

that 'twas his Intent to give his Heir at Law any Thing out of his Real Estate; that his Determination to settle his Manor, with the Appurtenances, was to settle the Whole; that what is not disposed of in Particulars, is to be directed, by the Court of *Chancery*; that that Court hath done Right in directing it in Augmentation of the Charities mentioned, because the Testator's Intent was most in Favour of those which are so mentioned: That if the *Quære* were askt, What shall be done with the Surplus, if any? The Answer is natural, *viz.* I am determined to settle the Manor, that is the whole, on Charitable Uses: That the Testator by his Will expressed some Care for his Sister, and for *John Boucher* his Nephew, and other his near Relations; but neither by any Expression or Implication pointeth at any Provision designed for his Heir at Law; but for the Excluding him of all Pretences hath bequeathed him 40s. and no more: That the other is to contradict his plain Intent; 'tis to make a new Will for him, contrary to the Determination which he saith he had made: And accordingly the Decree was affirmed.

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SIR RICHARD DUTTON, *Plaintiff*; RICHARD HOWELL, RICHARD GREY, AND ROBERT CHAPLAIN, EXECUTORS OF SIR JOHN WITHAM DECEASED [1693].

[15 Lds. Jo. 354. Consid. and dist. in *Hill v. Bigge*, 1841, 3 Moo. P.C.C. 465, at p. 482.]

IMPRISONMENT BY GOVERNOUR, &c. PLANTATIONS. COLONIES. PLANTATION LAWS. 3 MOD. 159. DECLARATION FOR FALSE IMPRISONMENT.—Writ of Error on a Judgment given in *B. R.* for Sir *John Witham* and Sir *Richard Dutton*, and the Award of Execution thereof upon *Scire Fac'* brought by the Defendants, as Executors of Sir *John Witham*; and affirmed in the *Exchequer Chamber* in Trespass and False Imprisonment. The Case on the Record was thus: The Plaintiff *William* did declare *versus Dutton*, for that he with Sir *Robert Davis* Bart. Sir *Timothy Thornhill*, *Henry Walrond*, *Thomas Walrond*, and *Samuel Rayner*, did 14 *Octob.* 36 *Car.* 2 at *L. in Par' & Ward'*, &c. assault, beat, and wound the Plaintiff, and imprisoned him, and his Goods then found did take and seize, and the Plaintiff in Prison, and the Goods and [25] Chattels from the Plaintiff did detain and keep for three Months next following, by which the Plaintiff lost the Profit he might have made of his Goods, and was put to Charges, &c. *Contra pac' & ad damp'* 13000l.

NOT GUILTY AS TO PART. JUSTIFICATION AS TO PART, AS GOVERNOR OF BARBADOES, &c.—The Defendant pleads Not guilty as to the *Venir' vi & armis*, and all the Assault, Imprisonment, and Detainer in Prison before the Sixth of *November*, and after the Twentieth of *December* in the same Year; and as to the Beating, and Wounding, and Taking, Seizing and Detaining his Goods, and thereupon Issue is joined; and as to the Assault, Taking and Imprisoning the Plaintiff the Sixth of *November*, and Detaining him from thence until in and upon the Twentieth of *December*, the Defendant doth justify, for that long before, *viz.* the 28th of *Octob.* 32 *Car.* 2. by his Letters Patents shewn to the Court, did constitute and appoint the Defendant his Captain General and Chief Governor in and upon the Islands of *Barbadoes*, and &c. and the rest of the Islands lying, &c. and thereby commanded him to do and execute all Things that belonged to that Government, and the Trust in him reposed, according to the several Powers and Directions granted to the Defendant by the Letters Patent, and Instructions with them given, or by such other Powers or Instructions as at any Time should be granted or appointed the Defendant under the King's Sign Manual, and according to the Reasonable Laws, as then were, or after should be made by the Defendant, with Advice and Consent of the Council and Assembly of the Respective Islands; appoints twelve Men by Name, *viz.* Sir *P.L. H.D. H.W. S.N. T.W. J. Witham* the Plaintiff, *J.P. J.S. R.H. E.S. T.W.* and *H.B.* to be of the King's Council of the Island, during the Pleasure of the King, to be Assistant to the Defendant with their Counsel in the Management of the Things and Concerns of the Government of the said Island, in relation to the King's Service and Good of his Subjects there; and gives Power to the Defendant, after he himself had taken the Oath of Office, to

