REPORTS
OF
CASES
Determined in the
Court of King's Bench,
TOGETHER
With ſome other CASES;
FROM
Trin. 12 Geo. I. to Trin. 7 Geo. II.
WITH
TABLES of the NAMES of the CASES and of the PRINCIPAL MATTERS.

VOL. II.

BY
THOMAS BARNARDISTON,
Serjeant at Law.

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Hepworth *and* The Manucaptors of Pullen.

How far the Court will not ſet aſide a Demurrer.

IN a Scire facias againſt Bail, one of the Defendant's pleaded, that there had been no Capias taken out againſt the Principal, and upon this Iſſue was joined with a prout patet per Recordum. But notwithſtanding this the Defendants delivered afterwards a Demurrer, which the Attorney for the Plaintiff accepted, but did not join in Demurrer. And now Mr. Agar moved, that the Court would ſet this Demurrer aſide, upon account of its having come in irregularly. The Chief Juſtice was not in Court. Upon which Judge Page ſaid, that if the Plaintiff had not accepted of the Demurrer, he might have ſigned his Judgment; and ſo he obſerved, it had been determined; but by accepting of it, there is a Diſcontinuance made in the Proceedings; for which Reaſon he thought, the Plaintiff could never have Judgment. Accordingly the Court made no Rule.

Vide poſt 2.

The King *and* Adams.

How far the Court will order an Officer, whom a Writ is directed to, to pay the Coſts.

MR. Strange moved for a Rule upon the Clerk of the Peace of the City of London to pay the Coſts, which he had occaſioned by returning an Indictment with a Caption Anno quarto, whereas it ſhould have been Anno tertio, upon a Certiorari to the Sittings of Niſi prius at Guild-Hall; by Means of which the Defendants was acquitted there. Accordingly the Court made a Rule to ſhew Cauſe. Chief Juſtice abſent.

The King *and* Empſon.

How far the Court will quaſh an Order of Seſſions. Vide poſt.

MR. Agar moved to quaſh ſome Orders of Sewers upon an Exception, that the Fact was only laid by Way of Recital, with a quod cum ad hanc Seſſionem præſentatum fuit. Accordingly a Rule was made to ſhew Cauſe. Chief Juſtice abſent.

Anonymus.

How far a Proſecutor ſhall be obliged to give a Note in Writing of his Place of Abode.

MR. Wirley moved, that the Proſecutor might give a Note of the Place of his Abode; and that after Plea pleaded, Judge Page doubted, whether this Motion was not now too late. But Judge Probyn ſaid, an Act of Parliament has allowed it; and therefore he thought it might be made at any Time. Accordingly Judge Page pronounced the Rule, that the Proſecutor ſhould do it. Chief Juſtice abſent.

Hepworth *and* The Manucaptors of Pullen.

Vide ante 1.

THREE Perſons had been Bail in this Caſe, and upon a Scire Facias brought on the Bail-piece, two of them had pleaded no ſuch Recognizance. However Mr. Cunningham came now and informed the Court, that though the Names of theſe two Defendants were put into the Recognizance, yet in Fact they were no Ways privy to it. And therefore he moved, that it might be referred to the Maſter to inquire, whether they were privy to this or not. Accordingly the Court made a Rule, that it might be ſo. Chief Juſtice abſent.

Vide poſt.

Anonymus.

How far the Court will give Liberty to plead three Pleas.

What ſhall be ſaid to be a Plea in Bar or the Subſtance of it and not in Abatement.

IN an Action brought upon a Promiſſory Note by Sawbridge, one of the South-Sea Directors and another. Serjeant Chappel moved, that the Defendant might plead three Pleas, Non Aſſumpſit, Non Aſſumpſit infra ſex Annos, and the Statute of 7 Geo. 1. which veſts the Eſtates of theſe Directors in the Hands of Truſtees, and makes the Directors incapable of bringing any Action themſelves, or of having any brought againſt them. Mr. Fazakerly objected on the other Side, that this laſt Plea was in Abatement and not in Bar; for which Reaſon he ſubmitted it, it was not within the Statute for the Amendment of the Law, which allows of pleading double. But the Serjeant ſaid, it had been determined, that this was a Plea in Bar. And Judge Page obſerved, that if a Man promiſes to ſix, and one of them Releaſes, this is a diſcharge againſt all. Accordingly the Motion was allowed. Chief Juſtice abſent.

Bird *and* Philips.

ON Rule to ſhew Cauſe, why the Defendant ſhould not have Liberty to withdraw his Plea, and likewiſe to plead double. Mr. Reeves ſaid, that the Caſe was, that an Action of Covenant was brought to recover the Penalty contained in certain Articles of Agreement, relating to Putney-Bridge; the Purport of which Articles amongſt other Things was, that if the Defendant ſhould happen to be appointed by the Commiſſioners to build the Bridge, the Plaintiff ſhould have a Share in it. Now the Declaration charged, that the Defendant was appointed to build it by the Commiſſioners; but that he had not let the Plaintiff have a Share in it. To this the Defendant pleaded Nil debet, and upon that the Plaintiff demurred, and gave a Rule for joining in Demurrer, which would have been out before the End of the laſt Vacation; but the Defendant did join in Demurrer in Time. And the firſt Day of this Term Motion was made, that the Record might be a Concilium. Notwithſtanding this the Defendant obtained the ſame Day this Rule for ſhewing Cauſe, which he hoped, according to the State of this Caſe, there was no Foundation; for Serjeant Chappel on the other Side ſaid, that if the Defendant had not joined in Demurrer, it would have been beyond all Queſtion clear, that the Rule for ſhewing Cauſe had been proper; ſo that the Joinder in Demurrer is the only Thing, which makes the Difficulty. And as to that, he ſaid, the Defendant was under a neceſſity of doing it, otherwiſe Judgment would have been ſigned againſt him. He did agree it might be ſaid poſſibly, that the Defendant ſhould have taken out a Summons at a Judge's Chamber to have got the Time enlarged for ſigning Judgment; but he obſerved, that all the Judges of this Court were at that Time out of Town; and therefore that Objection was ſufficiently anſwered. Then as to the Record's being made a Concilium, he ſaid, Mr. Reeves had agreed, that this Rule was made the ſame Day, and the Court would not inquire which Motion was made firſt. The Chief Juſtice and the Reſt of the Court declared themſelves to be of the ſame Opinion; and accordingly the Rule was made abſolute.

How far the Court will give Liberty to withdraw a Plea.

How far the Court gives Liberty to plead double.

N. B. The Pleas were, that there was no ſuch Covenant in the Articles; and likewiſe that the Commiſſioners did not appoint the Defendant.

Robinſon *and* Tool.

MR. Theede made a Complaint to the Court, that the Plaintiff had put in a prolix and impertinent Declaration; for he had made four Counts upon one and the ſame Note, by laying it only over different Ways, and likewiſe had two other Counts upon an Indebitatus Aſſumpſit, and two more upon a Quantum meruit; whereas in truth that ſingle Note was the only Matter in Queſtion. For which Reaſon he moved, that it might be

How far the Court will direct that ſome of the Counts in a Declaration ſhall be ſtruck out.

be referred to the Maſter to inquire, whether theſe Counts were for one and the ſame Cauſe of Action. Accordingly the Chief Juſtice abſent, the Court made that Rule.

Anonymus.

How far the Courts of Law will grant a Prohibition in a Suit relating to an Adminiſtration.

MR. Robinſon moved for a Prohibition to be directed to Dr. Betteſworth for firſt granting Adminiſtration to Mrs. Harriſon, Siſter to the Deceaſed, and afterwards citing her to ſhew Cauſe, why thoſe Letters of Adminiſtration ſhould not be revoked, and a new Adminiſtration granted to Mrs. Welden, ſuppoſed to be the Deceaſed's Wife. He ſaid in the Caſe of Sir George Sands, Sid. 179. this was finally ſettled, that though the Eccleſiaſtical Courts have it in their Election either to grant the Adminiſtration to the Wife or the next of Kin; yet when they have granted it to one of them, they have executed their Authority, and cannot afterwards grant it to the other. Judge Page ſaid, where-ever there is a nearer of Kin to the Deceaſed, than the Perſon to whom thoſe Courts have granted Adminiſtration, they may certainly revoke it, and grant a new Adminiſtration to the nearer of Kin. He ſaid likewiſe, that they may revoke ſuch Adminiſtration, where a Will happens afterwards to be found. But on the other Hand he obſerved, the Rule was undoubtedly certain in the Conſtruction on the Statute of Hen. 8. that where thoſe Courts have granted it to the Wife or next of Kin, they cannot afterwards grant it to the other. Accordingly, the Chief Juſtice abſent, he made a Rule for ſhewing Cauſe, why a Prohibition ſhould not be granted.

Vide poſt.

Squire *and* Archer.

How far Money cannot be brought into Court where the Damages are very uncertain.

IN an Action upon the Caſe for Dilapidations, Mr. Lambert moved, that Money might be brought into Court and ſtruck out of the Declaration. But Judge Page ſaid, theſe Motions are never granted, where the Damages are ſo very uncertain. And therefore never allowed in Covenant for want of Repairs. He ſaid too, that formerly theſe Motions he has known refuſed even in Quantum meruits. Accordingly, the Chief Juſtice abſent, the Court thought proper not to make any Rule.

Wilcox *and* Huggins.

THIS Matter now coming on to be argued again, the Court declared themselves unanimous in Opinion, that where-ever the Statute of Limitations takes place in the Time of a Testator it shall run on in the Time of the Executor; and though the Action brought by the Testator to take the Case out of the Statute cannot properly be said to be continued in the Time of the Executor, yet the Executor must commence his Action within a reasonable Time after the Probate of the Will; and so must an Administrator within a reasonable Time after Letters of Administration granted, of the Reasonableness of that Time the Court, they said, were the proper Judges. The Chief Justice and Judge Lee declared their Opinions to be, that the Statutes prescribing a Year as a reasonable Time in another Case was a proper Rule to guide the Discretion of the Court in this. But, as in the present Case the Plaintiff had lain by a very unreasonable Time, the Court pronounced their Judgment for the Defendant.

Vide ante Vol. I. 335, 349, 382.

Barcley *and* Howard.

UPON a Writ of Error on a Judgment by Default in the Common Pleas in an Action upon several Promises, want of an Original and Warrant of Attorney was assigned for Error. The Defendant in Error came in Gratis and pleaded In nullo est Erratum, which his Counsel now agreed was a Confession of the Errors. But yet submitted it, that the Court might award Certiorari's notwithstanding ad informandam conscientiam Curiæ; and the Fact he said, was, that there were both an Original and a Warrant of Attorney. The Court accordingly declared their Opinions to be, that though the Party confesses an Error, where there is none, they may award a Certiorari in Affirmance of a Judgment, according to the Case of Carlton and Mortagh, which is in Salkeld 268. But yet they thought it necessary, that there should be some Evidence given them, that there was an Original and a Warrant of Attorney. Upon which the Defendant in Error's Counsel said, he had an Affidavit to that very purpose; and accordingly the Court immediately granted one Certiorari to the Chief Justice of the Common Pleas, and another to the Custos Brevium. And a few Days after in the Case of Smith and Dod, the Court ordered the Cause to stand over in the Paper for the like Reason, though the Party had not such Affidavit present.

When a Writ of Error is brought, how far a Certiorari may go to inform the Conscience of the Court, notwithstanding the Party has confessed the Error.

When a Writ of Error is brought and the Defendant comes in Gratis, and pleads In nulla est Erratum, how far that shall be a Confession of the Errors.

Douſet *and* Hayward.

The Manner of declaring againſt a Filizer.

THE Plaintiff declared againſt the Defendant, as Clericus Domini Regis coram ipſo Rege; to this he pleads, that he was a Filizer of this Court, abſque hoc, that he was Clericus Domini Regis coram ipſo Rege; and to that the Plaintiff demurs. Mr. Strange was now Counſel for the Defendant, and ſaid, that he ſubmitted it in Point of Law, the Defendant was not one of the Clerks of the Court. But admitting he was, yet he ought to have been deſcribed by the proper Name of his Office by which he was admitted and entered in the Book, which is kept for this Purpoſe. He did agree, that in Suits againſt Attornies againſt the Chief Clerk, and the Clerks of the Chief Clerk, this general Appellation, by which the Defendant was declared againſt was ſufficient. But in all other Inſtances, where Officers of the Court are ſued, he ſubmitted it, they muſt be ſued by the proper Name of their Office. The Court ſaid, it was very true indeed, a Filizer is not a Clerk belonging to the Chief Clerk, the Buſineſs of which Perſons is Ad Placita irrotuland'; but he is a Clerk of the Court. Then as to the other Point they thought it not material by what Name a Filizer is entered in the Book; but as he is in Judgment of Law a Clerk belonging to the Court, they thought he might well be ſued by that Name. And accordingly ordered a Reſpondeas Ouſter.

Anonymus.

How far the Court will not give Liberty to rejoin double.

MR. Acherley moved for Liberty to rejoin double, as being within the Equity of the Act, which allows pleading double. But the Court ſaid, that they thought, this would be intirely inconvenient, and out of the Reaſon of the Act; and therefore refuſed it.

The King *and* Clendon.

How far the Court will not give Liberty that the Information may be amended, by reaſon that the Amendment would amount to changing the Venue.

THIS was an Information, that had been granted againſt the Defendant for beating one Captain Berg, who was a Priſoner of his, in a very unmerciful Manner. In laying the Fact in the Information there was a Doubt conceived, whether it ſhould have been charged to have been committed in London or in Middleſex; becauſe Part of the Houſe, where it was done, ſtood in one County and Part in the other; and it was uncertain, whether that Part of it, where the Fact was done, was in the one County or in the other. However at laſt they thought proper to lay it in London, and accordingly the Cauſe was carried down to Trial. But upon farther Enquiry they were ſatisfied, it was in Middleſex, and therefore would not go on to Trial at that Time. Upon which Mr. Theede moved now, that the Information might be amended in this Reſpect by laying the Fact in Middleſex.

Middlesex. The Chief Justice said, he has known Informations often amended after the Cause carried down to Trial; and therefore made a Rule to shew Cause. But afterwards it was discharged; for they said, if this Motion was allowed, they should change the Venue.

Young *and* Cain.

ON Rule to shew Cause, why an Attachment should not go against one Popham and others, for rescuing the Defendant, who was arrested upon a Non omittas, which ran into the Town of Bridgwater, and at the same Time asserting, that no such Process would run there; Mr. Strange said, that he should submit it, that this Motion was not proper, barely upon account of the Rescous, till that should be returned. He did agree, that these Motions have some Years ago been granted without such Return; but in Salk. 546. and in the Case of Sheder and Holt, Mich. 9 Geo. 1. it was held they might not, where the Rescous is supposed to be upon mean Process. And in the Case of Grinley and Fouster, Hill. 11 Geo. 1. it was settled upon Debate. Then as to the Words, that were supposed to be spoke at that Time, if they should be thought a Contempt, and to the Attachment applied for upon that account, he said, they were positively denied. Mr. Fazakerly on the other Side, said, that he submitted it, that it would be a Matter greatly inconvenient, to require in all Cases a Return of a Rescous; for if an Action should be brought for a false Return, in such Case the Sheriff's Bailiffs could not be Witnesses for the Sheriff to support his Return; because they all give Security to him; and in the Event it might happen that such Security would be liable. The Chief Justice said, that whatever might be pretended to be the Inconvenience of requiring a Return of the Rescous in these Cases, the Law was certainly so settled, and he was not from departing from it. He said farther that he knew, the antient Practice was so too; and in such Case there is always a small settled Fine of course set upon the supposed Recousers. And Judge Page said, an Attachment is many Times granted for not paying it. Then as to the supposed Mischief to the Sheriff of requiring this, he said, it was well known, there are generally Bailiffs Followers present upon an Arrest, who may be good Witnesses for the Sheriff, though the Bailiffs themselves may not. In the Exchequer, he said, he did agree, the Practice was not to require this; and there the Course is only to make a Rule to shew Cause, where there is no such Return, and to make the Rule absolute direct̃ly, where there is. Then as to the Words, he said, if they were not denied, he should not have been for granting an Attachment; because they are only Assertions of a Privilege belonging to the Parties. But as they were denied, the Court agreed clearly the Attachment ought not to go. And accordingly the Rule was discharged.

How far the Court will not grant an Attachment for a Rescous

The

The King *and* Abel.

What ſhall not be a good Conviction upon the Turn-pike Act.

THIS was a Conviction againſt the Defendant upon a Statute made 12 Geo. 1. for not accounting as Collector of a Turn-Pike. And the Exception taken to it by Mr. Fazakerly was, that it does not appear by the Evidence, as ſet forth in the Conviction, that the Witneſſes ſwore the Defendant to be Collector. He did agree, that this was charged in the Information, and that in the Concluſion it is ſaid, ſuper quo, and the Information being read to the Defendant, and he hearing what was ſaid, Nil dicit; which might ſeem to ſupply the Defect of the Evidence being not ſet forth more fully. But he inſiſted, it could not; for that no Intendment ſhall be allowed in a Matter of this Nature. The Chief Juſtice ſaid, if it had been averred, that the Defendant confeſſed the Fact as ſet forth in the Information, that would have ſupplied the Defect in ſetting out the Evidence; becauſe when the Party has confeſſed the Fact, all other Evidence is unneceſſary. But a Nil dicit is only a not contradicting, which is not ſufficient of itſelf, and therefore the ſetting forth, that there was Evidence given, was neceſſary. Accordingly the Court made a Rule for quaſhing the Conviction Niſi Cauſa within a Week.

Anonymus.

How far the Court will grant an Information againſt a Juſtice of Peace for making an undue Return of a Conviction.

SErjeant Baynes moved for an Information againſt Sir John Shaw, a Juſtice of Peace for the County of Kent, for returning up a Conviction contrary to the Truth. This was a Conviction for Killing a Hare without a Qualification; the Conviction, he ſaid, was made on the Evidence of one Mann, who was likewiſe the Informer, and one Moiety of the Penalty is given to him, the other to the Poor of the Pariſh; but, becauſe Sir John was unwilling that Part of the Penalty ſhould appear to have been given to the Witneſs, he returned in the Conviction one Cox to be Informer. And upon this the Court made a Rule to ſhew Cauſe.

Vide poſt

Harriſon *and* Mitchel.

Vide ante

MR. Fazakerly came now to ſhew Cauſe; and ſaid, that he did agree, in general, the Rule was as has been laid down in the Conſtruction upon the Statute of H. 8. but that Rule was intirely founded upon this, that when the Ordinary had made his Election, which of the Parties he will grant the Adminiſtration to, he ſhall not afterwards depart from it. But in the preſent Caſe the Fact was, that he had not an Opportunity of making his Election, the State of the Caſe being untruly laid before him by the Affidavit of Mr. Harriſon. For he had repreſented the Caſe to be, that Mr. Welden died a Batchelor. Whereas Mr. Fazakerly ſaid, that he had an

Affidavit now to produce, to ſhew that Mr. Harriſon muſt have known Mr. Welden was married to the Defendant, notwithſtanding the other Side were pleaſed to give her the Name of Mitchel in the Rule, that they drew up for ſhewing Cauſe for the Prohibition. Mr. Reeves on the other Side argued, and ſaid, that he believed the Fact was intirely different from what it was laid to be by the Affidavit, that has been read; and therefore he hoped, he ſhould be allowed Time to anſwer it. But he obſerved, if the Fact was even as it is alledged to be, yet ſtill the Prohibition ought to ſtand; for in all Caſes of granting Adminiſtration there is a general Citation, that goes out and is ſtuck up upon the Royal Exchange to require all Parties to come in, that are any Ways intereſted. The Court declared themſelves to be unanimous, that it was intirely againſt the Practice of the Court, when a Rule is ſhewn Cauſe upon, to allow ſubſequent Affidavits to be filed by the Party obtaining it. But as to the Principal Queſtion the Court were divided in their Opinions. The Chief Juſtice and Judge Page thought, that the Rule ſhould be diſcharged; for that the Ordinary had not had an Opportunity of making his Election. But Judge Probyn and Judge Lee ſaid, that they doubted, whether this Caſe any Thing differed from that of Sir George Sands, which was quoted upon the former Argument. For they ſaid, they believed, there muſt have been an Affidavit in that Caſe, made by the Children requeſting the Adminiſtration, that the Deceaſed died leaving no Widow. And this they took to be the Practice of the Eccleſiaſtical Court. Accordingly the Court ſaid, that it might be proper to inquire farther into that Caſe. And therefore the Rule was inlarged.

Vide poſt

Dr. Bently *and* The Biſhop of Ely.

THE Chief Juſtice delivered now the Reſolution of the Court; and ſaid, that the ſingle Queſtion was, whether upon this Record the Prohibition ought to ſtand. The Citation, he obſerved, was as Special Viſitor over the Maſter; for the Words of it were, You Richard Bentley, Doctor of Divinity, are required to appear before me, Thomas, Lord Biſhop of Ely, Viſitor, ſpecially authoriſed by the 40th Statute of Queen Elizabeth, given to Trinity College, and impowering me to examine and correct the Behaviour of the Maſter. But, he ſaid, upon this Record the Biſhop of Ely ſubſiſts general Viſitor over the whole College by the Statute of Edw. 6. and therefore the Citation is founded Wrong. The Court would not pronounce their Judgment, how far Queen Elizabeth had it in her Power with the Conſent of the College to controul the Biſhop's Power of Viſitation; but this they did determine, that, if ſhe had ſuch Power, ſhe did not make Uſe of it. For the Intent of this Statute of 40 Eliz. evidently was to leave the Biſhop's Power of Viſitation at Large over the whole College, as it was by the Statute of Edw. 6. and only to give ſome Directions as to the Exerciſe of it, particularly relating to the Maſter. For which Reaſon the unanimous Opinion of the Court was, that

Vide ante Vol. I. 192, 388, 451.

upon this Record the Prohibition ought to ſtand. But in Eaſter Term after, the Judgment was reverſed by the Houſe of Lords.

Walker *and* ——

How far the Court will not puniſh a Sheriff for taking Goods to an exceſſive Value under an Execution.

MR. Parker moved, that the Sheriff of Glouceſter might anſwer the Matters of an Affidavit, for taking Goods to the Value of an exceſſive Sum in Levying an Execution of a ſmall Value. But Judge Page ſaid, he has known theſe Motions often refuſed, and the Reaſon the Court has always given in theſe Caſes is, that the Defendant might have bought the Goods himſelf of the Sheriff, or have got ſome Friend of his to have bought them for him. Accordingly the Court refuſed the Motion in the preſent Caſe.

Fiſher *and* Hughes.

Vide ante Vol. 1. 464.

THIS Matter coming on to be argued again, Judge Lee ſaid, that he believed, the Objection taken by Mr. Strange might be got over, by conſidering the Words cætera præmiſſa to relate to the other two Terms demiſed; but yet he thought, the following Words of the Judgment were much more to be objected to; for they are ſed querens ſit in Miſericordia pro falſo clamore ſuo verſus præfatum Willielmum Fiſher pro prædictis Tenementis. But Mr. Fazakerly anſwered that Objection this Way, that the Amercement muſt be for a Wrong, done by the Plaintiff, relating to theſe Tenements; and therefore he ſubmitted it, the Judgment was well enough in this Reſpect likewiſe. Accordingly the Chief Juſtice with Judge Page and Mr. Juſtice Probyn, affirmed the Judgment.

Goodtitle *and* Pettoe.

What ſhall be ſaid to be a good Covenant to ſtand ſeiſed to Uſes.

IN an Ejectment upon the Demiſe of one Thornton, a Verdict was given for the Plaintiff, ſubject to the Opinion of the Court upon the following Caſe. One Angeloe Buck was ſeiſed in Fee of the Premiſſes in Queſtion, and by Deed bearing Date the 20th of June, 1702. covenanted with Hockley and Elliot and their Heirs in Conſideration of the Love he bore to his Wife Anne Buck, and to make a Proviſion for her in Caſe ſhe ſhould ſurvive him, and for other Uſes limited in the Deed, to ſtand ſeiſed of the Premiſſes, lying in the Pariſh of Guilford, to the Uſes following, viz. to the Uſe of himſelf and his Wife for their Lives and the Life of the longer Liver of them, and after their Deceaſe to the Uſe of the Heirs of the ſaid *Angeloe Buck*, on the Body of the ſaid *Anne* lawfully begotten, and then to the Uſe of ſuch Perſons as the ſaid *Anne* ſhould diſpoſe the ſame; and for Want of ſuch Diſpoſition, then to *William Thornton*, the Plaintiff and his Heirs. It was ſtated farther in the Caſe,

that Thornton was Nephew to the ſaid Angeloe Buck; that Anne ſurvived her Husband without Iſſue of their two Bodies; and that after the Decreaſe of her ſaid Husband, ſhe by Writing diſpoſed of the Premiſſes to the Uſe of herſelf for Life, the Remainder to Jones Malpeſs, who was her Siſter, under whom the Defendant claimed. Anne died. And now the Queſtion was, whether Judgment ſhould be for the Plaintiff, or for the Defendant. Serjeant Darnel argued for the Plaintiff, and ſaid, he ſhould ſubmit it, that by the Rules of Law no Perſon can take Advantage of a Uſe, raiſed by a Covenant to ſtand ſeiſed, unleſs there is ſome Conſideration in the Deed ariſing from him. And to this Purpoſe is the ſecond Reſolution in Mildmay's Caſe 1 Rep. 176. b. 1 Lev. 30. and 2 Ver. 7. The Conſequence of which, he ſubmitted it, was, that the Defendant could not claim under this Deed; for there is no Conſideration in the Deed ariſing from her; and ſhe is in from the Covenantor, and not from the Wife. Mr. Marſh on the other Side argued, and ſubmitted it, that the Conſtruction of Uſes was the ſame with the Conſtruction of Wills, to be governed according to the Intent of the Parties. And ſo the Rule is laid down in Coke Lit. 49. a. and in Carth. 343. And, he ſaid, the Intent of the Partie in thiss Caſe manifeſtly appears, that the Uſes ſhould be raiſed for the Benefit of the Wife; and therefore, he ſubmitted it, they well might. Then as to the Wanting a Conſideration to raiſe the Uſes in the preſent Caſe, there was a very good one; for it appears theſe Uſes were to be raiſed for the Wife's Benefit. And to this purpoſe he mentioned a Caſe out of Roll's Abridgment, 783. He ſaid farther, that if there was any Weight in this Objection, the Objection would equally hold againſt the Plaintiff's Title. For there is no Conſideration in the Deed ariſing from him. In the Caſe indeed it is ſtated, that he was of the Blood of the Covenantor; but nothing of that is mentioned in the Deed; and how far an Averment of a Matter dehors would be good in this Caſe, he has ſubmitted it to the Judgment of the Court. But beſides, if it had appeared in the Deed, that he was of the Blood, that would not have been ſufficient neither; for it is not mentioned in the Conſiderations of the Deed, that the Promoting thoſe of his Blood was any Part of them. He ſaid likewiſe, that if this Power of the Wife was void, that would be another Objection too againſt the Plaintiff's Title; for then it would be uncertain, when his Eſtate ſhould commence; and ſo is the Opinion, he ſaid, in Chedington's Caſe, 1 Rep. 154. The Court inclined to think, that the Limitation of the Power to the Wife was a void Limitation; and ſaid, that they took it, the Diſtinction was ſettled between a Covenant to ſtand ſeiſed, and other Conveyances; and that upon a Covenant to ſtand ſeiſed, no Uſes could be drawn out of the Covenantor, but upon an expreſs Conſideration ariſing from the Party, ſo drawing them out. But they all agreed, if the Remainder had been limitted to the Wife and her Heirs, the Heirs might well take; for in Judgment of Law, a Perſon's Heirs are included in the Perſon himſelf. And Judge Page ſaid, he was of Opinion, if the Limitation had been to her and her Heirs, to be diſpoſed of to ſuch Perſons as ſhe ſhould think proper, and afterwards ſhe had

diſpoſed

diſpoſed of the Uſes to other Perſons, thoſe Uſes would have been well raiſed and drawn out of the Covenantor. Then as to the Plaintiff's Title, they ſaid, they did not think there was much Weight in that Objection againſt it, in relation to the Time of its Commencement; but if the Limitation of the Power was void, the Plaintiff's Eſtate would commence from the Death of the Husband and Wife without Iſſue; and that the Caſe cited to ſupport the Objection was, when conſidered, really againſt it. However they ſaid, there was a good deal of Weight in the other Objection, relating to the Want of a Conſideration. They did agree, if one of the Conſiderations in the Deed had been the Love and Affection to his Family, tho' it had not been averred in the Deed, that the Plaintiff was of his Family, that might have been averred by Matter dehors, but they thought an Averment of both Matters, viz. that that was Part of the Conſideration, and that the Plaintiff was within that Conſideration, could hardly be admitted. However the Matter was ordered to ſtand over.

Vide poſt

Holt *and* Ward.

Vide ante Vol. 1. 333.

