totally unfit for the office: and therefore submitted that there was sufficient cause for removing him.

Mr. Lucas, contra, insisted that the office of parish clerk is a temporal office durante vitâ: that the parson cannot remove him: and that he has a right to appoint a deputy: and cited 1 Bur. 367. 2 Str. 942.—1108. 11 Mod. 261.

Lord Mansfield then said, there was an application of this sort in a case, *Rex* v. *Proctor*, Mich. 15 Geo. 3, where the parson removed a parish clerk appointed by the former incumbent. There the right of amotion was in question; and all agreed it must be somewhere, but that case was not decided.

Aston Justice.—The Court in that case recommended it to the minister to restore him upon his asking pardon.*[1]

Lord Mansfield.—What remedy is there in Westminster-Hall to remove him? He certainly has his office only quamdiu bene se gesserit. But though the minister may have a power of removing him on a good and sufficient cause, he can never be the sole Judge and remove him ad libitum; without being subject to the control of this Court.

Aston Justice.—As long as the clerk behaves himself well he has a good right and title to continue in his office: therefore if the clergyman has any just cause for removing him, he should state it to the Court.—Accordingly the Court enlarged the rule to this term, that affidavits might be made on both sides, of the cause and manner of amotion. Adjornatur.

And now on this day, upon reading the affidavits, Lord Mansfield said, it was settled in the case of *Rex* v. *Dr. Ashton*, 28 Geo. 2, 1754, "that a parish clerk is a temporal officer, and that the minister must shew ground for turning him out." Now in this case, there is no sufficient reason assigned in the affidavits that have been read, upon which the Court can exercise their judgment; nor is there any instance produced of any misbehaviour of consequence: therefore the rule for a mandamus must be absolute.

Per Cur. Rule absolute.

HAMBLY ET AL', Assignees of Moon *versus* TROTT, Administrator. Same day, 1776.

Trover does not lie against an executor for a conversion by his testator.

[Referred to, *Sawyer* v. *Goodwin*, 1867, 36 L. J. Ch. 583; *Peek* v. *Gurney*, 1873, L. R. 6 H. L. 393. Discussed, *Phillips* v. *Homfray*, 1883-86, 24 Ch. D. 445; 11 App. Cas. 466. Referred to, *Finlay* v. *Chirney*, 1888, 20 Q. B. D. 503; *Phillips* v. *Homfray*, 1890, 44 Ch. D. 699.]

In trover against an administrator cum testamento annexo, the declaration laid the conversion by the testator in his lifetime. **[372]** Plea, that the testator was not guilty. Verdict for the plaintiff.

Mr. Kerby had moved in arrest of judgment upon the ground of this being a personal tort, which dies with the person; upon the authority of *Collins* v. *Fennerell*,*[2] and had a rule to shew cause.

Mr. Buller last term shewed cause.—The objection made to the plaintiff's title to recover in this case is founded upon the old maxim of law which says, actio personalis moritur cum personâ. But that objection does not hold here; nor is the maxim applicable to all personal actions; if it were, neither debt nor assumpsit would lie against an executor or administrator. If it is not applicable to all personal actions, there must be some restriction; and the true distinction is this: where the action is founded merely upon an injury done to the person, and no property is in question; there, the action dies with the person: as in assault and battery, and the like. But where property is concerned, as in this case, the action remains notwithstanding the death of the party.

Trover is not like trespass, but lies in a variety of cases where a party gets the possession of goods lawfully. It is founded solely in property: and the value of the goods only can be recovered. Therefore, the damages are as certain as in any action

*[1] I omitted inserting the case of *Rex* versus *Proctor* in its place, because it was compromised as above; and the Court gave no opinion.

*[2] Trin. 22 & 23 Geo. 2, B. R.

of assumpsit. As to the case of *Collins* v. *Fennerell* it is a single authority and was not argued; therefore, most probably was determined simply on the old maxim. But Savile, 40, case 90, is directly the other way.

Where the damages are merely vindictive and uncertain, an action will not lie against an executor; but where the action is to recover property, there the damages are certain, and the rule does not hold. This is an action for sheep, goats, pigs, oats, and cyder converted by injustice to the use of the person deceased: therefore, this action does not die with the person.

Mr. Kerby contra for the defendant cited, Palm. 330, where Jones Justice said, "that when the act of the testator includes a tort, it does not extend to the executor; but being personal dies with him; as trover and conversion does not lie against an executor for trover fait par luy." *Collins* v. *Fennerell* above cited.

Here, the goods came to the hands of the testator, and he converted them to his own use. Trover is an action of tort; and conversion is the gist of the action: no one is answerable for a tort, but he who commits it; consequently this action can only be maintained against the person guilty of such conversion. But here the conversion is laid to be by the testa-**[373]**-tor. Therefore the judgment must be arrested. The distinction that has been taken in the books is, that the action may be maintained by an executor but not against him. Popham, 31, *Hughes* v. *Robotham.* Popham, 139, *Le Mason* v. *Dixon.*

Lord Mansfield. If this case depends upon the rule, actio personalis moritur cum personâ, at present only a dictum has been cited in support of the argument. Trover is in form a tort, but in substance an action to try property.