administer to every Member of the Council and Deputy Governor the Oaths of Allegiance and Supremacy, and the Oath of Office; with further Power to the Governor, by Advice and Consent of Counsel, to summon and hold a General Assembly of the Freeholders and Planters there, and to make Laws, Statutes, and Ordinances for the good Government of the Island, and to be as near and consonant, as conveniently may, to the Laws and Statutes of *England*, which Laws were to be transmitted, to be allowed by the King here; with Power also, by Advice and Consent of Counsel to erect, and establish such and so many Courts of Judicature, as he shall think fit for hearing and determining all Causes, as well Criminal as Civil, according to Law and Equity, and to appoint Judges, Justices of Peace, Sheriffs and other necessary Officers, for administring of Justice, and putting the Laws in Execution, provided Copies of such Establishments be transmitted to the King to be allowed; and with further Power to the Governor to constitute and appoint Deputy Governors in the respective Islands [26] and Plantations, which then were, or should be under his Command; to all and every which respective Governors, the King by these Letters Patent gave Power and Authority to do and execute what should be commanded them by the Governor, according to the Power granted to them by this Commission: And the Governor's Authority to continue during the good Will and Pleasure of the King.

The Defendant further pleads, That after the Making of the Letters Patent, and before the Time of the Assault and Imprisonment, *viz.* 1 *Mart.* 33 *Car.* 2. he arrived at *Barbadoes*, and by Virtue of the Letters Patent aforementioned, he took upon him and exercised the Government of that and the other Islands, and continued to do so till the first of *May*, 35 *Car.* 2. when he had License to return to *England*.

That he, before his Departure, by Virtue of the said Letters Patent, by a certain Commission under his Hand and Seal, did constitute the Plaintiff, in his Absence, to be his Deputy Governor in the said Islands of *Barbadoes*, to do and execute the Powers and Authorities granted to the Defendant by the said Letters Patent.

That the first of *August* following, the Defendant arrived at *London* in *England*; that the fourth of *May*, 35 *Car.* 2. after the Defendant's Departure, the Plaintiff took upon himself the Administration of the Government of the Island of *Barbadoes*; that the Plaintiff, not regarding the Trust reposed in him by the Defendant, nor the Honour of that Supreme Place and Office, did unlawfully and arbitrarily execute that Government and Office to the Oppression of the King's Subjects; *viz. apud Lond' præd' in Par' & Ward' præd'.*

That after the Return of the Defendant to the *Barbadoes*, *viz.* 6 *Nov.* 35 *Car.* 2. at a Council holden for the Island of *Barbadoes* at *St. Michael's* Town, before the Defendant *H.W. J.P. E.S. T.W. F.B.* which five are of the twelve named Council in the Letters Patent, and *Sir Timothy Thornhill* and *Robert Dawes*, Counsel for the Island aforesaid, the Plaintiff then and there was charged, that he in the Absence of the Defendant misbehaved himself in the Administration of the Government of the said Island, *non tantum* in not taking the usual Oath of Office, and not observing the Act of Navigation: And by his illegal Assuming the Title of Lieutenant Governor, and altering and changing Orders and Decrees made in *Chancery* of the said Island, according to his own Will and Pleasure, at his own Chamber, and altering the Sense and Substance of them from what was ordered in Court by and with the Consent of the Council; upon which it was then and there ordered in Council by the Defendant and Council, that the Plaintiff *Sir John Witham* should be committed to, &c. until he should be discharged by due Course of Law; by Virtue of which Order the Plaintiff the said sixth of *Nov.* was taken, and detained until the 20th of *Dec.* upon which Day he was brought to the Court of the General Sessions of *Oyer* and *Terminer*, and then by [27] Court recommitted, which is the same Assault, Taking and Imprisonment, and Traverses *absque hoc*, that he was guilty of the Assaulting, Taking or Imprisoning him within the Time last mentioned at *London*, or elsewhere than in the Isle of *Barbadoes*, or otherwise, or in other Manner than as before.