MR. Reeves now argued for the Plaintiff. He ſaid, the ſingle Difficulty for the Court to determine upon this Record was, whether there is a ſufficient Conſideration appearing to found the Promiſe upon, which the Action is brought for. The Objection againſt it has ariſen from the Infancy of the Plaintiff at the Time the Promiſe was made to her. But that Objection he ſubmitted it, would not have a great deal of Weight; inaſmuch as the Promiſe made on the Part of the Infant, which was the Foundation of the other, for the Reaſons, which he ſhould offer, would, he hoped, appear, not to be void, but only voidable. And if that could be made out, he believed, the Counſel of the other Side would not contend, but it muſt be a ſufficient Conſideration. In order to ſhew then, that this Promiſe, made on the Part of the Infant was not void, he apprehended, that there was this Diſtinction in the Law; that where the Promiſe is of ſuch a Nature, as to carry with it an Appearance of Benefit to the Infant, it is only voidable; where indeed it carries with it an Appearance of Prejudice to the Infant, it is abſolutely void. For this Reaſon he did agree, that in the Caſe of Barker and Medlicoat, Trin. 9 Anne, at Niſi prius, Lord Chief Juſtice Holt was of Opinion, that an Infant might bring Trover for Money won of him at play, and the Receipt of the Money was a Converſion. That Action indeed was an Aſſumpſit, and Lord Holt was of Opinion, that ſuch Action would not lie for the Money; accordingly the Infant was there nonſuited. So he agreed, if a Leaſe is made by an Infant without reſerving any Rent, the Leaſe is void. And to this Purpoſe is 3 Cro. 220. But if a Leaſe is made by an Infant, reſerving Rent, this is held in 1 Cro. 306. to be only voidable. So in 2 Cro. 320. a Reſervation of Rent upon a Leaſe made to an Infant is adjudged to be the ſame. He obſerved, that upon a former Argument of this Caſe, a Diſtinction was offered to be made by the

Gentlemen that argued for the Defendant, between Contracts executory and Contracts executed. And they did agree, if an Infant carries his Promise into Execution, that may be a good Foundation for him to make the other Party carry his into Execution likewise. But he submitted it, that that Distinction could not be maintained; for if the Promise made on the Part of the Infant is void, it is impossible the carrying such Promise into Execution can signify any Thing. And if the Promise is voidable only, the Party, to whom it is made, shall not render it ineffectual; the Infant himself only can do that; and to this Purpose he relied upon Sid. 41. which he apprehended to be an Authority full in Point for him. But besides, in the present Case, he observed, it was impossible in the Nature of the Thing, that the Infant should have carried her Promise strictly into Execution, to intitle her to a Remedy against the Defendant for a Breach of his. For then she must have married him, which would have been a Performance of the Promise on both Sides. However she has done as much as was in her Power to carry her Promise into Execution; she has requested the Defendant to marry her; and he has refused. Serjeant Eyres spoke on the other Side, but seemed not to be able to answer these Arguments. Accordingly the Court ordered this Matter to stand farther over, without delivering any Opinion themselves. Vide post.

The King *and* The Inhabitants of Luthborough.

IN a Presentment for a Nusance, Mr. Abney moved on Behalf of the Prosecutor to have a View, and likewise that a Rule might be entred into by Consent, that no Advantage should be taken on the Trial of this Presentment at the Assises of any Defect in it for Want of Form or Substance. The Court said, that the View must certainly be granted. But they thought, it was very extraordinary to bind the Judge of Assise by the last Part of the Rule, tho' it was even by Consent. However at last they made that Matter Part of the Rule likewise. What Things the Court will order to be done with the Consent of Parties.

Gordon *and* Martin.

THIS was an Indebitatus Assumpsit upon a Promise made by the Defendant to pay the Plaintiff 300l. for Work and Labour done for him. And upon the Evidence the Fact came out to be, that the Defendant's Brother employed the Plaintiff to sell a considerable Estate for him in Ireland, and that the Plaintiff's Livelihood was to do Business of that Nature. Accordingly the Plaintiff attended the Earl of Shelburn several Times in laying before him a Proposal of this Estate, and in bargaining with him about it. Whilst this Transaction was depending, the Defendant himself writ a Letter to the Plaintiff in the following Words. My Brother desires to treat with Lord *Shelburn* for selling him the late Mr. *Bagnall*'s Estate in *Ireland*, and if he goes on with the Purchase, you may depend upon a handsome Gratuity from my Brother; which, I assure and promise you, shall not be less than 300 *l.* How far a general Indebitatus Assumpsit will lie.

There was a Poſtſcript to the following Purpoſe; My Intention is that the Money ſhall be paid you upon executing the Writings. The Plaintiff afterwards concluded the Purchaſe. And upon this Evidence the Jury gave a Verdict for him for the 300l. And now Mr. Strange moved for a new Trial; in the firſt Place, for that the Defendant appears only to have tranſacted by Authority from his Brother; and in the next Place, admitting an Action would lie againſt the Defendant, a general Indebitatus Aſſumpſit could not poſſibly. The Court was of a different Opinion as to both Points. They ſaid, they thought it clear, that no Action could lie upon this Promiſe againſt the Defendant's Brother; becauſe it by no Means appears, that the Defendant had any Authority from him to write this Letter, by which the Promiſe was made. But the Defendant himſelf muſt certainly be bound to perform it; for he has expreſly undertaken, that the Promiſe ſhall be performed. They ſaid too, that they thought the Plaintiff had declared againſt the Defendant in a proper Manner. He has declared for 300l. promiſed by the Defendant, for Work and Labour done for him. The Work and Labour was done for another at his Requeſt; and ſurely that upon the Matter is Work and Labour done for himſelf. Accordingly the Court refuſed to grant a new Trial.

Smith *and* Jones.

What Words are actionable which are ſpoken of a Tradeſman.

IN an Action of Slander the Plaintiff declared, that he was a Timber Merchant, and that the Defendant, ſpeaking of him in his Way of Trade, ſaid, He is a Rogue and a Villain, he has cheated me of 14l. Serjeant Glide moved now in Arreſt of Judgment, that theſe Words were not actionable. But Serjeant Chapel on the other Side cited a Caſe out of 1 Roll's Abridgment 62. in Point. Accordingly the Court gave Judgment for the Plaintiff.

Woolaſton *and* Walker.

Vide Vol. 1. 423, 467.

THIS Matter coming now on to be argued by Mr. Denniſon on the Part of the Plaintiff, and by Mr. Peere Williams on the Part of the Defendant, the Chief Juſtice with Judge Page and Judge Probyn declared their Opinions to be, that this Caſe of Adminiſtration, Pendente Lite concerning the Probate of a Will, was of the ſame Nature with the Common Caſes of Adminiſtration, durante minore Ætate, & durante Abſentia. They did indeed think, that none of them were within the Deſign of the Statute relating to Adminiſtrations; but that they were neceſſary ſometimes to be allowed of. And as to the Caſe in Carth. they ſaid, the Court did not give Judgment in it. But Judge Lee ſaid, that his Opinion was at preſent different; and thought, that this Caſe might in Reaſon differ from the others. For in the others the Adminiſtration is always granted cum Teſtamento annexo, and it is upon the Matter the ſame Caſe, as if

the Deceaſed had declared, that he would have no Executor for ſuch a Time; but in this Caſe the Adminiſtration cannot be granted ſo; for the Diſpute is, whether there is a Will or no; and to grant Adminiſtration with the Will annexed, would be to affirm that there was one. So likewiſe it is wrong to grant Adminiſtration without the Will; for that is to affirm, that there is no Will. For which Reaſons he thought, no ſuch Adminiſtration ought to be granted at all, according to the Caſe in Car. which has been cited. Accordingly the Court ordered this Matter to ſtand over again. Vide poſt.

Harriſon *and* Mitchell.

THIS Matter coming on again, Mr. Robinſon obſerved, that the Affidavit produced on ſhewing Cauſe was not titled in any Cauſe; and therefore it ought not to have been read; and as to what might be ſaid, that this Objection ſhould have been made at the Time the other Side came to ſhew Cauſe, he took Notice, that they had no Copies of the Affidavit at that Time; and therefore they were not prepared to make this Obſervation upon it. Mr. Strange on the other Side ſaid, that there was the ſame Objection to be made to the Affidavits, that were produced at the Time of the firſt Motion for the Prohibition. They were not titled in any Cauſe; but they ought to have been ſo; becauſe it is ſuppoſed, that the Suggeſtion is filed upon Record before that Motion; and indeed, ſtrictly ſpeaking, a Prohibition cannot be moved for without it. Accordingly the Court diſcharged the Rules that had been made on both Sides; and ordered the Prohibition to be moved for de novo. Vide ante

Chaſe *and* Slaughter.

UPON a Writ of Error on a Judgment in the Palace-Court, Mr. Agar took an Exception to the Plaint, that it was not alledged in it, that the Cauſe of Action aroſe within the Juriſdiction. In the Declaration he did agree it was; but the Plaint is in the Nature of an Original; and therefore it ought to have been alledged there likewiſe. But Mr. Benny on the other Side obſerved, that the Form of all the Records out of the Palace-Court are the ſame with this; and in Saund. 87. it is ſo in a Writ of Error upon a Judgment in the Court of Briſtol. The Court ſaid likewiſe, that the Plaint it ſelf is not ſent up upon a Writ of Error; but only a ſhort Recital of it; and accordingly the Judgment was affirmed. What ſhall be ſaid to be a good Plaint in an Inferior Court.

Hodington

Hodington *and* Pinkard.

How far a Court of Law will not relieve in Case of an Execution, but will leave the Party to his Remedy in Equity.

MR. Fazakerly moved, that the Sheriff might have Liberty to amend his Return. He stated the Case to be, that the Plaintiff together with A. had two Judgments against another, and sued out each of them several Writs of Execution; that both of these Writs were delivered to the Sheriff the same Day; but that the Plaintiff's Writ came to the Sheriff's Hands first. The Sheriff upon this made out a Warrant to his Bailiff to levy the Money upon both of them; but there being not Goods enough belonging to the Party, on whose Estate the Execution was levied to satisfy the Whole of both Demands, A. proposed to the Sheriff, that if he would satisfy the Whole of his Demand, he would indempnify him, which accordingly was done; and the remaining Part of the Money was delivered to the Plaintiff to satisfy as much of his Demand, as it could satisfy, and a Return made of Nulla bona as to the rest. The Plaintiff afterwards commenced an Action against the Sheriff for this false Return, insisting, that his Execution ought to have been first satisfied wholly. And upon that the Sheriff got the Money back again from A. to pay the Plaintiff, and delivered him up his Bond of Indemnity. A Commission of Bankrupcy was afterwards taken out against the same Person, who had had the two Judgments recovered against him, which overreached both Executions. And upon this A. applied now to the Court, that the Return of Fieri feci, which was made as to him, might be rectified, and made according to what in Truth it ought to have been; in order that he might come in as a Creditor under the Commission. The Court said, that they had never given Relief in a Case of this Nature, where the Interest of Strangers is to be affected; and therefore left him to his Remedy in Equity.

The King *and* Theede.

What shall not be said to be a good Conviction.

THIS was a Conviction made by two Justices upon the Statute of 11 Geo. 1. relating to the better making of Candles; and for that Purpose provides, that all Tallow-Chandlers shall give Notice in Writing of the Number of Candles, of the Number of Sticks and of the Number of Courses, which they intend to make; and this Notice is appointed to be given to certain Officers so many Days before the making. The Information then, which was taken before the Justices set forth, that the Defendant had not given this Notice either of the Number of Candles, of the Number of Sticks, or of the Number of Courses; and thereupon the Conviction concluded, that this Fact was fully and duly proved before the Justices; upon which he was ordered to pay the Penalty of 20 l. and a Warrant issued out for this Purpose. The Defendant upon this appealed to the next General Quarter-Sessions; the Justices there were in Doubt, whether they had Jurisdiction upon

the Appeal; however the Conviction was filed, and nothing more at that Time done. At the Sessions after the Justices considered of this Matter again, and then upon Debate were of Opinion they ought to go on upon it. Accordingly at last they quashed this Conviction. The Form of which Order was; whereas an Appeal has been made unto us from a Conviction, Order or Warrant of two Justices made upon the Statute that has been mentioned; and it being made known unto us by the Oath of one Witness, that the Defendant did give Notice to the proper Officer of the Number of Courses of his Candles in Manner as the Statute directs; We do therefore set aside the Conviction, and order it to be null and void. Upon this a Certiorari was awarded to remove up both Orders; and now upon the Return the Attorney General argued on the Behalf of the Prosecutor, and prayed, that the Order of Sessions, quashing the Order of two Justices, might be quashed itself, and that the Order of two Justices might be confirmed. He said, the principal Question for the Consideration of the Court would be; whether the Appeal to the Sessions was good. The Words of the Act, upon which the Conviction was founded, are, that the Fine shall be recovered in the same Manner, as any Part of the Revenue or Excise is by any of the Statutes now in Being appointed to be recovered. And therefore it must be inquired into, whether an Appeal lies in those Cases or not. Now as to that, he observed, that the Statute of 12 Car. 2. c. 23. was the first Statute, which mentions the Duty of Excise; it speaks only of Ale and other Liquors; and indeed this is the only Statute, properly relating to the Excise. There are, it is true, other Statutes, as 6 Geo. c. 21. which put a Duty upon Malt and Hides; and that Duty is under the Management of the Commissioners of Excise; but still the Duties of Excise are properly understood only of such Duties relating to Liquors, which are settled by that general Statute of 12 Car. 2. c. 23. that has been before-mentioned. That Statute gave those Duties to that King for his Life; and the Statute next following it settled them as a Revenue of the Crown for ever in the Room of those burdensome Tenures, which were the principal Part of the King's Revenue before. But no Appeal is given by the Stat. of 12 Car. 2. c. 23. or that of 12 Car. 2. c. 24. from a Conviction of two Justices. He did agree, that the Stat. of 6 Geo. c. 21. did give an Appeal; but that is confined only to those other Duties, that are under the Management of the Commissioners of Excise, and are no Part of the Duties of Excise itself. And so there is the same Distinction made between these two Sorts of Duties by the Stat. of 1 Geo. 2. Sess. 2. He then observed, that there was nothing done upon this Appeal the first Sessions, nor any Adjournment appears to have been entred for the farther considering the Matter on this Appeal; and therefore, he submitted it, whether this could be said to be a sufficient Appealing to the next Quarter-Sessions within the Meaning of the Act. He took Notice farther, that the Appeal is bad in Point of Form; for it is from a Conviction, Order or Warrant, which is not certain. Mr. Pilsworth on the other Side argued, and submitted it, that this Appeal was well maintainable even by the Stat. of 12 Car. 2

c. 24. The 31ſt Sect. of that Statute expreſly allows of Appeals to the Commiſſioners of Appeals from Convictions made by the Chief Commiſſioners and Governors of the Exciſe in London; it allows likewiſe of Appeals to the Quarter-Seſſions from the Convictions of the Sub-Commiſſioners; and therefore that Clauſe muſt in all Reaſon be underſtood to allow of Appeals from Convictions of two Juſtices; ſince their Juriſdiction ariſes from this ſame Section. He obſerved farther, that it was well known, there were no Sub-Commiſſioners at this Day; he ſaid too, he believed, there never were any appointed; and yet it is certain, there were Appeals to the Quarter-Seſſions ſoon after the making this Statute; for the 15th of Car. 2. c. 11. ſect. 19. provides a Remedy to prevent Abuſes in them. So that if this is Fact, that there were no Sub-Commiſſioners ever appointed, the Appeals muſt have been from the Convictions of the two Juſtices. But if the Appeal in the preſent Caſe could not be maintained from this Statute, he ſubmitted it, it well might within the Stat. of 6 Geo. that has been mentioned. The Meaning of the Word Exciſe has indeed been confined by the Attorney General to the Duties upon Ale and Beer, and ſuch other Liquors, as are Part of our Home-Commodities; but he apprehended, that the Meaning of the Word was general, and extended to all ſuch Home-Commodities whatever, upon which the Parliament has thought proper to lay a Duty; and is a Word of an oppoſite Signification to Cuſtoms, which are Duties laid upon Goods of a foreign Growth. If the Word Exciſe then was to be underſtood in this Senſe; or if the Duties upon Malt and Hides were to be conſidered as Part of the King's Revenue or Exciſe, it follows, that an Appeal does lie in the preſent Caſe; for in Caſe of Convictions for not paying the Duties upon Malt and Hides, it is expreſly given by the Statute of 6 Geo. c. 21. ſect. 10. Then as to the Objection, for there being nothing done upon the Appeal at the firſt Seſſions, he ſaid, the Appeal was filed then; and ſo it appears by the Record, which is ſent up; and that, he apprehended, was a ſufficient bringing of it within the Meaning of the Act. And as to the Uncertainty of the Words in the Appeal, he ſubmitted it, they were ſufficiently certain; and that the Meaning of it ſhall be, that the Party appealed from the Conviction, and likewiſe the Order or Warrant made upon it. He then excepted to the Order of the two Juſtices, as being informal; for that the Act, upon which it was made, provides, that the Party ſhall be convicted only upon his own Confeſſion, or the Oath of one or more credible Witneſſes, and in the Conviction of the two Juſtices, it is not ſaid in what Way he was convicted, only in general, that the Fact was fully and duly proved upon the Defendant. He ſaid, for any Thing that appears, the Informer himſelf might have given the Juſtices what they thought full Proof; but that, he apprehended, was not ſufficient. The Attorney General in his Reply, chiefly took Notice of the Objection, that had been made to the original Order; and ſaid, he did agree, if it had appeared on the Face of the Conviction, that the Informer had been the Witneſs, it would have been bad; as the Informer himſelf is to have Part of the Penalty; and ſo he allowed

it was determined in the Case of The Queen and Cobhall. But he submitted it, the Court had never gone so far, as to require it should appear upon the Face of the Conviction, that the Informer was not the Witness. He said likewise, that he did agree in drawing up these Convictions the Deposition of the Witnesses is generally drawn up at Length, and the Fact of the Information generally set forth to have been specially proved; but he apprehended it was never determined, but if it was only in general alledged, that the Truth of the Premisses was made to appear, that would be sufficient. The Court declared that there was no Occasion to enter into the Merits of the principal Question, whether an Appeal would lie or not in this Case; for they said, they thought the Order of Sessions clearly bad upon an Exception taken to it by Judge Page, for its being only alledged, that the Defendant did give Notice to the Officer of the Number of Courses of his Candles, in Manner as the Statute directs, without alledging, that he gave Notice of the Number of Sticks, or of the Number of Candles, as the Statute requires, and as the Conviction charges the Defendant with omitting to do. Accordingly the Order upon the Appeal was quashed. As to the Exception to the original Order the Chief Justice and Judge Page inclined to be of Opinion, that the Order was good notwithstanding. The Chief Justice mentioned a very strong Case, which was that of The King and Sympson, which he was of Counsel in, when he was Attorney General in the Statute there, upon which the Defendant was convicted, required, that there should be the Confession of the Party, or the Oaths of Two or more credible Witnesses to convict him; the Defendant there was summoned to answer and did not attend; yet that was held to be a sufficient Confession within the Meaning of the Act. And as to its being requisite, that it should appear, that the Informer was not the Witness, they believed, that was never held. Judge Probyn and Judge Lee were of a different Opinion; and said, that they took it to be requisite, that so much should be set out in the Conviction, as to make it appear, that the Justices have given a right Judgment. For which Reason Judge Lee said he believed, it had been adjudged, that it must be set out, that the Witnesses were examined upon Oath; and that it will not be enough to say, that full Proof was made by Witnesses. Accordingly the Court conceiving this to be a Matter of considerable Doubt, they said, they would consider of it more fully before they gave their Opinions. Vide post

The King *and* Bently.

UPON a Return being made to a Habeas Corpus directed to the Defendant, Keeper of the Gaol of Norwich, the Attorney General moved, that the Prisoner might have Judgment passed against him on the Stat. of 6 Geo. 21, 34. But the Court observed upon the Return, that the Causes of the Commitment were not mentioned in it; and therefore thought it not sufficient. Upon which the Attorney General said, that there were no Words in the Habeas Corpus requiring this. The Court at first thought

The Certainty required in a Return to a Habeas Corpus.

thought this such a Fault in the Writ, as that they ought to quash it. But upon Mr. Masterman's saying, that the Form of all these Habeas Corpus's are so, the Court committed the Prisoner to the Marshalsea Prison, and ordered Precedents to be search'd.

Willing *and* Bourn.

How far a Prisoner who has escaped cannot be retaken.

ON Rule to shew Cause, why the Defendant should not be discharged out of Custody, Mr. Strange said, that the Fact was, that the Defendant had escaped by Breaking the King's Bench Prison, and before he was retaken had obtained a Discharge from the Plaintiff, which was shewn to the Marshal; the Marshal however had him retaken for his Fees upon a fresh Pursuit; and after that charged him in Custody with a Declaration in a special Action upon the Case for the Damage the Marshal suffered in the Walls of the Prison being broke. Upon this State of the Case, Mr. Strange submitted it, the Defendant was not intitled to be discharged; but if he was, the Court would leave him to his ordinary Remedy. The Court however declared their Opinions to be, that the Marshal had certainly no Authority to retake the Defendant for the Escape, after the Plaintiff had discharged him. They were likewise of Opinion, that the Marshal had no Authority to retake him for any Fees, that were due. Detain him, they said, for his Fees, the Marshal may certainly do, when he is legally in his Custody. But when he is once legally discharged out of his Custody, the Marshal is driven to his Remedy by Way of Action. Then as to the Action, that was brought by the Marshal for the Walls of his Prison being broke, they said, he could not hold him to bail without applying to a Judge. They observed farther, that as the Retaking was in itself unjustifiable all the Proceedings upon it must fall to the Ground; and therefore they said, they would discharge him even without finding common Bail. However the other Side consented to pay the Fees immediately; accordingly the Rule was drawn up by Consent, that upon the Defendant's paying the Fees, the Rule should be made absolute for discharging him out of Custody.

Harrison *and* Mitchel.

Vide ante p. 8, 15.

A Prohibition had been moved for de novo upon an Affidavit of Mr. Harrison and his Wife, that they had no Knowledge of their Brother's having been married; and a Rule obtained for shewing Cause, why it should not be granted. But the Court thought proper now to discharge it; for they said, it was doubtful to them, but Mr. Harrison and his Lady did know or had Reason to believe, that their Brother was married. And this Fact ought to be cleared up, not before the Court, but before the Ordinary. They did agree, if Mr. Harrison and his Lady had no Reason to have imagined, that their Brother was married, they were fully justified in making that Affidavit before

the Ordinary, which they did; and though the Fact had afterwards come out, that their Brother was married, this Court would not have suffered the Ordinary to have considered again about granting the Administration; but the Prohibition should certainly have stood. But where-ever this Court has the least Suspicion of the Party's believing, or having Reason to believe, that the Deceased was married, and notwithstanding this the Party makes such an Affidavit as in the present Case, the Ordinary shall have Liberty to inquire whether there was a Deceit put upon him or not. He shall be the Judge of that Fact. And if upon the Whole he is of Opinion, that there was a Deceit put upon him, he shall have it in his Power to grant the Administration de novo; but if he is of Opinion, that there was no Deceit put upon him, then indeed he shall not be suffered to grant it de novo. As to the Case of Sir George Sands, they said, it was more fully reported in Keble; but by no Means comes up to this Case; for here there was not so much as a Citation to allow the supposed Widow to come in. And they thought the Case in 1 Lev. 305. fully justifying the present Resolution. Accordingly the Rule for the Prohibition was discharged.

Cosset *and* Freeman.

MR. Kettleby moved for Costs for not going on to Trial; he did agree, that the Plaintiff had given a Countermand; but he submitted it, it was not in Time; for the Cause was set down for the Sittings in London, and the Defendant's Witnesses lived a considerable Distance in the Country; notwithstanding which the Plaintiff had countermanded the Notice but two Days before the Time for Trial. But the Court said, the standing Rule was, where the Cause is laid in London, and arises out of it, there must be four Days given for the Countermand; but where the Cause is laid in London, and arises in it, there need only be two Days. Accordingly this Case being, that the Cause of Action arose in London, where it was laid, the Countermand was held to be regular; and the Motion refused.

What shall be said to be a good Countermand of Notice of Trial.

The King *and* Morrice.

MR. Reeves argued now for the Defendant, and said, that the Counsel of the other Side had agreed, that where the Evidence varies in a material Part from the Declaration, the Plaintiff cannot recover. But he submitted it, the Cases had gone so far, as in some Instances to say, that the Plaintiff fails in his Proof, though the Variance be not material. To this Purpose he cited the Case of Courland and Hernigoe, Hill. 13 W. 3. That Action was Debt upon Bond for not performing an Award; the Defendant pleaded, no Award, the Plaintiff replied, that there was one, and set it forth in hæc verba. The Defendant in his Rejoinder demanded Oyer of the Award, and it appeared there were a few Clauses in it, but not material ones, omit-

Vide ante Vol. 1. 448

ted in the Replication. Upon the Demurrer the Court were of Opinion, that when the Plaintiff took upon himself to set out the Award in hæc verba, he ought to have set it forth exactly as it was; and as he had not done that, the Court gave Judgment against him. So is 2 Lev. 85. to the same Purpose. But he insisted farther, that the Variance in this Case was in the most material Place. For the Person's Name is omitted in the Warrant, against whom the Judgment was; and certainly that ought to have been inserted to found a Warrant for executing that Judgment. And as to the Cases cited on the other Side, of the Name of a Grantor being omitted in the granting Part of the Deed, and the like; those were, where the Mistake was in one and the same Instrument; and there one Part of the Deed might by Construction explain the other. But nothing of this can be said in the present Case. He observed farther, that there was another Variance, in that the Declaration had set forth, that so much was recovered pro damnis, misis & custagiis, but in the Warrant produced at the Trial, the Recovery was said to be pro damnis only. He did agree, that this Objection had been spoke to before, and the Court then seemed to over-rule it, by saying, that Damnis was a Word, that included the Whole. But he submitted it, that the Court would consider of that Objection a little farther. The Court said, that they were of Opinion, that in all reasonable Understanding the Construction of the Warrant must be, that the Recovery was against Urket, and therefore they thought the Evidence agreed well with the Declaration. For the Warrant is not set forth in hæc verba, only the Substance of it. The Chief Justice said likewise, that the Fieri facias was proved in Evidence, which had in it the very Words of a Recovery against Urket; and when this Warrant was afterwards proved to be made out to the Bailiff in Pursuance of it; he thought it good beyond Question. The other Objection was not taken Notice of by the Court. Accordingly they ordered, that the Postea should be delivered to the Plaintiff, that he might enter up his Judgment.

The King *and* Bentley.

Vide ante 19. THERE was now a new Habeas Corpus filed, and the Causes of the Commitment returned. Upon which the Attorney General said, that the Prisoner was convicted for beating a Custom-house Officer within the Description of the Statute of 6 Geo. 21. 34. and that Section in the Statute provides, that such Person shall be transported to his Majesty's Plantations for any Number of Years, not exceeding seven, at the Discretion of the Judges. And therefore he prayed the Judgment of the Court. Mr. Crowl on the other Side said, that Baron Carter tried the Prisoner for this Offence; and therefore he desired, that one of the Judges of this Court would be pleased to speak with him, and report from him the Nature of the Prisoner's Offence. The Court said, that that would be necessary; and therefore ordered it to be done. Upon which the Attorney Ge-

neral prayed, that the Prisoner might in the mean Time be committed to Newgate; for that he had broke one Prison and escaped already. The Court said, the King's Bench Prison is a very weak one; and there are continual Complaints of its being broke, and Escapes made out of it. For which Reason they ordered him to Newgate.

Anonymus.

ON Rule to shew Cause, why a Writ of Error should not be quashed, Mr. Strange said, that the Exception which Mr. Theed had taken to it, was, that it was tested this Term and returnable the next, whereas there are fifteen Days within this Term from the Day of the Teste, wherein it might have been returnable. But he observed, that the Rule of the Court was, that in this Term and in Hill. Term, wherever a Writ of Error bears Teste after the first Return within Term, it may be returnable the Term after. And to this Purpose he had an Affidavit of the proper Officer. The Chief Justice said, that in the Case of Shirley and Wright it was determined, that this was good in a Capias ad Satisfaciendum; otherwise in mean Process. And the Court in general observed, that they thought it good in this Case. But if it was not, the proper Place to apply for Relief was the Court of Chancery, and not this Court. Vide ante

Hepworth *and* Pullen.

A Rule had been made a few Days ago, that it should be referred to the Master, to inquire whether one of the Persons, whose Name was put into the Bail-piece, was privy to his being Bail, or not. And now on Motion for the Master's Report, the Master stated the Fact specially; but upon the whole seemed inclined to think, that there was an Imposition put upon the Court, and that Somebody had personated this Man, whose Name is in the Bail-piece, without his knowing any Thing of the Matter. Upon which Mr. Cunningham moved, that his Name might be struck out of it. And cited Cotton's Case, 2 Cro. 256. The Court said, that before the Statute of 21 Jac. 26. these Motions were allowed. But since that Statute has made this Offence to be Felony, the Court has always refused them. To this Purpose the Chief Justice said, he remembered the Case of Dod and Stackburn, Trin. 11 W. 3. the Name of one Garbon was put in there as Bail; and in a Scire Facias against him, he laid this Fact before the Court, that he was personated in giving Bail without his having had any Knowledge of it; and yet the Court refused to relieve him. And to the same Purpose is 1 Ven. 301. Accordingly the Rule of Reference was discharged.

How far the Court will not strike a Person's Name out of the Bail-piece.

Anony-

Anonymus.

Whom a Venire is proper to be directed to.

IN a Mandamus to ſwear in a Common Council-man for the Ward of Great Wyver in the City of Norwich, Serjeant Chapel had obtained a Rule a few Days ago to ſhew Cauſe, why the Venire ſhould not be directed to the Sheriff of the County of Norfolk, upon an Affidavit, that the Sheriff of the City, and likewiſe the Coroners, and Freemen who would be of the Jury, in Caſe the Venire was directed to an Officer within the City, were all Parties intereſted in the Election. And to ſhew that Venires have been directed in ſuch Caſe to the Sheriffs of the County at large, he cited Roll's Abridgment 597. The Caſe there is put, that an Iſſue is to try, whether there is ſuch a Cuſtom, as Foreign-bought and Foreign-ſold in the City of York; and the Opinion there is, that the Venire in ſuch Caſe ſhall be directed, not to the Sheriff of the City of York, but to the Sheriff of the County at large. And he obſerved beſides, that though the preſent Election relates only to a Common Council-man for one of the Wards of the City; yet in Fact, a Common Council-man for one of the Wards is a Common Council-man for the whole City; and therefore in the Nature of the Thing every Freeman within the City muſt be intereſted in this Election. Mr. Strange came now to ſhew Cauſe againſt this Rule, and ſaid, that he believed it was never thought of before, that a Venire ſhould be directed to the Sheriff of another County, when the Election of a Common Council-man within a Ward was diſputed. He obſerved, that Iſſues of this Sort are conſtantly tried in London; and therefore he ſubmitted it, that for the Precedent ſake the Rule ought to be diſcharged. And if there was any Reaſon to think, that there was any Partiality in the returning Officers, the other Side ought to apply, that Eliſors ſhould be appointed to ſtrike the Jury. The Chief Juſtice ſaid, that he well remembered a Diſpute, that happened between the City of Norwich and the County of Norfolk, which of them ought to repair a Bridge; and the Venire was directed to the Sheriff of Suffolk. The Court ſaid too, that they well agreed the Caſe cited out of Rolls; but they thought the preſent Caſe did not come up to it. Accordingly the Rule was diſcharged.

