received in the course of the year was to be deducted, and the balance to remain as principal, and so continue yearly till both principal and interest were fully paid," was not usurious.

This was an action of debt on a bond, conditioned for the payment of 100l. with interest at 5l. per cent. in yearly payments of 20l. by four quarterly payments of 5l. each, until the whole should be paid. There was also a memorandum indorsed as follows, "That it is the true intent and meaning of the parties, that at the expiration of each and every year, the year's interest due is to be added to the principal sum, and then the 20l. received during the course of the year to be deducted, and the balance to remain as principal, and so continue yearly, until both principal and interest be fully paid." The Defendant, after oyer of the condition and memorandum, pleaded usury, and obtained a verdict, which the Court of King's Bench afterwards set aside, being of opinion that the contract disclosed was not usurious. (4 Term Rep. B. R. 613.) A writ of error having been brought on the judgment of that Court, Reader now argued on the part of the Plaintiff in error, contending that it was a corrupt and usurious contract, being made with a view to receive more than 5 per cent. interest. The smallness of the sum of 100l. is the only thing which makes any difficulty in judging of the transaction. But suppose the bond to have been given for 10,000l. payable by 2000l. a year in **[145]** quarterly payments of 500l. the usury will then be manifest, for by the terms of the agreement, at the end of the year, the year's interest is to be added, (which must mean the year's interest on the whole sum, as no other is mentioned,) notwithstanding the several payments of the principal, at the end of the first, second, and third quarters, for which no allowance is to be made.

LORD CHIEF JUSTICE EYRE stopped Gibbs, who was going to argue on the other side, and said, the Court must strain the words of the contract in order to make it usurious: it was not the interest on 100l. but the interest due that was to be added to the principal at the end of the year, and the interest due could only be taken to mean what was legally due.

WILSON, J. Even admitting the construction contended for, there does not appear to me to be usury, for there was no loan, but the consideration of the bond was the giving up an annuity; the memorandum was part of the agreement, and the terms upon which the annuity was relinquished.

Judgment affirmed.

ILDERTON *against* ILDERTON. Wednesday, June 19th, 1793.

[Referred to, *Jackson* v. *Spittall*, 1870, L. R. 5 C. P. 549.]

A marriage celebrated in Scotland (but not between persons who go thither for the purpose of evading the laws of England) will intitle the woman to dower in England. The lawfulness of such a marriage may be tried by a jury; a replication therefore to a plea of "ne unques accouple" in a writ of dower, alleging a marriage in Scotland, may conclude to the country: and in such replication, it is not necessary to state that the marriage was had in any place in England, by way of venue (*a*).

This was a writ of dower unde nihil habet, and the pleadings were as follows,

Northumberland to wit, Mary, otherwise Maria Ilderton, widow, who was the wife of Thomas Ilderton, Esquire, deceased, by Townley Ward, her attorney, demands against Robert Ilderton, the third part of ten messuages, ten barns, ten stables, four gardens, four orchards, one water corn-mill, 2000 acres of land, 2000 acres of meadow, 2000 acres of pasture, 2000 acres of moor, and 200 acres of woodland, with the appurtenances, in the parish of Ilderton in the county of Northumberland, as the dower of the said Mary, otherwise Maria, of the endowment of the said Thomas Ilderton, heretofore her husband, whereof she has nothing, &c.

Plea. And the said Robert Ilderton by Henry Barney Mayhew his attorney comes and says, that the said Mary, otherwise Maria, ought not to have her dower in this behalf, as having been the wife of the said Thomas Ilderton deceased, because he says, that the said Mary, otherwise Maria, never was accoupled to the said Thomas

(*a*) [Vide 1 Saund. 8 a. (*n*) 5th Edit.]

Ilderton, deceased, in lawful matrimony. And this the said Robert Ilderton is ready to [146] verify, therefore he prays judgment if the said Mary, otherwise Maria, ought to have her dower of the messuages and tenements aforesaid, with the appurtenances.

Replication. And the said Mary, otherwise Maria, by the said Townley Ward her attorney aforesaid, says, that she ought not by any thing in the plea of the said Robert above alleged, to be barred from having her dower aforesaid, in this behalf, because she says, that she the said Mary otherwise Maria, on the 6th day of September, in the year of our Lord 1774, was accoupled to the said Thomas Ilderton deceased, in lawful matrimony, at Edinburgh, in that part of Great Britain called Scotland, and this she prays may be enquired of by the country, &c.