DEMURRER, &c.—The Plaintiff demurred, and the Defendant joined in Demurrer, and judgment was given for the Plaintiff, and a *Venire*, awarded *tam ad triand' exitum quam ad inquirend' de dampnis*, &c. and the Issue was found *pro querent'* and 6*d.* Damages, and on the Demurrer 500*l.* Damages, and Judgment for Damages and Costs amounting in the whole to 590*l.*

The Plaintiff, Sir *J. Witham*, dying, *Trin. 2 Will. & Mar.* the Judgment was revived by *Scire facias* brought by *Howel, Gray and Chaplain*, Executors of Sir *J. W. quoad omnia bona & catalla sua*, except one Debt due by Bond from *Henry Wakefield*. And at the Return of the *Scire fac'*, the Defendant appears and demurs to the *Scire facias*, and there is an Award of Execution; and thereupon a Writ of Error is brought in the *Exchequer Chamber*, and the Judgment was affirmed. Then a Writ of Error is brought in Parliament, and the General Error assigned.

ARGUMENT FOR PLAINTIFF IN ERROR.—And here it was argued on the Behalf of the Plaintiff in the Writ of Error, that this Action did not lie against him, because it was brought against him for that which he did as a Judge, and so it appeared on the Record, according to 12 *Rep.* 25. that the Rule seems the same for one sort of Judge, as well as for another; that this Person was lawfully made a Governor, and so had all the Powers of a Governor; that this was a Commitment only till he found Security, tho' not so expressed; that this is not conusable here in *Westminster-hall*; that he was only censurable by the King; that the Charge is sufficient, in that Sir *J.W.* had not taken the Oaths; that *male & arbitrarie executus fuit*, is Charge enough to warrant a Commitment; that this was a Charge before a Council of State, and there need not be all the Matters precisely alledged to justify their Acts; and by the same reason Actions may lie against the Privy Counsellors here, and enforce them to set forth every Particular, which would be of dangerous Consequence; the Plea might have been much shorter, as only that he was committed by a Council of State, and the Addition of the other Matters shall not hurt; and that the Charge was upon Oath shall be intended; no Presumption shall be, that the Supream Magistracy there did irregularly; 'tis a Power incident to every Council of State to be able to commit: This Action cannot lie, because the Fact is not triable here; the Laws there may be different from ours. Besides no Action lies unless 'twere a malicious Commitment as well as causeless: And that no Man will pretend that an Action can lie against the chief Governor or Lieutenant of *Ireland* or *Scotland*; and by the same Reason it ought not in this Case; he had a Power to make Judges, and therefore he was more than a Judge; and they have confessed all this Matter by the Demurrer. The Statute of *Car. 1.* which restrains the Power of our Council [28] of State supposes that they could commit; that in case of Crimes there they are punishable in that Place; and in Sir *Ellis Ashburnham's* Case there was a Remanding to be tried there, and if so, it can't be examinable here; and if not, this Action will not lie. And further, that what was done here, was done in a Court; for so is a Council of State to receive Complaints against State Delinquents, and to direct their Trials in proper Courts afterwards; that there was never such an Action as this maintained; and if it should, it would be impossible for a Governor to defend himself: First, For that all the Records and Evidences are there. 2. The Laws there differ from what they are here; and Governments would be very weak, and the Persons intrusted with them very uneasy, if they are subject to be charged with Actions here for what they do in those Countries; and therefore 'twas prayed that the Judgment should be reversed.

ARGUMENT FOR DEFENDANTS IN ERROR.—On the other side 'twas argued for the Plaintiff in the Original Action, That this Action did lie, and that the Judgment upon it was legal: That supposing the Fact done in *England*, the Plea of such Authority so executed at *Plymouth*, or *Portsmouth*, or the like, had been ill; for that Liberty of Person by our Law is so sacred, that every Restraint of it must be justified by some lawful Authority, and that Authority must be expressly pursued: That here was no Authority to commit; for that must be either as a Court of Record, or as Justices of Peace, Constable, or other Officer constituted for that Purpose; that the Letters Patent are the only Justification insisted on, and that gives none; 'tis true, the Power of Committing is Incident to the Office of a Court; here's only the Government of the Place committed to Sir *Richard Dutton*, with a Power to erect Courts, and appoint Officers, but none to himself: He in Person is only authorized to manage and order the Affairs; and the Law of *England* takes no Notice of such an Officer, or his Authority; and therefore a Court of Law can take Notice of it no further, or otherwise, than as it doth appear in pleading: The Council is not constituted a Court; they are by the Letters Patent only to advise and assist the Governor; and the Governor hath no Power to commit or punish,

