *boroughs* as in *corporations*, and *portreeves* of *boroughs* are expreſsly named amongſt other officers. It is ſufficient therefore to bring the caſe within the act that the defendant, the *portreeve*, claims an *office* or *franchiſe* within a *borough*. The ſame reaſon alſo holds between corporations and boroughs ſending members to Parliament; and both were plainly within the view of the Legiſlature when they paſſed the act of the 32 *Geo.* 3. which has in ſubſtance the ſame words as the former law, and ought to be conſtrued favourably in advancement of the freedom of election and the quiet and good order of boroughs, as well as of towns corporate, both of which are named. But if a preſcriptive borough be held not to be within the meaning of the clauſe ſo far as reſpects the pleading double, neither will it be within it in reſpect of the limitation of ſix years for filing informations in nature of quo warranto againſt borough officers, which will very much abridge the benefit of the act.

Lord ELLENBOROUGH C. J. The two acts being in pari materiâ, the one following the other almoſt verbatim in this reſpect the conſtruction of the one muſt govern the

the other; and then the caſe of the *King* v. *Wallis* is in point, that the conſtruction is to be confined to corporate offices.

1808.

The KING *againſt* RICHARDSON.

Per Curiam, The rule for pleading double diſcharged.

CHAMBERS *againſt* DONALDSON and Others.

Friday, May 27th.

A feme covert living apart from her huſband under ſentence of ſeparation with alimony allowed pendente lite in the eccleſiaſtical court, having brought treſpaſs in the name of her huſband againſt wrongdoers for breaking and entering her houſe and taking her goods, the Court refuſed, on the application of ſuch defendants, to ſtay the action, though ſupported by an affidavit of the huſband (who had not releaſed the action, nor applied to be indemnified againſt the riſk of coſts) that the action was brought without his authority.

THE plaintiff's wife was living apart from him, under a ſentence of ſeparation, with alimony allowed, pendente lite, in the eccleſiaſtical court: and during that time the defendants broke and entered her houſe and took away her goods; for which an action of treſpaſs was brought by her in her huſband's name, as for breaking and entering his houſe and taking his goods: on which the defendants obtained a rule niſi for ſtaying the proceedings, and making the plaintiff's attorney pay the coſts, upon an affidavit, amongſt others, of the huſband himſelf, the nominal plaintiff, ſtating that the action had been commenced in his name without his authority: againſt which rule

Marryat now ſhewed cauſe, diſcloſing the real circumſtances of the caſe as above ſtated; and obſerved that the plaintiff had not releaſed the action, as he might have done, without lending his aid to the preſent application; but which he refrained from doing, becauſe it would be in fraud of the decree of the eccleſiaſtical court, which would make him indemnify the wife for her loſs by his act. Neither did he apply to this Court to be indemnified againſt any claim upon him for coſts in caſe the action did not ſucceed; which the Court would

of

1808.

CHAMBERS *against* DONALDSON and Others.

of courſe have directed to be done, and which the plaintiff's attorney was ready to have done: and therefore he concluded that the Court would not interfere in this ſummary way, againſt the juſtice of the caſe, thereby leaving the wife without any protection againſt wrongdoers.

Richardſon, contrà, urged that the action ought not to have been brought in the huſband's name, which expoſed him to the peril of coſts, at leaſt without previous application to him for that purpoſe, and tender of a ſufficient indemnity.

Lord ELLENBOROUGH C. J. It is very evident that this application cannot be made on the part of the huſband, the plaintiff on the record; for if he do not chooſe that the action ſhould proceed he has a remedy in his own hand, without this application, by releaſing it: and if the attorney who ſued out the writ had behaved ill in ſo doing, the huſband might have applied againſt him for ſuch miſconduct: or if the ſubject of the complaint were only that the huſband was made liable to the riſk of coſts without his conſent, we ſhould have taken care, upon a proper application, to have ſecured his indemnity. But it is evident that this is an application by the defendants, colluding with the huſband, to protect their own wrong, by defeating the action in the only form in which, under the unfortunate circumſtances of the caſe, the wife can protect herſelf; and we will not lend our diſcretionary aid to the defendants to divert thoſe legal forms, which are framed for the furtherance of juſtice, to the purpoſe of defeating it.

Per Curiam, Rule diſcharged.

1808.

AMEY *againſt* LONG.

Saturday, May 28th.

THIS was an action on the caſe, in which the declaration ſtated that the plaintiff, in *Michaelmas* term 47 *Geo.* 3. in the Court of *K. B.* impleaded one *K. Smith* in a plea of treſpaſs on the caſe to the plaintiff's damage of 500*l*; and ſuch proceedings were thereupon had, that afterwards, on the 2d of *December* 1806, at the ſittings at Niſi Prius at *Weſtminſter*, &c. before Lord *Ellenborough* C. J. a certain iſſue joined in the ſaid plea between the plaintiff and *K. S.* in due manner was tried, &c.: and that before the trial of the ſaid iſſue, viz. on the 28th of *November* 1806, the plaintiff proſecuted out of the ſaid court his Majeſty's writ of *ſubpœna*, directed to — *Railton*, *W. F. Hope*, *C. Long* (the defendant), and *A. Grace*; by which writ the king commanded them that they ſhould appear in their proper perſons reſpectively before the ſaid *Edward* Lord *E.* &c. in his Majeſty's ſaid court at *Weſtminſter Hall*, in the county of *Middleſex*, on *Tueſday* then next, viz. on the 2d of *December* 1806, &c.: *And that they the ſaid C. Long and A. Grace, or one of them, ſhould produce and ſhew forth at the time and place aforeſaid, a certain warrant granted to them or one of them by the Sheriff of Surry*, upon a certain writ of non omittas teſtatum fieri facias iſſued out and under the ſeal of the ſaid Court, &c. on or about the 13th of *May* then laſt, between the plaintiff and *S. Glover*, defendant, *and the paper writing or inſtructions which accompanied the ſame warrant*; and then and there to teſtify and ſhew all and ſingular thoſe things which they knew, or the ſaid warrant, papers, &c. might

The writ of ſubpœna duces tecum is of compulſory obligation on a witneſs to produce papers thereby demanded which he has in his poſſeſſion, and which he has no lawful or reaſonable excuſe for withholding; of the validity of which excuſe the Court, and not the witneſs, is to judge. And in an action againſt a ſheriff's bailiff, for diſobeying ſuch writ, who having been ſubpœnaed, in a former action by the plaintiff againſt another, to produce the warrant under which he acted, had neglected ſo to do, whereby the plaintiff was nonſuited; his ability to produce the warrant and his want of juſt excuſe for not producing it, are ſufficiently alleged by ſtating, that he could and might in obedience to the ſaid writ of ſubpœna have produced at the trial the ſaid warrant, and that he had no lawful or reaſonable excuſe or impediment to the contrary.

1803.

AMEY against LONG.

import, of and concerning the said action between the plaintiff and *K. Smith*, &c.: which said writ the plaintiff afterwards, and before the trial of the said issue, viz. on the 1st of *December* 1806, at *Westminster*, &c. caused to be made known and shewn to the defendant, and a copy thereof to be left with him, and then and there paid him 1*s*., being a reasonable sum for his costs and charges in attending as a witness, according to the tenor of the said writ of subpœna. And although the defendant, *in part obedience* of the said writ of subpœna, did afterwards, on the 2d *December* 1806, at *W.* &c. appear as a witness on the trial of the said issue; and although the defendant *could and might*, in obedience of the said subpœna, *have produced and shewn forth at the time and place aforesaid on the said trial of the said issue the said warrant* so mentioned and referred to in the said writ of subpœna, as aforesaid, and thereby so required to be produced and shewn forth as aforesaid; and although the production and shewing forth of the said warrant was *material evidence* for the plaintiff on the said trial, and would have enabled the plaintiff to have obtained a verdict on the said issue against the said *K. S.* at *W.* &c. whereof the defendant there had notice; yet the defendant not regarding his duty in that behalf, but wrongfully and unjustly intending to injure the plaintiff, and to deprive her of the benefit of the same evidence on the trial of the said issue, and thereby to prevent her from obtaining a verdict against the said *K. S.* thereon, and to put her to expence, &c. *did not nor would* at the time and place aforesaid, on the said trial of the said issue, *produce or shew forth the said warrant*, or the said paper writing or instructions so mentioned and referred to in the said writ of subpœna as aforesaid; although the defendant was then

and

1808.

AMEY against LONG.

and there ſolemnly called upon by the ſaid Court for that purpoſe, *and had no lawful or reaſonable excuſe or impediment to the contrary*; but then and there wholly neglected and refuſed ſo to do: and by reaſon thereof the plaintiff was nonſuited in the ſaid action; and ſuch proceedings were thereupon had in the ſaid action, that afterwards, in *Hil.* 47 *Geo.* 3. the ſaid *K. S.* recovered againſt the plaintiff 52*l.* 10*s.* for his coſts and charges about his defence in that behalf, as by the record, &c. more fully appears. By reaſon of which ſaid ſeveral premiſes the plaintiff was not only obliged to pay and did pay to the ſaid *K. S.* the ſaid ſum of 52*l.* 10*s.* but was hindered and delayed in the recovery of her damages in the plea aforeſaid, and was obliged to lay out 200*l.* more in and about the proſecution of the ſaid action, &c. There was another count in ſubſtance the ſame. To which the defendant pleaded not guilty; and the plaintiff obtained a verdict.

A motion was made in laſt *Hilary* term to arreſt the judgment in this caſe, on two grounds; 1ſt, that it was not ſufficiently alleged in the declaration, that the defendant had it in his power to produce the warrant which the writ of ſubpœna duces tecum required him and another perſon to whom it was directed, or one of them, to produce at the trial. 2dly, That that which is commonly called a writ of ſubpœna duces tecum is not of compulſory obligation in the law. The caſe was argued at length by *Park*, *Marryat*, and *Pell*, on ſhewing cauſe againſt the rule for arreſting the judgment; and by *The Attorney-General*, and *Garrow*, in ſupport of it.

Againſt the rule it was urged, on the firſt ground of objection, that after verdict it was to be preſumed that every material allegation in the declaration, neceſſary to ſupport the gravamen of the complaint, was proved;

1808.

AMEY against LONG.

and conſequently it muſt be taken that the defendant *could and might have produced at the trial the warrant* mentioned in the ſubpœna duces tecum. For if it had appeared to the Court and jury that he had it not in his poſſeſſion or control (not having voluntarily parted with it in fraud of the ſubpœna), and conſequently could not in fact have produced it, but by the conſent of others, over whoſe acts he had no control, the plaintiff could not have recovered a verdict upon that allegation. And this preſumption ariſes more ſtrongly from the ſubſequent allegation, that the defendant *had no lawful or reaſonable excuſe or impediment to the contrary*, which let him in to ſhew, if he had, any reaſonable excuſe for not having ready to produce at the trial the warrant which was once in his poſſeſſion, and was his authority for what he did by the ſheriff's command. Upon this head of preſumptions after verdict, they referred principally to *Macmurdo* v. *Smith*, 7 *Term Rep.* 518., *Bull. Ni. Pri.* 320. and 1 *Saund.* 228. note 1. by Serjt. *Williams*, which collects all the caſes. As to the ſecond and principal point, they contended that the writ of ſubpœna duces tecum was known to have been in general uſe for a conſiderable period paſt. It is to be found in *Clerk's Manual*, 31. which was publiſhed in 1678, in the *Theſaurus Brevium*, 304. and *Officina Brev.* 385., amongſt other forms of acknowledged writs. The precedents of the common ſubpœna ad teſtificandum are ſcarcely more ancient than thoſe of the ſubpœna duces tecum. This writ is of eſſential importance to the due adminiſtration of juſtice; oftentimes as much ſo as the common writ of ſubpœna to compel the attendance of witneſſes: for where a matter depends upon written evidence in the poſſeſſion of another than the party in the cauſe who is intereſted in its production, it would be

1808.

AMEY *againſt* LONG.

nugatory to enforce his perſonal attendance, without the document by which the truth of the fact in iſſue can alone be proved. And as the obligation of a witneſs to anſwer by parol does not depend upon his own judgment, but on that of the Court, the ſame rule muſt prevail with reſpect to his production of documentary evidence. The witneſs is bound at all events to bring with him the paper which he has been ſubpœnaed to produce; and when it is in Court he may then ſtate any legal or reaſonable excuſe for withholding it, of which the Court will judge. In this reſpect there can be no diſtinction in principle between parol and written evidence. Proof of either kind, if within the knowledge or poſſeſſion of the witneſs, ought to be produced, if legal; and of its legality the Court and not the witneſs muſt judge. This writ is alſo to be found in all modern books of entries and practice: it is ſpoken of by Mr. Juſtice *Blackſtone* (3 *Com.* 382.) as a writ well known in the law. And though the general power of compelling a witneſs to produce every document in his poſſeſſion was denied by Lord *Kenyon* in *Miles* v. *Dawſon* (*a*), and *Bateſon* v. *Hartſink* (*b*); and he protected the witneſſes there in withholding certain documents which went to affect the intereſts of third perſons; yet thoſe were mere exceptions to the general rule,

(*a*) 1 *Eſp. Ni. Pri. Caſ.* 405. The caſe was thus ſtated by one of the defendant's counſel who was engaged in it. It was an action of treſpaſs for taking the plaintiff's ſhip; and he called a witneſs to prove the taking, who it was alleged had done it under a letter of attorney from the defendant; which letter the witneſs had in his hands when called; but objected to produce it, though ſerved with a ſubpœna duces tecum: and Lord *Kenyon* held that he was not obliged to produce it: in conſequence of which the plaintiff was obliged to prove the fact of the taking by the defendant's authority in another way.

(*b*) 4 *Eſp. N. P. Caſ.* 43.

1808.

AMEY against LONG.

ſtanding on the ſame footing as the practice of the courts of equity, in refuſing to compel a party to diſcloſe his title; and as the practice of the courts of law in refuſing to compel a witneſs to give evidence which tends to criminate himſelf, or to diſcloſe matters communicated to him confidentially in the character of counſel or attorney. And in *Leeds* v. *Cook* (*a*), where a witneſs had been ſerved by the defendant with a ſubpœna duces tecum to produce a letter written to her by the plaintiff, which it appeared ſhe had afterwards given up to him at his requeſt; Lord *Ellenborough* let in parol evidence of its contents. Then ſuppoſing this writ to be of binding force like a common ſubpœna, they referred to *Wakefield's* caſe (*b*), and to *Pearſon* v. *Iles* (*c*), recognizing that a remedy by action lay at the common law for the default of the witneſs.

On the part of the defendant it was objected, firſt, that the declaration did not ſtate any fact to ſhew that he, the witneſs in the former action, had the power of producing the warrant at the trial: it is not alleged that he had poſſeſſion of it at the time of the ſervice on him of the ſubpœna duces tecum, and alſo at the time of the trial; or that having it in the firſt inſtance, he might have held it till called to produce it; which would have ſhewn that he had, or might, but for his own default, have had it to produce then. It is not even ſtated that he was at any time *poſſeſſed* of, or *entitled* to the poſſeſſion of it: but the general allegations of the declaration would be anſwered by proof that another perſon, who had the warrant, had told the defendant that he would let him have it to produce, and that ſuch perſon was ready to have

(*a*) 4 *Eſp. N. P. Caſ.* 256. (*b*) *Rep. temp Hardw.* 313.
(*c*) *Dougl.* 556.

delivered

1808.

AMEY *against* LONG.

delivered it to him on requeſt. On the general point, they argued that the obligation to obey ſuch a ſubpœna, if legal, muſt always have exiſted, and been in general uſe: and, if ſo, it was ſingular that ſo few precedents, and thoſe comparatively in modern times, could be ſhewn; that each ſhould be directed to ſeveral perſons, and for the production of public documents, ſuch as pariſh regiſters. From thence they inferred that the writ of ſubpœna duces tecum only lay to public officers for the production of the public documents in their cuſtody, in which all perſons had or might have an intereſt; and could not properly be extended to private perſons, to compel them to produce papers belonging to them individually, or which might happen to be in their cuſtody. The inconvenience to ſome individuals of compelling ſuch diſcloſures will more than counterbalance any convenience to others. This is notorious, and admitted, with reſpect to title deeds and the like; and it applies in different degrees to other private papers. The owner of ſuch papers, of a letter, for example, may not be able preciſely to ſhew what detriment may enſue to him from the diſcloſure of its contents, and yet they may be ſuch, concerning himſelf, his family, or friends, which he might juſtly diſlike to publiſh. And if the plaintiff in the action have a right to read part of it in evidence, the defendant muſt neceſſarily have an equal right to have the remainder read, in order to be aſſured that it does not qualify or vary the ſenſe of what was deemed material by the other. Then how can the materiality of any part of a paper which is demanded to be produced in evidence be aſcertained, except by the peruſal of it, if not by the party calling for it, at leaſt by the Judge preſiding at the trial; which may let in all the inconvenience to be ap-

1808.

AMEY against LONG.

prehended, although ultimately it ſhould turn out that there was a ſufficient reaſon for withholding it, either as not applicable to the iſſue between the parties, or as the production of it would be injurious to the legal intereſts of the witneſs. But further, when this ſubject was before the Legiſlature in the time of Queen *Elizabeth*, and when a remedy was given by the ſtat. 5 *Eliz. c.* 9. *ſ.* 12. for the non-attendance of witneſſes upon whom proceſs was ſerved to teſtify, it is incredible that a like recompence ſhould not have been given in caſe of the non-production of writings, as well as for the non-appearance of the witneſſes themſelves, if it had been then conſidered that they were bound to produce any documents which the parties in a ſuit might think proper to call for. It is admitted, however, that the remedy of the party grieved by the default of a witneſs, in not appearing when ſerved with a common ſubpœna, does not reſt on this ſtatute, but that there are many precedents of declarations in ſuch actions at common law: but that only points the argument more ſtrongly againſt the extenſion of the remedy to the caſe in queſtion, of a witneſs appearing but not producing a paper which he was demanded by a ſubpœna to produce, of which not one precedent either ancient or modern has been ſhewn. They alſo relied on the opinion of Lord *Kenyon* in the caſes before cited againſt the right to compel a witneſs to produce papers.

In addition to theſe arguments, it was ſtated to have been the opinion of ſome eminent men at the bar, now deceaſed, and of others who had ſat on the bench, that a witneſs was not bound to produce papers belonging to him by virtue of a ſubpœna duces tecum, ſerved on him at the ſuit of third perſons; and that inſtances had occurred of witneſſes having been adviſed in open court

by

1808.

AMEY *againſt* LONG.

by the counſel of the adverſe party in the cauſe not to produce the papers called for; though the production of them was not objected to on any ſpecial ground. But Lord *Ellenborough* and Mr. Juſtice *Lawrence* declared that they had never known of any ſuch inſtances in their own time. And the latter ſaid that this was one of the greateſt queſtions he had ever heard agitated in *Weſtminſter Hall*; one which moſt deeply affected the adminiſtration of juſtice, both civil and criminal. That he could not reconcile it to his mind to ſuppoſe, that the innocence of a perſon accuſed might depend on the production of a certain document in the poſſeſſion of another, who had no intereſt in withholding it, and yet that there ſhould be no proceſs in the country which could compel him to produce it in evidence. Lord *Ellenborough* ſaid, that ſince the exiſtence of the courts of law there muſt have been ſome method of compelling the production of written evidence, and they were not aware of any other method than by the writ of ſubpœna duces tecum. That the queſtion being of very general and public concern, and as Lord *Kenyon* appeared to have once intimated great doubt at leaſt of the efficacy of ſuch a writ; and as the queſtion was upon the record, and the ultimate deciſion of it would give the rule in future; the Court would give the caſe the moſt profound conſideration, and deliver their opinion at another time. The caſe accordingly ſtood over from *Hilary* term to this day, when

Lord ELLENBOROUGH C. J. delivered the unanimous opinion of the Court.

The judgment in this caſe was moved to be arreſted on two grounds; firſt, that it was not alleged in the declaration with ſufficient certainty, that the defendant *had it in his*

1808.

AMEY against LONG.

his power to do the thing which the writ of ſubpœna duces tecum required him and one *Grace*, or one of them, to do; viz. to produce the ſheriff's warrant upon a teſtatum fieri facias to them, or one of them, directed. Secondly, That the ſuppoſed writ of ſubpœna duces tecum mentioned in the declaration was not a writ known to the law, nor had any ſuch compulſory force and obligation attached to it as the declaration ſuppoſes. As to the firſt of theſe objections, and which applies to both counts of the declaration equally, it appears to us that the allegation "that the defendant *could and might* in obedience "to the ſaid ſubpœna have produced and ſhewn forth at "the time and place aforeſaid at the ſaid trial of the "ſaid iſſue the ſaid warrant mentioned and referred to "in the writ of ſubpœna," in the plain, natural, and obvious ſenſe of theſe words imports an immediate phyſical ability to do the thing required to be done on the part of the defendant; *i. e.*, that the defendant was able, by having the warrant in his own poſſeſſion, to have produced it: and not that by application to others who had the cuſtody of it he *could and might* have acquired the means, and indirectly have become the inſtrument, of producing it. The latter ſenſe of the words is indeed ſo remote from the ordinary underſtanding of mankind on ſuch a ſubject, and has ſo little reference to the duty ſought to be enforced, viz. the production of that by the witneſs which the witneſs could, in obedience to the ſubpœna, perſonally produce; that, after verdict, it is not to be intended that the Judge at the trial received proof of the words in this ſtrained and unnatural ſenſe of them. And when it is afterwards ſaid in the count that the defendant did not, *nor would*, at the time and place of trial produce the warrant, although ſolemnly

called upon by the Court for that purpoſe; "*and although* "*he had no lawful or reaſonable excuſe or impediment to the* "*contrary;*" it certainly excludes the caſe of the warrant being in the poſſeſſion of another; and on that account attainable only through the means or by the delivery of ſuch other perſon; inaſmuch as the exiſtence of ſuch circumſtances, if they had in fact exiſted, would have afforded "a lawful and reaſonable excuſe and impediment to the contrary;" and of courſe have falſified the allegation upon which the blame of non-production is reſted: no man being obliged, according to any ſenſe of the effect of ſuch a ſubpœna, to ſue and labour in order to obtain the poſſeſſion of any inſtrument from another for the purpoſe of its production afterwards by himſelf, in obedience to the ſubpœna. We are of opinion, therefore, that there is no ground for arreſting the judgment upon this firſt objection.

As to the ſecond, and moſt material objection, viz. that a ſubpœna duces tecum is not a writ of compulſory obligation and effect in the law; it has been principally maintained in argument, on the part of the defendant, on the ground, that no ſuch writ is to be found in the *Regiſtrum Brevium*, nor any where elſe prior to the time of *Car.* 2. when the inſtances to be found in *Clerk's Manual*, 31. *Theſaurus Brevium*, 304. and *Officina Brevium*, 385. firſt occur. But when it is recollected that the *Regiſtrum Brevium* does not even contain the common writ of ſubpœna ad teſtificandum, the antiquity and compulſory effect of which is not diſputed, [His Lordſhip here referred to *Pearſon* v. *Lee*, *Dougl.* 556. 561. where it is laid down by Lord *Mansfield*, that the Courts of *Weſtminſter Hall* proceeded againſt witneſſes who wilfully abſented themſelves, as for a contempt, before the ſtat.

5 *Eliz.*

1808.

AMEY against LONG.

5 *Eliz. c.* 9.: and that ſtatute refers to proceſs out of courts of record to teſtify concerning matters depending in thoſe courts, as proceſs then known and in uſe;] the obſervation ariſing from the omiſſion of the writ in queſtion becomes leſs important. And indeed there are a multitude of writs, in daily uſe and of unqueſtioned legal validity and effect, which are not inſerted in that collection. One need not go further for an inſtance than the very writ of non omittas fieri facias, mentioned in this ſame declaration. The right to reſort to means competent to compel the production of written, as well as oral, teſtimony ſeems eſſential to the very exiſtence and conſtitution of a court of common law, which receives and acts upon both deſcriptions of evidence, and could not poſſibly proceed with due effect without them. And it is not poſſible to conceive that ſuch courts ſhould have immemorially continued to act upon both, without great and notorious impediments having occurred, if they had been furniſhed with no better means of obtaining written evidence than what the immediate cuſtody and poſſeſſion of the party who was intereſted in the production of it, or the voluntary favour of thoſe in whoſe cuſtody the required inſtruments might happen to be, afforded. The courts of common law, therefore, in order to adminiſter the juſtice they have been in the habit of doing for ſo many centuries, muſt have employed the ſame or ſimilar means to thoſe which we find them to have in fact uſed from the time of *Charles* the Second at leaſt, according to the entries before referred to; unleſs indeed it is to be inferred from the circumſtance of thoſe particular entries being found to reſpect books and papers in the cuſtody of rectors, vicars, and churchwardens, that the compulſory power of the Court related only to books and papers of that deſcription, and producible only by ſuch perſons,

and

1808.

