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[1] HILARY TERM, 26 GEO. II. 1753.

STEVENS, OF THE DEMISE OF WISE, *versus* TYRELL. C. B. A custom for a feme covert to surrender her copyhold lands without the assent of her husband is bad.

In an ejectment of copyhold lands this case was reserved at the assizes for the opinion of the Court, which states, that J. Jennings, being seised in fee according to the custom of the manor of the copyhold lands in question, died, and the same descended to his heir at law Frances the wife of William Geary, subject to J. Jennings's widow Henrietta's estate; that Frances the wife of William Geary was admitted, and being solely examined, surrendered the premises to the use of herself for life, remainder to Henry Wise in fee; and that William Geary her husband then living did not join with her, that Henry Wise was admitted to remainder in fee, that William Geary died in 1739, and Henrietta the widow is also dead; and that there is a custom in this manor that a feme covert seised in fee of copyland lands may dispose of her estate without her husband's joining. A verdict was taken for the plaintiff, who claims under the sole surrender of Frances the feme covert, which is void if the custom be not a good one.

After several arguments, the whole Court were clearly of opinion that this was a bad custom; and Willes Lord C.J. in giving the judgment of the Court said, that Justice Burnett (who was now lately dead) was of the same opinion.

It is not stated whether the feme covert by the custom was to be solely and secretly examined, though in fact she was so; nor is it stated that the husband by the custom was to consent though he did not join, and therefore it must be taken for granted he did not consent.

In support of the custom was cited 2 Danv. Abr. 430, pl. 10, where it is said that it is a good custom in a copyhold manor, that a feme covert, with or without the consent of her husband, may devise her copyhold lands to her husband, or whom she [2] pleases; but this is not rightly abridged, and shews what little credit ought to be given to abridgments. The case abridged is anonymous in Moor 123, pl. 268, and the custom there found on a special verdict is, that a feme covert with the assent of her husband may devise her copyhold lands to her husband or any other, which the Court thought was not an unreasonable custom; but that is not the present case, which must be taken to be without the assent of the husband.

defendant at the trial; and the case in 2 Stra. 1131, is a stronger case; so the rule to shew cause why the verdict should not be set aside was discharged.

[244] ARTHUR BEARDMORE, an Attorney, Plaintiff, *versus* NATHAN CARRINGTON, JAMES WATSON, THOMAS ARDRAN, AND ROBERT BLACKMORE, four of the King's Messengers in Ordinary, Defendants. A new trial was refused in an action of trespass and imprisonment under a Secretary of State's warrant, where 1000l. damages were given for six days imprisonment, and the entering plaintiff's house and seizing his books and papers.

This was an action of trespass and false imprisonment: the plaintiff declared, that on the 11th of November 1762, the defendants broke and entered his dwelling-house at London, in the parish of St. Stephen Wallbrooke, in the ward of Wallbrooke, and continued therein four hours, disturbed him in his possession, broke and forced open several doors of the rooms, and broke and spoiled the locks, bolts and bars thereof, and broke and forced open many boxes, chests, bureaus, scrutores, writing-desks, drawers, and cupboards of the plaintiff in his house, and the locks thereof, and searched and examined all the rooms in the house, and all the boxes, &c. so broke open; and read over, pryed into, and examined all the private papers, books, letters, and correspondences of the plaintiff and his clients, whereby the secret and private affairs, concerns, businesses, and circumstances of the plaintiff and his clients, became and were wrongfully discovered and made public; and then and there seized, took, and carried away 500 printed charts, and a great many other papers, printed and written, (particularly mentioned,) and took and closely imprisoned the plaintiff for nine months, whereby he was hindered from following and transacting his lawful affairs and business, and was thereby put to great expences in his maintenance during his imprisonment, and in obtaining his legal discharge and release therefrom, against the peace, &c. to the damage of the plaintiff 10,000l.