but to form and establish Courts to do so; which imports the direct contrary, that he had no such Power: The Ends of appointing the Council, as mentioned in the Letters Patent, are quite different, *viz.* to aid the Regent by their Advice, not to act as of themselves; and if neither the Governor of himself, nor the Council of it self, had such a Power, neither can both together have it: A Court of Justice is not to be intended, unless the same be specially shewn: Excepting the Case of the common known general Courts of Justice in *Westminster-hall*, which are immemorial; if any Thing be justified by the Authority of other Courts, the same must be precisely alledged, and how their Commencement was, either by Custom or Letters Patent: Here it appears by the Plea it self, that they had Justices of *Oyer* and *Terminer* appointed: It doth not appear that he or the Council were [29] Judges of Things of this kind. Besides, when a Council is constituted, as here was Twelve by Name, that must be the Majority, as is the Dean and Chapter of *Fernes Case*, *Davis's Rep.* 47. and that's Seven at least, which are not in this Case. There must be a Majority, unless the Erection did allow of a less Number. The Practise of the Courts of *Westminster-hall* does not contradict this, for there 'tis a Court, whether more or less, and so it hath been Time out of Mind. But here's a new Constitution; and the Rule holds so in Commissions of *Oyer* and *Terminer*, if the Direction be so: As is the Case in *Plowden* 384. the Earl of *Leicester's Case*. If a Mayor and three Aldermen have Conusance of Pleas, what a Mayor and two does is null and void. And if there be no Direction in particular for the Number, the Law requires the Majority. So that here was no Council, because but five of them present.

The Council have not the Power, but the Governor with the Advice and Assent of the Council; and so ought their Pleading to have been according to their Case; That if a Man justifies as a Judge to excuse him from an Action, he must set forth his Authority, and the Cause must appear to be within his Conusance; and so are Multitudes of Cases, 3 *Cro.* 130. 2 *Leon. pl.* 43, and 1 *Cro.* 153, 557, 579, 593. 12 *Rep.* 23, 25. *Mod. Rep.* 119.

But taking it as a Council, neither Person nor Thing are within its Jurisdiction; for if their Doctrine be true, that by being Governor, he is so absolute, as to be subject only to the King; then what Sir *John Witham* did, being while and as Deputy Governour, which is the true Governor to all Purposes *in absentia* of the other, is not examinable by a Successor. But admitting for the present, that by the Law one Magistrate may be punishable before his Successor for Miscarriages which were committed *colore Officii*; yet here are no such Miscarriages sufficiently alledged to be charged on him. 1. There's no Pretence of an Oath, nor Circumstances shewing a reasonable Cause of Suspicion, one of which ought to have been. 2. In pleading no Allegation is sufficient, if it be so general, as the Party Opponent can't in Reason be supposed capable of making an Answer to it; and that is the true Cause why our Law requires Certainty: He did *male & arbitrarie* execute the Office to the Oppression of the King's Subjects. No man living can defend himself on so general a Charge as this is: For if Issue had been taken thereon, all the Acts of his Government had been examinable, which the Law never allows: Then the Particulars are as general; 1. That he did not take the usual Oath; and it doth not appear what Oath, or if any was requirable of a Deputy Governor, nor who was to administer it; so that *non constat*, whether 'twas his Fault or the Governor's; besides, that's no cause of Imprisonment, for any Thing which appears in the Plea. 2. Assuming illegally the Title of Lieutenant Governor; that is so trivial, as it needs no Answer; for Deputy Governor and Lieutenant Governor are all one, *locum tenens* is a Deputy, & *contra*. 3. Altering of Orders at his Chamber *ad libitum*, which were made in Court; not said that there was any such Court, or what Orders, or where made; & *non tantum* without *etiam* or *ve*-[30]-*rum etiam*, is not a sufficient positive Allegation: Not said that he was guilty, but only charged; and not said how charged, whether with or without Oath, in Writing or by Parol; nor said to be in any such Manner as that the Council ought or might receive it: tho' Oath be not necessary to be mentioned in the Commitment, yet it ought to be alledged in pleading, because 'tis necessary to warrant the Commitment, as was held in the Lord *Yarmouth's Case* in *B.R.* It could not be to secure his Answering the same, for not so expressed; and 'tis not

said that Sureties were demanded or denied, or that he had Notice of the Charge; and surely this was bailable.

