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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.

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.

to deliver it, or to pay for it, and that the plaintiff might take his remedy; and pointing at the plaintiff, said, "If that man was to ask a turtle of me I would give him one." The plaintiff answered and said, this is very ungenteel; and the defendant shoved the plaintiff out of his house with his elbow, who thereupon asked the defendant if he would waive his privilege of Parliament, but the defendant refused to do it; plaintiff then said to him, "You are a scoundrel;" and defendant gave him a blow upon the face, which caused a black eye: the plaintiff also demanded the turtle by a letter, and required the defendant to restore it: Captain Holland also informed the defendant that the turtle had been delivered to him by mistake, and desired him to restore it; but the defendant said, "A turtle I have got, and what I have got I will keep." The captain told the defendant, if he wanted a turtle to entertain his friends, there was one then at the Jamaica Coffee-House to be sold, and he might buy that; the defendant answered, "You may buy it yourself, I will keep that I have got." Then the plaintiff said to the defendant again, "I come here to demand my right, and if you will not give it me I will take my remedy at law, if you will waive your privilege." The defendant answered and said, "In such a trifling business as this I will not waive my privilege, but in a matter of property I would waive it." One Falconer was called as a witness to prove he was present at this dispute, and could not remember that any blow was struck by the defendant; he had forgot every thing which made in favour of the plaintiff, but re-**[253]**-membered every thing which made for the defendant; so it was a measuring cast whether a blow was struck or not; however, the jury found for the plaintiff, and 200l. damages.

Curia.—This was a quarrel between two gentlemen, and has been properly tried by a special jury of merchants of London, who are the proper judges of the damages; when a blow is given by one gentleman to another, a challenge and death may ensue, and therefore the jury have done right in giving exemplary damages; the plaintiff has been used unlike a gentleman by the defendant in striking him, withholding his property, and insisting upon his privilege, all of them tending to provoke him to seek his revenge in another way than by law, and therefore we think the damages are not excessive. Rule to shew cause why a new trial should not be had discharged per totam Curiam.

MICHAELMAS TERM, 5 GEO. III. 1764.

COX *versus* ROLT. C. B. Practice. The Court refused to permit a defendant to add the plea of the Statute of Limitations.

This was a special action upon the case against the defendant for deflowering the plaintiff's daughter per quod servitium amisit; the defendant having pleaded the general issue, now moved for leave to withdraw that plea, and to plead the same plea again, together with the plea of the Statute of Limitations; upon an affidavit made by the defendant's attorney, that at the time when he was bound to plead by the rule of the Court, and then pleaded the general issue only, he was not fully instructed by his client what to plead; and upon citing a similar case in B. R. of *Vile* v. *Barry*, wherein that Court permitted this, upon an affidavit made by the very same attorney, that he was pressed for a plea, and was obliged to plead before he was instructed, and therefore pleaded the general issue to prevent judgment.

[254] Upon shewing cause it was insisted for the plaintiff, that the general rule of both the Courts of B. R. and C. B. is to permit a defendant to withdraw a special plea, and plead the general issue, but not vicê versâ; and many cases were cited to shew this to be the practice, which was agreed to be so by the Court; and it was said that in the case of *Vile* v. *Barry* the attorney was surprised, not instructed, and pleaded the general issue to prevent judgment; and for that reason the Court of King's Bench deviated from the general practice in that particular case; but here the affidavit made by the same attorney does not go so far, and therefore the rule ought to be discharged.

Curia.—It is a good maxim, that the law will rather suffer a particular mischief than a general inconvenience; general rules of practice must be strictly observed for the sake of certainty, or practisers will be negligent. Indeed, under very special circumstances, the Court will permit a defendant to and a special plea; in a late case of public concern, the defendant being advised by his counsel that he might give the