AMEY *against* LONG.

and upon a queſtion of nonage merely; a ſuppoſition to which we can by no means accede. They may be taken therefore as known and recorded ſpecial inſtances of a general practice to compel by writ the production of neceſſary written teſtimony at the trial of ſuits at law. In the caſe of *The King* v. *Dixon*, 3 *Burr.* 1687. it was held by Lord *Mansfield* and the reſt of the Court, that an attorney who had been ſerved with a ſubpœna duces tecum out of the Crown office, to produce certain vouchers which his client, a Mr. *Peach*, had exhibited and relied upon before a Maſter in Chancery, and which ſubpœna had been ſerved upon the attorney, in order to found a proſecution for forgery againſt his client, was not bound to produce thoſe required vouchers. In that caſe no objection was taken to the *writ*, but to the ſpecial circumſtances under which the party poſſeſſed the papers; ſo that the Court may be conſidered as recognizing the general obligation to obey writs of that deſcription in other caſes. Indeed the niſi prius caſe of *Miles* v. *Dawſon*, 1 *Eſp. N. P. Caſ.* 405. in which Lord *Kenyon* refuſed to compel a witneſs to produce a power of attorney in his poſſeſſion, eſtabliſhes in principle nothing more than this, that there are circumſtances in reſpect of which the production of an inſtrument, required in the terms of a ſubpœna, would not be enforced by the authority of the Court; which is a propoſition too clear to be doubted. And, to be ſure, though it will be always prudent and proper for a witneſs, ſerved with ſuch a ſubpœna, to be prepared to produce the ſpecified papers and inſtruments at the trial, if it be at all likely that the Judge will deem ſuch production fit to be there inſiſted upon; yet it is in every inſtance a queſtion for the conſideration of the

Judge

1808.

AMEY *against* LONG.

Judge at nisi prius, whether, upon the principles of reason and equity, such production should be required by him, and of the Court afterwards, whether, having been there withheld, the party should be punished by attachment. I have not thought it necessary to advert to certain extrajudicial opinions, supposed to have been entertained and expressed by several eminent lawyers on this subject, as they afford no safe basis for judicial determination, and are contradicted by the actual practice and experience of courts of law during the period already alluded to, as well as opposed by the convenience and necessity of common law trials, which must have at all times required, and may therefore be presumed to have had, the use of some such means as the writ in question, to conduct them to any useful and effectual termination. Upon the whole, therefore, as to the general question, whether a writ of subpœna duces tecum be a writ of compulsory obligation and effect in the law; we are of opinion that it is: and, therefore, that neither upon this second ground, any more than upon the former, ought this judgment to be arrested.

Rule discharged.

1808.

ROBERTSON and Another, Aſſignees of MILBURN, HALLOWELL, and WALMSLEY, Bankrupts, *againſt* Sir THOS. HENRY LIDDELL Bart.

Saturday, May 28th.

IN trover, the following caſe was made for the opinion of this Court, which was tried before *Chambre* J. at the aſſizes for *Northumberland* in 1805.

The action was brought againſt the late ſheriff of *Northumberland* to recover the value of houſehold furniture belonging to the bankrupt *Milburn*, ſold by the ſheriff under an execution at the ſuit of *Newnham* and Co. upon a judgment obtained after the ſuppoſed act of bankruptcy and the actual aſſignment to the plaintiffs. *Milburn*, *Hallowell*, and *Walmſley*, were copartners in the buſineſs of ſhip-building at *North Shields*, in the county of *Northumberland*; and *Milburn*, *Hallowell*, and one *Humble* were alſo partners in a brewery at the ſame place. In *Auguſt* 1803 their partnerſhip concerns became much deranged, and on the 6th of *December* following *Milburn*, *Hallowell*, and *Walmſley*, (the two former having been arreſted about three weeks before) left *North Shields* from an apprehenſion of being arreſted by *Brown* and *Dixon* of *Newcaſtle*, and other creditors. They left home together, and croſſed over the river *Tyne* to *South Shields*, in the county of *Durham*, in order to get out of *Northumberland*, and came up to *Gateſhead*, in the county of *Durham*. Whilſt they were at *Gateſhead* they ſent for Mr. *Bainbridge*, an attorney of *Newcaſtle*, who went to *Gateſhead*, and found all the three parties there together. They then

The departure of a trader from his dwelling-houſe, *with intent* to delay his creditors, is an act of bankruptcy, though no creditor be *thereby* in fact delayed. And the words in the ſtat. 1 *Jac.* 1. *c.* 15. *ſ.* 2. following this and other acts of bankruptcy committed, viz. "to the intent "*or whereby* his "creditors *ſhall* "or *may* be de-"feated or de-"layed," &c. are to be read "to the intent "his creditors "*ſhall*, or "whereby, (or "that thereby) "they *may* be "defeated," &c. But the lying in priſon ſix months upon an arreſt is made a ſubſtantive act of bankruptcy independant of any intent of the trader.

So in the caſe of an act of bankruptcy by the trader's *beginning to keep houſe*, the denial of a creditor is uſually given in evidence, not to ſhew the fact of the creditor's being delayed, but as evidence to explain the equivocal act of the trader's keeping in his houſe, and to ſhew that he *began to keep houſe with intent* to delay his creditors.

informed

1808.

ROBERTSON *againſt* LIDDELL.

informed him that they had left their homes for fear of being arreſted, and they ſaid that they croſſed the water at *South Shields* in order to get out of the county of *Northumberland* as ſoon as they could, and had come up on the ſouth ſide in the county of *Durham*, and that they were on their road to *Gillſland* in *Cumberland*. *Bainbridge* told them that he was afraid their proceedings would end in a commiſſion of bankrupt, and wiſhed them to go back to *North Shields*. *Walmſley* did in fact return thither either on that or the following day; and *Bainbridge* told him to be extremely circumſpect in what way he acted: but *Millburn* and *Hallowell* proceeded to *Gillſland*. Several creditors of *Millburn*, *Hallowell*, and *Walmſley*, called for payment of their debts (*a*) during the abſence of *Millburn* and *Hallowell*; but it did not appear whether they ſo called during the abſence of *Walmſley*, in manner and for the purpoſe aforeſaid, or after *Walmſley*'s return to *North Shields* from *Gateſhead*. A joint commiſſion of bankrupt was iſſued againſt *Millburn*, *Hallowell*, and *Walmſley*; upon which they were declared bankrupts, and the plaintiffs were duly choſen aſſignees. The queſtion was, Whether an act of bankruptcy had or had not been committed by *Millburn*, *Hallowell*, and *Walmſley*.

The only queſtion argued was, Whether *Walmſley*'s having departed from his dwelling-houſe *with intent* to delay his creditors, but *no creditor* having been *in fact delayed* by ſuch his departure and before his return home, conſtituted an act of bankruptcy? The affirmative of the queſtion was argued by *Carr* for the plaintiffs; and the negative by *Hullock* for the defendant. The argument turned upon the critical meaning of the words of

(*a*) It was admitted that they were not paid.

the

1808.

ROBERTSON *againſt* LIDDELL.

the ſtat. 1 *Jac.* 1. *c.* 15. *ſ.* 2. as preceded and explained by the ſtat. 13 *Eliz. c.* 7. *ſ.* 1. made in pari materiâ, and upon the conſtruction which theſe ſtatutes had received in different caſes. The giſt and force of the argument was afterwards fully ſtated by Lord *Ellenborough* in delivering the judgment of the Court on a ſubſequent day in the term, and therefore it will be ſufficient to ſtate the ſeveral proviſions of the two ſtatutes, and the caſes which were referred to and commented upon.

By ſtat. 13 *Eliz. c.* 7. *ſ.* 1. "if any merchant, &c. "ſhall depart the realm, or begin to keep his houſe, or "otherwiſe to abſent himſelf, or take ſanctuary; or "ſuffer himſelf willingly to be arreſted for any debt, "&c.; or ſuffer himſelf to be outlawed; or yield him-"ſelf to priſon; or *depart from his dwelling-houſe* or "houſes, *to the intent* OR *purpoſe* to defraud or hinder "any of his creditors of their juſt debt," &c.; he ſhall be deemed a bankrupt. Then the ſtat. 1 *Jac.* 1. *c.* 15. intituled "An act for the better relief of the creditors," &c. reciting, amongſt other defects, that "the deſcription of a bankrupt in former ſtatutes is not ſo fully expreſſed" as is meet, enacts, by *ſ.* 2. "that every perſon "uſing the trade of merchandize, &c. who ſhall depart "the realm; or begin to keep his houſe, or otherwiſe "to abſent himſelf, or take ſanctuary; or ſuffer himſelf "willingly to be arreſted for any debt, &c.; or ſuffer "himſelf to be outlawed; or yield himſelf to priſon (*a*); "or willingly or fraudulently procure himſelf to be ar-"reſted, or his goods, money, or chattels, to be at-"tached or ſequeſtered; or depart from his dwelling-"houſe; or make or cauſe to be made any fraudulent

(*a*) So far following the former ſtatute.

1808.

ROBERTSON *againſt* LIDDELL.

" grant or conveyance of his lands, goods, &c., *to the* " *intent* OR *whereby* his creditors *ſhall* or *may* be defeated " or delayed for the recovery of their juſt and true " debts; or being arreſted for debt ſhall after his arreſt " lie in priſon ſix months or more upon that arreſt, or " upon any other arreſt, &c. ſhall be adjudged a bank- " rupt." The authorities cited and commented upon by *Carr* were 1 *Com. Dig.* 523. *Bankrupt*, C. 1. 1 *Bac Abr.* 383. *Bankrupt*, A. *Colkett* v. *Freeman*, 2 *Term Rep.* 59. (*a*). *Heylor* v. *Hall*, *Palm.* 325. *Dickinſon* v. *Foord*, *Barnes*, 160. *Phillips and Peake* v. *The Sheriff of Eſſex*, before *Eyre* C. J. *Green*, 52. and 2 *Montague*, 158. *Aldridge* v. *Ireland*, *E.* 34 *Geo.* 3. cited 7 *Term Rep.* 512. and *Fowler* v. *Pagett*, ib. 509. and *Hawkins* v. *Lukin*, *T.* 36 *G.* 3. ib. 516. *Barnard* v. *Vaughan*, 8 *Term Rep.* 149. explained in *Wilſon* v. *Norman*, *Cullen*, 34. and 1 *Eſp. N. P. Caſ.* 334. *Aſſignees of Miller* v. *Turner*, *Montague* 167. *Adey and Others Aſſignees of Parker*, v.—Sittings at *Weſtminſter*, *M.* 41 *Geo.* 3. ib. There Lord *Kenyon* C. J. ſaid (MS.) that the real ground of deciſion in *Barnard* v. *Vaughan* was that Mrs. *Barnard* left her dwelling-houſe to avoid the inconvenience of being there with the ſheriff's execution, and not to avoid her creditors. *Hornſby and Others*, *Aſſignees of Needham*, v. *Neville*, *York Lent Aſſizes* 1801, when *Chambre* J. held that the trader leaving his houſe with intent to delay his creditors, though none were actually delayed, was an act of bankruptcy. The ſame opinion by Lord *Eldon*, in *Wolf* v. *Horn*, in Chancery, *T.* 44 *G.* 3. and *Hammond and Others*, *Aſſignees of Gadſden*, v. *Hincks*, *T.* 44 *G.* 3. 5 *Eſp. N. P. Caſ.* 139.

(*a*) This was only cited to ſhew, that if *Walmſley* committed an act of bankruptcy by departing from his dwelling-houſe with intent to delay his creditors, his return home again could not purge the act of bankruptcy; which was admitted at once by the Court.

S. P.

S. P. *Garret* v. *Moule*, 5 *Term Rep.* 575. *King* v. *Bebb*, Excheq. *Hil.* 46 *G.* 3. and *Dudley* v. *Vaughan*, Sittings at *Guildhall* after laſt *Eaſter* term, before Lord *Ellenborough* C. J. who ruled that a trader beginning to keep houſe with intent to delay his creditors was ſufficient to conſtitute an act of bankruptcy, though he were only denied to be ſeen, but not denied to be at home. In addition to theſe *Hullock* mentioned another niſi prius caſe before *Chambre* J. where the reſult was different from that in *Hornſby* v. *Neville*; alſo *Jackman* v. *Nightingale*, *E.* 13 *G.* 2. per *Lee* C. J. at *Guildhall*, *Bull. N. P.* 40.; *Hawkes* v. *Saunders*, *T.* 24 *G.* 3. *Cooke's Bank. Laws*, 4th edit. 74: *Judine* v. *Da Coſſen*, 1 *New Rep.* 234.; and *Ex parte Cockſhot*, 3 *Bro. Ch. Caſ.* 504.

Lord ELLENBOROUGH C. J. now delivered judgment. —After ſtating the caſe—The validity of this joint commiſſion of bankrupt againſt the three partners depends upon the queſtion, Whether *Walmſley*, one of them, duly became a bankrupt under the circumſtances ſtated: for, reſpecting the bankruptcy of the other two, *Millburn* and *Hallowell*, no queſtion has been ever raiſed. Whether *Walmſley* became a bankrupt depends upon this point, Whether a departure from his dwelling houſe, by a trader, *with intent* to delay his creditors, be a ſufficient act of bankruptcy, within the meaning of the ſtat. 1 *Jac.* 1. *c.* 15. *ſ.* 2., although no creditor ſhould have been *thereby* in fact *defeated or delayed* for the recovery of his debt. This fact of departing from the dwelling-houſe by a trader is one of ſeveral indications of inſolvency, conſtituted and declared to be acts of bankruptcy by ſtat. 13 *Eliz.* *c.* 7. when accompanied with the *intent* OR *purpoſe* to defraud or hinder any of his creditors, &c. It will be

1808.

ROBERTSON *againſt* LIDDELL.

obſerved that upon the language of this ſtatute the act is complete by being done with the *intent* ſpecified; the words, "*or purpoſe*," being merely additional words to the ſame effect, and which carry the ſenſe no further than it was carried before by the preceding word *intent*. The ſtat. 1 *Jac.* 1. *c.* 15. introduces three new ſpecific acts of bankruptcy, in addition to thoſe ſpecified in the ſtat. 13 *Eliz.*: two of which, together with all the other acts of bankruptcy enumerated in the ſtat. 13 *Eliz.*, precede and are governed by their relation to theſe words which follow them; viz. "*to the intent*, OR *whereby* his or their "creditors ſhall or may be defeated or delayed," &c. The third new act of bankruptcy in the ſtat. 1 *Jac.* 1. viz. the lying in priſon ſix months upon an arreſt, is made a ſubſtantive act of bankruptcy, independent of any *intent* of the party, not being in the context connected therewith. Theſe words, "*to the intent* OR *whereby*," literally taken in their diſjunctive ſenſe, may be thought to import that a *beginning to keep houſe*, and a *departing from the dwelling-houſe* (and any other of the acts ſpecified) are acts of bankruptcy, whether they be done with an intent to delay, or be merely productive of that effect, however innocently and unintentionally they may have happened to produce it. Upon this conſtruction of the words "*or whereby*," a temporary retirement and privacy, by ſtaying in a man's own houſe, to the excluſion of ſtrangers, during the hours of ſleep, or refreſhment, or during a period of ſickneſs, or domeſtic affliction, might be an act of bankruptcy, as "a beginning to keep houſe;" in the ſame manner as going abroad for the purpoſe of exerciſe, buſineſs, or entertainment, might alſo be, as a departing from the dwelling-houſe; if during any of thoſe periods a creditor called in vain for his debt. It hardly needs

any

1808.

ROBERTSON against LIDDELL.

argument to prove that such could not have been the intention of the Legislature: and if it could not, the words "*or whereby*," must either be rejected, or understood in some other sense. A cure for this difficulty was sought in the case of *Fowler* v. *Pagett*, 7 *Term Rep.* 509. where a creditor had left his dwelling-house for a short time in order to seek and secure the means of satisfying his creditors, and with no purpose of delaying them, but who had in fact by his absence occasioned a delay to some of them, who had called for payment whilst he was from home. Lord *Kenyon* in that case thought that "by reading the word "*and*" for "*or*" in the stat. 1 *Jac.* 1. *c.* 15. "as was frequently done in the construction of legal "instruments where the sense requires it, all difficulty "would be got over." And indeed the difficulty of the particular case was thereby disposed of; for as no intention of delay existed on the part of the trader who departed from his dwelling-house, both the circumstances, which a copulative construction of the words required, (if that were the necessary construction) could not take effect in that case; and if the intent of the departure be alone considered as material, still that case will at any rate have been well decided; although the mode of solving the difficulty which was resorted to on that occasion may not be satisfactory. The objection to this construction, which requires that both the intent and the consequence of delay should concur, in order to constitute the act of bankruptcy, is that the bankruptcy is made to depend not merely on the acts and intents of the bankrupt himself, however clear and unequivocal they may be; but upon the fortuitous coincidence of the acts of other persons; and which acts (in the instance particularly of a departure from the dwelling-house) are less likely to

1808.

ROBERTSON *against* LIDDELL.

concur in the proportion in which that departure is moſt notorious. For when the flight of an inſolvent trader from his houſe of trade is univerſally known, it is not likely that any creditors, by uſeleſsly calling for payment of their debts at ſuch a time, ſhould furniſh the ordinary proof of delay, which ariſes from the non-payment of creditors ſo calling. If the conſequence of actual delay be neceſſary to perfect every one of the ſeveral acts of bankruptcy in the ſtat. 1 *Jac.* 1. *c.* 15. which precede the words "*to the intent or whereby*," &c., it muſt be neceſſary to perfect the act of *making a fraudulent conveyance*, which is one of them; but inaſmuch as a fraudulent conveyance, ſhewn to be ſuch, cannot in law have the effect of defeating or delaying a creditor; unleſs *the making* ſuch a conveyance be an act of bankruptcy, conſummated by the intent with which it is made, it can never become more an act of bankruptcy by any thing which may happen in reſpect to it afterwards. And indeed it has never been held neceſſary, in proof of this act of bankruptcy, to do more than to prove the execution of the deed, under ſuch circumſtances as rendered it a fraudulent one in reſpect of creditors; without going on to ſhew that any creditor had been in fact ever delayed or defeated thereby. Indeed the fact of delay in the caſe of beginning to keep houſe is uſually reſorted to *in evidence* for the mere purpoſe of explaining an act which might otherwiſe be equivocal: and the denial to a creditor is there given in evidence to ſhew that the party has *begun* to keep houſe: and it is from miſtaking the intended effect of this evidence, as given to prove actual delay, that proof of actual delay can be required where the act of bankruptcy is by departing from his dwelling-houſe. If theſe and other inconveniences which might be ſhewn, ariſe

ariſe from conſtruing the word *or* for *and*, in this part of the ſtatute, it is material to conſider, whether ſome other cure in point of conſtruction cannot be applied to theſe words, and whether the words which follow the word *intent*, i. e. "*or whereby*," may not by a ſmall change in them be rendered ſuſceptible of another ſenſe, more conſiſtent with the meaning of the original ſentence as it occurs in the ſtat. 13 of *Eliz.*, and more agreeable to the general ſcope and object of the bankrupt laws. If, inſtead of "*or whereby*" the ſentence ſhould be read, "or *that thereby*" or "*that*," (omitting the word *whereby*) the original ſenſe of the word *purpoſe* in the ſtat. 13 *Eliz.* is reſtored; and inaſmuch as it would neither extend or narrow the meaning of the immediately foregoing word *intent*, it would leave to that word its full operation and effect, without engrafting upon it any of the inconveniences already obſerved upon as reſulting from the copulative conſtruction ſuggeſted in the caſe of *Fowler* v. *Padgett*. Another mode of conſidering the words "*to the intent*" "*or whereby*," as meaning the ſame thing, is this; by referring the former to the word *ſhall*, and the latter to the word *may*; i. e. *to the intent* that the creditors *ſhall* be defeated, or *whereby* they *may* be ſo. This gives the words the ſame effect as *intent or purpoſe* in the ſtatute of *Eliz.*, and prevents *this* act from operating in reſtriction of *that*, which it otherwiſe would do, and which, as may be collected from the title, which is for the better relief of creditors, could not have been intended. It would be a ſuperfluous waſte of time to advert to all the various caſes which have been cited in argument. The lateſt of them is that of *Hammond and Others, Aſſignees of Gadſden a Bankrupt*, v. *Hincks*, which, having been tried at Niſi Prius before the preſent Chief Juſtice of the Common

1808.

ROBERTSON *againſt* LIDDELL.

Pleas, came before that Court upon a motion for a new trial, as reported in 5 *Eſp.* 141. In that caſe the Chief Juſtice is reported to have laid down at Niſi Prius, and the Court of Common Pleas, in refuſing to make the rule abſolute, muſt be taken to have agreed with him, that evidence of the actual delay of a creditor, by the bankrupt's leaving his houſe to avoid his creditors, was not neceſſary to conſtitute an act of bankruptcy. As far as we are able to collect what was the opinion of the Court of Exchequer upon that ſubject from the ſtatement made to us of what paſſed in that court, upon the motion for a new trial, in *King* v. *Bebb*, upon *Caſtell* and *Powell*'s bankruptcy, we cannot but ſuppoſe that it inclined the ſame way with that of the Common Pleas in the caſe of *Hammond* v. *Hincks*. Upon the authority therefore of theſe later caſes, in which all the former ones were, as we underſtand, conſidered; as indeed they have been by us upon the preſent argument; upon the ſound conſtruction of the ſtatute 1 *Jac.* 1. *c.* 15, explained by the antecedent ſtatute of 13 *Eliz.*, made in pari materiâ, and almoſt in iiſdem terminis with the other, excepting only what appears to have been a caſual and unintended variation in the phraſe of a particular ſentence; as well as upon the reaſon and convenience of the thing; we are of opinion that *Walmſley*, in leaving home with intent to delay his creditors, committed an act of bankruptcy, although no creditors were thereby in fact delayed; and that therefore the poſtea ſhould be delivered to the plaintiffs.

Judgment for the Plaintiffs.

BLANCHARD *againſt* LILLY and Others.

The KING *againſt* BLANCHARD.

Saturday, May 28th.

An award that certain actions be *diſcontinued*, and each party pay his own coſts, is final and good, being in effect an award of a ſtet proceſſus.

THE above cauſe and proſecution for a miſdeameanor ariſing out of the ſame tranſaction, as well as other cauſes, were referred to an arbitrator, under a rule of reference of *all* matters in difference between the parties; and the arbitrator awarded "in favour of the defendants in the firſt mentioned cauſe;" and as to the indictment, "that the verdict of acquittal ſhould ſtand:" and further, "that each of the parties in the ſaid cauſes ſhould pay his or their own coſts, and alſo their coſts of the reference." Then reciting that two other cauſes were depending, one of *Edwards* v. *Blanchard*, and another of *Blanchard* v. *Edwards*; he awarded each to pay his own coſts, and alſo his own coſts of the reference, "*and that the ſaid actions be diſcontinued.*"

Eſpinaſſe, on a former day, had obtained a rule niſi for ſetting aſide the award, on the ground that an award *to diſcontinue an action* was bad, becauſe it did not make a final end of the matter in difference; for it did not prohibit any new action to be brought: and he cited *Tipping* v. *Smith* (*a*), where an award, that all proceedings, if any, depending at law, ſhould be no further proſecuted, was held ill, as not being final. And alſo 1 *Com. Dig.* 412. *Arbitrament* E 15. "An award that each ſhall be nonſuited, or diſcontinue his action againſt the other, is not good; for they may ſue de novo," referring to 1 *Rol. Abr.* 252. l. 50.

(*a*) 2 *Stra.* 1024.

Lawes

1808.

BLANCHARD *againſt* LILLY and Others. The KING *againſt* BLANCHARD.

Lawes and *Gurney* oppoſed the rule, on the ground that the award was ſufficiently certain; evidently meaning that all litigation ſhould ceaſe between the parties upon the ſubjects in difference between them; and they referred to *Linſey and Aſhton's* caſe (*a*), where the award was, amongſt other things, that the defendant ſhould ſurceaſe all ſuits depending between the plaintiff and him, which he had done: and this was held good; and the plaintiff recovered on the arbitration-bond for breach of another part of the award.

The Court thought the award intelligible enough; and that the arbitrator's meaning neceſſarily to be implied from it was, that there ſhould be a ſtet proceſſus in the actions pending: but becauſe of the caſes cited, which might have miſled thoſe who applied for the rule, they diſcharged the rule without coſts.

(*a*) *Godb.* 255.

Monday, May 30th.

HOSKINS and Another, Aſſignees of DEIGHTON a Bankrupt, *againſt* DUPEROY.

