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IV

CONTAINING

BLACKSTONE (H.), VOLS. 1 AND 2;
BOSANQUET AND PULLER, VOLS. 1 AND 2

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of this case, as they stood in the evidence before the Court, the inlistment with the East India Company was the act of desertion. There was no desertion, no quitting the service, in the two men getting drunk at different ale-houses, for the changing their clothes, and taking measures in order to desert, would all have been at an end, and entirely at an end, if the next day they had gone back to their regiment. The only thing that fixed them, was their attestation for the service of the Company; and therefore by that they had deserted from the service, in which they were engaged. Therefore the enlisting them into the service of the East India Company under the circumstances of this case, was conducting them in a direct act of desertion, and was not only advising and persuading, but doing something more; because Grant not only suggested to them the idea of leaving the service in which they were, but was the means of their doing it. Instead therefore of an inferior degree, it appears to me directly and plainly within the words of [107] the charge. If a difference were to be made, it rather tended to an aggravation of the charge: and I think it would be totally unprecedented to make that the subject of a prohibition.

Taking the whole of the case together, it is clear that there is ground to suppose that they meant to convict him of the charge. But if by the nicety which they used in penning the sentence, that sentence were to be invalidated, it could not be by a prohibition, whatever it might be by a review, or by an appeal. The most that can be made of it, is an error in the proceedings; but we cannot prohibit upon that account. The sentence in the case of an unfortunate admiral, was certainly an accurate one. The question there was, whether the Court had not mistaken the law, yet a prohibition was not thought of (a). But it is unnecessary to discuss the sentence further; it

(a) It is presumed, that his Lordship here alluded to the sentence against the unfortunate Admiral Byng, which was as follows:—

"The Court, pursuant to an order from the Lords Commissioners of the Admiralty, to Vice Admiral Smith, dated 14th December 1756, proceeded to inquire into the conduct of the Honourable John Byng, Admiral of the Blue Squadron of his majesty's fleet, and to try him upon a charge, that during the engagement between his majesty's fleet under his command, and the fleet of the French king, on the 20th of May last, he did withdraw or keep back, and did not do his utmost to take, seize and destroy the ships of the French king, which it was his duty to have engaged, and to assist such of his majesty's ships as were engaged in the action with the French ships, which it was his duty to have assisted; and for that he did not do his utmost to relieve St. Philip's Castle, in his majesty's Island of Minorca, then besieged by the forces of the French king, but acted contrary to, and in breach of his majesty's command; and having heard the evidence, and prisoner's defence, and very maturely and thoroughly considered the same, they are unanimously of opinion that he did not do his utmost to relieve St. Philip's Castle; and also that, during the engagement between his majesty's fleet under his command, and the fleet of the French king, on the 20th of May last, he did not do his utmost to take, seize and destroy the ships of the French king, which it was his duty to have engaged, and to assist such of his majesty's ships as [108] were engaged in fight with the French ships, which was his duty to have assisted; and do therefore unanimously agree that he falls under part of the 12th article of an act of parliament of the 22d year of his present majesty, for amending, explaining and reducing into one act of parliament the laws relating to the government of his majesty's ships, vessels and forces by sea; and as that article positively prescribes death, without any alternative left to the discretion of the Court, under any variation of circumstances, the Court do therefore unanimously adjudge the said Admiral John Byng to be shot to death, at such time, and on board such ship, as the Lords Commissioners shall direct.

"But as it appears by the evidence of Lord Robert Bertie, Captain Gardner, and other officers of the ship, who were near the person of the admiral, that they did not perceive any backwardness in him during the action, or any mark of fear or confusion, either from his countenance or behaviour, but that he seemed to give his orders coolly and distinctly, and did not seem wanting in personal courage, and from other circumstances, the Court do not believe that his misconduct arose either from cowardice or disaffection, and do therefore unanimously think it their duty, most earnestly to recommend him as a proper object of mercy." M'Arthur on Naval Courts Martial, Append. No. 35. But now, by 19 Geo. 3, c. 17, s. 3, a court-martial may either "pronounce sentence of death, or inflict such other punishment as the nature and degree of the offence shall be found to deserve."

would be extremely absurd to comment upon it as if it was a conviction before magistrates, which was to be discussed in a court where that conviction could be reviewed.