Demurrer. And the said Robert saith, that the said plea of the said Mary, otherwise Maria, in manner and form aforesaid above pleaded, by way of reply to the said plea of the said Robert by him above pleaded, and the matters therein contained, are not sufficient in law for the said Mary, otherwise Maria, to have or maintain her said action thereof against him, and that he the said Robert is not bound or obliged by the law of the land to make answer thereto, and this he is ready to verify, wherefore, for want of a sufficient replication in this behalf, the said Robert, as before, prays judgment, and that the said Mary, otherwise Maria, may be barred from having her dower aforesaid, in this behalf, and for causes of demurrer in law in this behalf, the said Robert, according to the form of the statute in such case made and provided, specially sets down and shews to the Court here, the causes following, (that is to say) that the said supposed marriage in the replication mentioned, and therein alleged to have been celebrated in that part of Great Britain called Scotland, is not a marriage whereby, or by reason whereof, the said Mary, otherwise Maria, can by law claim or intitle herself to any dower of the tenements above mentioned. "And also for that the said Mary, otherwise Maria, hath not laid any place by way of venue, where the said supposed marriage was had." And also for that the said replication is ill concluded, by being concluded to the country; and for that the said Mary, otherwise Maria, hath by her said replication and the conclusion thereof, attempted to put in issue, and draw to a trial of the country, a matter which is not by law triable by a jury of the country, "but which is of ecclesiastical cognizance, and which ought to be tried by the certificate of the bishop, to whom the right of certifying whether the said Mary, otherwise Maria, and [147] Thomas Ilderton deceased, were or were not accoupled in lawful matrimony, belongs. And also for that it does not appear to the court here, to what bishop, or other spiritual judge or person, any writ can or ought to be directed or sent, to inquire and certify whether the said Mary, otherwise Maria, was accoupled to the said Thomas Ilderton deceased, in lawful matrimony, or not," and also for that the said replication is in other respects defective and informal.

Joinder in Demurrer.

This cause was first argued in Michaelmas term 1791, by Le Blanc, Serjt., for the demandant, and Cockell, Serjt., for the tenant, and a second time in Hilary term 1792 by Lawrence, Serjt., for the demandant, and Bond, Serjt., for the tenant: after which, and before any judgment was given, the tenant died. In consequence of this a fresh writ was brought, and the pleadings being altered by the additional assignment of the causes of demurrer, marked with inverted commas (" "), a third argument came on in the present term, when Le Blanc, Serjt., argued for the demandant, and Adair, Serjt., for the tenant.

It was admitted, on these arguments, at the Bar, and assented to by the Bench, that the first cause of demurrer could not be maintained, it being taken as an undoubted proposition, that a marriage celebrated in Scotland was such a marriage as would intitle the woman to dower in England (*a*). The points, therefore, which were made on the part of the tenant, were two: 1. That the lawfulness of marriage was exclusively the subject of ecclesiastical cognizance, and therefore not to be tried by a jury of the

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(*a*) But this proposition is quite clear of the question, whether marriages celebrated in Scotland, between persons who go thither in order to evade the laws of England, be valid in England. See the case of *Compton* v. *Bearcroft* before the delegates, shortly stated Bull. N. P. 113, 8vo. See also the observations on this subject, contained in a note Co. Litt. by Hargr. & Butl. p. 79 b. & 80 b. [See also *Dalrymple* v. *Dalrymple*, 2 Haggard, 54. *Scrimshire* v. *Scrimshire*, Id. 395. *Ruding* v. *Smith*, Id. 376 (*n*).]

country. 2. That some place within the kingdom of England ought to have been laid as a venue in the replication, where the marriage should have been alleged to have been celebrated.

1. Although the fact of marriage may be tried by the country, yet the lawfulness of it being a matter solely of ecclesiastical jurisdiction can be decided by no other mode than the certificate of the bishop, which is indispensable in the cases of dower and appeal. This principle, which arose from the circumstance of marriage being a sacrament of the Church of [148] Rome, is to be found in the earliest authorities in the law. Bracton lays it down "cum autem talis proponatur exceptio, quod dotem habere non debeat, eo quod non fuit tali viro (per quem petit) matrimonialiter desponsata, vel legitimo matrimonio copulata, hujusmodi inquisitio fieri non potest nec debet in foro seculari, cum sit spirituale; et ideo demandetur inquisitio facienda ordinario loci, sicut archiepiscopo, episcopo, vel aliis privilegiatis, quibus papa hujusmodi concesserit cognitionem," then follows the form of the writ to the archbishop or bishop, in which it is expressly said, quoniam hujusmodi causæ cognitio ad forum spectat ecclesiasticum, &c." Bracton de Actione Dotis, 302 a. Thus also Fleta, lib. 5, c. 28, "Super contentionem autem desponsationis, et divortii celebrationem, non poterit justiciarius procedere in foro seculari; indeoque demandetur inquisitio facienda archiepiscopo vel episcopo loci, quia hujusmodi causarum cognitio spectat ad forum ecclesiasticum, quod convocatis convocandis, veritatem diligenter inquirant, et inde certificent justiciariis per literas suas patentes." So likewise Britton, cap. 107, 108, pp. 252, 255, Exceptiones de concubinage &c. is to the same effect. Thus too Glanville says, "Si quis versus aliquem hæreditatem aliquam tanquam hæres petat, et alius ei objiciat quod hæres inde esse non potest eo quod ex legitimo matrimonio non sit natus, tunc quidem placitum illud in curiâ Domini Regis remanebit, et mandabitur archiepiscopo vel episcopo loci, quod de matrimonio ipso cognoscat; et quod inde judicaverit, id Domino Regi, vel ejus justiciariis scire faciat," lib. 7, cap. 13, and then follows the writ to the bishop.

