1790.

TOUCH on the demiſe of WARD *v.* WILLINGALE. *Friday, Feb. 5th.*

A diſtreſs taken for rent accrued after the expiration of a notice to quit, is a waiver of the notice.

IN this ejectment, tried before the Lord Chief Baron at the laſt aſſizes at *Chelmsford*, the Plaintiff was nonſuited on the following circumſtances. In *September* 1787, the leſſor of the Plaintiff purchaſed the premiſes in fee, then occupied by the Defendant, who continued tenant from year to year, and to whom the leſſor of the Plaintiff on the 19th of *March* 1788, gave the following notice to quit. "I do hereby give you no-"tice to quit and leave the poſſeſſion of all that meſſuage or "tenement, *&c.* which you hold under me, *&c.* at *Michaelmas* "day next," *&c.* The Defendant not having quitted poſſeſſion in purſuance of the notice, on the 24th of *February* 1789, the leſſor of the Plaintiff diſtrained for a year and a quarter's rent, due at *Chriſtmas* 1788, *viz.* for the year ending at the expiration of the notice to quit, and the quarter from that time to *Chriſtmas*, during which the Defendant held over. The demiſe was laid on the 1ſt of *January* 1789, and the queſtion was, as appeared from the Chief Baron's report, whether the diſtreſs taken for rent accrued ſubſequent to the time when the Defendant had notice to quit, was not a waiver of the notice?

His Lordſhip was of opinion that it was a waiver, and therefore directed a nonſuit.

A rule having been obtained to ſhew cauſe, why the nonſuit ſhould not be ſet aſide, and a verdict entered for the Plaintiff or a new trial granted;

Bond, Serjt. now ſhewed cauſe. The leſſor of the Plaintiff could not recover in this ejectment, having by the taking a diſtreſs affirmed and continued the tenancy, which he had before admitted by the terms of the notice. Though in *Doe* v. *Batten* *Cowp.* 243. the mere acceptance of rent was holden not to be of itſelf a waiver of the notice, but to be a queſtion for the jury, whether it was the intention of the parties, that ſuch acceptance ſhould be a waiver or not; yet in the preſent caſe no ſuch queſtion could ariſe, the diſtreſs being a direct acknowledgment, that the tenancy continued. This principle is to be collected from, *Co. Lit.* 212. *b.*—1 *Roll. Abr.* 475.—3 *Co.* 64. *Pennant's caſe.* *Plowd.* 133. which cites 14 *Aſſize.*—*Birch* v. *Wright*, 1 *Term Rep. B. R.* 378.

Runnington, Serjt. *contrà*. As the Defendant was tenant from year to year, the authorities cited from Lord *Coke*, which were

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of the waiver of a forfeiture for a condition broken, are not applicable. As the landlord might have brought an action for uſe and occupation, there is no good reaſon why he may not alſo bring an ejectment. In the former, there is an implied contract between the parties, founded on a ſuppoſed permiſſion by the Plaintiff for the Defendant to enjoy, in the latter, the contract is expreſs; but the principle is the ſame. In *Doe* v. *Batten* acceptance of rent was holden not to be a waiver of a notice to quit; and in a caſe there cited tried at *Launceſton* aſſizes, though the Plaintiff had accepted rent which had accrued after the demiſe, yet he both recovered in the ejectment, and afterwards in an action for uſe and occupation.

Lord LOUGHBOROUGH.—There could be no queſtion of intention left to the jury, as the taking a diſtreſs was an act not to be qualified, and an expreſs confirmation of the tenancy.

GOULD, J.—In the mere acceptance of rent, the *quo animo* is to be left to the jury agreeable to Lord *Mansfield*'s doctrine in the caſe in *Cowper*. But I agree with my Lord Chief Juſtice, that the diſtreſs was in this caſe, an act not to be qualified, and amounted to a confirmation of the tenancy.

WILSON, J.—I am of the ſame opinion. In *Doe* v. *Batten* there was a deſign to deceive the landlord, and a queſtion I remember very well was made, whether he ſhould be bound by the terms of the receipt in which the money was called rent for that direct purpoſe; which was the ground of Lord *Mansfield*'s ſaying, that the queſtion *quo animo* ſhould be left to the jury. The mere acceptance of money is equivocal, it may be in ſatisfaction for the treſpaſs, or it may be for rent: and in an action of treſpaſs for meſne profits, accord and ſatisfaction may be pleaded in bar if rent has been accepted. There would be no doubt, but that the Plaintiff would not have been precluded by taking a diſtreſs, if inſtead of the year and a quarter, it had been only for rent due at *Michaelmas*, becauſe the (*a*) ſtatute ſays, that a diſtreſs may be taken within ſix months after the determination of a leaſe, provided the intereſt of the landlord, and the poſſeſſion of the tenant continue: the law in this reſpect being altered ſince the time of Lord *Coke*, when the old notion prevailed, that a diſtreſs could not be taken, unleſs the ſame relation ſubſiſted between the parties.