Goods ſold and delivered upon an agreement to be paid for by a preſent bill payable at a future day does not create a preſent debt, on which to found a commiſſion of bankrupt: nor can an action for goods ſold and delivered be maintained by the vendor before the time when the bill agreed to be given would have become due, and when the contract would be no longer executory. Neither can ſuch executory contract, if no ſuch bill payable at a future day be actually given to ſecure it, found a good petitioning creditor's debt within the ſtatutes 7 *Geo.* 1 *c.* 31. *ſ.* 1. and 5 *Geo.* 2. *c.* 30. *ſ.* 22. which are confined to debts due on bills, bonds, promiſſory notes, and other perſonal *written ſecurities* of the like ſort, payable at a future day; which alone by the latter ſtatute are made available to found a good petitioning creditor's debt.

THIS was an action for money had and received by the defendant to and for the uſe of the bankrupt, before his bankruptcy, and for money had and received to the uſe of the aſſignees after the bankruptcy, and upon an account ſtated by the defendant with the aſſignees:

to

1808.

HOSKINS *againſt* DUPEROY.

to which the defendant pleaded the general iſſue; and on the trial at *Guildhall*, a ſpecial verdict was found, which ſtated, that *Deighton* before his bankruptcy carried on the trade of a calico printer and manufacturer, and on the 19th of *March* 1805 *Hamer* ſold to him goods of various prices, by the yard, to the value in the whole of greatly more than 100*l.*, though the exact amount of them in money was never aſcertained, nor any ſtatement thereof rendered to *Deighton*: and it was expreſsly ſtipulated and agreed between them at the time of the contract that the amount of the price ſhould be paid by *Deighton* to *Hamer* in a preſent bill of exchange, payable in two months from the time of the ſale and delivery of the goods; and no other contract concerning the manner of payment for the goods was agreed upon between them. *Hamer* has never yet been paid for the goods: and after the ſale and delivery thereof as before ſtated, but before the expiration of two months from ſuch ſale or delivery, viz. on the 26th of *March* 1805, *Deighton* committed an act of bankruptcy, by departing from his dwelling-houſe with intent to delay his creditors, and whereby certain of his creditors were delayed (*a*): and thereupon *Hamer*, on the 22d of *April* 1805, petitioned the Chancellor for a commiſſion of bankrupt to iſſue againſt *Deighton*, in which petition he ſtated that *Deighton* was indebted to him in 100*l.* and upwards for goods ſold and delivered; meaning the goods ſold and delivered as aforeſaid on the 19th of *March*: upon which a commiſſion of bankrupt iſſued againſt *Deighton*, dated the 1ſt of *May* 1805, and he was declared to be a bankrupt, and the plaintiffs were choſen

(*a*) The actual delay of a creditor is not neceſſary to conſtitute the act of bankruptcy, if the trader departed from his dwelling-houſe with that intent. Vide ante, 487. *Robertſon* v. *Liddell*.

his

1808.

HOSKINS *against* DUPEROY.

his aſſignees, and an aſſignment made to them of his effects, and they afterwards brought this action. And the queſtion was, Whether the commiſſion founded upon ſuch petitioning creditor's debt were good? If it were, the jury aſſeſſed the plaintiffs' damages at 2295*l.*

This caſe was argued by *Yates* for the plaintiffs, and *Marryat* for the defendant; but as all the points made in argument, and the authorities cited bearing upon them, were brought in review in the judgment of the Court, it is not neceſſary to ſtate them here. After time taken to adviſe on the caſe,

Lord ELLENBOROUGH C. J. now delivered the opinion of the Court. After ſtating the pleadings, and the facts found by the ſpecial verdict—

On this ſpecial verdict the ſingle queſtion is, Whether at the time of the act of bankruptcy, viz. on the 26th of *March* 1805, *Hamer*, the petitioning creditor, were in point of law a good petitioning creditor; he having only ſeven days before, viz. on the 19th of *March* 1805, ſold and delivered goods to the bankrupt to the value of more than 100*l.*, though the exact amount had not been aſcertained, under an expreſs contract that ſuch goods ſhould be paid for by a preſent bill *at two months* from the time of ſuch ſale and delivery. Obſerve, that no ſuch bill had been given or demanded; and that the two months were not expired, either at the time of the act of bankruptcy, or of the iſſuing of the commiſſion. The caſe on the part of the plaintiffs, the aſſignees, has been argued on two grounds: firſt, That by the ſale and delivery of the goods a preſent debt was created from the buyer *Deighton* to the ſeller *Hamer*. Secondly, If that be not ſo, that it is within the ſtatute 7 *Geo.* 1. *c.* 31. a debt proveable

1808.

HOSKINS *against* DUPEROY.

able under the commiſſion, and barred by the certificate; and by ſtat. 5 *Geo.* 2. *c.* 30. a good petitioning creditor's debt. As to the firſt ground; the verdict ſtates the terms of the contract under which the goods were ſold, viz. "that they ſhould be paid for by a preſent bill, payable in two months from the time of ſuch ſale and delivery:" and in fact default had not been made in giving ſuch bill; for the amount for which the bill was to be given does not appear to have been ever aſcertained; nor was the bill ever called for or demanded. But independent of this laſt obſervation, it is now ſettled by the two caſes alluded to in the argument, of *Muſſen* v. *Price* (*a*) in this Court, and *Dutton* v. *Solomonſon* (*b*) in the Court of Common Pleas, that where goods are ſold upon a certain credit, to be paid for by a bill payable at a future day, the vendor cannot maintain an action for the goods ſold until the time is arrived at which the bill would become due; becauſe by the contract the goods are not to be paid for till that time. And the ſame doctrine is fully recognized by the more recent caſe in the Common Pleas, of *Brooke and Others* v. *White* (*c*), where the Court held that after the expiration of the time which the bill would have had to run, which by the terms of the contract was to have been given in payment for the goods, the ſeller might bring his action for goods ſold and delivered; the contract being then no longer executory: the preſent Chief Juſtice and the other Judges of the Court of Common Pleas, expreſsly admitting the diſtinction eſtabliſhed by the former caſes, that before the expiration of the time on the bill, ſuch action for the goods ſold and delivered could not be maintained. On this firſt ground we are therefore of opinion, that at the time of the act of bank-

(*a*) 4 *Eaſt*, 147. (*b*) 3 *Boſ. & Pull.* 582. (*c*) 1 *New Rep.* 330.

1808.

HOSKINS *againſt* DUPEROY.

ruptcy, and of the commiſſion ſued out, there was not a preſent debt owing from the bankrupt to *Hamer* created by the ſale and delivery of the goods.

And this brings the caſe to the ſecond ground, on which it has been argued on behalf of the plaintiffs, the aſſignees; viz. Whether this be not a good petitioning creditor's debt within the ſtats. 7 *Geo.* 1. *c.* 31. and 5 *Geo.* 2. *c.* 30. This queſtion depends on the conſtruction of the 1ſt ſection of the ſtat. 7 *Geo.* 1. and the 22d ſection of the ſtat. 5 *Geo.* 2. The preamble of the firſt of thoſe ſtatutes recites the miſchief or doubt which exiſted: "Whereas merchants and traders have been "obliged to ſell and diſpoſe of their goods and mer-"chandizes to ſuch perſons as have occaſion for the ſame "upon truſt or credit, and *to take* bills, bonds, and pro-"miſſory notes, *or other perſonal ſecurities*, for their mo-"nies payable at the end of three, four, or ſix months, "or other future days of payment; and the buyers of "ſuch goods becoming bankrupts before *the money upon* "ſuch bonds, notes, or other ſecurities *became payable*, it "hath been a queſtion whether ſuch perſons giving "credit *on ſuch ſecurities* ſhould be let in to prove their "debts: for remedy enacts, That all perſons who have "given credit, or at any time hereafter ſhall give cre-"dit, *on ſuch ſecurities* as aforeſaid, upon a good and va-"luable conſideration, bonâ fide, for any ſum of money, "or any matter or thing whatſoever, which is or ſhall "be due or payable at or before the time of ſuch perſon "becoming bankrupt, ſhall be admitted to prove his or "her ſeveral and reſpective bills, bonds, notes, or other "ſecurities, *promiſe, or agreements for the ſame*, in the "like manner as if they were made payable preſently, "and not at a future day." Section 3. Provides that

no

1808.

HOSKINS *against* DUPEROY.

no such creditor shall be deemed or taken to be a sufficient creditor, for or in respect of such debt, to petition or join in any petition for the obtaining or suing forth any commission of bankrupt, until such time as such debt shall become actually due and payable. The 22d section of the stat. 5 *Geo.* 2., which repeals the above mentioned proviso of the stat. 7 *Geo.* 1., and enables creditors on securities due at a future day to be petitioning creditors for a commission of bankrupt, recites the former act of 7 *Geo.* 1. in these words: "Whereas by an act made in the 7th year of his late majesty persons taking bills, bonds, promissory notes, or other personal security for their money, payable at a future day, (not saying *promise or agreement for the same*,) are enabled to prove their debts under a commission of bankrupt; but not to petition for or join in petitioning for any new commission: which having been found inconvenient; now it is hereby enacted, that so much of the said act as disables any *such* person from petitioning for a commission is hereby repealed; and it shall be lawful hereafter for such person to petition for any such commission, any thing in the said act contained to the contrary notwithstanding." It is observable that this clause, on which the right of such creditor to petition for a commission alone rests, mentions only persons taking bills, bonds, notes, or other personal security, payable at a future day; and although it refers to the former act, and may be said to enable such creditors to petition for a commission, as by the former act were enabled only to prove their debts under a commission; still it shews the sense which the Legislature put on the former act, and is a legislative construction of that act; namely, that such creditors only were intended as had bills, bonds, notes, or securities of the like

1808.

HOSKINS *againſt* DUPEROY.

ſort, payable at a future day. And ſuch appears to have been the conſtruction adopted by the different Courts in *Weſtminſter Hall.* Lord Ch. Juſt. *Lee*, at Niſi Prius, in *Swaine* v. *De Mattos* (*a*), and the Court of King's Bench, in *Pattiſon* v *Bankes* (*b*), conſidered the ſtat. 7 *Geo.* 1. as explained by ſtat. 5 *Geo.* 2., and as relating to *written ſecurities*; though the queſtion in thoſe caſes was not reſpecting the right of a creditor for goods ſold, payable by bill at a future day, and where no bill or ſecurity had been given; but whether *the ſecurities* were confined to *ſecurities for goods ſold in the courſe of trade:* and they held a creditor by bond or bill, payable at a future day, to be within the act; although ſuch bond or bill were not for goods ſold in the courſe of trade. Such was the opinion of Lord Chancellor *King* in the caſe *Ex parte The Eaſt India Company* (*c*); and the Court of Common Pleas, in the time of Lord Chief Juſtice *Wilmot*, in *Chilton* v. *Whiffin* (*d*), and in *Goddard* v. *Vanderheyden* (*e*), underſtood the ſtatute in the ſame ſenſe, as extending only to *written* ſecurities; although that was not in either of the caſes the point immediately in judgment. A caſe was alſo mentioned at the bar, as having been ruled at Niſi Prius at *Guildhall*, before Mr. Juſtice *Rooke*, (*Cox and Another, Aſſignees of Key, a Bankrupt*, v. *Cripps*,) where he nonſuited the aſſignees, on the ground that the debt of the petitioning creditor, or at leaſt a part of it neceſſary to make up 100*l.*, aroſe from goods ſold and delivered upon a credit which was not expired at the time of the commiſſion: and no motion was afterwards made in the Court of Common Pleas to ſet aſide that nonſuit. And ſome of the Judges of this court ſo ex-

(*a*) 2 *Stra.* 1211. (*b*) *Cowp.* 540. (*c*) 2 *P. Wms.* 395.
(*d*) 3 *Wilſ.* 13. (*e*) 3 *Wilſ.* 262.

preſſed

preſſed their underſtanding of the ſtatutes in the late caſe of *Parſlow* v. *Dearlove* (*a*). We are aware that in the caſe of *Henbeſt and Others* v. *Brown* (*b*), Lord *Kenyon*, at *Guildhall*, ſaid, that the inclination of his mind was that all debts whatever, though not due, were ſufficient to ſupport a commiſſion; and that the act was not confined merely to bonds, notes, and bills. But the evidence there did not raiſe the point, and the matter was no further diſcuſſed. And a ſhort time before, in *Cochran* v. *Love*, (ſhortly noticed in *Cooke's Bank. Laws*,) Lord *Kenyon* is reported to have intimated the like opinion at *Guildhall*. The reſpect due to any intimation of opinion of that very learned Judge has, as it ought, made us pauſe, and examine the ſtatutes with attention, and the caſes in which they have been brought under conſideration of the Courts. And on the words of the acts themſelves, we think the intention of the Legiſlature ſeems plain, to confine the power of petitioning for a commiſſion of bankrupt to ſuch creditors, where the debts are due at a day to come, as have *written ſecurities* payable at a future day: and ſuch conſtruction ſeems to be confirmed by the greater weight of authorities which I have noticed. We are therefore of opinion, that on the facts found by this ſpecial verdict there does not appear a ſufficient petitioning creditor's debt to ſupport the commiſſion of bankrupt which has been ſued out againſt *Deighton*; and the plaintiffs, who found their title to recover in this action as aſſignees under ſuch commiſſion, have not ſuch title. The conſequence is that judgment muſt be entered for the defendants.

(*a*) 4 *Eaſt*, 438. (*b*) *Peake's N. P. Caſ.* 54.

1808.

Monday, May 30th.

CUMING *againſt* BROWN.

The property of goods paſſes by the indorſement and delivery of the bill of lading by the conſignee to another bonâ fide for a valuable conſideration, and without colluſion with the conſignee, although the indorſee knew at the time that the conſignor had not received money-payment for his goods, but had taken the conſignee's acceptances payable at a future day not then arrived: and after ſuch aſſignment of the bill of lading the conſignor cannot ſtop the goods in tranſitu upon the inſolvency of the original conſignee.

THIS was an action of trover againſt the Captain of a ſhip who had ſigned bills of lading for ſome pipes of wine which had been originally conſigned by *Jean* of *Jerſey* (the real defendant in the cauſe) to *Maine* of *London*, and by him conveyed, by indorſement of the bill of lading, to the plaintiff for a valuable conſideration. The invoice of the wines, which ſtated that they had been *bought for account of* E. Maine *of* London, was tranſmitted to *Maine* by *Jean* in a letter of the 31ſt of *December* 1806; and in another letter of the 17th of *February* 1807, *Jean* tranſmitted the bill of lading for the ſame: at the foot of the invoice was written "payable in bill on *London* at three months from the 20th *December* (1806), and marked with *Maine*'s initials." The bill of lading, ſigned by the defendant, bore date "*Jerſey* 14th *Feb.* 1807," and expreſſed that the wine was to be "ſhipped by *P. Jean* on board the *Britannia*," and "to be delivered *to* E. Mayne *or his aſſigns*, he or they paying freight: with liberty to ſtop at *Guernſey*." *Jean* drew a bill upon *Maine* for the value of theſe goods, dated 20th *December* 1806, at three months; which bill, due 23d of *March* 1807, was accepted by *Maine*; and on the 23d of *February* 1807 *Maine* indorſed the bill of lading in queſtion to the plaintiff for full and valuable conſideration; and abſconded about *April*; and has not ſince been heard of; leaving his acceptance unpaid. The goods which were firſt taken to *Guernſey* arrived at *London* about the beginning of *June*, and were demanded by the plaintiff of the defendant, who refuſed to deliver them, having been indemnified by the agent

agent of *Jean* the conſignor, who, on notice of the abſconding and inſolvency of *Maine*, claimed to ſtop them in tranſitu. There were other tranſactions both of goods and bills between *Maine* and *Jean* before and during the time of the tranſaction in queſtion. On the part of the defendant, the anſwer of the plaintiff to a bill in Chancery filed by *Brown* and *Jean* was read, whereby it appeared that on the 23d *February* 1807, the plaintiff, being then a creditor of *Maine*'s for about 500*l.* for goods before ſold to him, applied for payment, when *Maine* requeſted a further advance of 1300*l.*, and propoſed as a ſecurity for the payment of both ſums to indorſe and deliver over to him the bill of lading in queſtion; which was agreed to, and the indorſement made accordingly: and the plaintiff thereupon gave *Maine* his acceptances to the amount agreed upon, payable ſome at 2 others at 3 months, which have been ſince duly paid. That *Maine* at the ſame time ſhewed the plaintiff the letter from *Jean* which incloſed the bill of lading of the wines (from which it was to be collected that there were mutual dealings between *Jean* and *Maine*, and that the wines were ſhipped on *Maine*'s own account, and not as factor). That it was agreed between the plaintiff and *Maine*, that the plaintiff ſhould be at liberty to inſure the cargo for the benefit of both; which was accordingly done. The plaintiff alſo denied by his anſwer to his knowledge or belief that at the time when the bill of lading was ſo indorſed and delivered to him by *Maine* the latter had ſtopped payment, or was unable to pay his debts, or was under any pecuniary difficulties, or that he, the plaintiff, had any knowledge, belief, or ſuſpicion of his inſolvency. "That the plaintiff underſtood and believed at that time that the pipes of wine in queſtion had been ſold to and

1808.

CUMING against BROWN.

purchaſed by *Maine* in the courſe of trade; *and that although the plaintiff was aware that they had not then been actually paid for by* Maine *or by any other perſon; yet he concluded that the ſame would be paid for or credit given to* Jean *by* Maine *in the courſe of their buſineſs together.* That he, the plaintiff, then underſtood and believed that a running account ſubſiſted between *Jean* and *Maine*, and that they were in the habit of ſupplying each other with goods of different kinds; and that *Jean* uſually drew bills of exchange upon *Maine* at different times to the amount in which *Maine* was indebted to him for goods ſupplied." And the plaintiff further denied that, at the time when the bill of lading was indorſed or delivered to him, he knew, or believed, or ſuſpected, or had any reaſon to know, &c. that *Maine* would be unable to pay for the ſame. And he alſo denied obtaining the bill of lading by colluſion with *Maine*. It was then objected at the trial that it appeared by the plaintiff's anſwer that he knew at the time he received the bill of lading that *Jean* the conſignor had not been paid for the goods, and therefore upon the authority of *Salomons* v. *Niſſen* (*a*), that the aſſignee of the bill of lading took it ſubject to the conſignor's right of ſtopping the goods in tranſitu in caſe of the inſolvency of the conſignee before payment. And Lord *Ellenborough* C. J. left it to the jury to conſider whether the indorſement were made by *Maine* to the plaintiff for a valuable conſideration, and whether he had then notice of any circumſtance which ought in fairneſs to have prevented his taking it: and under this direction the jury found a verdict for the plaintiff. In the laſt term a new trial was moved for on the ground, that the indorſee of the bill of lading, having actual notice of the nonpayment

(*a*) 2 *Term Rep.* 674.

for

1808.

CUMING *againſt* BROWN.

for the goods by the conſignee to the conſignor, was thereby placed in the ſame ſituation as the original conſignee himſelf, and ſubject to all the legal and equitable rights of the conſignor againſt ſuch conſignee, and conſequently ſubject to the conſignor's right to ſtop the goods in tranſitu on the inſolvency of the conſignee; although the bill of lading had been indorſed and delivered to the plaintiff for a valuable conſideration: and the caſe of *Salomons* v. *Niſſen* (*a*) was particularly relied on.

Garrow, *Park*, and *Taddy*, ſhewed cauſe on a former day againſt the rule for a new trial; and inſiſted that though the plaintiff, who was a creditor of *Maine*'s, knew that the goods had not been paid for at the time when the bill of lading was indorſed to him by *Maine*, yet he alſo knew that they had been conſigned to *Maine* on his own account and not as factor merely, and that he had accepted bills drawn on him by *Jean* the conſignor for the value of the goods in the regular courſe of buſineſs, which he had no reaſon to think would not be paid when due. He then took the indorſement of the bill of lading, bonâ fide, for a valuable conſideration, without notice of *Maine*'s impending inſolvency, and without any intent to aid *Maine* in defrauding *Jean* the conſignor. This tranſaction therefore ſtands on the authority of *Lickbarrow* v. *Maſon* (*b*), where it was ultimately decided, and it cannot

(*a*) 2 *Term Rep.* 674.

(*b*) 2 *Term Rep.* 63. 1 *H. Blac.* 357. 2 *H. Blac.* 211. 5 *Term Rep.* 367. 683. and 6 *Eaſt*, 20. which laſt collects all the prior authorities in a note. It was alſo proved by the record of *Haille* v. *Smith*, in Error, 1 *Bos. & Pull.* 563., that by the cuſtom of merchants bills of lading, made out to the order of the ſhipper or his aſſigns are negotiable, and transferrable by the ſhipper's indorſement, which veſts the property of the goods therein named in the indorſees.

1808.

CUMING *against* BROWN.

now be called in queſtion, that the indorſement and delivery of a bill of lading, bonâ fide, transfers the legal property of the goods to the indorſee, ſo as to deveſt the right of the conſignor to ſtop them in tranſitu. There *Freeman*, the conſignee, never paid *Turing* the conſignor for the goods, but had only accepted bills for the amount drawn on him by *Turing*, which were running at the time when *Freeman* indorſed the bill of lading to *Lickbarrow* for a valuable conſideration, and which acceptances were afterwards diſhonored. The legal title then of the indorſee of a bill of lading can only be impeached on the ground of fraud; and that was the ground on which both the caſes of *Wright* v. *Campbell* (*a*), and *Salomons* v. *Niſſen* (*b*) went. The former was the caſe of an aſſignment by a mere factor, without authority, and with ſtrong ſuſpicion of colluſion on the part of the aſſignee. The latter was either a caſe of colluſion between the conſignee of the goods and his indorſee of the bill of lading, who had notice that the goods had not been paid for; or at leaſt it was a caſe of partnerſhip between them, in which view the latter was to be taken to ſtand in the ſhoes of the former with reſpect to the conſignor, who had not been paid for his goods, and who, therefore, according to all the caſes, had a right to ſtop them in tranſitu. But all the Court there aſſented to the doctrine of *Lickbarrow* v. *Maſon*. [*Bayley* J. It was part of the agreement in *Salomons* v. *Niſſen*, that *Salomons* ſhould ſtand in the place of the original conſignee and pay the conſignor.] There could have been no queſtion in any of the caſes as to the conſignor's right of ſtopping in tranſitu if nothing ſhort of actual payment by the conſignee could have deveſted the right: but the property of goods paſſes to the

(*a*) 4 *Burr.* 2046. (*b*) 2 *Term Rep.* 674.

vendee

vendee by the mere contract of ſale, according to *Hinde* v. *Whitehouſe* (*a*); and by *Shep. Touch.* 222. If the ſale be for ready money, the vendor has a lien on the goods till the money is paid; but not if the ſale be upon credit till a future day. So here where the ſale was upon the credit of acceptances to be given payable at a future day, the vendor had no lien after ſuch acceptances given. It appears then, that ſo far from the plaintiff having had notice, in any fraudulent ſenſe, that the goods had not been paid for, at the time he took the aſſignment of the bill of lading, he had expreſs notice that *Maine* had at that time complied with the terms of the contract of ſale by having given the conſignor his acceptances then running, upon the credit of which the conſignor was content to part with the property of the goods to *Maine*. And as this is the common courſe of dealing with reſpect to foreign conſignments, to determine againſt this plaintiff's right to hold the goods would be in effect to determine that bills of lading, though transferrable by law, ſhould no longer be transferred: for if queſtions of equity, as between the conſignor and conſignee, are to be entered into againſt a bonâ fide indorſee of the bill of lading, there can be no ſafety in taking ſuch a ſecurity, as there is if the legal title untouched by fraud is to prevail.

The Attorney General, *Topping*, and *Pailey*, contrà, relied upon the fact, that the plaintiff knew at the time he took the indorſement of the bill of lading that the goods had not been paid for, as diſtinguiſhing this from the caſe of *Lickbarrow* v. *Maſon*; though they admitted that if their objection prevailed it would tend to narrow very much the doctrine ſuppoſed to be there laid down as

(*a*) 7 *Eaſt*, 558.

1808.

CUMING *againſt* BROWN.

to the general negotiability of bills of lading. But they contended that it had been ſo narrowed in the caſe of *Salomons* v. *Niſſen* (*a*). The intention of forwarding the bills of lading before the goods originally was, not to enable the conſignee to aſſign them away without payment, but to put him in a condition to claim them on their arrival. The bill of lading in itſelf is nothing more than an undertaking by the Captain to deliver the goods to the order of the ſhipper; and it is hard enough upon him, whoſe right to ſtop in tranſitu in caſe of the inſolvency of his conſignee is acknowledged on all hands, that ſuch right can in any caſe be deveſted by the conſignee's aſſignment, without notice that the goods have not been paid for: but it has never yet been decided that the aſſignee, having that notice at the time, acquires by the aſſignment a better and more indefeaſible title than the perſon from whom he received it: on the contrary, in *Salomons* v. *Niſſen*, the fact of ſuch knowledge by the aſſignee was held to take the caſe out of the rule of *Lickbarrow* v. *Maſon*, and to ſubject him to the conſignor's right of ſtopping in tranſitu. No other fraud was or could be imputed to the plaintiff in that caſe than what aroſe out of his knowledge that the goods had not been paid for; for he himſelf had actually given a valuable conſideration for them to the conſignee; and the opinion of each of the Judges was founded on that circumſtance. With this limitation the rule eſtabliſhed in *Lickbarrow* v. *Maſon*, as to the negotiability of bills of lading, will become more uſeful and equitable. While every perſon muſt be taken to know that a bill of lading is transferrable, he muſt alſo be taken to know that the vendor has a right to ſtop the goods in tranſitu if he have not been

(*a*) 2 *Term Rep.* 674.

paid

1808.

