

[136] ROGERS *Plaintiff*, against PARKEY *Defendant*.

Entred Trin. 11 Jac. B. R. Rott, 223.

[See *Maxim-Nordenfelt Company v. Nordenfelt* [1893], 1 Ch. 652; [1894], A. C. 535.]

An action upon the case upon a promise. 2 Cr. 326.

In an action upon the case grounded upon assumpsit, upon non assumpsit pleaded, a verdict was found for the plaintiff. It was moved in arrest of judgment, that the declaration was not good, wherein the case appeared to be this, the plaintiff shews in his declaration, that in consideration of so much, by him paid to the defendant, the

defendant did assume and promise unto the plaintiff, that he would not exercise the trade of a joyner, in a shop, parcel of a house, to him demised in London, for 21 years, durante termino prædicto, and for breach shews, that he had demised this to a joyner who did there exercise the trade of a joyner, during the said term, and contrary to his promise, unde actio acerevit, exceptions taken to the declaration. 1. Because he doth not say, that he there used the trade of a joyner during all the said term, and whether this shall be taken to be so by intendment, when he saith only, during the term generally, whether this shall be intended to be the whole term, or but for some part of it. Coke Chief Justice, There will be a difference, where the assumpsit is in the negative, and where in the affirmative, as where a man is bound, that such an one shall inhabit in such an house durante termino, this shall be taken for the whole term, and so is *Colthirst, and Bejushins case*, in Plowdens Commentaries, fol. 21. but where the promise is in the negative, this is as much as to say, and undertake that he will not do it at any time during the term; and this is the difference. Haughton Justice. He ought to have alledged, this lease to be made, and to have continuance. Coke Chief Justice. This ought not to be by him so alledged in this case, in as much, as it was a lease certain to him for 21 years, and he ought not to aver that, which of it self doth certainly appear unto the Court; here this doth appear of his own shewing and so no need of any averment; and as the objection made, that this lease may be surrendered up; this shall not be so intended, if it be not shewed by the other party; one well saith thus of discretion, ista discretio discretionem confundit, and so it may be said here in this case, talis certitudo certitudinem confundit & destruit. Croke Justice. The doubt which at the first troubled me, was, for the binding of one, that he should not use and exercise his trade, being his livelyhood. Coke Chief Justice. This is not so, being but for a time certain, and in a place certain, but no general restraint there is here. The Court agreed with Croke Justice herein, that a man cannot bind one, that he shall not use his trade generally, this is not good; but Coke Chief Justice, Croke Justice, and the whole Court, agreed all in this clearly, that as this case here is, for a time certain, and in a place certain, a man may be well bound, and restrained from using of his trade; and so by the whole Court, here is a good breach of promise assigned, which well entitles the plaintiff to his action, that the declaration is good; and so by the rule of the Court, judgment was given, and so entred for the plaintiff.