Rule diſcharged.

(*a*) 8 *Anne*. 14. *ſ.* 6 & 7.

COLLIS

LORD KENYON, C. J.---The queſtion is, Whether a bond given by one perſon to another, both reſident in this country, is valid, though it reſerve a greater intereſt than is allowed by the laws of this country. The ſtatute 14 Geo. III. cap. 79. (which, it has been argued, protects this Caſe) is an enabling act, extending to particular caſes therein mentioned, and does not reach any others. Now it enacts, that mortgages and other ſecurities reſpecting lands in Ireland and the Weſt Indies, reſerving intereſt allowed in thoſe countries, ſhall be valid, though executed in England: but it does not extend to *perſonal* contracts. And if the preſent attempt were to ſucceed, it would ſap the foundation of the ſtatutes of uſury.

The three other Judges concurring,

Rule diſcharged.

CASES in the COURT OF COMMON PLEAS, in Hilary Term, 30 GEO. III.

TOUCH, *on the Demiſe of* WARD, *v.* WILLINGALE.

This was a motion to ſet aſide a non-ſuit in the following Caſe; viz. The defendant rented certain premiſes from year to year, and had regular notice from the plaintiff to quit. But, not quitting purſuant to the notice, the plaintiff diſtrained for the rent due at the time the notice expired, and alſo for a quarter's rent which had afterwards become due for the time the defendant held over ſince the expiration of the notice. The plaintiff was non ſuited at the trial of the ejectment, on the ground that diſtraining for rent which accrued after the expiration of the notice to quit, was a waiver of the notice.

Now upon cauſe ſhewn, the Caſe of *Doe* v. *Batten* (Cowper, 243) where the acceptance of rent after the expiration of notice to quit, was held not to be a waiver of the notice but a queſtion for the Jury to find the intention of the parties upon, was inſiſted on as analogous to the preſent.

LORD LOUGHBOROUGH ---There could be no queſtion of intention left to the Jury, as the taking a diſtreſs was an act not to be qualified, and an expreſs confirmation of the tenancy.

GOULD,

GOULD, J.---In the mere acceptance of rent, the *quo animo* is to be left to the Jury, agreeable to Lord Mansfield's doctrine in the caſe in Cowper. But I agree with my Lord Chief Juſtice, that the diſtreſs was, in this caſe, an act not to be qualified, and amounted to a confirmation of the tenancy.

WILSON, J.---I am of the ſame opinion. In *Doe* v. *Batten*, there was a deſign to deceive the landlord; and a queſtion, I remember very well, was made, whether he ſhould be bound by the terms of the receipt in which the money was called *Rent* for that direct purpoſe; which was the ground of Lord Mansfield's ſaying, that the queſtion *quo animo* ſhould be left to the jury. The mere acceptance of money is equivocal; it may be in ſatisfaction for the treſpaſs, or it may be for rent: and in an action of treſpaſs for meſne profits, accord and ſatisfaction may be pleaded in bar if rent has been accepted. There would be no doubt but that the plaintiff would not have been precluded by taking a diſtreſs, if, inſtead of the year and a quarter, it had been only for rent due at Michaelmas, becauſe the ſtatute ſays, that a diſtreſs may be taken within ſix months after the determination of a leaſe, provided the intereſt of the landlord, and the poſſeſſion of the tenant continue: the law in this reſpect being altered ſince the time of Lord Coke, when the old notion prevailed, that a diſtreſs could not be taken, unleſs the ſame relation ſubſiſted between the parties.

Rule diſcharged.

PARSONS v. THOMPSON.

CASE.

The plaintiff was a maſter-joiner in one of the King's Dock-Yards; the defendant, having a view of ſucceeding him, entered into a written agreement to allow him, in caſe he ſhould procure himſelf to be ſuperannuated, and the defendant ſucceed to his appointment, his *extra-pay* from the yard-books, excluſive of the ſuperannuation-money paid by Government, during his life.

An action of aſſumpſit was brought for the *extra-pay*; and now upon ſhewing cauſe why the verdict ſhould be ſet aſide, and a non-ſuit entered,

LORD LOUGHBOROUGH delivered the judgment of the Court. On the trial of this cauſe two points were made, one, whether the agreement was legal, the other, what was the meaning of *extra* pay. The ſecond queſtion is immaterial,