Mr. Kerby. The executor is answerable for all contracts of the testator, but not for torts.

Lord Mansfield. The fundamental point to be considered in this case is, whether if a man gets the property of another into his hands it may be recovered against his executors in the form of an action of trover, where there is an action against the executors in another form. It is merely a distinction whether the relief shall be in this form or that. Suppose the testator had sold the sheep, &c. in question: in that case, an action for money had and received would lie. Suppose the testator had left them in specie to the executors, the conversion must have been laid against the executors. There is no difficulty as to the administration of the assets, because they are not the testator's own property. Suppose the testator had consumed them, and had eaten the sheep; what action would have lain then? Is the executor to get off altogether? I shall be very sorry to decide that trover will not lie, if there is no other remedy for the right.

Aston Justice. Suppose the executor had had a counter demand against the plaintiff, he could not have set it off in trover: but in an action for money had and received, he might. If these things had been left by the testator in specie, the conversion must have been laid to be by the executor. There seems to be but little difference between actions of trover, and actions for money had and received. As at present advised, I incline to think trover maintainable in this case.

Ashhurst Justice. The maxim does not hold as an universal proposition; because assumpsit lies. As to the case of *Collins* v. *Fennerell*, all the Court considered it as unargued, and given up rather prematurely by Mr. Henley.

Lord Mansfield. The criterion I go upon is this: can justice possibly be done in any other form of action? Trover is merely a substitute of the old action of detinue. 2 Keb. 502. Ventr. 30. Sir T. Raym. 95.—The Court ordered it to stand over.

[374] Upon a second argument this day, Mr. Dunning cited Cro. Car. 540. —1 Sid. 88.

Lord Mansfield. Many difficulties arise worth consideration. An action of trover is not now an action ex maleficio, though it is so in form; but it is founded in property. If the goods of one person come to another, the person who converts them is answerable. In substance, trover is an action of property. If a man receives the property of another, his fortune ought to answer it. Suppose he dies, are the assets to be in no respect liable? It will require a good deal of consideration before we decide that there is no remedy.

Aston, Justice. The rule is, quod oritur ex delicto, non ex contractu, shall not charge an executor. 2 Bac. Abr. 444, 445, tit. Executors and Administrators. 5 Bac. Abr. 280, tit. Trover. Where goods come to the hands of the executor in

specie, trover will lie; where in value, an action for money had and received. But the difficulty with me is, that here it does not appear whether the goods came to the hands of the defendant in specie or in value.

Cur. advisare vult.

Afterwards, on Monday, February 12th, in this term, Lord Mansfield delivered the unanimous opinion of the Court as follows:

This was an action of trover against an administrator, with the will annexed. The trover and conversion were both charged to have been committed by the testator in his life-time: the plea pleaded was, that the testator was not guilty. A verdict was found for the plaintiffs, and a motion has been made in arrest of judgment, because this is a tort, for which an executor or administrator is not liable to answer.

The maxim, actio personalis moritur cum personâ, upon which the objection is founded, not being generally true, and much less universally so, leaves the law undefined as to the kind of personal actions which die with the person, or survive against the executor.

An action of trover being in form a fiction, and in substance founded on property, for the equitable purpose of recovering the value of the plaintiff's specific property, used and enjoyed by the defendant; if no other action could be brought against the executor, it seems unjust and inconvenient, that the testator's assets should not be liable for the value of what belonged to another man, which the testator had reaped the benefit of.

[375] We therefore thought the matter well deserved consideration: we have carefully looked into all the cases upon the subject. To state and go through them all would be tedious, and tend rather to confound than elucidate. Upon the whole, I think these conclusions may be drawn from them.

First, as to actions which survive against an executor, or die with the person, on account of the cause of action. Secondly, as to actions which survive against an executor, or die with the person, on account of the form of action.

As to the first; where the cause of action is money due, or a contract to be performed, gain or acquisition of the testator, by the work and labour, or property of another, or a promise of the testator express or implied; where these are the causes of action, the action survives against the executor. But where the cause of action is a tort, or arises ex delicto (as is said in Sir T. Raym. 57, *Hole* v. *Blandford*,) supposed to be by force and against the King's peace, there the action dies; as battery, false imprisonment, trespass, words, nuisance, obstructing lights, diverting a water course, escape against the sheriff, and many other cases of the like kind.

Secondly, as to those which survive or die, in respect of the form of action. In some actions the defendant could have waged his law; and therefore, no action in that form lies against an executor. But now, other actions are substituted in their room upon the very same cause, which do survive and lie against the executor.—No action where in form the declaration must be quare vi et armis, et contra pacem, or where the plea must be, as in this case, that the testator was not guilty, can lie against the executor. Upon the face of the record, the cause of action arises ex delicto; and all private criminal injuries or wrongs, as well as all public crimes, are buried with the offender.