JURISDICTION.—As to the *Quære*, If conusable here; 'twas argued, That they had not pleaded to the Jurisdiction, nor any Matter to oust the Court of its Jurisdiction: If they intended by this Plea to have done that, they should have given Jurisdiction to some other Court in some other Place; but this is not done; for if an Injury, 'tis relievable somewhere in the King's Dominions; and whether it be so, or not, is examinable somewhere: Now here is a Wrong complain'd of, as done by one *Englishman* to another *Englishman*, and a Jurisdiction attacht in the *King's Bench*, both of Cause and Person, by the Bill filed, and his Defence to it: Besides Jurisdiction could not be examined in the *Exchequer Chamber*, because both the Statute and the Writ of Error expressly provide against it; and this Writ of Error is founded upon that Affirmance, and therefore questionable, whether that could be insisted on here? But supposing it might, 'twas argued that the Action lies, for that 'tis a transitory Action, and follows the Person wheresoever he comes under the Power of the Common Law Process: And that a Man may as well be sued in *England* for a Trespass done beyond Sea, as in *Barbadoes*, or the like Place; as for a Debt arising there by Specialty, or other Contract; that no Body but *Prynne* ever denied it, and he did so only in case of Bonds dated there: That many Actions have been maintained and tried here for Facts done in the *Indies*, notwithstanding special Justifications to them, and the Trials have been where the Actions were laid: There was quoted *Dowdale's Case*, 6 *Rep.* 47, 48. and 7 *Rep.* 27. and if otherwise, there would be a Failure of Justice in the King's Dominions. 32 *Hen.* 6. 25. *vide Jackson and Crispe's Case*, *Sid.* 462. 2 *Keble* 391, 397.

'Twas then argued, That whatsoever Question might be made about the Trial of the Issue, if one had been joined; yet now Demurrer being to the Plea, if that Plea be naught, then the Plaintiff is to have Judgment upon his Declaration, and that is all right.

It was further said, That the Justification of such a *Tort* or Wrong ought to be according to the Common Law of *England*, for that *Barbadoes* is under the same Law as *England*; and if 'twere not, upon his pleading it must be intended to be so; and tho' they should be intended different, yet the Defendant in the Action was obliged to the same Rules of Pleading; for tho' the Matter may justify him for an Act done there, which would not justify him for the same Act done here, yet he must shew that he hath [31] pursued the Rules of Law in that Place; or in case of no positive Laws, the Rules of Natural Equity: For either the Common Law, or new instituted Laws, or Natural Equity, must be the Rule in those Places.

BARBADOES A PLANTATION, AND NOT A CONQUEST.—'Twas agreed, That according to *Calvin's Case*, 7 *Rep.* 17. upon the Conquest of an Infidel Country, all the old Laws are abrogated *eo instante*, and the King imposes what he pleases; and in case of the Conquest of a Christian Country, he may change them at Pleasure, and appoint such as he thinks fit; tho' *Coke* quotes no Authority for it, yet 'twas agreed, that this might be consonant to Reason. But 'twas denied that *Barbadoes* was a Conquest, 'twas a Colony or Plantation, and that imports rather the contrary; and by such Names these Plantations have always gone in Letters Patent, Proclamations, and Acts of Parliament. But whatsoever may by some be said as to Statutes in particular binding there, the Common Law must and doth oblige there, for 'tis a Plantation or new Settlement of *Englishmen* by the King's Consent in an uninhabited Country; and so is the History of *Barbadoes* written by *Richard Ligon*, Printed at *London* 1673. *pag.* 23. says he, 'Twas a Country not inhabited by any, but overgrown with Woods. And *pag.* 100. They are governed by the Laws of *England*. And *Heylin* in his *Geography*, *lib.* 4. 148. says, The *English* are the sole Colony there; they are called the King's Plantations, and not his Conquests; and he neither could, nor can now impose any Laws upon them different from the Laws of *England*. 'Twas argued that even our Statutes do bind them; and many of them name these Plantations as *English*; they have some Municipal Rules there, like our By-laws in the *Stanneries* or *Fenns*; but that argues nothing as to the General; which shall prevail when the one contradicts the other, may be a *Quære* another Time.