The King *and* Macajah.

How far ſeveral Perſons may be joined in one Indictment.

THE Defendant having been convicted in an Indictment of Perjury without making any Defence, Mr. Fazakerly moved now in Arreſt of Judgment, that there were five other Perſons joined with this Defendant in the Indictment, whereas the Perjury of one Man is not the Perjury of another; and therefore there ought to have been ſeveral Indictments againſt them. He did agree, that in Offences of Treſpaſs or Imbracery, or Crimes of that ſort, the Indictments may be joint or ſeveral at the Election of the Proſecutors. But in

other Offences the Rule is, that the Proſecutions ſhall be ſeveral. And therefore in the Caſe of The King and Wilſon, Paſch. 11 Geo. 1. it was determined, that two Perſons could not be joined in one Indictment for uſing a Trade againſt the Statute of 5 Eliz. So in Cro. Jac. 647. it is held a joint Action will not lie againſt two for Words ſpoke of another. The Court thought, there was ſome Weight in this Objection, upon which the Matter was ordered to ſtand over. Accordingly Mr. Fazakerly prayed, that the Defendant might be bail'd in the mean Time; for that he ſubmitted it, the Court rather inclined to allow of the Exception that had been taken, and likewiſe becauſe this was a Conviction without Defence. The Court ſaid, that in Informations for Libels, though there be a ſtrong Exception taken at the Trial, yet if the Party is in Court, they conſtantly commit him after Conviction. And in general they obſerved, that in Caſes of this Sort, where the Court thinks proper to conſider of an Exception, they conſtantly commit the Party in the mean Time; though where the Court is ready to allow of the Objection and give Judgment that way, if the Proſecutor deſires Time to look into it, they did agree, they might bail the Party. And as to what was ſaid, that there was no Defence made, the Chief Juſtice agreed that to be true; but obſerved, that there was a very ſtrong Evidence given on the Part of the Proſecutor at the Trial. And therefore the Court remanded her.

The King *and* Empſon.

MR. Reeves coming now to ſhew Cauſe, deſired Mr. Agar to take all the Exceptions he had to theſe Orders, that he might anſwer them at the ſame Time. Upon which Mr. Agar took another Exception to one of them, for that the Commiſſioners ſtiled themſelves in it Juſtices of the Peace as well as Commiſſioners; but in the ordering Part of it, which requires the Defendant to attend before them, it requires them only to attend before them as Commiſſioners of Sewers. And his laſt Exception was, that the Commitment is for not anſwering certain Queſtions relating to the Raſures of a Book, that was delivered to him as Foreman of a Jury. To the Exception then that was taken upon the former Motion, Mr. Reeves anſwered, that the Words quod cum, &c. are only Words of the Clerk that drew up the Order to be ſent here, and are no Part of the Order itſelf but only an Introduction to it, and then the Order itſelf is ſaid to be ſet out in his Anglicanis verbis ſequentibus; and upon the Face of the Order ſo ſet out, the Facts in it appear all to be alledged with a poſitive Averment. He then obſerved as to the ſecond Point, that the Contempt to the Court which the Defendant is committed for, is manifeſtly a Contempt to them, as Commiſſioners of Sewers, and therefore the Addition, which they have given themſelves in the Stile of the Order is Surpluſage. And as to the laſt Objection, the Queſtion which was asked the Defendant, appears to be only, whether the Book was delivered to

Vide ante 2.

him in the ſame Condition as it was redelivered by him; and that is a Queſtion, which he ought to have anſwered. The Court thought the two firſt Exceptions ſufficiently taken off; but of the laſt they doubted. So this Matter was ordered to ſtand over.

Morrice *and* Redwyn.

When a Surety pays Money on Behalf of his Principal, how far he will be intitled to bring an Indebitatus Aſſumpſit againſt the Principal.

Norwich Aſſiſes. A. Had recovered in the Court of Lynn against another, and when he was going to take out Execution, the Defendant there offered to give him a Note for the Money, and to get one to join in it as Security with him; which was done accordingly. After this the Plaintiff in the former Action commenced another Action againſt the Security, and recovered; upon which the Security paid the Money, and now brought his Action againſt the Principal for ſo much Money laid out to his Uſe. This Matter appearing at the Trial, the Defendant's Counſel excepted, that the Action would not lie. But Lord Raymond, who ſat as Judge of Aſſiſe here, was of Opinion that it would. Accordingly the Plaintiff proceeded in his Evidence.

Norris *and* Le Neve.

How far Heralds Books ſhall be Evidence.

At the ſame Aſſiſes. IN an Ejectment, wherein a Deſcent came in Queſtion, a Book out of the Heralds-Office was produced to prove the Pedigree. Mr. Prime objected, that this was no Evidence, and cited Mr. Lloyd cited Salk. 281. in Proof that it was Evidence. The Chief Juſtice at firſt doubted; but as it appeared that this Pedigree was taken upon an Inqueſt made on a Viſitation, he allowed it to be good Evidence; and it was accordingly read.

The King *and* Dr. Brown.

Conſtruction upon the Statute of 21 Jac. 17. relating to Brokers.

At the ſame Aſſiſes. THE Defendant was indicted upon the Statute of 21 Jac. 17. for receiving a Guinea and a Half on the Procuring of 100 l. But as he appeared upon the Indictment to be a Phyſician and not a Scrivener or Broker, Lord Raymond declared his Opinion to be, that he was out of the Meaning of the Act. And accordingly he was diſcharged.

Term. Mich.

5 Geo. II. 1731.

Martin *and* Davis.

What Perſons may not be allowed to be added Defendants in an Ejectment.

IN an Ejectment for a Chapel and certain Lands in Hamſtead, Mr. Filmer moved, that the Chaplain might be made a Defendant, quoad his Right of Entry into the Chapel to perform Divine Service; and quoted Salk. 256. in Point. But Judge Page ſaid, in the Caſe of the Dean and Chapter of Weſtminſter he remembred Dr. Broderick applied for ſuch a Rule in the Court of Exchequer, and it was refuſed him. Lord Raymond ſaid too, that he had known theſe Motions refuſed; accordingly it was ſo in the preſent Caſe.

Anonymus.

How far the Court will grant an Information for a Battery, notwithſtanding the Facts are denied by the Affidavits on the other Side.

ON Rule to ſhew Cauſe, why an Information ſhould not go for a Battery of a very enormous Nature, Mr. Parker ſaid, that he had various Affidavits to produce, directly denying the Fact; and therefore he hoped, that by the Practice of this Court the Rule ſhould be diſcharged. The Court agreed, that if the Battery ſworn had been of ſuch a Sort as Informations are generally granted for, the Practice of the Court was, that the Rule ſhould be diſcharged; but as the Battery ſworn is of a very enormous Nature, the Practice of the Court is otherwiſe; and accordingly the Rule was made abſolute.

The King *and* Freeman.

What ſhall be ſaid to be a good Warrant of a Judge of the Court of King's Bench.

THE Defendant had been indicted for a Battery, and upon that Judge Lee made out his Warrant to take him; which Warrant required, that the Defendant ſhould be brought before one of the Judges, and if none of them were in Town, then before one of his Majeſty's Juſtices of Peace, reſiding within five Miles of London. The Tipſtaff however did not think proper to execute it; and for this Mr. Kettleby moved for an Attachment. Lord Raymond ſaid, that Precedents might be ſhewn of theſe Warrants having been granted Time out of Mind. And it has been determined, that their Warrant is good even by Parol to arreſt a Perſon committing an Offence openly before them. Accordingly the Attachment was granted.

Anonymus.

How far the Court ſets aſide a Verdict for a Variance between the Record of Niſi prius and the Copy of the Iſſue, when there is no Defence at the Trial.

SErjeant Darnel moved to ſet aſide a Verdict, where there was no Defence, for a Variance between the Copy of the Iſſue and the Niſi prius Roll; the Copy of the Iſſue being made up with a Miſtake in the Replication's concluding & prædictus Defendens ſimiliter, inſtead of & prædictus Querens, and the Roll of Niſi prius being made up right. Lord Raymond ſaid, that theſe Motions have been allowed; accordingly the Court made a Rule to ſhew Cauſe. A few Days after Serjeant Chapel made the like Motion for the ſame Variance in the Caſe of Robins and Churchman, where there was no Defence neither. And the ſame Rule was made.

Anonymus.

How far the Court of King's Bench will grant an Information againſt a Judge of an inferior Court.

SErjeant Hawkins moved for an Information againſt the Bailiff of Wallingford for an Abuſe in his Office, as Judge of the Court within that Corporation. Lord Raymond ſaid, an Attachment would lie for this Offence. And Judge Page obſerved, that it was granted in his Time againſt a Judge of an inferiour Court for not giving Judgment. Accordingly the Court asked the Serjeant, which he deſired, an Attachment or an Information. He anſwered, that he was inſtructed to pray an Information. The Court ſaid, that this would end in an Attachment. Accordingly the Court made a Rule to ſhew Cauſe.

Bowes *and* Haddock.

MR. Kettleby came to ſhew Cauſe, why a Fieri facias ſhould not be quaſhed, for its being taken out when a Writ of Error was depending. His Reaſon was, that the Defendant had got an Injunction continued in the Court of Exchequer upon theſe very Terms, that he ſhould bring no Writ of Error, and has ſince actually given a Releaſe of Errors. The Court ſaid, that for the Breach of the Terms of this Injunction the Application ought to be made to the Court that granted it. And as to the other Part of the Reaſon, the Releaſe ought to be pleaded in Bar to the Writ of Error, and they would not try it in this Way. Accordingly the Rule was made abſolute.

How far the Court will ſet aſide an Execution for being taken out pending a Writ of Error.

Anonymus.

MR. Fazakerly moved for an Information againſt the Baliffs of Scarborough, for convicting a Man upon the Statute of 9 Anne 11. for ſelling Hides without being marked, and yet not allowing him to be heard, but at the ſame Time allowing the Informer to be the Witneſs. He ſaid, before this Motion could be proper, he did agree, regularly ſpeaking the Conviction ought to be brought up by Certiorari; but he remembered well that one of the Statutes in Geo. 1. had taken away Certioraris in theſe Caſes. The Court accordingly made a Rule to ſhew Cauſe, and ſaid, if a Certiorari would lie the other Side would then ſhew it.

How far an Information will lie for making an illegal Conviction.

Anonymus.

MR. Taylor moved for an Information againſt one Liſle, Deputy Town-Clerk of the City of Glouceſter, for entring a Verdict different from what the Jury gave. One was indicted there before the Juſtices of Peace for an Aſſault and Raviſhment. The Jury found him Guilty as to the Aſſault, but acquitted him as to the Raviſhment. Notwithſtanding which the Deputy Town-Clerk entred up the Verdict generally Guilty as to the Whole. Judge Page doubted, as this was an inferior Officer, whether the Party ought not firſt of all to have applied to the ſuperior Officer for Redreſs. But Judge Lee ſaid, he took it in the Caſe of the Town-Clerk of Norwich, the Court granted an Attachment againſt him directly; and that was for entring up a Record of Seſſions wrong; which is much ſuch a Caſe as this. Accordingly the Court made a Rule to ſhew Cauſe. And afterwards made it abſolute.

How far an Information will lie againſt an Officer for entering up a Verdict wrong

Holt *and* Foreſt.

When a Recognizance of Bail is entered into in Purſuance of the Statute of 16 & 17 Car. 2. what ſhall be a Breach of ſuch Recognizance.

IN Debt upon a Recognizance againſt Bail, given on a Writ of Error in a Judgment after a Verdict, the Plaintiff had ſet forth the Recognizance in the Declaration, and on Oyer the Condition appeared to be, that if the Plaintiff in Error ſhould proſecute his Writ of Error with Effect, and if the Judgment ſhould be affirmed, and if he ſhould pay ſuch Money as ſhould be awarded, then the Recognizance ſhould be void. To this the Defendant pleads, that the Plaintiff in Error did proſecute his Writ with Effect, and that the Judgment was not affirmed. The Plaintiff replies, that the Plaintiff in Error ſuffered himſelf to be nonpros'd. And thereupon the Defendant demurs generally. Mr. Strange now argued for the Defendant, and ſaid that this Recognizance was given upon the Statute of 16 & 17 Car. 2. 8. (3). but it by no Means followed the Words nor Meaning of it. For the Words in that Section are, That if the Judgment ſhall be affirmed in the ſaid Writ of Error, or that the ſaid Writ of Error be diſcontinued in Default of the Plaintiff or Plaintiffs therein, or that the ſaid Plaintiff or Plaintiffs be nonſuit in ſuch Writs of Error; and they are all in the Diſjunctive. But the Words of the Condition in this Recognizance are an intire different Set of Words, and all in the Copulative. For which Reaſon he ſubmitted it the Plaintiff could not recover. Mr. Parker on the other Side argued, and ſaid, that the Objection, now taken to the Form of this Recognizance, was by no Means a new Objection; for, when he was Clerk of the Errors, he remembred it was taken, and ſtrongly inſiſted upon. Lord Macklesfield too was ſpoke to about it; Precedents were ſearched; and it was found, that for above fifty Years then paſt, every one of theſe Recognizances was in this Form. Lord Raymond ſaid, that however the Penning of the Condition in this Recognizance be, the plain Meaning of it muſt be, that the Plaintiff in Error ſhould proſecute his Writ with Effect, and if the Judgment be affirmed, that he ſhould pay the Money. And whenever a Word is put in of a direct contrary Signification to what the Party intends, the Court will tranſpoſe or change that Word, in order that the Party's Intent may take Effect. And that is like the Caſe which has been determined, where the Condition of a Bond was, that the Party ſhould not pay the Money; the Court underſtood the Condition, as if the Word not had been left out. And he took that Caſe to be much ſtronger than the preſent one. However, he ſaid, if this Recognizance had not been given according to the Act, but the Party had voluntarily entred into one with a different Condition, ſuch Recognizance would bind him; and ſo this Point has been expreſsly determined. It being then to be taken for granted now, that the Recognizance is a good one, and within the Meaning of the Act; he ſaid, it might be proper to conſider, what Conſtruction ſhould be put upon the Words proſecuting with Effect. And as to that, he did not think indeed they required the Party to reverſe the Judgment; but only to bring

the Judgment ſo before the Court, as to have it reverſed or affirmed. However in the preſent Caſe the Plaintiff in Error has done neither of theſe Things; and therefore, he thought the Recognizance clearly forfeited, by his ſuffering himſelf to be nonproſſed. Accordingly the Court ordered, that the Plaintiff ſhould have his Judgment, unleſs Cauſe on Thurſday next.

Anonymus.

ON Rule to ſhew Cauſe, why an Information ſhould not be granted againſt the Defendant for ſetting Nets croſs one of the publick Rivers. Mr. Reeves ſaid, that he did not certainly know what Statute the former Motion was made upon; but he ſuppoſed it was that of 1 Geo. 18. (14). And if it was, he apprehended an Information would not lie; becauſe that Statute has preſcribed a ſummary Method of proceeding before Juſtices of the Peace. Upon which Mr. Wilbraham ſaid, that he founded his former Motion on the Statute of 2 H. 6. 15. But Mr. Reeves ſaid, that then there was a very plain Anſwer to be given to it, which was, that the Statute of 21 Jac. 4. has provided, that all Informations brought upon Penal Statutes made before that Time, ſhould be laid in the proper County, where the Fact ariſes. And it was determined therefore in the Caſe of The King and Gall, that no Information for ſuch Offence could be granted by this Court. Accordingly the Court diſcharged the Rule.

When a Statute creates an Offence, and preſcribes a particular Method in order to puniſh it, how far the Court of King's Bench cannot grant an Information.

Lane *and* Chapman.

MR. Strange moved to ſet aſide a ſecond Fieri facias, that had been executed after the firſt, and no Notice taken in it of any Money being levied upon the firſt. And beſides he ſaid, the Defendant had Goods enough by him, to have had the whole Debt and Coſts levied upon the firſt. Accordingly the Court made a Rule to ſhew Cauſe.

How far the Court will ſet aſide a ſecond Fieri facias. Vide poſt.

Anonymus.

ON Rule to ſhew Cauſe, why a Priſoner ſhould not be diſcharged out of Cuſtody upon the late Statute of 2 Geo. 2. for the 2s. and 4d. not having been duly paid upon the Day, Mr. Marſh ſaid, that Thurſday was the Day on which it ought to have been paid, and the Plaintiff gave the Money to his Servant to be delivered to the Defendant on that Day, but the Servant forgot it, and did not go to deliver it till ſeven the next Morning, and then did tender it the Priſoner, but he refuſed to accept it. He obſerved, that the Court in other Inſtances has not kept to the Letter of this Act of Parliament; for the Act requires, that the Money ſhall be paid on the firſt Day of the Week; but the Court has conſtrued that Day to be the firſt Day after the Plaintiff's Undertaking. And there-

How far the Court will diſcharge a Perſon out of Cuſtody on the Statute of 2 Geo. 2. by Reaſon that the Weekly Payment which that Statute preſcribes was not duly made him.

therefore he hoped, there should be a like Construction made upon this Clause, by understanding it to mean The first Day of every Week after his Undertaking, or as soon after as in any Convenience may be. The Court said, they were intirely for keeping to the Letter of the Act in this respect; for otherwise they did not know where they should stop. And Judge Lee said, the Court has been of the same Opinion upon the Statute of 3 & 4 W. 11. relating to Settlements; and there they will not allow of the least Variation from an intire Year's Service. Accordingly the Rule was made absolute.

Seymour *and* Winnyat.

When a Writ of Error is brought in the House of Lords, what is the Nature of the Recognizance, which is entred into upon that Occasion.

When a Writ of Error is brought in the House of Lords, what Time the Court of King's Bench will give the Party to justify his Bail in.

UPON a Writ of Error in Parliament on a Judgment of the Common Pleas affirmed in this Court, Mr. Reeves moved for a Week's Time to justify their Bail, and that Execution might be staid in the mean Time. He said, the Reason for his Motion was, that the Bail were out of Town, and could not be back again till then. But if the other Side should be unwilling that such Rule should be made, he would consent that Mr. Molesworth, one of the Bail upon the former Writ of Error, and a Member of Parliament, should be Bail in this. Judge Page said, that he had known it an Objection in the Common Pleas and Exchequer to a Person's being Bail, that he was a Member of Parliament. And the other Side declared, that they would not consent to Mr. Molesworth's being Bail here; and hoped, that no Time should be given to justify in this Case. But the Court declared, that Members of Parliament were frequently Bail in the Crown-side of this Court; and they would not suffer that to be any Objection of the other. They said farther, that it has been held, that no Bail was requisite upon a second Writ of Error. Indeed they did agree, that the Law was at this Day held otherwise. However they observed, that the Condition of the Recognizance of Bail in this Case only subjected them to pay the Costs upon the Affirmance of the Writ of Error, which the Chief Justice said could not be above 100 l. And therefore they granted the Motion.

Parrot *and* Green.

How far the Court stays Proceedings upon a Distringas nuper Vic'.

ON Rule to shew Cause, why Proceedings should not be staid upon a Distringas nuper Vic' for that Bail had been put in at a Judge's Chamber, and no Exceptions entred in the Book, the Counsel said, that the Plaintiff's Attorney met the Defendant's Attorney, and told him, he did expect he should justify in Court. And that the Court held to be sufficient. However Judge Page said, if the Plaintiff should insist upon going on upon the Distringas, they will compound this Matter in the Exchequer. For which Reason the Court advised the Parties to agree it, which they accordingly did.

Spinmore *and* Bowler.

ON Rule to ſhew Cauſe, why the Defendant ſhould not be diſcharged out of Cuſtody, upon his having ſigned a Nonpros for want of the Plaintiff's declaring againſt him within two Terms, Mr. Strange ſaid, that the Fact was, that the Defendant was ſued in one of the City-Courts, and removed himſelf here by Habeas Corpus; after that he made an Eſcape, and being taken up by an Eſcape-Warrant, was committed to Newgate; upon this he lay in Newgate for above two Terms, and the Plaintiff did not declare againſt him. Upon the State of this Caſe Mr. Strange ſaid, he ſhould ſubmit it, that the Nonpros was irregularly ſigned. He did agree, that if the Action had not been brought in the City-Court, but had been brought here, the Nonpros would have been regular, and according to the Intent of the Statute of 4 & 5 W. & M. 21. and 1 A. 6. But he ſubmitted it, that the Statute of 1 A. 6. (1). has only provided, that Proceedings ſhall go on againſt the Party taken upon an Eſcape-Warrant, where an Action was actually pending againſt him at the Time of the Eſcape. And in the preſent Caſe no Action was depending. For the Action in the City-Court was determined by the Habeas Corpus; and no Action was begun in this Court. The Court thought this a Matter deſerving Conſideration; ſo the whole of it was refer'd to the Maſter; that the Irregularity of the Nonpros might be inquired into. Vide poſt.

Burgis *and* Page.

MR. Strange moved for a Rule on the Under-Sheriff of the County of Northampton, to ſhew Cauſe why he did not deliver to the Plaintiff the Money levied on a Fieri facias, upon an Affidavit, that the Defendant's Goods being taken in Execution, the Under-Sheriff wrote a Letter to the Bailiff to deliver them up, becauſe he had received the Debt and Coſts; ſince which the Money had often been demanded of the Under-Sheriff, but he had not paid it. The Court declared they ſhould willingly grant the Motion, if it had ever been granted before; for they have obſerved of late, that Under-Sheriffs make it a Practice to delay Plaintiffs their Suits, and to ſtand out, till the Attachment. However they ſaid, they would think of ſome Way to make Under-Sheriffs pay Coſts for their Delay. The Rule made at preſent, was only, that the Sheriff ſhould return his Writ. What kind of Rules are proper to be made on an Under-Sheriff.

Anonymus.

How far Bail above ſhall be ſaid to be Regular.

MR. Agar moved to ſtay Proceedings againſt Bail. In Hilary Vacation the Plaintiff ſued out the Writ, which was returnable the firſt Wedneſday in Eaſter Term, and on the Monday following took an Aſſignment of the Bail-Bond, on which ſame Day Bail was put in. Mr. Strange ſubmitted it, that the four Days for putting in Bail muſt be reckoned incluſively, ſo that the laſt Day for putting in Bail was on the Saturday. But the Court were of Opinion, that one of the Days muſt be excluſive; and that therefore the Bail above was regular. Accordingly granted the Motion.

—— *and* Smith.

How far the Court cannot proceed in a ſummary Method againſt an Attorney.

SErjeant Urlin moved, that the Defendant's Attorney might ſhew Cauſe, why he did not deliver up 100l. which was delivered him as an Indemnity againſt all Damage that he might ſuffer by becoming Bail. The Plaintiff had given the Defendant a general Releaſe, and yet the Attorney refuſed to deliver up the Money. The Court ſaid, they did not ſee how a Rule could be made upon him to do this; becauſe in this Reſpect he did not act as an Attorney. However a Rule was made upon him to ſhew Cauſe why he ſhould not conſent.

Anonymus.

How far the Court will not grant an Information againſt a Perſon for making an illegal Conviction, till the Conviction is brought into Court by a Certiorari.

MR. Strange moved for an Information againſt one Heber, a Juſtice of Peace, for convicting a Man for killing five Hares, and refuſing to hear what he could ſay in his Defence. But the Court refuſed the Motion, becauſe the Conviction was not brought up by Certiorari. They ſaid, if there was no Conviction, there ought to be no Information; and if there was a Conviction, this ought to appear by the Record.

Blake *and* Hutchenſon.

How far the Court will ſet aſide a Judgment, notwithſtanding the Length of Time.

IN Debt on a Judgment of ſixteen Years ſtanding, Mr. Prime moved to ſet the Judgment aſide, for its being entred up of a Term precedent to that whereof the Writ was taken out, whereon the Defendant was arreſted. The Latitat bore Teſte, Hil. 1715. and the Judgment was entred up on the Mich. Term before. Accordingly the Court ordered this Matter to be referred to the Maſter, and upon an Affidavit of Notice of the Motion Proceedings were ſtaid in the mean Time.

Anonymus.

MR. Kettleby moved for an Attachment againſt one Wright, the Keeper of a Mad-houſe, for not making a Return to a Habeas Corpus. But Mr. Maſterman informed the Court, that he took the Practice to be, to obtain a Rule for his returning the Writ. Upon which Mr. Kettleby ſaid, that he believed, in the Caſe of Colonel Dunbar, an Attachment was granted directly for his not making a Return to a Habeas Corpus, where he was going to ſhip off ſome People directly without Authority. Judge Page ſaid too, in the Caſe of Dr. Fellers he believed the ſame was done, where a Habeas Corpus was directed to him to bring up a Perſon, who was ordered by him to be put under a Pump of cold Water to cure him of a pretended Madneſs. And Judge Lee took it, the Caſe of Mr. Baldwin of Ludlow was in Point. The Chief Juſtice ſaid likewiſe, that he believed the Diſtinction was between theſe Habeas Corpus's directed to private Perſons, and thoſe to publick Officers. Accordingly the Court were granting the Attachment; and then the Return was put in.

How far the Court will grant an Attachment againſt a Perſon for not making a Return to a Habeas Corpus, without firſt of all making a Rule to return the Writ.

Probin *and* Churchman.

MR. Draper came now to ſhew Cauſe, and ſaid he ſubmitted it, that this Defect (if any) was amendable within the Statute of 8 H. 6. and therefore the Rule ought to be diſcharged. But yet he took it, that there was no Occaſion for an actual Amendment. And it might be doubted, whether this was any Defect at all. The Defendant's Plea, he ſaid, concludes, & hoc pet' quod inquiratur per Patriam; & prædictus Defendens ſimiliter, inſtead of & prædictus Querens. But he ſubmitted it, that the Word pet' might be read petunt; and then there is a complete Iſſue, and the reſt Surpluſage. To this Purpoſe he cited a Caſe determined very lately in the Common Pleas. That was an Action wherein were three Counts, two upon Bond, the third upon a Mutuatus. To all the Counts the Defendant pleads the General Iſſue. But to the two firſt, his Plea concluded with a hoc petit, &c. and no prædictus Quer' ſimiliter. To the laſt he concluded with a hoc petit and a ſimiliter. Upon this, he ſaid, an Objection was taken, that there was no Iſſue joined upon the two firſt Counts; but the Court there held, that the laſt cured it; and they conſtrued that Iſſue to extend to the whole. He ſaid, Serjeant Chapple was Counſel in that Motion, and he appealed to him, whether the Fact was not ſo. Serjeant Chapple on the other Side argued, and ſaid, he believed, he muſt give it up, that this Fault was amendable. But he begged Leave to inſiſt, it was a Fault; and as a Fault it ought to be amended. To ſhew, that this Fault ought to be amended, he ſaid, he thought he need mention no other Authority than 1 Cro. 633. And if this was ſo, the other Side were not capable to make this Amendment; for the

Vide ante 28.

the Roll above is wrong, as well as the Nisi prius one; and then there is nothing to amend by. The Court in general agreed, that this was a Fault; but they thought it as certain, that it was a Fault amendable. And this upon the Authority of two Cases, one cited by Judge Page of Greenwood and Picking, Mich. 7 W. 3. the other cited by Judge Lee of Rawborn and Hickman, Pasch 9 Geo. 1. which Cases were both in Point. But the Question, which the Court conceived great Doubts upon, was, whether there was Occasion for the Record of Nisi prius being actually amended. The Chief Justice declared his Thoughts to be, that an actual Amendment might be insisted upon. For, he said, the Motion that a Verdict may be set aside is in Effect a Motion to stay the Judgment; and so long as there is a Defect appearing upon their Records he did not think they could give Judgment. But Judge Page and Judge Lee declared, that in the two Cases by them cited there was no Amendment made; the Court only said there that the Fault was amendable; and upon that nothing more was expected. And Judge Page declared farther, that in the Case by him cited the Fault went through the whole, there was nothing to amend by; but yet the Court declared there it was Vitium Clerici, and the whole amendable. Accordingly upon the Authority of these two Cases the Chief Justice came over in his Opinion to the two other Judges; and Judgment was given for the Plaintiff without any Amendment.

Anonymus.

How far an Arrest may be made upon a Bill of Middlesex within the Liberties of London.

MR. Parker moved that Proceedings might be staid, upon an Affidavit that the Arrest was made within the Liberties of London upon a Bill of Middlesex. But the Court said, that that Affidavit was not sufficient, for the Liberty of London may extend into Middlesex, though no Part of London itself does. And Judge Page said, the Borough of Southwark is within the Liberty of London, though it lies in the County of Surry. The same, he said, has been thought of the Temple, that it lies within the Liberty of London, though out of the City and County. Accordingly the Motion was not allowed.

Lane *and* Chapman.

Vide ante

MR. Strange having obtained a Rule to shew Cause, why a second Fieri facias should not be set aside for its not being marked, but generally made out for the whole Judgment, tho' Part of the Money was actually levied upon a former one; Mr. Fazakerly now moved to discharge it. He said, he did agree, the want of marking the Writ was a Fault, for which there must be some Method of being relieved. But he submitted it, that the Method to have been taken was, an Action upon the Statute, which relates to this Matter; and not a Motion to set the Execution aside for this Reason. For those Motions are not allowed, but where there is an Irregularity in

the Iſſuing out of the Proceſs, which cannot be pretended in this Caſe. And he declared, in all his Experience he never knew ſuch a Motion made. But the Court, in the abſence of the Chief Juſtice declared, that they thought this a proper Method to apply for Relief; and they believed it had oftentimes been made Uſe of. However the Matter at laſt went off upon an amicable Propoſal.

Burden *and* Tomling.