But in most, if not in all the cases, where trover lies against the testator, another action might be brought against the executor, which would answer the purpose.—An action on the custom of the realm against a common carrier, is for a tort and supposed crime: the plea is not guilty; therefore, it will not lie against an executor. But assumpsit, which is another action for the same cause, will lie.—So if a man take a horse from another, and bring him back again; an action of trespass will not lie against his executor, though it would against him; but an action for the use and hire of the horse will lie against the executor.

There is a case in Sir Thomas Raymond, 71,* which sets this matter in a clear light: there, in an action upon the case, the plain-**[376]**-tiff declared, "that he was possessed of a cow, which he delivered to the testator, Richard Bailey, in his lifetime, to keep the same for the use of him the plaintiff; which cow the said Richard afterwards sold, and did convert and dispose of the money to his own use; and that neither the said Richard, in his life, nor the defendant after his death, ever paid the

* *Bailey* v. *Birtles et Uxor: Executrix of Richard Baily.*

said money." Upon this state of the case, no one can doubt but the executor was liable for the value. But the special injury charged, obliged him to plead, that the testator was not guilty. The jury found him guilty. It was moved in arrest of judgment, because this is a tort for which the executor is not liable to answer, but moritur cum personâ. For the plaintiff it was insisted, that though an executor is not chargeable for a mis-feasance, yet for a non-feasance he is: as for non-payment of money levied upon a fieri facias, and cited Cro. Car. 539. 9 Co. 50 b. where this very difference was agreed; for non-feasance shall never be vi et armis, nor contra pacem: but notwithstanding this the Court held "it was a tort, and that the executor ought not to be chargeable." Sir Thomas Raymond adds, "vide Saville, 40, a difference taken." That was the case of *Sir Henry Sherrington*, who had cut down trees upon the Queen's land, and converted them to his own use in his life-time. Upon an information against his widow, after his decease, Manwood, Justice, said, "In every case where any price or value is set upon the thing in which the offence is committed, if the defendant dies, his executor shall be chargeable; but where the action is for damages only, in satisfaction of the injury done, there his executor shall not be liable." These are the words Sir Thomas Raymond refers to.

Here therefore is a fundamental distinction. If it is a sort of injury by which the offender acquires no gain to himself at the expence of the sufferer, as beating or imprisoning a man, &c. there, the person injured has only a reparation for the delictum in damages to be assessed by a jury. But where, besides the crime, property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor. As for instance, the executor shall not be chargeable for the injury done by his testator in cutting down another man's trees, but for the benefit arising to his testator for the value or sale of the trees he shall.

So far as the tort itself goes, an executor shall not be liable; and therefore it is, that all public and all private crimes die with the offender, and the executor is not chargeable; but so far as the **[377]** act of the offender is beneficial, his assets ought to be answerable; and his executor therefore shall be charged.

There are express authorities, that trover and conversion does not lie against the executor: I mean, where the conversion is by the testator. Sir William Jones, 173-4. Palmer, 330. There is no saying that it does.

The form of the plea is decisive, viz. that the testator was not guilty; and the issue is to try the guilt of the testator. And no mischief is done; for so far as the cause of action does not arise ex delicto, or ex maleficio of the testator, but is founded in a duty, which the testator owes the plaintiff; upon principles of civil obligation, another form of action may be brought, as an action for money had and received. Therefore, we are all of opinion that the judgment must be arrested.

Per Cur. *Judgment* arrested.

REX *versus* DOCTOR WINDHAM, Warden of Wadham College. Thursday, Jan. 25th, 1776. Mandamus granted to compel the warden of Wadham College to affix the common seal of the college to an answer of the fellows, &c. in Chancery, contrary to his own separate answer put in.

[Referred to, *Mill* v. *Hawker*, 1874-75, L. R. 9 Ex. 322; 10 Ex. 92.]

Lord Mansfield.—This is an application, by the majority of the fellows of Wadham College to this Court, for a mandamus to be directed to the warden of the college, to compel him to affix the common seal of the college to an answer of the subwarden, bursars, dean and principal officers of the college, to a bill filed in the Court of Chancery by Thomas Lloyd against the warden, fellows, and scholars. The object of the bill is to compel the execution of a lease according to an agreement alleged to have been made by the college, but which the fellows now insist was not made by a majority of them, as it ought to have been. The warden disapproves of the answer of the fellows, and therefore has refused to put the seal of the college to it.

The ground on which the application has been made is, that there is no other remedy by which the end can be specifically obtained.

In the Court of Chancery, when a bill is brought against a corporation, if the corporation is in contempt, there is no remedy by way of proceeding for a contempt personally against the real parties who offend; but the mode of compulsion is by