Armenian merchants, for assaults and trespasses in the East Indies, and they are very strong authorities. Serjeant Glynn said, that the defendant Mr. Verelst was very ably assisted: so he was, and by men who would have taken the objection, if they had thought it maintainable, and the actions came on to be tried after this case had been argued once; yet the counsel did not think it could be supported. Mr. Verelst would have been glad to make the objection; he would not have left it to a jury, if he could have stopped them short, and said, you shall not try the actions at all. I have had some actions before me, rather going further than these transitory actions; that is, going to cases which in England would be local actions: I remember one, I think it was an action brought against Captain Gambier, who by order of Admiral Boscawen had pulled down the houses of some sutlers who supplied the navy and sailors with spirituous liquors; and whether the act was right or wrong, it was certainly done with a good intention on the part of the admiral, for the health of the sailors was affected by frequenting them. They were pulled down: the captain was inattentive enough to bring the sutler over in his own ship, who would never have got to England otherwise; and as soon as he came here he was advised that he should bring an action against the captain. He brought his action, and one of the counts in the declaration was for pulling down the houses. The objection was taken to the count for pulling down the houses; and the case of *Skinner and The East-India Company* was cited in support of the objection. On the other side, they produced from a manuscript note a case before Lord Chief Justice Eyre, where he over-ruled the objection; and I over-ruled the objection upon this principle, namely, that the reparation here was personal, and for damages, and that otherwise there would be a failure of justice; for it was upon the coast of Nova-Scotia, where there were no regular Courts of Judicature: but if there had been, Captain Gambier might never go there again; and, therefore, the reason of locality in such an action in England did not hold. I quoted a case of an injury of that sort in the East Indies, where even in a Court of Equity Lord Hardwicke had directed satisfaction to be made in damages: that case before **[181]** Lord Hardwicke was not much contested, but this case before me was fully and seriously argued, and a thousand pounds damages given against Captain Gambier. I do not quote this for the authority of my opinion, because that opinion is very likely to be erroneous, but I quote it for this reason; a thousand pounds damages and the costs were a considerable sum. As the captain had acted by the orders of Admiral Boscawen, the representatives of the admiral defended the cause, and paid the damages and costs recovered. The case was favourable; for what the admiral did was certainly well intended; and yet there was no motion for a new trial.

I recollect another cause that came on before me; which was the case of *Admiral Palliser*. There the very gist of the action was local: it was for destroying fishing huts upon the Labrador coast. After the Treaty of Paris, the Canadians early in the season erected huts for fishing; and by that means got an advantage, by beginning earlier, of the fishermen who came from England. It was a nice question upon the right of the Canadians. However the admiral from general principles of policy ordered these huts to be destroyed. The cause went on a great way. The defendant would have stopped it short at once, if he could have made such an objection, but it was not made. There are no local Courts among the Esquimaux Indians upon that part of the Labrador coast; and therefore whatever any injury had been done there by any of the King's officers would have been altogether without redress, if the objection of locality would have held. The consequence of that circumstance shews, that where the reason fails, even in actions which in England would be local actions, yet it does not hold to places beyond the seas within the King's dominions. *Admiral Palliser's case* went off upon a proposal of a reference, and ended by an award. But as to transitory actions, there is not a colour of doubt but that every action that is transitory may be laid in any county in England, though the matter arises beyond the seas; and when it is absolutely necessary to lay the truth of the case in the declaration, there is a fiction of law to assist you, and you shall not make use of the truth of the case against that fiction, but you may make use of it to every other purpose. I am clearly of opinion not only against the objections made, but that there does not appear a question upon which the objections could arise.

The three other Judges concurred.

Per Cur. Judgment affirmed.

who was then and now is, commander of the above vessel, then and now lying in the river of Thames, did the said negro, committed to his custody, detain; and on which he now renders him to the orders of the Court. We pay all due attention to the opinion of sir Philip Yorke, and lord chancellor Talbot, whereby they pledged themselves to the British planters, for all the legal consequences of slaves coming over to this kingdom or being baptized, recognized by lord Hardwicke, sitting as chancellor on the 19th of October, 1749, that trover would lie: that a notion had prevailed, if a negro came over, or became a Christian, he was emancipated, but no ground in law: that he and lord Talbot, when attorney and solicitor-general, were of opinion, that no such claim for freedom was valid; that though the statute of tenures had abolished villeins regardant to a manor, yet he did not conceive but that a man might still become a villein in gross, by confessing himself such in open court. We are so well agreed, that we think there is no occasion of having it argued (as I intimated an intention at first,) before all the judges, as is usual, for obvious reasons, on a return to a Habeas Corpus. The only question before us is, whether the cause on the return is sufficient? If it is, the negro must be remanded; if it is not, he must be discharged. Accordingly, the return states, that the slave departed and refused to serve; whereupon he was kept, to be sold abroad. So high an act of dominion must be recognized by the law of the country where it is used. The power of a master over his slave has been extremely different, in different countries. The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political, but only by positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created, is erased from memory. It is so odious, that nothing can be suffered to support it, but positive law. Whatever inconveniences, therefore, may follow from the decision, I cannot say this case is allowed or approved by the law of England; and therefore the black must be discharged.

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549. Proceedings in an Action by Mr. Anthony Fabrigas, against Lieutenant-General Mostyn, Governor of Minorca, for False Imprisonment and Banishment; first in the Common-Pleas, and afterwards in the King's-Bench: 14 George III. A. D 1773—1774.*

[The following Case is taken from the Trial, which was printed from the Notes in short-hand of Mr. Gurney, soon after the hearing. From the Address to the Bookseller, which preceded the Trial, it is plain, that Mr. Gurney was employed to take notes for the plaintiff, and that the Trial was published by the plaintiff or his friends:† *Former Edition.*]

In the Common Pleas, Guildhall.

Anthony Fabrigas, gent. Plaintiff. John Mostyn, esq. Defendant.

Counsel for the Plaintiff.—Mr. Serjeant Glynn, Mr. Lee, Mr. Grose, Mr. Peckham.

Counsel for the Defendant.—Mr. Serjeant Davy, Mr. Serjeant Burland, Mr. Serjeant Walker, Mr. Buller.

THE Court being sat, the jury were called over, and the following were sworn to try the issue joined between the parties.

Jury.

Thomas Zachary, esq.	Mr. Thomas Bowlby,
Thomas Ashley, esq.	Mr. John Newball,
David Powel, esq.	Mr. John King,
Walter Eaver, esq.	Mr. James Smith,
Mr. William Tomkyn,	William Hurley, esq.
Mr. Gilbert Howard,	Mr. James Selby.

Mr. *Peckham.* May it please your lordship, and you gentlemen of the jury, this is an action for an assault and false imprisonment, brought by Anthony Fabrigas against John Mostyn, esq. The plaintiff states in his declaration, that the defendant, on the 1st of September, 1771, with force and arms, made an assault upon him at Minorca and then and there imprisoned him, and caused him to be

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* See 2 Blackstone, 929. Cowp. 161.

† The title of the proceedings first published, being only the trial of the cause at Nisi Prius before Mr. Just. Gould, who sat for the chief justice of the Common Pleas, was thus expressed:

"The Proceedings at large, in a Cause on an Action brought by Anthony Fabrigas, gent. against lieutenant-general John Mostyn, governor of the island of Minorca, colonel of the first regiment of dragoon guards, and one of the grooms of his majesty's bed-chamber; for False Imprisonment and Banishment from Minorca to Carthagena in Spain. Tried before Mr. Just. Gould, in the Court of Common-Pleas, in Guildhall, London, on the 13th of

carried from Minorca to Carthagena in Spain. There is a second count in the declaration, for an assault and false imprisonment, in which the banishment is omitted. These injuries he lays to his damage at 10,000*l*. To this declaration the defendant has pleaded, Not Guilty; and for further plea, has admitted the charges in the declaration mentioned, but justifies what he

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July, 1773. Containing the evidence *verbatim* as delivered by the witnesses; with all the speeches and arguments of the counsel and of the court."

Before the Trial there was the following Address to the Bookseller.

"I am very glad to find you are going to publish the trial between Fabrigas and Mostyn, as the knowledge of the particulars of this interesting cause must be worthy the attention of the public.

"As I have passed a great part of my life in Minorca, and have some knowledge of the parties, I was induced from curiosity with many others to attend this trial at Guildhall, where I was greatly surprised to hear the account given by governor Mostyn's witnesses, Mess. Wright and Mackellar, of the constitution and form of government of that island.

"I did indeed expect that Mr. Fabrigas's counsel would have called witnesses to contradict the very extraordinary account those gentlemen had given, which they might easily have done by any person who had the least knowledge of the matter. I suppose they did not, either from thinking the subject immaterial to their case, or perhaps to preserve to Mr. Serj. Glynn the closure of the trial by that most eloquent and masterly reply with which it was concluded.

"Whatever the motives of Mr. Fabrigas's counsel might be for leaving this account uncontradicted, I think it very material that the world should not now be misled, as they would be, should they read the evidence of these gentlemen, and not be informed of their mistakes; I call them mistakes, for however extraordinary some parts of their depositions may appear to an observant reader, I am unwilling to charge them with any other crime than ignorance.

"I am therefore induced to trouble you with this letter, that (if not too late) you may publish it with the trial; my sole object is, that the public may be apprized of the misinformation given by these gentlemen. I do not expect that the bare contradiction of an anonymous person should overset the declarations upon oath of two gentlemen given in open court. All I mean is, to apprize the public of the truth, and to leave them to make such farther inquiry as they shall think fit.

"The purport of that part of the evidence given by those gentlemen, which I mean to dispute, was, that a part of the island called the arraval of St. Phillip's is not under the jurisdiction of the magistrates, nor governed by the same laws which prevail in the rest of the island, but is under the sole authority of the governor, and has no law but his will and pleasure.

"It should seem that so very extraordinary a constitution as absolute despotism for a considerable number of inhabitants, in a country governed by law, and which is part of the dominions of the crown of Great Britain, should have had some very urgent and apparent cause to make necessary that slavery which Englishmen abhor, and if it exists, must have been established by some particular provision. If it had been said, that in the fort of St. Phillip's, in time of actual siege, an absolute military government must prevail, the objects and the reasons could easily be understood. But to say that in time of profound peace not only the inhabitants of fort St. Phillip's, but all those of the arraval, which contains a large district of country, with many hundred inhabitants, living out of all reach of the garrison, should be subject not to military government, for that has its written laws and forms of trial, but to the absolute will of the governor, without any law or trial, is in itself so absurd, and so contradictory to every idea of reason, justice, and the spirit with which this country governs its foreign dominions, that, I trust, my countrymen will not believe such a monster exists in any part of this empire, without better proof than the information of these gentlemen.

"I would not have the reader think that this strange idea originated in the brain of Mess. Wright and Mackellar, for I know it is a favourite point, which the governor of Minorca has endeavoured to establish; not so much, I believe, for the pleasure of exercising absolute authority, as on account of some good perquisites, which he enjoys, and which can be defended on no other ground.

"To establish this, it has been endeavoured to alter the ancient distribution of the districts or terminos of the island from four to five.

"The four terminos Cieutadella, Alayor, Marcadal, and Mahon, have their separate magistrates and jurisdictions, and comprehend the whole island. The arraval of St. Phillip's was always a part of the termino of Mahon; in order therefore to establish the governor's claim, it became necessary to set up the arraval of St. Phillip's as a separate and distinct termino. If this could be done, it ceased to be within the jurisdiction of the magistrates of the island, who have power only in their four terminos, and accordingly Mess. Wright and Mackellar advance, that there are five terminos instead of four; but those who are acquainted with the island well know, that this is a modern invention; that in the records of the country, there is not the least foundation for such an idea; on the contrary, that every proof of the reverse exists. The inhabitants of the arraval are subject to the particular jurats of Mahon, they differ in no respect from the other inhabitants of that termino, and the judges possess and exercise the same jurisdiction and authority in the arraval, as they do in the other parts

has done, by alledging that the plaintiff endeavoured to create a mutiny among the inhabitants of Minorca, whereupon the defendant, as governor, was obliged to seize the plaintiff, to confine him six days in prison, and then to banish him to Carthagena, as it was lawful for him to do. To this plea the plaintiff replies, and says, that the defendant did assault, imprison, and banish him of his own wrong, and without any such cause as he has above alledged, and thereupon issue is joined. This, gentlemen, is the nature of the pleadings. Mr. Serjeant Glynn will open to you the facts on which our declaration is founded, and if we support it by evidence, we shall be entitled to your verdict, with such damages as the injury requires.

Serj. *Glynn*. May it please your lordship, and you gentlemen of the jury, I am of counsel in this cause for the plaintiff. Gentlemen, this is an action that Mr. Fabrigas, a native and inhabitant of the island of Minorca, has brought against the defendant, Mr. Mostyn, his majesty's governor in that island, for assaulting, false imprisoning, and banishing him to a foreign country, the dominions of the king of Spain. Mr. Mostyn has, in the first place, pleaded that he is not guilty of those injuries; in the next, he has offered this justification for himself, that the plaintiff, Mr. Fabrigas, was guilty of practices tending to sedition, and that Mr. Mostyn, for such misbehaviour, by his sole authority as governor, thought proper to inflict upon him as a punishment, what Mr. Fabrigas, in his declaration, complains of as a grievance. This Mr. Mostyn takes upon him to insist, in an English court of justice, is the justifiable exercise of an authority derived from the crown of England. And the facts which he undertakes thus to justify, are, in the first place, a length of severe imprisonment upon a native of the island of Minorca, a subject of Great Britain, living under the protection of the English laws; and, secondly, by his sole authority, without the intervention of any judicature, the sending him into exile into the dominions of a foreign prince. Gentlemen, some observations must strike you upon the very state of this plea; they must alarm you, and you must be anxious to know the particulars of that case, to which, in the sense of any man who has received his education in this country, or ever conversed with Englishmen, it can be applied as justification; that case, therefore, I will shortly state to you:—Mr. Fabrigas is a gentleman of the island of Minorca, of as good a condition as any inhabitant of that island, of as fair and unblemished a character too as that island produces. It is however enough, for

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of the island, which could not be the case, if the claim set up by the governor really existed.

"No proof whatever has been or can be produced that this claim has any foundation; nor indeed did Mess. Wright and Mackellar attempt to give any but their own assertions. The only thing that had the least similitude to proof, was their saying, that in one instance the officer acting as coroner to examine a corpse that had met with a violent death in the arraval, asked the governor's leave before he proceeded.

"This fact I do not pretend to dispute; it proves nothing; and was evidently only a mark of respect, which it is no wonder magistrates in that island pay to a governor who really has so much power. But to have made this amount to any thing like proof, it should have been shewn, that the like attention was not paid to the governor at Mahon, and in other parts of the island. The truth is, that the inhabitants are so dependant on the military, that I have known the same civility shewn in another part of the island to the officer who happened to command there, but certainly without any intention of surrendering to him their authority as magistrates.