By the 22 & 23 *Car. 2. cap. 26.* against the Planting of Tobacco here, and for the Regulation of the Plantation Trade, the Governors of those Plantations are once a Year to return to the *Custom-house* in *London* an Account of all Ships laden, and of all the Bonds, &c. And they are, throughout the whole Act, called the King's *English* Plantations, Governors of such *English* Plantations, to some of the *English* Plantations; and *Parag. 10.* 'tis said, Inasmuch as the Plantations are inhabited with his Subjects of *England*; and so 'tis in 15 *Car. 2. cap. 7. sect. 5.* and in 12 *Car. 2 cap. 34.* they are called Colonies and Plantations of this Kingdom of *England*. From all which 'tis natural to infer, That the Rules in case of conquered Places cannot prevail here; *Conquest est res odiosa*, and never to be presumed; besides, 'tis the People, not the Soil, that can be said to be conquered. The Reason of a Conqueror's Power to prescribe Laws, is the Conqueror's Clemency, in saving the Lives of the conquered, whom, by the Strict Right of War, he might have destroyed; or the presumed Chance of Subjection, which the conquered Prince and People threw themselves upon, when they first engaged in the War. But this is not pretended to here, tho' all the Cases about this Subject were [32] put below Stairs: Then taking it as the Truth is, certain Subjects of *England*, by Consent of their Prince, go and possess an uninhabited desert Country; the Common Law must be supposed their Rule, as 'twas their Birthright, and as 'tis the best, and so to be presumed their Choice; and not only that, but even as Obligatory, 'tis so. When they went thither, they no more abandoned the *English* Laws, than they did their Natural Allegiance; nay, they subjected themselves no more to other Laws, than they did to another Allegiance, which they did not.

This is a Dominion, belonging not only to the Crown, but to the Realm of *England*, tho' not within the Territorial Realm. *Vaughan* 330. says, That they follow *England*, and are a Part of it. Then 'twas argued further, if 'twere possible that it should be otherwise, when did the Common Law cease? On the Sea it remained in all Personal Respects; If Batteries or Wounds on Shipboard, Actions lay here: Then the same held when they landed there, and no new Laws could be made for them but by the Prince with their Consent.

OCCUPANCY.—Besides, Either the Right of these Lands was gained to the Crown, or to the Planters, by the Occupancy; and either way the Common Law must be their Rule: It must be agreed, That the first Entry gained the Right, and so is *Grotius de jure Belli & Pacis, lib. 2. cap. 8. sect. 6.* and these Lands were never the King's, tho' they afterwards submitted to take a Grant of the King. 'Tis true, in case of War, what is gained, becomes his who maintained the War, and doth not of Right belong to that Person who first possessed it. *Grot. lib. 3. cap. 6. sect. 11.* But in case it be not the Effect of War, but only by Force of their first Entry, it must be considered what Interest they did acquire, and certainly 'twas the largest that can be; for an Occupant doth gain an Inheritance by the Law of Nations, and the same shall descend; then by the Rules of what Law shall the descent be governed? It must be by the Laws of the Country to which they did originally, and still do belong. But then supposing the Lands gained to the Crown, and the Crown to distribute those Lands, the Grant of them is to hold in *Socage*, and that is a common Law Tenure; why are not their Persons in like Manner under the Common Law? When a Governor was first received by, or imposed upon them, 'twas never intended, either by King or People, that he should Rule by any other Law than that of *England*. And if it had been known to be otherwise, the Number of Subjects there would have been very small. In these Cases their Allegiance continues, and must be according to the Laws of *England*; and 'twas argued, that *ex consequenti* the Protection and Rule of them ought to be by the same Laws, for they are Mutual and Reciprocal, *unum trahit alterum*; and that Law, which is the Rule of the one, should be the Rule of the other; besides, 'tis the Inhabitants, not the Country, that are capable of Laws, and those are *English*, and so declared and allowed to be; and consequently there's no Reason why the *English* Laws should [33] not follow the Persons of *Englishmen*, especially while they are under the *English* Government, and since the Great Seal goes thither. And further, a Writ of Error lies here upon any of their ultimate Judgments; so says *Vaughan* 402. and 21. *Hen. 7. 3.* that it doth so to all Subordinate Dominions; and tho' the Distance of the Place prevents the common Use of such Writ, yet by his Opinion it clearly lies; and he reckons the Plantations Part of those Subordinate