And this principle is recognized by Lord Coke, Co. Litt. 33 a. 134 a. 4 Co. 29 a. *Bunting* v. *Lepingwel*, Moore, 169. 2 Roll. Abr. 584, 585, tit. Trial. Style, 10. *Betsworth* v. *Betsworth*, Bro. Abr. tit. Trial, pl. 16. 2 Wils. 122, 127, *Robins* v. *Crutchley*. It being clear therefore that the lawfulness of marriage can only be tried by the certificate of an Ecclesiastical Judge, though episcopacy has been abolished in Scotland, and therefore there can be no certificate where the espousals were celebrated, yet it by no means follows that the trial shall be by the country: it ought rather to be by the certificate of the bishop in whose diocese the lands lie. Although there may be possibly no instance in dower, expressly in point, yet in similar cases the writ has gone to the bishop of the diocese where the lands were situated. Thus in an assise of Mort d' ancestor "the tenant pleaded bastardy in the demandant, who said he was Mulier and born in another diocese, and prayed a writ to the [149] bishop of that diocese to certify, and yet the writ was awarded to the bishop of the diocese where the action was brought," i.e. where the lands lay. 35 Ass. 7 Bro. Abr. tit. Certificate d' Evesque, pl. 14. So in a writ Sur. cui in vitâ, where bastardy was pleaded, and a marriage replied in the county of S., the writ was awarded to the bishop of E. where the lands were. Year Book, 7 Hen. 5, 7 & 8 Bro. tit. Trial, pl. 21. Thus also in an assise of novel disseisin of lands in the diocese of Winchester, where the plea of bastardy was set up, and a marriage alleged to have been had in London, the writ to certify was awarded to the bishop of Winchester, and not to the bishop of London. 38 Ass. pl. 30, p. 231.

2. It is a rule of law, that on every fact stated in pleading to have happened in a foreign country, a venue must be alleged within the realm of England for the purpose of trial. Co. Litt. 251 a. & b. 2 Keb. 315. Style, 342. 6 Co. 47. *Dowdale's case*, *Mostyn* v. *Fabrigas*, Cowp. 176, per Lord Mansfield; and undoubtedly Scotland, notwithstanding the union, is in this respect a foreign country. The replication therefore is bad in this point of view, and the defect is pointed out by a special demurrer.

On the part of the demandant, the arguments were as follow.

It is not denied, that the lawfulness of marriage is a matter of ecclesiastical cognizance, but it is manifest that in dower the writ to certify ought to be directed, not to the bishop in whose diocese the lands are situated, but to him in whose diocese the espousals were celebrated.

This plainly appears from the form of the proceedings in the Entries. Thus in Rast. Entr. 223 a. tit. Dower, to a count in dower the tenant pleads ne unques accouple, the demandant replies, that she at C. in the county of C. in the parish church of M. was accoupled to the said R. (her husband) in lawful matrimony, and this she is ready to verify, when and where the Court shall award.

The record goes on, "And because the conuzance of causes of this kind belongeth to the Ecclesiastical Court, therefore it is commanded W. bishop of C. and L. the diocesan of the said place, that he, convening before him those who ought to be convened, in this behalf, do diligently inquire into the truth of the fact, and what he shall find thereon he shall make appear to our justices at Westminster by his letters patent and close." Then follows the writ to the bishop, reciting the pleadings and issue, and the parish and church where **[150]** the espousals are alleged to have been had. So also in Rast. 223 b. there is a similar entry, though in neither instance is it clearly marked in what county the lands lay. *In Co. Entr.* 180 b. *tit.* Dower, where the demand is of dower in London, to a plea of ne unques accouple, the replication is, That the demandant at the parish of St. Hilary in the county of Glamorgan in the diocese of Llandaff, was accoupled in lawful matrimony, &c. "Therefore because the issue must be tried by the bishop of the said place, it is commanded Francis, Bishop of Llandaff, the diocesan of the said place, &c." In Robinson's Entr. 240, the demand *is of lands in* Suffolk, the plea ne unques accouple, and the replication, that the demandant at Wested in the said county, in the diocese of Norwich, was accoupled; "Therefore John, Bishop of Norwich, the diocesan of the said place is commanded:" there the lands and the marriage were in the same diocese, but the replication is particular in specifying the parish and diocese. In Bro. Ab. tit. Trials, pl. 114, "in an appeal by a feme of the death of her baron, if the Defendant pleads ne unques accouple in lawful matrimony, this shall be tried where the espousals are alleged, by the certificate of the bishop of the place where the espousals are alleged." To the same point also is Fitz. Abr. 220, Trial, pl. 85.