"Mess. Wright and Mackellar also said, that the Minorquins claimed to be governed sometimes by the English, and sometimes by the Spanish laws, as suited best for the moment; but insinuated that the Spanish laws prevailed, and that by them the governor had a right by his sole authority to banish.

"The fact most undoubtedly is, that Minorca, a conquered country, preserves its ancient (the Spanish) laws, till the conqueror chuses to give them others; and therefore as England has not given them others, it is true the Spanish laws do prevail in Minorca, both in civil and criminal matters, among themselves: but it is equally true that they have the protection of the English laws against their governor, who cannot be amenable to their local laws, and that however despotically a Spanish governor may formerly have acted, it cannot be the law of Spain, or of any country (because it is contrary to natural justice) that a man should be condemned and punished without either trial or hearing.

"It would have been easy for governor Mostyn, if Mr. Fabrigas had committed a crime, to have followed the mode of proceeding established there in criminal cases, which is for the advocate fiscal to prosecute in the court of royal government, where the chief justice criminal is the judge.

"If I was not afraid of swelling this letter to too great a length, I should make more remarks on what passed at this trial, and point out many more instances of power unjustifiably assumed by the governors. But I hope that what appears from this publication will be sufficient to induce administration to consider the state of this island, and give the inhabitants some better security for the safety of their persons, and enjoyment of their property; for, exclusive of the meanness there is in ill using those who cannot resist, it is undoubtedly the best policy, for the honour and stability of our empire, to make all its dependencies happy." *Former Edition.*

this present purpose, to say that Mr. Fabrigas is a descendant of the antient inhabitants of Minorca: that he lived there under the capitulated rights: that, as such, the national faith was pledged for his enjoyment of those rights that his ancestors capitulated for; but what is of more consideration, being born in Minorca since its subjection to the crown of England, he was a free-born subject of England, and claimed, as his birth-right, the privileges due to that character, and the protection of the English laws. There was a particular stipulation upon the surrender of the island, that every occupier or possessor of land should be intitled, under certain regulations and restrictions, to the produce of his lands, and to such profit as by his industry he could make of them. Upon that ground a dispute arose, to which alone can be imputed the displeasure of Mr. Mostyn towards the plaintiff, and the treatment he received from him, in the progress of it. Mr. Mostyn, as governor, was appealed to, and his good-nature appeared to be so serviceable to the adversary of Mr. Fabrigas, that early in the morning Mr. Fabrigas was suddenly taken from his house by a file of soldiers, and by them conducted to a dungeon, unaccused, untried, unconvicted. Thus, without any form of judicial proceedings, this gentleman, who then lived in esteem in the island, finds himself all of a sudden committed to a dungeon, a dungeon that was made use of only for the most dangerous malefactors, and that only when they were ready to receive the last of punishments. In this gloomy, damp, dismal, and horrid dungeon, was this man detained without any previous accusation, without any call upon him to make his defence, or being informed there was any crime or offence that was alledged against him, and without any notice either to him or his family. When he found himself in prison, there was humanity enough in the breast of the keeper of that prison to accommodate him with a bed; but it seems that accommodation was by the power of that island thought too much for him, and the bed was taken from him; a check was given to the lenity of the keeper. No notice having been given to his family that they might visit or administer comfort to him; he did, by humble request, desire that his wife might be permitted to visit him: that consolation too was denied him. In this manner was Mr. Fabrigas deprived of his liberty for a considerable time. It is unnecessary for me to state particularly the precise time that this imprisonment continued; that you will hear from the witnesses. Nor does a case like this depend upon minutes, hours, or days, but this is the nature and kind of imprisonment that Mr. Fabrigas endured: so closely watched that no man could have access to him, deprived of the consolation of his family, severed from all communication with his friends, relations, or acquaintance, that could administer the least comfort to him. For several days did this man continue under this imprisonment, nor did his sufferings determine with it; his removal from the dungeon was only a substitute of one species of cruelty in the place of another: for the instant he was taken from prison, he was carried by the same arbitrary and despotic power on board a ship, without any previous notice, without any time allowed him to prepare for his departure, without the ordinary visit or comfort of friends and acquaintance, from whom he was probably to be separated for ever. Thus was this man taken from his native country, and the insupportable hardships of a dungeon were followed by an entire expulsion from his country, and every thing that was dear to him: he was sent instantly on board a ship by force, and carried to Carthagena, a foreign country, under the dominion of the crown of Spain. This is the nature of Mr. Fabrigas's case. Now, gentlemen, for a moment, let me remind you of the pretence under which this imprisonment is inflicted. It is said Mr. Fabrigas excited sedition, or attempted to excite sedition; that he acted or spoke in a turbulent and mutinous manner; and therefore that the governor, as his plea states he was well authorized to do, committed him to prison, and banished him out of the island; or rather committed him to prison for the purpose of banishing him out of the island, for I believe that is the true state of his plea. Gentlemen, you would justly accuse me of a great and wanton waste of your time, if I should say a great deal for the purpose of exculpating Mr. Fabrigas from the charge and imputation that is thrown upon him in this place, because I am persuaded that you, an English jury, if you were sitting in judicature upon the case of confessedly the vilest of offenders, you would not suffer the atrocity of the offence to mitigate that censure and animadversion which is due to a behaviour like this of the governor's. In private justice to the character of Mr. Fabrigas, and not as the least relating to any question here to be tried, gentlemen, I will state to you upon what grounds and pretence this mutiny is alleged against Mr. Fabrigas. Mr. Fabrigas, as I have told you, claimed, among all the other inhabitants and possessors of lands in the island, a right of selling the produce of his lands, under certain restrictions. The produce of the lands is chiefly wine: Mr. Fabrigas had a considerable quantity. His majesty, by his proclamation, had given free liberty to the inhabitants of that part of the island where Mr. Fabrigas lived, to sell their wines, the price being first settled by the authority of the governor:—that price is called the afforation price. Notwithstanding his majesty's proclamation, by an act and order, not of governor Mostyn, but of his lieutenant-governor, there was a prohibition that no wine should be sold without the immediate authority of the mustastaph. An application therefore, by Mr. Fabrigas, was made to this officer, either to permit him to sell his wines under the afforation price, which would be for the general relief and benefit of the islanders, and of the garrison, or that he him-

self would buy it at a fixed price. This officer refused to comply with either: Mr. Fabrigas therefore was reduced to the necessity of making an humble application to governor Mostyn, to permit him this alternative, either to sell his wine under a certain afforation and regulated price, or that the government would buy his wine of him for their use, or the use of the garrison. This petition was thought reasonable at first, and had a kind answer; it was received, and it appears to have been taken into consideration, but nothing was done in consequence of it. Mr. Fabrigas therefore repeats his application, and he receives encouragement to expect that the reasonableness of his petition would be taken into consideration, and that he should be at liberty to sell the produce of his land. But, gentlemen, at last this answer was given to Mr. Fabrigas: that if it appeared to be the sense of a considerable number of the inhabitants of the island, that it was for their benefit that such permission should be given, his application should be complied with. Mr. Fabrigas then prepares such a petition; he gets it signed, and he presents it to governor Mostyn. Now, gentlemen, here it is impossible to state what passed between the parties. If it can be pretended that there was any thing mutinous, menacing, or improper, in this last petition, I presume that petition will be produced to you, and it will speak for itself; but some indignation was conceived by governor Mostyn against the plaintiff, Mr. Fabrigas, which produced that strange, unaccountable, unwarrantable, and alarming conduct, which we now, by evidence, impute to Mr. Mostyn. For gentlemen, instantly upon this, Mr. Fabrigas is conducted in the manner before-mentioned to that horrible dungeon, where he continues for a considerable time under such orders as I have stated to you, till he was hurried on board a ship, and was conveyed to Carthagena in Spain. Here, for the first time, he receives intelligence of what was the provocation that he gave, what was the ground of such treatment of him, what charge was imputed to him, by what authority he was so detained and so treated: for here appears a letter under the hand of governor Mostyn, avowing this act, and telling him that he thought it necessary and expedient, for the punishment of his offence, to send him into exile, and to direct him to be conveyed to Carthagena in Spain. Here then you find the governor avowing the whole; and if he did not avow the whole, you could have no doubt under what authority these things were done; because you will hear from all, that they cannot be done but under the authority of the governor. Then, gentlemen, the imprisonment, and the sending this man into exile, are the acts of governor Mostyn. The imprisonment under such strange aggravating circumstances of horror and ignominy, and the sending him without notice, without time for preparation, without giving him the opportunity of paying the least attention to the concerns of his estate and family, into exile; these, gentlemen, we now presume to treat as the acts of governor Mostyn; and the governor says, he is justified in so doing, as governor of Minorca. I should be glad to know upon what idea of justice the governor grounds that pretence. I conceive, that in this case, there cannot be the least colour or pretence of any judicial examination, or the least form of judicial proceedings. Governor Mostyn, after having been guilty of this outrage to the plaintiff, would have acted much better, if he had not added this insult to the laws of his country, by assuming an authority incompatible with the least possible idea of justice that can be entertained in this or in any country whatsoever. Gentlemen, if governor Mostyn complains that justice is not done to his defence by his plea, that he is fettered and embarrassed by it, and could now justify his conduct upon better grounds, we will freely give him the opportunity of doing it; he shall do it in what character he thinks proper. If he has acted under the colour of any judicial proceedings in civil judicature, let those proceedings be produced, let him desert and abandon the shameful plea that he has presented; he has even our liberty to do it. If the governor means to be justified in his military character, I need not tell you, gentlemen, that it is necessary in that character, that there should be judicial proceedings likewise of a military court of justice. I will be bold to say, that the idea governor Mostyn has adopted, that the lives, fortunes, and being of the inhabitants of the island of Minorca are at his mercy, and that by his sole authority he can inflict bonds and imprisonment on any inhabitant of that island, is the single idea of governor Mostyn; and I say the governor does not, in this case, talk like a military man, for his ideas are as foreign to the notions of a soldier, as of a lawyer. Gentlemen, this is the nature of the case that we shall offer to you, and which we shall produce in proof to you against governor Mostyn: an imprisonment, if it had been attended with all the circumstances of comfort that could have been administered to a person in that situation, unjustifiable, and without colour or pretence of legal authority, sufficient to entitle this gentleman to call for considerable damages from a verdict of a jury: a banishment into a foreign country of a subject of England, intitled to be protected, to whom the laws cannot be denied without breach of public faith, and a dangerous wound to the general system of our constitutional liberties. Thus, by the sole authority of governor Mostyn, without pretence of judicial examination, was Mr. Fabrigas sent into banishment. If all other circumstances were away, the being sent out of his native country by an arbitrary act of the governor of that island, is surely ground enough to call for the most considerable damages. But, gentlemen, you are to add to it every circumstance of discomfort. He was, during the whole time of his imprisonment, kept in a gloomy dungeon; no circumstance o ignominy that

could affect the mind of a man of feeling was omitted: he was put into a place set apart and designed only for the reception of the worst of malefactors, secluded from any conversation or communication with his friends or acquaintance, his nearest relations, his wife or his family, deprived of the comfort of a bed, and obliged, for a considerable number of days, to subsist upon bread and water. This is a case of the most unparalleled cruelty; the most ingenious circumstances of torture being added to the most unjustifiable and the most lawless exertion of authority, that I am persuaded has ever appeared before any court. If governor Mostyn can support the powers of this claim, and vindicate himself, as governor, by the plenitude of his powers, and that the sole judicature of the island resides in his person; if it was for a moment possible for you to entertain the idea of the legality of such a power being placed in any man, in consequence of an authority derived from the crown of England: I say, if it was possible for you to conceive that such a power could exist; try him even by that rule, try him by that rule, and he is without excuse; for the most despotic, the most arbitrary and uncontroulable power that is ever exercised, professeth at least to act by calling upon the party accused to make his defence, and I believe in no part of the globe is it looked upon as just to condemn a man unheard. Let general Mostyn travel into Asia, or visit his neighbours on the continent of Barbary, he will not find examples there to justify his conduct, in any of the powers assumed, or in the use he has made of them: for if their powers are not circumscribed or restrained by any laws; if they act, as the general professes he has a right to, by their sole will and pleasure; if that is the rule of their government, yet still there is an idea of a principle of natural justice that should govern their proceedings there; at least an appearance of it they are anxious to produce. I never heard in my life that it was the avowed privilege of any country, that a man should be charged with an offence, that he received the punishment for that offence, without the offence being explained and stated to him, and an opportunity given him of hearing the charge and the evidence by which it was produced; but this is the case of a transaction in the dark, a secret indignation conceived, that indignation immediately followed by the most horrid exertions of power upon the person of Mr. Fabrigas—committed to a dungeon, and unapprized of the charge against him till sent out of his native country, and upon the voyage to the destined place of his banishment. The offer made to general Mostyn not to tie him down merely to the justification specified in his plea, but to give him leave to offer any justification that may be consistent with the idea of civil or military justice, may be called insidious, because I must disbelieve every thing suggested on any trust, if I think the offer can be of no benefit to him if wanted; but it may be added to it, "Governor, take your ideas of law from Barbary or Turkey, produce your precedent, India or negro law, you are still unable to justify your conduct." Gentlemen, these are the circumstances we are to lay before you in evidence. The governor may, if he pleases, endeavour to charge this gentleman with mutiny. If he does, I presume he will adduce his proof of it. But if it was possible to decide that Mr. Fabrigas was a mutinous man, though the reverse of that character is but justice to him; nay, if you could decide that he was the worst and most dangerous of offenders, governor Mostyn's conduct is still destitute of any colour of justice or law. His conduct is totally unwarrantable, and the pretence he has here set up, that he is a prince with a power unbounded and unlimited by any rule or law whatsoever, that he is authorized to act by his own will and pleasure, must represent this case in so alarming a light to you, that I am persuaded that you, who have taken your ideas of law and justice from conversation with Englishmen, and observation on the English constitution, will give all attention to the particular sufferings of the man, as well as to what you owe to yourselves, your country and posterity; and we trust, even in the very best construction that is possible to put on governor Mostyn's conduct, that you will think the damages laid in the declaration are not extravagant.

Basil Cunningham sworn.

Examined by Mr. *Lee*.

Mr. *Lee*. You are in some military capacity?—*Cunningham*. Yes.

Were you in the year 1771 in the island of Minorca?—Yes.

In what character?—Acting serjeant major for the royal artillery.

Do you remember Mr. Anthonia Fabrigas being at Minorca?—Yes.

Were you serjeant major at the time he was seized and taken into custody?—I was, when I saw him brought into prison.