I have thus gone through all the circumstances of the case, in order, as far as I can, to shew that the Court have paid great attention to the arguments which have been urged.

With respect to the sentence itself and the supposed severity of it, I observe that the severe part is by the Court deposited, where it ought only to be, in the breast of his majesty. I have no doubt but that the intention of that was to leave room for an application for mercy to his majesty, from the goodness and clemency of whose disposition, applications of this nature are always sure to be duly considered, and to have all the weight they can possibly deserve.

Rule discharged.

ALSEPT *against* EYLES. Saturday, June 16th, 1792.

An action of debt will lie against a gaoler, for the escape of a prisoner in execution, though the escape were without the knowledge of, and without any fault whatsoever on the part of the gaoler; who in such case can avail himself of nothing but the act of God or the king's enemies as an excuse.

This was an action of debt against the warden of the Fleet for the escape of Francois Gabriel de Vertillac, a prisoner in execution.

The declaration stated a judgment recovered in the King's Bench, that the prisoner was committed to the custody of the marshal, and afterwards removed by habeas corpus to the Fleet, and that the Defendant wrongfully and unlawfully, and without the leave and licence of the Plaintiff, permitted and suffered him to escape, &c.

Pleas. 1. Nil debet. 2. That the King granted the office of Warden of the Fleet to the Defendant by letters patent; that from the time of the granting of the said office, the said prison hath been, and of right ought to have been, and still of right ought to be maintained and repaired by and at the expence of his majesty, and not by and at the expence of the Defendant; that the Defendant took all due and possible care in his power to prevent the escape; that notwithstanding such care, the said Francois Gabriel without the consent, privity or knowledge of the Defendant or his servants, &c. did contrive, conspire, confederate and agree, together with two other persons, whose Christian names were unknown, but whose surnames were Valmer and Imber, unlawfully to break the said prison by and in behalf of the said Francois Gabriel, and to effect his escape from and out of the same: that the said unlawful combination, con-[109]-spiracy, &c. having been so entered into, the said two persons unknown in pursuance of such unlawful combination, &c. and in order to effect the escape of the said Francois Gabriel, and just before the said escape in the declaration mentioned, did unlawfully, secretly and clandestinely, and without the consent, &c. of the Defendant or his servants, &c. fling, cast and throw, and cause to be flung, cast and thrown, over and across a certain external wall of the said prison, contiguous and next adjoining to a certain house, part of certain premises situate in London aforesaid, commonly called and known by the name of The Bell Savage Inn, not then and there belonging to the said prison, a certain rope ladder, then and there being fastened to and suspended from one of the windows of the said house, so contiguous and adjoining to the said prison as aforesaid, overlooking the said wall of the said prison, for the purpose of thereby then and there effecting the escape of the said Francois Gabriel from and out of the said prison, over the aforesaid wall thereof; and the said Francois Gabriel did thereby, and by means thereof, and in consequence of the insufficient height of the said wall of the said prison, then and there at the said time when, &c. secretly, privately and clandestinely escape from and out of the said prison, over the said wall thereof, without the consent of, or any negligence or default in the Defendant, or any or either of his deputies or servants, &c. That immediately