IN an Action upon the Caſe the Plaintiff declared upon a Promiſſory Note given by the Defendant, and bearing Date the 22d Day of Feb. 1728, by which Note the Defendant agreed to pay the Plaintiff ſeveral Sums at ſeveral Inſtalments, the laſt of which was not to be till ſome Time in the Year 1732; and then the Declaration ſet forth, that the Defendant ſo being indebted eiſdem die & anno promiſed to pay; but that he did not pay the ſame; whereupon the Plaintiff brought his Action for the Money due on ſome of the firſt Inſtalments. To this the Defendant pleads, that he became a Bankrupt on the 11th of March 1728, (which was before the Money due upon the firſt Inſtalment) and that the Cauſe of Action accrued before ſuch Time as he became a Bankrupt; and concludes his Plea with a hoc paratus eſt verificare. The Plaintiff in his Replication demurs to this Plea; and ſhews for Cauſe, that the Plea ought to have concluded to the Country, and not with an Averment. Mr. Bootle, Jun. now argued for the Plaintiff, and ſubmitted in the firſt Place, that the Subſtance of the Plea was bad, becauſe the Act of Bankrupcy was before the firſt Inſtalment; and in the next Place, that the Concluſion of the Plea was bad; and to this Purpoſe cited the Caſe of Britton and Laſſel, Mich. 2 Geo. 2. in the Court of Exchequer. That was an Action upon ſeveral Promiſes; as to all the Money demanded by the Declaration but 10l. the Defendant pleaded his becoming a Bankrupt, and concluded his Plea in the ſame Manner as this is, with a hoc paratus eſt verificare; and as to the 10l. Part of the ſaid Promiſes, he pleaded Non Aſſumpſit. The Plaintiff demurred to this Plea, and ſhewed two Things for Cauſe; one that the Plea ought to have concluded to the Country; the other, that it was uncertain which of the Promiſes the 10l. excepted related to. The whole Court, he ſaid, delivered their Opinions, that the Plea was bad upon the firſt Exception; and the late Chief Baron ſaid, that he had known the ſame Point twice before determined ſo upon his Argument. Mr. Joſling on the other Side argued, and ſubmitted in the firſt Place, that the Action ought not to have been brought till the laſt Day of Payment was over, and for this Purpoſe relied upon Co. Lit. 47. He ſubmitted it likewiſe, that the Declaration was bad in Subſtance, becauſe the Promiſe to pay is laid to be at the Time of the laſt Inſtalment. For the Words Eiſdem die & anno muſt refer to that Time; it being a known Rule, that the Words idem ſemper refertur proximo Antecedenti. Then in Anſwer to what had been objected againſt the Defen-

How far a Plea ought to conclude to the Country, how far with an Averment.

dant's Plea, he ſubmitted it, that it was right both in Form and Subſtance. And the Determination of both theſe Queſtions muſt depend upon the Conſtruction that ſhall be made on the Statute of 5 Geo. 24. (14, 30.) the laſt Clauſe relates to the Subſtance of the Plea; and therefore he choſe to obſerve upon that firſt. As to that, he ſaid, the Words of the Clauſe were, That the Certificate of a Bankrupt ſhall be a full Diſcharge of any Debt or Demand contracted, due or demandable before the Iſſuing out of the Commiſſion. And he did ſubmit it, that a Note of Hand, payable at a future Day was in itſelf a Demand contracted before the Day of Payment within the Meaning of the Act. Then as to the Form of the Plea, he ſaid, he apprehended, that the Plea would have been bad, if it had concluded to the Country. The Plea of the Bankrupcy is a new Fact; not denying any Thing that the Plaintiff has alledged in his Declaration, but confeſſing and avoiding it. But before the Party is intitled to join Iſſue, there muſt be both a Negative and an Affirmative. And beſides he obſerved, that there were Facts, which the Plaintiff might poſſibly alledge in Avoidance of the Defendant's Plea, which the Defendant by concluding to the Country would have prevented him from doing. The Chief Juſtice declared his Opinion to be, that the Action was well brought; and ſaid, that in theſe Contracts he took it the Diſtinction was, between Actions of Debt brought upon them, where the Thing itſelf is to be recovered, and theſe, where Damages only are to be recovered; for here the Jury may ſever the Damages, as they think proper. He ſaid likewiſe, that he took it, the Subſtance of the Plea was not good, and that the Promiſſory Note in Queſtion was not a Demand contracted till the Day of Payment, within the Meaning of the Act. Mr. Bootle too in his Reply ſaid, that the eiſdem die & anno, &c. was meer Surpluſage; and therefore, he apprehended, whatever Conſtruction was made of it, it could ſignify nothing. However the Court did not deliver their Opinions ſolemnly upon any other Point, but that relating to the Form of the Plea. And as to that Matter the Court declared their Opinions to be, that the Intention of the Legiſlature was, that the Plaintiff ſhould not be able to reply any new Matter; but that the whole Merits of the Action ſhould be tried upon that ſingle Iſſue. For which Reaſon they declared their Judgment to be, that the Plea ought to have concluded to the Country. And ſo Judge Lee ſaid, this Point was determined in the Caſe of Miles and Williams in this Court, when Lord Mackelfield ſat as Chief Juſtice; there Debt was brought upon Bond againſt two; the Defendants jointly pleaded, that the Plaintiff ought not to have his Action, becauſe one of the Defendants became a Bankrupt after the Bond became due; and in the Plea ſet out more than it needed have done, and then ſays & ſic he became a Bankrupt; & hoc parati ſunt verificare. To this Plea the Plaintiff ſpecially demurred for this very Reaſon for which the Plaintiff now does. And upon great Debate the Concluſion of the Plea was held bad. Accordingly in the preſent Caſe the Court gave Judgment for the Plaintiff. The next Day Mr. Joſling came into Court and ſaid, that he had been informed, that a Caſe of

the ſame Nature with the preſent one had lately been in the Common Pleas; the Name of it was Fuller and Burden, and it was determined about three Terms ago. There a Plea of Bankrupcy concluded to the Country; and in Serjeant Hawkins's Argument to ſupport it, the whole Court ſeemed clearly inclinable againſt it. Upon its coming on again before that Court, the Caſe of Miles and Williams, which has been mentioned, was cited. He did agree, three of the Judges altered their former Opinions, and held the Plea to be good; but the Chief Juſtice continued of the Opinion he was of at firſt. For which Reaſon he hoped, the Judges of this Court would be pleaſed to confer with the Court of Common Pleas; and that, as the Judgment was in the Breaſt of this Court for the whole Term, they would be pleaſed to ſtay Execution, till they had conferred with them. But the Court ſaid, that ſince they declared their Reſolution Yeſterday, they had conſidered of this Matter again amongſt themſelves, and had found ſtronger Reaſon to abide by their Opinion. For upon Judge Lee's looking into the Caſe of Miles and Williams he had found, that in Lord Macklesfield's Argument he had cited another Caſe determined upon the ſame Point; and that was the Caſe of Bugg and Lacey 6 Ann. The Chief Juſtice farther ſaid, that upon looking into the old Books he believed it would be found, that an Affirmative and Negative is not always requiſite to the forming an Iſſue, and inſtanced the Caſe of partes finis nihil habuerunt. Accordingly the Court declared, that they would abide by the Reſolution they had given; and let the Party take his Remedy by a Writ of Error. Vide poſt.

Salford *and* Storeford.

How far a Perſon ſhall not gain a Settlement by ſerving an Apprenticeſhip.

MR. Reeves moved to quaſh an Order of two Juſtices confirmed at the Seſſions. The Seſſions ſpecially ſtated the Fact to be, that one Lineacre had been bound an Apprentice by Indenture, and ſerved his Maſter the laſt two Years of his Apprenticeſhip in the Pariſh of Salford in the County Palatine of Lancaſter; but that his Indenture was not ſtamped. However the Juſtices adjudged this to be a good Settlement by way of a Service, though not as an Apprenticeſhip; accordingly removed his Wife and two Daughters from the Pariſh of Storeford in Cheſhire to this Pariſh of Salford. But he ſubmitted it, this was directly contrary to the Reſolution lately made by the Court in the Caſe of Courden and Leeland. And accordingly the Court made a Rule to ſhew Cauſe. And this Term made it abſolute.

Loſield

Lofield *and* Bankcroft.

How far an Innuendo is neceſſary to be laid in an Action for a Libel.

IN an Action for a Libel publiſhed in the Poſt-Boy, July 30, 1730, the Declaration ſet forth the Advertiſement to the following Effect. A Warrant of Felony having been iſſued out againſt John Lofield of ſuch a Pariſh, this is to give Notice, that whoever ſhall apprehend him, ſhall receive a Reward of 10l. by me, Bankcroft. And now Mr. Filmer moved in Arreſt of Judgment, and ſubmitted it, as the Declaration was laid, the Plaintiff could not recover. He ſaid, it was not laid, that the Words were ſpoken any Ways relating to the Plaintiff; nor one Innuendo, to ſhew, that they any ways concerned him. And that this was neceſſary, he cited 2 Cro. 126. 'Twas farther inſiſted, that the Declaration could not be maintained; becauſe it is no where laid in it, that the Plaintiff had not ſuch Warrant iſſued out againſt him. It was likewiſe ſaid, that the Words faration' e poculo were bad, notwithſtanding the Anglice picking a Pocket; and for this Purpoſe was cited 2 Keb. 15. It was urged farther, that the Action was againſt three jointly, whereas the Actions ought to have been ſeveral. The Chief Juſtice ſaid, he thought the Exception for want of an Innuendo had a good deal of Weight with it. Accordingly this Matter was ordered to ſtand over.

Vide poſt.

Aſtley *and* Reynolds.

When a Pawn Broker receives more Intereſt than he is intitled to, how far an Indebitatus Aſſumpſit will lie in order to recover it back again.

THE Trial of this Cauſe having come on before the Chief Juſtice at Niſi prius, a Caſe was drawn up ſpecially for the Opinion of the Court. The Caſe was, that upon the 29th of October 1726, the Defendant lent the Plaintiff 20l. upon the Pledge of a Piece of Plate, and no Agreement was made about Intereſt. Afterwards on the 8th of October 1729, the Plaintiff went to redeem his Plate, and asked the Defendant, what was due to him for Intereſt. The Defendant inſiſted upon 10l. The Plaintiff refuſed to give it him, but tendered him the Principal with 4l. for Intereſt. Upon the Defendant's not agreeing to it he went away; but on the 6th of February following came again and tendered the Principal and 4l. for Intereſt as before. The Defendant inſiſted then likewiſe upon Ten Pounds for Intereſt; and upon that the Plaintiff paid it him, knowing the ſame to be more than legal Intereſt. And now brings his Action of Indebitatus Aſſumpſit for ſo much Money had and received to his Uſe for what was beyond the legal Intereſt. Upon the Trial the Plaintiff obtained a Verdict, ſubject to the Opinion of the Court upon the Caſe, which has been ſtated. Mr. Reeves was Counſel for the Plaintiff, and ſubmitted it for a Principle known and certain, that if a Man pays Money in his own Wrong by Miſtake, an Indebitatus Aſſumpſit will lie for that Money. He apprehended likewiſe the Law to be clear, that if a Man pays Money to another freely to do a wicked Act, an Act, which is malum in ſe,

an Indebitatus Aſſumpſit will lie for that Money; and to this Purpoſe was cited the Caſe of Wilkenſon and Kitchen, Trin. 8 W. 3. There Money was given to a Solicitor to lay out in Bribes; the Solicitor did lay it out ſo; and an Action was, notwithſtanding, brought againſt him for ſo much Money had and received to the Party's Uſe. There was a conſiderable Debate whether that Action would lie; and held to be maintainable. But he did not conceive this Action to be ſo difficult to maintain as that. For there the Party paid his Money voluntarily; but here he was forced to do it; for he could not get is Goods without it. And in 1 Rolls Abr. 687, it is held, that Dureſs upon a Man's Goods ſhall as much avoid even his Deed, as Dureſs upon his Perſon. Mr. Fazakerly on the other Side argued and ſaid, he did agree, that where-ever a Man pays Money by a Miſtake an Indebitatus Aſſumpſit will lie. But he did ſubmit it, the Rule of Law was, that wherever a Man pays Money, knowing what he does, he ſhall never recover it back again. Volenti non fit Injuria is a Principle of Law as well as Common Reaſon. And for this Purpoſe he cited Salk. 22. Skin. 412. 6 Mod. 161. He ſaid, he did think it to be a very hard Thing to maintain, that here was Coercion in this Caſe. The Defendant indeed inſiſted upon the Money; but the Plaintiff took a long Time to conſider of it; and afterwards paid it. He obſerved too, that it might be doubted, whether the Plaintiff had any Right to the Plate upon the Tender that he made. The Tender of 4 l. was a Tender of more than legal Intereſt; which the Defendant was not obliged to accept; and if he had accepted it, he might have been puniſhed for it. The Tender therefore he ſubmitted it, was void; and if ſo, the Plaintiff could not have recovered his Goods even in an Action of Trover. He ſaid farther, that he conceived the Poſition maintained by the other Side of a Man's recovering back Money which he had paid upon an illegal Conſideration, not to be Law. He ſaid, if a Man gives Money to beat another, he believed, it was never heard of that an Indebitatus Aſſumpſit would lie; and it has been even determined, that it will not for Intereſt paid that is Uſurious. The Giver and Receiver are both involved in the Guilt, and therefore the Giver ſhall not have any Aſſiſtance from the Law to recover the Money out of the Hands of the Receiver. And he ſaid, it has always been taken for known Law, that theſe Actions will not lie even for Money ſtolen. The Court declared their Opinions very freely, that the Tender was well made. They thought the Tender of more than is due, muſt be a Tender of that which is due; though they did agree, a Tender of leſs would not. And Judge Page ſaid, that he believed it had been determined, that if a Man throws a Bag of Money looſe upon a Table, and bids the other take what is his due, that is a good Tender. But the great Difficulty which ſtuck with the Court, was, Whether, as this Caſe was, the Action of Indebitatus Aſſumpſit would lie. The Chief Juſtice ſaid, if the Caſe cited out of Rolls was Law, it was a pretty ſtrong Authority to maintain the Action. He owned, he had ſome Doubts of it; however inclined to be of Opinion that it would lie ſingly upon this

What ſhall be ſaid to be a good Tender.

Conſideration, that there was ſomething of a Force put upon the Plaintiff. Judge Page ſaid, he took it, there was ſomething of Deceit as well as a Force; and if the Party paid the Money any may upon a Surprize, he took it clearly the Action would lie. For then it would fall within the Common Caſe, where an Attorney delivers a Bill, and the Client pays it; yet if the Client was overcharged, he ſhall recover the Overplus-Money in an Indebitatus Aſſumpſit, though he did not apply to have the Bill taxed. And he believed, he remembered the firſt Action of that Sort that was maintained. Judge Probyn ſaid likewiſe, that he thought there was ſomething of a Deceit as well as a Force in this Caſe; for the Plaintiff borrowed the principal Sum upon the Credit that he was to pay only common Intereſt; afterwards the Defendant would be for drawing him to pay a greater Intereſt. Judge Lee however declared his Opinion to be, that here was neither a Deceit put upon the Party, nor a Force. He ſaid, he took it, that the Plaintiff plainly knew what he did, he had full Time to conſider of it; and therefore he thought this Caſe fell within the common Rule of Volenti non fit Injuria. The Court thought this a Matter of conſiderable Conſequence as well as Difficulty; for they ſaid if this Action could be maintained, it would be a much more eaſy Remedy, than to bring an Action of Trover for the Goods. And therefore thought it deſerved to be farther conſidered of. So it was ordered to ſtand over for the Opinion of the Court. But the laſt Day of the Term they gave Judgment for the Plaintiff, with Liberty to enter it up nunc pro tunc.

Dilly *and* Polhill.

Vide Vol. 2. 448.

THIS Matter now coming on again, Mr. Strange took the following Exception; he ſaid that this was Debt upon an Award, and the Declaration had only ſet forth, that the Arbitrator was indifferenter elect' & nominat' tam ex parte Querentis quam ex parte Defendentis; and not ſaid that the Arbitrators were choſe by the Parties, Plaintiff and Defendant. Upon which Mr. Strange excepted now to the Declaration for that Reaſon. He ſaid, in 2 Saund. 61. in 2 Roll. Rep. 194. and in many other Precedents this is expreſsly laid, that the Arbitrators were choſen by the Parties. And he did apprehend, that there was a manifeſt Diſtinction between the Caſe of a Bond to perform an Award and the preſent Caſe. For there the Duty ariſes upon the Bond, but here it muſt be expreſsly laid, that the Parties themſelves did mutually ſubmit to the Award of the Arbitrator, in order to raiſe a Conſideration. Serjeant Hawkins was on the other Side, but was not prepared to cite any other Caſes, but thoſe of Debt upon Bonds to perform Awards; and therefore the Court ordered this Matter to ſtand over. Vide poſt.

Miles *and* Wollham.

IN Writ of Error brought upon a Judgment recovered by a Bankrupt, the Adminiſtrator to the Bankrupt ſued out a Scire facias againſt the Plaintiff in Error, to make him aſſign his Errors. To this Scire facias the Plaintiff in Error pleaded, that the Commiſſioners of the Bankrupt ought to have ſued out this Writ, and not his Adminiſtrator. Mr. Robinſon moved now, that this Plea might be ſet aſide, which the Court accordingly did; for, they ſaid, they never allow of any Matter to be pleaded to a Scire facias to aſſign Errors.

When a Scire facias is brought to aſſign Errors, how far no Plea can be pleaded to it.

Anonymus.

ONE Burg had been committed for Felony, in being married to two Women at the ſame Time, and now being brought up by Habeas Corpus. Mr. Kettleby moved, that he might be bailed. He ſaid, the ſecond Woman, whom this Man was married to, was a common Street-Walker, and got herſelf married to him by a Fleet Parſon, when the Poor Man was ſo drunk, that he was intirely Senſeleſs. Judge Page ſaid, that he was of Opinion, that the Man's Drunkenneſs would not take his Offence out of the Statute. Accordingly the Court refuſed to do any Thing in this Matter.

How far the Court will not bail a Man in caſe of Felony.

Anonymus.

ON Rule to ſhew Cauſe, why an Attachment ſhould not be granted againſt one Elizabeth Mayer and one Dowling for publiſhing a Libel upon the Proceedings of the Court in a late Trial of Lady Lawley, Mr. Marſh ſaid, that he was Counſel only for Mrs. Mayer, but he hoped, the Rule ſhould not be made abſolute againſt her. He ſaid, Mrs. Mayer's Husband kept a Pamphlet-Shop, and one Day in his Abſence Mr. Vaughan came and asked her, whether ſhe had Lady Lawley's Caſe; the Woman did not know, it was in the Shop; but upon looking into a Drawer of Papers ſhe found it. He ſaid, that he had an Affidavit to produce, that ſhe knew nothing of the Contents. Mr. Vaughan would willingly have bought it of her; ſhe refuſed to ſell it him; but told him he might read it, which he accordingly did. The Court ſaid, that it was beyond all Queſtion, that Attachments have been granted in theſe Caſes; and particularly mentioned Dr. Middleton's Caſe, where it was ſo done. The Chief Juſtice ſaid likewiſe, that he thought it was not material whether Mrs. Mayer knew of the Purport of this Writing or not. However the Court in general agreed to diſcharge the Rule as to her; becauſe there did not appear to be any Publication by her. They ſaid likewiſe,

How far the Court does grant an Attachment for publiſhing Reflections upon its Proceedings.

wise, that they could not make the Rule absolute as to Dowling; because there was no Affidavit of Service.

The King *and* Nelson.

How far a Conviction must be set down in the Paper, before any Remedy can be given upon it.

MR. Fenwick moved to quash a Conviction for a forcible Detainer. The Court said, that it ought to be put into the Paper of Crown Causes; before they could do any Thing in it. Mr. Fenwick said, that in the present Conviction there was no Fine set; and he apprehended the Distinction to be, that where there is a Fine set, the Party can be relieved against it only by a Writ of Error; but where there is no Fine set, he may be relieved upon Motion. The Court said, that they did agree, there was no Occasion for a Writ of Error; but every Conviction must come on in the Paper, before they can give any Remedy upon it. Vide post.

Martin *and* Moor.

How far Bail are liable or not, when the Plaintiff recovers against the Principal more than is contained in the Ac etiam.

THE Irregularity of a Scire facias against Bail having been refer'd to the Master, Serjeant Raby moved now for the Master's Report. Accordingly the Master stated the Fact to be, that the Ac etiam in the Original Action was but for 80 l. the Declaration for 150 l. the Damages recovered 104 l. and the Costs 15 l. 10 s. that in Pursuance of this Judgment a Writ of Execution was made out for the whole Money; but that the Writ was marked to order the Bailiff to levy no more, than the 80 l. with the 15 l. for Costs. And upon this State of the Case the Question was, how far the Bail were liable, or whether they were absolutely discharged. Mr. Reeves and Mr. Fazakerly argued, that the Bail were absolutely discharged. They said, that by the antient Rule of this Court, whenever a Person was Bail for another in any Action, he was Bail in all Actions that the Plaintiff should commence against the Defendant that Term. For this amongst other Purposes was the Statute of 13 Car. 2. Stat. 2. 2. made; by which it is provided, that every Person shall be discharged upon giving a Bail-Bond of 40 l. who is arrested upon any Process, wherein the Certainty and true Cause of Action is not expressed. The Construction of which has always been, that the Form of the Writ should not be altered, but only the Sum in Demand with the Nature of the Action ascertained under an Ac etiam. The Ac etiam therefore is to be the Guide to the Bail; it is that which ascertains the Cause of Action to them; and if the Plaintiff declares in a greater Sum, that is another Cause of Action as to them, and they are discharged. Accordingly they observed, that in a Book, which is called The Rules and Orders of the Courts in Westminster-Hall, p. 44. there is a Rule of Court to this very Purpose. And in 3 Keb. 16. this Rule is taken Notice of, and allowed. And in the Case of Cognoni and Garibaldo, 6 Mod. 266. Lord Holt is of this Opinion, and

cites the Case of Collins and Thompson, determined in Lord Pemberton's Time, directly in Point. They said farther, that if the Law was not so, there might be a manifest Inconvenience to Bail. For a Man might be very willing to be Bail for another, when he took his Debt to be not above 100l. but probably he would refuse to be Bail for him, when he found, that it was 1000l. Serjeant Raby and Mr. Strange argued on the other Side, that the Bail were liable pro tanto, as is contained in the Ac etiam. They said, that they apprehended the Intent of the Statute, which has been mentioned, only was, that the Bail should not be made answerable for any greater Sum, than what they are apprised of at the Time they became Bail. But still the Forms of the Court ought to be allowed to continue; and as before the Act, Persons were Bail for Defendants according to the Bill upon the File; so now it is the same; and the Form of the Recognizance shews, that this has constantly been the Practice. Then as for Authority, they observed, that the Case cited out of 6 Mod. was an Authority for them; for three Judges were against the Opinion of Lord Holt. And they said, in the Case of Webster and Guerey, the Court seemed strongly of Opinion, that the Bail were liable pro tanto, where the Judgment was not for more than the Ac etiam, though the Plaintiff declared for more; but indeed did not give a direct Resolution. Upon Search amongst Mr. Clark's Father's Papers there has been a Note found in the following Words, writ with his own Hand. That no Person, being Bail, shall upon Recovery be answerable for a greater Sum, but shall be liable for such Sum, or any lesser Sum, for which he shall be Bail as aforesaid. And Mr. Strange said, that in the Case of Tanner and Bogden, Pasch 4 Geo. 1. Serjeant Darnel produced a Rule made Trin. 35 Car. 2. in the Case of Ward and others against The Manucaptors of Overton, and he at that Time took a Copy of it, which was in the following Words; Ordinatum est, quod Defendens onerabilis sit cum quinquaginta & quinque libris in brevi mentionat' tantummodo. And for farther Authority, Serjeant Raby cited 2 Show. 183. directly in Point. They said farther, that even since this Statute they apprehended the constant Practice of the Court was, that this Recognizance of Bail serves as a common Appearance for all Actions commenced against the Defendant that same Term; these Declarations that are so delivered, are called Declarations by the By; and they did think as certain, that though the Party doth recover more than is contained in the Ac etiam, yet if it be under the Sum mentioned in the Declaration, the Defendant is answerable for the Whole. Then as to what was objected by the other Side, that this Declaration, varying in the Sum, shall be intended to be a Declaration in another Action; they said, if it was such a one, it must be, what is called a Declaration by the By, which is a second Declaration; and then the Proof lies upon them, that there was a first. And as to the other Objection, that the Bail might be deceived in this Way, they said, the Plaintiff must be a considerable Loser himself by such a Deceit; and therefore such a Case could not be supposed to happen. The Court declared, that they had considerable Doubts

in this Matter. The Chief Justice said, when a Scire facias is brought against the Bail in such a Case, the Scire facias must set out the very Sum contained in the Judgment; and upon Oyer of the Recognizance, with Oyer of the Writ, he did not see but in strict Law there will be a Failure of the Record. Judge Lee said likewise, that in that Case of Tanner and Bogden, he remembred, Lord Chief Justice Pratt said, that he had talked with most of the antient Practisers, and they seemed to be of Opinion, that the Bail were wholly discharged; and so was that Chief Justice of Opinion at that Time, and likewise Mr. Justice Fortescue. The Court in general too condemned the Authority of 2 Show. and therefore they could not pay a great Regard to that Case. And they said the Rule cited in the printed Book of Rules, is not to be found upon the File; and so it is taken Notice of in that Book. However if these Difficulties could be cleared, they said, they thought, there was great Reason to incline to the other Side of the Question. For besides the Justice and Equity, which there was of that Side, Mr. Clark had informed them, that the Recognizance entred into at a Judge's Chamber is only a Warrant to draw up the Recognizance at full Length; that is not done till the Declaration is filed; then the Recognizance itself is put at the Foot of the Declaration; and the Purport of it is, that the Bail subject themselves to pay the Costs and Damages, which shall be recovered in that Action. And therefore it is certain, that the Bail do often pay the Costs, recovered against the Defendant; and are bound to do so, though it is more, than the Ac etiam. Accordingly the Court declared their present Opinions to be rather in Favour of that Side, that the Bail were liable pro tanto. However, as this was a Question, which they believed had never finally been settled, they desired to have farther Light shewn them, by hearing what the antient Practisers could discover. They said, this was a Means of being informed, which was much practiced in the Time of Lord Holt, and in a Question of this Nature deserved to be continued. Accordingly this Matter stood over.

Vide post.

Anonymus.

How far the Court will grant an Information in Nature of a Quo Warranto against a Person, in order to try the Validity of his Election.

SErjeant Birch moved for an Information in the Nature of a Quo Warranto against one Bull, to shew by what Authority he took upon himself to be one of the Burgesses of the Borough of New-Radnor. He said, the Validity of his Election would depend upon the Validity of a former Election of one Miles. Upon which Judge Page said, that he had some Doubts, whether it was not necessary then, that the Validity of Miles's Election should be first tried in an Information against him. But in Answer to this the Counsel said, that it was resolved in the Case of the Corporation of Appleby, that this was not necessary; accordingly the Court made a Rule to shew Cause.

Vide post.

Anonymus.

MR. Starkey moved for an Information against one Stephens, a Member of the Corporation of New-Radnor, for receiving a Bribe of one Price to give his Vote upon an Election for an Officer of that Corporation, as Price should direct him, and for giving his Vote accordingly. He said, the Court granted the like Motion in the Case of one Hutchinson of Carlisle; and accordingly a Rule was made to shew Cause.

How far an Information shall be granted for Bribery.

Martin *and* Davis.

IN an Ejectment for some Lands, which were Part of the Waste of the Manor of Hampstead, Mr. Filmer moved that Proceedings in it might be staid; because it was between the same Parties and upon the same Demise with a former Ejectment still depending. Judge Lee said, in the Case of Baller and Delany the same Motion was refused; accordingly the Court refused the Motion.

How far the Court will not stay Proceedings in one Ejectment till the Event of another be determined.

West *and* Newman.

MR. Fazakerly moved to discharge a Rule for staying Proceedings upon a Bail-Bond. He said, the Writ was returnable the 20th of October, the Surrender of the Defendant the 28th, an Assignment of the Bail-Bond that very Day, and no Notice given of the Surrender till the 30th; for which Reason he submitted it, that the Proceedings upon the Bail-Bond were regular. But the Court said, when the Bail surrender the Defendant within four Days after the Days of Grace for his Appearance, there is no Occasion for Notice; otherwise they agreed there would. Accordingly the Motion was refused.

When Bail surrender the Principal, how far Notice need not be given of the Surrender.

Anonymus.

ON Motion for an Attachment against one Hooper for not obeying an Order of Sessions, confirmed in this Court, by which he was required to pay 2 s. per Week for the Relief of his Father, the Counsel prayed, that it might be granted without a Rule to shew Cause; and cited the Case of The King and Yelden, where it was so done. The Court said, they took the constant Distinction to be between where an Attachment is moved for Non-payment of Costs and other Cases. Accordingly they only made a Rule to shew Cause.

How far an Attachment cannot be granted, without first making a Rule to shew Cause.

Raw-

Rawlinſon *and* Smith.

How far the Court will diſcharge a Rule whereby Liberty is given to withdraw a Plea.

THE Common Serjeant moved to diſcharge a Rule, by which the Defendant had Liberty to withdraw his Plea, and plead Nul tiel Record upon Payment of Coſts; and this Motion he made upon an Affidavit that the Maſter had ſettled the Coſts, and the Plaintiff demanded them of him laſt Night, but that the Defendant had not paid them. Accordingly it was granted.

The King *and* Melſham.

What Sentence is proper to be paſſed on a Perſon that utters falſe Money.

THE Defendant having been convicted upon two Indictments; the one for coining falſe Halfpennies; the other for uttering them, knowing them to be Counterfeit; Mr. Reeves moved for Judgment againſt him. Accordingly upon the firſt Indictment the Sentence of the Court was, that the Defendant ſhould ſtand in the Pillory, pay a Fine of 40 s. be committed for two Years, and until he ſhould pay that Fine, and after that find Security for his good Behaviour. Upon the other Indictment the Sentence only was, that the Defendant ſhould pay one Mark.