Do you recollect any orders at that time coming in any body's name touching his confinement?—There was a general order given us, that three more men should be added to the artillery guard.

Court. Have you that order?—*A*. No.

Q. Was it not your office as serjeant major to transcribe that order into your book?—*A*. I gave that order out in the company's order book.

To whom does the custody of that order book belong?—When the books are written out, they give them to the captain to whom they belong.

They put three additional men sentry upon that occasion?—Yes.

Court. Why?—*A*. To do duty upon the prisoner Mr. Fabrigas.

How long had Mr. Fabrigas been in custody at that time when this order was given out? Was it immediately upon his coming into custody, or after he had been put there?—

uneasy, if they are subject to be charged with actions here for what they do in that character in those countries. My lord, unless that case can be materially distinguished from the present, it will be an authority, and the highest authority that can be adduced, to shew that this action cannot be maintained, and will be a sufficient authority to entitle the plaintiff in error in this cause to your lordship's judgment. What answer may be given to that case, or distinctions made between that case and the case now before the Court, I cannot at present foresee; but if any are attempted, when I hear them, I shall be at liberty to give such answers to those arguments, as may occur to me by way of reply.

Mr. *Peckham.* My lord, as the moderation and mildness of governor Mostyn's proceedings have been insisted on by Mr. Buller, I trust it will not be thought irrelative to the present question, if I shortly state to your lordships the nature of those injuries which gave birth to the action.

It appeared in evidence on the trial, that Mr. Fabrigas was a natural born subject, being born in Minorca subsequent to the cession by the Spaniards at the treaty of Utrecht, and prior to the capture by the French in the year 1758; that he was a man of irreproachable character and good property; not of the first class of nobility, but, to borrow an expression from colonel Bidulph, 'what we should call in England a gentleman farmer;' that he lived in friendship with the first noblesse in the island; and that he had a father living, and a wife and five children.

Thus circumstanced and thus situated, he was at the express command of the governor taken from his house by a party of soldiers, and dragged at noon-day through the streets of Mahon as a criminal, and thrown into a dungeon appropriated solely to capital offenders.

It appeared likewise in evidence, that he was confined six days in this dungeon, with nothing but the boards to lie on, and with no other sustenance than bread and water, though felons under sentence of death were allowed the common food of the island; that he was refused the consolation of his friends, and denied all intercourse with his family; that on the seventh morning he was hurried aboard a ship, without being permitted to take leave of his children, to see his wife, or to be accommodated with money or other necessaries for his subsistence; that during this whole time he had heard of no charge against him, he had been confronted with no accuser, he had not even seen his judge: yet he was to be banished to Carthagena in Spain for the space of twelve months. The sentence was faithfully executed; and Mr. Fabrigas, having experienced that distress which a moneyless stranger must necessarily be reduced to in a country whose language he did not understand, as fortunately for himself as unexpectedly to governor Mostyn, escaped from the Spaniards: I say unexpectedly, my lord, because he little thought that Mr. Fabrigas would live to tell an English jury of his sufferings and the governor's oppression.

I thought it necessary to state these facts to your lordships, that you might judge of the mildness of that treatment which Mr. Buller deemed it prudent to expatiate on.

It now becomes requisite for me to state the conduct of the governor through the subsequent stages of his very extraordinary defence; and that I must do with some precision, as I mean to contend, that the plaintiff in error by that defence is estopped from agitating the question of jurisdiction.

The declaration was delivered in Hilary term, 1773; a rule to plead was given, and a plea demanded. Had the governor then pleaded to the jurisdiction, the question would have come before the Court on a demurrer; and if that had been determined in our favour, a writ of enquiry would have been executed, and Mr. Fabrigas would in a short space of time, at a little expence, have received a satisfaction adequate to the injury, and would have been enabled to return to his friends and to his family. But that would not have answered the purpose of the governor, as Mr. Fabrigas would not then have been delayed in England, nor have been harassed with this expensive litigation.

Had the governor at the expiration of the four days pleaded in chief, he might then have had the appearance of an argument in his application to your lordships; for it then would have been competent for him to have said, 'I was hurried into this plea before I had time to advise with my counsel, and consult upon the propriety of admitting the jurisdiction.' But he has debarred himself even of this shadow of an argument; for instead of pleading at the usual time, he applied to the Court of Common Pleas for six weeks time to plead. Here then was an admission of the jurisdiction; for he could not apply for time to plead, unless the Court had cognizance of the matter.

I shall presently state to your lordships some cases, whose authority cannot be shaken, to prove, that even after imparlance the question of jurisdiction cannot be gone into.

But this was not the only submission to the jurisdiction of the Court; for he then applied to put off the trial till after Easter Term. It would have been nugatory, it would have been absurd, to have prayed the Court to put off that trial, which they had no power to try at all. When Easter Term arrived, the governor made a second attempt to postpone the trial; but the Court saw through his design, and, satisfied that he did it only for the purpose of delay, they tied him down by the rule to try it peremptorily in Trinity Term, and that he should not bring a writ of error for delay.

When he saw the Court of Common Pleas would not lend him their power for so base a purpose, he next made application to the Court of Exchequer for an injunction to stay proceedings, and a bill was filed in Trinity Term

to effectuate that intention; but the bill was dismissed on argument, and the governor was at length driven in the subsequent sittings to trial. When the cause came on, the defendant's counsel did not object to the jurisdiction, they did not request the learned judge to nonsuit the plaintiff; but they suffered us to go into our case, they cross-examined our witnesses, and finding that we had made good our declaration by evidence irrefragable, they then went into their justification, and called many witnesses in support of it. But a verdict being found for the plaintiff, they tendered a bill of exceptions; and in last Michaelmas Term, they applied to the court of Common Pleas for a new trial; first, for excess of damages; secondly, because the Court had no jurisdiction —the most extraordinary reason perhaps that ever was given; to desire a second trial because the Court had no jurisdiction to try it at all.

Governor Mostyn having in so many instances admitted the jurisdiction of the Court, I must beg leave to state some authorities to your lordship, which prove that he is now too late to take any advantage of a defect of jurisdiction.

'The first case I shall mention to your lordships is to be found in the year books in the 22d H. 6, f. 7, where there was a special imparlance, 'salvis 'omnibus allegationibus et exceptionibus, tam 'ad breve quam ad narrationem'; and the Court would not allow the defendant's privilege, because, says the case, by imparling he has admitted the jurisdiction of the Court. This doctrine is confirmed by lord Coke, in his comment on the 195th section of Littleton, where speaking of a personal action he says, three parts are to be considered; first, when the defendant defends the wrong and force, he maketh himself a party to the matter; secondly, by the defence of the damages he affirmeth, that the plaintiff is able to sue and to recover damages upon just cause; and by the last part, viz. 'all that which he ought to defend when and where he ought,' he affirmeth the jurisdiction of the Court.

The case of Barrington and Venables, 13 C. 2, reported in sir Thomas Raymond, 34, is very clear on this head. The defendant after imparlance pleaded to the jurisdiction; the plaintiff demurred: the judgment was, that he should answer over, for such plea cannot be pleaded after imparlance.

The next case in order of time is reported in 1 Modern, 81, Cox and St. Alban's, 22 Car. 2. A prohibition was prayed for the city of London, because the defendant had offered a plea to the jurisdiction which had been refused. Lord chief justice Hale said, "in transitory actions, if they will plead a matter that ariseth out of the jurisdiction, and swear it before imparlance, and it be refused, a prohibition will go." There was a case, said his lordship, in which it was adjudged that the jurisdiction must be pleaded and the plea sworn, and it must come in before imparlance. It was also agreed in that case, "that the party should never be received to assign for error, that it was out of the jurisdiction, but it must be pleaded." I have in vain endeavoured to find this case; but it is sufficient for my purpose to observe, that lord chief justice Hale would not have cited it unless it had been law. If therefore the opinion of that great man, solemnly given in the court of King's-bench, is authority, I am bold to say, that governor Mostyn not having pleaded to the jurisdiction, cannot now assign it for error.

In a few years after, lord chief justice Hale was again called upon to consider this question in the case of Mandyke and Stint, 2 Modern 273, 22 Car. 2. There was a prohibition to the sheriff's court of London: the suggestion was, that the contract was made in Middlesex, therefore the cause of action did not arise within their jurisdiction. The chief justice and justice Wyndham were of opinion, "that after the defendant had admitted the jurisdiction by pleading to the action, especially if verdict and judgment pass, the court will not examine whether the cause of action did arise out of the jurisdiction or not;" on which a prohibition was denied, and judgment was given for the plaintiff. I cannot distinguish this from the present case; for as the Court will not examine whether the cause of action did arise out of the jurisdiction, there can be no difference whether it was in Middlesex or in Minorca; and that question cannot now be asked, because verdict and judgment have passed.

Lord chief justice Holt, in the case of Andrews and Holt, 2 lord Raymond, 884, said, that he was counsel in the case of Denning and Norris (reported in 2 Levintz, 243) and that the Court held there, "that since the defendant had admitted the judge to be a judge by a plea to the action, he was estopped to say, that he was not a judge afterwards." If then a defendant, by having submitted the decision of his cause to a judge, precluded himself from objecting to him afterwards, how much stronger is the present case, where the defendant has submitted his cause to the determination of a court which has cognizance over all transitory actions. It is again laid down by lord chief justice Holt, "that there ought to be no plea to the jurisdiction after imparlance, and that a special imparlance admits the jurisdiction." Holt's Reports, Pasch. 5 W. and M.

I must trouble your lordships with the case of Trelawney and Williams, to shew, that there has been but one opinion on both sides of the hall respecting a plea to the jurisdiction; and that equity and common law have united in saying, that if the jurisdiction is not pleaded to, it must be afterwards admitted. This case is reported in 2 Vernon 483, Hil. 1704. The plaintiff prayed an account relative to a tin-set: the defendant insisted that he ought to have been sued in the Stannary-court. The lord-keeper decreed an account; and as to the objection that the plaintiff ought to have sued in the Stannary-court, he said, "to oust this court

of its jurisdiction, the defendant must plead to the jurisdiction, and not object to it at the hearing."

There are a great variety of cases tending to establish this position, that when a defendant has once submitted to the jurisdiction, he has for ever precluded himself from objecting to it. To state them all, after the great authorities I have mentioned, would be to multiply the witnesses without strengthening the testimony: I shall therefore only cite a few passages from lord chief baron Gilbert's History of the Common Pleas, which are decisive upon this part of the argument. In page 40, speaking of the order of pleading, he says, "the defendant first pleads to the jurisdiction of the Court; secondly, to the person of the plaintiff; and thirdly, to the count or declaration. By this order of pleading, each subsequent plea admits the former. As, when he pleads to the person of the plaintiff, he admits the jurisdiction of the Court; for it would be nugatory to plead any thing in that court which has no jurisdiction in the case. When he pleads to the count or declaration, he allows that the plaintiff is able to come into that court to implead him, and he may be there properly impleaded." He lays it down in a subsequent part of his treatise (p. 148,) as a positive rule of law, that, "if a defendant pleads to the jurisdiction of the Court, he must do it *instanter* on his appearance; for if he imparls, he owns the jurisdiction of the Court, by craving leave of the Court for time to plead in, and the Court shall never be ousted of its jurisdiction after imparlance." When I find this doctrine in our old law-books, when I see it ratified in modern times, and stamped with the authorities of Coke, Hale, Holt, and Gilbert, I am warranted in saying, that governor Mostyn cannot now agitate the question of jurisdiction: and if he cannot, the judgment must be affirmed.

Notwithstanding which, I have no objection to follow Mr. Buller through the grounds of argument that he has adopted; and I shall endeavour to prove,

That an action of trespass can be brought in England for an injury done abroad:

That Mr. Fabrigas is capable of bringing such action:

And, that governor Mostyn may be the subject of it.

It cannot be contended, but that an action of trespass is a transitory action, and may be brought any where: "all personal actions," says lord Coke, "may be brought in any county, and laid any where." Co. Litt. 282.

In the earl of Derby's case, 12 Coke, the chancellor, the chief justice, the master of the Rolls, and justices Dodderidge and Winch, resolved, "that for things transitory, although that in truth they be within the county palatine, the plaintiff may by law alledge them to be done in any place within England; and the defendant may not plead to the jurisdiction of the Court, that they were done within the county palatine." This doctrine is not confined to counties palatine; for lord Coke, in his comment on Littleton, 261, *b*, says, "that an obligation made beyond the seas at Bourdeaux, in France, may be sued here in England in what place the plaintiff will." Captain Parker brought an action of trespass and false imprisonment against lord Clive, for injuries received in India, and it was never doubted but that the action did lie. Even at this moment there is an action depending between Gregory Cojimaul, an Armenian merchant, and governor Verelst, in which the cause of action arose in Bengal. A bill was filed by the governor in the Exchequer for an injunction, which was granted; but on appeal to the House of Lords, the injunction was dissolved. The supreme court of judicature, by dissolving the injunction, acknowledged that an action of trespass could be maintained in England, though the cause of action arose in India.

The next point to be considered is, whether there is any disability attending the person of Mr. Fabrigas, that incapacitates him from bringing this action. But it will be requisite for me first to state, that governor Mostyn pleaded not guilty, and then justified what he had done by alledging, that the plaintiff had endeavoured to create mutiny among the troops; therefore he, as governor, had a right to imprison and banish him. Your lordship observes, that, according to his own plea, he does not pretend to justify what he has done as governor merely from the plenitude of his power, but from the necessity of the act, because the plaintiff had endeavoured to create mutiny and sedition. The learned judge who tried the cause, foreseeing the importance of this justification, requested the jury, at the same time they brought in their verdict, to find whether the governor's justification had been proved. The jury found a verdict for the plaintiff, with 3,000*l.* damages, and, that the plaintiff had not endeavoured to create mutiny or desertion, or had acted in any way tending thereto.

In consequence of that decision, the question now is, whether Mr. Fabrigas, a man perfectly innocent, can bring an action against governor Mostyn for this wanton and unparalleled injury?

As the law grants redress for all injuries, so it is open to all persons, and none are excluded from bringing an action, except on account of their crimes or their country. Littleton says, there are six manner of persons who cannot bring actions: Mr. Fabrigas is not included in either of those descriptions. The only person that can bear the least resemblance to him is an alien, who, Littleton says, to be incapacitated from bringing an action, must be born out of the ligeance of the king. Lord Coke, in his comment on that passage, observes, that "Littleton saith not, out of the realm, but out of the ligeance; for he may be born, says Coke, out of the realm of England, yet within the ligeance, and shall be called the king's liegeman, for *ligeus* is ever taken for a natural-born subject." Co. Litt. 129.