It appears therefore, that the trial ought to be by the certificate of the bishop of the diocese in which the espousals were celebrated: but where it is impossible, as in the present case, that there should be such a certificate, there the marriage may be tried by the country. There are many instances where certain issues ought regularly to be tried by the certificate of a bishop, yet under particular circumstances those issues may be tried by the country. Thus general bastardy is to be tried by the certificate of the bishop; but there are cases, where, if alleged, it shall be tried per pais; as in formedon, bastardy was alleged in one who was mesne in the conveyance by which the demandant claimed; and because he was dead and not a party to the writ, it was tried per pais, and not by the certificate of the bishop. Bro. Abr. Trial, pl. 10. So where the bastardy of one who is dead comes in issue, it shall be tried per pais, and not by certificate, id. pl. 26. The reason of which is thus given 2 Roll. Abr. 584, Trial, pl. 17. "If bastardy be alleged in a stranger to the writ, it shall be tried by the country, and not by certificate, because if it should be tried by the ordinary, it would be peremptory to the stranger perpetually, if it were certified **[151]** that he were a bastard," and pl. 19. If bastardy be alleged in one who is dead, it shall be tried by the country, and not by the ordinary, because the judgment cannot be final. So in the case of infancy, a matter of spiritual cognizance, as bastardy, alleged in the infant, shall be tried per pais, 2 Roll. Abr. 586, pl. 34. So if the issue on ne unques accouple is to be tried between strangers, it shall be tried by the country, id. 585, pl. 17. In quare impedit, the ability or non-ability of the clerk shall be tried by the ordinary: but if the ordinary refuses a clerk for non-ability, and gives notice to the patron, who does not present another within six months, whereupon the bishop collates, and the patron brings quare impedit, and insists that his clerk was able, if the clerk be living, the question whether able or not, shall be tried by the metropolitan by examination, but per pais, if the clerk be dead. Bro. Abr. Qua. Imp. pl. 102. 2 Roll. Abr. 583, Trial, pl. 1 and 2. So profession is regularly to be tried by the certificate of the ordinary; but if the profession of a third person comes in question, or of one who is dead, it shall be tried by the country. Hardres, 63. And so it shall be of monks and other exempts, and if the ordinary returns that he is exempt from his jurisdiction, then it shall be tried by the country. 2 Roll. Abr. 587, pl. 38. So it is where the persons to certify are interested: thus customs of the city of London shall be certified by the mayor and aldermen by the mouth of their recorder;

but when the city is itself concerned, such custom shall be tried by the country. Hob. 86. 2 Roll. Abr. 579, pl. 2.

With respect to the want of a venue, which is assigned as a cause of demurrer, it is to be observed that fictions of law are invented for the furtherance of justice, and shall never be contradicted so as to defeat that end, though for every other purpose they may be contradicted. The fiction of a venue with a videlicet, is barely for a 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. *Mostyn* v. *Fabrigas*, Cowp. 177. So here it shall not be insisted on for the purpose of preventing a trial.

"In an action on a policy of assurance, the plaintiff declared, that the Defendant undertook that such a ship should sail from Melcombe Regis in Dorsetshire to Abbeville in France, safely, without violence, &c. and alleged that the said ship in sailing towards Abbeville, that is to say in the river of Somme in the realm of France, was arrested by the French king, [152] whereupon the parties came to issue, whether the ship was so arrested or not: and this issue was tried at Nisi Prius before Wray, Ch. J., in London, and found for Plaintiff; and it was moved in arrest of judgment, that this issue, arising merely from a place which is out of the realm, could not be tried; and if it could be tried, it was said it should be tried by a jury from Melcombe: but it was answered and resolved, that this issue should be tried where the action was brought. 6 Co. 47 b. 4 Inst. 142."

So too in Pasch. 28 Eliz. "In the King's Bench the case was, a charter party by deed indented was made at Thetford in Norfolk, between Evangelist Constantine of the one part, and Hugh Gynne of the other part, by the which Constantine did covenant with Gynne, that a certain ship should sail with merchandizes of Gynne to Muttrel in Spain, and there should remain by certain days, upon the breach of which covenant, Gynne brought an action of debt for 500l. upon a clause in the charter, and alleged the breach of the covenant, for that the ship did not remain at Muttrel in Spain by so many days, as were limited by the covenant: whereupon issue was taken, and tried before Sir Christopher Wray, Ch. J. of England, and found for the Plaintiff; and in arrest of judgment it was shewn, that this issue did arise out of a place totally and merely in a foreign kingdom, out of the realm, from whence no jury of twelve men could come, and the trial was insufficient.

"But it was adjudged by Sir Christopher Wray, Sir Thomas Gawdy, and the whole Court of B. R., after great deliberation, that the Plaintiff should recover his 500l., besides his damages and costs, for that the charter party whereon the action is brought, was made at Thetford within the realm, and the trial being in the same place where the action was brought, was sufficient. 4 Inst. 141, 142. Co. Litt. 261 b." So too when part of the act, especially the original, is done in England, and part out of the realm, that part which is to be performed out of the realm, if issue be taken thereupon, shall be tried here by twelve men, and those twelve men shall come out of the place where the writ is brought. Co. Litt. 261 b. In Bro. Abr. tit. Trials, pl. 93, it is holden, that in divers cases, jurors shall take cognizance of an act done in another country, as of shipping merchandize to Venice, or of freighting a foreign ship to Bourdeaux against the statute, and of an alien born beyond sea; those things shall be tried in England, and a foreign county shall try damages in another county: and the jurors of one county shall find the making of a grant of a rent-charge in [153] one county, out of lands in another county, and a lease and release made in a foreign county shall be tried in the county where the land lies, and a retainer of services beyond sea shall be tried in England. 7 H. 7, 8.