The defendants pleaded first not guilty; and 2dly, by leave of the Court, as to the breaking and entering the dwelling-house, continuing there, disturbing the plaintiff in his possession, forcing open the said doors, forcing open the boxes, chests, &c. and examining his private papers, &c. and carrying away the goods, &c. and imprisoning the plaintiff and detaining him for six days and an half. They plead, that the plaintiff ought not to have his action against them; because they say, that before the trespass, &c. was supposed to be committed, on the 6th of November 1762, the Earl of Halifax was, and yet is, one of the lords of the King's Privy Council, and one of his principal Secretaries of State, and that he on the 6th of November 1762, made his warrant under his hand and seal, directed to the defendants, four of the King's messengers in ordinary, by which warrant the earl did, in the **[245]** King's name, authorize and require them (the defendants), taking a constable to their assistance, to make strict and diligent search for the said Arthur Beardmore, mentioned in the said warrant to be the author, or one concerned in the writing of several weekly very seditious papers, intitled, *The Monitor or British Freeholder*, Number 357, 358, 360, 373, 376, 378, 379, and 380; London, printed for J. Wilson and J. Fell in Paternoster-Row, which contained gross and scandalous reflections and invectives upon His Majesty's Government, and upon both Houses of Parliament, and him the said Arthur Beardmore having found, to seize and apprehend, and to bring him together with his books and papers in safe custody, before the said Earl of Halifax, to be examined concerning the premises, and further dealt with according to law, &c. That the said warrant was, that day, delivered to the defendants to be executed: that they took C. W. a constable to their assistance, and on the same day in the declaration, they went towards the plaintiff's house and found him near to it, and did there seize and apprehend him by virtue of the warrant; and immediately on the same day about 10 o'clock in the forenoon, being the time when, &c. entered his dwelling-house, (the door being then open,) to search for, and seize the books, papers, &c. of the plaintiff, and to bring them with the plaintiff, before the Earl of Halifax, according to the exigency of the warrant; and so the defendants go on and justify the trespass aforesaid, and say they delivered the books, papers, &c. to Lovel Stanhope, an assistant of the Earl of Halifax, and a Justice of Peace for Westminster, to be examined; and that they kept the plaintiff in custody till he gave bail for his appearance in the King's Bench the then next term, to answer to such matters as should be objected

against him, and then the defendants by order of the Earl of Halifax discharged the plaintiff; and they say, that he was necessarily put to expences by such detainer, which is the same trespass complained of. There is another justification much to the same purpose. The plaintiff replied de injuria sua propria, whereupon issue was joined; and at the trial the jury were directed to assess damages under an idea that the trespass and imprisonment committed under this warrant could not be justified by any plea whatsoever; and they found a verdict for the plaintiff, and gave him 1000l. damages.

It was moved by the King's Serjeants that the verdict might be set aside for excessive damages. Upon shewing cause, the Lord Chief Justice stated the substance of the evidence given at the trial as follows:

The plaintiff called his clerk David Merideth, who proved that on the 11th day of November 1762, he found all the defendants in the plaintiff his master's house, and in the private office there, opening the drawers and taking out papers; that they demanded **[246]** the plaintiff's file of letters, and examined them back till the year 1752; defendant Carrington then said, "that was sufficient." Afterwards they went into the public office, and there opened the desk, took out the books, and looked into the ledgers, but did not break any desks or drawers open, because the plaintiff opened the same for them; afterwards they took the plaintiff and this witness away in a coach. This witness proved, that the plaintiff was then concerned in a great many causes depending, as an attorney; that he sent for Mr. Wimbolt to manage his business while he should remain in confinement; that no violence was offered to the person of the plaintiff, and that his wife was permitted to be with him; that this witness had actions depending against the defendants and Lord Halifax; that the defendants refused to permit one Mr. Collet, who was a client of the plaintiff, to converse privately with him about his business; that while the plaintiff and this witness were confined in the house of the defendants, he the plaintiff was suffered to go into any part of the house, and after six days imprisonment, they were both discharged, upon entering into recognizances to appear in the King's Bench the then next term, and for their good behaviour, without paying any fees.

Mr. Collet, a client of the plaintiff, swore that the plaintiff was concerned in some causes for him at that time, and that he desired to speak with him in private about his business, but he was refused by the defendants to speak to the plaintiff privately, and to write down what he wanted to say; that pen and ink were refused to him, but the defendants told him he might speak publicly to the plaintiff in the hearing of the defendants, if he pleased. It was also proved, that the plaintiff was then refused the liberty of writing a letter to Mr. Alderman Beckford, one of the members of Parliament for the City of London. This was the substance of the plaintiff's evidence.