Mr. Fabrigas was born in Minorca subsequent to the cession of Spain, consequently he is a natural-born subject; every natural-born subject, according to lord Coke, owes allegiance to the king; allegiance implies protection, the one is a necessary consequence of the other; the king of England can protect only by his laws; by the laws of England there is no injury without a remedy; the remedy for false imprisonment and banishment is an action of trespass, which is a transitory action, and may be brought any where, therefore rightly brought in the city of London, where this action was actually tried, and Mr. Fabrigas recovered 3,000*l.* damages. I hope your lordships will justify me in saying, that this is a fair deduction from established principles.

Coke (Co. Litt. 130), mentions three things whereby every subject is protected, 'rex, lex, 'et rescripta regis;' and he adds, "that he that is out of the protection of the king, cannot be aided or protected by the king's law, or by the king's writ." The natural inference to be drawn from thence is, that he who is under the king's protection may be aided by the king's law. Mr. Fabrigas is under the king's protection, because he owes him allegiance, therefore he may be aided by the king's laws; consequently is warranted in bringing this action, the only aid the laws of England can afford him for that injury.

Mr. Buller has mentioned the case of Pons and Johnson, lieutenant-governor of Minorca, and seems to rely on what was said by lord Camden on that occasion. If my memory does not mislead me, the plaintiff could not make good his case, being unable to prove Mr. Johnson's hand-writing to the order for the fiscal to commit him, and the question of jurisdiction was not agitated; but if it had, however respectable lord Camden's opinion ever will be, yet it was only the opinion of a judge at Nisi Prius. And according to Mr. Buller's own state of the case, he makes lord Camden confess, that an action might lie in a transaction between subject and subject. That concession is sufficient for me; for I have your lordship's own words to prove, that Mr. Fabrigas, being born in a conquered country, is a subject.

In the king and Cowle, 2 Burr. 858, your lordship, speaking of Calvin's case, said, "the question was, whether the plaintiff Calvin, born in Scotland after the descent of the crown of England to king James the first, was an alien born, and consequently disabled to bring any real or personal action for any lands within the realm of England;" and your lordship added, "but it never was a doubt whether a person born in the conquered dominions of a country is subject to the king of the conquering country." From this two points are gained: first, that Calvin, though born in Scotland, was not an alien, and might bring a real action; and that there never was a doubt, but that a person born in a conquered country was subject to the conqueror. As therefore the twelve judges determined that Calvin could bring a real action, because he was not an alien; certainly Fabrigas may bring a transitory action, as he is a subject, being born in a country that was conquered by the state of Great Britain.

There is an anonymous case in 1 Salkeld, 404, 4 Ann: A bill was brought in Chancery to foreclose a mortgage of the island of Sarke: the defendants pleaded to the jurisdiction of the court, viz. that the island of Sarke was governed by the laws of Normandy; and it was objected, that the party ought to sue in the courts of the island, and appeal. On the other side, it was said, that if the person be here, he may be sued in Chancery, though the lands lie in a county palatine, or in another kingdom, as Ireland, or Barbadoes. Lord-keeper Wright over-ruled the plea, saying, "that the Court acted against the person of the party and his conscience, and there might be a failure of justice if the Chancery would not hold plea in such a case, the party being here." How much stronger then is the present case? for this is a transitory action that may be brought any where; Mr. Fabrigas on the spot to bring it, and governor Mostyn in England to defend it.

The case Mr. Buller has cited, of the East-India Company and Campbell, admits of a short answer; for had the defendant confessed the matter charged, he would have confessed himself to be guilty of a felony; and the humanity of the laws of England will not oblige a man to accuse himself: but this is not a public crime, but a civil injury. As Mr. Buller has gone to the East-Indies for a case, I shall be excused mentioning the case of Ramkissenseat and Barker, 1 Atkyns, 51, where the plaintiff filed a bill against the representatives of the governor of Patna, for money due to him as his banyan. The defendants pleaded, that the plaintiff was an alien born, and an alien infidel, and therefore could have no suit here: but lord Hardwicke said, as the plaintiff's was a mere personal demand, it was extremely clear that he might bring a bill in this court; and he over-ruled the defendant's plea without hearing one counsel of either side. As therefore lord Hardwicke was of opinion, that by the laws of England an alien infidel, a Gentoo merchant, the subject of the great mogul, could claim the benefit of the English laws against an English governor for a transaction in a foreign country; I trust that your lordships will determine, that Mr. Fabrigas, who is neither an infidel nor an alien, but a subject of Great-Britain, may bring his action here for an injury received in Minorca.

The case of the countess of Derby, Keilway 202, does not affect the question; for that was a claim of dower, which is a local action, and cannot, as a transitory action, be tried any where. The cases, mentioned by Mr. Buller, from Latch and Lutwyche, were either local actions, or questions upon demurrer, therefore not applicable to the case before the Court; for a party may avail himself of many things upon a demurrer, which he cannot by a writ of error.

Mr. Buller's endeavouring to confound tran-

sitory with local action, must be my apology for mentioning another case in support of the distinction. The case I allude to is Mr. Skinner's, which was referred to the twelve judges from the council-board. In the year 1657, when trade was open to the East-Indies, he possessed himself of a house and warehouse, which he filled with goods at Jamby; and he purchased of the king of Great Jamby the islands of Baretha. The agents of the East-India company assaulted his person, seized his warehouse, carried away his goods, and took and possessed themselves of the islands of Baretha. Upon this case, it was propounded to the judges, by an order from the king in council, dated the 12th April 1665, whether Mr. Skinner could have a full relief in any ordinary court of law? Their opinion was, "that his majesty's ordinary courts of justice at Westminster can give relief for taking away and spoiling his ship, goods, and papers, and assaulting and wounding his person, notwithstanding the same was done beyond the seas: but that as to the detaining and possessing of the house and islands, in the case mentioned, he is not relievable in any ordinary court of justice."

Your lordships will collect from this case, that the twelve judges held that an action might be maintained here for spoiling his goods, and seizing his person, because an action of trespass is a transitory action; but an action could not be maintained for possessing the house and land, because it is a local action.

I trust I have proved that an action of trespass may be brought here for an injury received in Minorca; and that Mr. Fabrigas, a natural-born subject, is capable of bringing such action. The only remaining question is, whether Mr. Mostyn, as governor, can tyrannize over the innocent inhabitants within his government, in violation of law, justice, and humanity, and not be responsible in our courts to repair by a satisfaction in damages the injury he has done? Mr. Buller has contended, that general Mostyn governs as all absolute sovereigns do, and that 'stet pro ratione voluntas' is the only rule of his conduct. I did not expect to hear such an assertion advanced in this court. From whom does the governor derive this despotism? Can the king delegate absolute power to another, which he has not in himself? Can such a monster exist in the British dominions as tyranny uncontrouled by law? Mr. Buller asserts, that the governor is accountable to God alone; but this Court I hope will teach him, that he is accountable to his country here, as he must be to his God hereafter, for this wanton outrage on an unoffending subject. Many cases have been cited, and much argument adduced, to prove that a man is not responsible in an action for what he has done as a judge. I neither deny the doctrine, nor shall endeavour to impeach the cases; but I must observe, that they do not affect the present question. Did governor Mostyn sit in judgment? Did he hear any accusation? Did he examine a witness? Did he even see the prisoner? Did he follow any rule of law in any country? 'Stet pro ratione voluntas' was his law, and his mercy was twelve months banishment, to an innocent individual.

As Mr. Buller has dwelt so much upon the case of Dutton and Howell, it will be expected that I take some notice of it. I need not go over the case again, as it has been already very accurately stated; but I must beg leave to read the reasons which were given with the printed case to the Lords, before it came on to be argued in the House of Peers. It is stated, that sir Richard Dutton ought to have the judgment that was obtained against him below, reversed; for

1st, That what he did, he did as chief governor, and in a council of state, for which he ought not to be charged with an action. If he shall, it may be not only the case of sir Richard Dutton, but of any other chief governor or privy-counsellor in Scotland, Ireland, or elsewhere.

2. What was done, was in order to bring a delinquent to justice, who was tried in Barbadoes and found guilty; and if for this he shall be charged with an action, it would be a discouragement to justice.

3. What was done, was done in court; for so is a council of state, to receive complaints against state delinquents, and direct their trials in proper courts. What a judge acts in court, as sir Richard Dutton did, no action lies against him for it.

4. There never was such an action as this maintained against a governor for what he did in council; and if this be made a precedent, it will render all governments unsafe.

5. If a governor of a plantation beyond the seas shall be charged with actions here, for what he did there, it will be impossible for him to defend himself: first, for that all records and evidences are there: secondly, the laws there differ in many things from what they are here.

Though the first part of this reason seems to operate in favour of governor Mostyn, yet it goes no farther than this; that if an action is brought here, it will be impossible for him to defend himself. The latter part shews the meaning of the whole; that is, if an action is brought here against the governor for any thing done by him in his judicial capacity, then he will not be able to defend himself, because all the records and evidences are there. This clearly proves, that it refers to what he did as judge, otherwise there could have been no occasion to have mentioned the records being there.

These reasons must have been the ground of the counsel's argument, and the whole is bottomed in sir Richard Dutton's having acted with his council in a judicial capacity. I take no notice of the arguments of counsel, as reported by Shower, because it can be no authority for this court. I shall only observe, that in respect to the jurisdiction, which was

but slightly touched on, that the assertion of the counsel for the defendant in error, affirming the jurisdiction, is as good authority for me, as the denial of it by sir Richard Dutton's counsel is for Mr. Buller. The report is silent as to the grounds of the judgment: it only says, "that the action was reversed;" but not one word that the action could not be maintained. But I venture to affirm, that this case has not the least resemblance to the present. My duty calls on me to draw the invidious parallel.

Governor Dutton sat with his council, to hear and enquire in the supreme court of judicature in Barbadoes:

Governor Mostyn sat neither as a military nor a civil judge.

Mr. Fabrigas was not brought before him, neither was he accused by any man:

Sir John Witham was publicly accused before the governor and council of state:

Mr. Fabrigas was thrown into a dungeon, and treated with the most unheard-of severity:

Sir John Witham was only confined for the purpose of securing his person.

Mr. Fabrigas was banished for twelve months to the Spanish dominions:

Sir John was kept in custody for 14 days, till he could be brought to his trial:

Mr. Fabrigas, on the governor's justification, was found to be innocent:

Sir John Witham, when brought before the court of general sessions, was found guilty, and recommitted:

The governor of Barbadoes followed the laws of Barbadoes:

The governor of Minorca acted in diametrical opposition to all laws, and in violation of the natural dictates of humanity:

Sir Richard Dutton let the law take its course against a criminal:

But governor Mostyn went out of his way to persecute the innocent.

Having shewn the difference between the two cases, permit me to mention an observation of lord chief-justice de Grey, in his opinion on the motion for a new trial. "If the governor had secured him," said his lordship, "nay, if he had barely committed him, that he might have been amenable to justice, and if he had immediately ordered a prosecution upon any part of his conduct, it would have been another question: but the governor knew he could no more imprison him for a twelvemonth, (and the banishment for a year is a continuation of the original imprisonment) than that he could inflict the torture."

Lord chief-justice de Grey then undoubtedly thought that governor Mostyn had acted illegally: if so, I hope I shall be able to shew, that he is amenable to the courts of law in England.

Lord Bellamont's case, in 2 Salkeld 625, B. R. Pasch. 12 W. 3, evinces, that a governor abroad is responsible here. "The attorney-general moved for a trial at bar the last paper-day in the term, in an action against the governor of New-York, for matter done by him as governor, and granted, because the king defended it." I collect from this case, that the attorney-general knew the Court had jurisdiction, or he would not have made the motion; and the Court would not have granted it, if they had not been legally impowered to try it. The legislature, in the same year (12 W. 3, cap. 12,) enacted, that governors beyond the sea should be tried in the King's-bench, or in such county as shall be assigned by his majesty, by good and lawful men, for offences committed in their governments abroad against the king's subjects there. As, by the common law, an indictment could be preferred only in that county where the offence was committed, governors abroad were not criminally amenable till this act had passed. When the legislature so carefully provided to bring governors to justice for the offences they might commit in their governments, they would indisputably, by the same law, have protected the subjects from civil injuries, had they not known that such provision was unnecessary, and that, by the common law, all personal actions might be brought in England; of which lord Bellamont's case was a recent instance.

In Michaelmas-term, 11 Geo. 2, 1737, Stephen Conner brought an action against Joseph Sabine, governor of Gibraltar: and he stated in his declaration, that he was a master carpenter of the office of ordnance at Gibraltar; that governor Sabine tried him by a court-martial, to which he was not subject; and that he underwent the sentence of receiving 500 lashes, and that he was compelled to depart from Gibraltar, which he laid to his damage of 10,000*l*. The defendant pleaded Not Guilty, and justified by trying him by a court-martial. There was a verdict for the plaintiff, with 700*l*. damages. A writ of error was brought, and the judgment affirmed. No distinction can be made between the governor of Gibraltar and the governor of Minorca; except only, that the one tried Conner by a court-martial, and punished him by military law; while the other, without any trial, banished Mr. Fabrigas, contrary to all ideas of justice and of law.

I must now beg leave to advert to the bill of exceptions; in which it is alledged, that "Minorca is divided into four districts, exclusive of the arraval, which the witnesses always understood to be distinct from the others, and under the immediate order of the governor."

I am well aware, that I am not at liberty to go out of the record; if I was, the fact warrants me in saying, that the evidence is most untrue.

It is notorious that Minorca is divided into four terminos only; Cieutadella, Alayor, Marcadel, and Mahon, which latter includes the arraval of St. Phillip's. This is known to every man who has been at Minorca, and to every man who has read Armstrong's history of that island. That the governor has a legislative authority within the arraval, is too absurd to dwell on. By what law, by what provision,

does he claim that power? When process is executed within St. Phillip's, or its environs, the civil magistrate usually pays the governor the compliment of acquainting him with it; but the same compliment is paid to the commanding officer at Cieutadella, where an exclusive jurisdiction is not even pretended. In fact, it is a matter of civility merely, but never was a claim of right.

Lord chief justice de Grey in the solemn opinion which he gave upon the motion for a new trial, has been explicit on these two heads. "One of the witnesses in the cause (said his lordship) represented to the jury, that in some particular cases, especially in criminal matters, the governor resident upon the island does exercise a legislative power. It was gross ignorance in that person to imagine such a thing: I may say, it was impossible, that a man who lived upon the island, in the station he had done, should not know better, than to think that the governor had a civil and criminal power in him. The governor is the king's servant; his commission is from him, and he is to execute the power he is invested with under that commission, which is to execute the laws of Minorca, under such regulations as the king shall make in council. It was a vain imagination in the witnesses to say, that there were five terminos in the island of Minorca. I have at various times seen a multitude of authentic documents and papers relative to that island; and I do not believe, that, in any one of them, the idea of the arraval of St. Phillip's being a distinct jurisdiction was ever started. Mahon is one of the four terminos, and St. Phillip's, and all the district about it, is comprehended within that termino; but to suppose, that there is a distinct jurisdiction, separate from the government of the island, is ridiculous and absurd."