So it is said that if an act be to be done all beyond sea, it cannot be tried in England; but where part is to be done in England, that part beyond sea, it may be tried in England. Bro. Abr. Trials, pl. 154. So where an agreement is at land, and a performance at sea, it shall be tried where the agreement is made; and saying in partibus transmarinis infrà parochiam, is idle. 12 Mod. 34, *Can* v. *Cary*.

Lord Chief Justice Eyre. This is a proceeding in dower, and to the declaration there is a plea that the demandant was never accoupled to Thomas Ilderton, deceased, in lawful matrimony. To this plea there is a replication, which states that the demandant, on the 6th of September, in the year of our Lord 1774, was accoupled to Thomas Ilderton deceased, in lawful matrimony at Edinburgh, in that part of Great Britain called Scotland, and the replication concludes to the country. To this replication there is a special demurrer. The demurrer states for cause, that the supposed

marriage in the replication mentioned, declaring it to have been celebrated in that part of Great Britain called Scotland, is not a marriage whereby, or by reason whereof, the demandant can by law claim or intitle herself to have any dower of the tenements above mentioned. There is also another cause of demurrer alleged, That the Plaintiff has not laid any place by way of venue, where the supposed marriage was had. There is a third cause, That the replication is ill concluded, by being concluded to the country, and by having by that conclusion attempted to put in issue, and draw to a trial by a jury of the country, a matter that is not by law triable by a jury of the country, but which is of ecclesiastical cognizance, and which ought to be tried by the certificate of the bishop, to whom the right of certifying, whether the Plaintiff and Thomas Ilderton were or were not accoupled in lawful matrimony, belongs: and also for that it does not appear to the Court, by the said replication, to what bishop, or other spiritual judge or person, any writ can or ought to be directed or sent, to inquire and certify, whether the Plaintiff was accoupled to Thomas Ilderton deceased, in lawful matrimony or not; and there is a joinder in demurrer.

[154] Upon the argument, the first cause of demurrer having been abandoned, the residue of these causes resolves itself into two questions, which have been very ably argued at the Bar; and the Court always feel themselves obliged to the Bar, when they will have the goodness to examine questions of this sort, with that diligence which they have used upon the present occasion. The first of these questions is, Whether the Plaintiff ought in this case to have concluded to the country? The second question is, Whether the replication is either informal, or substantially defective, for want of a venue? In support of the demurrer, and upon the first question it has been argued, that the matter of this replication is exclusively of ecclesiastical cognizance; and a passage from Glanville, book 7, chap. 13 and 14, has been cited in support of these propositions, that in intendment of law, a jury is not competent to decide upon this matter; that there was in this case no necessity for excluding the ecclesiastical jurisdiction; that in cases of bastardy, which it was said are not distinguishable from this case, a writ always goes to the bishop of the diocese where the lands lie, without regard to the place where the espousals were had, or where the birth was; and that the analogy directs how the writ should be directed, where there happens to be no bishop having jurisdiction in the place, where the demandant states herself to have been accoupled in lawful matrimony, and consequently, that in this case the demandant should have prayed a writ to the bishop where the lands lay, and ought not to have concluded to the country.

The passage in Glanville is as follows: "Hæres autem legitimus, nullus bastardus, nec aliquis qui ex legitimo matrimonio non est procreatus, esse potest. Verum si quis versus aliquem, hæreditatem aliquam tanquam hæres petat, et alius ei objiciat, quòd hæres inde esse non potest, eo quod ex legitimo matrimonio non sit natus, tunc quidem placitum illud in curiâ Domini Regis remanebit, et mandabitur archiepiscopo vel episcopo loci, quod de matrimonio ipso cognoscat; et quod inde judicaverit, id domino Regi vel ejus justiciariis, scire faciat, et per hoc breve."

Then follows the form of the writ "Rex archiepiscopo salutem, veniens coram me W. in curiâ meâ, petiit versus R. fratrem suum, quartam partem feodi unius militis in illâ villâ sicut jus suum, et in quo idem R. jus non habet, ut W. dicit, **[155]** eo quod ipse bastardus sit, natus ante matrimonium matris ipsorum. Et quoniam ad curiam meam non spectat agnoscere de bastardiâ, eos ad vos mitto, mandans ut in curiâ Christianitatis, inde faciatis, quod ad vos spectat, et cum loquela illa debitum coràm vobis finem sortita fuerit, mihi literis vestris significetis quid inde coram vobis actum fuerit, &c."

Now it must be acknowledged, that the language of these passages very distinctly marks the ground and principle upon which the temporal courts have sent their writs to the bishop, namely, that the cognizance of lawful matrimony belongs to the Court Christian, and not to the temporal courts. "Placitum illud in curiâ Domini Regis remanebit, et mandabitur archiepiscopo vel episcopo loci, quod de matrimonio ipso cognoscat, et quod indè judicaverit, id scire faciat" are strong words, and the language of the writ, quoniam ad curiam meam non spectat agnoscere de bastardiâ, eos ad vos mitto, mandans ut in curiâ Christianitatis inde faciatis quod ad vos spectat; et cum loquela illa debitum coràm vobis finem sortita fuerit, mihi literis vestris significetis, quid indè coram vobis actum fuerit," is still stronger to mark the sense of the time in which Glanville wrote, that questions of matrimony and bastardy were exclusively of

ecclesiastical cognizance, and that a jury was at that time thought to be not competent to decide upon these questions; or at least if they do not go so far, as a jury not being thought competent to the decision of these questions, they shew that the Court itself was not competent to such examination and decision.

