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and therefore he was not bound then upon this request after the time to make the lease; the plaintiff ought to have had the lease drawn in time, and to have tendered the same unto him, which was not done in this case; and the refusal here by the defendant to make this lease upon the plaintiffs request, after the time, is no breach of covenant, and so the plaintiff had no cause of action.

Coke. The lease was to be made, as it should be advised by the counsel of —— not devised, but to be as effectual as might be advised by council, and this to be to Edward Allen and his assigns; he was to enter at our Lady-day, and then to pay the 20l. the day past, no request made for the lease till after, the defendant then not bound by his covenant to make it, for then he had no remedy for his 20l. and so this refusal coming upon a request, after the time past, is no breach of covenant, and so the plaintiff had no cause of action, judiciis officium est ut res, ita tempora, rerum, &c.

The whole Court inclined to be of opinion against the plaintiff: and so for this time it rested upon a Curia advisare vult.

Afterwards this case was moved again.

Coke. The plaintiff here alledges, that the defendant hath not made the lease in June, according to his request, if no good breach assigned, no cause of action, when he shall enter to pay the 20l. that is, when he is to enter by their mutual agreement; and if the plaintiff will not come, and request him in due time to make the lease according to their agreement, he may well provide himself of another tenant; the plaintiff ought to have come upon the land, and there to have been ready to receive this lease, and so to enter; and here the defendant is not bound to make the lease by his covenant, until the plaintiff do nominate to whom the same should be made, and this nomination and lease accordingly made, ought to be before our Lady-day, being the time certain prefixed for the doing of it.

Haughton. This lease ought to be for three lives, and to be made at our Lady-day; and if the plaintiff do surcease this time, and demands of the defendant after this feast to make this lease; he is not bound by his covenant to do it, and his refusal then to make is no breach of covenant, to give the plaintiff cause of action.

The Court then said unto Bridgman, who was for the plaintiff, that the plaintiff might discontinue this action, and that this would be his best way.

Curia. We will be of this matter better advised, and by the rule of the Court, the matter to rest as it is, and advised the plaintiff and defendant to make an end between themselves before the next term, the Court being all clear of opinion against the plaintiff, and in default of an end, the rule of the Court to be, quod querens nil capiat per billam.

[171] THE KING *against* TAVERNER.

1 Ro. Rep. 360.

Richard Taverner was indicted, arraigned, and now tried at the Bar by a jury of Middlesex, for the killing and murdering of one John Bird 3 Martij, 6 Jac. Angliæ & Scotiæ 42. The endictment was taken at Hartford Assizes, before Wamsley and Croke Justices of Assize and goal-delivery, for the killing of him in Theobals Park, Thomas Musgrave being present, and his second, but fled, and stands outlawed. Taverner also was outlawed, but returned, and was taken, and termin. Hillar. 13. brought a writ of error, and reversed the utlary, because there were but 14 days between the two county days, and pleaded to the indictment, and now he was tried at the Bar for his life; one Hughes was second unto Bird, who was also killed; a brother of Bird did prosecute this business; and there being a good and sufficient jury sworn, he produced his witnesses to prove a former quarrel, and a falling out between them; upon which, and upon a mutual challenge the one to the other, they joyned in single combate, in the which Bird was killed; and this they shewed, to prove a continuing malice, to make this fact to be murther.

It was further shewed, that the cause of difference between them, and of the subsequent challenge was first by Bird, who sent the challenge unto Taverner, who did accept of it upon very forcible provocations, and then sent him a letter, appointing

therein the time when, and the place where they were to meet, and the weapon to be single sword, and withall sent him a patern thereof, and to have a second; accordingly they met on Sunday in the afternoon, and there did fight; the greatest part of the witnesses produced, did shew unto the jury that all the provocation was on the part of Bird, who sent the challenge, and that Taverner would have had a reconcilement made between them, being very unwilling to fight upon such a slight, or rather no cause at all, being only for his refusal to pay mony unto Bird, which was owing by him to him, he being then minus sufficiens to pay this, but promised to pay him afterwards so soon as he could what was due to him; this would not satisfie Bird, but he would be revenged on him by single combate.

The Judges perceiving the circumstances, the which if they only were to be considered without the law, would make the matter much favourable on the part of Taverner, therefore in this case they directed the jury as to the matter in law, touching the murther.

Coke Chief Justice. It is well said by one, Infœlix pugna, ubi plus periculum victori quam victo, (s) (loss of his goods, of his land, of his life, and the jeopardy of soul, without true repentance). This I say for law, that if one only do give the cause and provocation, and send the challenge, and the other accepts of it, and upon this they enter combate, and he which sends the challenge is killed, this is clearly murther in the other; for it is not material in the law who begins the quarrel, (so as there was a former quarrel) and the malice still continuing until the last stroak given; for the difference will be this, if they are once reconciled for the first matter, and afterwards they happen to fall out again suddenly, and do fight, and the one kills the other, this is but a man-slaughter.