Dominions. Now a Writ of Error is a remedial Writ, whereon Right is to be done, and that must be according to the Laws of *England*; for the *King's Bench*, in case of a Reversal upon such Writ, is to give a new Judgment, as by Law ought to have been first given. *Vaughan*, 290, 291. says, It lies at Common Law to reverse Judgments in any inferior Dominions; for if it did not, Inferior and Provincial Governments might make what Laws they please; for Judgments are Laws when they are not to be reversed. It lay to *Ireland* by the Common Law, says *Coke* 7 *Rep.* 18. tho' there had been no Reservation of it in King *John's* Charter. Then 'twas inferred, that the lying of a Writ of Error proves the Laws to be the same, i.e. in general the Common Law to govern in both Places, from the Difference assigned between *Ireland* and *Scotland*; it lies not to *Scotland*, because a distinct Kingdom, and governed by distinct Laws; and it lies to *Ireland*, because ruled by the same, and consequently, if a Writ of Error lies on the final Judgment there, it's a good Argument that the same Law prevails there. These Plantations are Parcel of the Realm, as Counties Palatine are: Their Rights and Interests are every Day determined in *Chancery* here, only that for Necessity and Encouragement of Trade and Commerce, they make Plantation Lands as Assets in certain Cases to pay Debts; in all other Things they make Rules for them according to the common Course of *English* Equity: The Distance or the Contiguity of the Thing, makes no Alteration in the Case. And then 'twas said, as at first, That this then was the same Case, as if the Imprisonment had been in *England* or on Shipboard, as to the Rules of Justification; that if there were another Law, which could justify it, the same ought to have been certainly pleaded.

As to the Instructions, these do not appear, and therefore are not to be considered in the Case, and they should have been set forth, and no extraordinary Power is to be presumed, unless shewn; for every Man in pleading is thought to make the best of his own Case, and consequently that if 'twould have made for him, the same would have been shewn; and because they are not shewn, they must be thought directive of a Government according to the Laws of *England*, since 'tis to a Subject of this Realm to govern other Subjects of this Realm living upon a Part of this Realm, and from the King thereof, who must be supposed to approve those Laws which make him King, and by which he Reigns.

[34] Then 'twas argued, Suppose this Governor had borrowed Money of a Man in the Island, and then had returned to *England*, and an Action had been brought for it, and he had pretended to justify the Receipt of it as Governor; he must have shewn his Power, the Law, and how he observed that Law; the like for Goods; the same Reason for Torts and Wrongs done *vi & armis*.

Now the Court below could consider no other Power or Law to justify this Act, but the Common Law of *England*, and that will not do it for the Reasons given; and if it be justifiable by any other, it must be pleaded; and what he hath pleaded is not pursued, &c.

As to the Commitment by a Council of State, what it means is hardly known in the Law of *England*; and that Authority which commits by our Law, ought to be certain, and the Cause expressed, as all the Arguments upon the Writ of *Habeas Corpus* in old Time do shew; but here's no Council: And 'tis not said so much as that he was *debito modo onerat*: And as to the Demurrer, that confesses no more than what is well pleaded: And as to Consequences, there's more Danger to the Liberty of the Subject, by allowing such a Behaviour, than can be to the Government by allowing the Action to lie: And therefore 'twas prayed that the Judgment might be affirmed.