These were the words of lord chief justice de Grey; to which, I am confident, this Court will pay a proper attention.

The bill of exceptions then states, that general Mostyn was appointed governor by the king's commission, which gives him all the powers belonging to the said office. I wish to ask Mr. Buller, whether to persecute the innocent, and to banish those subjects committed to his care, is a power incident to or springing out of the office of governor? If it is not, the governor cannot justify himself under his commission.

It is then stated, that the king ordered "all his loving subjects in the said island to obey him, the said John Mostyn;" but nothing in particular is mentioned of the arraval. Had it been a peculiar district, under the despotic will of the governor, there must have been some notice taken of it, either in the commission, or in his majesty's orders. The governor then confesses in his bill of exceptions, "that he banished Mr. Fabrigas without any reasonable or probable cause, or any other matter alledged in his plea, or any act tending thereto." Notwithstanding which admission, in the very next sentence, he insists that the plaintiff ought to be barred his said action, although it is stated in the bill of exceptions, that "the Minorquins plead sometimes the English laws."

Were the bill of exceptions less absurd than it is, yet I should contend, that the governor, by pleading in chief, and submitting his cause to the decision of an English jury, has precluded this Court from enquiring into the original jurisdiction. Were it possible that this ground should fail me, when supported by so many great authorities, yet I should be very easy about the event; for, as an action of trespass can be brought in England for injuries abroad, and as every subject can bring that action, and as governor Mostyn (being a subject) must answer to it, I have no doubt but the judgment will be affirmed. Should it be reversed, I fear the public, with too much truth, will apply the lines of the Roman satirist on the drunken Marius to the present occasion; and they will say of governor Mostyn, as was formerly said of him,

Hic est damnatus inani judicio;

and to the Minorquins, if Mr. Fabrigas should be deprived of that satisfaction in damages which the jury gave him,

At tu victrix provincia ploras.

Mr. *Buller*. I beg leave to trouble the Court with a few words by way of reply: and though Mr. Peckham has thought fit to declaim so much upon the particular facts of this cause, yet I was confident at first, and do not now find I was deceived in thinking, I should not be contradicted in what I said about the propriety of governor Mostyn's conduct; that he had taken every precaution that a man in his situation could do, had consulted many persons there, civil and military, and that they were all unanimous in advising the governor to do what was done.

The first objection made by Mr. Peckham has been, that Mr. Mostyn should be precluded from contending that this Court hath not a jurisdiction, because he has submitted to the jurisdiction of the Court in so many instances during the whole of these proceedings. He has stated the whole proceedings during the stages of this cause, by which he supposes Mr. Mostyn hath done such acts as shall be construed into a submission to the jurisdiction of the Court, and is therefore now precluded from entering into the question. Further, Mr. Peckham has insisted upon it, that at the trial we did wrong in making a defence; because, if we meant to go into the question, whether the Court has jurisdiction or not, we should have then insisted upon a non-suit, and not gone into the merits of the cause. I do not apprehend any of the cases he has cited will come up to the present: and as to the different periods of the cause, where he supposes we have submitted to the jurisdiction of the Court, if this Court hath no jurisdiction at all, I do not know how it can then be said we have submit-

ted to it. Saying, that at the trial we should have insisted upon a non-suit, is saying we should have insisted upon what we could not demand; for it is at all times at the option of the plaintiff, whether he will submit to a non-suit or not. If the defendant can avail himself of the objection at all, it must be by entitling himself by that means to a verdict; for it is in the power of the plaintiff to get up and say, I will not be non-suited. It was impossible for us to insist upon the objection in any other way than it is now done: the objection arises out of the facts of the case, and what was proved at the trial. It was there proved, that Mr. Mostyn was the governor; that what he did was in that character; and therefore, says he, these facts being proved, I insist I am not answerable in a court of justice in England, for what I have done in this character: therefore the objection would have been improper, if it had come at any other time; it could only come when these facts appeared in evidence upon which this objection was founded. As to the many cases that have been cited, I believe I may safely give this general answer to them all: they are cases where an action has been brought in a court in England, for a transaction arising in England, but, on account of a charter or statute, the jurisdiction of the superior court has been excluded. Where that is so, and this Court has a general superintendent jurisdiction, but it is taken away by a particular law, in such case it is necessary to plead to the jurisdiction: but when the question arises upon a transaction happening in foreign parts, and where the courts of England cannot have any controul whatsoever, suppose, for instance, in France, where the king or parliament of England can make no laws to bind the inhabitants, it is just the same as a court of inferior record in England, where it holds plea of a thing done out of their jurisdiction. In that case, if it appears upon the proceedings that the cause of action arose out of the jurisdictions, the whole proceedings are void; they are *coram non judice;* and an action will lie against the party, the officers and the judges, for what is done under them.

In this case, as I submit to your lordship, the question is the same; because it is not on a transaction happening within the limits, or within the country where this Court resides or has a jurisdiction, but on a transaction arising in foreign dominions. I beg leave to mention too, that if these cases were so very general as Mr. Peckham wishes to have them understood, it is not possible that the case in Latch, or the case in Lutwyche, ever could have existed; because, if it was to hold as a general rule, that where the cause of action arises out of the kingdom you must plead to the jurisdiction, it would have been a sufficient answer in those cases to say, it was not so pleaded. In the case in Lutwyche, there was a plea in bar, and demurrer to that plea; but it appearing, that the cause of action did not arise in this kingdom, but in foreign parts, the Court agreed, that the supposition and quaint legal fiction, which otherwise would avail, that it was in London or England, was absurd, and the plaintiff could not support his action. It was the same in the case in Latch; for that was not on a plea to the jurisdiction, but the objection arose long after, and in a subsequent period of the cause: the judges there agreed, that if it appeared on the record, that the case was plainly and evidently out of their jurisdiction, they were bound to take notice of it.

Mr. Peckham has divided his argument into three heads: first, whether a transitory action is capable of being brought in England, if the cause of that action arise beyond the seas: secondly, whether the plaintiff is capable of bringing such action: and, in the third place, whether the defendant is a proper object of it. On the first of these questions it has been insisted, that an action of false imprisonment is a transitory action; and some cases cited, where transitory actions, arising abroad, are holden to be maintainable here. An action of false imprisonment certainly is a transitory action: but, my lord, the cases cited from 12th Co. and Co. Lit. were not cases of action for false imprisonment, but debt upon bond. These cases were where the law, in the different countries, was the same; and they therefore come within the distinction laid down in the case before lord Camden. For, where the law of the different countries is the same, this Court may hold plea; it may do as much justice as the foreign courts, and can be involved in no difficulty with respect to the rules by which they are to decide. But in the case of transactions arising in foreign dominions, where the law of the foreign country is different from the law of this kingdom, this Court has no way of informing themselves what the foreign law is, nor can they know what rules to decide by; and therefore every inconvenience arises against their entertaining such a suit. Mr. Peckham then cited the case of Parker against lord Clive, in this court, and observed, that there never was any objection taken there, that the action would not lie. That case is different from the present. That was a case between English subjects, and a case that was to be determined, not by the law of the East Indies, (for that was not set up as a defence, or at all intermixed with the case) but by the law of England; and therefore is still within the distinction I have laid down and endeavoured to support. Then the second question Mr. Peckham has made is, whether the plaintiff can maintain this action? The plaintiff, he says, is not an alien, but a natural-born subject, and as such he owes allegiance, and is entitled to protection; and that the king of England can protect only by the laws of England, and therefore this man has a right to bring his action here. The proposition will itself shew how enormous it would be, if it were to hold in this case. How is the king to rule by the laws of England? Is it meant that this case is to be determined by the laws of England? If so, that would be injustice in the most

glaring light; because it would be condemning the defendant by one law, when he was bound to regulate his conduct by a different. But it is not true that the king of England can protect by the laws of England only; for, in other places, a transaction must be tried by the laws of that place where it arises; and the king can, in other places, govern by other laws than those of England: and I contend, this question must be determined by such laws, and not by the laws of this country. Mr. Peckham has then insisted, that this is a case between subject and subject. If he means it is between subject and subject, speaking of the king of England, it is true; but Fabrigas is not a subject of this realm, nor subject to be governed by the laws of this country, and therefore shall not avail himself of the laws of this country. The case in Salkeld, 404, was then cited, where the Court of Chancery proceeded against a foreigner; and the reason there given for so doing is, because that Court acts *in personam*. But, my lord, that case does not appear to be at all blended with foreign law; nor is any thing there stated, which called on the Court to determine that case by any other law than the known laws of this country, and the rules of their own court. The case in the 4th Institute was then endeavoured to be distinguished from the present, by insisting, that the subject-matter of that case was local: but that answer cannot hold. If it had been an action in a court of law, the answer would have been a good one; because an action of dower is local, and can only be tried in the county where the land lies; but that was a suit in Chancery, and not an action; and, as is said in the case cited from Salkeld, the Court of Chancery don't proceed against the thing, but against the person.

Then the last question that has been made is, whether the defendant in this case is the proper subject of an action? My lord, Mr. Peckham has observed, I said the governor was absolute; but that he insists is impossible, because there is no person who could delegate such an authority to him; that if he derived such authority from any one, it must be from the king; but the king, not being absolute himself, could not grant such authority to Mr. Mostyn. If it be meant only, that the king is not absolute in this country, I most readily accede to the proposition; but what the constitution of this country is, can be no argument to prove what is the state or constitution of Minorca. That Minorca is of a different constitution, and is governed by different laws from what prevail in this country, is stated in the record; which record is decisive upon that point, for the Court cannot depart from it. It is there stated, that the arraval of St. Phillip's is subject to the immediate order of the governor, and to his order and direction only; for no judge, either criminal or civil, can interfere, or has any jurisdiction there, unless under his express leave: therefore the argument, as to the authority or power of the king here, is totally foreign to the situation of the governor of Minorca, or the power or jurisdiction he has there. Then it is said, it does not appear on the record, that the defendant did act as judge. This also must be decided by the record; and it is there stated, that the defendant was governor, and so being governor he caused the plaintiff to be taken, imprisoned, &c. The case of Dutton *v.* Howell has been much observed upon, and the printed reasons given in that case particularly stated; but I do not perceive the case has been distinguished from the present. Some of the reasons alledged for the defendant there, are equally strong in favour of the present defendant. It is said, there never was such an action maintained before; and if a governor beyond sea be charged here, he cannot defend himself, because all the records and evidence are there. Mr. Peckham has not been able to produce one case, in which such an action as this has been maintained before. But then another distinction he endeavoured to avail himself of is, that, in the case of Dutton and Howell, the action was for an act done in council, and therefore varied from this case, because here there was no council at all. I cannot see how that difference will at all avail Mr. Peckham's client. In the first place, in Barbadoes, there was a council, and the governor had no power without the council; but is that the case here? In Minorca, there is no council at all; and therefore, in this case, the governor stands in the same situation as the governor and council of Barbadoes. As to the necessity of pleading in abatement to the jurisdiction, it is very observable, that in the case of Dutton *v.* Howell, the counsel who argued in that case do not venture to rely upon that objection. But they insist further, that the jurisdiction cannot be examined in the Exchequer chamber, because both the statute and writ of error expressly provide against it: and therefore, say they, it is questionable, whether it can be insisted upon in the House of Lords: and it is admitted by them, that a question might have been made on the trial of an issue, if one had been joined. However, that question was gone into in the House of Lords, and the final decision of the cause appears from the book; namely, that the judgment in that case was for the defendant, and that the action could not be maintained. Then the words of lord chief justice de Grey, in this present cause, upon a motion for a new trial, have been much relied upon; and his lordship is made to say, that if the governor had secured the present plaintiff, merely for the sake of a trial, it would be a different affair. In this case, I apprehend it would be quite sufficient for me, if the governor had a power of committing at all; for if he had, that is sufficient to prevent the defendant's being a trespasser by such commitment: and the reasonableness of the time for which he was committed, would be a very different question; for, if the governor had a power of committing, he has pursued that power, and then this action cannot be main-

tained. The next case that has been cited, is lord Bellamont's case in 2d Salkeld, which was an action against a governor for what he did in that character: but that is simply a motion for a trial at bar. The merits of the case, or the propriety of the action, were not before the Court, or at all entered into; nor was any objection made to the jurisdiction of the Court; and where a thing is not objected to, the case can never be an authority on the point: there is not one syllable said about it; and therefore that case cannot have the least weight whatsoever respecting this question. Then Mr. Peckham cited the statute of the 12th of William the third: but that was admitted by him to extend only to criminal prosecutions at the king's suit, and therefore can have nothing to do with the present question. The case of Conner against Sabine is as different from this case, as any one case can be from another. There the defence was put upon the ground, that the plaintiff was amenable to a court-martial. The fact turned out otherwise: they stated a limited jurisdiction, and it appeared the plaintiff was not the object of that jurisdiction. Then it is said, that Minorca is not a military camp, but that there are judges both criminal and civil. Here again I must have recourse to the record itself; for there it is stated, that within the arraval of St. Phillip's, where this transaction occurred, there is no judge either criminal or civil; there is no power but that of the governor. Mr. Peckham observed, that it is stated in the record, that the inhabitants sometimes claim protection from the law of England, as well as the law of Spain. It is so stated; but what is said further? Not that they ever have it allowed to them, or that they are governed by it; but it is expressly stated, that they are in general governed by the law of Spain: therefore the record does not prove, that the people in Minorca are governed by the same laws as the people here; but it does prove, that they are governed by laws which are totally different, and that within the arraval of St. Phillip's, the will of the governor is the law. Mr. Peckham then attacks the veracity of the record with respect to the different districts which there are within the island; and has insisted, that though in the execution of process, &c. the law-officers may consult the governor, or inform him what they are going to do, yet that they are not bound by law to do so. My lord, the record must, in these aspects, also decide for us. It is there stated what the districts are; that the arraval of St. Phillip's is distinct from the others; and that no magistrates can come there, nor can any process be executed there, without the governor's particular leave. Mr. Peckham asks, where is the authority that enables a governor to banish an innocent man? In the first place, as to his being an innocent man, it is not competent to this Court to enquire whether he was innocent or not, or whether the governor was strictly justifiable or not; but it is sufficient to prove, that the governor had an authority to imprison. That authority appears upon the face of the record; for it is there stated that he was governor, and had every power, civil and military, and that all he did was in the character of a governor. These facts being proved, I submit are a sufficient bar to this action, and the Court cannot go into the question, whether the plaintiff was innocent or guilty. The last argument that has been relied upon by Mr. Peckham is, some other expressions of lord chief justice de Grey, in the course of this cause; in which his lordship said, that the witnesses must have been mistaken in the account they gave of the constitution and law of the island. Here it is impossible for the Court to go out of the record: but these observations of lord chief justice de Grey go certainly a great way towards proving the impropriety of maintaining such an action here as the present. If the account given by lord chief justice de Grey of the island be true, and I make no doubt it is, the consequence is this: that even though all the evidence was obtained in this cause that could be had; though persons were called as witnesses, who, from their situation, and the departments they had officiated in, were most likely to be conversant with the law and constitution of the island; yet that all the accounts that have been given are imperfect, erroneous, and unworthy of credit. That is the strongest evidence of the impropriety of maintaining such an action as this in England. For if, as lord chief justice de Grey says, the evidence that has been given of the foreign law in this case is not to be relied upon, but is all a mistake; it may happen, and it must naturally be expected, that in every case which is brought here from foreign dominions, where the cause of action arises abroad, all the evidence is abroad, and the Court can get no other evidence of the law of the place than the loose opinions of those who have occasionally been there; and the courts here having no established legal mode of obtaining certificates from such country, properly authenticated, to say what the law there is, the same mistakes and inconvenience will arise.