For the defendants, Lovel Stanhope Esq. Deputy Secretary of State, assistant to Lord Halifax, was called, who swore that his business was to look into, and examine all papers touching the Government; that he took an oath of office, and was to pay obedience to the orders of the Secretary of State: he said, that on these occasions when the messengers have a man in custody, they are not to do any thing without his orders; that Lord Halifax ordered the plaintiff to be bailed, and that he was continued upon his recognizance from term to term for several terms. It was admitted on all sides at the trial, that there have been a great many precedents of warrants of the like sort with the present for seizing persons and papers, &c. and for all sorts of crimes or offences, let the offence be what it would: and this was the substance of the defendants' evidence.

[247] For the defendants it was said, that for six days and an half confinement in a messenger's house, where little or no injury had been done either to the plaintiff's person, house, or goods, 1000l. were excessive and outrageous damages; and that if the Court saw that they were excessive, they had power to grant, and would grant a new trial, even in cases of tort. It is said the case of *Wood and Gunston*, Styles 466, Mich. 1655, is the first instance of granting a new trial; but this seems to be a mistake, for there were new trials granted long before, as appears from this, viz. that it is a good challenge to a juryman to say that he hath been a juror before in the * same

* Note; this might be in the case of a venire facias de novo awarded, where a mis-trial has been had.

cause. Per Holt C.J. 2 Salk. 648. It is true that in *Roe and Hawkes*, 1 Lev. 97, it is said by Twisden Justice, that the new trial in *Wood and Gunston* was not merely granted for excessiveness of damages, but for tampering with the jury; but in 1 Sid. 131, and in 2 Mod. 151, it is said that the new trial in *Wood and Gunston* was for excessiveness of damages; that was an action for words, and is a case in point, that the Court has power to grant new trials in cases of tort for excessive damages. Supposing new trials first began in the reign of Charles the First, yet it appears from the Year-Books long before that time, that Courts of Justice, (not having then come into granting new trials,) when they saw reason for it, either lessened or increased the damages, as they do in the case of maihem to this day, upon view of plaintiff's maihem and identifying his person; and for this purpose these cases were cited from the Year-Books, Mich. 22 Ed. 3, fol. 11, c. 10, which was a battery; Mich. 3 Hen. 4, fol. 4, c. 16. Mich. 7 H. 4, 31 b. c. 15, in conspiracy, where the plaintiff released part, or the Court would have abridged the damages according to their conscience; Easter, 8 Hen. 4, fol. 23, c. 9, the Justice of Nisi Prius thought the damages too little, yet they would not increase them without seeing the maihem; Mich. 19 H. 6, 10 b. c. 28. Trin. 32 H. 6, 1 a. c. 2; in debt, the parties were at issue, and the jury found for the plaintiff damages 6s. 8d. and costs 20s., the Court increased the damages to 13s. 4d. more; Dyer 105. Palm. 314. From these ancient cases it was argued, that Courts of Justice have in all times considered themselves authorized to review the damages given by juries in all kinds of actions, and either to abridge or increase them; and since that practice has been disused, and abridging damages by the Court has been looked upon as unconstitutional, new trials have been granted for excessive damages.

For the plaintiff it was said, that new trials can only be granted in cases where the Court can clearly see that the jury is mistaken, or have misbehaved themselves; all the cases of new trials tend to prove, that where the Court have no measure to direct them, they cannot grant a new trial; there must be some infallible mark for them to go by, in the case; no two Judges in the **[248]** world can agree what damages ought to be given in the present case, for damages here lie in speculation. That the misconduct of juries seems to have been the first occasion of new trials. It is said new trials were first introduced to prevent attaints; but an attaint would not lie in this case, for there is no possibility of pointing out how far the damages are excessive or not. The case in Styles 466, was not for excessive damages, but for tampering with the jury; it was said in that case to be a packed business; in the case of *Lord Townsend* for words, 2 Mod. 150, the Court said they had no ground whereby they could measure the damages, and refused a new trial. *Ash and Ash*, Comb. 357, is not to the purpose: Lord Holt asked the jury upon what ground they went, which they refused to answer him, and so were guilty of a misconduct.

