

The defendant justifies by virtue of the King's writ, dated 4th August, 11 Car. 1. for not paying of money assessed upon him towards finding of a ship.

Being argued at the Bar this term, it was now moved to have judgment without any further argument, because it had been voted and resolved in the Upper House and the House of Commons, *nullo contradicente*, that the said writ, and what was done by colour thereof, was illegal.

The Court therefore would no further dispute thereof, but gave judgment for the plaintiff.

CASE 4. LORD GREY'S CASE.

A baron by writ being created an earl to him and the heirs male of his body has issue two sons by several venters, the eldest of whom had issue a daughter; the barony shall go to the daughter, and the earldom to the second son.

3 Co. 42. W. Jones, 16. See Hal. MSS. in Mr. Hargrave's Co. Lit. note (3), p. 15. b. where this case is differently reported and explained. See also Collier's Claims of Honour, 255. 272. Selden's Works, 3d vol. 1713. and 3 Com. Dig. 63.

In this Parliament a question was moved concerning the barony of Ruthen.

The case was, that one being created a baron to him and his heirs, hath issue a son and a daughter by one venter, and a second son by another venter, and the eldest son hath the barony, and sits in Parliament, and afterwards dies without issue.

The question was, whether the second son shall have that dignity as heir to his father, or the sister shall have it as *possessio fratris* in lands, &c. ? and they desired to have the opinion of the Judges therein.

And all the justices resolved, that there is not any *possessio fratris* of a dignity, but it shall descend to the son; for the younger son is *heres natus*, and the sister is only *heres facta*, by the possession of her brother, of such things as are in demesne, but not of dignities and such like, whereof there cannot be an acquisition of the possession, according to Co. Lit. 15. b. and 3 Co. 42. a. *Ratcliff's case*.

CASE 5. GERTRUDE BACON *against* JAMES BACON AND THREE OTHERS.

Trinity Term, 16 Car. 1. Roll 456.

[See *De Geer v. Stone*, 1882, 22 Ch. D. 251.]

Children born abroad of English parents are considered as natural-born subjects; and the daughter of an Englishman, though born abroad, may be an English parent.

Vaugh. 279. 7 Co. 18. 1 Sid. 198. March. 150. Lit. Rep. 26. 1 Vent. 413. 427. Cro. Eliz. 3. 1 Com. Dig. 297. 1 Bac. Abr. 77.

See the case of *Durore v. Jones*, 4 Term Rep. 300.

Trespass for breaking his close in Cramford. Upon not guilty pleaded, a special verdict was found, that

Thomas Bacon, late of Cramford aforesaid, was seised in fee of the tenements in the declaration mentioned, and had issue John and Thomas, and 15th October 1610 died so seised, which descended to the said John: who, being a merchant, went beyond seas to Elvin, in Prussia, which is in the dominions of the King of Poland, to merchandize, and used the trade of a merchant there; and during his trading espoused there Elizabeth the daughter of Francis Cockley, an Englishman, who exercised the trade of a merchant *in partibus transmarinis*: and that 31st August 1615 the said John Bacon died, the said Elizabeth his wife being *grossment enseint* with the said Ger-[602]-trude, now the plaintiff, which Gertrude was born the 31st October 1615, at Elvin aforesaid; and that the said Thomas Bacon was brother of the whole blood to the said John; and that the plaintiff is the sole daughter and issue of the said John; and that she, the plaintiff, entered into the said tenements, and was seised *prout lex postulat*; and the said James, as son and heir of the said Thomas Bacon,

entered and ousted her, and continued the possession, *prout* in the declaration, &c. *Et si super totam materiam, &c.* the Court shall adjudge for the plaintiff, they find for the plaintiff, and assess damages twelve shillings and costs; and if, &c.

Brampton, Berkley, and myself, after this had been argued at the Bar, agreed, that judgment should be given for the plaintiff; for her father being an English merchant, and living beyond the seas for merchandizing, his daughter is born a denizen, and shall be heir to him; and it is not material although his wife be an alien, for she is, as Berkley said, *sub potestate viri*, and *quasi* under the allegiance of our King. And, as Brampton said, although the civil law is, that *partus sequitur ventrem*, yet it is not so in our law; but the child shall be of the father's condition: and he being an English merchant, and residing there for merchandizing, his children shall, by the common law, or rather, as Berkley said, by the statute of 25 Edw. 3. st. 2. (a) be accounted the King's lieges, as their father is. And they all agreed the sooner in this opinion, by reason of a case vouched to be adjudged 2 Car. 1. which I remember was argued in the Duchy Court before Hobart and Yelverton, Justices, assisting there; where one Stephens, being a merchant, went over the seas and resided for his merchandizing, and there had children, they resolved, by the advice of the other justices, that those children were denizens; and it is entered there accordingly. And so in this case it was agreed, and judgment was given for the plaintiff.

CASE 6. PRINSOR'S CASE.

An arrest cannot be made on a Sunday upon process for good behaviour.

Ante, 395.

10 Co. 76. b. Raym. 250. 5 Mod. 449. 2 Salk. 672. 1 Mod. 56. 3 Bac. Ab. 39.
1 Term Rep. 265. 3 Term Rep. 739.

An officer is justified under process of the sessions, although it be irregularly issued.

Edward Prinsor, constable of Offenham, was brought into Court upon an attachment of contempt; where it appeared by his examination, that he had arrested one Anthony Haslewood, Esq. in the church yard, upon a Sunday, as he came from divine service, by a process for the good behaviour (a), out of the sessions, when the said Anthony Haslewood shewed him, that he had a *certiorari* out of this Court. But he, pretending that he could not read, arrested and detained him, until he went to another house, and procured it to be read to the said Prinsor, who then discharged him.

And for this contempt, because he was arrested upon a Sunday, immediately after divine service, whereas he might have arrested him upon any day of the week, the said Prinsor was fined twenty shillings: and for arresting and detaining him after the writ of *certiorari* shewn (his ignorance not excusing him), he was ordered to be bound with sureties to the good behaviour.

But the fine and imprisonment were discharged, because the arrest was by process of the sessions of peace, although the Court declared, it was not well awarded according to the statute of 21 Jac. 1. c. . .

[603] CASE 7. KINGS *against* HILTON AND HIS WIFE.

Trinity Term, 16 Car. 1. Roll . . .

If a man marry an administratrix to a former husband, who has wasted the assets during her widowhood, he shall be liable to the debts of the intestate; for it shall be considered a *devastavit* in him. *Ante*, 519.

1 Roll. Ab. 931. 1 Lutw. 672. Moor, 761. 1 Com. Dig. 256. 565.

Debt against husband and wife, administratrix of her former husband, in which judgment was given against them.

(a) See 7 Ann. c. 5. 4 Geo. 2. c. 21. and 13 Geo. 3. c. 21.

(a) See 29 Car. 2. c. 7.