The South-Sea Company *and* Colonel Duncomb.

How far an Indebitatus Aſſumpſit will lie.

ON a Trial at Bar in an Indebitatus Aſſumpſit for 8000 l. Mr. Reeves ſtated the Nature of the Caſe to be, that ſoon after the South-Sea Company was Incorporated, viz. on the 14th of March 1711, at a general Court it was thought proper, that certain By-Laws ſhould be made relating to their Caſh, and amongſt others one of their By-Laws was, that the Court of Directors ſhould not veſt any of the Company's Money in purchaſing any of the Company's Stock without a Conſent of the general Court. But in the Year 1720, finding that the Credit of their Stock increaſed, the general Court thought proper to intruſt the Court of Directors with a Power of lending Money upon their Stock. Accordingly in the Month of April in that Year the Court of Directors came to a Reſolution to lend 500000 l. upon their Capital Stock at 250 l. per Cent. and afterwards in the next Month to lend another Sum upon their Capital Stock at 300 l. per Cent. and on the 9th of June in the ſame Year they reſolved to lend another Sum upon their Capital Stock at 400 l. per Cent. And the Method of transferring this Stock to the Company at that Time was, by transferring it either to Mr. Knight the Caſhier, or to Mr. Surmon, the Deputy Caſhier, or elſe to Mr. Powel, the Clerk of the Treaſury, to the Uſe of the Company. Upon which one or other of them immediately paid out the Money ſo reſolved to be lent. And then took a Receipt from the Borrower for ſo much Money for ſo much Capital Stock transferred to the Company. Theſe Receipts were printed, and the

Directors found that the Words in full for so much Stock was in them; but they thought those Words in full ought properly to be left out; accordingly they gave Directions that they should be blotted out, and most of them were so. The Directors too had thoughts at that Time to have given Defeasances upon these Transfers; but through the Hurry of Business at that Time it was found impracticable. At this Time too the common Price of Stock was 700 l. per Cent. Upon the 13th of June, which was but four Days after the Court of Directors came to the Resolution which was last mentioned, the Defendant came to Mr. Surmon, and transferred to him 1000 l. Capital Stock for the Use of the Company; accordingly Mr. Surmon paid him 4000 l. and took a Receipt of him in the following Words, Received of Mr. *Surmon* 4000 *l.* being in full for 1000 *l.* Capital Stock transferred to me to the Use of the Company, *John Duncomb.* Afterwards on the 29th of August following the Defendant came to Mr. Powel, transferred to him the like Sum of 1000 l. Capital Stock, and received of him 4000 l. and gave him the like Receipt as he did to Mr. Surmon, only the Words in full were blotted out. Soon after the Stock fell very much; upon which on the 30th of September following the Court of Directors resolved to reduce their Subscriptions, which they accordingly did. And afterwards the Statute of 7 Geo. Stat. 2. 1. (6). was made; by which it is provided, that every Borrower upon Stock shall have Liberty to redeem his Stock upon paying 10 l. per Cent. from the Time he lent it within a certain Time specified by the Act. But the Defendant did not think proper to comply with this. Accordingly the Stock continued still as a Loan in the Company's Hands. But they now thought proper to waive that Security, and bring a Personal Action for so much Money had and received to their Use; which Mr. Reeves said, he hoped, they should recover in. The Counsel for the Plaintiffs then went into their Evidence, and began first to prove the Receipt, which the Defendant gave Mr. Surmon. That Receipt was witnessed by one Grigbey, who was since dead. And upon their going to prove his Hand, the Defendant's Counsel objected, that this Witness had Stock in the Company, which continued in him untransferred at the Time of his Death. And to prove this, they called upon the Plaintiffs to produce a particular Book which they had given them Notice to be ready with at the Trial. Upon the Defendant's looking into it, it appeared that the Witness had such Stock, and therefore the Plaintiffs Counsel agreed, they must give other Evidence, that the Defendant had this Money. But they submitted it, that this Evidence need only be the same Book. For the Defendants have made it good Evidence by insisting upon its being produced. But the Court said, they did agree the Plaintiffs had a Right to read any other Passages in it, relating to that Matter for which the Defendants insisted upon its being produced; but they could use it for no other Purpose, accordingly it was disallowed. The Plaintiffs Counsel then said, that they would prove the Hand Writing of the Defendant himself to this Receipt. For which Purpose they called a Clerk belonging to the Company, who said, that he had seen the

Defendant write his Name several Times upon receiving his Dividends; and upon looking into these Receipts which he had signed he did believe this was the Defendant's Hand. But upon his being cross-examined he did agree that many of the Receipts to these Dividends the Defendant did give, when he was not present; and he could not swear which of them in particular he did give when he was present; and owned farther, that if he had not looked upon these Dividend Receipts, he should not have been able to have recollected the Defendant's manner of Writing; so that the only Reason, why he believed this to be the Defendant's Hand, was, that by the comparing the Hands together they seemed to be alike. Upon which Mr. Wills insisted, that this was not Evidence; because the Witness could not swear to one Dividend-Receipt in particular, and therefore could make no Judgment from his supposed Comparison of them together. He said farther, that the Defendant himself was alive and his Hand well known; for which Reason he submitted it, that a Proof by a Comparison of Hands was not the best Proof, and therefore it ought not to be allowed. However the Court said, that they thought there was sufficient Proof given of this Receipt, at least to leave the Credit of it to the Jury; for which Reason the Receipt was allowed to be read. The other Receipt was then proved; and after that Mr. Reeves said, he was ready to shew the great Disproportion which there was between the Value of Stock at that Time and what the Defendant received from the Company; in order to leave it to the Credit of the Jury, whether they could believe that this was intended as a Sale of the Stock, notwithstanding the general Words in the Receipt, or whether they must believe it was intended only as a Security. But Mr. Acherly objected to this Evidence, that a Corporation can only transact these Matters by Writing, and not by Parol; and therefore no Parol Evidence ought to be admitted to explain this Evidence. He said likewise, that he submitted it, the Plaintiffs must be nonsuited upon the Evidence, which they have produced already; for the Action, which they have brought is a general Indebitatus Assumpsit; that Action will not lie but where Debt will lie; and therefore he apprehended, that they ought to have declared upon a special Agreement. But the Court said when a Writing is produced in Evidence it is frequent to explain it by collateral Evidence. And they did think it very clear that this Transfer could be considered only as a Deposit. To the other Objection the Court gave no Answer then; nor in summing up the Evidence did they regard it. Mr. Wills said too, that he certainly must admit, that this was considered as a Loan or Deposit, and therefore he would not insist upon the Plaintiffs giving this Evidence, which they offered. But he did submit it, that upon the Whole of what they have produced no Action can be maintainable; he said, they had got their Security, and that Security they must abide by. He observed that the Distinction in the Books was fixed and certain between a Pledge and a Mortgage; that where they are generally made without a particular Agreement, an Action of Debt will lie for the Money secured by the Pledge, but not for the Money secured by

the Mortgage. And for this Purpose he relyed upon the Cases in 2 Cro. 244, 281. Yel. 178, 206. 2 Lev. 116. 3 Keb. 460. The Reason for which Distinction he apprehended to be, that every Contract ought to be mutual; the Pawner has a personal Remedy for his Pledge at any Time during his Life; and therefore it is reasonable that during that Time the Pawnee should have a personal Remedy against him. But the Mortgagor has no Remedy by Law upon the Person of the Mortgagee; and therefore it is not reasonable, that the Mortgagee should have a personal Remedy against him. And in the present Case he did submit it, that the Defendant had no Remedy at Law for his Stock against the Plaintiffs; for which Reason the Plaintiffs could have no Remedy against him. The Remedy at most was only in Equity. He observed farther, that in the present Case, the Offer of lending Money upon the Stock was an Offer proceeding from the Lenders, was made by them with a View, that thereby their Stock might receive the greater Credit; and therefore if this Stock should be considered as a Pledge, and consequently an Action lie against the Person of the Borrowers, if there was nothing particular in this Transaction; yet that Matter, which has been mentioned, must have this Influence, as to make every one believe, that the single Credit of the Stock was in this Case relyed upon. The Defendants Counsel then thought proper to produce very little Evidence on their Parts, but to leave it upon what had been said. Upon which the Court entred into a Consideration of this matter amongst themselves; and at last the Chief Justice summed up the whole Evidence, and declared the Opinion of the Court to be, that if the transfer'd Stock was believed by the Jury to be in the Nature of a common Pledge, and nothing more, the Action which the Plaintiff brought would well lie, and the Jury ought to find for him. But if the Jury were of Opinion, that this Evidence amounted to a special Agreement that the Plaintiffs would require no other Security but the Stock, then the Jury ought to find for the Defendants. Accordingly the Jury went out for some Time, and then brought in their Verdict for the Defendants.

George *and* Norman.

THIS Matter coming on again, Judge Lee made an Objection, before the Counsel entred into their Argument, that the Writ in itself was insufficient; and if that was so, to be sure there could be no Pretence to say, that the Fault in the Declaration could be supplied by it. Now in the Writ itself, the Complaint is only quare, &c. and in Salk. 636. this is held to be as bad a Fault in a Declaration, as quod cum. To this Mr. Fazacherly answered, that the Form of the Writ is always so; for the Sheriff is required by it to summons the Party to shew, why he has done or has not done such a Thing. The Chief Justice said, that there was another Difficulty with him against the Recital of the Writ's being considered as Part of the Declaration in the Common Pleas, and helping the other Part

Vide ante Vol. 2. 446.

Part of it, and that was, that these Recitals are sometimes so short as even attachiat' ad respondend' has been held sufficient. In answer to this Mr. Fazacherly said, that in those Actions, where there is an Averment of the Fact laid in the Declaration, after what is introduced by a Quod cum, he did agree, Attachiat' ad respondend' had been held sufficient; for there nothing in the Declaration wants to be supplied by the Writ. But in these Actions of Trespass, there is no Fact laid in Introduction of another; and therefore if what is first alledged in the Declaration cannot be helped by the Recital of the Writ, it cannot be helped at all. For which Reason, in these Cases he believed the Recital of the Writ was always laid more special. The Chief Justice, however, declared, he continued his former Opinion, and chiefly for the Reason mentioned in his former Argument. Judge Lee owned at present, that he continued too of the Opinion he was before. He did agree, that till the Cases cited out of Sid. he believed it was never thought of, to make Faults in the Declaration in the Common Pleas supplied in the manner that has been mentioned. And indeed there are Cases, he said, in each of the Volumes of Cro. which shew, that no such Thing was at that Time conceived. But since the Cases in Sid. he believed, the Law has been taken to be settled that way. And one of those Cases was allowed upon a Writ of Error in this Court. The Court in general said, that they thought this a Matter proper to be considered of farther; and therefore ordered it to stand over. But Judge Page quoted a pretty strong Case out of Sir Thomas Jones 197. which was upon a Judgment in the Common Pleas in Ireland, where the Proceeding was by original, as here, to shew, that he inclined to be of Opinion with the Chief Justice. Vide Post.

Speak qui tam *and* Bourn.

Vide ante Vol. 2. 450.

MR. Reeves now argued for the Plaintiff, and said, that there were three Questions, proper for the Determination of the Court in this Matter; first, Whether a Parish-Clerk can make a Deputy; secondly, Whether a Parish-Clerk is a temporal Officer; thirdly, Whether a License is necessary. To the first Point, he observed, that in Roll's Rep. 274. and in Moor 845. it is resolved, that a Constable may make a Deputy; and in the same Place in Rol. it is said, that a Dean may; and yet in Rep. 13. a Dean is held to be a spiritual Officer. And he submitted it, that the general Distinction in our Books was, between Officers that are judicial and those which are ministerial only. To the second Point, he did agree, that in some Places in the Books, a Parish-Clerk is said to be a spiritual Officer; but when this Question has come judicially before the Court, they have always considered him as a temporal Officer: For which Purpose he cited Rep. 13, 70. Marsh. 101. 1 Keb. 286. He said, he apprehended, that the different manner of appointing a Parish-Clerk could not possibly make the Office itself different in one Case from what it is in another. In some Places, Church-Wardens are chose by the Parish, in others they are

appointed by the Parſon; but yet the Nature of the Office does in all Caſes continue the ſame. In the preſent one, he did agree, that the Exerciſe of the Plaintiff's Office was circa ſpiritualia; but yet it will not follow, but the Right and Title to the Office, may be of a temporal Conuſance. And in the Caſe in Queſtion, the Libel complains, that the Plaintiff intrudes upon the Defendant; by which the Title to his Office is evidently in Diſpute. And upon this Head was cited 2 Roll's Abridgment 285. 2 Brownlow 11. Mandmus's have often been granted to admit theſe Officers, as appears by 1 Lev. 75. 2 Lev. 18. Ven. 143. To the third Point, he ſaid, the Proof of that lay upon the Defendant; and it would not be enough neither for them to ſhew, that there was a Canon which required a Licenſe; but they muſt ſhew farther, that ſuch Canon has been received and allowed by the Common Law. Mr. Marſh argued on the other Side, and ſaid, that the Caſe cited out of Roll's Reports, of a Conſtable's making a Deputy, has been called in Queſtion, and ſo it was in Sid. 355. And as to the Caſe of a Dean's making a Deputy he did agree, that in ſome Places there is a Vice-Dean; but he believed that depended only upon local Statutes; and he apprehended, that is never received for Law, that he could make a Deputy; at leaſt at this Day, undoubtedly, the Law is taken otherwiſe. He ſaid farther, that the Diſtinction that has been made between judicial and miniſterial Officers muſt not be received in ſo great a Latitude; for there is a Difference between ſome miniſterial Officers and others. Thoſe that require Skill and Judgment cannot make a Deputy, without expreſs Words in their Patent; though others, he agreed, might: For which Purpoſe he ſaid, it was held in 2 Roll's Abridgment 154. that the Marſhal of England cannot. And in Dyer 278. it appears, that there was a Clauſe in his Patent, giving him a Power to do it. And for the Authority upon this Head, he rely'd upon 3 Cro. 187. Plow. 379. b. And to ſhew that the Senſe of the Legiſlature has lately been, that a Pariſh-Clerk cannot make a Deputy, he ſaid, in a late Act of Parliament, which paſſed the third of this King, and which was made for creating the Pariſh of St. Nicholas Deptford, it is provided by an expreſs enacting Clauſe, that the Pariſh-Clerk ſhall have a Power of making a Deputy. Then as to the Queſtion, Whether this Office was ſpiritual or not, he ſaid, he ſubmitted it, that the whole Employment was ſo. He obſerved too, it was known, that antiently, Pariſh-Clerks were of the Order of the Clergy, and not of the Laity. And in 2 Roll's Abridgment 227. it appears, that by the Canon the Parſon has a Right to appoint him. And as to Mandamus's going to admit Pariſh-Clerks, he believed, the Court did not grant thoſe Motions, but upon an Affidavit that they were elected by the Pariſh; and for this Purpoſe cited Sal. 468. To the laſt Point he ſaid, that he muſt agree, that he could find no Canon, which made theſe Licences neceſſary; but the innumerable Inſtances of them was an Evidence, that ſuch Canon has been made and allowed, though at this Day it cannot be found. And the eccleſiaſtical Courts are governed by the Lex non ſcripta, as well as ours. The Chief Juſtice ſaid, that the Marſhal was

conſidered partly as a judicial Officer; for wherever Battle is joined, he is to determine that Matter. And he ſaid it was certain, that even a miniſterial Office, which requires Skill, cannot be executed by Deputy, without Words in the Grant for that Purpoſe. He ſaid, he had ſome Doubts, how that was to be underſtood of a Conſtable's making a Deputy; for if a Juſtice of Peace directs his Warrant to him, he ſhould queſtion, whether the Conſtable could appoint by Word of Mouth, that another ſhould execute it. As to the Nature of the Office, he ſaid, he was well ſatisfied, that the different Methods of appointing this Officer could not make his Office different in one Caſe from what it was in another. The Caſe of Townſend and Thorp, he ſaid, was determined intirely upon its particular Circumſtances. The Temporal Court permitted the Eccleſiaſtical to deprive the Party there, ſingly, by Reaſon of the Enormity of his Crimes. The Licence, he ſaid, he could not ſee how it could be maintainable. The Suit below too was principally inſtituted to deprive the Party for his not obtaining one; and therefore he thought the Prohibition muſt ſtand. Judge Page ſaid, he was clearly of Opinion, that the different Methods of coming into an Office could in no Caſe make the Office itſelf to be different. In the Caſe of St. Clements, he believed that the Court was of Opinion, that this Office was temporal. If ſo, this Court would not ſuffer the Court below to deprive him. However, even in the Caſe of a Donative, he took it, they might ſuſpend. Judge Lee ſaid, that the Queſtion, whether this Office is ſpiritual or not, ſtrikes at the whole. He did agree, that the Buſineſs of the Office was, circa ſpiritualia. But yet he could not ſee but the Office muſt be conſidered as temporal. A cuſtom for the Pariſh to chooſe ſuch Officer is agreed on all Sides to have been good. If his Office had been conſidered as ſpiritual, he could not ſee how the Lay Gents could have had any thing to do with it. And therefore he thought the Canon ſeemed in this Reſpect to be an Innovation upon the Common Law. As to the Office of a Dean, he ſaid, it was certain, that that was many Times, till Queen Mary's Reign, executed by a Lay-man. The Court, upon the whole, thought the Prohibition muſt ſtand; however, gave Leave for another Argument, upon the Defendant's deſiring it.

Vide Poſt.

Anonymus.

How far an Information ſhall be granted for a Nuſance to a Highway.

MR. Reeves moved for an Information againſt one Thomſon, for digging a Ditch croſs a Turn-Pike Road leading from Woodſtock to London; and the Court accordingly made a Rule to ſhew Cauſe.

Dilley *and* Polhill.

THIS Matter coming on again, Serjeant Hawkins ſaid, that it was very true, this was an Action brought upon the Award itſelf, for the not performing it; but he obſerved, that it was ſaid in the Declaration, that the Defendant obliged himſelf by this Deed to ſtand to this Award; and therefore there was no occaſion to lay a mutual Agreement. He ſaid, the Plaintiff would have declared upon the Bond itſelf; only then the Defendant would have pleaded a Tender at the Day, without an uncore priſt, as the Bond was given to do a collateral Act. And if the Party had declared upon the Bond, it would have been good beyond all Queſtion. To which Purpoſe he cited Saun. 164. 2 Ven. 239. Lut. 550. For which reaſon, he ſubmitted it, it was equally good in this Caſe. Judge Page ſaid, that he had looked into ſome of the beſt of the Entries, and he found, that in Actions founded on the Award, they conſtantly laid a mutual Submiſſion of the Parties; And particularly he cited Raſt. 153. The Court ſaid too, that in the Caſes cited by the Serjeant, the Defendant pleaded over; and by that means admitted the Submiſſion. But here, as there was a Demurrer to the Declaration, the Court muſt give Judgment, whether the Submiſſion appeared to be ſufficiently laid, or not. And they thought, it did not; however, gave Leave for another Argument. Vide Vol. 2. 448. Vide poſt.

Hayes *and* Warren.

UPON a Writ of Error on a Judgment by Nil dicit in Aſſumpſit, Mr. Theed, Jun. ſaid, that there were ſeveral Counts, and intire Damages have been given; but he ſubmitted it, one of them was bad. The Count was for Work and Labour done; and he did agree the Work and Labour was ſaid to be done for the ſaid Charles Warren the Defendant; but he ſubmitted it, that was not enough, without alledging, that the Work was done at the Defendant's Requeſt; and for this Purpoſe he cited 3 Cro. 42, 382. Judge Page ſaid, that upon this Iſſue the Plaintiff would not have been bound to have proved that the Work was done at the Defendant's Requeſt; and if it was done at any Body's elſe, he ought to be the Paymaſter and not the Defendant. The Court ſeemed to be of the ſame Opinion. However this Matter ſtood over. Vide poſt. What ſhall be a good Count in an Aſſumpſit for Work and Labour done.

The

The King *and* The Juſtices of Nottingham.

The Certainty required in a Return to a Mandamus.

What ſhall not be ſaid to be a good Writ of Mandamus which is directed to Juſtices of Peace.

A Mandamus having been granted to require the Juſtices of the Town and County of Nottingham, to order the Church-wardens of the Pariſh of St. Mary in that Place, to pay to the Church-wardens of the Pariſh of Kirdlington in Yorkſhire ſuch Coſts as were reaſonably expended by them in maintaining one Henry Bell, between the Time of his being removed to them from the Pariſh of St. Mary by an Order of two Juſtices, to the Time of ſuch Order being ſet aſide at the Quarter-Seſſions for the ſaid Town and County. Mr. Fazakerly ſaid, that the Juſtices had made a Return; but he apprehended it was inſufficient. He ſaid, this Mandamus was founded upon the Statute of 9 Geo. (8). But the Return has not complied with it. For the Words of the Return are, that they did order the Church-wardens of the Pariſh of St. Mary to pay the Sum of 30 s. to the Church-wardens of the Pariſh of Kirdlington, ſuch Sum according to our Directions being reaſonably paid by the Church-wardens of the ſaid Pariſh of Kirdlington. Now, he ſaid, this Sum of 30s. might have been a Sum, which was reaſonably paid by them, but it does not follow but there might have been more Sums of the ſame Nature. And he ſubmitted it, if an Action was brought againſt the Juſtices for a falſe Return, and it ſhould be proved upon the Trial, that there were ſuch other Sums, the Plaintiff could not recover. Judge Page ſaid, that he took it, the Legiſlature had intruſted the Juſtices with an abſolute Power of judging in this Matter; and he did not think ſuch Action would lie. The Court declared too, that they thought, the Return was certain enough. But afterwards they took Notice, that by the Words of the Act the very Juſtices only, which allow of the Appeal, can aſſeſs the Coſts; and therefore they thought the Mandamus ought to be quaſhed, for ordering Juſtices at another Quarter-Seſſions to do this. To this Mr. Fazakerly ſaid, that the Words in this reſpect were to be conſtrued only by way of Direction, like the Caſe of Overſeers. However the Court quaſhed the Writ.

The King *and* Lane.

Vide Vol. 2. 414.

Mr. Reeves now moved for Judgment. He ſaid there were two Offences laid in the Indictment; one for not executing the Office of Conſtable, the Defendant being choſen in the Leet; the other for not executing this Office, the Defendant being a Freeman in London, and choſen Conſtable at one of the Wardmotes. He ſaid, it has been objected, that the Defendant is not indictable for refuſing to execute the Office of Conſtable, being choſen for that Purpoſe at the Leet. And if that ſhould be admitted, the King is intitled to Judgment upon the other Part of the Indictment, for the Defendant's not executing this Office, being choſen at the Wardmote. And as to that, he ſaid, the Wardmote is a Court held before

the Alderman of the Ward. Conſtables are preſented there; that Preſentment is delivered by the Alderman of the Ward to the Court of Aldermen, and before them the Conſtables are ſworn; ſo that there is no Power of puniſhing ſuch Conſtables in the Wardmote; and therefore if the preſent Indictment does not lie, there is no Method of puniſhing them at all. But he did ſubmit it, that the Defendant might be puniſhed even upon the firſt Part of the Indictment. For this Purpoſe, he ſaid, many Caſes might be cited of Indictments of this Sort having been brought in this Court, other Exceptions taken, and upon ſome of thoſe Exceptions Judgment arreſted, upon others Judgment actually given for the King; and yet this Exception not attempted to be made Uſe of. Accordingly he cited 3 Keb. 230. Sid. 272. Comb. 416. Skin. 669, and Ven. 344. Mr. Abney on the other Side ſaid, that it is certain, that the received Notion in the Law-Books is, that a Wardmote is of the ſame Nature with a Leet; there is nothing laid in this Indictment to ſhew it to be different, and therefore he ſubmitted it, that it ſhould be taken to be the ſame. Then as to the general Queſtion, whether an Indictment would lie againſt a Man, for not executing the Office of Conſtable, being choſen into it at the Leet, he ſubmitted it, that it would not. That the Leet is the proper and ordinary Place for this Buſineſs cannot be doubted. It is held ſo in Bulſt. 174. Sav. 93. Salk. 195. and many other Books. That this Offence is not indictable at the Seſſions, he ſaid, was as certain. 'Twas held ſo in the Caſe of The Queen and Wheetthorp, Mich. 8 Ann. and there the Caſe of The Queen and Dummer was cited Trin. 2 Ann. The ſame Point was reſolved in the Caſe of The King and Beel, Trin. 7 Geo. 1. And in the Caſe of The King and The Conſtables of Limington, Paſch 1 Geo. 2. this Point was ſettled upon Debate. He ſaid, if this was ſo, this would be a ſtrong Argument, that this Offence was indictable no where. And for Authority directly in Point he again mentioned the Caſe of The Queen and Dacey, which he cited upon the former Argument. He ſaid, he had ſince more fully inquired after that Caſe. He had found that many Gentlemen at the Bar had taken a Note of it. And their Notes all agreed, that the Court declared their Opinion to be, that no Indictment would lie for this Offence. He ſaid however, that he muſt own, that Matter came only on upon Motion to quaſh the Indictment, and the Court only made a Rule to ſhew Cauſe. The Court ſaid, that they thought the Caſes of Indictments at the Seſſions being quaſhed were not material to the preſent Queſtion. For till the Statute of 13 & 14 Car. 2. 12. (15). it is beyond all Queſtion, that they had no ſort of Juriſdiction in this Matter relating to Conſtables. And that Statute has only given them a limited Juriſdiction in appointing Perſons to execute the Office of Conſtable in particular Caſes, till the Leet is held. They did agree, that the Caſe of The Queen and Dacey was a ſtrong Caſe; but they ſaid it was known, that Rules of that Sort were often made of a ſudden; and therefore the Authority of that Caſe cannot be ſo great as the Authority of many others. Judge Lee ſaid, that he did believe indeed, a Juſtice of Peace might ſwear

in a Conſtable before the Statute of Car. and ſo he may at this Day, though choſen at the Leet, as Conſervator of the Peace; and he remembred Lord Holt was of that Opinion. But he remembered likewiſe in the Caſe of Fletcher and Ingram, Hil. 7 W. 3. Lord Holt ſaid, a Conſtable might be indicted for not executing his Office. And as to the Authority of the Leet in this Matter, he ſaid, it was a Doubt, whether the Jury has a Right of amercing, or the Steward of fining for this Offence. Accordingly the Court gave Judgment for the King.

Deemes *and* Panſton and others.

How far the Court will grant an Information for a Reſcous notwithſtanding the Reſcous be not returned.

ON Rule to ſhew Cauſe, why an Information ſhould not be granted againſt the Defendants for a Reſcue, Judge Probin ſaid, that the Reſcue ought to be returned, before this Court will do any Thing in it. But Mr. Huſſey informed them, that this was a Reſcue of Goods upon a Writ of Execution; for which Reaſon the Sheriff ought to have maintained his Poſſeſſion, and cannot return a Reſcue. Accordingly the Court made the Rule abſolute as to Panſton, and diſcharged it as to the others. (Chief Juſtice abſent.)

Marſhal *and* Cope.

How far a Rule to aſſign Errors de Recordo, ſhall be ſaid to be irregular.

MR. Parker moved to ſet aſide a Rule for aſſigning Errors de Recordo; becauſe the Defendant in Error had not given a Rule to aſſign Errors upon the Return to the Scire facias. Mr. Strange on the other Side ſubmitted it, that ſuch Rule was not neceſſary. But upon Mr. Clark's informing the Court that it was; the Rule that had been obtained was ſet aſide. Chief Juſtice abſent.

Anonymus.

Within what Time a Motion may be made to put off a Trial.

MR. Morley moved to put off a Trial, which was to come on this Afternoon, upon an Affidavit, that one of the Defendant's material Witneſſes was taken dangerouſly ill this Morning, ſo that he could not attend at the Trial. He had an Affidavit likewiſe, that Notice of this Motion was left at the Attorney's Chambers. But the Court ſaid, as it does not appear that any Body was in the Chamber, that Notice was not ſufficient. Accordingly the Motion was diſallowed. Chief Juſtice abſent.

Forwood *and* Duffen.

ON Rule to ſhew Cauſe, why a Capias ad Satisfaciendum ſhould not be ſet aſide for its being taken out after a Writ of Error allowed, the Counſel for the Defendant in Error ſaid, that it was very true, the Plaintiff put in Bail to the Writ of Error at a Judge's Chambers, but the Defendant's Attorney gave two Rules for him to juſtify his Bail; upon which the Plaintiff propoſed to juſtify likewiſe at a Judge's Chamber; but the Defendant's Attorney declared he would not agree to it. Notwithſtanding this the Plaintiff's Attorney came to the Judge's Chamber, and did juſtify; and the Counſel did agree that the Defendant's Attorney was there preſent, and did not oppoſe it; but, he ſaid, he was there upon other Buſineſs; and therefore he ſubmitted it, that his being there and not oppoſing it was not material. He obſerved farther, that the Plaintiff's Attorney was one of the Bail; and it has been an old Rule of this Court, that ſuch Perſon ſhall not be Bail for his Client; and in the Common Pleas this Rule is to this Day ſtrictly followed. For which Reaſons he ſubmitted it, that the Execution was regular. On the other Side it was inſiſted, that the juſtifying at a Judge's Chamber was regular even without Conſent; and therefore it was prayed on that Side, that the Rule might be made abſolute. The Court ſaid, that the Rule that has been mentioned, againſt Attornies being Bail for their Clients, was made for the Benefit of Attornies; but of late it has not been obſerved. So they thought that Matter regular enough. But as to the other, they ſaid, Bail never can juſtify at a Judge's Chamber without Conſent; and they did not think this was a Conſent. So the Rule was diſcharged.

How far Bail cannot be allowed to juſtify at a Judge's Chamber.

Dowſen *and* Hayward.