after the said escape of the said Francois Gabriel, he made fresh pursuit, &c.; that notwithstanding such fresh pursuit, the said Francois Gabriel, together with the said two other persons, before the said Francois Gabriel could be retaken, or the said two other persons could be apprehended, and also before the exhibiting of the said bill of the said Plaintiff against the said Defendant, to wit, &c. fled and departed from this kingdom into certain foreign parts, out of the reach of the process of any of the courts of this country, to wit, into the kingdom of France, and there from thence continually hitherto have remained and continued, and still are resident and abiding; that at the time of the said unlawful combination, conspiracy, confederacy and agreement, herein mentioned, and also at the time of the said escape of the said Francois Gabriel, he the said Francois Gabriel, and the said other two persons were aliens, and each and every of them was an alien, born out of the liegeance of our said lord the now king, to wit, in the said kingdom of France, of parents then and there being subjects of that kingdom; and that they **[110]** the said Francois Gabriel, and the said two other persons have not, nor had either of them at any or either of the times aforesaid, any lands, tenements or other property, in this kingdom, whereby they could be amenable to the laws or justice of this country, for or in respect of the said escape of the said Francois Gabriel, &c.; that the said escape in that plea mentioned, and the said escape in the said declaration mentioned, were one and the same, and not other or different; and that the Defendant was not warden of the said prison of the Fleet, otherwise than in respect of the said letters patent, &c.

The third plea did not differ in any material respect from the second.

The replication to the second plea, protesting against the several matters alleged in it, concluded with a traverse, "without this, that the said Francois Gabriel did escape from and out of the said prison, without any negligence or default in the said Defendant or any or either of his deputies or servants, &c."

The replication to the third plea concluded with a similar traverse.

The rejoinder took issue on each of the traverses.

At the trial a verdict was found for the Plaintiff. But a rule was now obtained to shew cause why the verdict should not be set aside, and a new trial granted. The grounds on which this rule was moved for were two: one, that an action of debt would not lie for a negligent escape; the other, that the matters disclosed in the plea, which were proved, shewed that there was in fact no negligence on the part of the Defendant.

Against the rule Le Blanc and Runnington, Serjts., shewed cause. In answer to the first objection, they urged that there was no distinction, as to the action of debt, between a negligent and a voluntary escape; but that debt would lie on every escape of a prisoner who was in execution. The stat. West. 2 (13 Edw. 1, st. 1, c. 11), first gave a writ of debt against a gaoler, for the escape of a servant or accountant, at the suit of his master. The 1 Ric. 2, c. 12, which was made expressly for the purpose of regulating the confinement of prisoners in the Fleet, extends the action of debt against the warden to all cases of escapes in execution: and no distinction is made by Lord Coke in commenting on these statutes between voluntary and negligent escapes. 2 Inst. 382. In *Bonafous* v. *Walker*, 2 Term Rep. B. R. 127, the distinction was so little regarded, that evidence of a negligent escape was holden **[111]** to be good under a count for a voluntary escape. That in truth debt as well as case will lie for the escape of a prisoner in execution, appears from Cro. Eliz. 767. Cro. Jac. 288. Plowd. 35. Latch, 168. 2 Bulstr. 310. 3 Co. 52 a. 1 Roll. Abr. 809. 1 Ventr. 211, 217. 1 P. Wms. 685. F. N. B. 93. 2 Stra. 873. 5 Burr. 2812. 2 Term Rep. B. R. 126. With respect to the second ground, on which the rule was obtained, the facts stated in the plea only shew that the escape was not a voluntary one. But it was not necessary to state, on the part of the Plaintiff, any specific act of negligence in the Defendant, every escape which does not arise from the act of God or the king's enemies, being by construction of law a negligent escape, 1 Roll. Abr. 808, tit. Escape, Dyer, 66 b. 4 Co. 84 a. And though the reason given in both Dyer and Coke, why the gaoler is liable, where the prison is broken by persons not alien enemies, (though their force was irresistible,) is, that he has a remedy against them, yet it appears from the year-book 33 Hen. 6, 1, that "if a number of the king's subjects who are unknown break open the prison in the night and set the prisoners loose, in that case the marshal shall be charged, for negligently keeping them." So that the liability of the gaoler does not depend on his having a remedy over, against the persons who caused the

escape (*a*). But public policy requires, that the keepers of prisoners should be strictly responsible for the safe custody of prisoners, in the same manner as common carriers are for the safe carriage of goods, and that nothing short of the act of God or the king's enemies should excuse them. It was on this principle, that after the gaols in the Metropolis were destroyed by the rioters in the year 1780, an act of Parliament (*b*) was passed to indemnify the gaolers from the consequences of their prisoners escaping; though no actual negligence could be imputed to them, as it was impossible for them to prevent such escapes.