Curia.—We are called upon, on our oaths, to say, whether these are excessive damages or not, and ought to have very clear evidence before us, before we can say they are excessive. The jury were directed to assess damages for the plaintiff according to the evidence given, under an idea that the defendants could not by law justify the trespass under this warrant by any manner of plea whatsoever. It is clear that the practice of granting new trials is modern, and that Courts anciently never exercised this power, but in some particular cases they corrected the damages from evidence laid before them. There is great difference between cases of damages which be certainly seen, and such as are ideal, as between assumpsit, trespass for goods, where the sum and value may be measured, and actions of imprisonment, malicious prosecution, slander, and other personal torts, where the damages are matter of opinion, speculation, ideal; there is also a difference between a principal verdict of a jury, and a writ of inquiry of damages; the latter being only an inquest of office to inform the conscience of the Court, and which they might have assessed themselves without any inquest at all: only in the case of maihem, Courts have in all ages interposed in that single instance only: as to the case of the writ of inquiry in the Year-Book of H. 4, we doubt whether what is said by the Court in that case be right, that they would abridge the damages unless the plaintiff would release part thereof, because there is not one case to be found in the Year-Books where ever the Court abridged the damages after a principal verdict, and this is clear down to the time of Palmer's Rep. 314, much less have they interposed in increasing damages, except in the case of maihem; one side says no attaint lies (in cases of tort) for excessive damages; the other side

says it does. We give no opinion as to that point; but it is said in an hundred cases in the books that an attaint does lie. See 10 Rep. 119, *Lord Cheney's case.*

[249] All, or most of the cases of new trials, are where juries have * misdemeaned themselves contrary to their oath; in the case in Stiles 466, the misconduct of the jury was certainly an ingredient, and so it appears from the case in 1 Lev. 97. Some books say it was a trial at Bar, and it is highly probable there was some evidence that the jury had been tampered with; and this was certainly the very first case of a new trial, and from that period the Courts have exercised the power of granting new trials in several cases; as when the jury find contrary to the Judge's directions in point of law, when they find directly contrary to the evidence, (that is to say) against evidence all on one side, for if there be evidence on both sides, the Court never interposes in that case; as to granting the first new trial in Stiles 466, there is great reason (as was said before) to think it was for misbehaviour in the jury; it was an action for words; so was the case of *Lord Townsend*, 2 Mod. 250, for words, and 4000l. damages, where the Court refused to grant a new trial; and if a Court could not say that those damages were excessive, they can hardly say that damages are excessive in any case of slander whatever; and this case has never been contradicted or denied to be law. The case of *Ash and Ash*, Comb. 357, was plainly for the misdemeanor of the jury in refusing to answer the Judge when he asked what ground or reason they went upon: to be sure Judges are to advise, but not to control juries; and my Lord Holt and the King's Bench did right, in granting a new trial in that case. In the case of *Wilmot* v. *Berkley*, Trin. 31 & 32 G. 2, B. R. which was an action for criminal conversation, the jury gave 500l. damages against the defendant, and upon affidavits that he was only a clerk in low circumstances, and unable to pay so large a sum, it was moved for a new trial; but the Court refused to grant even a rule to shew cause, because in cases of tort the jury are the only proper judges of the damages. We are now come to the case in 1 Stra. 691, *Chambers* v. *Robinson*, which seems to be the only case where ever a new trial was granted merely for the excessiveness of damages only: we are not satisfied with the reason given in that case, and think it of no weight, and want to know the facts upon which the Court could pronounce the damages to be excessive. The principle on which it was granted, mentioned in Strange, was to give the defendant a chance of another jury: this is a very bad reason; for if it was not, it would be a reason for a third and fourth trial, and would be digging up the constitution by the roots; and therefore we are free to say this case is not law; and that there is not one single case (that is law) in all the books to be found, where the Court has granted a new trial for excessive damages in actions for torts.

[250] It was strongly argued at the trial of this cause, that the jury were to measure the damages by what the defendant had suffered by this trespass and six days and an half imprisonment; but this was thought a gross absurdity by the Judge who presided there.

We desire to be understood that this Court does not say, or lay down any rule that there never can happen a case of such excessive damages in tort where the Court may not grant a new trial; but in that case the damages must be monstrous and enormous indeed, and such as all mankind must be ready to exclaim against, at first blush.