MR. Strange moved, that a Judgment and Execution might be ſet aſide, for want of a Four-Day Rule given upon the Poſtea. Mr. Fazakerly on the other Side anſwered, that the Plaintiff gave Notice to tax the Coſts eight Days after the Beginning of the Term; accordingly the Coſts were taxed, and Judgment ſigned the tenth Day in the Defendant's Preſence, and he never made any Complaint of this Irregularity at that Time; for which Reaſon he ſubmitted it, that the Complaint was now too late. Mr. Strange by way of Reply took Notice, that at the Time the Judgment was ſigned the Defendant was not acquainted with this Irregularity; and therefore it would be hard to conſtrue his not complaining of it to be a Waiver of it. But beſides he beg'd Leave to ſubmit it, that he could not waive it. For the Crown is intitled to the Stamps upon this Rule; and the Officer is intitled to his Fees. The Court ſaid, that beyond all Queſtion, the primary Intention of theſe Rules being requiſite was not, that thereby a Duty

What ſhall be ſaid to be a Waiver of a Day Rule to be given on the Poſtea.

Duty might arise to the Crown, and Fees to the Officer; but that the Party might have due Notice given to him before the Signing the Judgment. For which Reason they thought it clear, that the Party himself might waive this Rule. And they said farther, that they were of Opinion he had waived it. Accordingly the Motion was not allowed.

The King *and* Spretbury.

What shall be a good Arrest of a Sheriff's Bailiff.

ON Motion for the Master's Report Mr. Strange said, that the Delivery of a Writ into the Sheriff's Office is a good Arrest of a Sheriff's Bailiff; because the Sheriff cannot return a Non est inventus. Which was not denied.

Anonymus.

How far an Information will lie against a Person for refusing to let Judges hold their Court in the Place which they used to do.

SErjeant Chappel moved for an Information against one Ree for refusing to let the Justices of Peace for the County of Worcester hold their Sessions in the Town-Hall belonging to the Corporation of the City. He said, the Judges have held their Assises, and the Justices of Peace their Sessions, there, Time out of Mind; and in the Charter given to the Corporation by King James I. there is an express Salvo, that the Town-Hall shall be free for such Purposes. He took Notice likewise, that the Gentlemen of the Country had contributed very largely of late to the Rebuilding and Beautifying that Place; and therefore the Attempt that has been made of excluding them from holding their Sessions there, is of a very extraordinary Nature. Judge Page said, in the Case of one Ferrars he remembered there was a Bill brought in the Court of Exchequer. And upon the Hearing it appeared, that a Father had been Tenant for Life, the Son Remainder Man in Tail; the Father agreed with a Dutchman, that he should build a Mill upon Part of this Estate, and the Son was privy to this Agreement, saw the whole Work go on, and never opposed it till his Father's Death; the Court in that Case granted a perpetual Injunction. Accordingly in the present Case the Court made a Rule to shew Cause.

Loving *and* Averey.

How far the Court will set aside a Judgment by reason of a Rasure.

ON Rule to shew Cause, why a Judgment and Execution should not be set aside, for making a Rasure in the Return of the Latitat, and the Judgment being signed too soon, even notwithstanding the Return of the Writ, as rased; Mr. Strange said that the Fact was, that the Plaintiff's Attorney gave a Præcipe or Note to the Sheriff to make out a special Latitat, Teste the first Day of the Term, returnable in un' Mens' Sti. Michaelis; the Sheriff accordingly took one of the printed Forms, wherein were the Words prox' post, blotted out those Words, and made the Writ returnable die Mercurii

in un' Menſ' according to his Diſcretion. By Miſtake the Sheriff made his Warrant wrong; for the Words prox' poſt were in that. The Bailiff however did not take Notice of the Day of the Return as it was in the Warrant; but took it for granted it was according to the Plaintiff's Intention. Accordingly made his Arreſt before the un' Menſ'; but finding that there was not Twenty-four Hours between the Arreſt and the Return, was under ſome Difficulties how he ſhould comply with the late Act of Parliament. For which Reaſon he propoſed, that no Bail-Bond ſhould be taken; and that the Defendant ſhould be diſcharged from the Arreſt upon his Attorney's agreeing, that the Defendant ſhould appear and find Bail above. This Propoſal was agreed to. Bail above was regularly given; the Defendant ſerved with a Copy of the Declaration; Rules given to plead; and for want of a Plea, Judgment ſigned the 9th of November, and Execution taken out that Day. Upon this State of the Fact, Mr. Strange ſaid, there could be no Pretence of any Misbehaviour in altering the Writ; and therefore the ſingle Queſtion would be, whether the Judgment was not regularly ſigned in Point of Time. As to that, he did agree, that if the Return of the Writ was not regular on the ſecond Return-Day, the Defendant was intitled to an Imparlance; and if ſo, undoubtedly the Judgment could not be maintained. But he ſubmitted it, that the Return was regular. He ſaid, he always took it, that the ſettled Diſtinction was, between Proceedings by Original and Proceedings by Bill; that in the Proceedings by Original the Writs are returnable at a general Return-Day; but in the Proceedings by Bill they are returnable at any Time. For which Reaſon he apprehended, that the Judgment was regular. Mr. Draper argued on the other Side, and ſaid, that this was a Proceeding by ſpecial Latitat, which is different from the Proceeding by a common one. He ſaid, he ſubmitted it, that the Proceeding by ſpecial Latitat was deſigned to be made like the Proceeding by Original; and in that Proceeding the Capias muſt have eight Days for the Return. He ſaid farther, that the Difficulty which the Bailiff lay under in executing the Procels of the Court, ought by no Means to put any Inconvenience upon the Defendant. Now if the Defendant had regularly given a Bail-Bond, the Condition of it muſt have been, that the Defendant ſhould appear at the Return contained in the Warrant, and not at the Return contained in the Writ. For which Reaſons he hoped, that the Rule ſhould be made abſolute. Judge Page ſeemed to ſay, that if the Defendant had given a Bail-Bond, he muſt have entered into it at the Sheriff's Office, and not given it to the Officer that made the Arreſt, by Reaſon that the Arreſt was in London. And upon the Whole, the Court took it, that the Judgment was regular. Upon which Mr. Draper prayed, that the Court would however ſet it aſide, tho' ſtrictly regular, upon Payment of Coſts and pleading an Iſſuable Plea, ſo as that the Plaintiff may go to Trial within the ſame Time as he might have done, if they had pleaded according to the Rules of the Court. The Plea, he ſaid, was, that the Bond, upon which the Action was brought, was given

upon a Uſurious Conſideration. And the Defendant offered to verify the Truth of it by an Affidavit. The other Side offered to make an Affidavit, that the Plea was falſe. Upon which the Court ſaid, that theſe Pleas are very often Sham-Pleas, as well as the Pleas upon the Statute of Limitations; for which Reaſon the Chief Juſtice ſaid, that he doubted, whether the Court had ever gone ſo far, as to ſet regular Judgments aſide upon theſe Terms. However, the Counſel at laſt agreed amongſt themſelves, that they would go to Trial upon this Plea of Uſury, upon the Defendant's entring into a Rule to deliver it to morrow, take Notice of Trial within Term, bring no Writ of Error, nor Bill in Equity, pay the Coſts, and let the Goods remain in the Sheriff's Hands, with the Judgment for a Security. Accordingly, this Rule was entred into by Conſent.

The King *and* Paxton.

How far the Court will grant an Information againſt a Perſon for endeavouring to poiſon another.

ON Rule to ſhew Cauſe, why an Information ſhould not be granted againſt the Defendant, for endeavouring to poiſon one Smith at Gibraltar, and ſeveral Parts of the Seas in coming over from thence, Mr. Fazacherly ſaid, that he had a great many Affidavits to produce, explaining this Fact; but he apprehended a very ſhort Anſwer might be given to this Complaint; and that is, that this Court has no Juriſdiction, in as much as the Facts were done beyond Sea; and all Offences puniſhable by Indictment or Information are local. Mr. Reeves on the other Side ſaid, that he did agree, Indictments are local; but it might be doubted whether Informations were ſo; and for this Purpoſe cited Ven. 183. The Court declared their Thoughts at preſent to be, that there was no ſuch Diſtinction. However, if Mr. Reeves could find proper Authorities to ſupport this, they gave him Liberty to move it again; ſo enlarged the Rule for a Day or two. Vide poſt.

Woolaſton *and* Walker.

Vide ante 14.

MR. Marſh now argued for the Plaintiff in Error. He ſaid, the Action in the Court below was an Aſſumpſit on a Promiſſory Note, and brought by the Plaintiff there, as Adminiſtrator de bonis non of one —— Clark, pendende Lite, about the Probate of a Will of Francis Clark, Executor to the ſaid Clark. The Defendant there let Judgment go againſt him by cognovit Actionem. But Mr. Marſh ſubmitted it, that the Action would not lie. He ſaid, it was not to be diſputed but at Common Law the Ordinary could maintain no Action, nor could any Action be maintained againſt him; and ſo is the Authority of Plow. 278. The Statute of 2 Weſt. 19. appointed, that the Ordinary ſhould be ſubject to Actions. And the Statute of 31 Edw. 3. 11. has required that Adminiſtrations ſhall be granted; and at the ſame Time provided that ſuch Adminiſtrators ſhould be capable of commencing Actions, and of having Actions commenced againſt

gainſt them. The other Statutes have only given Directions to what Perſons Adminiſtration ſhall be granted, and about the manner of Adminiſtrators diſpoſing of the Effects. From this ſhort State of the Caſe relating to Adminiſtrators, he apprehended it to be clear, that none of theſe limited Adminiſtrators are capable of commencing Actions by the Rules of Law. He did agree that they were capable of collecting in the Goods; becauſe theſe Letters of Adminiſtration might be conſtrued in the Nature of Letters ad colligenda bona Defuncti. For which Reaſon, if theſe Adminiſtrators have taken upon them any farther Power, it was Time now to put a Stop to them. But there was more particular Reaſon to do this in the preſent Caſe; becauſe this Sort of Adminiſtration has been condemned by the Judges; as may appear, not only from the Caſe in Moor 636. and in Carth. 153. but from 5 Rep. 33. and 3 Keb. 54. The Chief Juſtice owned it to be his Opinion, that it was very difficult to ſhew by the Rules of Law, how theſe limited Adminiſtrators were capable of commencing Actions. But he ſaid, the Judges of the preſent Time find that former Judges have allowed them; the preſent Judges, therefore, muſt walk in the Steps of their Predeceſſors, and by Reaſon of the many Precedents muſt now allow them. However, on the other hand, he ſaid, he believed it had never been ſettled, that theſe temporary Adminiſtrators can bind the Property in an arbitrary manner, as other Adminiſtrators can; and therefore if they ſhould commit a Devaſtavit, by changing the Poſſeſſion of the Goods, he ſhould much doubt, whether that Act would change the Property. Judge Lee ſaid, that the Authority of the Caſe in Carth. was what principally occaſioned his Doubts upon this Matter on the former Arguments. But, he ſaid, he had ſince ordered the Roll of that Caſe to be ſearched. Accordingly it was found that that Plea in Abatement, in Relation to the Validity of this Adminiſtration was there wav'd, and Judgment is actually entred up for the Plaintiff; ſo that he ſuppoſed there was only a Rule made to ſhew Cauſe in that Caſe. He ſaid, that the objection againſt the preſent Action could only be founded upon its appearing to the Court, that the Adminiſtration is void; ſed non conſtat that there is a Will, and therefore the other Matter cannot. If it had appeared to the Court that there was a Will, and the Diſpute was only who ſhould prove it, that he ſaid was a Queſtion which he did not think it neceſſary for him to give an Opinion upon at preſent. Upon the whole Matter, the Court declared their Opinions, that the Action was well brought; accordingly affirmed the Judgment.

Acherley *and* Bell.

When a Rule is made for the Inſpection of publick Books, what ſhall be ſaid to be a Breach of ſuch Rule.

SErjeant Chapel mov'd for an Attachment againſt the Defendant, for not letting the Plaintiff take a Copy of the Poll-Books in Purſuance of the Rule, which gave him Liberty to take a Copy of all publick Books. The Court inclined to think, that a Poll-Book was not within the Rule; however, made a Rule to ſhew Cauſe.

Jones *and* Stanley.

What ſhall not be ſaid to be a Waiver of the Benefit of a Plea of a Purchaſe for a valuable Conſideration without Notice.

Scac. ON Demurrer to a Plea of Purchaſe without Notice, Mr. Bootle objected in the firſt Place, that the Plea was informal for not concluding with an Averment; and cited the Caſe of in this Court, where a Plea was held to be bad upon this very Exception about three Years ago; and Mr. Bunbury ſaid, that he remembred that Caſe, and it was ſo. He ſaid, that he apprehended the Plea was bad in Subſtance likewiſe, for its being only alledged in the Plea, that he had no Notice at the Time of executing the Purchaſe Deeds; whereas, if he had Notice at any Time before the Payment of the Purchaſe Money, ſuch Notice would be ſufficient. And in the laſt Place, he ſubmitted it, that the Defendant had waiv'd his Plea, by anſwering over to the Notice, and denying it in his Anſwer. To the firſt of theſe Objections the Chief Baron obſerved, that ſuch Defect in Form was helped by the Statute for the Amendment of the Law, upon a general Demurrer; and therefore he thought it clear, this muſt be equally helped in a Court of Equity. To the ſecond he ſaid, it was certainly true, that if the Defendant had Notice before the Payment of his Purchaſe-Money, he ſhould not have the Benefit of this Plea; but yet he thought, there was enough ſet out in the Plea to have put the Plaintiff upon alledging the other Fact in his Replication. And as to the laſt, he took it, that in Caſe of a Plea of a Purchaſe bona fide, the Defendant conſtantly denies Fraud in his Anſwer; for which Reaſon he thought, that the denying Notice in the Defendant's Anſwer, in the preſent Caſe, could by no Means be ſaid to be a Waiver of the Plea of Purchaſe without Notice; accordingly the Demurrer was overruled.

The Biſhop of London *and* The Mercers Company.

Vide Vol. 1. 459.

THIS Matter was now argued again by Mr. Fazacherly, for the Plaintiff in Error; and by Serjeant Eyre for the Defendant. The ſame Points that were before argued, were now ſpoke to again; and upon the whole, the Court declared themſelves well ſatisfied as to the Merits of the Plaintiff's Title; and therefore would not have that Point argued any more. But as to

the Form of the Plaintiff's declaring they thought that might be proper to be farther considered of. Vide Post.

Pool *and* Hamerton.

ON Rule to shew Cause why the Plaintiff should not have Leave to amend his Declaration upon Payment of Costs, and Liberty to plead de novo, Mr. Kettleby said, that the Defendant had demurred, and the Plaintiff joined in Demurrer, and the Roll actually made up; for which Reason he submitted it, that the Rule ought to be discharged. But the Court said, this was only a loose Roll of this Term, and therefore they would consider it as all in Paper; accordingly they ordered that the Rule should be made absolute. Upon which Mr. Kettleby desired, that they might have four Days to demand Oyer; though he did agree they had not demanded it yet. The Court said, if the Defendant had demanded Oyer before, and it had been refused, he would have a Right to have four Days now to demand it, without Leave of the Court; but as he did not, it was necessary to apply to the Court for this; and they gave him two Days for that Purpose.

How far the Court will give Liberty to amend a Declaration after Joinder in Demurrer.

The King *and* Wakelyn and others.

ON Rule to shew Cause why an Information should not be granted against the Defendants Church-wardens and Overseers of the Poor of St. Giles's Shoredich, for forcing a Person to go into the Workhouse there, without her Consent, notwithstanding she had 120 Pounds by her, and for taking away that Sum of Money from her. Mr. Fazacherly said, that he had Affidavits denying all the criminal Part of the Charge, and explaining the whole Nature of it; for which Reason he hoped, that the Parties making this Complaint should be left to their ordinary Remedy. But Judge Page said, he took the constant Rule of the Court to be, that, wherever there is sufficient Cause shewn for granting an Information, if the Fact be true, they will always make the Rule absolute, if the Fact be denied, in order that it may be tried. Accordingly the Rule was made absolute in the present Case; and afterwards the same Day, in the Case of Birch and Atkyns, which was a Matter that came on upon a Rule to shew Cause, why an Attachment should not go against an Officer for an Abuse in executing the Process of the Court, Mr. Strange said, he apprehended the Rule was different between Attachments and Informations in this Respect; for that if the Person, against whom the Complaint was made, did but deny the Charge alledged against him, the Court would discharge the Rule in Case of an Attachment, though he agreed they would not in Case of an Information. The Court there did not deny this; but said, when they pronounced the Rule, at the Time the Affidavits were read, on which the Complaint was founded, they ordered that this Person should answer the Matters of the Affidavit, with an Intention, that on shewing

How far the Court will direct, that Overseers of the Poor shall answer the Matters of an Affidavit.

Cauſe they might grant an Attachment or Information at their Diſcretion. Accordingly the Rule was ordered to be drawn up ſo; and that the Perſon complained of ſhould ſhew Cauſe on Thurſday.

The King *and* Paxton.

Vide ante

THIS Matter being moved again, a Caſe out of 3 Keb. 603. was cited, to ſhew that Informations are local, as well as Indictments; and it was ſaid, that there are two or three more Caſes, wherein this is adjudged. Accordingly the Court diſcharged the Rule, unleſs Cauſe on Thurſday.

Ely *and* Morant.

How far the Court will quaſh a Scire facias againſt Bail.

MR. Robinſon moved, that Proceedings againſt Bail might be ſtayed, and that the ſecond Scire facias might be quaſhed, for its being returnable Die Lunæ prox' poſt Menſ' Sti. Michaelis, which was the Feaſt of all Saints; and conſequently no Law-day. Accordingly the Court referred the Irregularity of this Matter to the Maſter.

The King *and* Empſon.

Vide ante 25.

MR. Fazakerly and Mr. Agar both now argued this Matter for the Defendant. They ſaid, there were three Convictions returned upon the Certiorari; the firſt, whereby the Defendant was fined 60 l. the ſecond, whereby he had a Day given him to appear and pay it on; the third, whereby the Fine was eſtreated. To the firſt of theſe Convictions, they ſaid, the Form of it was, Cum ad Seſſion' tent' apud Howden octavo die Novembris Anno tertio Domini Regis nunc; Cumq; ad hanc Seſſion' ordinatum eſt in his Anglicanis verbis ſequentibus: It is ordered, that Empſon, the Defendant, ſhould appear and anſwer certain Raſures contained in a certain Book of Pains, which was delivered to him when Foreman of a Jury for Howdenſhire. And whereas he the ſaid Empſon did appear, and it being asked him, is this Book of Pains, delivered you when you were Foreman of the Jury for Howdenſhire, the ſame Book; was it then in the ſame Condition it is now? The ſaid Empſon did refuſe to anſwer upon Oath; it is ordered, that he ſhould be fined 60 l. And the fourth Day of April in the ſame Year was given him to appear and pay the Fine on. The Exceptions taken by them to this Order was, firſt that this Order is only by way of Recital; ſecondly, that it does not appear the Book in Queſtion related to them; thirdly, that Howdenſhire was not ſaid to be within their Juriſdiction; fourthly, that the Raſures did not appear to be in material Places; fifthly, that they had no Authority to adminiſter ſuch Oath, it tending to accuſe himſelf; and laſtly, that it was not ſet forth with ſufficient Certainty, that the Oath was ever tendered. Mr. Reeves was

Counſel of the other Side; but deſired Time to anſwer theſe Exceptions; accordingly the Matter was ordered to ſtand over. Vide poſt.

Darby *and* Pool.

IN Debt on Bond for 18l. the Defendant demanded Oyer of the Condition, ſet forth the Statute of Hen. 6. and farther pleaded, that a Plaint was laid in the Palace-Court in Southwark againſt one Bridge for 20l. that thereupon Proceſs iſſued to one Birley, a Clirger and Miniſter of the Court, who did arreſt the ſaid Bridge, apud Weſtmonaſter' infra Juriſdiction' Cur' prædict'; and accordingly took the ſaid Bond of her in the Name of the Plaintiff, for her Appearance for Eaſe and Favour. The Plaintiff replies, that the Plaintiff was Under-Marſhal and Keeper of the Priſon of the ſaid Palace-Court, erected by Letters Patent in the Reign of King Charles 2. vigore & ſecundum formam Statut' infra Weſtmonaſter' prædict'; and that the Bond was made to the Plaintiff, abſque hoc, that Birley took the Bond in the Name of the Plaintiff, in the Manner mentioned by the Defendant. Upon this, Iſſue was joined, and a Verdict found for the Plaintiff. Mr. Filmer now moved in Arreſt of Judgment. The Objection, that he relied upon was, that the Bond does not appear to have been given to the Plaintiff in the Name of his Office. He ſaid, he did agree, that the Defendant did not demand Oyer. But then the Plaintiff ought to have ſet it forth in his Replication; and prayed that the Bond might be inrolled. To which Purpoſe he cited Carthew 301. Lutw. 680. He likewiſe obſerved, that the Plaint ſet forth in the Plea is for a greater Cauſe of Action, than that Sum mentioned in the Bond; and therefore the Cauſes of Action could not be intended to be the ſame. To this Serjeant Darnel anſwered, that the Palace-Court appears by the Record to have been erected long ſince the Statute of Hen. 6. and therefore he apprehended, that that Statute could not extend to the Caſe in Queſtion. To this Purpoſe he cited the Opinion of the eleven Judges againſt one in Salk. 373. that the Statute of 21 Jac. requiring Informations to be brought in the proper County where the Offence ariſes, does not extend to Offences, for which Informations lie by ſubſequent Acts of Parliament. Beſides, he ſaid, he apprehended, that the Bond on which the preſent Action was brought, does not appear to have been a Bail-Bond; and if ſo, there was no Colour for either of theſe Exceptions. Now as to that Mr. Benney, who was of the ſame Side, ſpoke more particularly; and ſaid, that wherever a Defendant may plead, that the Bond was taken by Dureſs, he ſubmitted, that the Bond ſhould not be conſidered, as taken by Virtue of the Statute. And he ſaid, he took it, that wherever it did not appear, that the Bond was taken within the Officer's Juriſdiction, ſuch Bond may be pleaded to have been taken by Dureſs. For this Purpoſe he cited 3 Cro. 745. 1 Cro. 309. Dyer 120. Now in the preſent Caſe he ſubmitted it, that the Bond did not appear to have been taken within the Juriſdiction of the Court.

What ſhall be ſaid to be a good Bail-Bond.

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He did agree, that the Defendant had alledged in his Plea, that Darby took this Bond at Weſtminſter within the Juriſdiction of the Court. But that Fact is found againſt him by the Verdict. And nothing of this is admitted in the Plaintiff's Replication. It is only admitted there, that the Bond was given infra Weſtmonaſter' prædict'. But one Part of Weſtminſter may be within the Juriſdiction, and one Part out of it. And for this Purpoſe he cited the Caſe of Darby and Reydock. The Chief Juſtice ſaid, that he took it clear, that the Weſtmonaſter' prædict' in the Plaintiff's Replication, and the Weſtmonaſter' infra Juriſdiction' Cur' alledged in the Plea, muſt be underſtood to be the ſame Place. However the Court thought this might be a proper Matter to be farther conſidered of. Vide poſt.

Lady Faulconberg *againſt* Legh and others.

How far an Anſwer to a Bill of Diſcovery ſhall be ſaid to be ſufficient.

Scac. THIS was a Matter that came on upon an Exception to the Anſwer, which the Defendant Legh put in to a Croſs Bill that was filed againſt him, requiring him to diſcover amongſt other Things, what Title he had to the Impropriation, by Virtue of which he brought his Original Bill againſt the preſent Plaintiff, demanding Tithes in kind of her. The Chief Baron objected, that we had no Right to controvert the Title of the preſent Defendant, in as much as we did not ſet up any Title againſt him. And if it ſhould be admitted, that he was obliged to ſet forth a Title, poſſibly a ſmall Title would be ſufficient; for he had known forty Years Poſſeſſion to ſerve for a Title in many Caſes. To this I anſwered, that I did agree, if the Plaintiff's was an Original Bill, he would have had no Right to have called in Queſtion the Defendant's Title; but I did ſubmit it, as the preſent Defendant filed his Bill firſt againſt the Plaintiff, ſhe had a Right to defend herſelf in the beſt Manner ſhe was able; and therefore might well inſiſt upon an Anſwer to the preſent Queſtion. I ſaid farther, that the preſent Defendant's Title was to an Impropriation; which Title, I ſubmitted it, could only be by Matter of Record. Becauſe till the Statute for diſſolving Monaſteries was made, a Layman was not capable of Tithes; then indeed the Statute allowed, that Grants ſhould be made of them by Letters Patent to the Laity. For which Reaſon I apprehended, that no other Title, but the Record of the Letters Patent, would be allowed of. However the Court over-ruled me, and would not let me enter into the Merits of the Exception.

The Sword-Blade Company *and* Dempſey.

ON a Writ of Erroꝛ upon a Judgment in the Court of Exchequer in Ireland, given in an Ejectment, that was brought foꝛ the Moiety of the Mill and Territoꝛy of Kilcommore, and of the Moiety of the Mill and Territoꝛy of Kanymore in King's County, upon the Demiſe of Jane Mackgawley; Mr. Robinſon ſaid, that the Fact ſtated upon the Recoꝛd was, that a Trial at Bar was had upon this Ejectment in the Court below; and that the Title pꝛoved in Evidence foꝛ the Plaintiff there was, as one of the Siſters and Coheirs of Thomas Leiceſter, who died ſeiſed in Fee of theſe two Townſhips and Territoꝛies inter alia, and left the Plaintiff Jane and one Mary Nugent his Coheirs at the Time of his Death; which ſaid Jane and Mary entꝛed into the ſaid Pꝛemiſſes in 1694, and thereof made Partition; that the Moiety of theſe Mills and Territoꝛies now in Queſtion was allotted to the Plaintiff; whereupon ſhe entered and was poſſeſs'd, till the Defendants ejected heꝛ. The Recoꝛd then ſets foꝛth, that the Defendants went into their Title; and they firſt pꝛoduced in Evidence certain Inquiſitions taken in the ſeveral Counties in Ireland at the Time of the late Wars, of all ſuch Rebels as were ſlain there on Account of their Foꝛtunes and Eſtates; which Inquiſitions were made in Puꝛſuance of certain Commiſſions iſſued out foꝛ that Puꝛpoſe. They then pꝛoduced an Act, paſſed in the Parliament of Ireland 9 W. 3. by which it was pꝛovided, that all Papiſts oꝛ reputed Papiſts ſlain in open Rebellion in that Kingdom, and found ſo by any Inquiſition taken within two Yeaꝛs then befoꝛe, ſhould be conſidered as attainted of High Treaſon to all Puꝛpoſes whatſoever; and that thereupon their Lands, Tenements, Goods and Chattels ſhould be veſted in the Crown. They farther gave in Evidence an Act paſſed in the Parliament of England 11 & 12 W. 3. 2. by which it is pꝛovided, that the Lands, Tenements, Goods and Chattels of all ſuch Perſons found by Inquiſition to have been ſlain in actual Rebellion within the Kingdom of Ireland ſince the 13th of February 1688, ſhould be veſted in certain Truſtees to be ſold, in oꝛdeꝛ that the Money ariſing from ſuch Sale might be applied to the Uſe of the Publick. It was then pꝛoved, that Thomas Leiceſter was found by Inquiſition to have been ſlain in open Rebellion between the ſaid 13th of Feb. and the Time of making this Act. That the Defendants purchaſed the Lands in Queſtion of the ſaid Truſtees on the 19th of June 1703. The Recoꝛd then farther ſets foꝛth, that the Plaintiff below offeꝛed to pꝛoduce Evidence, that Thomas Leiceſter was no Papiſt noꝛ reputed Papiſt. And in oꝛdeꝛ to be let into this Evidence, it was pꝛoved, that a foꝛmeꝛ Ejectment had been bꝛought by The Sword-Blade Company againſt the ſaid Jane Mackgawley, of the Lands in Queſtion; upon that Trial the ſame Soꝛt of Evidence was pꝛoduced foꝛ the then Plaintiffs; and notwithſtanding the Inquiſitions and all this Pꝛoceeding it was inſiſted upon, that the Plaintiffs ſhould pꝛove, that Thomas Leiceſter

Vide ante Vol. I. 421.

was a Papiſt or a reputed Papiſt, and accordingly the then Plaintiffs were allowed to give Parol Evidence of that Fact. The then Defendant upon that ſigned a Bill of Exceptions. A Writ of Error was brought in the Exchequer-Chamber in Ireland upon that Judgment, and the Judgment of the Court of Exchequer, which was given for the then Plaintiffs reverſed. Another Writ of Error was upon this brought into the Houſe of Lords, and the Judgment of Reverſal was reverſed itſelf, and the Judgment of the Court of Exchequer affirmed. The Record ſet forth, that accordingly this Parol Evidence, that Thomas Leiceſter was no Papiſt, nor reputed Papiſt, was allowed by the Barons in the preſent Caſe. And thereupon the Counſel for the Defendant below inſiſted upon a Bill of Exceptions, which was accordingly ſigned. And now the whole Fact appears upon this Bill of Exceptions, as returned. And likewiſe it is ſet forth by the Record, that the Barons gave Judgment for the Plaintiff. Which Mr. Robinſon ſaid, he ſubmitted it, was erroneous. He obſerved, that it was by no Means clear, that there was any Neceſſity to prove Thomas Leiceſter a Papiſt or reputed Papiſt. He did agree, that the Iriſh Act confines itſelf to ſuch Perſons only; but the Engliſh Act ſpeaks of all Perſons in general, that were found by Inquiſition to have been ſlain in actual Rebellion between 13th of Feb. 1688, and the Time of paſſing that Act. But if that Queſtion was to be entered into, whether Papiſt or not Papiſt, he ſubmitted it, that Parol Evidence of that Sort ought not to be admitted; eſpecially after ſo great a Length of Time. He ſaid, in not one of the Forms of theſe Inquiſitions was it ever mentioned, that the Party ſlain in Rebellion was a Papiſt or reputed Papiſt. And therefore from the Fact's not being mentioned in the Inquiſition no Argument could be drawn, that the Fact was not ſo. He ſaid likewiſe, that there was another Engliſh Act paſſed 6 Ann. 34. by which it is provided, that all Perſons, having any Right or Title to the Lands in Ireland purchaſed by the Sword-Blade Company, ſhould enter their Claims in ſome Court of Record in Ireland, within two Years to be computed from the 24th of June then next following. He ſaid, Patrick Mackgawley, Husband of the ſaid Jane, did enter his Claim for her within the two Years; but in that Claim never ſet up this for a Title, that Thomas Leiceſter was not a Papiſt nor reputed a Papiſt. And therefore he apprehended the Court would not ſuffer him to do it now. He ſaid likewiſe, that he ſhould ſubmit it, that there was a material Fault in the Declaration; for the Plaintiff has brought his Ejectment, amongſt other Things, of the Moiety of a Mill or Territory; for which an Ejectment would not lie; and therefore, as there are intire Damages given, the Plaintiff cannot recover. To this Purpoſe he cited Moor 427. 3 Cro. 186. Rolls Rep. 55. Sid. 259. 3 Keb. 450. Yelv. 117. Salk. 254. Carth. 224. Mr. Bootle on the other Side ſaid, that he was ſurpriſed to find it made a Queſtion at this Time, whether it was neceſſary, that Thomas Leiceſter ſhould have been a Papiſt or reputed Papiſt at the Time of his being ſlain in this Rebellion, in order to

give the preſent Plaintiffs a Title to theſe Lands; for that he was credibly informed, that this was never offered to be diſputed in this Ejectment before the Barons, nor in the other Ejectment, that was brought between the ſame Parties for theſe very Lands, and wherein the Judgment of the Court of Exchequer was affirmed in the Houſe of Lords, Feb. 9, 1726. He ſaid therefore, that he apprehended the Court would hardly enter into that Queſtion. Then as to the ſecond, he ſubmitted it, that the parol Evidence, even at this Day, was very proper. He ſaid, the Husband of Jane Mackgawley did enter her Claim within the Time preſcribed by the Statute of Anne; and therefore it could not be pretended, that the preſent Ejectment was brought too late. But whatever Claim he then made, that could certainly not conclude her now from alledging a different one. However, if there ſhould be any Doubt, whether this very Claim ought not to have been entred upon Record; and conſequently, whether this Parol Evidence ſhall not be now refuſed; he ſaid, the preſent Plaintiffs muſt be eſtopped from making this Objection; becauſe it appears by the Record, that they themſelves went into this Sort of Evidence in the former Ejectment. Then as to the laſt Objection, he ſaid, he did believe in former Times the Judges would not allow Ejectments to be brought of Things, which are ſo uncertain, as a Mill or a Townſhip. But of later Times the Courts have not tied themſelves up ſo ſtrictly. For this Purpoſe he cited 3 Cro. 465. Sid. 75. 1 Mod. 90. 4 Mod. 145. And in Lit. Rep. 301. it is held in particular, that an Ejectment will lie for the Moiety of a Manor; and therefore he thought there would be little Doubt with the Court as to this Objection. And as to the Word Territory, he was informed, that in Ireland that is of the ſame Signification with a Mill; but if the Court ſhould have any Doubt in that Reſpect, they would write to the Judges in Ireland, to be informed as to this Matter by Certificate. The Court ſaid, that they believ'd they ſhould get over this Objection as to the Uncertainty of the Thing for which the Ejectment was brought; but as to the other Matters, they were proper to be farther conſidered of. Vide Poſt.

