CASE 104. THE COMPANY OF HORNERS *against* BARLOW.

A bye-law made by the Company of Horners of London, that none of the company shall buy horns within *twenty-four miles* of London, except two persons appointed by the company, is void; for they have not jurisdiction to that extent.—5 Co. 63. 3 Lev. 294. Savil, 74. 2 Jones, 145. Bridg. 139. Hob. 212. 10 Mod. 131, 338. 12 Mod. 270, 686. 1 Salk. 193, 143. 1 Bac. Abr. 341. 1 Wils. 233. 2 Wils. 266. 2 Peer. Wms. 207. Comyns, 269. 1 Ld. Ray. 498. 2 Ld. Ray. 1129. 1 Term Rep. 118. 11 Co. 54. Hob. 210.

Debt upon a bye-law, wherein the company set forth, that they were incorporated by letters patents of King Charles the First, and were thereby empowered to make bye-laws for the better government of their corporation; and that the master, warden, and assistants of the company made a law, viz. "that two **[159]** men appointed by them should buy rough horns for the company, and bring them to the hall, there to be distributed every month by the said master, &c. for the use of the company; and that no member of the company should buy rough horn within four-and-twenty miles of London but of those two men so appointed, under a penalty to be imposed by the said master, warden, &c.;" that the defendant did buy a quantity of rough horn contrary to the said law, &c. There was judgment in this case by default.

And *for the defendant* it was argued, that this was not a good bye-law.—First, because it restrains trade (*a*), for the company are to use no *horns* but such as those two men shall buy, and if they should have occasion for more than those men should buy, then it is plain that trade is thereby restrained.—Secondly, the master, &c. has reserved a power which they may use to oppress the poor, because they may make what agreements they will amongst themselves, and set unreasonable prices upon those commodities, and let the younger sort of tradesmen have what quantity and at what rates they please.

Thompson, Serjeant, answered. First, this bye-law is for the encouragement of trade, because the horns are equally to be distributed when brought to the hall for the benefit of the whole company (*a*).

But the material objection was, that this being a company incorporated within the City of London, they have not jurisdiction elsewhere, but are restrained to the city, and by consequence cannot make a bye-law which shall bind at the distance of four-and-twenty miles; for if they could make a law so extensive, they might, by the same reason, enlarge it all over England, and so make it as binding as an Act of Parliament.

And for this reason it was adjudged no good bye-law.

CASE 105. SIR JOHN WYTHAM *against* SIR RICHARD DUTTON.

To an action of trespass and false imprisonment, a plea that the defendant was Governor of Barbadoes; that he appointed the plaintiff deputy-governor during his absence; that the defendant did *malè et arbitrariè* execute the said office; and that by powers vested in him for that purpose he called a Council, before whom the defendant was charged with, and committed to the custody of the provost marshal for *mal-administration;* which is the same assault and imprisonment, &c.; is a good *justification:* for an action will not lie against a person for acts done in the character

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being demanded by the Court why judgment should not be given against him, he demanded the benefit of clergy, which was allowed to him. The question was, whether this plea was good in bar of the appeal? And it was resolved by the whole Court to be a good plea, S. C. Skin. 670. S. C. 1 Salk. 62. S. C. Kely. 93. It seems, therefore, to be fully settled by this case, that a conviction of manslaughter on an indictment of murder, and the prayer of clergy thereupon, may be pleaded in bar of an appeal of the same death, whether such prayer were made upon the party being called to judgment or not, 2 Hawk. P. C. 536. And the law of this case has been since confirmed, in the case of *Smith* v. *Taylor*, Trinity term, 11 Geo. 3. 5 Burr. 2801.

(*a*) 11 Co. 54. Hob. 210. *Post*, 193.

(*a*) See the case of *Pierce* v. *Bartrum*, Cowp. 270.

of a Judge.—S. C. 13 Vin. Abr. 412. S. C. Show. Cases in Parl. 24. 6 Mod. 195. 2 Salk. 625. Cowp. 166. Dougl. 594. 1 Term Rep. 493. Ld. Ray. 1447.

Assault and false imprisonment, on the fourteenth day of October in the thirty-sixth year of Charles the Second, &c.

The defendant as to the assault before the sixth day of November pleads *not guilty*, and as to the false imprisonment on the said sixth day of November in the same year he made a special justification, viz. **[160]** that on the twenty-eighth of October in the thirty-second year of Charles the Second, &c. the King by his letters patents did appoint the defendant to be Captain-General and Chief Governor of Barbadoes, and so sets forth the grant at large, by which he appoints twelve men to be of the King's Council during pleasure, of which the plaintiff Wytham was one; that the defendant had also power by the advice of that Council to appoint and establish Courts, Judges, and justices, and that the copies of such establishments must be sent hither for the King's assent, with power also to establish a deputy-governor; that by virtue of these letters patents the defendant had appointed Sir John Wytham to be deputy-governor of the said island in his absence; and that he being so constituted did *malè et arbitrariè* execute the said office; that when the defendant returned to Barbadoes, viz. 6 November 35 Car. 2, he called a Council, before whom the plaintiff was charged with *mal-administration* in the absence of the defendant, viz. that he did not take the usual oath for observing of trade and navigation; that he assumed the title of lieutenant-governor; and that decrees made in Court were altered by him in his chamber: upon which it was then ordered that he should be committed to the provost-marshal until discharged by law, which was done accordingly; in whose custody he remained from the sixth day of November to the twentieth of December following, which is the same imprisonment, &c.

To this plea the plaintiff demurred; and the defendant joined in demurrer.

Mr. Pollexfen argued *for the plaintiff*, first, that the causes of his commitment, if any, were such as they ought not meddle withal, because they relate to his misbehaviour in his government, for which he is answerable to the King alone. But supposing they might have some cause for the committing of him, this ought to be set forth in the plea, that the plaintiff might answer it; for to say that he did not take the oath of deputy governor in what concerned trade and navigation is no cause of commitment, because there was nobody to administer that oath to him, for he was Governor himself. Then to alledge that he altered in his chamber some decrees made in the Court of Chancery, that can be no cause of commitment, for the Governor is Chancellor there. **[161]** Besides, the defendant does not shew that any-body was injured by such alterations; neither doth he mention any particular order, but only in general; so it is impossible to give an answer to it.

Secondly, he does not alledge that the plaintiff had made or done any of these things, but that he was charged to have done it; and *non constat* whether upon oath or not.

Thompson, Serjeant, *for the defendant.*—The Governor has a large power given by these letters patents to make laws such as he, by consent of a General Council, shall enact. The fact is set forth in the plea; the plaintiff was committed by virtue of an Order of Council, until he was brought to a general Court of Oyer and Terminer, by which Court he was again committed. That the Court had power to commit him is not denied, for the King is not restrained by the laws of England to govern that island by any particular law whatsoever, and therefore not by the common law, but by what law he pleases; for those islands were gotten by conquest or by some of his subjects going in search of some prize, and planting themselves there (*a*). The plaintiff being then committed by an Order of Council "till he should be discharged by due course of law," this Court will presume that his commitment was legal.

The Court were all of opinion that the plea was not good; so judgment was given for the plaintiff. But afterwards, in the fifth of William and Mary, this judgment was reversed by the House of Peers (*b*).

(*a*) See *Calvin's case.*

(*b*) See *Mostyn* v. *Fabrigas*, Cowp. 161; *Johnston* v. *Sutton*, 1 Term Rep. 493; *Sutherland* v. *Murray*, 1 Term Rep. 538.