CUMING *against* BROWN.

paid for them: but whether he have or have not may not be known. As againſt the conſignee who has ſuch knowledge, the conſignor may ſtop the goods in tranſitu: then if his aſſignee have the ſame knowledge at the time he takes the aſſignment, how does his caſe differ in juſtice and reaſon from that of the original conſignee? and if it be the ſame, though the preſent legal property may ſtill paſs by the aſſignment, it will ſtill be ſubject to the conſignor's contingent legal right of ſtoppage. But if the aſſignee take the bill of lading without knowing the ſtate of the account between the conſignor and conſignee, then his preſent legal title will prevail againſt the contingent right of the conſignor. In this view alone, the two rights will not be inconſiſtent or contradictory: but, without this reſtriction, the right of ſtopping in tranſitu will be rendered nugatory; and whenever the occaſion has called for it, the general rule has been laid down with this qualification.

Curia adv. vult.

Lord ELLENBOROUGH C. J. now delivered the judgment of the Court. After ſtating the facts, and the queſtions ſubmitted to the jury, with their finding—

The queſtion is whether the indorſement of the bill of lading in this caſe paſſed the property of the goods, the plaintiff having notice that the goods had not been paid for in *money*. It muſt be taken to have been found that the indorſement was, bonâ fide, for valuable conſideration, and without notice of any circumſtance which ought in fairneſs to have prevented the plaintiffs taking it; unleſs, indeed, notice that the goods had not been paid for in money be ſuch circumſtance. But to render this circumſtance one which ought in fairneſs to have prevented the aſſignee of the bill of lading from taking it, it ſhould have

1808.

CUMING *against* BROWN.

have appeared that the conſignor by the terms of his dealing with the conſignee had bargained for or expected that the payment ſhould precede the aſſignment of the bill of lading. But if we look at the actual facts of the caſe, as between the conſignor and conſignee, by the memorandum at the foot of the invoice tranſmitted before the bill of lading, (and which arrived on the 3d of *January* 1806), the price of the goods was "payable in bill "on *London* at 3 months from 20th *December*;" and at the time of the aſſignment *Maine*, the conſignee, had done all that ſuch bargain required, by having accepted a bill on *London* at 3 months from the 20th of *December*, which was not due at the time of the indorſement of the bill of lading on the 23d of *February*. If therefore the plaintiff had known all the circumſtances of the caſe as they ſtood between conſignor and conſignee, he would have known nothing which ſhould have made it unfair in the conſignee to aſſign, or in himſelf to accept, the aſſignment of the bill of lading. If he had aſſiſted in contravening the actual terms of ſale on the part of the conſignor, or his reaſonable expectations ariſing out of them, or his rights connected therewith, it would have been otherwiſe, and he would in that caſe have ſtood in the ſame ſituation with the conſignee. If, for inſtance, he had known that the conſignee had been in inſolvent circumſtances, and that no bill had been accepted by him for the price of the goods, or that, being accepted, it was not likely to be paid; in that caſe the interpoſition of himſelf between the conſignor and conſignee, in order to aſſiſt the latter to diſappoint the juſt rights and expectations of the former, would have been an act done in fraud of the conſignor's right to ſtop in tranſitu, and would therefore have been unavailable to the party taking

1808.

CUMING against BROWN.

an aſſignment of the bill of lading under ſuch circumſtances, and for ſuch purpoſe: but here, any knowledge or ſuſpicion of the kind on the part of the plaintiff is negatived expreſsly by the plaintiff's anſwer read on the part of the defendant. And if a bill of lading ſhould be held by us not aſſignable under theſe circumſtances, the conſequence would be that no bill of lading could be deemed ſafely aſſignable before the goods arrived, unleſs the aſſignee of the bill of lading was perfectly aſſured that the goods were paid for in money, or paid for in account between the parties, which is the ſame thing: a poſition which would tend to overturn the general practice and courſe of dealing of the commercial world on this ſubject, and which is warranted as we conceive by no decided caſe upon the ſubject. The caſe of *Salomons* v. *Niſſen*, 2 *Term Rep.* 674. was a caſe of fraud on the part of the plaintiff, who had taken an aſſignment from the vendee, not only knowing the goods were not paid for, but by his own agreement taking upon himſelf perſonally the immediate duty of paying for them: and he afterwards brought his action to take the goods out of the hands of the defendant, the vendor, without having paid for them, in fraud of the terms of his own expreſs agreement with the original vendee, with whom he had become partner in profit and loſs as to theſe goods, and with whom he had expreſsly contracted that he would himſelf pay for them. This caſe therefore, being a caſe of expreſs fraud and mala fides, affords no principle to govern the preſent caſe, in which the abſence of fraud and mala fides is found. The doubt which has been thrown on this ſubject has ariſen principally from the words, "*without notice*," which are to be found in the caſe of *Salomons* v. *Niſſen* and other caſes on the ſubject.

But

1808.

CUMING *againſt* BROWN.

But we think that, according to the general ſcope and meaning of the paſſages in the opinions of the Judges where this expreſſion occurs, it is not to be underſtood in the reſtrained ſenſe contended for; viz. "*without notice that the goods had not been paid for*;" but, "*without notice of ſuch circumſtances as rendered the bill of lading not fairly and honeſtly aſſignable.*" The criterion being, according to Mr. Juſtice *Buller* in that caſe, (p. 681.) *Does the purchaſer take it fairly and honeſtly?* And ſo underſtanding ſuch expreſſion, or at any rate ſo underſtanding the rule of law on the ſubject, we think that in this caſe no circumſtance appears to have exiſted at the time of the aſſignment of this bill of lading which ſhould have prevented the plaintiff from taking it, or which ſhould now render it not available in his hands. We are of opinion therefore that the rule for a new trial in this caſe ſhould be diſcharged.

Monday, May 30th.

The KING *againſt* DODD.

Whether or not the particular ſchemes denounced by the ſtat. 6 *Geo.* 1. *c.* 18. *ſ.* 18. as *manifeſtly tending to the common grievance, prejudice, and inconvenience*, of great numbers of ſubjects in their trade and other affairs; ſuch as the raiſing a great ſum by ſubſcription for trading purpoſes, and making the ſhares in the joint *ſtock tranſferrable*; be in themſelves unlawful and prohibited, without reference to the *fact* of ſuch tendency in the particular inſtance in the opinion of a Court and jury; at any rate the inviting of ſuch ſubſcriptions by holding out falſe and illegal conditions, ſuch as that the ſubſcribers would not be liable beyond the amount of their reſpective ſhares, ſeems to be an offence within the act. But as the ſtatute had not been acted upon for a great length of time, and was now ſought to be enforced by a private relator, who ſeemed not to have been deluded by the project, but to have ſubſcribed with a view to this application, the Court refuſed to interfere by granting an information, though they diſcharged the rule without coſts.

THE defendant, ſometime in the year 1807, publiſhed and circulated two different ſchemes; one of them, intitled, "Proſpectus for the *London* Paper "Manufacturing Company;" the other, "A Proſ- "pectus of the intended *London* Diſtillery Company "for making and rectifying genuine *Britiſh* Spirits, Cor-

1808.

The KING against DODD.

"dials, and Compounds." By the firſt of theſe it was propoſed, amongſt other things, to raiſe by ſubſcription 50,000*l.* by twenty five hundred transferrable ſhares of 50*l.* each, payable by inſtalments not exceeding 10*l.* per cent.: the whole to be under a deed of truſt or enrolment in Chancery; "by which no party (it was ſaid) could be accountable for more than the ſum ſubſcribed under the regulations therein ſtipulated:" and the perſons qualified to be choſen directors by the amount of their ſhares were to be taken in the rotation in which they ſubſcribed. The great advantages of this ſcheme over other paper manufactories were extolled throughout the proſpectus. The other ſcheme, for a Diſtillery Company, which was alſo held forth in terms of extravagant praiſe to attract popular favour, propoſed to raiſe 100,000*l.* by two thouſand transferrable ſhares at 50*l.* each, payable by inſtalments not exceeding 10*l.* per cent. at twenty days notice; to be in like manner under a deed of truſt enrolled in Chancery, "by which no party was to be accountable for more than the ſum ſubſcribed under the regulations ſtipulated therein." This alſo was to be under the management of directors properly qualified, to be nominated in rotation as they ſubſcribed. Annexed to the former ſcheme was a ſuppoſed report to the directors of the *London* Diſtillery Company from the defendant, ſtating that he had begun in *May* or *June* 1807 taking in 1*l.* ſubſcriptions; and ſpeaking of the large ſums which would be required for the purchaſe of premiſes, &c.; and naming different individuals, amongſt others himſelf, to be elected to the principal employments in the concern.

The

1808.

The KING *againſt* DODD.

The Attorney-General (on the part of a private relator), moved the Court on a former day for a criminal information againſt the defendant as the framer and promoter of theſe ſchemes, which he contended to be againſt the expreſs proviſions and plain policy of the ſtat. 6 *Geo.* 1. *c.* 18. *ſ.* 18. and ſupported the application by an affidavit verifying the iſſuing of theſe printed propoſals by the defendant, to whom application was made by the deponent for information reſpecting the nature of them, and from whom he received a proſpectus as to the paper manufactory. That the deponent agreed to ſubſcribe to it, and paid the defendant 5*l.* as for an inſtalment of 10*l.* per cent. on a transferrable ſhare of 50*l.* And in anſwer to an inquiry by the deponent what return would be made if the ſcheme did not ſucceed, the defendant anſwered 2½*l.* per cent. on each ſhare: and at the ſame time mentioned that the ſubſcriptions to the diſtillery ſcheme which he had to offer to the public had been all full three months before, and that the ſhares bore a premium, but he thought he could get the deponent one for a premium of 10*l.* or 20*l.* Facts of a ſimilar nature were alſo ſworn to, with reſpect to the defendant's taking ſubſcriptions for the diſtillery ſcheme in a book kept in an office for that purpoſe, and for which a clerk in the office delivered receipts purporting to be ſigned by the defendant as ſurveyor; and that at the ſame time the defendant came into the office and converſed with another perſon preſent on the nature of the undertaking, who alſo ſubſcribed.

The ſtat. 6 *Geo.* 1. *c.* 18. *ſ.* 18. (*a*), on which this application was founded, reciting that "whereas it is no-

"torious

(*a*) Mr. Juſtice *Blackſtone*, in B. 4 *c.* 8. of his Commentaries, ſays that this ſtatute was enacted in the year after the infamous *South Sea* project

1808.

The KING *against* DODD.

" torious that ſeveral undertakings or projects of diffe-
" rent kinds have at times ſince *June* 1718 been pub-
" licly contrived and practiſed, or attempted to be prac-
" tiſed, within *London* and other parts of the kingdom,
" as alſo in *Ireland*, and other dominions of the king,
" which manifeſtly tend to the common grievance, pre-
" judice, and inconvenience of great numbers of ſubjects
" in their trade or commerce or other their affairs; and the
" perſons who contrive or attempt ſuch dangerous and
" miſchievous undertakings or projects, under falſe pre-
" tences of public good, do preſume according to their
" own devices and ſchemes, to open books for public
" ſubſcriptions, and draw in many unwary perſons to
" ſubſcribe therein, towards raiſing great ſums of
" money; whereupon the ſubſcribers or claimants
" under them do pay large proportions thereof, &c.;
" which dangerous and miſchievous projects relate to
" ſeveral fiſheries and other affairs wherein the trade,
" commerce, and welfare of the ſubjects, or great num-
" bers of them, are intereſted. And whereas in many
" caſes the ſaid undertakers or ſubſcribers have preſumed
" to act as if they were corporate bodies, and have pre-
" tended to make their ſhares in ſtocks transferrable or
" aſſignable without any legal authority, &c. (Then
" after ſtating ſome inſtances of illegal acting under ob-
" ſolete or pretended charters;) and many other unwar-
" rantable practices, too many to enumerate, have been
" and may hereafter be contrived, ſet on foot, or pro-
" ceeded upon, to the ruin of many ſubjects, &c. And

ject had beggared half the nation. It was obſerved, however, in the argument, from *Anderſon's Hiſtory of Commerce*, that the *South Sea* bubble, as it was called, burſt after the act was paſſed, which was in 1718, two years after the failure of *Law's* project in *France*.

" whereas

1808.

The KING against DODD.

"whereas it is abſolutely neceſſary that all public undertakings and attempts, tending to the common grievance, prejudice, and inconvenience of the ſubjects in general, or great numbers of them, in their trade, commerce, or other lawful affairs, be effectually ſuppreſſed," &c. For remedy enacts, "that all and every the undertakings and attempts deſcribed as aforeſaid, and all other public undertakings and attempts tending to the common grievance, prejudice, and inconvenience of his Majeſty's ſubjects, or great numbers of them, in their trade, commerce, or other lawful affairs, and all public ſubſcriptions, receipts, payments, aſſignments, transfers, pretended aſſignments and transfers, and all other matters and things whatſoever for furthering, countenancing, or proceeding in any ſuch undertaking or attempt, and more particularly the acting or preſuming to act as a corporate body, the raiſing, or pretending to raiſe, transferrable ſtock, the transferring, or pretending to transfer or aſſign, any ſhare in ſuch ſtock, without legal authority, &c. ſhall be deemed illegal and void, &c."

S. 19. enacts that all ſuch unlawful undertakings and attempts ſo tending to the common grievance, &c. ſhall be deemed public nuſances, and ſubjects the offenders to the penalties of præmunire, in addition to the fines, penalties and puniſhments of perſons convicted of common and public nuſances. And ſubſequent clauſes give other remedies in reſpect of theſe grievances. With a proviſo (ſ. 25.) that the act ſhall not be conſtrued to prohibit or reſtrain the carrying on of partnerſhips, in trade in ſuch manner as had been before uſually and may legally be done.

Garrow,

1808.

The KING *againſt* DODD.

Garrow, *Park*, *Jervis*, *Lawes*, and *Adolphus*, ſhewed cauſe againſt the information, and denied that there was any apparent miſchievous tendency or public grievance in theſe ſchemes, (the one of which was to ſupply better and cheaper paper, and the other to ſupply better and cheaper *Britiſh* ſpirits to the public than they had at preſent;) without which they were not within the letter, and ſtill leſs within the ſpirit of the law. The relator does not pretend to ſay that the money was attempted to be raiſed, without any real intention to apply it to the purpoſes in view, in fraud of the ſubſcribers; or that the ſchemes themſelves are impracticable and fallacious; but the objects which are openly avowed are ſuch as, if realized, muſt not only be advantageous to the ſubſcribers, but to the public at large. They are fair objects of trade, meant to be obtained by fair competition with other traders; but as a larger capital was required than it is in general practicable for a few private partners to raiſe, it was propoſed to accompliſh it by inviting many ſubſcribers to form a joint ſtock. Then if the object were legal, and it would have been legal for any number of perſons to have met by appointment and entered into partnerſhip for this purpoſe, as they may for any purpoſe of trade, (except in the coal trade, and in that of bankers, and of inſurance, under different acts), the mere circumſtance of inviting others by advertiſement to join them in ſuch an undertaking cannot make it unlawful, nor the defendant's miſtake of the law in ſuppoſing that each partner would only be accountable for the joint debts incurred to the amount of his ſubſcription. Then the circumſtance of this aſſociation, if legal in its object and beneficial in its nature and tendency, being to be accompliſhed *by tranſferrable ſhares* is not in itſelf made illegal

1808.

The KING *against* DODD.

by the act of Parliament, unleſs the Court ſee clearly that it has, in the words of the act, a manifeſt tendency to the common grievance, prejudice and inconvenience of the public. It is only put by way of example amongſt other means which may have that tendency: but ſtill the Court muſt be ſatisfied that the ſcheme itſelf to be promoted by thoſe means has ſuch miſchievous tendency. They alſo dwelt on the hardſhip of inſtituting a proſecution of this ſort upon a ſtatute, which, except in the inſtance of a proſecution againſt *Caywood* (*a*) within two years after it paſſed, does not appear by any caſe in print to have been acted upon: and he is there repreſented to have been a projector of an unlawful undertaking to carry on a trade to the *North Seas*, whereby *many* of his Majeſty's ſubjects had been *defrauded* of *great* ſums. And they urged that the Court would not put in force ſo penal a law at the inſtance of a private relator, who had himſelf voluntarily, without ſolicitation from the defendant, or any one connected with him, become a ſubſcriber, with a view as it ſeemed, of preferring this complaint; when if the evil were of magnitude ſufficient to call for public redreſs, the *Attorney General* might file an information ex officio againſt the offenders.

The Attorney General, *Beſt* Serjt. and *Abbott*, in ſupport of the rule, premiſed that the only probable reaſon why this branch of the ſtatute had not been acted upon for ſo long a time was becauſe it had corrected the evil it was intended to ſuppreſs, till now of late when it had ſhewn itſelf again, and it was again neceſſary, in proportion as ſchemes of this ſort multiplied (and the public had heard

(*a*) 1 *Sid.* 472, and 2 *Ld. Ray.* 1361.

of

1808.

The KING *againſt* DODD.

of others on foot beſides thoſe in queſtion), to put this wholeſome law in force. They then argued from the wording of the ſtatute that the Legiſlature meant to prohibit altogether projects of this nature, deſcribed by certain indicia as tending in their nature to the common grievance, prejudice and inconvenience of the ſubject. It ſtates that it was *notorious* that projects of different kinds had been of late practiſed or attempted to be practiſed which *manifeſtly* tended to the common grievance, &c. that the perſons who continued or attempted ſuch *dangerous and miſchievous* projects, under *falſe pretences of public good* (and ſuch are blazoned forth in theſe ſchemes), preſumed *to open books for public ſubſcription*; that they drew in the ſubſcribers or claimants under them *to pay ſmall proportions thereof*: ſome of them, it is ſaid, preſumed to act as corporate bodies, and had pretended to *make their ſhares in ſtocks transferrable*, without any legal authority. All theſe acts, which are to be found in the preſent caſe, are declared to be dangerous and miſchievous. But then the legiſlature go on further to recite more generally, that it is neceſſary that *all public* undertakings and attempts tending to the common grievance, &c. of the ſubjects in their trade or lawful affairs ſhould be ſuppreſſed: and then it enacts for remedy that *all undertakings and attempts as aforeſaid*;" (which muſt mean all thoſe particularly deſcribed in the firſt part of the preamble,) "and all "*other* public undertakings *tending to* the common griev- "ance, &c. (which evidently points to the general "words at the concluſion of the preamble,) "and all "other matters and things whatſoever for furthering, "countenancing, or proceeding in any ſuch undertaking;" and *more particularly* (inter alia) the pretending to raiſe

1808.

The KING against DODD.

transferrable ſtocks, or to *aſſign ſhares in ſuch ſtocks*, &c. without authority of Parliament or of the Crown, are declared to be illegal and void. That the particular acts deſcribed are in themſelves unlawful, as being aſſumed to have a miſchievous and dangerous tendency, is further evident from the 21ſt ſection, which ſubjects to puniſhment any broker who ſhall act as ſuch in contracting for the ſale or purchaſe "of any ſhare or intereſt in any "of the undertakings by the act *declared to be unlawful.*" But unleſs the particular acts themſelves deſcribed are to be taken as expreſsly prohibited without any reference to what a jury may conſider as their tendency, how is a broker to know whether a jury will conſider them as *tending to the common grievance*, ſo as to govern his conduct in exerciſing his buſineſs of a broker. But if the conſtruction of the act were otherwiſe, it cannot be doubted that theſe ſchemes come within the ſpirit of it. They hold out a falſe lure to the ſubſcribers, that they ſhall not be anſwerable for more than the amount of their ſhares, which is calculated to enſnare the unwary; while extravagant hopes of gain are proclaimed to allure the greedy; and adventurous perſons of ſmall property are drawn in by the facility held out of paying their ſubſcriptions by ſmall inſtalments; which is one of the miſchiefs intended to be prevented by the act. There are alſo miſchiefs of a more general nature affecting others than the ſubſcribers themſelves; for when a multitude of perſons are engaged in a commercial adventure with transferrable ſhares, it is next to impoſſible for thoſe who deal with them to know to whom they are giving credit, or for the members themſelves to know the extent of their own reſponſibility. It is impracticable for 500 perſons to ſue or be ſued with effect.

1808.

The KING *against* DOBB.

effect. And the individual ſhareholder does not get rid of the evil by parting with his ſhare; as he ſtill remains liable not only for the partnerſhip debts contracted during the time he held it, but alſo for thoſe contracted afterwards with one who may have continued to deal with the company on his credit, not knowing that he had ceaſed to be a partner. One of the ſpecial objects of the act therefore was to prevent numbers of perſons clubbing together with transferrable ſhares for the purpoſe of carrying on trade. It was conſidered as a crafty expedient to enable the original projectors, after having poſſeſſed themſelves of the joint ſtock and ſubſcription funds, to withdraw themſelves from reſponſibility: but if the ſhares are not transferrable, then the loſs and ruin will fall as it ought upon the original projectors. One object of the legiſlature was to ſecure ſimple individuals againſt the ruinous conſequences of ſuch projects, where great hopes are holden out to the public on falſe foundations; a large fund to be collected by numerous ſubſcriptions of ſmall ſums, of which the chief projector is to retain a principal ſhare in the management; and the ſhares to be transferrable in order to facilitate the eſcape of thoſe who are in the ſecret, and to make redreſs more difficult and fruitleſs. Another object was to ſecure the public. Legal corporations are known, and can be made reſponſible by their property, and puniſhed by the forfeiture of their charter; but bodies of this ſort, indefinitely numerous and having only individual exiſtence, can with difficulty be traced, and cannot afford the ſame protection to the public who deal with them.

Lord ELLENBOROUGH C. J., at the concluſion of the argument, obſerved that it was a queſtion of conſiderable

1808.

The KING *against* DODD.

novelty upon the conſtruction of the act, which, though of ſome ſtanding, could not be conſidered as obſolete: yet the long period which had intervened ſince the paſſing of the law, and the little uſe which appeared to have been made of it, might perhaps afford ſome excuſe for this party, and for others who of late may have been engaged in ſimilar projects, if it ſhould appear that they had fallen unawares into the commiſſion of an offence. The Court would therefore take into conſideration, firſt, whether the acts imputed to the defendant were illegal; and next, whether under the circumſtances it might be proper to grant the information prayed for. The firſt queſtion was of very extenſive conſequence, as it might affect other caſes: and the Court would wiſh their deciſion to have as much public benefit with as little private inconvenience as poſſible. Two days afterwards his Lordſhip delivered the opinion of the Court to this effect.

The caſe has been very fully argued, and the application for an information has at leaſt had this good effect, that it has produced a full diſcuſſion of the queſtion, and has given a general notoriety to the exiſtence of the ſtatute of the 6th of *Geo.* 1., ſo that no perſon can hereafter pretend to ſay that it is an obſolete law, and on that account no longer to be enforced againſt ſuch as offend againſt the proviſions of it. After a lapſe, however, of 87 years ſince any authenticated proceeding has been had upon this branch of the act, and when other ways are ſtill open to the party now applying to put this act in force againſt offenders, the Court in the exerciſe of a ſound diſcretion, under all the circumſtances of the caſe, will forbear to interfere in this extraordinary manner. But at the ſame time we wiſh it to be underſtood that it

is

1808.

The KING *againſt* DODD.

is not becauſe we think that the facts brought before us are not within the penalty of the law: but we chooſe to expreſs ourſelves with the greater reſerve, becauſe the defendant may ſtill be indicted, and the Court may ſtill be called, upon the removal of the indictment by certiorari, or upon an information filed by the Attorney-General, to give their opinion on this very caſe. But independent of the general tendency of ſchemes of the nature of the project now before us to occaſion prejudice to the public, there is beſides in this proſpectus a prominent feature of miſchief; for it therein appears to be held out that no perſon is to be accountable beyond the amount of the ſhare for which he ſhall ſubſcribe, the conditions of which are to be included in a deed of truſt to be enrolled. But this is a miſchievous deluſion, calculated to enſnare the unwary public. As to the ſubſcribers themſelves, indeed, they may ſtipulate with each other for this contracted reſponſibility; but as to the reſt of the world it is clear that each partner is liable to the whole amount of the debts contracted by the partnerſhip. I forbear to comment on leſſer circumſtances; ſuch as the ſmallneſs of the ſum to be ſubſcribed in the firſt inſtance, which ſeems to carry an appearance of holding out a lure to the unwary; and other features in the caſe. But conſidering that this is brought forward after a lapſe of ſo many years ſince any ſimilar proſecution was inſtituted, and brought forward by a party who does not profeſs to have been himſelf deluded by the project; and the ſtatute having been paſſed principally for the protection of unwary perſons from deluſions of this kind; the Court think, in the exerciſe of their diſcretion, that they ſhould not now enforce the ſtatute againſt

1808.