Therefore, on the whole, I trust the Court will be of opinion, that this action is improper, and ought not to be maintained here.

Lord *Mansfield*. Let it stand for another argument. It has been extremely well argued on both sides.

On Friday the 27th January, 1775, it was very ably argued by Mr. Serjeant Glynn, on the part of Mr. Fabrigas, and by Mr. Serjeant Walker, on behalf of governor Mostyn: but as no new cases were cited, we shall proceed to give the Judgment of the Court of King's-bench, which was in substance as follows:

Lord *Mansfield*. This was an action for an assault and false imprisonment by the defendant upon the plaintiff. And part of the com-

the will, as to pass them? It clearly does; because no precise form of words is necessary; but any which denote the continuance of the testator's mind, are sufficient. Here the codicil has an express reference to the will, and in terms ratifies and confirms every gift in it.

In *Heylin* v. *Heylin* * argued in this Court last term, it was adjudged, that the circumstance of a testator's expunging a legacy, coupled with an intermediate purchase and surrender of copyhold lands to the uses of his will, amounted to a republication so as to pass such newly purchased copyhold lands. In *Potter* v. *Potter*, 1 Vez. 438, the testator by a second codicil, on a separate piece of paper, and without date, revoked so much of his will as should be found to be inconsistent with such codicil, and confirmed the rest. It was held by Sir J. Strange Master of the Rolls, that this latter codicil was a republication, so as to pass lands only contracted for at the date of the testator's will under **[160]** the general words contained in the will, even if they had not passed before; which, however, his Honour inclined to think they had.

Here the testator directs the codicil to be annexed to his will; clearly, therefore, it is a republication; and consequently the after purchased copyhold lands pass under the general residuary devise.

Mr. Mansfield for the defendant. The copyhold lands descend to the heir at law. At the date of the will the testator had no copyhold estate: clearly therefore he had no intention to pass any copyhold estate to the devisee. He afterwards purchases the copyholds in question, and surrenders them "to such uses as he shall declare by his last will;" not to the uses "declared or to be declared by his last will," as was the case of *Heylin* v. *Heylin*; and the ground upon which that case was decided; namely, that it was a republication by reference to uses already declared by a will then existing. He then makes a codicil, whereby he ratifies and confirms every gift in his will, except what he had particularly altered by it. This is a ratification only of what he had before expressly given by his will, and nothing else. But the will contains no gift or devise of any copyhold lands, nor does the codicil refer to any. On the contrary, it is clear that the only object the testator had, in adding the codicil, was, to make the particular alteration there mentioned; consequently the copyhold lands are undisposed of, and the heir at law is entitled to them by descent.

Mr. Lee was going to reply: but Lord Mansfield asked him, if he had seen the case of *Acherley* v. *Vernon*, as reported in Comyn, 383, where the testator by a codicil, reciting, that he had made his said will, adds "I hereby ratify and confirm my said will, except in the alterations after mentioned;" and Lord Chancellor Macclesfield decreed, that the will was confirmed by the codicil; that the testator signing and publishing his codicil in the presence of three witnesses was a republication of his will, and both together made but one will; and by the said will and codicil his fee-farm rents, and assart rents purchased after the will did well pass. Lord Mansfield said this case was decisive of the question.

Aston Justice. It is an authority exactly in point. Mr. Justice Willes and Mr. Justice Ashhurst concurred.

Per Cur. Let the postea be delivered to the plaintiff.

[161] MOSTYN *versus* FABRIGAS. Tuesday, Nov. 14th, 1774. Trespass and false imprisonment lies in England by a native Minorquin, against a governor of Minorca, for such injury committed by him in Minorca.

[S. C. Sm. L. C. (1903 ed.) vol. 1, p. 591. Dictum disapproved, *Hill* v. *Bigge*, 1841, 3 Moo. P. C. 476. Referred to, *Hart* v. *Gumpach*, 1872, L. R. 4 P. C. 464; *Musgrave* v. *Pulido*, 1879, 5 App. Cas. 107; *In re Hawthorne*, 1883, 23 Ch. D. 747; *Ewing* v. *Orr-Ewing*, 1885, 10 App. Cas. 522; *Companhia de Moçambique* v. *British South Africa Company* [1892], 2 Q. B. 361; [1893], A. C. 602; *Adam* v. *British and Foreign Steamship Company* [1898], 2 Q. B. 432.]

On the 8th of June, in last term, Mr. Justice Gould came personally into Court, to acknowledge his seal affixed to a bill of exceptions in this case; and errors having been assigned thereupon, they were now argued.

This was an action of trespass, brought in the Court of Common Pleas by Anthony

* Ante, 130.

Fabrigas against John Mostyn, for an assault and false imprisonment; in which the plaintiff declared, that the defendant on the first of September, in the year 1771, with force and arms, &c. made an assault upon the said Anthony, at Minorca, (to wit) at London aforesaid, in the parish of St. Mary le Bow, in the ward of Cheap, and beat, wounded, and ill-treated him, and then and there imprisoned him, and kept and detained him in prison there for a long time, (to wit) for the space of ten months, without any reasonable or probable cause, contrary to the laws and customs of this realm, and against the will of the said Anthony, and compelled him to depart from Minorca aforesaid, where he was then dwelling and resident, and carried, and caused to be carried, the said Anthony from Minorca aforesaid, to Carthagena, in the dominions of the King of Spain, &c. to the plaintiff's damage of 10,000l.

The defendant pleaded 1st. Not guilty; upon which issue was joined. 2dly. A special justification, that the defendant at the time, &c. and long before, was Governor of the said island of Minorca, and during all that time was invested with, and did exercise all the powers, privileges, and authorities, civil and military, belonging to the government of the said island of Minorca, in parts beyond the seas; and the said Anthony, before the said time when, &c. (to wit) on the said first of September, in the year aforesaid, at the island of Minorca aforesaid, was guilty of a riot, and was endeavouring to raise a mutiny among the inhabitants of the said island, in breach of the peace: whereupon the said John so being Governor of the said island of Minorca as aforesaid, at the said time, when, &c. in order to preserve the peace and government of the said island, was obliged to, and did then and there order the said Anthony to be banished from the said island of Minorca; and in order to banish the said Anthony, did then and there gently lay hands upon the said Anthony, and did then and there seize and arrest him, and did **[162]** keep and detain the said Anthony, before he could be banished from the said island, for a short space of time, (to wit) for the space of six days, then next following; and afterwards, to wit, on the 7th of September, in the year aforesaid, at Minorca aforesaid, did carry, and cause to be carried, the said Anthony, on board a certain vessel, from the island of Minorca aforesaid, to Carthagena aforesaid, as it was lawful for him to do, for the cause aforesaid; which are the same making the said assault upon the said Anthony, in the first count of the said declaration mentioned, and beating, and ill-treating him, and imprisoning him, and keeping and detaining him in prison for the said space of time, in the said first count of the said declaration mentioned, and compelling the said Anthony to depart from Minorca aforesaid, and carrying and causing to be carried the said Anthony from Minorca to Carthagena, in the dominions of the King of Spain, whereof the said Anthony has above complained against him, and this he is ready to verify; wherefore he prays judgment, &c. without this, that the said John was guilty of the said trespass, assault, and imprisonment, at the parish of St. Mary le Bow, in the ward of Cheap, or elsewhere, out of the said island of Minorca aforesaid. Replication de injuria suâ propriâ absq. tali causâ. At the trial the jury gave a verdict for the plaintiff, upon both issues, with 3000l. damages, and 90l. costs.

The substance of the evidence, as stated by the bill of exceptions, was as follows: On behalf of the plaintiff, that the defendant, at the island of Minorca on the 17th of September 1771, seized the plaintiff, and, without any trial, imprisoned him for the space of six days against his will, and banished him for the space of twelve months from the said island of Minorca to Carthagena in Spain. On behalf of the defendant; that the plaintiff was a native of Minorca, and at the time of seizing, imprisoning, and banishing him as aforesaid, was an inhabitant of and residing in the Arraval of St. Phillip's, in the said island; that Minorca was ceded to the Crown of Great Britain, by the Treaty of Utrecht, in the year 1713. That the Minorquins are in general governed by the Spanish laws, but when it serves their purpose plead the English laws; that there are certain magistrates, called the Chief Justice Criminal, and the Chief Justice Civil, in the said island: that the said island is divided into four districts, exclusive of the Arraval of St. Phillip's; which the witness always understood to be separate and distinct from **[163]** the others, and under the immediate order of the governor; so that no magistrate of Mahon could go there to exercise any function, without leave first had from the governor: that the Arraval of St. Phillip's is surrounded by a line wall on one side, and on the other by the sea, and is called the Royalty, where the governor has greater power than any where else in the island; and where the Judges cannot interfere but by the governor's consent; that nothing

can be executed in the Arraval but by the governor's leave, and the Judges have applied to him the witness, for the governor's leave to execute process there. That for the trial of murder and other great offences committed within the said Arraval, upon application to the governor, he generally appoints the assesseur criminal of Mahon, and for lesser offences, the mustastaph; and that the said John Mostyn, at the time of the seizing, imprisoning, and banishing the said Anthony, was the Governor of the said island of Minorca, by virtue of certain letters patent of His present Majesty. Being so governor of the said island, he caused the said Anthony to be seized, imprisoned, and banished, as aforesaid, without any reasonable or probable cause, or any other matter alleged in his plea, or any act tending thereto.

This case was argued this term, by Mr. Buller, for the plaintiff in error, and Mr. Peckham, for the defendant. Afterwards, in Hilary term 1775, by Mr. Serjeant Walker, for the plaintiff, and Mr. Serjeant Glynn, for the defendant.

For the plaintiff in error. There are two questions, 1st, whether in any case an action can be maintained in this country for an imprisonment committed at Minorca, upon a native of that place?

2dly. Supposing an action will lie against any other person, whether it can be maintained against the governor, acting as such, in the peculiar district of the Arraval of St. Phillip's?

In the discussion of both these questions, the constitution of the island of Minorca, and of the Arraval of St. Phillip's, are material. Upon the record it appears, that by the Treaty of Utrecht, the inhabitants had their own property and laws preserved to them. The record further states, that the Arraval of St. Phillip's, where the present cause of action arose, is subject to the immediate controul and order of the governor only, and that no Judge of the island can execute any function there, without the particular leave of the governor for that purpose. 1st. If that be so, and the lex loci differs from the law of this coun-**[164]**-try; the lex loci must decide, and not the law of this country. The case of *Robinson* versus *Bland*, 2 Bur. 1078, does not interfere with this position; for the doctrine laid down in that case is, that where a transaction is entered into between British subjects, with a view to the law of England, the law of the place can never be the rule which is to govern. But where an act is done, as in this case, which by the law of England would be a crime, but in the country where it is committed, is no crime at all, the lex loci cannot be the rule. It was so held by Lord C. J. Pratt, in the case of *Pons* versus *Johnson*, and in a like case of *Ballister* versus *Johnson*, sittings after Trinity term 1765.

2d. In criminal cases, an offence committed in foreign parts, cannot, except by particular statutes, be tried in this country. 1st. Vezey, 246, *The East India Company* versus *Campbell*. If crimes committed abroad cannot be tried here, much less ought civil injuries, because the latter depend upon the police and constitution of the country where they occur, and the same conduct may be actionable in one country, which is justifiable in another. But in crimes, as murder, perjury, and many other offences, the laws of most countries take for their basis the law of God, and the law of nature; and therefore, though the trial be in a different country from that in which the offence was committed, there is a greater probability of distributing equal justice in such cases than in civil actions. In Keilwey, 202, it was held that the Court of Chancery cannot entertain a suit for dower in the Isle of Man, though it is part of the territorial dominions of the Crown of England. 3d. The cases where the Courts of Westminster have taken cognizance of transactions arising abroad, seem to be wholly on contracts, where the laws of the foreign country have agreed with the laws of England, and between English subjects; and even there it is done by a legal fiction; namely, by supposing under a videlicet, that the cause of action did arise within this country, and that the place abroad, lay either in London or in Islington. But where it appears upon the face of the record, that the cause of action did arise in foreign parts, there it has been held that the Court has no jurisdiction. 2 Lutw. 946. Assault and false imprisonment of the plaintiff, at Fort St. George, in the East Indies, in parts beyond the seas; viz. at London, in the parish of St. Mary le Bow, in the ward of Cheap. It was resolved, by the whole Court, that the declaration was ill, because the tres-**[165]**-pass is supposed to be committed at Fort St. George, in parts beyond the seas, videlicet, in London; which is repugnant and absurd: and it was said, by the Chief Justice, that if a bond bore date at Paris, in the kingdom of France, it is not triable here. In the present case, it does appear upon the record, that the offence

complained of was committed in parts beyond the seas, and the defendant has concluded his plea with a traverse, that he was not guilty in London, in the parish of St. Mary le Bow, or elsewhere, out of the island of Minorca. Besides, it stands admitted by the plaintiff; because if he had thought fit to have denied it, he should have made a new assignment, or have taken issue on the place. Therefore as Justice Dodderidge says, in Latch, 4, the Court must take notice, that the cause of action arose out of their jurisdiction.

Before the Statute of Jeofails, even in cases the most transitory, if the cause of action was laid in London, and there was a local justification, as at Oxford, the cause must have been tried at Oxford, and not in London. But the Statute of Jeofails does not extend to Minorca: therefore this case stands entirely upon the common law; by which the trial is bad, and the verdict void.

The inconveniences of entertaining such an action in this country are many, but none can attend the rejecting it. For it must be determined by the law of this country, or by the law of the place where the act was done. If by our law, it would be the highest injustice, by making a man who has regulated his conduct by one law, amenable to another totally opposite. If by the law of Minorca, how is it to be proved? There is no legal mode of certifying it, no process to compel the attendance of witnesses, nor means to make them answer. The consequence would be to encourage every disaffected or mutinous soldier to bring actions against his officer, and to put him upon his defence without the power of proving either the law or the facts of his case.