The nature of the trespass in the present case is joint and several; and the plaintiff has still another action against Lord Halifax, who, it is said, is more culpable than the defendants, who are only servants, and have done what he commanded them to do, and therefore the damages are excessive as to them: but we think this is no topic of mitigation, and for any thing we know the jury might say, "We will make no difference between the minister who executed, and the magistrate who granted this illegal warrant;" so the Court must consider these damages as given against Lord Halifax: and can we say that 1000l. are monstrous damages as against him, who has granted an illegal warrant to a messenger who enters into a man's house,

* The Judge who tried the cause used to certify to the Court the misbehaviour. Cro. El. 189, 411, 616. 3 Keb. 351. Styl. 448. Moor 451, 452. *Bacon* v. *Hutchinson*, Easter term 8 Ann. C. B. a rule to stay the judgment until the Judge's certificate. Palm. 325. Concerning misdemeanor of juries, see 2 H. P. C. 306, 307, &c. Cro. Jac. 210, c. 2.

and prys into all his secret and private affairs, and carries him from his house and business, and imprisons him for six days. It is an unlawful power assumed by a great minister of State. Can any body say that a guinea per diem is sufficient damages in this extraordinary case, which concerns the liberty of every one of the King's subjects? We cannot say the damages of 1000l. are enormous; and therefore the rule to shew cause why a new trial should not be granted must be discharged. Per totam Curiam *.

[251] TRINITY TERM, 4 GEO. III. 1764.

GREY *versus* JONES, Executrix, &c. C. B. To a scire facias to shew cause why plaintiff should not have execution on a judgment, the defendant pleads that plaintiff ought not to have his action instead of ought not to have execution, and well enough.

This was a scire facias against the defendant, to shew cause why the plaintiff should not have execution of his debt and damages recovered by judgment of the Court against her testator; the defendant pleaded, that the plaintiff ought not to have his action against her, because she says, that she the defendant, after the recovery of the judgment, and before the suing forth the writ of scire facias, to wit, on the first day of October in the year of our Lord 1763, at K. in the county of S., paid to the plaintiff the debt and damages in form aforesaid recovered; and this she is ready to verify; wherefore she prays judgment if the plaintiff ought to have his said action against her, &c. The plaintiff demurred, and the defendant joined in demurrer. It was objected for the plaintiff, that the plea was bad, in alledging that the plaintiff ought not to have his action, &c. for that a scire facias quare executio non, &c. is not an action. To this it was answered for the defendant, that a release of all actions will bar a scire facias upon a judgment. 1 Inst. 190 b. That all writs, whether original or judicial, which require an answer by way of plea, are properly actions or suits. 2 Salk. 603. 2 Inst. Comment on Stat. Westm. 2, c. 45. A scire facias to repeal a patent is an original action.

Curia.—This plea is a little informal. The old way of pleading was for the defendant to say, that the plaintiff ought not to have execution, &c. by virtue of the recovery aforesaid, because, &c.; but as we must take this plea to be true, and not a sham plea, we will support it if possible. Lord Coke says, that albeit a scire facias be a judicial writ, yet because the defendant may thereupon plead, this scire facias is accounted in law to be in nature of an action, and therefore a release of all actions is a good bar of the same. Co. Lit. 290 b. Wherever a writ requires a **[252]** plea, it is an action; and though a plea be informal in its conclusion, or beginning, yet if it prays a right judgment, Courts have always rejected the informal words, and given judgments according to the right and merits of the cause. So the plaintiff moved for leave to withdraw his demurrer on payment of costs, and to reply de novo, which was granted.

GREY *against* SIR ALEXANDER GRANT, BART. a Member of Parliament. C. B. In a little assault and battery 200l. damages not excessive, and a new trial was refused.

This was an action of assault and battery, tried at Guildhall, London, wherein the jury gave a verdict for the plaintiff, and 200l. damages; and now it was moved to have the verdict set aside, and a new trial, for excessiveness of damages. The case upon the evidence was as follows:

Captain Holland of the ship "Nancy," having brought from the West-Indies a turtle for the plaintiff Mr. Grey, and which was his property, and it having been, by mistake, delivered to the defendant, the plaintiff went to him and demanded it of him; but he said he had invited some friends to dine with him upon it, and refused

* Note; Hil. term 8 G. 2, B. R. *Smith* v. *Boucher*. In trespass and imprisonment damages on a writ of inquiry, 200l. Skinner moved to set it aside for excessive damages; but, per Curiam, in tort the jury are the proper judges.