The KING *againſt* DODD.

againſt this defendant at the relation of a perſon ſo circumſtanced; leaving the relator to the common law remedy by indictment, or the defendant to be proceeded againſt by his Majeſty's Attorney-General ex officio, if he ſhould deem it adviſeable for the protection of the public. But the Court think it is fit that this rule ſhould be diſcharged without coſts. And they recommend it as a matter of prudence to the parties concerned, that they ſhould forbear to carry into execution this miſchievous project, or any other ſpeculative project of the like nature, founded on joint ſtock and transferrable ſhares: and we hope that this intimation will prevent others from engaging in the like miſchievous and illegal projects.

Rule diſcharged, without coſts.

Monday, May 30th.

LLOYD *againſt* MAURICE.

The *Engliſh* notice required by the ſtat. 5 *G.* 2. *c.* 27. *ſ.* 4 is to be on the *copy* of the proceſs and not on the writ itſelf; and the ſervice of ſuch copy without the notice is irregular and will be ſet aſide; though the Court diſcharged a rule for quaſhing the writ itſelf on this account.

THE *Attorney-General* ſhewed cauſe againſt a rule for quaſhing a writ of latitat, becauſe the copy of the proceſs ſerved on the defendant had not the *Engliſh* notice on it required by the ſtat. 5 *Geo.* 2. *c.* 27. *ſ.* 4.: and admitted that the ſervice of the copy was void for want of ſuch notice on the copy of the writ ſerved, as required by the act; but contended that the writ of latitat itſelf, which, in fact, had ſuch notice upon it, was good; and the act only requires the *Engliſh* notice to be on the copy ſerved.

W. E. Taunton ſaid that the act meant to identify the copy of the writ ſerved with the writ itſelf in this reſpect

1808.

LLOYD *against* MAURICE.

ſpect. The only uſe of the *Engliſh* notice was on the copy of the proceſs ſerved: it was uſeleſs, and not required by the act, on the writ itſelf.

The Court agreed that the *Engliſh* notice was only required to be on the copy of the proceſs ſerved, and need not be on the writ itſelf; and that for want of ſuch notice the ſervice of the copy was irregular: but the writ itſelf being perfect when iſſued could not be quaſhed; and therefore this rule muſt be diſcharged.

MEMORANDUM.

AT the end of this term *Wm. Manley* Eſq. of the Middle Temple, and *Albert Pell* Eſq. and *Wm. Rough* Eſq. of the Inner Temple, were called Serjeants, and took for their motto "Pro Rege et Lege."

END OF EASTER TERM.

AN

AN

INDEX

OF THE

PRINCIPAL MATTERS.

mon: but if all her daughters ſhould die without leaving any *iſſue*, then, after the deceaſe of the ſurvivor, in truſt for her grandſon, in fee, who was her *heir at law*: the reſidue of her real and perſonal eſtate to her three daughters. Upon a bill filed by the grandſon, in the lifetime of the ſurviving daughter, to reſtrain the tenant from cutting timber, &c.; and after a conveyance of the premiſes to the uſes of the will; held that under the will and deeds of leaſe and releaſe the three daughters took no legal eſtates, but that the releaſee took an eſtate for the lives of the daughters; and that ſuch of their children as ſhould be living at the death of the ſurvivor of the daughters would take eſtates *in fee*, as tenants in common. *Robinſon* v. *Grey and Others*, *M.* 48 *G.* 3. 1

2. Proof that the defendant agreed to ſell his horſe warranted ſound to the plaintiff for 31*l.* 10*s.*, and at the ſame time agreed that if the plaintiff would take the horſe at that value, he, the defendant, would buy another horſe of the plaintiff's brother for 14*l.* 14*s.*, and that the difference only ſhould be paid to the defendant, will ſupport a count charging only, that in conſideration that the plaintiff would buy of the defendant a horſe for 31*l.* 10*s.* the defendant promiſed that it was ſound; and that in fact the plaintiff did buy the horſe *for that price*, and *did pay to the defendant the ſaid* 31*l.* 10*s.* *Hands* v. *Burton*, *E.* 48 *G.* 3. 349

ALIEN ENEMY.

The Court would not ſtay judgment and execution on a ſummary application, becauſe the plaintiffs after verdict became alien enemies. *Vanbrynen* v. *Wilſon*, *H.* 48 *G.* 3. 321

AMENDMENT.

Order to amend writs of [illegible] facias on a judgment, and declaration thereon, conformably to the judgment roll. *Braſwell* v. *Jeco*, *H.* 48 *G.* 3. 316

ANNUITY.

1. Where tenant for life conveyed eſtates to truſtees for 99 years, if he ſhould ſo long live, in truſt to raiſe money by the grant of annuities for his life; and afterwards he and the truſtees granted an annuity to one by deed, reciting the former conveyance to the truſtees, it is not neceſſary by the annuity act 17 *G.* 3. *c.* 26. to inroll a memorial of the truſt deed; it not being "a deed, inſtrument, or aſſurance *whereby any annuity is granted*," but only a deed of conveyance to thoſe who afterwards granted the annuity, and conſtituting their title to the eſtate charged therewith. *O'Callaghan* v. *Ingilby*, *M.* 48 *G.* 3. 135

2. Where the memorial of a bond, conditioned to ſecure an annuity, recited in the condition an indenture between the ſame parties, and part of the ſame aſſurance, which ſtated the annuity to be granted "for the "price of 1800*l.*, which ſaid ſum of "1800*l.* *was paid by the grantee to* "*the grantors by his draft* on *R.* and "Co. his bankers *at or before* the "ſealing and delivery of the ſaid "indenture and bond;" and the memorial of the ſaid indenture ſtated that the indenture witneſſed that "in conſideration of 1800*l.* to the "grantors, *in hand paid* by the grantee, and which was *paid to them by* "*his draft* on *R.* and Co. his "bankers, &c. *the payment and re-*"*ceipt of which ſaid* 1800*l.* *the* "*grantors did thereby acknowledge*," the annuity was granted: this does ſufficiently import, *that the conſidera-*

tion

tion money was actually received by the grantor through the medium of the draft, *before* the execution of the deeds granting the annuity; ſo as to diſpenſe with the neceſſity of ſetting out in the memorial the particulars of ſuch draft, with the time of payment. *ib.*

3. The annuity act does not require that the eſtates charged with the annuity ſhould be ſpecifically ſet forth in the memorial: and therefore it is no objection that the memorial only ſtated the annuity to be charged on all the grantor's eſtates in the county of *York* and all other his premiſes conveyed to certain truſtees. *ib.* 135

4. It is no objection to the memorial of the deed granting the annuity, that it ſtated it in general terms, to contain "powers of diſtreſs and entry, as ſtated in the deed;" for the annuity act does not require ſuch powers to be ſtated, except as far as they create a truſt, which brings them within the branch of the act relating to truſtees. *ib.* Nor,

5. Is the memorial required to ſtate the covenants of the grantors for the due payment of the annuity. *ib.*

APPEAL.

By the ſtat. 35 *G.* 3. *c.* 101. *ſ.* 2. the party aggrieved by an order of Juſtices, directing payment, to the amount of above 20*l.* of the charges and coſts of the ſuſpenſion of an order of removal, on account of the illneſs of the pauper, may appeal to the next ſeſſions, in like manner as againſt an order of removal, though he omit to give notice of ſuch his appeal within three days after the demand of ſuch charges and coſts; by which he makes himſelf liable to a diſtreſs for the amount. And if on appeal the former order be vacated, or the amount of the charges to be paid be reduced, the ſurplus, if before levied by diſtreſs, muſt be refunded. *The King* v. *The Inhabitants of Bradford, M.* 48 *G.* 3. 97

APPRENTICE.

An indenture binding an adult as an apprentice, which was not executed by herſelf, but only by her father-in-law and the maſter, though with her conſent, does not conſtitute her an apprentice; and conſequently no ſettlement can be gained by her under ſuch indenture. *The King* v. *The Inhabitants of Ripon, H.* 48 *G.* 3. 295

ARREST.

One who had been appointed Conſul General from the *Porte*, but was diſmiſſed ſeveral months before from his employment, and another perſon reſident here appointed in his room, is not at any rate privileged from arreſt; though at the time of the arreſt he had not received any official notification of his diſmiſſal, or of the appointment of the other. *Marſhall* v. *Critico, E.* 48 *G.* 3. 447

ASSUMPSIT.

1. A cuſtomer paying bills, not due, into his bankers in the country, whoſe cuſtom it was to credit their cuſtomers for the amount of ſuch bills, if approved, as caſh (charging intereſt), is entitled to recover back ſuch bills in ſpecie from the bankers becoming bankrupt; the balance of his caſh account, independent of ſuch bills, being in his favour at the time of the bankruptcy: and if payment be afterwards received upon ſuch bills by the aſſignees, they are liable to refund it to the cuſtomer in an action for money had and received. *Giles* v. *Perkins and Others, Aſſignees of Dickenſon and Others, M.* 48 *G.* 3. 12

2. One

2. One who had voluntarily offered to pay a ſum of money for the uſe of the poor of the pariſh, in order to avoid a proſecution by a magiſtrate upon a charge of having inſtigated the eſcape of a priſoner in cuſtody for a miſdemeanor, which offer was conſented to by a magiſtrate, and the money accordingly paid by the party to the maſter of the workhouſe for the uſe of the poor; may at any rate countermand the application of the money before it is ſo applied; and may recover it back in an action for money had and received. *Taylor* v. *Lendey*, *M.* 48 *G.* 3. 49

3. The law will not raiſe an aſſumpſit upon a judgment obtained by default in one of the colonies againſt a party, who upon the face of the proceedings appeared only to have been *ſummoned* "by nailing up a copy of the declaration at the court-houſe door;" it not appearing that he had ever been preſent in the colony, or ſubject to the juriſdiction of the colonial court at the time of the ſuit commenced or afterwards: although by a law of the colony if a defendant be *abſent from the iſland*, and have no attorney, manager, or overſeer there, ſuch mode of ſummoning him ſhall be deemed good ſervice: for the *abſence* thereby intended is of one who had been *preſent* and ſubject to the juriſdiction: though even if it had been meant to reach ſtrangers to the juriſdiction, it would not have bound them. *Buchanan* v. *Rucker*, *H.* 48 *G.* 3. 192

4. Proof that the defendant agreed to ſell his horſe warranted ſound to the plaintiff for 31*l.* 10*s.*, and at the ſame time agreed that if the plaintiff would take his horſe at that value, he, the defendant, would buy another horſe of the plaintiff's brother for 14*l.* 14*s.*, and that the difference only ſhould be paid to the defendant, will ſupport a count charging only, that in conſideration that the plaintiff would buy of the defendant a horſe for 31*l.* 10*s.*, the defendant promiſed that it was ſound, and that in fact the plaintiff did buy the horſe *for that price*, and *did pay to the defendant the ſaid* 31*l.* 10*s.* *Hands* v. *Burton*, *E.* 48 *G.* 3. 349

5. Where money in litigation between two parties has by mutual conſent been paid over to a truſtee, in truſt for the party entitled, it can only be ſued for and recovered from the ſtakeholder by the party entitled to it, and not from the original party who was indebted; though he agreed to wave all objections to form. *Ker* v. *Oſborne*, *E.* 48 *G.* 3. 378

ATTORNEY.

An attorney of *B. R.* in pleading his privilege againſt being ſued by original, improperly ſtated the cuſtom of this court to be not to compel its attornies to anſwer an original writ, *unleſs firſt forejudged from their office*, &c. (which is the cuſtom in *C. B.* but not in this court): but held that enough appearing to ſuſtain the plea, the cuſtom which had no foundation here (of which the court would take notice) might be rejected as ſurpluſage. *Stokes* v. *Maſon*, *E.* 48 *G.* 3. 424

AUTERFOITS ACQUIT.

One was indicted in *Middleſex* for perjury committed in an affidavit; which indictment, after ſetting out ſo much of the affidavit as contained the falſe oath, concluded with a prout patet by the affidavit affiled in the court of *B. R.* at *Weſtminſter*, &c. and on this he was acquitted: after which he was indicted again *in Middleſex* for the ſame perjury, with this difference only, that the ſecond indictment ſet out the jurat of the affidavit, in which it was ſtated to have been ſworn *in London*; which was

was traverſed by an averment that in fact the defendant was ſo ſworn *in Middleſex* and *not in London*: and held that he was entitled to plead auterfois acquit; for the *jurat* was not concluſive as to the *place* of ſwearing; and the ſame evidence as to the real place of ſwearing the affidavit might have been given under the firſt as under the ſecond indictment; and therefore the defendant had been once before put in jeopardy for the ſame offence. *The King* v. *Emden*, *E.* 48 *G.* 3. 437

AUTHORITY.

One who had voluntarily offered to pay a ſum of money for the uſe of the poor of the pariſh, in order to avoid a proſecution by a magiſtrate upon a charge of having inſtigated the eſcape of a priſoner in cuſtody for a miſdemeanor; which offer was conſented to by the magiſtrate, and the money accordingly paid by the party to the maſter of the court-houſe for the uſe of the poor; may at any rate countermand the application of the money before it is ſo applied, and may recover it back in an action for money had and received. *Taylor* v. *Lendey*, *M.* 48 *G.* 3. 49

AWARD.

1. An award, that certain actions be *diſcontinued*, and each party pay his own coſts, is final and good; being in effect an award of a ſtet proceſſus. *Blanchard* v. *Lilly*, *E.* 48 *G.* 3. 497
2. Where by the rule of reference the coſts were to *abide the event* of an award; that includes the *coſts* of the *reference* as well as of the *cauſe*. *Wood* v. *O'Kelly*, *E.* 48 *G.* 3. 436

BAIL.

1. None can be holden to ſpecial bail in detinue or trover without a judge's order. *Reg. Gen. H.* 48 *G.* 3. 325
2. Bail above having been put in and exception entered in the vacation, notice of juſtification for the firſt day of the next term muſt be given within 4 days after ſuch exception. *Neillſon* v. *King*, *E.* 48 *G.* 3. 434

BAIL BOND.

Where the writ was to appear before the King *whereſoever he ſhould then be in* England, and the ſheriff took a bail bond for the party's appearance before the King *at Weſtminſter* on the day named in the writ; held to be a ſubſtantial compliance with the ſtat. 23 *H.* 6. *c.* 9. ſo as to entitle the aſſignee of the ſheriff to recover on ſuch bond. *Jones* v. *Stordy*, *M.* 48 *G.* 3. 55

BANKER.

See INFRA BANKRUPT, 1.

BANK NOTES.

See EXECUTION, 1.

BANKRUPT.

1. A cuſtomer paying bills, not due, into his bankers in the country, whoſe cuſtom it was to credit their cuſtomers for the amount of ſuch bills, if approved, as caſh, (charging intereſt), is entitled to recover back ſuch bills in ſpecie from the bankers becoming bankrupt; the balance of his caſh account, independent of ſuch bills, being in his favour at the time of the bankruptcy: and if payment be afterwards received upon ſuch bills by the aſſignees, they are liable to refund it to the cuſtomer in an action for money had and received. *Giles* v. *Perkins and Others*, *Aſſignees of Dickenſon and Others*, *M.* 48 *G.* 3. *ib.*
2. Neither the bankrupt, nor any perſon claiming from him by aſſign-

ment

ment ſubſequent to the commiſſion of bankrupt, ſhall be permitted in an action at law to queſtion the validity of ſuch commiſſion, and recover from the aſſignees the property of the bankrupt taken under it, by proving an act of bankruptcy committed by the bankrupt prior to the petitioning creditor's debt; though it be alſo ſhewn that there was a ſufficient petitioning creditor's debt exiſting at the time of ſuch prior act of bankruptcy, whereon a better commiſſion might have been ſued out. *Donovan, Aſſignee of Kennet an Inſolvent Debtor,* v. *Duff, Aſſignee of the ſame Kennet, under a Commiſſion of Bankrupt, M.* 48 *G.* 3. 21

3. The certificate of a bankrupt, allowed after the filing of the plaintiff's bill and before plea pleaded, is evidence to ſupport the general plea in bar given by the ſtat. 5 *G.* 2. *c.* 30. *ſ.* 7. viz. that before the exhibiting of the plaintiff's bill the defendant became a bankrupt, and that the cauſe of action accrued before he became a bankrupt. *Harris* v. *James, M.* 48 *G.* 3. 82

4. *A., B.*, and *C.*, partners and diſtillers, occupied certain premiſes leaſed to *A.* and another, and uſed in common in the trade the ſtills, vats, and utenſils neceſſary for carrying it on, the property of which ſtills, &c. afterwards appeared to be in *A.* On the diſſolution of the partnerſhip, which was a loſing concern, it was agreed that *C.* and one *J.* ſhould carry on the buſineſs on the premiſes; and by deed between the two laſt and *A.* it was covenanted and agreed, that *A.* ſhould withdraw from the buſineſs, and permit *C.* and *J.* to uſe, occupy, and enjoy the diſtill-houſe and premiſes, paying the reſerved rent, &c. and the ſeveral ſtills, vats, and utenſils of trade ſpecified and numbered in a ſchedule annexed, in conſideration of an annuity to be paid by *C.* and *J.* to *A.* and his wife and the ſurvivor; with liberty for *C.* and *J.*, on the deceaſe of *A.* and his wife, to purchaſe the diſtill-houſe and premiſes for the remainder of *A.*'s term, and the ſtills, vats, &c. mentioned in the ſchedule: and *C.* and *J.* covenanted to keep the ſtills, vats, and utenſils in repair, and deliver them up at the time, if not purchaſed: and there was a proviſo for re-entry if the annuity were two months in arrear. Under this, *C.* and *J.* took poſſeſſion of the premiſes, with the ſtills, vats, and utenſils, and carried on the buſineſs as before; and made payments of the annuity, which afterwards fell in arrear more than two months; but *A.*'s widow and executrix who ſurvived him did not enter, but brought an action for the arrears, which was ſtopped by the bankruptcy of *C.* and *J.* who continued in poſſeſſion of the ſtills, vats, and utenſils on the premiſes.—

On a queſtion, whether ſuch ſtills, vats, and utenſils, ſo continuing in poſſeſſion of *C.* and *J.* the new partners, and uſed by them in their trade in the ſame manner as they had been by the former partners, of whom *A.* the owner was one, paſſed under the ſtat. 21 *Jac.* 1. *c.* 19. *ſ.* 10. and 11. to the aſſignees of *C.* and *J.*, as being in the *poſſeſſion, order, and diſpoſition,* of the bankrupts at the time of their bankruptcy as *reputed owners*: and nothing appearing to the world to rebut the preſumption of true ownerſhip in the bankrupts ariſing out of their poſſeſſion and reputed ownerſhip, (of which reputed ownerſhip the jury are to judge from the circumſtances;) held,

1. That the ſtills which were fixed to the freehold did not paſs to the aſſignees under the words *goods and chattels* in the ſtatute,

2. That the vats, &c. which were not ſo fixed, did paſs to the aſſignees

as being left by the true owner in the poſſeſſion, order and diſpoſition (as it appeared to the eye of the world) of the bankrupts, as reputed owners.

3. That the caſe would have admitted of a different conſideration if there had been a uſage in the trade for the utenſils of it to be let out to the traders; as that might have rebutted the preſumption of ownerſhip ariſing from the poſſeſſion and apparent order and diſpoſition of them. *Horn* v. *Baker*, *H.* 48 *G.* 3. 215

5. The coſts of a ſuit in Chancery, directed to be paid by an award made before the bankruptcy of the defendant, but which coſts were not taxed till after he became bankrupt, cannot be proved under the commiſſion; but the bankrupt remains liable to be attached for the amount under the award made a rule of court. *The King* v. *Davies*, *H.* 48 *G.* 3. 318

6. The departure of a trader from his dwelling houſe, with intent to delay his creditors, is an act of bankruptcy, though no creditor be thereby in fact delayed. And the words in the ſtat. 1 *Jac.* 1. *c.* 15. *ſ.* 2. following this and other acts of bankruptcy committed, viz. "to the intent or whereby his creditors ſhall or may be defeated or delayed," &c. are to be read, "to the intent his creditors ſhall or whereby (or that thereby) they may be defeated," &c. But the lying in priſon 6 months upon an arreſt is made a ſubſtantive act of bankruptcy independent of any intent of the trader. So in the caſe of an act of bankruptcy by the trader's beginning to keep houſe the denial of a creditor is uſually given in evidence, not to ſhew the fact of the creditor's being delayed, but as evidence to explain the equivocal act of the trader's keeping in his houſe, and to ſhew that he began to keep houſe with intent to delay his creditors. *Robertſon* v. *Liddel*, *E.* 48 *G.* 3. 487

7. Goods ſold and delivered upon an agreement to be paid for by a preſent bill payable at a future date does not create a preſent debt, on which to found a commiſſion of bankrupt: nor can an action for goods ſold and delivered be maintained by the vendor before the time when the bill agreed to be given would have become due, when the contract would be no longer executory. Neither can ſuch executory contract, if ſuch bill payable at a future day be actually given to ſecure it, found a good petitioning creditor's debt within the ſtatutes 7 *G.* 1. *c.* 31. *ſ.* 1. and 5 *G.* 2. *c.* 30. *ſ.* 22. which are confined to debts due on bills, bonds, promiſſory notes, and other perſonal written ſecurities of the like ſort, payable at a future day; which alone by the latter ſtatute are made available to found a good petitioning creditor's debt. *Hoſkins* v. *Duperoy*, *E.* 48 *G.* 3. 498

BASTARD.

See ORDER OF JUSTICES, 1.

1. *One* magiſtrate committing the mother of a baſtard child to cuſtody for not filiating the child is yet entitled to the previous notice of action required by the ſtat. 24 *G.* 3. *c.* 44. though by the ſtat. 18 *Eliz.* *c.* 3. *ſ.* 2. juriſdiction over the ſubject matter is given to *two* magiſtrates. *Weller* v. *Toke*, *E.* 48 *G.* 3. 364

2. A married woman pregnant in the abſence of her huſband with a child, which when born would by law be a baſtard, is removeable as an unmarried woman under ſect. 6. of ſtat. 35 *G.* 3. *c.* 101. *The King* v. *The Inhabitants of Tibbenham*, *E.* 48 *G.* 3. 388

BILL OF LADING.

The property of goods paſſes by the indorſement and delivery of the bill

of lading by the consignee to another bonâ fide for a valuable consideration, and without collusion with the consignee; although the indorsee knew at the time that the consignor had not received money payment for his goods, but had taken the consignee's acceptances payable at a future day not then arrived: and after such assignment of the bill of lading the consignor cannot stop the goods in transitu upon the insolvency of the original consignee. *Cuming* v. *Brown*, *E.* 48 *G.* 3. 506

BILLS OF EXCHANGE.

1. *A.* and *B.* having exchanged their acceptances of bills drawn by each on the other at so many day's date; held that the delivery of the respective bills for acceptance, and the re-delivery of the same by the acceptors to the respective drawers, was a negotiation of the bills; and that such bills could not, after they had been so exchanged for valuable consideration (as the exchange of acceptances is) for 20 days, be post-dated without a new stamp, as upon new bills; although during all that time each had remained in the hands of the original drawer. *Cardwell* v. *Martin*, *H.* 48 *G.* 3. 190

2. Where the indorsee of a bill of exchange lodged it with his bankers, who presented it for payment on the 4th, when it was dishonored; and on the 5th they returned it to the indorsee, who gave notice to the drawer of the dishonor on the 6th by the two-penny post: held such notice to be reasonable. *Scott* v. *Lifford*, *E.* 48 *G.* 3. 317

BOND.