It was agreed by my Brother Adair, that the matrimony of which the Court Christian has at this day exclusive cognizance, is lawful matrimony, as opposed to marriage in fact, and that it was essential that the marriage should be lawful in two cases only, in the case of dower and in the case of appeal: but it is very obvious that Glanville, in the passage which I have read, draws no such line; he supposes that in the case of bastardy, "mandabitur episcopo, &c. quod de matrimonio ipse cognoscat." Glanville wrote in the time of Henry the Second, at which time the distinction between general and special bastardy had not been introduced. The struggle for legitimating the issue born before matrimony, which is recorded in the statute of Merton (2 Inst. 96), 20 Henry 3, c. 9, seems first to have suggested the plea of special bastardy, and it is observable, and is material, that the Temporal Courts, from that time, withdrew the cognizance of **[156]** special bastardy from the Court Christian. In succeeding times, other considerations induced the Temporal Courts to withdraw from the cognizance of the Court Christian the questions of matrimony and of bastardy, in a variety of cases. In bastardy, the trial by the certificate of the bishop takes place at this day, only in the case of a general allegation of bastardy, and that only so long as the party is living, and not only living, but a party to the suit, and not only a party to the suit, but adult; in matrimony, as is agreed by my Brother Adair, in the two cases only of dower and appeal. It is not therefore to Glanville that we must resort for the present state of the law respecting the trial by certificate of the bishop; and when we advert to the ordinary course of proceeding, in every one of those cases which have been withdrawn from the cognizance of the Court Christian, it will be impossible to maintain that, in intendment of law, a jury is not competent to try questions of matrimony or bastardy. The true proposition is, that the common law is general and fundamental, that the particular trials by the Court Christian are to be considered as privileges, and as such in their nature particular, that every thing which is not within the privilege belongs to the common law. Respecting things which have been considered in early times as proper to be tried by the certificate of the bishop, if for good reason they ought not to be so tried, or if from particular circumstances they cannot be so tried, the common law, out of its own inexhaustible fountain of justice, must derive another mode of trial, and that mode is the trial by the country. It was upon these principles that the case of special bastardy, and every one of the other cases which I have alluded to, have been sent by the Temporal Courts to be tried by the country, instead of being tried by the certificate of the bishop; and they will be found applicable to every case in which the law of England hath admitted of any special mode of trial; for instance, the trial by inspection, by the escheator, by the certificate of the marshal of the king's host, by the certificate of the recorder of London, nay, even at the trial by the record, and in short, every other kind of trial that can be stated.

But it has been argued in support of the demurrer, that in this case there is no necessity for departing from the antient and usual course of trial, of an issue joined on the marriage in dower; that this marriage alleged to have taken place in Edinburgh, in that part of the united kingdom called Scotland, may **[157]** be tried by the certificate of the bishop of that diocese in which the county where the writ is brought happens to lie. This is not supported by the authority of any case adjudged in point, but it is argued upon the analogy which the present case bears to adjudged cases, and particularly to the case of general bastardy, where the writ to the bishop is said, and I believe truly said, to be always sent to that bishop in whose diocese the lands lie, or, more properly, where the demandant's writ is brought. But there will be found no analogy between those cases and the present. I have observed that the writ to the bishop goes only where there is a plea of general bastardy; the replication to that plea, though it may specially allege the espousals of the parents, or the birth in another diocese, amounts to nothing more than an averment that the demandant was mulier, and not bastard; and in some of the year books, abridged by Brooke, in his title "Bastardy," the special allegation of espousals and birth is disallowed by the Court, and the demandant is driven to add "et sic mulier, et non bastardus;" and in one of the cases in particular, the whole special allegation is left out of the record,

and nothing entered, but that the demandant was mulier, et non bastardus (pl. 20), and so the writ went of course to the bishop of the diocese where the lands lay, and in that case could by no possibility go to any other bishop.