[112] Adair, Bond, and Marshall, Serjt., in support of the rule, argued that it had never been decided that the law with respect to gaolers was the same as with respect to common carriers, and that they were answerable to the same extent, for every escape, except that which was occasioned by the act of God or the king's enemies. In truth a gaoler and a carrier stand in very different situations. According to the doctrine of the cases cited on the other side, a gaoler is liable because he has a remedy over, but that is not the ground of a carrier's liability: according to those cases also, a sudden fire, by means of which the prisoners escape, is a matter of defence of which the gaoler may avail himself, but a carrier still remains chargeable though the goods committed to his care are destroyed by fire, without any negligence on his part, unless the fire were occasioned by lightning. 1 Term Rep. B. R. 27. Admitting the law to be, that a gaoler is liable for an escape, effected by persons not of the description of the king's enemies, because he has a remedy against them; in the present case the Defendant ought clearly to be discharged, because it appears, on the record, that the two persons who assisted the prisoner in his escape, were aliens, and had no property in this kingdom, by which they could be amenable to our laws. With respect to the form of the action, there is no decided authority to shew that an action of debt will lie for an escape, where no fault could be imputed to the gaoler. All the cases, where debt has been brought, have been of voluntary escapes. The remedy which the common law points out, is an action on the case, in which it would be open to the Defendant to shew that he was not in fault, and the jury would assess damages accordingly. The statutes West. 2 and 1 Ric. 2, which gave an action of debt on an escape, clearly refer, by fair construction only, to an escape with the knowledge and actual permission of the gaoler and warden; but as in the present case, the escape was entirely without the knowledge or assent of the warden, the common law remedy ought to have been pursued. As every escape of this kind is holden to be a negligent escape by mere construction of law, the replication was wrong in taking a traverse on a matter of legal inference.

Cur. advis. vult.

Lord Loughborough. In this case the Plaintiff is intitled to judgment, it being clear that an action of debt will lie for the escape of a prisoner in execution. In the year-book **[113]** 33 Hen. 6, c. 1 (pl. 3) the action was debt for an escape which was evidently involuntary. In Plowden, 35, it is debated, whether the action lay at common law, by the statute West. 2, or by that of Ric. 2, and an instance is cited (45 Ed. 3), before the time of Ric. 2, of debt being brought for an escape: but the Court held, that whether it was by the common law or by either of those statutes, yet that the action laid. Lord Coke in 2 Inst. 382, refers the action to the construction of the statute of West. 2, and in Plowden it is said, that the statute of Ric. 2 extends to all gaolers, like the statute de circumspectè agatis (13 Ed. 1, st. 4), to all bishops, as well as the bishop of Norwich. To the same effect also is 1 Ventr. 217. The question therefore is not now open to argument, and the verdict must be entered for the whole

(*a*) The argument here used is, that as the persons who break open the prisons are unknown, and therefore there can be no remedy against them, the true reason why the gaoler is liable, is not that which is given by Dyer and Lord Coke. This indeed seems to be supported by the position of Prisot in the year-book: but in the same case Danby expressly distinguishes between the acts of the king's enemies, against whom the gaoler could have no remedy, and those of persons within the king's liegeance, against whom an action might be brought. Besides, in that case there was no decision. So that upon the whole, the reasoning in Dyer, 66 b. and 4 Co. 84 a. does not appear to be contradicted by the year-book.

(*b*) 20 Geo. 3, c. 64. There is also a similar provision to indemnify the marshal of the King's Bench prison, in the last section of the stat. 12 Geo. 3, c. 23.

sum. With respect to the other point, it is impossible to take that ground. As the law stands, nothing but the act of God or the king's enemies will be an excuse. I take the notion of fire being an excuse, to have arisen from some short expressions in the books. In the year-book the words are "sudden tempest of fire" (*a*)[1], but Rolle (1 Roll. Abr. 808, pl. 6) in his Abridgment, and Dyer (Dyer, 66 b.) from whom he cites, says, "fire which is the act of God," which seems to mean fire by lightning.