1. To debt on bond conditioned for the payment of a sum of money, which the condition stated to have been *taken up, borrowed, and received* by the defendants of the plaintiffs at respondentia interest, secured by a cargo of goods shipped from *Calcutta* to *Ostend*; it is competent to the defendant to plead that the bond was given to secure the price of goods sold by the plaintiffs to the defendants in the *East Indies*, and illegally prepared by the plaintiffs for shipment from thence to beyond the *Cape of Good Hope*, without the licence of the *East India* Company; without proceeding to state formally, that the condition was colourable, to conceal the illegality of the transaction, and to negative that the bond was given for money *taken up, borrowed, and received*, &c. For the statement in the plea is rather explanatory of, than absolutely inconsistent with, the transaction stated in the condition of the bond: but if it were inconsistent with it, the plea would still be good in this form. *Paxton* v. *Popham*, *E.* 48 *G.* 3. 408

2. An officer cannot commute for money the services of an impressed man, nor let him go for money; and a bond given to secure the man's return on non-payment of such money is void; and may be avoided by plea disclosing the true transaction, and shewing that the man was illegally impressed. *Pole* v. *Harrobin*, *E.* 22 *G.* 3. *B. R.* 416

BUILDING ACT.

In trespass against the owner of a house adjoining to the plaintiff's in the metropolis, for taking down his party wall and building on it, the defendant shewing at the trial that he was authorised in doing the thing complained of under the building act 14 *G.* 3. c. 78. is entitled to treble costs under the 10th section, upon a nonsuit. *Collins* v. *Poney*, *H.* 48 *G.* 3. 322

COMPOUNDING.

See MISDEMEANOR COMPOUNDING.

CON-

CONSUL.

See ARREST.

CONTRACT.

See TRADE, 1.

CONVEYANCE VOLUNTARY.

A *voluntary* ſettlement of lands made *in conſideration of natural love and affection* is void as againſt a ſubſequent purchaſer for a *valuable* conſideration, though with notice of the prior ſettlement before all the purchaſe money was paid, or the deeds executed; and though the ſettlor had other property at the time of ſuch prior ſettlement, and did not appear to be then indebted, and there was no fraud in fact in the tranſaction: for the law, which is in all caſes the judge of fraud and covin ariſing out of facts and intents, infers fraud in this caſe, upon the conſtruction of the ſtat. 27 *Eliz. c.* 4. *Doe d. Otley* v. *Manning, M.* 48 *G.* 3. 59

CONVICTION.

Though it be proper for a magiſtrate in drawing up a conviction on the ſtat. 5 *Ann. c.* 14. to ſtate the particular evidence of the fact on which his judgment is founded, and not merely the legal effect of ſuch evidence, in the words of the ſtatute, yet a conviction in the latter form is valid in law: but the magiſtrate ſubjects himſelf to an information if he endeavour to ſhelter himſelf from detection by miſ-ſtating ſuch legal reſult when the evidence would not warrant it. *The King* v. *Pearſe, E.* 48 *G.* 3. 350

COPYHOLD.

See SURRENDER.

CORPORATION.

1. The charter of *Saltaſh* empowers the mayor, juſtice of the peace, and the reſt of the aldermen (ſeven in all), or the major part of them, of whom the mayor and juſtice to be two, when it ſhall ſeem to them *convenient and neceſſary*, to elect as many free burgeſſes as ſhall pleaſe them, *and to the ſame free burgeſſes ſo elected to adminiſter an oath, &c.* The defendant was elected a free burgeſs in *October* 1804, and in *December* 1806, at a meeting of ſix out of the ſeven aldermen, in conſequence of a mandamus to them to fill up the vacant place of alderman, and which meeting the mayor ſaid was held for that ſole purpoſe, the defendant tendered himſelf to be ſworn in; againſt which 3 aldermen proteſted, one of whom immediately left the aſſembly; but before the other two proteſtors withdrew, the mayor, with the aſſent of two other aldermen, adminiſtered the oath of office to the defendant. Held,

1ſt, That the ſwearing in of the burgeſs might well be at a time ſubſequent to the election; he having had a preſent legal capacity to be ſworn in at the time of his election; and therefore not like the caſe of an infant elected.

2dly, That the act of ſwearing in, being merely miniſterial, may be done by the mayor, as preſiding officer, in the preſence of the majority of the mayor and aldermen, by whom ſuch act was required to be done, whenſoever and howſoever aſſembled, and without any previous ſummons for this purpoſe; there being no diſſent by the majority at the time when the oath was ſo adminiſtered.

3dly, Though three, an equal number of thoſe firſt aſſembled, proteſted againſt the defendant's being ſworn in when he firſt tendered

himſelf to take the oath; yet one of the proteſtors having withdrawn, it was competent to the majority who remained to adminiſter the oath; no vote having been come to by the major part at firſt aſſembled to preclude the body from doing the act at that meeting.

4thly, *Quære*, Whether, if it be found againſt a defendant in quo warranto, that, though duly elected, he was not duly ſworn in, there can be any other judgment againſt him than of *ouſter abſolute*; there being no inſtance of a judgment of *ouſter quouſque*. *The King* v. *Courtenay*, *H.* 48 *G.* 3. 246

2. But where the new mayor of *New Romney* was required by charter to be ſworn in *before* the old mayor, a ſwearing in by the town clerk, the uſual officer to adminiſter the oath, *before* the old mayor, but againſt the conſent and direction of the latter, was held void. *Rex* v. *Ellis*, *M.* 8 *G.* 2. *B. R.* cited in *Rex* v. *Courtenay*. 252

3. The neglect to be ſworn into an office for above 20 years after the party's election to it is evidence of his refuſal to accept the office: as his acquieſcence unexplained for ſo long time in the election of another perſon into the office is an evidence of his renunciation of it, and the acceptance of ſuch renunciation by the body. *Rex* v. *Jordan*, *tempore Lord Hardwicke*, cited *ibid.* 263

4. Though the affixing of the common ſeal to the deed of conveyance of a corporation be ſufficient to paſs the eſtate, without a formal delivery, if done with that intent; yet it has no ſuch effect if the order for affixing the ſeal be accompanied with a direction to their clerk to retain the conveyance in his hands till accounts were adjuſted with the purchaſer. *Derby Canal Company* v. *Wilmot*, *E.* 48 *G.* 3. 360

CORRECTION, HOUSE OF.

See PRISONER, I.

COSTS.

See DAMAGES AND COSTS.

1. In an order of filiation and maintenance the juſtices have no power by the ſtat. 18 *Eliz. c.* 3. to direct the defendant to pay the coſts of the pariſh in obtaining the order: but having in ſuch order ſeparated the ſum to be paid for maintenance, and the ſum to be paid for coſts, the order was quaſhed as to the latter, and confirmed as to the reſt of it. *The King* v. *Sweet*, *M.* 48 *G.* 3. 25

2. In treſpaſs againſt the owner of a houſe adjoining to the plaintiff's in the metropolis, for taking down his party-wall and building on it, the defendant ſhewing at the trial that he was authorized in doing the thing complained of under the building act 14 *G.* 3. *c.* 78. is entitled to treble coſts under the 10th ſection, upon a nonſuit. *Collins* v. *Povey*, *H.* 48 *G.* 3. 322

3. The coſts of a ſuit in Chancery directed to be paid by an award made before the bankruptcy of the defendant, but which coſts were not taxed till after he became bankrupt, cannot be proved under the commiſſion; but the bankrupt remains liable to be attached for the amount under the award made a rule of court. *The King* v. *Davis*, *H.* 48 *G.* 3. 318

4. In a ſpecial count on a policy, the riſk was ſtated to continue until the ſhip was unloaded, and there were common counts: held that the premium having been paid into court generally was an admiſſion of the contract ſtated in the ſpecial count; and that it was not competent to the defendant to ſhew that the policy, by which the riſk was originally made to ceaſe after the ſhip was moored 24 hours in ſafety, was afterwards

wards altered by the broker without the defendant's knowledge. But the defendant having afterwards obtained a rule to amend the rule for paying money into court, by confining it to the money counts, and for a new trial on payment of costs; and the plaintiffs thereupon determining to take the money out of court, and not to proceed further, is entitled to all the costs of the action, and not merely to the usual costs of a new trial. *Andrews* v. *Palsgrave*, *H.* 48 *G.* 3. 325

5. Where by the rule of reference the costs were to *abide the event* of an award; that includes the *costs* of the *reference* as well as of the *cause*. *Wood* v. *O'Kelly*, *E.* 48 *G.* 3. 436

COVENANT.

A variance in setting out one of several covenants in a lease, on which breaches were assigned, viz. the *Cellarbeer* field, instead of the *Allerbeer* field; being considered as part of the description of the deed declared on; though the plaintiff waved going for damages on the breach of that covenant; is fatal. *Pitt* v. *Green*, *H.* 48 *G.* 3. 188

CUSTOM.

Where a plea of justification in trespass for taking two horses, as heriots, stated a custom in the manor that the lord *from time immemorial, until the division* of a certain tenement into moieties, had taken and been accustomed to take a heriot upon the death of every tenant dying seised; and *since the division* the lord had taken and been *accustomed* to take on the death of every tenant dying seised of either of the moieties a heriot for each moiety: this must be taken to be one entire custom, and not two distinct customs, the one applicable to the tenement *before*, and the other *after* the division of it: and being laid to be an *immemorial* custom, it is disproved by evidence that the division was made within memory. *Kingsmill, Bart.* v. *Ball*, *H.* 48 *G.* 3. 185

DAMAGES AND COSTS.

In an action on the case against the sheriff for negligent and wrongful conduct in conducting the sale of the plaintiff's goods under a writ of *fieri facias*, by which they were sold much under value, where, in stating the substance of the writ, the count alleged that the sheriff was commanded to levy 80*s.* awarded to *J. C.* for his *damages* sustained *by occasion of the detaining the debt*; that is proved by the writ which stated that the 80*s.* were awarded to *J. C.* for his *damages* sustained *as well* by reason of *detaining the debt* as for his *costs*, &c.; for *costs* are in legal sense included in the word *damages*. *Philips* v. *Bacon*, *H.* 48 *G.* 3. 198

DAY-RULE.

A day-rule, when made, covers, by relation back, the liberation of a prisoner who had signed the petition, but had gone out of the prison before the sitting of the court on the same day; though the marshal were sued for the escape before the sitting of the court. *Field* v. *Jones*, *M.* 48 *G.* 3. 151

DEBTOR AND CREDITOR.

See INSURANCE OF LIFE, 1.

DEED.

See CONVEYANCE. SURRENDER, 1. or, DESCRIPTION OF PERSONS, 1.

Though the affixing of the common seal to the deed of conveyance of a corporation be sufficient to pass the estate, without a formal delivery, if done with that intent; yet it has no

such effect if the order for affixing the seal be accompanied with a direction to their clerk to retain the conveyance in his hands till accounts were adjusted with the purchaser. *Derby Canal Company* v. *Wilmot*, *E.* 48 *G.* 3. 360

DEMISE.

See LEASE.

DESCRIPTION OF PERSONS.

John Lealand surrendered a copyhold in the occupation of him *John Lealand* to the use of *Joseph* Lealand and *John* Lealand *his son*, for their lives and the life of the survivor; remainder to the heirs of the body of the *said John* Lealand *son of Joseph* L.; remainder to the right heirs of *the said* John Lealand: held, that the ultimate remainder was meant for the right heirs of *John the surrenderor*; as well because *John the surrenderee* is before described with the addition of *the son of Joseph*; as of the manifest futility of giving *John the surrenderee* an estate *tail*, and afterwards a *fee* in succession. Though if the construction had been left doubtful, the ultimate remainder would have continued in the surrenderor. *Roe d. Hucknall* v. *Foster*, *E.* 48 *G.* 3. 405

DESERTER.

See SETTLEMENT BY HIRING AND SERVICE, 1.

DEVISE.

1. One, having entered into articles of agreement for the purchase of certain premises, devised the same to a trustee to pay the rents and profits to her three daughters (one of them being covert), and the survivor of them, for their lives, share and share alike: and, after their decease, in trust for all and every the *child and children* of her three daughters who should be living at the death of the survivor of them, as tenants in common: but if all her daughters should die without leaving any *issue*, then, after the decease of the survivor, in trust for her grandson, in fee, who was her *heir at law*: the residue of her real and personal estate to her three daughters. Upon a bill filed by the grandson, in the lifetime of the surviving daughter, to restrain the tenant from cutting timber, &c.; and after a conveyance of the premises to the uses of the will; held that under the will and deeds of lease and release the three daughters took no legal estates, but that the release took an estate for the lives of the daughters; and that such of their children as should be living at the death of the survivor of the daughters would take estates *in fee*, as tenants in common. *Robinson* v. *Grey and Others*, *M.* 48 *G.* 3. 1

2. *J. P.* devised real and personal estate to trustees, to pay thereout an annuity to his wife for life, and out of the residue to pay sufficient for the maintenance, education, and support of his only daughter, *until she should attain the age of 21 years, or marry*; and when she should attain 21, or marry, then to her in fee: but in case his daughter should *die under age and unmarried*, then the estates to go to his wife for life; and, after her decease, *to the two children of his nephew*, as tenants in common in fee: with a proviso, that if either his wife or daughter should *marry a Scotchman*, then his wife or daughter *so marrying* should *forfeit* all benefit under his will, and the estates given to such his wife or daughter as should so marry *should descend to such person or persons as would be entitled under his will, in the same manner as if his wife or daughter were dead.* Held, that such partial restraint of marriage was legal; and that the daughter having

having while under age married a *Scotchman* and died, leaving a ſon, ſuch ſon could not inherit, nor her huſband be tenant by the curteſy; but that the limitation over (the teſtator's wife being alſo dead) to the two children of the teſtator's nephew (which nephew was ſtill living,) took effect immediately on ſuch marriage; they being the perſons deſignated by the will to take in the event which had happened; the teſtator having conſidered ſuch prohibited marriage the ſame as the death of his daughter, under age, unmarried. *Perrin* v. *Lyon*, *M.* 48 *G.* 3. 170

3. Where there is no connexion by grammatical conſtruction or direct words of reference, or by the declaration of ſome common purpoſe, between diſtinct deviſes in a will, the ſpecial terms of one deviſe cannot be drawn in aid of the conſtruction of another, although in its general terms and import ſimilar, and applicable to perſons ſtanding in the ſame degree of relationſhip to the teſtator; and there being no apparent reaſon, other than the different wording of the clauſes, to preſume that the teſtator had a different purpoſe in view.

Therefore, where the teſtator having a ſon married, and ſix grandſons and three grand-daughters, and three farms, deviſed *all* his lands to his ſon *for life*; and after his death gave to his eldeſt grandſon *Thomas* (the defendant) *the north ſide of Down farm*, and to his grand-daughter *Frances the ſouth ſide* of the ſame farm; and to his grandſons *George* and *Edmund*, and his grand-daughter *Elizabeth*, "*the upper part* "*of Lain farm*, equally between "them ſo long as they ſhould remain "ſingle; but if either married, then "to have *paid by the other two ten* "*pounds* a year for his or her life;" and to his grandſons *Edward* and *John*, and his grand-daughters *Mary* and *Ann*, "*the lower part of Lain* "*farm*, equally between them (which "made them tenants in common) "ſo long as they remained ſingle; "but if either married, then 10*l.* a-"*year* (not ſaying, *to be paid by the* "*others*) for his or her life:" and then gave the third farm to another grandſon: held, that on the marriage of *Edward*, *Mary*, and *Ann*, their co-deviſee of the lower part of the *Lain* farm, *John*, who remained ſingle, could not recover the 3-4ths of the farm forfeited by their marriage, as upon the ſuppoſition that the 10*l.* a-year for life to each of the deviſees ſo marrying was to be paid *by him* who remained ſingle; as in the correſponding deviſe of the other part of the *Lain farm*: but the 3-4ths may be chargeable with the annuities of 10*l.* a-year to each in the hands of the heir at law, who was entitled to thoſe ſhares.

Neither could the grandchildren take a fee by implication in the ſhares ſo deviſed to them generally, without words of limitation, merely from the circumſtance that an expreſs eſtate *for life* was firſt given to the teſtator's ſon and heir at law. *Right d. Compton* v. *Compton*, *H.* 48 *G.* 3. 267

4. By a bequeſt of leaſehold to *R. until his* (eldeſt) *ſon* T. *ſhall attain* 21, *and no longer*: but *in caſe* T. *ſhall die in minority, then to* J. *or* O. (his younger brothers) or either ſurviving or attaining 21, as aforeſaid; with a deſire that *R.* would *quit and deliver up the premiſes as aforeſaid*, and *confirming* the bequeſt of them to *R.*'s family on his relinquiſhment of a certain claim, which he did relinquiſh: held, that *T.* on his attaining 21 took the eſtate by neceſſary implication; though there were a deviſe of the reſidue to *N.* the younger brother of *R.* *Goodright* v. *Hoſkins*, *H.* 48 *G.* 3. 396

5. Under a deviſe to *A.* for life, remainder to *B.* and her heirs; but if *B.* die before *A.*, *or* if ſhe die without heirs of her body, then to *C* and his heirs, &c.: held, that the deviſe over to *C.* after *B.* could only take eff & if *B.* died before *A. and* without iſſue; for that unleſs *or* were read as *and*, the deviſee over would take if *B.* died before *A*, although *B.* left iſſue; which would clearly be againſt the apparent intent of the deviſor, which was to prefer the iſſue of *B.* to *C.* *Denn d. Wilkins* v. *Kemeys*, *E.* 48 *G.* 3. 366
6. It ſeems that *freehold* may paſs by a will giving the eſtate a local deſcription and name, though it be miſtakenly called *leaſehold*; there being no other property anſwering to the name and deſcription. *ibid.*
7. Under a deviſe of land to the teſtator's ſon *Joſeph*, his *heirs* and *aſſigns for ever*; but in caſe his ſon ſhould *die without iſſue, then*, to go to the child of which his ſecond wife was enſient: held, that *Joſeph* took an eſtate tail. *Doe d. Ellis* v. *Ellis*, *E.* 48 *G.* 3. 382
8. Under a deviſe of land to the two children of the teſtator's brother *W.*, when they attained the age of 21 years; but the executor to account to them for the profits until the age of 21, or day of marriage: but *if either ſhould die before* 21, the ſurvivor to be *heir* to the other: held that the fee paſſed, which would go over to the ſurvivor in caſe one died under 21, and would deſcend or be diſpoſeable if he died after attaining 21: and that a deviſe of other land to the two children of another brother *R. on the ſame condition as* W.'s *children*, was governed by the ſame conſtruction. *Doe d. Wight* v. *Cundall*, *E.* 48 *G.* 3. 400
9. One having a *freehold manor* of *Sutton*, and *freehold* lands *there*, and having alſo *copyhold* within the *townſhip* of *Sutton*, and within the local ambit of the manor, but held of another manor; and having ſurrendered his copyhold to the uſe of his will; deviſed all his *manor* of *S.*, and all his meſſuages, *farms*, lands, tenements, and hereditaments whatſoever, *within the precincts and territories* of *S* in the county of *Cheſter*, with their rights, members, and appurtenances, in truſt for his daughter *L.*, (having deviſed other eſtates in other counties to two other daughters,) and to her children in ſtrict ſettlement: held, 1. That *farms*, lands, &c. within the *townſhip*, though *not* within the *manor*, of *Sutton*, paſſed by the deſcription of *farms*, &c. *within the precincts and territories of* S. 2. That the general words "meſſuages, *farms*, lands," &c. and particularly the word *farms*, were ſufficient to carry *copyhold* as well as *freehold* in the place deſcribed, if ſuch appeared to be the intent of the teſtator upon the whole will. 3. That ſuch intent was evinced in this caſe by the word *farms*, where it appeared that the teſtator had a farm compoſed of copyhold and freehold, which he had let as one entire ſubject, and which muſt otherwiſe be divided: and alſo by this, that he had charged the property deviſed beyond the annual income of it, unleſs the *copyhold* were included. And that this intent was not rebutted by a power of leaſing for 21 years given to all the tenants for life; nor by power to the truſtees to raiſe portions by grants of long terms of years. 4. That a ſmall copyhold diſtant 8 miles, and a ſmall freehold 20 miles from *Sutton*, but within the county of *Cheſter*, did not paſs by that deviſe, but did paſs under a general reſiduary clauſe to another daughter. *Doe d. Belaſyſe* v. *The Earl of Lucan*, *E.* 48 *G.* 3. 448

DOGS.

See ACTION ON THE CASE, 1.

EJECTMENT.

See LANDLORD AND TENANT, 1.

Where ejectment is brought after a fine levied by the defendant, but before all the proclamations have been made under the ſtat. 4 *Hen.* 7. *c.* 24., it is not neceſſary for the leſſor to prove an actual entry to avoid ſuch fine; conſidering it to operate only as a fine at common law: but by the defendant's confeſſion of leaſe, entry, and ouſter, the merits only of the leſſor's title are put in iſſue. *Doe* v. *Watts, M.* 48 *G.* 3. 17

ENEMY.

See TRADE, 1.

ESCAPE.

See PRISONER, 1.

A day-rule, when made, covers by relation back the liberation of a priſoner who had ſigned the petition, but had gone out of the priſon before the ſitting of the court on the ſame day; though the marſhal were ſued for the eſcape before the ſitting of the court. *Field* v. *Jones, Marſhal of K. B. Priſon, M.* 48 *G.* 3. 151

ESTATE.

One, having entered into articles of agreement for the purchaſe of certain premiſes, deviſed the ſame to a truſtee to pay the rents and profits to her three daughters (one of them being covert), and the ſurvivor of them, for their lives, ſhare and ſhare alike: and, after their deceaſe, in truſt for all and every the *child and children* of her three daughters who ſhould be living at the death of the ſurvivor of them, as tenants in common: but if all her daughters ſhould die without leaving any *iſſue*, then, after the deceaſe of the ſurvivor, in truſt for her grandſon in fee, who was her *heir at law*: the reſidue of her real and perſonal eſtate to her three daughters. Upon a bill filed by the grandſon, in the lifetime of the ſurviving daughter, to reſtrain the tenant from cutting timber, &c., and after a conveyance of the premiſes to the uſes of the will; held, that under the will and deeds of leaſe and releaſe the three daughters took no legal eſtates, but that the releaſee took an eſtate for the lives of the daughters; and that ſuch of their children as ſhould be living at the death of the ſurvivor of the daughters would take eſtates *in fee*, as tenants in common. *Robinſon* v. *Grey and Others, M.* 48 *G.* 3. 1

EVIDENCE.

See BANKRUPT, 2. and other particular titles.

In an action on the caſe for a malicious proſecution, it is not material for the plaintiff to prove the exact day of his acquittal as laid in the declaration, ſo that it appears to have been before the action brought: and therefore a variance in that reſpect between the day laid and the day ſtated in the record, which was produced to prove the acquittal, is not material; the day not being laid in the declaration as part of the deſcription of ſuch record of acquittal. *Purcell* v. *Macnamara, M.* 48 *G.* 3. 157

EXECUTION.

See ACTION ON THE CASE, 2.

The court will not order the ſheriff to retain in ſatisfaction of a preſent writ of fi. fa., iſſued by the plaintiff againſt

againſt the defendant, *money* or *Bank notes*, which the ſheriff had before received for the uſe of the defendant, in diſcharge of an execution levied by the defendant againſt another, and which the ſheriff had not paid over. *Knight* v. *Criddle*, *M.* 48 *G.* 3. 48

FILIATION, ORDER OF.

See BASTARD. ORDER OF JUSTICES, 1.

FINE.

Where ejectment is brought after a fine levied by the defendant, but before all the proclamations have been made under the ſtat. 4 *H.* 7. *c.* 24., it is not neceſſary for the leſſor to prove an actual entry to avoid ſuch fine; conſidering it to operate only as a fine at common law: but by the defendant's confeſſion of leaſe, entry, and ouſter, the merits only of the leſſor's title are put in iſſue. *Doe* v. *Watts*, *M.* 48 *G.* 3. 17

FOREIGN JUDGMENT.

The law will not raiſe an aſſumpſit upon a judgment obtained by default in one of the colonies againſt a party, who upon the face of the proceedings appeared only to have been *ſummoned* "by nailing up a copy of the declaration at the court-houſe door;" it not appearing that he had ever been preſent in the colony, or ſubject to the juriſdiction of the colonial court at the time of the ſuit commenced or afterwards: although by a law of the colony if a defendant be *abſent from the iſland*, and have no attorney, manager, or overſeer there, ſuch mode of ſummoning him ſhall be deemed good ſervice: for the *abſence* thereby intended is of one who had been *preſent* and ſubject to the juriſdiction: though even if it had been meant to reach ſtrangers to the juriſdiction, it would not have bound them. *Buchanan* v. *Rucker*, *H.* 48 *G.* 3. 192

FOREIGN MINISTER.

See ARREST.

FRANCHISE.

By the long eſtabliſhed and recognized practice of *B. R.* a writ of capias, with a non omittas clauſe, may iſſue in the firſt inſtance, and be executed by the ſheriff within a particular liberty, (ſuch as the honor of *Pontefract* in the county of *York*,) the bailiff of which has the execution and return of writs, without a prior writ of latitat firſt iſſued, and a return made by the ſheriff of mandavi ballivo qui nullum dedit reſponſum; and therefore no action on the caſe lies by the bailiff of ſuch liberty againſt the party ſuing out ſuch writ, upon an allegation that it was *wrongfully, injuriouſly, and deceitfully* cauſed to be iſſued by him, to the damage of the bailiff's office, &c. *Carrett* v. *Smallpage*, *E.* 48 *G.* 3. 330

FRAUD.

