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. 192

[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 3000*l.* 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.

* 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

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.