CASE 3. SANDS *against* DRURY.

Quære, whether tithes can be granted by copy? *Ante*, 293. 413. 784.

1 Roll. Ab. 498. Moor, 50. 219. 355. Co. Lit. 58. a. 4 Co. 24. b. Viner "Copyhold," E. pl. 1.

Trover of twenty loads of hay. Upon not guilty pleaded, a special verdict was found, that this hay was parcel of the tithes severed from the nine parts pertaining to the Rectory of Hackley, and demised and demisable time, &c. *secundum consuetudinem manerii de Hackley;* that the Prior of Newbury was seised in fee of the manor and Rectory of Hackley; and in 27 Hen. 8. demised those tithes by copy to H. under whom the defendant claimed; and afterwards, by the dissolution, &c. the manor and rectory came to King Henry the Eighth, who conveyed it to the Archbishop of York, who let that rectory to the plaintiff, who claimed those tithes; and the defendant, under pretence of that copy, carried them away. *Et si, &c.*

The sole question was, whether those tithes were grantable by copy, &c.? It was moved for the plaintiff, that they were not. First, in respect of the nature of tithe, wherein none could have any property before the Council of Lateran, which was in the time of King John: for before that time every one might have paid them to whom he pleased; but by those constitutions they are annexed to the rectory: it is then impossible that there should be any custom to demise them by copy, from time, &c. whereas none had interest in them but within time of memory. Tithes also cannot pass, unless by deed; and therefore to grant them by copy of court roll cannot be good. There cannot also any thing pass by copy, but that which is parcel of the manor; but it hath been adjudged, that tithes cannot be parcel of a manor. Wherefore, &c.

And of that opinion was Popham, for the first and last reasons; for although common and *prima vestura prati* may be granted by copy, because they are parcel of the manor, yet tithes cannot be so, because they cannot be parcel of a manor; for a manor and tithes are of several natures, although they be united in one man's hand; and then it is not possible that that which is not parcel of a manor, can be demised *secundum consuetudinem manerii.* And therefore it was adjudged in the time of Queen Mary, in the case of the Duke of Suffolk, that where one had two manors, and granted a copyhold of the one manor at the court of the other manor, that it was a void grant; for it cannot be a copyhold, according to the custom of a manor, whereof it is not parcel.

But Gawdy doubted thereof, and conceived it had been well enough, if it had been so used from time whereof, &c.—But because upon the verdict it did not appear that it had been granted by copy, from time whereof, &c. it was held, that there was not any title found for the defendant; and therefore adjudged for the plaintiff (*a*).

[815] CASE 4. SOUTHCOT *against* BENNET.

A bailee, except the bailment be special, is liable in *detinue* to the bailor, if the goods be stolen.

Cro. Jac. 188. Noy, 126. 1 Ld. Raym. 655. *Vide Coggs* v. *Barnard*, 2 Ld. Raym. 911. the note in Co. Lit. 89. a. and 1 Bac. Ab. 236.

Judgment may be given on a bad plea. Dyer, 184. a. b. Strange, 302. 317. 394. 5 Com. Dig. 124, 125.

Detinue of goods; and counts, that he delivered them to the defendant to keep safely, &c. The defendant confesseth the delivery, and that afterwards J. S. feloniously robbed him of them. Wherefore, &c. The plaintiff replies *protestando*, that J. S. did not rob him, for plea saith, that the said J. S. was servant to the

(*a*) By 5 Geo. 3. c. 17. leases by ecclesiastical persons of tithes and other incorporeal hereditaments for life, lives, or years, are declared good in law.

defendant. And it was thereupon demurred.—And after argument at the Bar, Gawdy and Clench, *cæteris absentibus*, held, that the plaintiff ought to recover, because it was not a special bailment; that the defendant accepted to keep them as his proper goods, and not otherwise; but it is a delivery, which chargeth him to keep them at his peril. And it is not any plea in a *detinue* to say, that he was robbed by one such; for he hath his remedy over by trespass, or appeal, to have them again. And that is the reason of 33 Hen. 6. pl. 1. that if a gaol be broke open by thieves, and the prisoners let at large, yet the gaoler is chargeable (*a*), because he hath his remedy over; but if it be broken by the Queen's enemies, it is otherwise.

And although it was moved that the replication was vitious, for that the protestation is repugnant to the matter confessed; and then, the replication being ill, although the bar be vitious, the plaintiff cannot have judgment, as 2 Eliz. *Dautrie's case* is; yet it was held to be but a default of form, and not of substance: and the demurrer being general, no advantage can be taken thereof. Wherefore it was adjudged for the plaintiff.—*Vide* for the principal case 3 Hen. 7. pl. 4. 6 Hen. 7. pl. 12. 9 Edw. 4. pl. 40. 29 Ass. 28. 8 Edw. 2. "Detinue," 59. 4 Co. 83 & 84.

CASE 5. DUMPER *against* SYMS.

Easter Term, 40 Eliz. Roll 361.

On a proviso that a lessee and his assigns shall not alien without licence, if the lessor give licence, the condition is entirely destroyed, and the assignee may afterwards assign or demise the whole or any part of the term without licence; but otherwise a devise of the term would have been a breach of the condition. *Ante*, 348. 757.

S. C. 4 Co. 120. 1 Roll. Abr. 429. 471. 514. 2 Roll. Ab. 699. Style, 483. Dyer, 45. Moor, 205. 1 Roll. Rep. 70. 390. 2 Bulst. 291. Noy, 32. Cro. Jac. 398. 102. 3 Co. 64. Dyer, 66. 2 Bl. Rep. 766. 3 Wils. 234. 1 Wood's Con. 309. 318. Dougl. 57. 184.

A corporation aggregate cannot without deed authorize their bailiff to enter for a condition broken; and if they lease without reserving the ancient rent, it is void; but an immaterial addition will not hurt.

Trespass. Upon a special verdict it was found, that the president and scholars of Corpus Christi College in Oxford were seised in fee, and anno 10 Eliz. let it by indenture to one Bold for 30 years; proviso that the lessee and his assigns should not alien the premises, or any part thereof, without licence of the lessors, rendering 33s. 4d. per annum. In 15 Eliz. the president and scholars, by their deed, licensed Bold to alien the premises, or any part, for the entire term, or for part thereof, to any person whom he pleased. Bold assigns the entire term to one Tubb. Tubb devises the entire term to his eldest son, and made him his executor, and died. The executor entered generally; and they find, that the testator was not indebted to any; that afterwards the son died intestate; and administration of his goods were committed to J. S. who entered, and aliened to the defendant. That afterwards, in 38 Eliz. the said president and scholars, by the name of the president and scholars of Corpus Christi College in Oxon. *in comitatu Oxon.* made a lease thereof to the plaintiff rendering 22s. rent per annum; and that they made a warrant to one Englesfield to enter, and deliver the lease upon the land (but it was not found that this warrant was by writing under their seal); and that Englesfield entered in their name (*a*), and delivered the lease upon the land to the **[816]** plaintiff, upon whom the defendant re-entered; whereupon this action was brought. *Et si, &c.*—First, and which was the principal question in the case, it was moved, whether this licence to the first lessee to alien (who aliened accordingly) be a dispensation only, or a total determination of the condition? Moor, for the defendant, moved, that at the first the words do not extend to alienations by assignees in deed; but the word assignees in the condition extends

(*a*) 4 Co. 84. 2 Mod. 28. 1 Vent. 239.
(*a*) 2 Roll. Ab. 699. Cro. Jac. 411. Cro. Car. 269.