The law is in all caſes the judge of fraud and covin ariſing out of facts and intents, and will infer fraud, upon the conſtruction of the ſtat. 27 *Eliz.* *c.* 4., in the caſe of a *voluntary* ſettlement, made in conſideration of natural love and affection, againſt a ſubſequent purchaſer for a *valuable* conſideration, though with notice of the prior ſettlement before all the purchaſe-money was paid or the deeds executed. *Doe d. Otley* v. *Manning*, *M.* 48 *G.* 3. 59

FRAUDS, STATUTE OF.

A guarantie in writing to pay for any goods which the vendor delivers to a third

a third perſon is good, within the 4th ſect. of the ſtatute of frauds, as containing a ſufficient deſcription of the *conſideration* of the promiſe, (namely, the delivery of the goods when made,) as of the *promiſe* itſelf; both of which are included in the word *agreement*, required by that ſection to be reduced into writing, &c. *Stadt* v. *Lill*, *E.* 48 *G.* 3. 348

FREEHOLD.

See DEVISE, 6.

GRANT.

See LEASE, 1.

GREENLAND FISHERY.

See IMPRESS, 1.

GUARANTIE.

See FRAUDS, STATUTE OF. TRADE, 1.

HOUSE OF CORRECTION.

See PRISONER.

HUSBAND AND WIFE.

A feme covert living apart from her huſband, under ſentence of ſeparation, with alimony allowed, pendente lite, in the eccleſiaſtical court, having brought treſpaſs in the name of her huſband againſt wrong doers for breaking and entering her houſe and taking her goods, the Court refuſed on the application of ſuch defendants to ſtay the action, though ſupported by an affidavit of the huſband (who had not releaſed the action, nor applied to be indemnified againſt the riſk of coſts,) that the action was brought without his authority. *Chambers* v. *Donaldſon*, *E.* 48 *G.* 471

IMPRESS.

1. The ſtat. 13. *G.* 2. *c.* 28. *ſ.* 5. exempting from the impreſs ſervice any harpooner, &c. or *ſeaman* in the *Greenland* fiſhery trade, is impliedly repealed by the ſtat. 26 *G.* 3. *c.* 41. *ſ.* 17. which exempts ſuch harpooner, &c. *whoſe name ſhall be inſerted in a liſt*, required to be delivered on oath by the owner of the veſſel to the collector of the cuſtoms; and which alſo exempts any *ſeaman* entered on board any ſhip intended to proceed on the ſaid fiſhery in the following ſeaſon, *whoſe name ſhall be inſerted in a liſt to be delivered as aforeſaid*, and who ſhall have given *ſecurity*, &c. to proceed, and ſhall proceed accordingly: for the latter ſtatute ſuperadds the inſertion of the ſeaman's name in ſuch liſt as a condition precedent to the exemption. *Caruthers Ex parte*, *M.* 48 *G.* 3. 44
2. It does not appear that the freemen and liverymen of *London* are exempted from being impreſſed for the ſea ſervice, if in other reſpects fit ſubjects for that ſervice. *The King* v. *Young*, *E.* 48 *G.* 3. 466

INDICTMENT.

1. One was indicted in *Middleſex* for perjury committed in an affidavit; which indictment, after ſetting out ſo much of the affidavit as contained the falſe oath, concluded with a prout patet by the affidavit affiled in the court of *B. R.* at *Weſtminſter*, &c. and on this he was acquitted: after which he was indicted again *in Middleſex* for the ſame perjury, with this difference only, that the ſecond indictment ſet out the jurat of the affidavit, in which it was ſtated to have been ſworn *in London*; which was traverſed by an averment that in fact the defendant was ſo ſworn *in Middleſex* and *not in London*: and held that he was entitled to plead autrefois acquit; for the *jurat* was not

not conclusive as to the *place* of ſwearing; and the ſame evidence as to the real place of ſwearing the affidavit might have been given under the firſt as under the ſecond indictment; and therefore the defendant had been once before put in jeopardy for the ſame offence. *The King* v. *Emden*, *E.* 48 *G.* 3. 437

2. Whether or not the particular ſchemes denounced by the ſt. 6 *G.* 1. *c.* 18. *ſ.* 18. as manifeſtly tending to the common grievance, prejudice and inconvenience of great numbers of ſubjects in their trade and other affairs, be in themſelves unlawful and prohibited, without reference to the fact of ſuch tendency in a particular inſtance in the opinion of a court and jury; ſuch as the raiſing great ſums by ſubſcription for trading purpoſes, and making the ſhares in the joint ſtock transferrable; at any rate the inviting of ſuch ſubſcriptions by holding out falſe and illegal conditions, ſuch as that the ſubſcribers would not be liable beyond the amount of their reſpective ſhares, ſeems to be an offence within the act. But as the ſtatute had not been acted upon for a great length of time, and was now ſought to be enforced by a private relator who ſeemed not to have been deluded by the project, but to have ſubſcribed with a view to this application, the Court refuſed to interfere by granting an information, though they diſcharged the rule without coſts. *The King* v. *Dodd*, *E.* 48 *G.* 3. 516

INSURANCE.

See PAYMENT OF MONEY INTO COURT, 1.

1. The ſtat. 43 *G.* 3. *c.* 153. *ſ.* 15. having enabled the king by order in council to licenſe the importation of certain goods, being *Britiſh* or neutral property, from the enemy's country, in neutral ſhips; a contract made by *A.* and *B. Britiſh* ſubjects, (the plaintiffs) for the purchaſe of brandy from a houſe of trade in *France* (an enemy,) to be ſhipped from thence in a neutral, on account of *A.* and *B.*; which contract was made *in contemplation of obtaining a licence* for that purpoſe; which licence was accordingly obtained ſoon after the making of ſuch contract, and before it was begun to be executed; is a legal contract, and may lawfully be guarantied in the firſt inſtance by *C.* and *D.* other *Britiſh* ſubjects (the defendants). And after ſuch licence obtained, the guarantees are liable in damages for the non-ſhipment of the goods by the houſe in *France* on board a neutral ſent there for that purpoſe. Though it were objected to the licence legalizing ſuch trade, that it was not made out to *A.* and *B. by name*, but only to *C.* and *D.* and *other Britiſh merchants*; and that neither *C.* and *D.*, nor even *A.* and *B.*, had any property in the goods; whereas the licence required the goods to be imported to be *the property of the ſaid perſons or ſome of them*; and, until ſhipment, the property continued in the houſe in *France*. For neither the act of parliament, nor the king's licence, required the owners of the property to be *individually named*; and even if the licence were to be ſo conſtrued, as it only required the goods imported to be the property of "the "ſaid perſons or ſome of them, *as* "*may be ſpecified in their bills of lading*;" and as no bills of lading were made out, which might have been made in the names of *C.* and *D.*, and if ſo, would have conveyed to them a legal or ſpecial property in the goods; the defendants *C.* and *D.* were ſtill liable to anſwer in damages, upon their guarantie, as for the non-performance of a legal contract. *Timſon* v. *Merac*, *M.* 48 *G.* 3.

2. It

2. It is not an implied condition in a common marine policy on ſhip and freight, that the ſhip ſhall not trade in the courſe of her voyage, if that may be done without deviation or delay or otherwiſe increaſing the riſk of the inſurers: and therefore where a ſhip was compelled in the courſe of her voyage to enter a port for the purpoſe of obtaining a neceſſary ſtock of proviſions, which ſhe could not obtain before in the uſual courſe, by reaſon of a ſcarcity at her lading ports; and during her juſtifiable ſtay in the port ſo entered for that purpoſe ſhe took on board bullion there on freight, which the jury found did not occaſion any delay in the voyage; it was held not to avoid the policy. *Raine* v. *Bell*, *H.* 48 *G.* 3. 195

3. It is no breach of neutrality for a neutral ſhip to carry enemy's property from its own to the enemy's country; the voyage and commerce not being of a hoſtile deſcription, nor otherwiſe expreſsly or impliedly forbidden by the law or policy of this country; though the neutral thereby ſubjects his ſhip to be detained and carried into a *Britiſh* port for the purpoſe of ſearch. And therefore a *Britiſh* underwriter, after condemnation of the enemy's goods found on board, and liberation of the ſhip and the reſt of the cargo, is liable to the neutral owner of goods inſured in the ſame ſhip, whoſe voyage was ſo interrupted, either as for a total loſs, if notice of abandonment upon the loſs of the voyage be given in reaſonable time; or for an average loſs, if ſuch notice be given out of time. *Barker* v. *Blakes*, *H.* 48 *G.* 3. 283

4. Where a neutral ſhip bound from *America* to *Havre* was ſo detained and brought into a *Britiſh* port; and pending proceedings in the Admiralty the king declared *Havre* in a ſtate of blockade, by which the further proſecution of the voyage was prohibited; this was held a total loſs of the voyage, which entitled the neutral aſſured to abandon. *ib.*

5. But the blockade of *Havre* having been publicly notified here on the 6th of *September*; and no notice of abandonment given till the 14th of *October*, nor any excuſe ſubſtantiated for not giving it ſooner for want of competent authority before, nor any authority ſhewn for giving it then; held that the notice was out of time; and this, though the plaintiff's agents in this country had no notice till the 17th of *October* of the decree for reſtoration of the ſhip and goods in queſtion, which had been pronounced on the 8th of *October*. *ib.*

6. A policy of inſurance originally underwritten on "ſhip *and outfit*" was after the ſhip ſailed declared by conſent of all parties, to be on "ſhip *and goods*," by a memorandum written on a blank ſpace in the body of the policy; but without any new ſtamps: and it having been before decided that for want of the ſtamps the plaintiff could not recover as upon a policy on ſhip *and goods*, as declared by the memorandum, it was now held that he could not recover upon the policy in its original ſtate, as an inſurance on "ſhip *and outfit*," by reaſon of the alteration apparent upon the face of the inſtrument itſelf, and which was made by parties intereſted. *French* v. *Patton*, *E.* 48 *G.* 3. 351

INSURANCE OF LIFE.

A creditor may inſure the life of his debtor to the extent of his debt; but ſuch a contract is ſubſtantially a contract of indemnity againſt the loſs of the debt; and therefore, if, after the death of the debtor, his executors pay the debt to the creditors,

ditor, the latter cannot afterwards recover upon the policy; although the debtor died insolvent, and the executors were furnished with the means of payment by a third party. *Godfall* v. *Boldero*, *M.* 48 *G.* 3. 72

JUDGMENT.

See FOREIGN JUDGMENT.

JURISDICTION.

By the long established and recognized practice of B. R. a writ of capias, with a non omittas clause, may issue in the first instance, and be executed by the sheriff within a particular liberty, (such as the honor of *Pontefract* in the county of *York*,) the bailiff of which has the execution and return of writs, without a prior writ of latitat first issued, and a return made by the sheriff of mandavi ballivo qui nullum dedit responsum: and therefore no action on the case lies by the bailiff of such liberty against the party suing out such writ, upon an allegation that it was *wrongfully, injuriously, and deceitfully* caused to be issued by him to the damage of the bailiff's office, &c. *Carrett* v. *Smallpage*, *E.* 48 *G.* 3. 330

JUSTICE OF PEACE.

See ORDER OF JUSTICES.

One magistrate committing the mother of a bastard child to custody for not filiating the child is yet entitled to the previous notice of action required by the stat. 24 *G.* 3. *c.* 44., though by the stat. 18 *Eliz.* *c.* 3. *s.* 2. jurisdiction over the subject matter is given to *two* magistrates. *Weller* v. *Yoke*, *E.* 48 *G.* 3. 364

LADING, BILL OF.

See BILL OF LADING.

LANDLORD AND TENANT.

After a landlord has recovered in ejectment against his tenant, he may maintain debt upon the stat. 4 *G.* 2. *c.* 28. for double the yearly value of the premises, during the time the tenant held over after the expiration of the landlord's notice to quit. *Soulsby* v. *Neving*, *H.* 48 *G.* 3. 310

LEASE.

Under a lease for 14 or 7 years the lessee only has the option of determining it at the end of the first 7 years; every doubtful grant being construed in favour of the grantee. *Doe* v. *Dixon*, *M.* 48 *G.* 3. 15

LICENCE TO TRADE WITH ENEMY.

See TRADE, 1.

LIEN.

The master of a ship has no lien on it for money expended or debts incurred by him for repairs done to it on the voyage. *Hussey* v. *Christie*, *E.* 48 *G.* 3. 426

LIFE INSURANCE.

See INSURANCE OF LIFE.

LONDON DOCK COMPANY.

By the construction of the statute 39 and 40 *G.* 3. *c.* 47. the *London* Dock Company are liable, even during the first 12 years of their establishment, to be rated for the fair annual value of their *warehouses* and other works which are finished and productive, though all the works directed by the act be not completed. But such completed works must under such circumstances be rated for their value at the rate of 8½*d.* in the pound; such being the rate calculated upon by the legislature to raise 139*l.*

139*l.* 8*s.* 7*d.* per quarter upon 3966*l.* the average rental for 10 years preceding the ſtatute, on the premiſes deſtroyed by the company in making their works; and which quarterly ſum the Company were at all events bound to pay to the pariſh during the 12 years, or until the works were completed, whether thoſe works were productive or not. But when productive beyond that ſum, the ſurplus is to be taken in the firſt inſtance by the Company; in order to reimburſe themſelves what they may have advanced to the pariſh, to make good the deficiencies, before any ſuch productive ſurplus exiſted, until the Company ſhall be reimburſed. Therefore until theſe purpoſes are effected, a rate made on the increaſed real value of the Dock premiſes at more than 8½*d.* in the pound, or a rate of 8½*d.* in the pound on the old average value of the premiſes before the erection of the Company's works, and below the increaſed value of the new works, is in either caſe bad. *The King* v. *The Inhabitants of St. George, Middleſex, M.* 48 *G.* 3. 127

LONDON.

It does not appear that the freemen and liverymen of *London* are exempted from being impreſſed for the ſea ſervice, if in other reſpects fit ſubjects for that ſervice. *The King* v. *Young, E.* 48 *G.* 3. 466

MALICIOUS PROSECUTION.

1. In an action on the caſe for a malicious proſecution, it is not material for the plaintiff to prove the exact day of his acquittal as laid in the declaration, ſo that it appears to have been before the action brought; and therefore a variance in that reſpect between the day laid and the day ſtated in the record, which was produced to prove the acquittal, is not material; the day not being laid in the declaration as part of the deſcription of ſuch record of acquittal. *Purcell* v. *Macnamara, M.* 48 *G.* 3. 157

2. It lies on the plaintiff in an action for a malicious proſecution to give evidence of malice in the defendant, either expreſs or to be collected from circumſtances ſhewing plainly the want of probable cauſe; and the malice is not to be implied from the mere proof of the plaintiff's acquittal for want of the proſecutor's appearing when called. *Purcell* v. *Macnamara, E.* 48 *G.* 3. 361

MANDAMUS.

See CORPORATION, 1. SEWERS, 1.

MARRIAGE, RESTRAINT OF.

J. P. deviſed real and perſonal eſtate to truſtees to pay thereout an annuity to his wife for life, and out of the reſidue to pay ſufficient for the maintenance, education, and ſupport of his only daughter *until ſhe ſhould attain the age of* 21 *years, or marry*; and when ſhe ſhould attain 21, or marry, then to her in fee: but in caſe his daughter ſhould die under age and unmarried, then the eſtates to go to his wife for life; and, after her deceaſe, *to the two children of his nephew*, as tenants in common in fee: with a proviſo, that if either his wife or daughter ſhould *marry a Scotchman*, then his wife or daughter, ſo marrying, ſhould *forfeit* all benefit under his will, and the eſtates given to ſuch his wife or daughter as ſhould ſo marry *ſhould deſcend to ſuch perſon or perſons as would be entitled under his will in the ſame manner as if his wife or daughter were dead.* Held, that ſuch partial reſtraint of marriage was legal; and that the daughter having while under age married a *Scotchman* and died, leaving

ing a ſon, ſuch ſon could not inherit, nor her huſband be tenant by the curteſy; but that the limitation over (the teſtator's wife being alſo dead) to the two children of the teſtator's nephew (which nephew was ſtill living) took effect immediately on ſuch marriage; they being the perſons deſignated by the will to take in the event which had happened; the teſtator having conſidered ſuch prohibited marriage the ſame as the death of his daughter, under age, unmarried. *Perrin* v. *Lyon*, *M.* 48 *G.* 3. 170

MASTER AND SERVANT.

See SETTLEMENT BY HIRING AND SERVICE.

MILITIA.

A captain in the militia receiving his pay and contingent allowances, before his qualification was properly authenticated, is not *executing any power* directed by the militia act of the 42 *G.* 3. *c.* 90. to be executed by captains, ſo as to bring him within the penalty of the 14th clauſe; the receipt of ſuch pay and allowances not being provided for by that ſtatute, even if any other than acts of military diſcipline were intended to be ſo prohibited. *Robinſon* v. *Garthwaite*, *H.* 48 *G.* 3. 296

MISDEMEANOR.—*Compounding.*

See INDICTMENT.

One who had voluntarily offered to pay a ſum of money for the uſe of the poor of the pariſh, in order to avoid a proſecution by a magiſtrate upon a charge of having inſtigated the eſcape of a priſoner in cuſtody for a miſdemeanor, which offer was conſented to by the magiſtrate, and the money accordingly paid by the party to the maſter of the workhouſe for the uſe of the poor; may at any rate countermand the application of the money before it is ſo applied; and may recover it back in an action for money had and received. *Taylor* v. *Lendey*, *M.* 48 *G.* 3. 49

MONEY.

See EXECUTION, 1.

NEUTRAL TRADE.

See INSURANCE, 3.

NUSANCE.

See INDICTMENT, 2.

ORDER OF JUSTICES.

In an order of filiation and maintenance the juſtices have no power by the ſtat. 18 *Eliz. c.* 3. to direct the defendant to pay the *coſts* of the pariſh in obtaining the order; but having in ſuch order ſeparated the ſum to be paid for maintenance, and the ſum to be paid for coſts, the order was quaſhed as to the latter, and confirmed as to the reſt of it. *The King* v. *Sweet*, *M.* 48 *G.* 3. 25

OUSTER, JUDGMENT OF.

See QUO WARRANTO, 1.

PARTNERS.

See BANKRUPT, 4.

PARTY WALL.

See BUILDING ACT.

PAYMENT OF MONEY INTO COURT.

In a ſpecial count on a policy of inſurance, the riſk was ſtated to continue until the ſhip was unloaded, and there were common counts: held that the premium having been paid into court generally was an admiſſion

miſſion of the contract ſtated in the ſpecial count; and that it was not competent to the defendant to ſhew that the policy, by which the riſk was originally made to ceaſe after the ſhip was moored 24 hours in ſafety, was afterwards altered by the broker without the defendant's knowledge. *Andrews* v. *Palſgrave*, *H.* 48 *G.* 3. 325

PENAL ACTION.

Though a penal action be removed out of the proper county into another for trial, yet the cauſe of action muſt ſtill be proved to have happened within the proper county where the venue is laid. *Robinſon* v. *Garthwaite*, *H.* 48 *G.* 3. 296

PLEADING.

See MALICIOUS PROSECUTION, 1.

1. Where new matter introduced by an innuendo, without any antecedent colloquium to which it can refer to ſupport it, is not neceſſary to ſuſtain an action of ſlander, it may be rejected as ſurpluſage. And therefore an innuendo, that *the Attorney-General* ſpoken of meant the Attorney-General for the county palatine of *Cheſter*, was ſo rejected. *Roberts* v. *Camden*, *M.* 48 *G.* 3. 93

Vid. SLANDER, 1.

2. Where a plea of juſtification in treſpaſs for taking two horſes as heriots, ſtated a cuſtom in the manor that the lord *from time immemorial, until the diviſion* of a certain tenement into moieties, had taken and been accuſtomed to take a heriot upon the death of every tenant dying ſeiſed; and *ſince the diviſion* the lord had taken and been *accuſtomed* to take on the death of every tenant dying ſeiſed of either of the moieties a heriot for each moiety: this muſt be taken to be one entire cuſtom, and not two diſtinct cuſtoms; the one applicable to the tenement *before*, and the other *after* the diviſion of it: and being laid to be an *immemorial* cuſtom, it is diſproved by evidence that the diviſion was made within memory. *Kingsmill, Bart.* v. *Bull*, *H.* 48 *G.* 3. 185

3. To debt on bond conditioned for the payment of a ſum of money, which the condition ſtated to have been *taken up, borrowed, and received* by the defendants of the plaintiffs at reſpondentia intereſt, ſecured by a cargo of goods ſhipped from *Calcutta* to *Oſtend*, it is competent to the defendant to plead that the bond was given to ſecure the price of goods ſold by the plaintiffs to the defendants in the *Eaſt Indies*, and illegally prepared by the plaintiffs for ſhipment from thence to beyond the *Cape of Good Hope*, without the licence of the *Eaſt India* Company; without proceeding to ſtate formally, that the condition was colourable, to conceal the illegality of the tranſaction, and to negative that the bond was given for money *taken up, borrowed, and received*, &c. For the ſtatement in the plea is rather explanatory of, than abſolutely inconſiſtent with, the tranſaction ſtated in the condition of the bond: but if it were inconſiſtent with it, the plea would ſtill be good in this form. *Paxton* v. *Popham*, *E.* 48 *G.* 3. 408

4. An officer cannot commute for money the ſervices of an impreſſed man, nor let him go for money; and a bond given to ſecure the man's return on non-payment of ſuch money is void, and may be avoided by plea diſcloſing the true tranſaction, and ſhewing that the man was illegally impreſſed. *Pole* v. *Harrobin*, *E.* 22 *G.* 3. *B. R.* 416

3. An attorney of *B. R.* in pleading his privilege againſt being ſued by original, improperly ſtated the cuſtom of this court to be not to compel its attornies to anſwer an original writ, *unleſs firſt forejudged from their office*, &c.

&c. (which is the cuſtom in *C. B.* but not in this court): but held that enough appearing to ſuſtain the plea, the cuſtom, which had no foundation here, (of which the court would take notice) might be rejected as ſurpluſage. *Stokes* v. *Majon*, *E.* 48 *G.* 3. 424

6. The ſtat. 32 *G.* 3. *c.* 58. *ſ.* 1., enabling defendants in quo warranto to plead double, is, as well as the ſtat. 9 *Ann*, *c.* 20, confined to *corporate* officers. *The King* v. *Richardſon*, *E.* 48 *G.* 3. 469

POOR APPEAL.

See APPEAL.

POOR-RATE.

By the conſtruction of the ſtatute 39 and 40 *G.* 3. *c.* 47. the *London* Dock Company are liable, even during the firſt 12 years of their eſtabliſhment, to be rated for the fair annual value of their *warehouſes* and other works which are finiſhed and productive, though all the works directed by the act be not completed. But ſuch completed works muſt under ſuch circumſtances be rated for their value at the rate of 8½*d.* in the pound; ſuch being the rate calculated upon by the legiſlature to raiſe 139*l.* 8*s.* 7*d.* per quarter upon 3566*l.* the average rental for 10 years preceding the ſtatute, on the premiſes deſtroyed by the company in making their works; and which quarterly ſum the Company were at all events bound to pay to the pariſh during the 12 years, or until the works were completed, whether thoſe works were productive or not. But when productive beyond that ſum, the ſurplus is to be taken in the firſt inſtance by the Company; in order to reimburſe themſelves what they may have advanced to the pariſh, to make good the deficiencies, before any ſuch productive ſurplus exiſted, until the Company ſhall be reimburſed. Therefore until theſe purpoſes are effected, a rate made on the increaſed real value of the Dock premiſes at more than 8½*d.* in the pound, or a rate of 8½*d.* in the pound on the old average value of the premiſes before the erection of the Company's works, and below the increaſed value of the new works, is in either caſe bad. *The King* v. *The Inhabitants of St. George, Middleſex*, *M.* 48 *G.* 3. 127

2. Payment by one who was aſſeſſed to a church rate upon *houſeholders* only, and not upon the pariſhioners at large, will nevertheleſs gain him a ſettlement; for it is not leſs a *public* tax, becauſe laid too narrowly; and it is *charged* and *paid* within the pariſh, which is all that is required by the ſtat. 3 *W.* 3. *c.* 11. *ſ.* 6. *The King* v. *The Inhabitants of St. Bees*, *H.* 48 *G.* 3. 203

POOR-REMOVAL.

