

The point in issue to be tryed was whether the ship tooke in Tobacco before Bond given or not; and if the Def<sup>t</sup> had given the Bond in Evidence to the Jury at the Barr to Maintain & support the Matter in issue, if the Bond was not a good Bond according to the form of the Statute, the Kings Councill or they that were of Councill with the Informer ought to have demurred in Law to such Bond given in Evidence, and then vpon Demurrer joyned the Judges would have given Judgm<sup>t</sup> whether the bond was according to the form of the Statute or not, and whether twas good Evidence or not to the jury; for the Jurye cannot Trye whether the Bond be a good Bond or not, but this must be tryed by the Judges, being a matter of Law, and it cannot come before them but by Demurrer, and the Jury are sworn to Trye the ffact only, Viz<sup>t</sup> whether the ship tooke in Tobacco before bond given or not; And if the Informer will not Demurr to the Bond when 'tis given in Evidence to the Jury then it shall be taken to be a good Bond, and if the Jury find against him, he cannot vpon a Writ of Error in a Superiour Court Assign for Error that the bond was not a good bond, because he did not take advantage thereof in the first Action, Vide Rolls tit Error ffol 781. 20 Ass: 3M: 40: 41 Eliz: B: R: Smith & Odyhams case adjudged p: 16. Jacobi. B: R: Markham and S<sup>r</sup> ffra: ffortescues Case adjudged P. 9. Caroli. Lord Powes & Kirtmans Case adjudged, Nat Brev ffo: 21. Brook tit Error 34. 3. H. 4. 6.

Vbi Eadem Ratio ibi idem Jus esse debet.

3: The Law seemeth to have a far greater care of the ffact than it hath of it self; for it will not believe the ffact vntill it be sworn by Twelve Men of the Vicinage where the ffact did arise, and if Eleaven of the Inquest be Agreed about the ffact, and the twelfth man not Agreed, there can be no Verdict, but in the Law it is otherwise for there the Major part of the Judges do give Judgm<sup>t</sup> what the Law is, although the other Judges dissent; but as to the ffact, the whole Inquest must Agree before there can be any Verdict, and when they are Agreed vpon the ffact, and have delivered this to the Court, then is it said to be a Verdict which is of so much esteem in the Law that it shall be credited vntill it be vndone by Attaint &c<sup>a</sup>

4: When the Matter of ffact is once tryed, there is not any need to trye that again; for being once well & sufficiently tryed the Law is contented therewith; and in this principall case there is not any thing as touching the ffact Assigned for Error (but in Law that the bond was not a good bond only) and the Law intends that the Jury tryed the fact, Viz<sup>t</sup> whether the ship had taken in Tob<sup>o</sup> before bond given or not, and they finding for the Def<sup>t</sup> it is as much as if they had in express Words said that she did not, & then there being not any Error in the prosecu-

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