Hayes *and* Warren.

THIS Matter coming on again, Mr. Parker argued for the Plaintiff; he ſaid, he ſhould ſubmit it, that there was no Occaſion to prove a Requeſt by the Plaintiff to the Defendant, in Order to ſupport the preſent Action; and if the Plaintiff could prove a Promiſe made by the Defendant to pay after the Work, that would be ſufficient; for which Purpoſe he cited Hutt. 84. He ſaid farther, that in the preſent Caſe, the Promiſe to pay is laid to be made on the ſame Day which the Work was done upon, and therefore this is unqueſtionably good, by the Authority of Latch 150. The Chief Juſtice and Judge Page ſaid, the preſent Action is not for Goods ſold and delivered; if it had, it would have been a much more favourable Caſe for the Plaintiff; becauſe by the Acceptance of the Goods, there ſeems to

Vide ante

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be an Agreement to pay for 'em. But here the Defendant might be no ways privy to the work done at the Time of the doing it. And therefore they continued to think, that the Plaintiff could hardly recover; however ordered this Matter to ſtand farther over. Vide poſt.

The Biſhop of Landaff *and* The King.

What ſhall be ſaid to be a ſufficient ſetting out of a Preſentation in a Quare Impedit.

IN a Writ of Error upon a Judgment in Quare Impedit, given in the Grand Seſſions of Glamorgan, the Declaration ſet forth, that Queen Anne was ſeiſed of the Advowſon in Gros of the Church of St. Andrew in the County of Glamorgan, in Fee, in Right of her Crown, and that the Church became vacant in 1706. by means of Dr. Tylor, the then Incumbent, being made Biſhop of Landaff, by which the Arch-Biſhop of Canterbury granted by his Letters of Diſpenſation, that Dr. Tylor, the then elected Biſhop of Landaff, might retinere, gaudere, habere & in Commendam tenere, the ſame Church during his Life, and ſo long as he ſhould be Biſhop of that Dioceſe, which Letters of Diſpenſation were founded upon a Motion, ſetting forth the Smallneſs of the Biſhoprick. The Declaration farther ſet forth, that the Queen by her Letters Patent confirmed his Diſpenſation, by which the ſaid Dr. Tylor did enjoy the ſaid Church during his Life; that Dr. Tylor died in the Time of the late King, by which the Right of preſenting to the ſaid Church was in his late Majeſty, and from him deſcended to the preſent King; that the preſent King preſented to this Church, but that the Lord Brookes diſturbed him, by Reaſon of which the King brought the preſent Action. The Biſhop claimed nothing but as ordinary. The Lord Brookes pleaded, that he was ſeiſed of a Moiety of the Manor in Fee, to which this Advowſon was appendant, by means whereof he had a Right to preſent every other Turn, abſq; hoc, that the late Queen was; and upon that, Iſſue was join'd; and the Jury found a Verdict for the King, viz. that the late Queen was ſeiſed of the Advowſon ut de uno groſſo per ſe in Right of the Crown. Serjeant Hawkins now argued for the Plaintiff in Error, and ſubmitted it, that upon this Record the King ought not to have had judgment; becauſe he has laid no Preſentment in his Declaration, nor any Thing equivalent to it. That it was neceſſary for the King to lay a Preſentment, as well as a common Perſon, he ſaid, was evident from the Authority of 14 H. 4. 6. Vau. 7, 53. Skin. 651, 657. And he ſubmitted it, that the Commendam ſet forth, could by no means be thought equivalent to a Preſentation; becauſe it is a Commendam retinere, and not a Commendam accipere. The Court declared their preſent Thoughts to be, that if any Thing was ſet out upon this Record equivalent to a Preſentation, that would be ſufficient, as well as if a Preſentation itſelf was. They ſaid the Record ſets out, that the Church was void at the Time this Commendam was made. There are Words in this Commendam, amounting to an accipere; as habere, gaudere & tenere. The Objection then ariſes from the Word retinere; but they obſerved it was frequent in Conſtruction, when ſome

Words will make an Inſtrument good, and others void, to reject thoſe that would make it void, and to keep thoſe that will make it good. However, they thought this a Matter proper to be farther conſidered of; ſo ordered it to ſtand over. Vide Poſt.

Skinner *and* Rebow.

IN an Action brought by Aſſignees under a Commiſſion of Bankruptcy againſt the Executor of Sir Iſaac Rebow, the Plaintiffs declared, that the Defendant promiſed to pay them, but did not; by means of which they brought this Action. The Defendant pleaded, that he never made ſuch Promiſe to the Bankrupt; and upon that the Plaintiff demurred. Mr. Deniſon now argued for the Defendant, and ſaid, that he ſubmitted it, the old Right of the Bankrupt was in the Aſſignees, and no new Right accrued to them; and for this Purpoſe cited the Caſe of Gray and Mendiſh, 9 Geo. 1. where the Court made uſe of this very Expreſſion; the Conſequence of which, he apprehended, was, that though the Plaintiffs have made Uſe of an Expreſſion in the Declaration, that the Defendant promiſed to pay them; yet that muſt be underſtood of the old Promiſe made to the Bankrupt; for which Reaſon he ſubmitted it, that the Plea of the Defendant, denying that Promiſe, was right; and if the Plaintiffs had intended by their Declaration, that there was a new Promiſe, they ought to have replied that. But the Court ſaid, that if the Defendant had by his Plea denied the very Words of the Declaration in this Point, the Plaintiffs would have been bound at the Trial to have proved a Promiſe actually made to themſelves. They took this to be exactly like the Caſe of an Executor; accordingly gave Judgment for the Plaintiff. Vide Poſt.

When an Action is brought by Aſſignees under a Commiſſion of Bankruptcy, what ſhall not be good pleading in ſuch Action.

The King *and* Theed.

MR. Marſh now argued for the Defendant; but inſiſted ſingly on that Exception for want of the Evidence being ſet forth, on which the Defendant was convicted. To this Purpoſe he cited the Caſes of The Queen and Green, Hill. 1713. The Queen and Brown, Paſch. 12 Ann. The Queen and Randon the ſame Term, The King and Step, Trin. 11 Geo. 1. And The King and Tuck, Paſch. 11. in that Reign. All which, he ſaid, were directly in Point. Mr. Reeves on the other Side, cited a Caſe in Salk. 369. where a Conviction is expreſly held to be good, without ſetting out the Evidence. Beſides, he ſaid, he apprehended, that the Evidence was ſufficiently ſet out in the preſent Caſe; for the Words in the Statute on which he is convicted, are, That the Party ſhall not be convicted but by his own Confeſſion, or the Oath of one or more credible Witneſſes. Now he obſerved, that it was expreſly ſet out on this Record, that the Party was ſummoned, and appeared, and pleaded, that he was not guilty. Therefore it evidently appeared upon this Conviction, that the

Vide ante 16.

Party could only be convicted by at least the Testimony of one Witness; and the Words in the Conviction are, the same being fully and duly proved. The Court said, that the Case cited out of Salk. they believed was one of the first Cases wherein this Exception was ever taken; and there they did agree it was over-ruled; but since that Case it has constantly been allowed. And as to what was said, that the Evidence was sufficiently set out in this Case, they took it to be otherwise. And Judge Lee said, he remembred a Case, which was that of The King and Baker, Trin. 6 Geo. 1. where the Words in the Conviction were, that the Witness made Oath de veritate præmissorum, and yet that was held not to be sufficient; accordingly the Court quashed the Conviction in the present Case.

The King *and* Nelson.

Vide ante 44. THIS Matter being now set down in the Paper, the Court said, that they took this Case to be exactly the same with that of Sir Edmund Elwell; and therefore were for quashing the Conviction directly. However, as Mr. Fazacherley was retained to support it, but could not be present, they only quashed it, nisi.

Anonymus.

The Construction of a Charter relating to the Persons who are to chuse a Member of a Corporation.

MR. Kettleby moved for an Information in the Nature of a Quo Warranto against one Harris, to know by what Authority he claim'd to exercise the Office of Capital Burgess in the Borough of New Radnor. He said the Charter required that the Capital Burgesses should be chose by the Burgesses, or the major Part of them. Now he submitted it, that the Construction of this Charter must be, that the Majority of the whole Number of the Electors must be present at least at an Election. Thirty-one was the Number of the Electors appointed by the Charter; but he had an Affidavit to produce, that but nine of them were present; accordingly the Court made a Rule to shew Cause.

White *and* Love.

The Certainty required in an Affidavit to change a Venue.

MR Marsh moved to discharge a Rule for changing a Venue from London to Norfolk, for that the Affidavit, on which it was obtained, was only, that the Promise arose there and not elsewhere, without saying in general, that the Cause of Action did; accordingly it was discharged.

Meed *and* Gibons.

IN Debt on Bond, brought by two surviving Executors, the Defendant demurred specially to the Declaration; and the principal Cause relyed upon was, that the Plaintiffs had only alledged, that the Money had not been paid to the Testator in his Life-time, nor to them, or one of them, since his Decease. Mr. Agar now argued, that this Declaration was not certain enough, so as the Plaintiffs could recover upon it; because, notwithstanding any Matter which they have alledged, the Money might have been paid to the Executor, that is now dead. Serjeant Baynes on the other Side answered, that if it had, the Money would in Judgment of Law have been paid to the surviving Executors, as well as to the Executor deceased; for a Payment to one is a Payment to all. The Court thought this a Matter proper to be farther considered of. But a few Days after over-ruled the Demurrer; and gave Judgment for the Plaintiff.

The Certainty required in a Declaration by an Executor.

Anonymus.

MR. Strange moved for a Rule to shew Cause, why some Orders should not be quashed, that were made at the Quarter-Sessions for the County of Surrey. He said, they were founded upon a Statute made 4 Geo. 1. for repairing the Roads leading from the City of London to the Town of East Greenstead in that County. That Statute provides, that there shall be a Turnpike erected upon some Part of the Road between the City of London and that Town, and that there shall be Trustees appointed for that Purpose. The Act farther provides, that the Justices of the Quarter-Sessions for the County of Surrey, shall have a Power to nominate two Persons to inspect the said Roads, in Relation to the Condition that they shall be in from Time to Time, and likewise to inquire into the Duties and Tolls arising from the Turnpike. The Justices at their Sessions accordingly did take into their Consideration this Matter, and made an Order in the first place, that two Persons then present, should inspect these Roads. At another Time, that these Persons should make their Report. At a third Time, they made an Order, reciting, that it had appeared by the Report made by these two Persons, that the Turnpike was erected within the Town of Kingston; whereas the Act gave the Trustees only a Power to erect one between the City of London and the Town of Kingston; so that the Trustees had exceeded their Authority; and thereupon they ordered, that this Turnpike should be abated. At a fourth Time they made an Order that the Sheriff should abate it. And at a fifth Time, finding that the Sheriff had not done it, they made an Order that the Sheriff should peremptorily do it. He said, he apprehended, that two plain Exceptions might be taken to these Orders; one, that the Persons appointed to take the View, had no Power to make any Inquiry relating to the Situation of the

What shall be said to be a good Order or not, relating to a Turnpike.

the Turnpike; the other, that the Seſſions had no Power to order the Sheriff to abate it. Accordingly a Rule was made to ſhew Cauſe. Vide poſt.

Roffey *and* Hanbury.

How far the Court will not allow an Amendment of a Declaration in an Ejectment.

MR. Harper moved for Liberty to amend a Declaration in an Ejectment by the Bill upon the File, by altering the Day of the Demiſe to the firſt of June. He ſaid the Tenant in Poſſeſſion has entered into the common Rule; by which this Ejectment ceaſes to be a fictitious Suit, and is become a real one. For which Reaſon he ſubmitted it, that this Ejectment now is upon the ſame footing with all other Actions. The Court ſaid, that they have known the Diſtinction between the Ejectments and other Suits often taken in this reſpect. Becauſe the Tenant only appears to the Demiſe as laid. For which Reaſon, they ſaid, he muſt bring a new Ejectment.

The King *and* St. Margaret's Weſtminſter.

How far a Perſon gains a Settlement by renting a Tenement.

SErjeant Corbet moved to quaſh an Order of Seſſions, allowing an Appeal from two Juſtices, for the Removal of one Elizabeth Conyers from the Pariſh of St. Margaret's to the Pariſh of Ludgate. The Fact ſpecially ſtated was, that James Conyers, the Father of the ſaid Elizabeth, rented a Houſe in Ludgate Pariſh of 25 l. per Ann. and paid to the Rates of Church and Poor, but that he was a Priſoner in the Fleet at the Time he did ſo, and that Elizabeth had gained no Settlement for herſelf. Upon which the Seſſions adjudged, that he gained no Settlement by this. But the Serjeant ſubmitted it, that he did. Accordingly the Court made a Rule to ſhew Cauſe. And the next Term made it abſolute.

Leel *and* Smith.

How far the Court ſtays Proceedings in an Action upon a Bail-Bond.

MR. Fazakerley moved for Liberty to proceed in an Action upon a Bail-Bond. He ſaid the Fact was, that the Defendant owed the Plaintiff 40 l. but before any Action commenced for this Money the Defendant agreed to pay the Plaintiff 5 l. in Money, and 20 l. by a Bill of Exchange; and ſo no Proceedings were to be had. The Bill of Exchange was not paid; and upon this the Plaintiff bought his Action for the whole Money; and took an Aſſignment of the Bail-Bond. The Defendant ſummoned the Plaintiff before Judge Probyn, to ſhew Cauſe, why Proceedings upon the Bail-Bond ſhould not be ſtaid. The Defendant offered there to pay him the whole Sum demanded; and the only Diſpute between them was about Coſts. Upon this the Judge ordered, that Proceedings on the Bail-Bond ſhould be ſtaid till farther Order, in hopes that the Parties would agree this Affair within a Day or two amongſt themſelves. However they did not, and now the Defendant

fendant offers indeed to pay the Coſts. But he ſubmitted it, the Plaintiff had a Right to proceed. He ſaid this was a bare Agreement between the Parties without a Satisfaction, and therefore he apprehended the Defendant would not be at all benefited by it, if he ſhould plead in Bar. And ſo, he ſaid, he remembered, that a ſtated Account and a Note for the Balance was held to be no Satisfaction in the Court of Exchequer. He ſaid farther, that he apprehended this Court would never ſtay Proceedings in a ſummary Way upon ſuch an Agreement, when the Agreement was made before the Suit begun. But the Court ſaid, that the Parties diſagreeing before the Judge in nothing but the Coſts, they thought was a ſufficient Agreement pending the Suit for this Court to lay hold of. Accordingly they ſtaid the Proceedings upon the Defendant's offering to pay Principal and Coſts.

Spinmore *and* Bowler.

THIS Matter now coming on upon the Maſter's Report, Serjeant Cummins ſaid, that he ſubmitted it, Perſons eſcaping who are brought up out of inferiour Juriſdictions by Habeas Corpus, cannot be taken up by Eſcape-Warrants within the Statute of 1 Ann. 6. And therefore upon that Account, if there was no other, he apprehended, the Defendant ought to be diſcharged upon common Bail. Mr. Strange ſaid, that this Point, which was now made, was not thought of in the former Motion. And therefore he deſired Time to look into the Act; which the Court granted. Vide ante 33. Vide poſt.

The King *and* Heber.

MR. Strange had moved at the Beginning of the Term for an Information againſt the Defendant, who was a Juſtice of Peace, for convicting a Man upon one of the Game-Acts without giving him any Summons to hear what he could ſay in Defence of himſelf. But the Court refuſed the Motion then; becauſe the Convictions were not returned. Mr. Strange now moved this Matter again, and ſaid they were returned; and the Defendant has been ſo hardy, as to return, that he was ſummoned. Upon which he moved for a Rule to ſhew Cauſe; and the Court granted it. How far the Court will grant an Information againſt a Perſon for making an illegal Conviction.

The Governor and Company of London-Aſſurance *and* Dickenſon.

When an Action is brought againſt a Bailiff of a Liberty, what ſhall be ſaid to be a good Declaration in ſuch Action.

UPON a Writ of Error on a Judgment in the Common Pleas in an Action upon the Caſe againſt the Defendant as Bailiff of the Liberty of Stepney, Mr. Robinſon ſaid, that the Declaration ſet forth, that a ſpecial Capias was directed to the Sheriff of Middleſex, and that the Defendant had the Return of Warrants within this Bailiwick; that he had the Return of this particular Writ, and accordingly the Sheriff made out his Warrant to him ut caperet this Perſon, ita quod haberet before the Juſtices of the Common Pleas on ſuch a Day; that the Defendant accordingly did arreſt this Man; that he eſcaped from him, and yet he made a falſe Return, that he could not be found, to the Plaintiff's Damage, &c. To this Declaration Mr. Robinſon took ſeveral Exceptions. He ſaid, in the firſt place, that here were two Cauſes of Action joined together in one Suit, viz. an Eſcape and a Falſe Return; which were ſo different in their Natures, that he apprehended by Law, they could not be joined. In the next place he ſubmitted it, that it was neceſſary to be ſaid in this Declaration, that the Defendant had the Return of the Writs; and for this Purpoſe he cited a Precedent out of Ven. 399. But in the preſent Declaration, it is only ſaid, that he had the Return of Warrants, which every Conſtable has. And in the laſt place he obſerved, that by Law the Sheriff is to have the Body of the Party arreſted on the Return of the Writ; but in the preſent Declaration, it is ſaid, that the Defendant was to have his Body there. To the firſt of theſe Exceptions the Court ſaid, that this was only an Action for a falſe Return; and the Matter relating to the Eſcape is only by way of Aggravation. To the ſecond the Chief Juſtice did agree, if the Action had been brought by the Defendant, it would have been neceſſary for him to have laid a Title to the Return of Writs; but in the preſent Caſe it is enough for the Plaintiffs to ſhew, that he ought to return the Writ in Queſtion; and that they have done; for the Fact is expreſsly laid ſo in the Declaration. Then as to the laſt Exception, the Court ſaid, that they would underſtand the Declaration to mean, that the Sheriff ſhould have the Body at the Day, and not the Defendant. For which Reaſons they affirmed the Judgment.

Matthews *and* Kingsford.

How far the Court will ſuperſede an Eſcape-Warrant.

MR. Reeves moved, that an Eſcape-Warrant might be ſuperſeded, and that the Defendant might be diſcharged out of Cuſtody. He ſaid, that the Warrant was made out ſo long ago as in the Year 1725. and the Defendant was taken upon it laſt October; and that too by a common Bailiff that exe-

cuted it, without any other Authority whatsoever. But he observed, that in the Case of Web and Cutler, Mich. 2 Geo. 1. an Escape-Warrant, made out in the late Queen's Time, was held to be of no Force after her Demise. For which Reason the present Writ likewise, that appears to have been made out in the Time of Geo. 1. must have lost its Force likewise by his Demise. He said likewise, that in the Case of Year and Gour, Hil. 10 Ann. it was held, that a common Bailiff could not execute such a Warrant by Virtue of the general Words in it without a particular Authority. The Chief Justice said likewise, that he remembered an Escape-Warrant was superseded, that was executed after the Time that the Judge was out of his Office, that granted it. Accordingly the Court made a Rule, that the Writ should be superseded, and the Defendant discharged, unless Cause to Morrow.

Cortesses *and* Munes.

How far a Writ shall not be said to be duly marked with the Name of the Plaintiff's Attorney, according to the Intent of the Statute of Geo 2.

MR. Filmer moved, that the Defendant's Bail might be discharged, and the Process, on which he was taken, set aside, for not being marked with the Name of the Attorney, as the late Act requires, which was made 2 Geo. 2. He did agree that it was marked with the Name of the Person, whom the Attorney employed to manage this Cause for him. But Judge Lee said, that this Person could at most be considered only as a Solicitor in the Cause. And the Act requires, that the Writ should be marked with the Name of the Attorney and Solicitor. Accordingly the Court made a Rule to shew Cause. Vide post.

Burrey *and* Perrey.

How far Words which are spoken of a Tradesman shall be said to be actionable, or not.

IN an Action brought by the Plaintiff for Words, they were laid to be spoke of him in his Trade as a Blacksmith; and were to this Purpose, *Burrey* put on a Lock for Mrs. *Fowler*, and he put it on so, that he could pull out the Screws, and he broke into the House. The Plaintiff laid likewise in his Declaration special Damage, which he suffered by the Speaking these Words. And had a Verdict with 5 l. Damages. Serjeant Belfield now moved that the Plaintiff might have full Costs. He said the Words were not Actionable in themselves, and therefore the Special Damage is the Jit of the Action. For which Reason he submitted it, his Application was proper by the Authority of Salk. 206. Accordingly the Court made a Rule to shew Cause. Vide post.

The

The King *and* Burford.

What kind of Indictments the Court will quash.

MR. Reeves moved on Behalf of the Prosecutor to quash an Indictment of Perjury, for there being a Mistake in it in laying the Fact. The Chief Justice at first doubted, whether it was usual to quash Indictments for so great Offences. But Mr. Abney said, he remembered, the same was done in the Case of The King and Rouse. And Judge Lee said, that he remembered the same in the Case of The King and The Inhabitants of Aynesworth. That was an Indictment for not repairing a Highway, which the Court would not have quashed, but on the Behalf of the Prosecutor. Accordingly the Court did it in the present Case.

The King *and* Philips and others.

How far several Persons cannet be jointly indicted for one and the same Offence

THIS was an Indictment for Perjury, which charged the Defendants, who were six in Number, with Swearing Falsly against one Willis, who had been indicted for Felony. And after the Indictment had charged them with committing this Offence jointly, the Indictment charged them separately with it. Mr. Reeves said, that the Defendants had moved in Arrest of Judgment, upon an Exception taken, that a joint Indictment would not lie against them; but he submitted it, that the Indictment might be well maintained. He said, the Perjury was committed by all of them against one and the same Person, at one and the same Time, and upon one and the same Occasion. On this Indictment they are all of them found Guilty; and therefore if the Indictment had even gone no farther, than to have been a joint Indictment against all; he apprehended the Court might well pronounce Judgment against the Defendants upon it. But he observed, that there was farless Foundation for supporting the present Exception; because they are indicted saparately over again. Mary Philips is expresly so; Elizabeth Heaton and another are indicted, that they & uterque eorum committed this Offence; and so the other three are indicted, that they & quilibet eorum did the same. Then by Way of Authority to shew, that this Indictment would have been good, if it had even went no farther, than the first Part of it, he cited the Case of The Queen and Marshal, Trin. 10 Ann. There two were indicted for receiving stolen Goods; one was acquitted; the other convicted; a Motion in Arrest of Judgment made, because the Indictment did not say, that they & quilibet eorum committed this Offence; but the Court there over-ruled this Exception. So he said several may be jointly indicted for Extortion, as is the Case in Salk. 382. The same is of Maintenance, Ven. 302. So two have been jointly Indicted for speaking blasphemous Words; and such Indictment was held good in Stiles 312. And there Chief Justice Rolls declared, that the same was of an Indictment of Perjury. Then by Way of Authority to shew, that at least one Indictment

might include these Offenders, by charging them separately with this Offence; he said, it is allowed in Palmer 369. and in 2 Roll's Rep. 345. that four Persons may be included in one Indictment for erecting four several Inns. And in order to shew, that the Words uterque eorum & quilibet eorum does amount to a separate Charge, he said, the Word separaliter is allowed to amount to one in the same Books immediately before cited. Mr. Hayward on the same Side said, that in Keb. 585. two were jointly indicted for Perjury, and on Exception taken to the Indictment for this Reason, the Indictment was held good. Mr. Fazakerly and Mr. Strange argued on the other Side, and said, that they did agree, wherever Misdemeanours are in their Nature joint, Persons joining in the Commission of such Misdemeanours may be punished by a joint Indictment. And therefore the Cases of Trespasses, Extortion, Maintenance and such like, they well allowed. But wherever Misdemeanours are in their Nature several, the Persons committing such Misdemeanours at one and the same Time can never be indicted jointly for the committing them. For this Purpose they cited the Case of The Queen and Hodgson, Trin. 6 Ann. There two were indicted for being common Scolds. Mr. Whitaker moved to quash the Indictment; because these Offences are in their Nature several. The Court allowed, that the Indictment was bad for this Reason; but refused to quash it; because that was in the Nature of an Indictment for a Nusance. So in the Case of The King and Wilson, Pasch 11 Geo. 1. an Exception was taken to the Indictment for being joint against two for exercising a Trade against the Statute of 5 Eliz. and the Indictment quashed for that Reason. To the like Purpose was cited the Case of The King and Clendon, 6 Mod. 210. And in Palmer 535. an Indictment of Perjury against two was held bad upon this very Exception. Then as to the other Answer which was made, that the present Defendants are indicted separately for this Offence; they said, if this Answer was sufficient, it would equally hold, that such Indictment would have been good, if one Misdemeansur had been a Perjury and the other a Forgery. Which, they believed, was never yet imagined. The Court declared their Opinions to be, that the Offence of Perjury was of such a Nature, as it was impossible two could be jointly indicted for it; and said, they were well satisfied that the Distinction taken by the Defendant's Counsel between some Misdemeanours and others, was well supported by the Law. And as to the Case cited out of Keb. 585. the Chief Justice said, the same is afterwards stated in 635. and he took it, the Judgment was arrested upon the Exception taken in 585. and not for the Reason given in 635, for that can hardly be credited. Then as to the other Point, the Court said, they took it, the Law was certain, that separate Offences cannot be included in one Indictment. Judge Probyn said, that he should think it a dangerous Thing to the Liberty of the Subject ever to admit of this. For if it should, one Defendant might possibly be affected by the Evidence given against the other; whereas the Law requires, that every Defendant should be convicted or discharged singly upon the proper Evidence given against him. Accordingly the Court arrested the Judgment.

The King *and* Rofe.

How far the Court will quaſh a Coroner's Inqueſt.

MR. Reeves and Mr. Verney moved to quaſh an Inquiſition taken by the Coroner of Kent, upon two Exceptions; one, for Matter appearing upon the Inquiſition; the other, for Matter appearing by Affidavits out of it. The Caſe ſtated upon the Inquiſition was, that one Stone was driving a Waggon down a Hill, that the Horſes began to run very violently, upon which the Waggoner leaped out of the Waggon, and thereby one of the Wheels went over him and killed him; and ſo the Inquiſition finds, that that Wheel moved to his Death. The Counſel upon this obſerved, that this was a falſe Finding in Judgment of Law upon the Face of the Inquiſition; for undoubtedly the whole Waggon, and all the Horſes in it, moved to his Death; and the Lord of the Manor was intitled to them, as a Forfeiture. But they ſaid beſides, that they had Affidavits from ſix of the Jurymen, that the Coroner directed them to find, that the Wheel only moved to his Death, and in his Charge told them, that the Law was ſo; and if he had not informed them ſo, they ſhould have given in their Verdict otherwiſe. The Court ſaid, that if this Matter ſtood ſingly upon what is found by the Inquiſition, they ſhould have clearly thought, that this Court could do nothing in it; becauſe the Jury are the only Judges of what moved to the Party's Death or not. And ſo Judge Page ſaid, he remembered, the Court was of that Opinion in the Caſe of The King and Clark. Then as to the other Matter, they were in Doubt, whether they could go out of the Inquiſition in this Caſe. Judge Page ſaid, in caſe a Judge of Aſſiſe miſdireſs a Jury, he thought there was no way to come at that, but by a Bill of Exceptions. However Mr. Verney ſaid, that he had known Caſes, where it has been held, that the Court will grant a new Trial in ſuch Caſe. And Mr. Reeves ſaid, that he was ſatisfied, he could find Authority, to ſhew, that the Court has ſet aſide theſe Inquiſitions upon Affidavits. Accordingly they made a Rule to ſhew Cauſe. Vide poſt.