Upon whatever ground it proceeded in bastardy, the writ always went to the bishop of the diocese where the lands lay. Now in the case of dower, if a general replication to a plea of ne unques accouple in loyal matrimonie is admissible, there, by analogy to the case of bastardy, it might be argued that the writ should go to the bishop of that diocese where the lands lay, upon a foundation common to both cases, that the birth in wedlock in bastardy, or the lawful marriage in dower, should be intended to have taken place in the county where the lands lay. But as in most of the cases of dower, and probably in all, the replication is special, of espousals in a particular church, in a particular county and diocese, and as the writ to the bishop has usually gone to the bishop of the diocese where the espousals have been alleged to have been celebrated, and as I have been able to find no case, in which the espousals having been alleged to have been celebrated in another county, and in another diocese, the writ has yet gone to the bishop of the diocese where the lands lay, there seems to be no manner of analogy between the case of bastardy and dower. To whatever **[158]** bishop the writ in either case is directed, it is sent to him as ordinary, as having either in fact or in the intendment of law, cognizance of the question. The ordinary acts as a judge, in a cause regularly instituted before him: one of the reasons for not sending a writ to the bishop, where a party who is attempted to be bastardized is dead, or a stranger to the suit, is, that the suit in the Court Christian cannot be decided between the parties; it is a false reason to say that it does not go in that case because it is peremptory; it is peremptory because it is the judgment of a Court of competent jurisdiction, in a suit between the parties. If under any circumstances, the writ goes to a bishop within whose diocese the espousals were in fact not celebrated, it is pretty clear that he might decline certifying. In one of the cases that were cited, it was said expressly, that he might return by way of answer to the writ, that the place of the espousals alleged to be within his diocese was not within his diocese, which return could not be admitted if the writ might go to any bishop, in respect of the matter being in its nature of ecclesiastical cognizance. All the analogies of law contradict that notion. In the theory of our law, a jury of one county could not try a matter of fact arising in another county. If we are to resort to analogy, let us consider how the law stands respecting the certificate of the bishop. In the case of profession, the writ went to the bishop of that diocese in which the religious house was situate, upon the presumption that he was the ordinary, and could examine; but if the religious house happened to be exempted, as was frequently the case, this was a sufficient return to the writ, and the trial by certificate could not be had. If a question arises in quare impedit, the writ goes to the bishop of the diocese to certify, but if the bishop claims any thing more than as ordinary, so that he may be a disturber, the writ cannot go to him, for he is interested: in that case it does not go to any other bishop, but it goes to his metropolitan. Why? Because he is superior ordinary. Suppose the case then to arise in the diocese of the Archbishop of Canterbury, who has no superior ordinary, and he was a disturber, and consequently the writ could not go to him, all the analogies of law exclude the idea of the writ being sent to any inferior ordinary; in that case, therefore, it is evident that in a matter confessedly arising, not only within the kingdom, but even within the diocese where the writ is brought, and where the lands lay, there could be no writ to the **[159]** bishop. If in all cases in which a writ goes to the bishop, the writ is sent to that bishop who has, or is at least presumed to have, jurisdiction of the subject matter; if it is sent to him as ordinary, and in no other character, and if where it cannot be sent to the ordinary, even within the kingdom, it cannot be sent to a bishop at all, upon what principle, or upon what analogy of law, can a marriage distinctly stated to have been celebrated out of any diocese, out of any actual or presumed jurisdiction of any ordinary, nay out of the kingdom, be sent to any bishop to be by him inquired into and certified? If the trial cannot be by certificate, we lay it down as a proposition fundamental and incontrovertible, that the trial is to be by the country: and for a reason that is unanswerable, that there may not be a failure of justice. This is not a point to be debated, but they who have the curiosity to enquire what has been done in cases of a similar exigency, may find in Sir Thomas Hardres's Reports, 65, several instances collected by him in an argument delivered by him, of cases, in their own nature

triable by the bishop's certificate, sent to be tried by the country, upon the particular circumstances of those cases. One of them is taken from the Year Book 2 Richard 33 & 4, and it was trespass for taking of goods: the Defendant pleaded a will by which he was constituted executor, and so entitled himself to the goods in question, which had been the testator's. The Plaintiff said, that after the will was made, whereby the Defendant was appointed to be executor, the testator made another will, wherein he appointed the Plaintiff to be his executor; the Defendant pleaded that the Pope, by his bull, had delegated such a one to examine this matter, who had by sentence annulled the will by which the Plaintiff claimed. It was resolved, that because this matter was not triable by the certificate of any bishop of England, to whom the Court might write, that therefore some matter must be put in issue triable per patriam, ne deficiat justitia.

The second question which arises upon this demurrer, is, whether in point of form or in substance, it was necessary that the Plaintiff should have alleged that the espousals were celebrated in some place, within some county in England, in order to a trial by the country, supposing that such is to be the trial in this case? I must conclude that this inserting of a place has been anxiously avoided, considering the circumstances in which this replication has been framed: I suppose from an apprehen-**[160]**-sion, in my judgment unfounded, that the alleging a place within a county, for the purpose of trying here a matter arising in a foreign country, might have assisted the argument in favour of a trial by certificate. The leaving the replication open to this objection, undoubtedly gives great advantage to the Defendant, because, if he can maintain that it is the established form of replication, in similar cases, to allege a place within a county in England, the want of it will support his demurrer, it being specially assigned for cause, though in truth it be but a mere form, and not at all essential to the real justice of the case: and if it should in the result be found that there is no such established form of replication, the Defendant has still this advantage, that he will be at liberty to insist that the replication is in this respect substantially defective, and that in this respect, therefore, the demurrer will hold. The question of mere form must be decided by the books of entries; but no one entry has been produced, in a case exactly similar, and very few, if any, in cases analogous, that is, where any matter arising in a foreign country is replied. Forms of declarations stating matters arising in a foreign country, or even pleas, are no precedents. Replications stand upon their own ground in this respect; they have reference to the declaration, they maintain the declaration, and they cannot be entirely separated from the declaration, in the way in which a plea in bar may. They may therefore have the assistance of the declaration, as far as concerns the allegation of a place within a county of England, for the mere purpose of trial. The cases cited on the part of the Defendant, for another purpose, proving or tending to prove that special espousals or birth in another county should be tried where the writ is brought, and many other cases which are to be found in the books, some of which were also cited, of matter respecting the persons, when pleaded in abatement, being tried where the writ is brought, sufficiently establish that the replication may borrow a place, for the mere purpose of trial, from the declaration, of which I make no other use at present, than to shew that forms of declarations, and of pleas in bar, are no precedents for forms of replications, and I conclude, that this objection to the replication, considered as an objection of form only, and to be supported only, because it is especially assigned for cause of demurrer, is not so maintained as to oblige us upon fair ground of form to say, that this replication is ill. Considered as an objection in substance, I am ready to agree that it **[161]** is by no means a trivial objection; our books are full of cases upon the subject of venues, and the doctrine is very nice and curious. It was anciently the opinion of lawyers, that a jury of one county could not try any matter arising within another county, and a foreign county was almost as formidable a thing in point of jurisdiction to try, as a foreign country. The place therefore in which every alleged fact was done, was to be shewn upon the pleadings, that it might be known to what county the jury process should go; and if the facts arose in two counties, or in confinio comitatuum, that the process might go to both counties. The old law too being, that the jury were to come de vicineto, there was another necessity created for very great particularity and niceness in laying venues. But when, in process of time, masculine sense had so far controlled the former doctrine of venues, that in respect of all matters transitory in their nature the Defendants were obliged to