Judgment for the Plaintiff (*d*).

WARRE *against* HARBIN. Saturday, June 16th, 1792.

In an action for bribery on the statute 2 Geo. 2, c. 24, it is not a material variance if the declaration state the precept to have issued to the bailiffs of the borough, but the precept produced in evidence is directed to the bailiff (*a*)[2].

This was an action of debt, for the penalty of the statute 2 Geo. 2, c. 24, for bribery at the last election for the borough of Seaford. The declaration stated the writ, and that the Lord Warden issued his precept to the bailiffs and jurats of Seaford; but the precept produced in evidence was directed to the bailiff (in the singular number) and jurats. Mr. Baron Hotham who tried the cause, thought this a material variance, and therefore the Plaintiff was nonsuited.

A rule having been granted to shew cause why the nonsuit should not be set aside, Rooke, Serjeant, shewed cause. Admitting that a slight variance in the precept is not material, according to the doctrine laid down in *King* v. *Pippet*, 1 Term Rep. B. R. 235, yet here an integral part of the corporation is mistaken, and a variance in the name of a corporation is fatal **[114]** in a lease or in a contract. Gilb. Hist. C. P. 228. 2 Lord Raym. 1516. Stra. 787. The declaration states a precept giving a false description of the corporation: and this being a penal action, is to be strictly construed.

Bond and Runnington, Serjts., contrà. Penal actions are to be considered as civil suits. Cowp. 382, *Atcheson* v. *Everitt*, and the variance is in a mere matter of inducement. In *Cuming* v. *Sibly* (*b*), the declaration stated the precept to be directed to the Mayor only, but the precept given in evidence was directed to the Mayor and Burgesses, which was holden to be an immaterial variance. This is not in fact a mistake in the name of a corporation, Seaford not being a corporation; the cases therefore which regard the proper denomination of a corporation are not applicable.

Cur. advis. vult.

The Court were afterwards clearly of opinion, on the authority of *Cuming* v. *Sibly*, that the variance was immaterial, and therefore made the

Rule absolute to set aside the nonsuit.

BRIGGS *against* SIR FREDERICK EVELYN. Saturday, June 16th, 1792.

The lord of a manor, who is also a justice of the peace, is intitled to a month's notice of an action brought against him for taking away a gun in the house of an unqualified person, by stat. 24 Geo. 2, c. 44, for it will be presumed that he acted as a justice (*a*)[3].

Trover for a gun. The facts of the case were these; the Plaintiff, who was a game-keeper of the manor of Effingham in Surrey, sent a gun to a blacksmith, between

(*a*)[1] But in the latter part of the case the expression is, "Si fuit per sodein aventure de feu," &c.

(*d*) See 4 Term Rep. B. R. 789, *Elliot* v. *The Duke of Norfolk*.

(*a*)[2] [Vide *Dickson* v. *Fisher*, 4 Burr. 2269. *Rex* v. *Leefe*, 2 Campb. N. P. C. 139. *Draper* v. *Garratt*, 2 B. & C. 2. Vide ante, vol. i. 49, 162.]

(*b*) East, 9 Geo. 3, C. B. cited by Buller, J., in *King* v. *Pippet*, 1 Term Rep. B. R. 239.