Croke Justice agreed with him herein, and no palliating of the matter, at the place by them appointed to fight, will make any difference or alteration of the case.

Dodderidge Justice. The place was here appointed by Taverner himself, he did fight upon the Sunday, having heard a sermon in the morning, and the text was, Non occides, so that it is altogether forbidden by God, because that juxta **[172]** imaginem Dei, factus est homo, no lawful cause can there be for one to fight in single combate, but only in defence of his country or State. He agreed in all with the other.

Coke. This is a plain case, and without any question, if one kill another in fight, upon the provocation of him which is killed, this is murther; here Taverner sends his weapon, appoints the place and time, for no private provocation he ought to fight in such a manner, for it shall be murther in him if he kills him in the defence of his reputation. And we do all of us agree in this, that it is clearly murther in him, notwithstanding he kills him upon the provocation of the other, and not on his part; where time and place is appointed, they sleep upon it, and so they fight, and he kills the other, we do all agree that this is murther in him.

Haughton Justice. Two matters are here considerable: 1. Whether here be any excuse and extenuation of the murther, the provocation being only by him that was killed? wherein I shall deliver my opinion, and herein I agree to that which hath been before delivered, that when there is a mutual consent to go to a place, and there to perform the fight, where they come not for their defence, but for to fight; each of them carries malice along with him, the one of them is killed, this is clearly murther in the other: so I agree herein, the law to be as it hath been said.

The second matter, whether there be any clearing of this, here a day is appointed, and a place, and two days after they do meet, according to their, appointment, this is in discharge of the malice. Taverner then said, that he did confess his error, that he did not acquaint the Judges with this matter at the first, to have had an order by them taken therein; and he being so forcibly urged to this by threats, to proclaim him a coward, and that he would kill him in some base manner, this error in defence of himself and of his reputation, had caused him to fall into this inconvenience: and he said also, that the Kings edict was not then extant, and that therefore he did very much bewail his miserable and unfortunate chance, to be the first president in this case, to have the trial of law.

To whom the Court answered, You are not the first president by many hundreds, for this was the common law before the Kings edict, which was but declaratio juris antiqui & non introductio novæ legis.

And so with this direction of the Court, the jury found the prisoner guilty of felony and murther, of which he was indicted and arraigned, but that he had neither goods nor chattels.

Upon demand of the prisoner, by the Clerk of the Crown, what he had to say for himself, why the Court should not proceed to give judgment upon him.

The prisoner said, that he had nothing further to say upon this.

Croke Justice, to the prisoner, you have been indicted for this fact, and have pleaded not guilty, and have had a fair trial: the jury have found you guilty, wherein they have done very discreetly, and with good advice and judgment, they have well weighed and pursued their evidence: and now Taverner take into thy heart with serious meditation, all the errors of thy life past, turpe enim est, bene natis, & bene educatis, male vivere, as you have been: now you are to prepare your self for your appearance at the judgment-seat of God; neither good nor ill comes to any one by chance, but by the divine providence of God, as touching this offence of which you are found guilty, it is an offence of blood, a crying sin: for offences in other matters, Gen. 3. ver. 13. dixit Deus ad hominem, quare hoc fecisti? But in matters of blood, Gen. 4. ver. 10. the question there is not, Quare hoc fecisti? sed dixit Deus ad Cain. Quid fecisti? vox sanguinis fratis tui clamat ad me de terra. No answer to this could be made, no excuse, (in defence of his reputation) as here hath been made, but this is no excuse, this matter is prosecuted, and so now to be punished, ut pœna ad paucos, metus ad omnes perveniat, for this offence of effusion of blood, no sleeve-[173]-less excuse can serve; Cain answered to Gods question of ubi est Abel, frater tuus? with a nescio, nunquid custos fratris mei sum ego? Homo homini Deus, non lupus, none of these will serve his turn, but O quid fecisti! Infœlix victoria, where more damage comes to him which doth overcome, than unto him who is vanquished; his punishment is secret, inter pontem & fontem, he may find mercy: but as to the murtherer, quid fecisti for him? vox sanguinis fratris tui clamat ad me, &c. maledictus eris super terram & profugus eris, super terram, the civil sword of justice hangs now shaking over your head, judicia Dei sæpe sera semper certa, as one well observeth, Blood it is a crying sin, the which doth pollute the land.

The observation of the barbarians, out of the light of nature, was admirable, where seeing a man to escape one danger, and to have another overtake him, as St. Paul, Acts 28. having escaped the danger of the sea, upon the land a viper fastened on his hand; they censured him presently, saying, he had provoked God, that he was a murtherer, whom though he had escaped the sea, yet vengeance suffereth not to live; this they collected out of the light of nature, (but there they were mistaken in the person, but not in the matter): here make your repentance correspondent to your offence, quid verba audiam cum facta videam? a quarrel offered, and the same entertained, (on the Sabbath-day) you heard before a sermon in the pulpit, and the text, Non occides; notwithstanding this, you did undertake this quarrel, this doth much aggravate your offence, that you have not sucked so good juyce out of so good herbs, as you ought to have done: but if you will now cry unto God truly in sincerity of heart, Domine libera me de sanguinibus, He will then hear thee, and He hath sent His Son to this purpose, for to deliver thee, who hath said, Come unto Me all that be weary and heavy laden, &c.

