

For the Whitehall Evening-Post.

A RAMBLER'S CURSORY
THOUGHTS.

READING, in an old Newspaper, a paragraph about some depredation which Mr. Whidman's Bees had made in a Confectioner's shop, it recall'd to my mind an affair that happen'd some years ago at Enfield, and that was equitably settled by Mr. Smart, an honest Attorney of that place. In what manner it was settled by him, I shall leave it to my Readers to guess. But the subject occasioning no little mirth in the neighbourhood, a club of friends, who sat as judge and jury, desired me to personate Mr. Doublefee, and to plead before them on both sides of the case. The following, as far as I can recollect, were the points on which I enlarged.

COUNSEL for the PLAINTIFF.

My Lord, and Gentlemen of the Jury! I am Counsel, in this cause, for William Whitebread, the Plaintiff. As my brief states the case, John Fenton, in the parish of Enfield, Middlesex county, is the proprietor of an orchard, lying and being in the foresaid parish of Enfield, the fruit of which orchard he lett for the term of one year to Benjamin Blossom the Defendant, and the pasture he reserved for his own use. The Plaintiff was the owner of a sow and nine pigs, which sow and nine pigs being one morning, as it was their natural custom, in quest of the acorns, crab-apples, hips, haws and nuts, that are usually to be found under the trees and hedges of an enclosed country, arrived at the fence which inclosed the foresaid orchard belonging to the foresaid John Fenton. In the said fence, which consisted of a quick-set hedge, the foresaid nine pigs found a little hole, or aperture, through which, in search of food, they crept; and, notwithstanding the sage admonition of the old sow their mother, who prudently remained on the public high-way, they thoughtless stray'd into the orchard. Far had the pigs not wander'd, ere they beheld a windfall of tempting apples, which a late storm had scattered thick upon John Fenton's herbage. Of these apples, as it was natural for pigs to do, they did most plentifully eat; 'till the Defendant accidentally arriving, forthwith hurried them from off the orchard, and shut them up in the open pound. The Defendant demanding damages beyond all reason, and to which he had no manner of right, the Plaintiff replied; but on the redelivery of the pigs into the possession of the Plaintiff, the said pigs were found to be dead; ergo, not in the same condition in which they were by the Defendant impounded. The Plaintiff demands the full value of his pigs to be paid to him, and that for the sundry good reasons which we mean to give. First, my Lord, and Gentlemen of the Jury, it can no ways be proved that the Plaintiff's pigs were guilty of any trespass on the Defendant's property. The close or orchard was the property of Mr. John Fenton. The pigs made no unwarrantable entry on the Defendant's soil, by "breaking his Close", nor did they do him any damage by "treading down and bruising his Herbage". Both these are necessary to constitute a trespass, and yet the fence and the herbage were, neither of them, the property of the Defendant. Nor can he say that the pigs "spoilt his trees", supposing them to be his property, which in reality they were not; he could not lawfully cut one twig of them; 'twas only the fruit of them which he could dispose of for that season. I will now ask him one plain question: Did the pigs climb the trees? or did they break the branches, or did they break the fruit?—No; the pigs found the apples scattered, by the wind, on Mr. Fenton's herbage; and whoever had been at the pains to have gathered them, would, by his labour, have acquired the property of them; having dropt off the trees, they were no longer the fruit growing on those trees, and therefore no longer the property of the Defendant.—But supposing that the pigs had committed an act which the law did deem unjustifiable, your Lordship and the Gentlemen of the Jury will be pleased to consider, that these were pigs of but eight weeks old; they were not arrived at the age of possible discretion, and could not discern between good and evil. Their *etate infantia*, or, at the most, their *etate infantia proxima* exempted them from punishment for any crime or misdemeanor.—Had the old sow their mother entered the orchard, Mr. John Fenton (for he was the man against whom the trespass, if any, was committed,) might, with greater plea of justice, have impounded her;—but no, she stood on the outside of the fence, and granted warning to the pigs to keep on the uncontroversible highway.

My Lord and Gentlemen of the Jury, I will be bold to say, there has been infinite malice in this affair. The Defendant Benjamin Blossom is suspected to be a believer of the Holy Catholic Faith; he was never known to have attended Divine Service at any Christian church; excepting, now and then, an Alderman of London, how seldom do we find a Benjamin that is not a Jew! &c.

and the Defendant is known to have a morose aversion to pork; accordingly, he shut up these nine poor pigs in an open pound, and that in a cold bleak night of the October month, when, by the inclemency of the weather, they came to a miserable and untimely end!—We therefore hope that you will, as in your judgments shall seem meet, decree us the value of our foresaid nine pigs, and our full costs of suit.

COUNSEL for the DEFENDANT.

My Lord and Gentlemen of the Jury! I am Counsel, in this cause, for Benjamin Blossom the Defendant. The Plaintiff's Counsel having admitted that the nine pigs, last belonging to William Whitebread, were detected in the fact of eating the Defendant's fruit, it only remains, with us, to prove, that the said Defendant was justified in detaining the said pigs *damage-feasant* on his property, as hath already been stated in the brief.—We admit that the herbage of the orchard belonged to John Fenton, but the trees and the fruit of them constituted part of the *vesture*, and were, for that year, the property of the Defendant. *Cujus est solum ejus usque ad cælum* is a maxim of the law with regard to the soil; and so it is, I venture to affirm, with regard to its produce, which the proprietor may have lett to any other man. The apples therefore belonged to Benjamin Blossom, though the trees had reached the clouds, or their roots shot down to hell. The Defendant not having relinquished his property in the apples when they lay upon the ground, the pigs had no manner of right to convert them to their own use, and to devour them as they did. John Fenton, indeed, might have gathered the apples; because, by damaging his herbage, they became a nuisance to him; or if they had dropt over the wall, or fence, upon another man's ground, the proprietor thereof might have lawfully done the same. But the pigs could never have acquired a property in the apples, even though they had found them on the public highway, unless the owner of them had for ever remained unknown.—The Plaintiff seems to lay great stress on the *infancy* of his pigs; but with how much reason, I shall leave it to your Lordship and the Gentlemen of the Jury to judge. It being held that the capacity of doing ill, or contracting guilt, is not so much measured by years and days as by the Delinquent's understanding, we can prove that the foresaid pigs manifested a consciousness of guilt, by precipitately running away and endeavouring to hide themselves, immediately upon the Defendant's appearance in the close. As for the old sow standing on the watch without, there was a very evident reason for that. There are holes of various sorts and sizes, as your Lordship and the Gentlemen of the Jury well know; and one hole might give an easy admission to a pig, that would be found, upon trial, to be too small to let in a beastly hog.—Now, the hole, or aperture, in the fence which inclosed the Defendant's fruit-trees, being but a small one, the great sow (however willing) could not possibly follow her diminutive pigs.—In regard to *malice* in this affair, I believe, my Lord and Gentlemen of the Jury, we can prove a good deal of that on the Plaintiff's side. The said Plaintiff, William Whitebread, is by trade a Baker, and as apples are generally used in puddings and pies, which diminish considerably the consumption of bread, it was therefore undoubtedly for the Plaintiff's interest to let loose his pigs on the Defendant's apples, and to destroy as many of them as he possibly could.—The Plaintiff lastly says, that his pigs died by the inclemency of the weather. We shall leave it to the Gentlemen of the Jury to determine whether a pig could die by cold in a mild October night. No; the truth of the case is this: The apples were blown off the trees before they were ripe; the apples were a sour fruit; the pigs did eat most immoderately thereof; the pigs consequently died of the gripes.

J. H.