lay the venues of transactions they alleged in their pleas in the place and county in which the Plaintiff had laid his declaration, and since the statute 4 Ann. (c. 16, s. 6) has directed that the jury should come de corpore comitatûs, the law of venues will be found to be very substantially altered, and to lie in a very narrow compass; and the distinction between laying no venue at all in a plea, and being obliged to lay the same venue as is to be found in the declaration, will not be a very substantial one. The principle now is, that the place laid in the declaration draws to it the trial of every thing that is transitory, and it should seem that neither forms of pleading, nor ancient rules of pleading established upon a different principle, ought now to prevail (*b*). I have said that there was a time when a foreign county was almost as formidable a difficulty, with respect to mere trial, as a foreign country; and in respect of matters arising in the one or in the other, as far as respects the trial merely, there is no difference between them. All matters arising in a foreign country must be considered, for the purpose of trial, as transitory; there can be no reason for preferring the trying them in one county rather than in another. When the old doctrine prevailed, if a matter arose in Ireland the judges thought themselves obliged to take the jury de vicineto of the borders of the English county nearest to Ireland; but since that doctrine has been justly exploded, if a Defendant were to plead a matter arising in a foreign country, he would be obliged to lay the same venue as was laid in the declaration, which brings us **[162]** again to the distinction between being obliged to repeat the venue, which is in the declaration, and laying no venue at all, which appears to me, I confess, to be a distinction without a difference. It may be asked, shall we then assume jurisdiction to try matters arising in a foreign country, without even the colour which the fiction of the parish of St Mary le Bow in the ward of Cheap has so long supplied? Certainly not: of matters arising in a foreign country, pure and unmixed with matters arising in this country, we have no proper original jurisdiction; but of such matters as are merely transitory, and follow the person, we acquire a jurisdiction by the help of that fiction to which I have alluded, and we cannot proceed without it: but if matters arising in a foreign country mix themselves with transactions arising here, or if they become incidents in an action, the cause of which arises here, we have jurisdiction, and according to the case in 12 Mod. the fiction need not be resorted to at all, and if resorted to, the effect will be not to give jurisdiction; and if a place had been before named, for that part of the transaction which arose here, it would have no effect even as to the trial. In the very infancy of commerce, and in the strictest times, as I collect from a passage in Brooke, Trial, pl. 93, the cognizance of matters arising here, was understood to draw to it the cognizance of all matters arising in a foreign country, which were mixed and connected with it, and in these days we should hardly hesitate to affirm that doctrine.

The result is, That there are no precedents to bind the case in point of form, and if there were, the law has been so altered, that they ought not to bind. In point of substance, the question on this marriage in Scotland arising incidentally in a suit in dower, of which we have original jurisdiction, is for the purpose of this cause within our jurisdiction, without the assistance of a fiction; and the venue for the mere purpose of trial, being necessarily the venue laid in the declaration, the inserting it in the replication would have been nugatory, and the want of it can do no harm. We are therefore of opinion that the Demandant is entitled to judgment in her favor.

Judgment for the Demandant.

[163] FRENCH AND HOBSON *against* CAMPBELL. Wednesday, June 19th, 1793.

Bills of exchange were drawn by A. in England on B. in the East Indies, payable 60 days after sight, and a bond was entered into, conditioned to be void if the bills should be duly paid in India, or come back to England duly protested for non-payment and the amount of them paid by the obligor within a certain time after they should be so returned protested for non-payment. The bills were sent to India, but before they arrived, B. the drawee had left the country, and his agent there refused to accept them. They were then protested in India for non-acceptance, sent back to England so protested, and being presented to the drawee here for

(*b*) [Vide *Neale* v. *De Garay*, 7 T. R. 247, accord.]