The jury here have done discreetly and wisely, you are now justly condemned, inasmuch as the jury have found you guilty; the Court doth therefore adjudge, that you shall be carried from hence to the place from whence you came, and from thence to the place of execution, and there to be hanged per collum until thou art dead, & diu à mercy de vostre ailme.

Coke Chief Justice. If the cause be never so important, yet it cannot allow one to draw blood of a subject; if this were lawful, who should then live? If all be so as you Taverner have said, yet by the very letter of the law, this fact is murther in you: here a challenge sent, accepted of by you, the weapon, time and place agreed on, and seconds to be, and chyrurgions to be ready; if this be not murther, what then shall be murther? misera servitus, ubi jus est incognitum, you are punished here, ut pœna ad paucos. Nemo prudens punit, ut præterita revocentur, sed ut futura præveniantur; maledicta est terra propter effusionem sanguinis, nec aliter pacificatur ira Dei, nec placatur, nisi per effusionem ipsius sanguinis.

Nota, in the case of Taverner, the coroner gave evidence to the jury, super visum corporis, but they would give up no verdict, wherefore he adjourned them from time to time, and from place to place, but they would not agree upon a verdict; upon this a letter was sent to him from Flemming Chief Justice, not to take a verdict of them; upon which he went to the Assizes at Hartford, and did acquaint the Judges with it; for his discharge the jurors were fined, and the indictment there taken at Hartford.

Coke. The jury are to be fined, if they will not give up their verdict.

Dodderidge. If such packing be, the indictment then is to be found before the Justices of Assize, as here it was: the Court commended the coroner for his care in this business.

[174] GRANGE *Plaintiff against* DENNY *Defendant.*

Entred Mich. 13 Jac. B. R. Rot. 165.

Error in a quare impedit. 1 Ro. Rep. 363. 1 Ro. Abr. 772. 784.

In a writ of error to reverse a judgment given in the Court of C. B. In a quare impedit brought there against the archbishop, the bishop, and three others defendants. The archbishop pleads, that he claims nothing but as metropolitan; the bishop pleads, that he claims nothing but as Ordinary, and the three others, as disturbers, make their title; judgment for the plaintiff, three errors here assigned for reversing of the judgment (s)

1. In the quare impedit here, costs were assessed by the jury; this error was waived, being an error only in the jury, but no judgment given for costs, and the penalty of damages include costs. Another matter moved for error, because there is no release of the party, of the costs given by the jury. The whole Court clear of opinion, that this ought not to be, being not at all material.

2. The second error insisted upon, that the judgment given for the plaintiff against the two first, (s) the archbishop and the bishop, being without a cessat executio, until the other be tried against the other three defendants, this being one intire quare impedit, and for this omission, being an essential and principal part of the judgment, therefore all to abate and to be reversed for the whole. And for this was cited 20 E. 4. fol. 1. a quare impedit brought by the Queen against divers, a recovery by default against one of them. The judgment was to have a writ to the bishop, and damages for half a year, but execution to stay till it be tried between the other defendants; otherwise this execution against one alone would abate the writ against the other defendants; as in trespass against two, the issue is tried against one, the plaintiff prays execution, the writ shall abate against the other.

Coke Chief Justice. If he had taken execution against the other, it is true then, and shall be so as it hath been said.

To prove that such a cesser of execution is material, and part of the record, these books were urged, (s) 24 E. 3. fol. 61. dower recovered with a cessat executio, during the minority of an infant, and 36 H. 6. fol. 13. in a forger of faux faits. So that (as it was urged) this is a material part of the record, this being omitted in the judgment in the C. B. being a material part of the judgment, shall make the same to be erronious; and the entring of this at the Assizes will nothing at all aid it.

3. The third error, the plaintiff here hath judgment, & breve metropolitano granted to him, where it ought to have been breve episcopo. It was urged, the difference to be where the archbishop and bishop be defendants, and claim nothing but as Ordinary; there it ought to be breve episcopo; but if the bishop si episcopus est pars, there it shall be breve metropolitano, authorities and presidents urged for this, Coke 6 pars, fol. 48. 6. In *Boswells case*, in a quare impedit against the Bishop of London, and John Lancaster; the bishop pleads, quod ipse nihil habet, nec habere clamat in ecclesia prædicta, nisi admissionem, institutionem, & inductionem personarum, upon this plea, the plaintiff had a writ to the bishop, sed cessat executio quousque le plea between the plaintiff and the other be determined; and with this agrees 26 E. 3. fol. 75. Fitz. Nat. Brev. fol. 38. B. a man recovers his presentation in the C. B. against the bishop, he may have a writ to the same bishop, to admit his clerk, or to the metropolitan, if he **[175]** will, and Coke 5 pars, fol. 36. b. in *Baynhams case*,