1. By the ſtat. 35 *G.* 3. *c.* 101. *ſ.* 2. the party aggrieved by an order of Juſtices, directing payment, to the amount of above 20*l.* of the charges and coſts of the ſuſpenſion of an order of removal, on account of the illneſs of the pauper, may appeal to the next ſeſſions, in like manner as againſt an order of removal, though he omit to give notice of ſuch his appeal within three days after the demand of ſuch charges and coſts; by which he makes himſelf liable to a diſtreſs for the amount. And if on appeal the former order be vacated, or the amount of the charges to be paid be reduced, the ſurplus, if before levied by diſtreſs, muſt be refunded. *The King* v. *The Inhabitants of Bradford*, *M.* 48 *G.* 3. 97

2. Under the ſtat. 35 *G.* 3. *c.* 101. *ſ.* 2. an order of juſtices, ſuſpending their order made for the removal of a pauper to his place of ſettlement,

on account of ſickneſs, may be made, though he were not *brought before the juſtices* at the time of ſuch orders made: the plain intent and preciſe object of the ſtatute being to extend the power of ſuſpenſion to all caſes where orders of removal may be made; and orders of removal may be made though the paupers to be removed be not brought perſonally before the magiſtrates; however fit that is to be done where it may be done. *The King* v. *The Inhabitants of Everdon, M.* 48 *G.* 3. 101

3. A married woman pregnant in the abſence of her huſband with a child, which when born would by law be a baſtard, is removeable as an unmarried woman under ſect. 6. of ſtat. 35 *G.* 3. *c.* 101.; and the preſumption of her being chargeable ariſes by the ſame clauſe from the bare fact of being with child of a baſtard, if no circumſtances be ſtated to ſhew that ſuch preſumption is not applicable to a perſon in the particular ſituation of the party coming within the general deſcription of the clauſe. And the order of removal may charge ſuch a perſon generally as *actually chargeable*, without ſetting forth in what manner chargeable. *The King* v. *The Inhabitants of Tibbenham, E.* 48 *G.* 3. 388

4. An order of removal founded on the ſtat. 35 *G.* 3. *c.* 101. *ſ.* 6. ſtating that *A. E. ſingle* woman was "*by being pregnant deemed to have become chargeable*," &c. is good. *The King* v. *The Inhabitants of Diddlebury, E.* 48 *G.* 3. 393

PRACTICE.

1. The court will not order the ſheriff to retain, in ſatisfaction of a preſent writ of fi. fa. iſſued by the plaintiff againſt the defendant, *money* or *bank notes*, which the ſheriff had before received for the uſe of the defendant, in diſcharge of an execution levied by the defendant againſt another, and which the ſheriff had not paid over. *Knight* v. *Criddle, M.* 48 *G.* 3. 48

2. A day-rule, when made, covers by relation back the liberation of a priſoner who had ſigned the petition, but had gone out of the priſon before the ſitting of the court on the ſame day; though the marſhal were ſued for the eſcape before the ſitting of the court. *Field* v. *Jones, Marſhal of K. B. Priſon, M.* 48 *G.* 3. 151

3. A priſoner under criminal proceſs in the houſe of correction cannot be brought up by habeas corpus ad reſpondendum, for the purpoſe of being charged with a declaration on a bailable writ, and re committed to his former cuſtody ſo charged: for the court have no power to make a gaoler of ſuch priſon liable for the eſcape of a priſoner on civil proceſs. *Brandon* v. *Davis, M.* 48 *G.* 3. 154

Aliter in the caſe of a ſheriff or gaoler of the court. *ibid.*

4. Order to amend writs of ſcire facias on a judgment, and declaration thereon, conformably to the judgment roll. *Braſwell* v. *Jeco, H.* 48 *G.* 3. 316

5. The ſheriff cannot relieve himſelf from an attachment for not bringing in the body, by payment of the debt ſworn to and indorſed on the bailable writ ſince the ſtat. 43 *G.* 3. *c.* 46. *ſ.* 2., having neglected to take the money at the time of the arreſt as directed by that act; but muſt pay the whole debt and coſts. *The King* v. *The Sheriff of London, H.* 48 *G.* 3. 316

6. The court would not ſtay judgment and execution, on a ſummary application, becauſe the plaintiffs after verdict became alien enemies. *Vanbrynen* v. *Wilſon, H.* 48 *G.* 3. 321

7. None can be held to ſpecial bail in trover or detinue, without a judge's order. *Reg. Gen. H.* 48 *G.* 3. 325

8. By the long eſtabliſhed and recognized practice of *B. R.* a writ of capias, with a non omittas clauſe, may iſſue in the firſt inſtance, and be executed by the ſheriff within a particular liberty, (ſuch as the honor of *Pontefract* in the county of *York*,) the bailiff of which has the execution and return of writs, without a prior writ of latitat firſt iſſued, and a return made by the ſheriff of mandavi ballivo qui nullum dedit reſponſum: and therefore no action on the caſe lies by the bailiff of ſuch liberty againſt the party ſuing out ſuch writ, upon an allegation that it was *wrongfully, injuriouſly, and deceitfully* cauſed to be iſſued by him, to the damage of the bailiff's office, &c. *Carrett* v. *Smallpage*, *E.* 48 *G.* 3. 330

9. Bail above having been put in and exception entered in the vacation, notice of juſtification for the firſt day of the next term muſt be given *within four days after ſuch exception*. *Millſon* v. *King*, *E.* 48 *G.* 3. 434

10. Where the rule for an attachment againſt the ſheriff for not bringing in the body was obtained on the 11th of *February*, which attachment was returnable on the 4th of *May*, and the plaintiff did not iſſue the attachment till the 3d of *May*, and in the mean time the defendant became bankrupt on the 19th *March*, by which means the ſheriff loſt his opportunity of paying the debt and proving it under the commiſſion the attachment was ſet aſide for ſuch laches. *The King* v. *The Sheriff of Surry*, *E.* 48 *G.* 3. 46

11. The ſtatute 32 *G.* 3. *c.* 58. *ſ.* 1 enabling defendants in quo warranto to plead double is, as well as the ſtat. 9 *Ann.* *c.* 20. confined to corporate officers. *The King* v. *Richardſon*, *E.* 48 *G.* 3. 46

12. A feme covert living apart from her huſband, under ſentence of ſeparation, with alimony allowed, pendente lite, in the eccleſiaſtical court, having brought treſpaſs in the name of her huſband againſt wrong doers for breaking and entering her houſe and taking her goods, the Court refuſed on the application of ſuch defendants to ſtay the action, though ſupported by an affidavit of the huſband (who had not releaſed the action, nor applied to be indemnified againſt the riſk of coſts,) that the action was brought without his authority. *Chambers* v. *Donaldſon*, *E.* 48 *G.* 3. 471

13. The *Engliſh* notice required by the ſtat. 5 *G.* 2. *c.* 27. *ſ.* 4. is to be on the copy of the proceſs, and not on the writ itſelf: and the ſervice of ſuch copy without the notice is irregular and will be ſet aſide; though the court diſcharged a rule for quaſhing the writ itſelf on this account. *Lloyd* v. *Maurice*, *E.* 48 *G.* 3. 528

PRISONER.

See ESCAPE.

1. A priſoner under criminal proceſs in the houſe of correction cannot be brought up by habeas corpus ad reſpondendum, for the purpoſe of being charged with a declaration on a bailable writ, and re-committed to his former cuſtody ſo charged: for the court have no power to make the gaoler of ſuch priſons liable for the eſcape of a priſoner under civil proceſs. *Brandon* v. *Davis*, *M.* 48 *G.* 3. 154

2. Aliter in the caſe of a ſheriff or gaoler of the court. *ib.*

PROMOTIONS.

1. In *Hilary* vacation Mr. Juſtice *Rooke*, of C. B. died; and was ſucceeded by Mr. Juſtice *Lawrence*, who reſigned his ſeat on the bench of *B. R.* And in *Eaſter* term *John Bayley*,

Bayley, Eſq. ſerjeant at law, was appointed a judge of this Court, and knighted. 329

2. In *Trinity* term Meſſrs. *Manley*, *Pell*, and *Rough*, were called ſerjeants, and took for their motto "Pro rege et lege." 529

PROTEST,

See CORPORATION, 1.

QUO WARRANTO,

See CORPORATION.

1. Quære, Whether, if it be found againſt a defendant in quo warranto, that, though duly elected, he was not duly ſworn in, there can be any other judgment againſt him than of *ouſter abſolute*; there being no inſtance of a judgment of ouſter quouſque. *The King* v. *Courtenay*, *H.* 48 *G.* 3. 246

2. The ſtat. 32 *G.* 3. *c.* 58. *ſ.* 1., enabling defendants in quo warranto to plead double, is, as well as the ſtat. 9 *Ann. c.* 20., confined to corporate officers. *The King* v. *Richardſon*, *E.* 48 *G.* 3. 469

RECORD.

See VARIANCE, 1.

RENT DOUBLE.

See LANDLORD AND TENANT, 1.

SCIRE FACIAS, WRIT OF.

See AMENDMENT, 1.

SETTLEMENT.

See CONVEYANCE.

SETTLEMENT—*By Apprenticeſhip.*

An indenture binding an adult as an apprentice, which was not executed by herſelf, but only by her father-in-law and the maſter, though with her conſent, does not conſtitute her an apprentice; and conſequently no ſettlement can be gained by her under ſuch indenture. *The King* v. *The Inhabitants of Ripon*, *H.* 48 *G.* 3. 295

—*By Hiring and Service.*

1. A deſerter from the King's marine ſervice cannot gain a ſettlement under a hiring and ſervice for a year; not being ſui juris, nor competent *lawfully* to *hire* himſelf within the ſtat. 3. *W.* and *M. c.* 11. *ſ.* 7. *The King* v. *The Inhabitants of Norton*, *H.* 48 *G.* 3. 206

2. A poor boy ſent out of the houſe of induſtry at 14 years of age to the pariſh officers, and by them *allotted* to a pariſhioner, who handed him over to another perſon, by whom the boy was told that he was to ſtay with them a year, and ſhould have clothes, &c.; to which the boy made no objection; conceiving himſelf obliged to accept the ſervice; but made no agreement for wages, or concerning the nature or duration of his ſervice, nor was conſulted upon the ſubject; does not gain a ſettlement by ſerving under this ſuppoſed obligation for a year; for neither did he conſider himſelf, nor was he conſidered by the other parties, as a free agent; and ſuch only can contract, or adopt a contract made by others. *The King* v. *The Inhabitants of Stow-Market*, *H.* 48 *G.* 3. 211

—*By Rating.*

Payment by one who was aſſeſſed to a church rate upon *houſeholders* only, and not upon the pariſhioners at large, will nevertheleſs gain him a ſettlement; for it is not leſs a *public* tax becauſe laid too narrowly; and it is *charged* and *paid* within the pariſh, which is all that is required by the ſtat. 3 *W.* 3. *c.* 11. *ſ.* 6. *The King* v. *The Inhabitants of St. Bees*, *H.* 48 *G.* 3. 203

SEWERS.

The ſtat. 23 *H.* 8. *c.* 5. *ſ.* 17. having directed that "*Laws, acts, decrees, and ordinances*" made by commiſſioners of ſewers ſhall ſtand good and be put in execution *ſo long time as their commiſſion endureth, and no longer*, except "the ſaid laws and ordinances" be engroſſed in parchment, and certified under the ſeals of the commiſſioners into Chancery, and have the royal aſſent: and the ſtat. 13 *Eliz. c.* 9. having directed all commiſſions of ſewers to continue in force for 10 years, unleſs ſooner determined by ſuperſedeas or any new commiſſion; and that all *laws, ordinances, and conſtitutions*," made by force of ſuch commiſſion, *being written in parchment, indented and under ſeals*, &c., ſhall, without ſuch certificate or royal aſſent, continue in force notwithſtanding the determination of the commiſſion by ſuperſedeas, until repealed or altered by new commiſſioners; and that all ſuch *laws, ordinances, and conſtitutions*, written *in parchment, indented, and ſealed, &c.* ſhall, without certificate or royal aſſent, continue in force *for one year* after the expiration of ſuch commiſſion by lapſe of 10 years from its teſte; held,

1. That the *laws, acts, decrees, and ordinances*, mentioned in the ſtat. of *Hen.* 8. mean the ſame as the *laws, ordinances, and conſtitutions*, mentioned in that of *Elizabeth*. And,

2. That a *decree* made by commiſſioners under a former commiſſion which had expired by lapſe of 10 years, directing a ſea wall to be refounded, which had been deſtroyed by a violent tempeſt and inundation, and the ſums neceſſary for its conſtruction to be advanced by thoſe who were before bound to ſuſtain it ratione tenuræ, (and who did advance the money accordingly) and that a rate ſhould be made on the level for their reimburſement; (although ſuch decree had been written in *parchment, indented, and ſealed*; which this was not,) could not be enforced by commiſſioners under a *new* commiſſion, iſſued more than a year after the expiration of the former commiſſion; as to ſo much of it as remained unexecuted: though good to the extent to which it had been executed: and therefore this Court refuſed a mandamus to the new commiſſioners to direct a rate to be levied on the level for the reimburſement directed by the decree. *The King* v. *The Commiſſioners of Sewers, Somerſet, M.* 48 *G.* 3. 109

SHERIFF.

In an action on the caſe againſt the ſheriff for negligent and wrongful conduct in conducting the ſale of the plaintiff's goods under a writ of fieri facias, by which they were ſold much under value, where, in ſtating the ſubſtance of the writ, the count alleged that the ſheriff was commanded to levy 80*l.* awarded to *J. C.* for his *damages* ſuſtained *by occaſion of the detaining the debt*; that is proved by the writ which ſtated that the 80*l.* were awarded to *J. C.* for his *damages* ſuſtained *as well* by reaſon of *detaining the debt* as for his *coſts*, &c.; for *coſts* are in legal ſenſe included in the word damages. *Phillips* v. *Bacon, H.* 48 *G.* 3. 298

SHIP.

The maſter of a ſhip has no lien on it for money expended or debts incurred by him for repairs done to it on the voyage. *Huſſey* v. *Chriſtie, E.* 48 *G.* 3. 426

SLANDER.

I. 1. The rule of conſtruction as to ſlanderous words is to conſtrue them in their plain and proper ſenſe, ſuch in which an ordinary hearer would have underſtood them at the time they were ſpoken. And therefore the

the defendant saying of the plaintiff that "he was under a charge of a "profecution for perjury; and that "*G. W.* (an attorney of that name) "had *the Attorney-General's* direc- "tions to profecute the plaintiff *for* "*perjury*," is actionable. For after verdict (by which the jury, who are to judge of the intent of the ſpeaker, muſt be taken to have negatived that he meant to ſpeak of a profecution for a perjury which the plaintiff had *not* committed,) the words, not having been juſtified, muſt be taken to be *falſe*; and being unqualified by any context, and unexplained by any occaſion to warrant them, the law infers *malice* from the *falſehood* of an accuſation which, in the common acceptation of the words, impute *perjury* to the plaintiff. *Roberts* v. *Camden*, *M.* 48 *G.* 3. 93

2. Where new matter introduced by an innuendo, without any antecedent colloquium to which it can refer to ſupport it, is not neceſſary to ſuſtain the action, it may be rejected as ſurpluſage. And therefore an innuendo, that *the Attorney-General* ſpoken of meant the Attorney-General for the county Palatine of *Cheſter*, was ſo rejected. *ib.*

SOLDIER.

See SETTLEMENT BY HIRING AND SERVICE, 1.

STAKE HOLDER.

Where money in litigation between two parties has by mutual conſent been paid over to a truſtee, in truſt for the party entitled, it can only be ſued for and recovered from the ſtakeholder by the party entitled to it, and not from the original party who was indebted; though he agreed to wave all objections to form. *Ker* v. *Oſborne*, *E.* 48 *G.* 3. 378

STAMPS.

1. *A.* and *B.* having exchanged their acceptances of bills drawn by each on the other at ſo many day's date; held that the delivery of the reſpective bills for acceptance, and the re-delivery of the ſame by the acceptors to the reſpective drawers, was a negotiation of the bills; and that ſuch bills could not, after they had been ſo exchanged for valuable conſideration (as the exchange of acceptances is) for 20 days, be poſt-dated without a new ſtamp, as upon new bills; although during all that time each had remained in the hands of the original drawer. *Cardwell* v. *Martin*, *H.* 48 *G.* 3. 190

2. A policy of inſurance originally underwritten on "ſhip *and outfit*" was after the ſhip ſailed declared by conſent of all parties, to be on "ſhip *and goods*," by a memorandum written on a blank ſpace in the body of the policy; but without any new ſtamps: and it having been before decided that for want of the ſtamp the plaintiff could not recover as upon a policy on ſhip *and goods*, as declared by the memorandum, it was now held that he could not recover upon the policy in its original ſtate, as an inſurance on "ſhip *and outfit*," by reaſon of the alteration apparent upon the face of the inſtrument itſelf, and which was made by parties intereſted. *French* v. *Patton*, *E.* 48 *G.* 3. 351

STATUTES.

A ſtatute introductive of a new qualification as to the ſubject matter, though penned in the affirmative, repeals a former ſtatute concerning the ſame matter. Therefore the ſtat. 13 *G.* 2. *c.* 28. *ſ.* 5., exempting from the impreſs ſervice any harpooner, &c. *ſeaman*, &c. in the *Greenland* trade, is impliedly repealed by

STOCK TRANSFERRABLE SCHEMES.

See INDICTMENT, 2.

SUBPŒNA DUCES TECUM.

The writ of ſubpœna duces tecum is of compulſory obligation on a witneſs to produce papers thereby demanded which he has in his poſſeſſion, and which he has no lawful or reaſonable excuſe for withholding; of the validity of which excuſe the Court, and not the witneſs, is to judge. And in an action againſt a ſheriff's bailiff for diſobeying ſuch writ, who having been ſubpœnaed, on a former action by the plaintiff againſt another, to produce the warrant under which he acted, had neglected ſo to do, whereby the plaintiff was nonſuited; his ability to produce the warrant and his want of juſt excuſe for not producing it are ſufficiently alleged by ſtating, that he could and might in obedience to the ſaid writ of ſubpœna have produced at the trial the ſaid warrant, and that he had no lawful or reaſonable excuſe or impediment to the contrary. *Amey* v. *Long*, *E.* 48 *G.* 3. 473

SURPLUSAGE.

Where new matter introduced by an innuendo, without any antecedent colloquium to which it can refer to ſupport it, is not neceſſary to ſuſtain an action for ſlander, it may be rejected as ſurpluſage. And therefore an innuendo that *the Attorney General* ſpoken of meant the Attorney-General for the county palatine of *Cheſter*, was ſo rejected. *Roberts* v. *Camden*, *M.* 48 *G.* 3. 93

SURRENDER.

John Lealand ſurrendered a copyhold in the occupation of him, *John Lealand*, to the uſe of *Joſeph* Lealand and *John* Lealand *his ſon*, for their lives and the life of the ſurvivor; remainder to the heirs of the body of the *ſaid John* Lealand *ſon of Joſeph* L.; remainder to the right heirs of *the ſaid* John Lealand: held, that the ultimate remainder was meant for the right heirs of *John the ſurrenderor*; as well becauſe *John the ſurrenderee* is before deſcribed with the addition of *the ſon of Joſeph*; as of the manifeſt futility of giving *John the ſurrenderee* an eſtate *tail*, and afterwards a *fee* in ſucceſſion. Though if the conſtruction had even been left doubtful, the ultimate remainder would have continued in the ſurrenderor. *Roe d. Hucknall* v. *Foſter*, *E.* 48 *G.* 3. 405

TENANT,

See LANDLORD AND TENANT.

TRADE.

See IMPRESS, 1. INSURANCE, 3. INDICTMENT, 2.

The ſtat. 43 *G.* 3. *c.* 153. *ſ.* 15. having enabled the king by order in council to licenſe the importation of certain goods, being *Britiſh* or neutral property, from the enemy's country, in neutral ſhips; a contract made by *A.* and *B. Britiſh* ſubjects, (the plaintiffs) for the purchaſe of brandy from a houſe of trade in *France* (an enemy,) to be ſhipped from thence in a neutral, on account of *A.* and *B.*; which contract was made *in contemplation of obtaining a licence* for that purpoſe; which licence was accordingly obtained ſoon after the making of ſuch contract, and before it was begun to be executed; is a legal contract, and may lawfully be guarantied in the firſt inſtance by *C.* and *D.* other *Britiſh* ſubjects (the defendants). And after ſuch licence obtained, the guarantees are liable in damages for the non-ſhipment of the goods by the houſe in *France* on board a neutral ſent there for that purpoſe. Though it were

objected to the licence legalizing ſuch trade, that it was not made out to *A.* and *B.* *by name*, but only to *C.* and *D.* and *other Britiſh merchants*; and that neither *C.* and *D.*, nor even *A.* and *B.*, had any property in the goods; whereas the licence required the goods to be imported to be *the property of the ſaid perſons or ſome of them*; and, until ſhipment, the property continued in the houſe in *France*. For neither the act of parliament, nor the king's licence, required the owners of the property to be *individually named*; and even if the licence were to be ſo conſtrued, as it only required the goods imported to be the property of "the "ſaid perſons or ſome of them, *as* "*may be ſpecified in their bills of lad-*"*ing*;" and as no bills of lading were made out, which might have been made in the names of *C.* and *D.*, and if ſo, would have conveyed to them a legal or ſpecial property in the goods; the defendants *C.* and *D.* were ſtill liable to anſwer in damages, upon their guarantie, as for the non-performance of a legal contract. *Timſon* v. *Merac*, *M.* 48 *G.* 3. 35

TRESPASS.

See PLEADING, 2.

One magiſtrate committing the mother of a baſtard child to cuſtody for not filiating the child is yet entitled to the previous notice of action required by the ſtat. 24 *G.* 3. *c.* 44., though by the ſtat. 18 *Eliz.* *c.* 3. *ſ.* 2. juriſdiction over the ſubject matter is given to *two* magiſtrates. *Weller* v. *Toke*, *E.* 48 *G.* 3. 364

VALUE OF PREMISES UNDER COMPENSATION ACT.

See WEST INDIA DOCKS.

VARIANCE.

See DAMAGES AND COSTS, 1.

1. In an action on the caſe for a malicious proſecution, it is not material for the plaintiff to prove the exact day of his acquittal as laid in the declaration, ſo that it appears to have been before the action brought: and therefore a variance in that reſpect between the day laid and the day ſtated in the record, which was produced to prove the acquittal, is not material; the day not being laid in the declaration as part of the deſcription of ſuch record of acquittal. *Purcell* v. *Macnamara*, *M.* 48 *G.* 3. 157
2. A variance in ſetting out one of ſeveral covenants in a leaſe, on which breaches were aſſigned, viz. the *Cellar-beer* field, inſtead of the *Aller-beer* field, being conſidered as part of the deſcription of the deed declared on; though the plaintiff waved going for damages on the breach of that covenant; is fatal. *Pitt* v. *Green*, *H.* 48 *G.* 3. 188
3. Proof that the defendant agreed to ſell his horſe warranted ſound to the plaintiff for 31*l.* 10*s.*, and at the ſame time agreed that if the plaintiff would take the horſe at that value, he, the defendant, would buy another horſe of the plaintiff's brother for 14*l.* 14*s.*, and that the difference only ſhould be paid to the defendant, will ſupport a count charging only, that in conſideration that the plaintiff would buy of the defendant a horſe for 31*l.* 10*s.* the defendant promiſed that it was ſound; and that in fact the plaintiff did buy the horſe *for that price*, and *did pay to the defendant the ſaid* 31*l.* 10*s.* *Hands* v. *Burton*, *E.* 48 *G.* 3. 349

VOLUNTARY CONVEYANCE.

See CONVEYANCE VOLUNTARY.

WEST INDIA DOCKS.

The compenſation clauſe, *ſ.* 121. of the ſtat. 39 *G.* 3. *c.* 69. directing that in caſe any warehouſes, &c. (uſed for holding *Weſt India* produce before that act) ſhould be rendered *leſs valuable* by reaſon of the *Weſt India* trade being diverted therefrom by the then intended *Weſt India* docks and works, than they were *before the paſſing of the act*; or in caſe the *yearly* or *other receipts* of *Chriſt*'s hoſpital ſhould be thereby leſſened; the owners of ſuch warehouſes, &c. and the governors of the hoſpital ſhould be compenſated; (thereby putting ſuch owners, and governors on the ſame footing) muſt be conſtrued with reference to the *yearly* profits made of the premiſes *antecedent* to the paſſing of the act; and the *value* of ſuch warehouſes cannot be evidenced by the yearly profits made between the paſſing of the act and the opening of the docks, by which latter the loſs was occaſioned. *Manning* v. *Commiſſioners of Compenſation under the Weſt India Dock act*, *M.* 48 *G.* 3. 165

END OF THE NINTH VOLUME.

Printed by A. Strahan, Law Printer to His Majeſty,
Printers-Street, London.