REPLY FOR PLAINTIFF IN ERROR. JUDGMENT REVERSED.—It was replied on Behalf of the Plaintiff in the Writ of Error, That notwithstanding all that had been said, the Laws there were different, tho' the Foundation of them was the Common Law, that they would not enter into that Question, What sort of Title at first gave Right to these Lands? But that this was a Commitment by a Council of State: And, as to the Objection of too general Pleadings in *male & arbitrarie exercendo*, &c. tho' the Inducement of the Plea was so; there were other Matters more particularly pleaded; the Altering the Decrees in his Chamber, which was sufficient: And as to the Objection, That 'tis not alledged in the Pleadings, that the Charge in Council against *Witham* was upon Oath; they answered, That 'tis



not essential, tho' prudent, to have the Charge upon Oath before Commitment; Matters may be otherwise apparent. And as to the Objection, That the Warrant of the Council for the Commitment was not shewn; they said that it lay not in their Power, because 'twas delivered to the Provost Marshal, as is Authority for the Capture and Detention of him, and therefore did belong to him to keep: And that the Council, tho' they were not a Court, yet they had Jurisdiction to hear the Complaint, and send him to another Court that could try the Crime; and tho' it did not appear that the King gave any Authority to the Governor and Council to commit, yet 'tis Incident to their Authority, as being a Council of State; the Council here in *England* commit no otherwise; and where the Commitment is not authorized by Law, the King's Patent gives no Power for it: But the Government must be very weak, where the Council of State cannot commit a Delinquent, so as to be forth-[35]-coming to another Court that can punish his Delinquency: And therefore prayed that the Judgment should be reversed, and the same was accordingly reversed.

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PHILIPS v. BURY [1694].

[15 Lds. Jo. 441, 482 (b); 1 Burn, E.L. 442; Mew's Dig. xi. 1375, xiv. 1071;  
2 T.R. 346; 4 Mod. 106, 107; Skin. 447, &c.; Carth. 180.]

EXTENT OF VISITATORIAL POWER. COLLEGES, &c.—Writ of Error to reverse a Judgment given for the Defendant in the Court of *King's Bench*, where the Case upon the Record was thus; *Ejectione firmæ* on the Demise of *Painter* as Rector, and the Scholars of *Exeter* College in *Oxon*, for the Rector's House. The Defendant pleads specially, That the House in Question is the Freehold of the Rector and Scholars of the College; but he says, That he, the said Dr. *Bury*, was then Rector of that College, and that in Right of the Rector and Scholars he did enter into the Messuage in Question, and did Eject the Plaintiff, and so holds him out; *absque hoc*, That *Painter*, the Lessor of the Plaintiff, was at the Time of making the Lease in the Declaration Rector of that College; & *hoc paratus est verificare, &c.*

The Plaintiff replies, That the Messuage belongs to the Rector and Scholars, but that *Painter* the Lessor was Rector at the Time of the Lease; & *hoc petit quod inquiratur per Patriam, &c.* and thereon Issue is joined, and a Special Verdict.

SPECIAL VERDICT.—The Jury find that *Exeter* College is and was one Body Politick and Corporate, by the Name of Rector and Scholars *Collegij Exon' infra Universitat' Oxon'*, that by the Foundation of the College there were Laws and Statutes by which they were to be governed; and that the Bishop of *Exeter* for the Time being, and no other, at the Time of founding the College, was constituted by Virtue of the Statute concerning that Matter hereafter mentioned, ordinary Visitor of the same College, *secundum tenorem & effectum statut' eam rem concernent'*, That the Bishop of *Exeter*, who now is, is Visitor according to that Statute. Then they find the Statute for the Election of a Rector, *prout, &c.*

Then they find the Oath required of the Rector, That so long as he should remain in that Office, he should be true and faithful to the College and its Lands, Tenements, Possessions Ecclesiastical and Secular, Rights, Liberties and Privileges, and all its Goods, moveable and immoveable would keep and defend, and all the Statutes, Ordinances and Customs of the College he would observe, and endeavour that they should be observed by all Scholars, Graduates and Under-graduates, &c. That he would occasion no Trouble or Grievance to any of the Scholars *contra justitiam, charitatem & fraternitatem*, but according to the best of his Judgment and Conscience he would cause due Discipline to be used according to the Form of the Statutes of the [36] College: That he would maintain and defend all Suits for the College, but never begin one wherein any Disadvantage or great Prejudice may happen to the College, without the deliberate Consent of the major Part of the