(*a*)[3] [The protection of the statute 24 Geo. 2, c. 44, and of similar statutes, extends to all persons intending to act within them. Therefore an excise officer, who, acting as such, receives money for duties under a statute which has been repealed, is entitled to notice under 23 Geo. 3, c. 70, s. 30, *Greenway* v. *Hurd*, 4 T. R. 553. "It has been frequently observed by the Courts, that the notice which is directed to be given to justices and other officers before actions are brought against them, is of no use to them when they have acted within the strict line of their duty, and was only required for the purpose of protecting them in those cases where they intended to act within it, but by mistake exceeded it." Per Lord Kenyon, ibid. So one magistrate committing the mother of a bastard child is entitled to notice under 24 Geo 2, though two magistrates only have jurisdiction in such case, for he intended to act as a magistrate at the time, however mistakenly. *Wheller* v. *Toke*, 9 East, 364. And where he has authority over the subject-matter of the complaint, although the place where the offence was committed is not within his jurisdiction, he is still entitled. *Prestridge* v. *Woodman*, 1 B. & C. 12. See also *Graves* v. *Arnold*, 3 Campb. N. P. C. 242. *Gaby* v. *Wilts Canal Company*, 3 M. & S. 580. *Theobald* v. *Crichmore*, 1 B. & A. 227. *Waterhouse* v. *Keen*, 4 B. & C. 200.

But where the act in question has not been done in the capacity of justice, &c. and cannot be referred to that character, but is wholly diverso intuitu, notice is not required; as where a revenue officer seizes goods not liable to seizure, and takes money to release them, in an action to recover such money no notice is requisite. *Irving* v. *Wilson*, 4 T. R. 485. So in an action against a tax-collector, not in respect of an act done in the execution of his office, but for his neglect to pay over money which he ought never to have taken, he is not entitled to notice under stat. 43 Geo. 3, c. 92, s. 70, which provides that no writ or process shall be sued out for any thing done in pursuance of that act till after one month's notice. *Umphelby* v. *M'Lean*, 1 B. & A. 42. So where the Defendant, who was a justice of the peace, and also mayor of a borough, had received a fee for granting a licence to a publican, it was held that such fee could not have been taken by him in his character of justice, and that he was not entitled to notice. *Morgan* v. *Palmer*, 2 B. & C. 729. If it be equivocal in what capacity the party acted, notice should be given, ibid. 734.

Replevin is not an action within the statute. *Fletcher* v. *Wilkins*, 6 East, 283.

The case is equally within the statute, where the Plaintiff waives the tort, and brings an action of assumpsit. *Waterhouse* v. *Keen*, 4 B. & C. 211.]

the 20th and 30th of August 1791, to be mended. The blacksmith having repaired it, kept it some time in his house, but did not use it. The Defendant, who was Lord of an adjoining manor, in which the blacksmith lived, and also a justice of the peace, on the 17th of September went together with his own game-keeper to the blacksmith's house to search for guns and other engines used for the destruction of the game, and finding the gun in question, took it away. It was objected at the trial, that the Defendant ought to have had a month's notice of the action, according to the stat. 24 Geo. 2, c. 44, having acted as a justice of the peace, under the powers given by stat. 5 Anne, c. 14, s. 4, and on that objection the Plaintiff was nonsuited.

A rule having been granted to shew cause why the nonsuit should not be set aside, Mr. Justice Gould, who tried the cause, stated the evidence, and that he was of opinion at the trial, that the Defendant was intitled to notice, having acted, though erroneously, in his character of a justice of the peace. And he **[115]** mentioned the case of *Stiles* v. *Coxe*, Vaugh. 111, in which it was holden, that justices and other officers of the peace, who acted in such official capacity, though wrong, were intitled to have the venue laid in the county where the trespass was committed, by stat. 21 Jac. 1, c. 12.

Bond, Serjt., shewed cause. The principle of *Stiles* v. *Coxe* is applicable to the present case, viz. that justices and other peace-officers are intitled to the favour of the law, where they have intended to act within the line of their authority, but by mistake have exceeded it, under which circumstances, they are to have a month's notice of the action, that they may have an opportunity of tendering amends, and pleading the tender. Now the stat. 5 Ann. c. 14, empowers a justice personally to seize any engine for the destruction of the game, in the custody of an unqualified person; the Defendant under that power took the gun; and whether the taking were justifiable or not, he was intitled to notice by 24 Geo. 2, c. 44.

Adair, Serjt., in support of the rule. Admitting the proposition that the provisions of the Legislature were intended for the protection of persons supposed to have acted wrong, but in the exercise of a legal authority, yet here, the Defendant was not acting as a justice, and cannot therefore avail himself of that character; he