

Bartue and Duchess of Suffolk's Case 2 Dyer 176 b, 73 ER 388
BARTHE AND THE DUCHESS OF SUFFOLK'S CASE.

The queen licenses A. to go beyond sea for a certain purpose' " provided that if he converses with fugitives the license shall be void." By privy seal she commands his return: the messenger" is by Al's servants prevented from delivering the message, and certifies it and a conversing with fugitives into chancery, which is sent to the exchequer, and his lands are seized: 1st, This certificate is not traversable, for the matter being out of the realm cannot be tried by a jury. Idly, The license is not revocable, being for a time certain. 3dly, Conversing with fugitives does not make it, void abnatio.

(30) Queen Mary, on the first of May, in the first year of her

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reign, at the request of the Marquis of Winchester and Mr. Bartue, who had espoused the Lady Catharine Duchess of Suffolk, the widow of Charles Duke of Suffolk, executors of his will, for the recovery of certain debts due to the said duke in parts beyond the seas, granted license under her privy signet for such purpose to the said Bartue to depart out of the realm, and there to stay until he had recovered his debts, with this proviso, that if the said Bartue during his abode beyond the sea should have any resort to any of the fugitives out of the realm, or should repair to any country at enmity with this kingdom, then the virtue of the said license should cease, &c. And by virtue of this he departed out of the kingdom to the country of Germany in the dominions of the Palsgrave, and within a short time afterwards the duchess his wife repaired to him secretly without license; and the truth was, that the cause of their departure was for their religion. During which time of their abode there the queen sent one Bret, a messenger, with letters under the privy seal directed to them, strictly commanding them upon their faith and allegiance to return immediately into this kingdom; which Bret came to a castle upon a hill near a city of the said Palsgrave in Germany, called Winhame, where the said duchess and Bartue were, but by the repulse and defence of their servants and allies the messenger could not approach to them to deliver his letters, but was there by their servants and allies ill treated, so that he returned back with his letters. And upon his return he made a full certificate in chancery, with a report of all his journey, and of the contemptuous demeanour which was used towards him: in which he also declared, that Barlow, late bishop of Bath, and other fugitives, were there in the company of the said duchess, and that he had spoken with them concerning the duchess, who much desired to know whether they were letters or process which he brought. (31) And upon this certificate sent by mittimus into the exchequer [2-Dyer-177a]a commission issued out of the exchequer to certain gentlemen of the county of l'incoln, reciting the departure of the said duchess and Bartue, and their adherence to the enemies and rebels of the said queen, and also the said command to repair back into this kingdom; but that they, despising those commands on their faith and allegiance aforesaid, did not take care to return into this kingdom, in contempt of the queen, and against their faith and allegiance, &c. upon which they were commanded by the said commission to seize into their hands, by the oaths of good and lawful men, or otherwise, all goods, lands, and tenements &c. and to return the rents of the said lands into the exchequer &c. (which was done accordingly until their return now within this year:) since which time they have tendered a traverse in the exchequer to the contempt, with an averment that they did not adhere to the fugitives &c. alleging first their license, with an averment that their suits for their debts to be recovered were not yet determined, &c. Whether upon this matter they shall be restored to their lands and goods without a fine for the contempt, was much doubted and debated among the Judges. And by the better opinion it was conceived that the certificates of the messenger recorded in chancery, and sent by qntttts into the exchequer, in which the prince also records a contempt, and refusal to come into this kingMom, ought to be credited as true, and no traverse by law can be taken to it, because it cannot be tried by any tousele of the kingdom. But Quære whether the messenger ought not to be sworn (which does not appear), as one who makes an affidavit of the service of a subpoena. Also by the better opinion it was thought, that the breach in the proviso in the license by repairing to and being conversant with the fugitives, has no relation to make the license void ab trinito, as some

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conditions do, because the words are " that then the virtue of twice cease, should cease," which ought to be taken only from thenceforth. Also it seems by the better opinion, that the license which was granted, for a time certain was not courtermandable or revocable by the † prince. See the like of this 10. H. 4.5

Cestuy que use before 27. H. 8. devised that A. B. and C. his flees, should sell his land. A. dies; the survivors cannot sell.

(32) Cestuy que use (before the statute) in fee willed by his testament, that A. B. and a. his feoffees, should suffer his wife to take the profits of his land during her life, and after her decease that the premises should be sold by his said feoffees, and the money therefrom received that the feoffees

should pay to certain persons and to certain intents prescribed. The testator died, A. died, and the wife died. 32 both B. and a. the survivors nary sell. And it seems not, and so it was ruled; but dance if they had not been named A. B. and P. C. but feoffees only. See 15. H. 7. 12. [b. pl. 22.]

No costs shall he had on 1. & 2. P. Sz M. c. 12. although the jury assess them.

Whether upon this statute judgment against the defendant shall be quod capiatur or in misericordiâ.

[2-Dyer-177b] (33) Note, That this Term, judgment was given in an Faction founded upon the statute of the 1st and Sd of Philip and e: Mary [c. 12.] for chasing a distress out of the hundred and county where it was taken, s. that the plaintiff should recover one hundred shillings, which is the forfeiture contained in the statute, and treble damages according to the statute, but no costs; although the jury at nisi prius in Essex at the last assizes had assessed costs. And whether the judgment should be quod defendens capiatur &c. or in misericordiâ was doubted, and it was stayed till the next Term,

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therefore quære thereof.(a) But a precedent was seen for the costs expended as above, about the 5th and 6th years of Philip and Mary.

On a false return of a panel by a sheriff that it Divas arrayed by his predecessor, the party may challenge it for cosinage notwithstanding the return.

(34) The sheriff returned on a venire facias in a plea of land, that that writ was so executed and indorsed by A. B. late sheriff, his predecessor, with the panel; where in fact that panel was made and arrayed by himself the now sheriff. The party may challenge this array afterwards for cosinage or affinity of the sheriff, and this shall be tried by two triors notwithstanding this false return, which see Mich. 8. H. 5. Rot. 128.