II. point. If an action would lie against any other person, yet it cannot be maintained against the Governor of Minorca, acting as such, within the Arraval of St. Phillip's.

The Governor of Minorca, at least within the district of St. Phillip's, is absolute: both the civil and criminal jurisdiction vest in him as the supreme power, and as such he is accountable to none but God. But supposing he were not absolute, in this case, the act complained of was done by him in a judicial ca-[166]-pacity as criminal Judge; for which no man is answerable. 1 Salk. 396, *Groenvelt* versus *Burwell*. 2 Mod. 218. Show. Parl. Cases 24, *Dutton* versus *Howell*, are in point to this position; but more particularly the last case; where in trespass, assault, and false imprisonment, the defendant justified as Governor of Barbadoes, under an order of the Council of State in Barbadoes, made by himself and the council, against the plaintiff (who was the deputy governor), for-mal-administration in his office; and the House of Lords determined, that the action would not lie here. All the grounds and reasons urged in that case, and all the inconveniences pointed out against that action, hold strongly in the present. This is an action brought against the defendant for what he did as Judge; all the records and evidence which relate to the transaction are in Minorca, and cannot be brought here; the laws there are different from what they are in this country; and as it is said in the conclusion of that argument, government must be very weak indeed, and the persons intrusted with it very uneasy, if they are subject to be charged with actions here, for what they do in that character in those countries. Therefore, unless that case can be materially distinguished from the present, it will be an authority, and the highest authority that can be adduced, to shew that this action cannot be maintained; and that the plaintiff in error is entitled to the judgment of the Court.

Mr. Peckham, for the defendant in error. 1st. The objection to the jurisdiction is now too late; for wherever a party has once submitted to the jurisdiction of the Court, he is for ever after precluded from making any objection to it. Year Book 22 H. 6, fol. 7. Co. Litt. 127 b. T. Raym. 34. 1 Mod. 81. 2 Mod. 273. 2 Lord Raym. 884. 2 Vern. 483.

Secondly, an action of trespass can be brought in England for an injury done abroad. It is a transitory action, and may be brought any where. Co. Litt. 282. 12 Co. 114. Co. Litt. 261 b. where Lord Coke says, that an obligation made beyond seas, at Bourdeaux in France, may be sued here in England, in what place the plaintiff will. Captain Parker brought an action of trespass and false imprisonment against Lord Clive for injuries received in India, and it was never doubted but that the action did lie. And at this time there is an action depending between Gregory Cojimaul, an Armenian merchant, and Governor Verelst, in which the cause of action arose in Bengal. A bill was filed by the governor in the Exchequer for an injunction, which

was [167] granted; but on appeal to the House of Lords, the injunction was dissolved; therefore the Supreme Court of Judicature, by dissolving the injunction, acknowledged that an action of trespass could be maintained in England, though the cause of action arose in India.

Thirdly, there is no disability in the plaintiff which incapacitates him from bringing this action. Every person born within the ligeance of the King, though without the realm, is a natural born subject, and as such, is entitled to sue in the King's Courts. Co. Lit. 129. The plaintiff, though born in a conquered country, is a subject, and within the ligeance of the King. 2 Burr. 858.

In 1 Salk. 404, upon a bill to foreclose a mortgage in the island of Sarke, the defendants pleaded to the jurisdiction, viz. that the island was governed by the laws of Normandy, and that the party ought to sue in the Courts of the island, and appeal. But Lord Keeper Wright overruled the plea; "otherwise there might be a failure of justice if the Chancery could not hold plea in such case, the party being here." In this case both the parties are upon the spot. In the case of *Ramkissenseat* v. *Barker*, upon a bill filed against the representatives of the Governor of Patna, for money due to him as his banyan; the defendant pleaded, that the plaintiff was an alien born, and an alien infidel, and, therefore, could have no suit here. But Lord Hardwicke said, "As the plaintiff's was a mere personal demand, it was extremely clear that he might bring a bill in this Court;" and he overruled the defendant's plea without hearing one counsel on the other side.

The case of *The Countess of Derby*, Keilwey, 202, does not affect the present question; for that was a claim of dower, which is a local action, and cannot, as a transitory action, be tried anywhere. The other cases from Latch and Lutwyche, were either local actions, or questions upon demurrer; therefore not applicable to the case before the Court; for a party may avail himself of many things upon a demurrer, which he cannot by a writ of error. The true distinction is between transitory and local actions; the former of which may be tried any where; the latter cannot, and this is a transitory action. But there is one case which more particularly points out the distinction, which is the case of Mr. Skinner, referred to the twelve Judges from the Council Board. In the year 1657, when trade was open to the East Indies, he possessed himself of a house and warehouse, which he filled [168] with goods at Jamby, and he purchased of the King at Great Jamby the islands of Baretha. The agents of the East India Company assaulted his person, seised his warehouse, carried away his goods, and took and possessed themselves of the islands of Baretha. Upon this case it was propounded to the Judges, by an order from the King in Council, dated the 12th April, 1665, "whether Mr. Skinner could have a full relief in any ordinary Court of Law?" Their opinion was, "that His Majesty's ordinary Courts of Justice at Westminster can give relief for taking away and spoiling his ship, goods and papers, and assaulting and wounding his person, notwithstanding the same was done beyond the seas. But that as to the detaining and possessing of the house and islands in the case mentioned, he is not relievable in any ordinary Court of Justice." It is manifest from this case that the twelve Judges held, that an action might be maintained here for spoiling his goods, and seizing his person, because an action of trespass is a transitory action; but an action could not be maintained for possessing the house and land, because it is a local action.

4th point. It is contended that General Mostyn governs as all absolute Sovereigns do, and that stet pro ratione voluntas is the only rule of his conduct. From whom does the governor derive this despotism? Not from the King, for the King has no such power, and, therefore, cannot delegate it to another. Many cases have been cited and much argument has been adduced, to prove that a man is not responsible in an action for what he has done as a Judge; and the case of *Dutton* v. *Howell* has been much dwelt upon; but that case has not the least resemblance to the present. The ground of that decision was, that Sir John Dutton was acting with his council in a judicial capacity, in a matter of public accusation, and agreeable to the laws of Barbadoes, and only let the law take its course against a criminal. But Governor Mostyn neither sat as a military or as civil Judge; he heard no accusation, he entered into no proof; he did not even see the prisoner; but in direct opposition to all laws, and in violation of the first principles of justice, followed no rule but his own arbitrary will, and went out of his way to persecute the innocent. If that be so, he is responsible for the injury he has done: and so was the opinion of the Court of C. B.

as delivered by Lord Chief Justice de Grey on the motion for a new trial. If the governor had secured him, said his Lordship, nay, if he had barely committed him, that he might have been amenable to **[169]** justice; and if he had immediately ordered a prosecution upon any part of his conduct, it would have been another question; but the governor knew he could no more imprison him for a twelvemonth (and the banishment for a year is a continuation of the original imprisonment) than that he could inflict the torture. *Lord Bellamont's case*, 2 Salk. 625. Pas. 12 W. 3, is a case in point to shew that a governor abroad is responsible here: and the Stat. 12 W. 3 passed the same year for making governors abroad amenable here in criminal cases, affords a strong inference that they were already answerable for civil injuries, or the Legislature would at the same time have provided against that mischief. But there is a late decision not distinguishable from the case in question. *Comyn* v. *Sabine*, Governor of Gibraltar, Mich. 11 Geo. 2. The declaration stated, that the plaintiff was a master carpenter of the office of Ordnance at Gibraltar, that Governor Sabine tried him by a court martial to which he was not subject, that he underwent a sentence of 500 lashes; and that he was compelled to depart from Gibraltar, which he laid to his damage of 10,000l. The defendant pleaded not guilty, and justified under the sentence of the court martial. There was a verdict for the plaintiff, with 700l. damages. A writ of error was brought, but the judgment affirmed.

With respect to the Arraval of St. Philip's being a peculiar district under the immediate authority of the governor alone, the opinion of Lord Chief Justice de Grey upon the motion for a new trial is a complete answer: "One of the witnesses in the cause (said his Lordship) represented to the jury, that in some particular cases, especially in criminal matters, the governor resident upon the island does exercise a legislative power. It was gross ignorance in that person to imagine such a thing; I may say it was impossible, that a man who lived upon the island in the station he had done, should not know better, than to think that the governor had a civil and criminal power in him. The governor is the King's servant; his commission is from him, and he is to execute the power he is invested with under that commission; which is, to execute the laws of Minorca, under such regulations as the King shall make in Council. It was a vain imagination in the witnesses to say, that there were five terminos in the island of Minorca; I have at various times, seen a multitude of authentic documents and papers relative to that island, and I do not believe that in any one of them, the idea of the Arraval of St. Phillip's being **[170]** a distinct jurisdiction, was ever started. Mahon is one of the four terminos, and St. Philip's and all the district about it, is comprehended within that termino; but to suppose that there is a distinct jurisdiction, separate from the government of the island, is ridiculous and absurd." Therefore, as the defendant by pleading in chief, and submitting his cause to the decision of an English jury, is too late in his objection to the jurisdiction of the Court; as no disability incapacitates the plaintiff from seeking redress here; and as the action which is a transitory one is clearly maintainable in this country, though the cause of action arose abroad, the judgment ought to be affirmed. Should it be reversed, I fear the public, with too much truth, will apply the lines of the Roman satyrist on the drunken Marius to the present occasion; and they will say of Governor Mostyn, as was formerly said of him,

Hic est damnatus inani judicio;

and to the Minorquins, if Mr. Fabrigas should be deprived of that satisfaction in damages which the jury gave him,

At tu victrix provincia ploras.

Lord Mansfield.—Let it stand for another argument. It has been extremely well argued on both sides.

On Friday 27th January, 1775, it was very ably argued by Mr. Serjeant Glynn, for the plaintiff, and by Mr. Serjeant Walker for the defendant.

Lord Mansfield.—This is an action brought by the plaintiff against the defendant, for an assault and false imprisonment; and part of the complaint made being for banishing him from the island of Minorca to Carthagena in Spain, it was necessary for the plaintiff, in his declaration, to take notice of the real place where the cause of action arose: therefore, he has stated it to be in Minorca; with a videlicet, at London, in the parish of St. Mary le Bow, in the ward of Cheap. Had it not been for that

particular requisite, he might have stated it to have been in the county of Middlesex. To this declaration the defendant put in two pleas. First, "not guilty;" secondly, that he was Governor of Minorca by letters patent from the Crown; that the plaintiff was raising a sedition and mutiny; and that in consequence of such sedition and mutiny, he did imprison him, and send him out of the island; which as governor, being invested with all the privileges, rights, &c. of governor, he alleges he had a right to do. To this plea the plaintiff does not demur, nor does he deny that it would be a justification in case it were true: but he denies the truth of the fact, and puts in issue whether the [171] fact of the plea is true. The plea avers that the assault for which the action was brought arose in the island of Minorca, out of the realm of England and no where else. To this the plaintiff has made no new assignment, and therefore by his replication he admits the locality of the cause in action.

Thus it stood on the pleadings. At the trial the plaintiff went into the evidence of his case, and the defendant into evidence of his; but on behalf of the defendant, evidence different from the facts alleged in this plea of justification was given, to shew that the Arraval of St. Phillips, where the injury complained of was done, was not within either of the four precincts, but is a district of itself more immediately under the power of the governor; and that no Judge of the island can exercise jurisdiction there, without a special appointment from him. Upon the facts of the case the Judge left it to the jury, who found a verdict for the plaintiff, with 3000l. damages. The defendant has tendered a bill of exceptions, upon which bill of exceptions the cause comes before us: and the great difficulty I have had upon both the arguments, has been to be able clearly to comprehend what the question is, which is meant seriously to be brought before the Court.

If I understand the counsel for Governor Mostyn right, what they say is this: the plea of not guilty is totally immaterial; and so is the plea of justification: because upon the plaintiff's own shewing it appears, 1st, that the cause of action arose in Minorca, out of the realm; 2dly, that the defendant was Governor of Minorca, and by virtue of such his authority imprisoned the plaintiff. From thence it is argued, that the Judge who tried the cause ought to have refused any evidence whatsoever, and to have directed the jury to find for the defendant: and three reasons have been assigned. One, insisted upon in the former argument, was, that the plaintiff, being a Minorquin, is incapacitated from bringing an action in the King's Courts in England. To dispose of that objection at once, I shall only say, it is wisely abandoned to-day; for it is impossible there ever could exist a doubt, but that a subject born in Minorca has as good a right to appeal to the King's Courts of Justice, as one who is born within the sound of Bow Bell: and the objection made in this case, of its not being stated on the record that the plaintiff was born since the Treaty of Utrecht, makes no difference. The two other grounds are, 1st, that the defendant being Governor of Minorca, is answerable for no injury whatsoever done by him in that capacity. 2dly, that the injury being done at Minorca, out of the realm, is [172] not cognizable by the King's Courts in England.—As to the first, nothing is so clear as that to an action of this kind the defendant if he has any justification must plead it; and there is nothing more clear, than that if the Court has not a general jurisdiction of the subject-matter, he must plead to the jurisdiction, and cannot take advantage of it upon the general issue. Therefore by the law of England, if an action be brought against a Judge of Record for an act done by him in his judicial capacity, he may plead that he did it as Judge of Record, and that will be a complete justification. So in this case, if the injury complained of had been done by the defendant as a Judge, though it arose in a foreign country where the technical distinction of a Court of Record does not exist, yet sitting as a Judge in a Court of Justice, subject to a superior review, he would be within the reason of the rule which the law of England says shall be a justification; but then it must be pleaded. Here no such matter is pleaded, nor is it even in evidence that he sat as Judge of a Court of Justice. Therefore I lay out of the case every thing relative to the Arraval of St. Phillip's.

The first point then upon this ground is, the sacredness of the defendant's person as governor. If it were true that the law makes him that sacred character, he must plead it and set forth his commission as special matter of justification; because primâ facie the Court has jurisdiction. But I will not rest the answer upon that only. It has been insisted by way of distinction, that supposing an action will lie for an injury of this kind committed by one individual against another, in a country beyond the

seas, but within the dominion of the Crown of England, yet it shall not emphatically lie against the governor. In answer to which I say, that for many reasons, if it did not lie against any other man, it shall most emphatically lie against the governor.

In every plea to the jurisdiction, you must state another jurisdiction; therefore, if an action is brought here for a matter arising in Wales, to bar the remedy sought in this Court, you must shew the jurisdiction of the Court of Wales; and in every case to repel the jurisdiction of the King's Court, you must shew a more proper and more sufficient jurisdiction: for if there is no other mode of trial, that alone will give the King's Courts a jurisdiction. Now in this case no other jurisdiction is shewn, even so much as in argument. And if the King's Courts of Justice cannot hold plea in such case, no other Court can do it. For it is truly said that a governor is in the nature of a viceroy; and therefore locally, during his government, no civil or criminal action will lie against [173] him: the reason is because upon process he would be subject to imprisonment. But here, the injury is said to have happened in the Arraval of St. Phillip's, where without his leave no jurisdiction can exist. If that be so, there can be no remedy whatsoever, if it is not in the King's Courts: because when he is out of the government, and is returned with his property into this country, there are not even his effects left in the island to be attached.

Another very strong reason, which was alluded to by Mr. Serjeant Glynn, would alone be decisive; and it is this: that though the charge brought against him is for a civil injury, yet it is likewise of a criminal nature; because it is in abuse of the authority delegated to him by the King's letters patent, under the Great Seal. Now if every thing committed within a dominion is triable by the Courts within that dominion, yet the effect or extent of the King's letters patents, which gave the authority, can only be tried in the King's Courts; for no question concerning the seignory, can be tried within the seignory itself. Therefore where the question respecting the seignory arises in the proprietary Governments, or between two provinces of America, or in the Isle of Man, it is cognizable by the King's Courts in England only. In the case of *The Isle of Man* *1 it was so decided in the time of Queen Elizabeth, by the Chief Justice and many of the Judges. So that emphatically the governor must be tried in England, to see whether he has exercised the authority delegated to him by the letters patent legally and properly; or whether he has abused it in violation of the laws of England, and the trust so reposed in him.

It does not follow from hence, that let the cause of action arise where it may, a man is not entitled to make use of every justification his case will admit of, which ought to be a defence to him. If he has acted right according to the authority with which he is invested, he must lay it before the Court by way of plea, and the Court will exercise their judgment whether it is a sufficient justification or not. In this case, if the justification had been proved, the Court might have considered it as a sufficient answer; and, if the nature of the case would have allowed of it, might have adjudged, that the raising a mutiny was a good ground for such a summary proceeding. I can conceive cases in time of war in which a governor would be justified, though he acted very arbitrarily, in which he could not be justified in time of peace. Suppose, during a siege or upon an [174] invasion of Minorca, the governor should judge it proper to send an hundred of the inhabitants out of the island from motives of real and genuine expediency; or suppose upon a general suspicion he should take people up as spies; upon proper circumstances laid before the Court, it would be very fit to see whether he had acted as the governor of a garrison ought, according to the circumstances of the case. But it is objected, supposing the defendant to have acted as the Spanish governor was empowered to do before, how is it to be known here that by the laws and constitution of Spain he was authorized so to act. The way of knowing foreign laws is, by admitting them to be proved as facts, and the Court must assist the jury in ascertaining what the law is. For instance, if there is a French settlement the construction of which depends upon the custom of Paris, witnesses must be received to explain what the custom is; as evidence is received of customs in respect of trade. There is a case of the kind I have just stated.*2 So in the supreme resort before the King in Council, the Privy Council determines all cases that arise in the plantations, in Gibraltar, or Minorca, in Jersey, or Guernsey; and they inform themselves, by having the law stated to them.—As to suggestions with regard to the difficulty of

*1 4 Inst. 284. *2 *Feaubert* v. *Turst*, Prec. Chan. 207.

bringing witnesses, the Court must take care that the defendant is not surprised, and that he has a fair opportunity of bringing his evidence, if it is a case proper in other respects for the jurisdiction of the Court. There may be some cases arising abroad, which may not be fit to be tried here; but that cannot be the case of a governor, injuring a man contrary to the duty of his office, and in violation of the trust reposed in him by the King's commission.

If he wants the testimony of witnesses whom he cannot compel to attend, the Court may do what this Court did in the case of a criminal prosecution of a woman who had received a pension as an officer's widow: and it was charged in the indictment, that she was never married to him. She alleged a marriage in Scotland, but that she could not compel her witnesses to come up, to give evidence. The Court obliged the prosecutor to consent that the witnesses might be examined before any of the Judges of the Court of Session, or any of the Barons of the Court of Exchequer in Scotland, and that the depositions so taken should be read at the trial. And they declared, that they would have put off the trial of the indictment from time to time, for ever, un-**[175]**-less the prosecutor had so consented. The witnesses were so examined before the Lord President of the Court of Session.

It is a matter of course in aid of a trial at law, to apply to a Court of Equity, for a commission and injunction in the mean time; and where a real ground is laid, the Court will take care that justice is done to the defendant as well as to the plaintiff. Therefore, in every light in which I see the subject, I am of opinion that the action holds emphatically against the governor, if it did not hold in the case of any other person. If so, he is accountable in this Court or he is accountable no where; for the King in Council has no jurisdiction. Complaints made to the King in Council tend to remove the governor, or to take from him any commission, which he holds during the pleasure of the Crown. But if he is in England, and holds nothing at the pleasure of the Crown, they have no jurisdiction to make reparation, by giving damages, or to punish him in any shape for the injury committed. Therefore to lay down in an English Court of Justice such a monstrous proposition, as that a governor acting by virtue of letters patent under the Great Seal, is accountable only to God, and his own conscience; that he is absolutely despotic, and can spoil, plunder, and affect His Majesty's subjects, both in their liberty and property, with impunity, is a doctrine that cannot be maintained.

In *Lord Bellamont's case*, 2 Salk. 625, cited by Mr. Peckham, a motion was made for a trial at Bar, and granted, because the Attorney General was to defend it on the part of the King; which shews plainly that such an action existed. And in *Way* versus *Yally*, 6 Mod. 195, Justice Powell says, that an action of false imprisonment has been brought here against a Governor of Jamaica, for an imprisonment there, and the laws of the country were given in evidence. The Governor of Jamaica in that case never thought that he was not amenable. He defended himself, and possibly shewed, by the laws of the country, an Act of the Assembly which justified that imprisonment, and the Court received it as they ought to do. For whatever is a justification in the place where the thing is done, ought to be a justification where the cause is tried.—I remember, early in my time, being counsel in an action brought by a carpenter in the train of Artillery, against Governor Sabine, who was Governor of Gibraltar, and who had barely confirmed the sentence of a court-martial, by which the plaintiff had been tried, and sentenced to be whipped. The governor was very ably defended, but nobody ever thought that the action would not lie; and it **[176]** being proved at the trial, that the tradesmen who followed the train, were not liable to martial law; the Court were of that opinion, and the jury accordingly found the defendant guilty of the trespass, as having had a share in the sentence; and gave 500l. damages.

The next objection which has been made, is a general objection, with regard to the matter arising abroad; namely, that as the cause of action arose abroad, it cannot be tried here in England.

There is a formal and a substantial distinction as to the locality of trials. I state them as different things: the substantial distinction is, where the proceeding is in rem, and where the effect of the judgment cannot be had, if it is laid in a wrong place. That is the case of all ejectments, where possession is to be delivered by the sheriff of the county; and as trials in England are in particular counties, the officers are county officers; therefore the judgment could not have effect, if the action was not laid in the proper county.

With regard to matters that arise out of the realm, there is a substantial distinction of locality too; for there are some cases that arise out of the realm, which ought not to be tried any where but in the country where they arise; as in the case alluded to, by Serjeant Walker: if two persons fight in France, and both happening casually to be here, one should bring an action of assault against the other, it might be a doubt whether such an action could be maintained here: because, though it is not a criminal prosecution, it must be laid to be against the peace of the King; but the breach of the peace is merely local, though the trespass against the person is transitory. Therefore, without giving any opinion, it might perhaps be triable only where both parties at the time were subjects. So if an action were brought relative to an estate in a foreign country, where the question was a matter of title only, and not of damages, there might be a solid distinction of locality.

But there is likewise a formal distinction, which arises from the mode of trial: for trials in England being by jury, and the kingdom being divided into counties, and each county considered as a separate district or principality, it is absolutely necessary that there should be some county where the action is brought in particular, that there may be a process to the sheriff of that county, to bring a jury from thence to try it. This matter of form goes to all cases that arise abroad: but the law makes a distinction between transitory actions and local actions. If the **[177]** matter which is the cause of a transitory action arises within the realm, it may be laid in any county, the place is not material; and if an imprisonment in Middlesex it may be laid in Surrey, and though proved to be done in Middlesex, the place not being material, it does not at all prevent the plaintiff recovering damages: the place of transitory actions is never material, except where by particular Acts of Parliament it is made so; as in the case of churchwardens and constables, and other cases which require the action to be brought in the county. The parties, upon sufficient ground, have an opportunity of applying to the Court in time to change the venue; but if they go to trial without it, that is no objection. So all actions of a transitory nature that arise abroad may be laid as happening in an English county. But there are occasions which make it absolutely necessary to state in the declaration, that the cause of action really happened abroad; as in the case of specialties, where the date must be set forth. If the declaration states a specialty to have been made at Westminster in Middlesex, and upon producing the deed, it bears date at Bengal, the action is gone; because it is such a variance between the deed and the declaration as makes it appear to be a different instrument. There is some confusion in the books upon the Stat. 6 Ric. 2. But I do not put the objection upon that statute. I rest it singly upon this ground. If the true date or description of the bond is not stated, it is a variance. But the law has in that case invented a fiction; and has said, the party shall first set out the description truly, and then give a venue only for form, and for the sake of trial, by a videlicet, in the county of Middlesex, or any other county. But no Judge ever thought that when the declaration said in Fort St. George, viz. in Cheapside, that the plaintiff meant it was in Cheapside. It is a fiction of form; every country has its forms, which are invented for the furtherance of justice; and it is a certain rule, that a fiction of law shall never be contradicted so as to defeat the end for which it was invented, but for every other purpose it may be contradicted. Now the fiction invented in these cases is barely for the mode of trial; to every other purpose, therefore, it shall be contradicted, but not for the purpose of saying the cause shall not be tried. So in the case that was long agitated and finally determined some years ago, upon a fiction of the teste of writs taken out in the vacation, which bear date as of the last day of the term, it was held, that the fiction shall not be contradicted so as to invalidate the writ, by averring that it issued on a day in the vacation: * because the fiction was invented for the **[178]** furtherance of justice, and to make the writ appear right in form. But where the true time of suing out a latitat is material, as on a plea of non assumpsit infra sex annos, there it may be shewn that the latitat was sued out after the six years notwithstanding the teste. I am sorry to observe, that some sayings have been alluded to, inaccurately taken down, and improperly printed, where the Court has been made to say, that as men they have one way of thinking, and as Judges they have another, which is an absurdity; whereas in fact they only meant to support the fiction. I will mention a case or two to shew that that is the meaning of it.

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* 2 Burr. 967.

In 6 Mod. 228, the case of *Roberts* v. *Harnage* is thus stated: the plaintiff declared that the defendant became bound to him at Fort St. David's in the East Indies at London, in such a bond; upon demurrer the objection was, that the bond appeared to have been sealed and delivered at Fort St. David's in the East Indies, and, therefore, the date made it local, and, by consequence, the declaration ought to have been of a bond made at Fort St. David's, in the East Indies, viz. at Islington, in the county of Middlesex; or in such a ward or parish in London, and of that opinion was the whole Court. This is an inaccurate state of the case. But in 2 Lord Raym. 1042, it is more truly reported, and stated as follows: it appeared by the declaration, that the bond was made at London in the ward of Cheap; upon oyer, the bond was set out, and it appeared upon the face of it to be dated at Fort St. George in the East Indies: the defendant pleaded the variance in abatement, and the plaintiff demurred, and it was held bad: but the Court said that it would have been good, if laid at Fort St. George, in the East Indies, to wit, at London, in the ward of Cheap. The objection there was, that they had laid it falsely; for they had laid the bond as made at London; whereas, when the bond was produced, it appeared to be made at another place, which was a variance. A case was quoted from Latch, and a case from Lutwyche, on the former argument, but I will mention a case posterior in point of time, where both those cases were cited, and no regard at all paid to them; and that is the case of *Parker and Crook*, 10 Mod. 255. It was an action of covenant upon a deed indented: it was objected to the declaration, that the defendant is said in the declaration to continue at Fort St. George, in the East Indies; and upon the oyer of the deed it bore date at Fort St. George, and, therefore, the Court, as was pretended, had no jurisdiction; Latch, fol. 4. Lutwyche, 950. Lord Chief Justice Parker said, that an action will lie in England upon [179] a deed dated in foreign parts; or else the party can have no remedy; but then in the declaration a place in England must be alleged pro formâ. Generally speaking, the deed, upon the oyer of it, must be consistent with the declaration; but in these cases, propter necessitatem, if the inconsistency be as little as possible, it is not to be regarded; and here the contract being of a voyage which was to be performed from Fort St. George to Great Britain, does import, that Fort St. George is different from Great Britain; and after taking time to consider of it in Hilary term, the plaintiff had his judgment, notwithstanding the objection. Therefore the whole amounts to this; that where the action is substantially such a one as the Court can hold plea of, as the mode of trial is by jury, and as the jury must be called together by process directed to the sheriff of the county; matter of form is added to the fiction, to say it is in that county, and then the whole of the inquiry is, whether it is an action that ought to be maintained. But can it be doubted, that actions may be maintained here, not only upon contracts, which follow the persons, but for injuries done by subject to subject; especially for injuries where the whole that is prayed is a reparation in damages, or satisfaction to be made by process against the person or his effects, within the jurisdiction of the Court? We know it is within every day's experience. I was embarrassed a great while to find out whether the counsel for the plaintiff really meant to make a question of it. In sea batteries the plaintiff often lays the injury to have been done in Middlesex, and then proves it to be done a thousand leagues distant on the other side of the Atlantic. There are cases of offences on the high seas, where it is of necessity to lay in the declaration, that it was done upon the high seas; as the taking a ship. There is a case of that sort occurs to my memory; the reason I remember it is, because there was a question about the jurisdiction. There likewise was an action of that kind before Lord Chief Justice Lee, and another before me, in which I quoted that determination, to shew, that when the Lords Commissioners of Prizes have given judgment, that is conclusive in the action; and likewise when they have given judgment, it is conclusive as to the costs, whether they have given costs or not. It is necessary in such actions to state in the declaration, that the ship was taken, or seized on the high seas, videlicet, in Cheapside. But it cannot be seriously contended that the Judge and jury who try the cause, fancy the ship is sailing in Cheapside: no, the plain sense of it is, that as an action [180] lies in England for the ship which was taken on the high seas, Cheapside is named as a venue; which is saying no more, than that the party prays the action may be tried in London. But if a party were at liberty to offer reasons of fact contrary to the truth of the case, there would be no end of the embarrassment. At the last sittings there were two actions brought by