Williams *and* Seagrave.

How far the Court will order a Note to be delivered up.

ON Rule to ſhew Cauſe, why the Plaintiff ſhould not deliver up a Note to one Avery, which Note Avery had paid as one of the Indorſors. The Chief Juſtice ſaid, this was proved to be a forged Note, in the Court of Exchequer, which Mr. Strange agreed, but ſubmitted it, that Avery might notwithſtanding bring an Action upon it againſt the other Indorſors. The Court allowed this, and accordingly made the Rule abſolute.

Anonymus.

MR. Wirley had obtained a Mandamus ſometime ago for the making a new Rate for the Relief of the Poor in the Pariſh of Utoxeter; and had likewiſe obtained a Certiorari for the bringing up all Orders relating to this Pariſh; but the Juſtices had not ſent up this Rate with it. For which Reaſon he moved now for a Certiorari to bring up this Rate. The Court ſaid, this was not a Motion of courſe for a Certiorari to remove a Rate. However made a Rule to ſhew Cauſe. Vide poſt.

How far a Certiorari will lie to remove a Poors Rate.

Anonymus.

A Woman having been brought up by Habeas Corpus, charged with Petit Treaſon on a Suſpicion of poiſoning her Husband; Serjeant Darnel moved, that ſhe might be bailed. He ſaid, that at preſent there was only an Inquiſition found againſt her before the Coroner, and no Indictment. He ſaid likewiſe, that there were only Circumſtances laid before the Jury of this ſuppoſed Fact; and he had Affidavits to produce directly denying them. The Counſel of the other Side ſaid, that a Fact of this Nature can only be traced out by Circumſtances; but that thoſe Circumſtances appeared ſo ſtrong to the Coroner's Inqueſt, that every one of the Jury (and they were Twenty-three in Number) brought her in Guilty. Judge Lee ſaid, that this Inquiſition is in the Nature of a Bill, upon which an Indictment may afterwards be found. And accordingly the Court refuſed the Motion.

How far the Court will not bail a Perſon on an Indictment for Petit Treaſon.

Corteſſes *and* Munes.

MR. Fazakerly came now to ſhew Cauſe, and ſaid, that the Fact was, that the Plaintiff had employed one Cuningham as his Attorney, to ſue the Defendant in the Common Pleas, which Cuningham accordingly did; but afterwards adviſed the Plaintiff to diſcontinue that Action, and bring one in this Court, to prevent the Defendant's being able to keep the Plaintiff out of his Money by Writs of Error, longer than he could do if the Action was in this Court. At the ſame Time Mr. Cuningham told the Plaintiff, that he was only Attorney in the Common Pleas, and therefore the Plaintiff muſt employ ſome Attorney in this Court; accordingly the Plaintiff deſired Mr. Cuningham to employ whom he would for him, which Mr. Cuningham did, and afterwards writ the Plaintiff Word that he had employed Mr. Stone for him. Upon this State of the Caſe Mr. Fazakerly ſaid, he ſubmitted it, that Mr. Stone was to be conſidered as the Plaintiff's Attorney in this Court, and not Mr. Cuningham. And if ſo, the Writ was rightly marked with the Name

Vide ante 79.

Name of Mr. Stone. The Court was of the ſame Opinion; accordingly diſcharged the Rule.

Burrey *and* Perrey.

Vide ante 79.

MR. Huſſey came to ſhew Cauſe upon this Rule, and ſaid, he ſubmitted it, that the Words were actionable in this Caſe; and therefore the Action was to be conſidered, as founded upon them; and conſequently no more Coſts than Damages ought to be given, according to the Words and Intent of the Act of Parliament. He ſaid, the Declaration ſet forth, that the Defendant, knowing the Plaintiff to be a Lockſmith, ſpoke of him the following Words. He put on a Lock for Mrs. *Fowler*, and at Night broke open the Houſe (*Innuendo Burglariter*) and was likely to have been proſecuted for it, and down'd upon his Knees and beg'd Pardon. He obſerved, that of late Years, Words had been conſtrued in Actions brought upon them according to the plain and ordinary Meaning of them. And therefore in the Caſe of Button and Hayward, Hil. 3 Geo. 1. which he himſelf was Counſel in, in Arreſt of Judgment the ſaying, That the Plaintiff kill'd my Husband, was held Actionable. The Court thought this a Matter proper to be farther conſidered of; ſo ordered it to ſtand over. Vide poſt.

Anonymus.

How far the Court will direct peremptory Iſſues, in order to inforce their Proceſs.

THERE having been a Diſtringas nuper Vic', and upon the firſt forty Shillings Iſſues returned, and upon the ſecond, ten Pounds, Mr. Parker moved, that upon this, which was the Third, there might be peremptory Iſſues returned upon him to the Value of the Debt. Which the Court accordingly granted.

The King *and* Purſore.

Againſt what Perſon the Court will grant an Information for a Libel.

ON Rule to ſhew Cauſe, why an Information ſhould not go againſt him for a Libel upon Mr. Pike, who was a Cuſtomhouſe Officer, by which he expoſed him for being caſt in ſix Informations; Mr. Strange ſaid, that on the Rule, which was obtained for ſhewing Cauſe, Mr. Pike had made Affidavit, that he was the Man that was caſt in theſe Informations, by Reaſon of which he did believe that he was the Perſon that was expoſed. But Mr. Strange ſubmitted it, that as Mr. Pike had by this Affidavit aſcertained himſelf to be the Perſon expoſed; ſo he had ſhewn by it, that there was ſufficient Reaſon for expoſing him. For which Reaſon he hoped, the Rule for the Information ſhould be diſcharged, and the Party left to his ordinary Remedy. And he remembered the ſame was done in the Caſe of The King and Bicarton, Hil. 8 Geo. 1. and in the Caſe of The King and Beharel, Mich. 11 Geo. 1. But the Court made the Rule abſolute in the preſent Caſe notwithſtanding.

The King *and* Franklyn.

MR. Fazacherly moved, that the Defendant might be discharged from his Recognizance. The Recognizance was taken before a Justice of Peace on the 10th of September was Twelvemonth, and the Condition of it was, that the Defendant should appear in this Court on the last Day of the then next Michaelmas Term to answer such Matters, as should be there objected against him, and not depart without Leave of the Court, and to be of his Good Behaviour in the mean Time. The Justice of Peace required him to give Bail to this Recognizance, and upon his omitting to do it committed him. Soon after the Chief Justice of England granted his Habeas Corpus to bring him up before him, and upon his being brought up bailed him upon it. The Attorney General filed an Information against him, which was not brought to Trial till the Sittings after last Trinity Term; and then was not tried by Reason that there was not a full Jury. Now, he said, the Prosecutor talks again of trying this Matter the Sittings after this Term. But he hoped, the Defendant should be discharged. He submitted it, that the Construction of this Recognizance was, that the Defendant should appear in this Court on the last Day of the next Michaelmas Term, and to be of his good Behaviour in the mean Time, and not depart the Court without Licence. The Doubt, he said, he did agree would arise upon the Construction, which the Court should put on the Words in the mean Time. But if the Court should not confine the Sense of it to the End of the next Term, but should extend it to any Period of Time, before they should signify their Licence for his departing, he submitted it, it would be a Recognizance of a very extensive Nature; and such a one, as has never been allowed of since the Habeas Corpus Act, and in Dalton 413. it is held, that a Justice of Peace cannot take such a one. If the Sense of these Words then was to be confined to the Time, which he contended for, the Defendant clearly ought to be discharged; for there was not so much as a Charge against him for the Breach of his good Behaviour within that Time. But if this Sense of the Words was not to be admitted, and the Recognizance should be allowed to be legal even in that general Sense; yet still he submitted it, that the Defendant ought to be discharged. Because by the Rules of the Court the Defendant is intitled to move, that he may be discharged after the End of the fourth Term, unless something can be shewn against him as a Breach of his good Behaviour within that Time. The four Terms were out at the End of last Trinity Term; and then nothing was done, but barely an Information filed against him, and if that should be sufficient, a Man would never be able to be discharged from such a Recognizance during his Life. The Chief Justice owned, that at the Time he bailed the Defendant, he did declare his Opinion was, that such a Recognizance could not be legal. But however, he said, there were a great Number of Precedents

How far the Court will not discharge a Man of his Recognizance.

ſhewn him at that Time of Juſtices of Peace taking them, and even of ſuch being made out in this Court ſince the Habeas Corpus Act. The Court upon this declared, that they would not enter into a Debate about a Queſtion of this Nature ſo late in the Term; and therefore at preſent they would take the Recognizance to be legal. Then as to the other Queſtion concerning the Conſtruction of it, they agreed it to be manifeſt, that the Words in the mean Time muſt be extended to that Period of Time, before they ſhould ſignify their Licence for the Defendant's departing. And as to the laſt Queſtion they were clear of Opinion likewiſe, that the bare filing an Information within the four Terms was ſufficient, unleſs there was manifeſt Reaſon to think, that this was done only to oppreſs the Subject. Accordingly the Motion was diſallowed.

Term. Hill.

5 Geo. II. 1731.

Anonymus.

MR. Kettleby moved for a Prohibition to be directed to one of the Eccleſiaſtical Courts, for holding a Plea in a Libel for calling a Woman a Strumpet, and ſaying theſe farther Words of her, I have ſeen you in the Act, Innuendo the Act of Incontinency. Judge Page did agree, that the Word Strumpet of itſelf would not have been ſufficient to have ſupported the Libel; but as it is coupled with other Words, the Senſe of the whole Expreſſion can be no other than calling the Woman a Whore; accordingly the Court refuſed the Prohibition.

How far the Eccleſiaſtical Court have a Juriſdiction in a Suit for Words.

Anonymus.

ON Motion to ſet aſide an Execution for Irregularity, Mr. Fazacherly ſaid, that the Trial was ſo late as the laſt Sitting in laſt Term, which was the 26th of November, and the Rule given on the Poſtea for ſigning Judgment did not expire till the 2d of December; notwithſtanding which, the Plaintiff laſt Vacation ſued out a Fieri Facias, teſted the firſt Day of laſt Term, returnable the laſt, and likewiſe a Teſtatum teſted the laſt Day of that Term, returnable the firſt Return of this. This, he ſaid, could only be endeavoured to be maintained by ſuppoſing, that the Judgment ſhould relate to the firſt Day of laſt Term; but that he ſubmitted it could not be; becauſe, if it ſhould, the Judgment muſt relate to a Time before the Verdict; Accordingly the Court made a Rule to ſhew Cauſe.

How far a Writ of Execution ſhall be ſaid to be regular, or not.

Anonymus.

MR. Fazacherly moved for an Information againſt one Mr. Smith, for aſſaulting Mr. Nox Ward, in Order to force him to Sign a Paper, which he produced to him. He ſaid, if Mr. Ward had ſigned it, undoubtedly the Court would have granted an Information for this Extortion; but the Court refuſed it in the preſent Caſe.

How far the Court will not grant an Information for an Aſſault with an Intent to extort Money.

Anonymus.

Anonymus.

When a peremptory Rule is made upon a Sheriff to return a Writ, how far it ſhall be with Coſts.

MR. Brooks moved for a peremptory Rule upon a Sheriff to return a Writ. The Court ſaid, that there appeared ſo manifeſt an Oppreſſion in Sheriffs, by their not executing the Proceſs duly as it ought to be, that they had reſolved to grant theſe peremptory Rules with Coſts; accordingly they did ſo in the preſent Caſe.

The King *and* Francklyn.

How far the Proſecutor muſt give a Rule upon the Poſtea for Judgment, before the Defendant can move that the Jury-Proceſs may be recorded.

MR. Bootle moved that the Poſtea might be brought in, and the Jury-Proceſs recorded. He ſaid, Yeſterday was the Day for the Return of the Diſtringas; and therefore now they were intitled to this Motion. He obſerved likewiſe, that in the Caſe of The King and Ward, and likewiſe in a former Caſe between The King and Franklyn, this ſame Motion was granted. But Mr. Maſterman informed the Court, that the conſtant Practiſe was; for the Proſecutor to give a Rule upon the Poſtea for Judgment, before the Defendant can be intitled to this Motion. That the Proſecutor had not done this yet; and therefore the Motion was too early. But the Court declared, that this might be of dangerous Conſequence to the Liberty of the Subject. For Suppoſe the Defendant was in Cuſtody, and the Proſecutor would not give this Rule, this might be Impriſonment for Life. Accordingly the Court granted the Motion, unleſs Cauſe to the contrary To-morrow. Vide Poſt.

Maynard *and* The Manucaptores of Harvey.

How far Bail may be relieved upon Motion, without putting them to the Expence of an Audita Querela.

ON Motion to ſet aſide a Judgment againſt Bail, upon an Affidavit, that the Principal was dead before the ſuing out of the Capias ad ſatisfaciendum againſt him, and that the Plaintiff had Notice of his Death before the taking out of the Scire facias; it was objected, that this was a proper Matter to be relieved upon by Audita querela, but not in this ſummary Method, by way of Motion; however, the Court made a Rule to ſhew Cauſe. Vide Poſt.

Pierce *and* Morris.

When a Defendant is ſued as Executor, how far he ſhall be intitled to an Imparlance.

THIS was a Suit by Special Capias againſt the Defendant, as Executrix to her late Husband, and now Mr. Brown moved, that the Defendant might have Time to plead till the next Term, by Reaſon that there were many Debts owing from her Teſtator by Specialty, which were of a ſuperior Nature to the preſent Demand, and thoſe Specialties at preſent could not be known, ſo as to enable the Defendant to plead a ſpecial plene adminiſtravit. But the Court ſaid, that it might be of dangerous

Conſequence to allow ſo long a Time; becauſe the Defendant might poſſibly take this Advantage to confeſs Judgments upon the Simple-Contract Debts; and thoſe Judgments ſhe would be intitled to plead in Bar to the preſent Demand. Accordingly the Court ordered him to move the Matter again, when he ſhould have a proper Conſent from his Client, not to take this Advantage.

Anonymus.

MR. Thede moved to ſet aſide Judgment ſigned after executing a Writ of Inquiry; becauſe the Writ of Inquiry was executed the laſt Day of laſt Term, and the Judgment ſigned that very Day; by which Means the Defendant had not the leaſt Opportunity of moving in Arreſt of Judgment. The Court ſaid, it is well known, that when an Action is tried the laſt Sitting in Term, the Defendant has but one Day to move in Arreſt of Judgment. And they took it, the conſtant Practiſe in the preſent Caſe was, that where a Writ of Inquiry is returnable the laſt Day of a Term, and executed the ſame Day, the Defendant has never a one. The Maſter too confirmed the ſame; accordingly the Motion was refuſed.

The Time which is allowed to move in arreſt of Judgment

The King *and* Busbey and others.

MR. Abney moved for an Information againſt the Defendant for forcing a Woman, that was in the Pains of Labour, to remove herſelf from the Pariſh of Charleton in Bedfordſhire to the Pariſh of Harrow next adjoining, in Order that the Child might not be ſettled in the Pariſh of Charleton. He ſaid, the like Motion was granted in the Caſe of the Pariſh of Godolvin in Surrey, and in another Caſe, about a Year ago on his Motion; accordingly a Rule was made to ſhew Cauſe, and the next Term it was made abſolute. Vide Poſt.

How far an Information will lie againſt the Overſeers of the Poor, for removing a Perſon unduly.

Martin *and* Moor.

THIS Matter coming on again, ſeveral of the moſt experienced Attorneys attended the Court, and informed them, that their Opinion was, that the Bail ought to be liable pro tanto as the Writ was marked for, and likewiſe all the Coſts in the original Action. Mr. Atwood ſaid, that he remembred the Caſe of Dan and Berry, and Dan and Freeman, which he was concerned in as Attorney, and that was Hill. 2 Geo. 1. The Writ there was marked for 17 l. 10 s. and a Bail-Bond taken accordingly; an Action was brought upon the Bail-Bond; and on Motion by the Bail for ſtaying Proceedings on Payment of what was due, the Maſter reported, that 18 l. was really owing to the Plaintiff by the original Defendant; but yet the Court ſtaid the Proceedings on Payment of the 17 l. 10 s. Part of the principal Money, with Coſts. And he produced the ſeveral Rules that were made on

Vide ante 44.

those Motions. Accordingly the Court declared themselves to be of the same Opinion; and a Rule was made for staying Proceedings on the Scire facias upon those Terms.

The King *and* Franklyn.

Vide ante 88. THE Attorney General came now to shew Cause, and said, that the Rule which was drawn up, was, that the Postea might be filed, and likewise the Venire and Distringas. He declared, that he thought it unnecessary to contend, whether the Prosecutor has a Right to give a Rule for a Judgment, before the Defendant can be intitled to this Motion, and accordingly he had given a Rule upon the Postea for Judgment to put that Matter out of Dispute. But he did observe, that in the Crown-Office there was no File for the Postea, nor any for the Distringas. The Postea is always moved for to be brought into Court, and the Distringas is constantly annexed to it; both which were done in this Case. As to the Venire, he did agree, there was a File for that Purpose; and the present Venire was put upon that File, before the former Motion was made. Mr. Bootle on the other Side said, that he would not contend, but it might be sufficient to bring the Postea into Court, and likewise the Distringas annexed to it, that the Defendant might be able to take a Copy of them. But he observed, that in the Proceedings in this Cause there had been a former Distringas, and a Juror withdrawn upon it, so that a Trial upon that Distringas was never had. He said, he submitted it, that the Defendant had a Right to have that Distringas annexed to the Postea as well as the other; accordingly he expressed his former Motion in that Manner, that the Jury-Process might be recorded. The Chief Justice declared his Opinion to be, that the Defendant could not possibly have a Right to have the first Distringas annexed to the Postea, and he believed it was never before imagined in all the several Instances of this Sort, that continually happen at the Assizes. However, if they would have the Opinion of the Court taken upon that Point, they must make a proper Case for it by Affidavits of the Fact. Then as to the present Rule, the Court declared their Opinions to be, that the Postea and Distringas are never filed. Accordingly that Rule was ordered to be amended, and made, that the Venire should be filed, and the Postea, with the Distringas, brought into Court; and then the Court made a second Rule for discharging it. Vide Post.

Goodtitle *and* Pettoe.

Vide ante 10. THIS Matter coming on again, Mr. Reeves argued for the Plaintiff, and said, there were two Questions to be made in this Case; one, whether the Defendant has any Title; and admitting he has not, the second Question will be, whether the Plaintiff has. In Order to shew that the Defendant has none, he submitted it, that the Distinction in the Books was

clear and manifeſt, between Uſes raiſed by Covenants to ſtand ſeiſed to them, and Uſes raiſed by other Conveyances; that in the firſt Caſe a Conſideration is neceſſary to be between the Party claiming the Uſe, and the Party from whom the Uſe is claimed; but in other Conveyances this is not ſo; and ſo is the expreſs Authority of Mildmay's Caſe, 1 Rep. 176. The Conſequence of this, he ſaid, clearly was, that the Uſe could not ariſe to the Perſon, whom the Defendant claims under; becauſe no Sort of Conſideration ariſes from her, which the Covenantor has any Benefit from. The ſecond Queſtion, he did agree, was more difficult; but yet he hoped it would appear, that it intirely fell within the Reaſon of the Caſe before cited, it is ſaid there, that in theſe Covenants to ſtand ſeiſed, an Averment of any Conſideration may be well allowed, though by Matter out of the Deed, provided ſuch Conſideration averred may ſtand conſiſtent with the Conſiderations expreſſed within the Deed, and the Perſon who is to take Benefit of this Conſideration, is aſcertained by the Deed likewiſe. He obſerved likewiſe, that this Rule is declared to be Law in 7 Rep. 40. and in 11 Rep. 25. and if this ſhould be allowed to be Law, he ſaid, it would directly determine the preſent Point; for the Leſſor of the Plaintiff is by Name aſcertain'd in the Deed, and the Conſideration ſtated by the Caſe of his being of the Blood of the Covenantor, is intirely conſiſtent with the Conſiderations that are expreſſed in the original Inſtrument. Mr. Fazacherly on the other Side argued, and ſaid, that however plain the firſt Queſtion may be thought to be at preſent, he believed, upon conſidering it more fully, it would not appear ſo. He ſaid in the Caſe of Dighton and Tomlinſon, which came into this Court upon a Writ of Error, out of the Common Pleas, it was ſtrongly debated upon the Words of a Will, whether an Eſtate given to a Woman for Life, with Power to diſpoſe of the ſame to any Perſon and his Heirs, according to her own Diſcretion, was not a Fee-ſimple in her. It was agreed at that Time, that the giving her ſuch Power, without an expreſs Eſtate for Life only, would clearly have amounted to the Gift of a Fee-ſimple; but as there was a particular Eſtate given her by expreſs Words, the Court were of Opinion there, that the Eſtate given was only an Eſtate for Life. He obſerved, that the Words of Uſes, were to be conſtrued in as free and liberal a Manner as the Words of Wills; and if that was a Point that would bear ſtrongly contending for in that Caſe, he ſubmitted it, that it ought to be allowed in the preſent one, inaſmuch as the Counſel of the other Side inſiſt, that theſe Words, if they ſhould operate barely as a Power, would be abſolutely void. Upon this Argument therefore, the Words of the Uſe relating to the Wife, ought to give her a Fee-ſimple; and if ſo, it was clear there was a good Title found in the Defendant. But beſides this Argument, he ſubmitted it, that there was another, that the Defendant's Title might be well maintained by; and that was, by conſidering theſe Words only to lodge a Power in the Wife to convey theſe Lands to any Body elſe. He ſaid, in 2 Rol. Ab. 784. it is held, that in Conſideration of Money paid by B. a Man may covenant to ſtand ſeiſed to the Uſe of C. and his Heirs;

and

and C. and his Heirs ſhall take Benefit of this Conſideration. If this was ſo, he ſubmitted it, that the Perſon whom the Defendant claims under, might equally take Benefit of the Conſideration ariſing from the Wife. Then as to the ſecond Queſtion, he hoped by conſidering that, that the Caſe would appear ſtill ſtronger againſt the Plaintiff. He did agree, that in Caſes cited out of the 7th and 11th Report, there were thoſe general Expreſſions, that have been mentioned; but the particular Caſes relied upon in thoſe Books for that Purpoſe, by no means warranted them; for one of the Caſes is put of a Uſe limited to a Wife by expreſs Name; the other of a Uſe limited to a Brother by expreſs Name. And he did agree, that in thoſe Caſes a Uſe would well ariſe to the Wife and to the Brother, by Virtue of an implied Conſideration of Love and Affection, equally, as if it was expreſſed. But in the preſent Caſe, the whole Conſideration, relating to the Leſſor of the Plaintiff, muſt be ſupplied by the Averment out of the Deed. And beſides what Objections might be made to ſuch Averments by the Common Law, thoſe Objections were ſtill ſtronger ſince the Statute of Frauds and Perjuries, which declares, that no Truſts and Uſes ſhall be raiſed out of a Deed by Parol. He took Notice farther, that it was not ſtated by that Caſe, that the Covenantor intended the Leſſor of the Plaintiff ſhould have the Remainder of this Uſe, out of any Conſideration of his being of his Blood. For which Reaſon he ſubmitted it, that what was ſtated by the Caſe, in Relation to his being of the Blood, was only Matter of Evidence, that the Covenantor intended he ſhould have the Uſe from that Conſideration: and conſequently the Caſe was ſubject to this Objection equally as a ſpecial Verdict would have been. The Court, upon the whole, declared themſelves well ſatisfied, that the Defendant's Title could not be maintained; becauſe the Words, which he claims under, can only operate by way of a Power in the Wife; and the Perſon, whom he claims under, can have no Benefit from it; inaſmuch as no Conſideration ariſes from her to the Covenantor. As to the ſecond Point, the Court declared themſelves to be under conſiderable Difficulties. The Chief Juſtice and Judge Page were of Opinion againſt the Plaintiff; Judge Probyn and Judge Lee were of Opinion for him. But they all conſidered the Caſe as at Common Law, and likewiſe that the Caſe was well ſtated; accordingly it ſtood over. Vide Poſt.

Perry *and* Corteſoes.

The Time which a Defendant is allowed to plead in.

THIS was a Suit by Special Capias, wherein the Plaintiff had offered to deliver a Declaration de bene eſſe before the Time, which the Defendant appeared in, but Defendant refuſed it; the quarto die poſt for the Defendant's appearing in, was to Day; and now Mr. Fazacherly moved, that the Defendant might have four Days to plead in. He ſaid, he made this Motion more out of a Scruple, which the Defendant's Attorney lay under, than any real Doubt which he had himſelf, in Relation to the Practiſe of the Court in this Reſpect. For he took it to be clear, that

that no Declaration could possibly by the Practice of this Court be delivered to a Man, till he had appeared; and therefore in the present Case the Defendant was of Course intitled to four Days to plead in after his Appearance. Mr. Strange on the other Side argued, and said, that the Practice of the Court of Common Pleas undoubtedly was, that if a Defendant does appear to a special Original or special Capias, his four Days for pleading shall be computed from the Day of the Delivery of the Declaration de bene esse, though before Appearance, and not from the Day which he does appear of. He observed, that if this was so in the Common Pleas, there was equal Reason, that it should be so in the King's Bench. And the Reason in both Cases was manifest; because by the Original or Capias being special the Defendant has as full Knowledge of the certainty of the Cause of Action against him, as he has after he has appeared and the Declaration is delivered to him. He took Notice farther, that if this was not so, though a special Original or special Capias be returnable the very first Return of the Term, it would be impossible by the Course of the Court, that a Plaintiff could go to Trial at the Sittings within Term; by which Means the other Court would have an apparent Advantage of this in the Expedition of their Proceedings. And he said, he was well satisfied, that in Point of Fact, Declarations of this Sort have been delivered of late in many Instances, and Defendants have pleaded within the four Days computed from such Delivery. The Court declared that these special Originals have been but of late Date in this Court, and at first they were only allowed in Suits, that were quare vi & armis. They said, that whatever the Fact may have been, that such Declarations have been accepted, this has by no Means yet been the settled Practice of the Court; and therefore the Defendant had a Right to four Days to plead in from the Day of his Appearance. However they made a Rule, that for the Future the four Days should be computed from the Day of the Delivery of the Declaration de bene esse, both in Proceedings by special Latitat, as well as in Proceedings by special Original.

The King *and* Pool.

What Persons are capable of being elected Members of a Corporation.

ON Rule to shew Cause, why an Information in the Nature of a Quo-Warranto should not go against the Defendant for exercising the Office of Capital Burgess in the Town of New Radnor, not being an Inhabitant at the Time of his Election; Mr. Reeves said, that the Clause of the Charter only declared, that no Capital Burgess should exercise his Office any longer than he is an Inhabitant in the Corporation, which is no express Declaration, that they shall be Inhabitants, at the Time they are elected. And besides, the present Defendant came with his Family and inhabited in the Town before the former Motion was made for the Information. He said, he submitted it, that the Court would now determine this Point

on the Rule for ſhewing Cauſe, and would not put the Defendant to the Expence of a ſpecial Verdict. Accordingly he obſerved, that the Court had determined a Point of much greater Difficulty than this, in the Caſe of the Town of Pomfret, when that Matter came before them in the ſame Manner, as the preſent one. There the Charter required, that no Perſon ſhould be Mayor, unleſs he was an Inhabitant at the Time of the Election. A Perſon came and lodged at an Inn for a Month; and the Court determined that to be a ſufficient Inhabitancy to qualify him for ſuch Election. However the Court made the Rule abſolute; and thought this a Matter proper to be determined in a more ſolemn Way.

Ruſſel *and* Ford.

What ſhall not be ſaid to be a good Plea of Payment before the Commencement of the Action.

IN an Action upon ſeveral Promiſes the Defendant pleaded, that before the Commencement of the Suit, the Plaintiff and Defendant came to an Account, and upon the Balance there was 5 l. found to be owing to the Plaintiff, which was agreed ſhould be paid to one whom the Plaintiff was indebted to; accordingly the Defendant averred, that he did pay it. To this the Plaintiff demurred generally, and the Defendant joined in Demurrer. Mr. Draper now argued for the Plaintiff, and ſaid, that the Reaſon for the Demurrer was, that the Defendant did not aver, that the Money was paid by him before the Commencement of the Action. Accordingly the Court gave Judgment for the Plaintiff.

Holſey *and* Mullins.

How far the Court will not ſtay the Proceedings in one Action till the Coſts of a former are paid.

IN an Action for an Eſcape brought by an Executrix againſt the Marſhal, Mr. Strange moved, that Proceedings might be ſtaid, till ſhe paid the Coſts of a Nonſuit in a former Action upon the ſame Demand, and compared this Caſe to that of a Pauper. But the Court (Chief Juſtice abſent) ſaid, that this Motion has been often made, but never allowed; accordingly it was refuſed in the preſent Caſe.

Corteſoes *and* Munes.

IN a Proceeding by ſpecial Capias, the Addition of the Defendant was nuper de London Mercator; the Defendant demanded Oyer of the Writ, and pleaded in Abatement to it, that he was an Inhabitant of the Pariſh of Mackpelen, *alias* White-Chapel, in the County of Middleſex, at the Time of the ſuing out of the Writ, and that he had not been an Inhabitant in London for four Years before the ſuing of it out; abſque hoc, that he was an Inhabitant of London at the Time of the ſuing of it out. Mr. Fazakerly moved to ſet this Plea aſide. He ſaid, that he did agree, that it was neceſſary to Name the Defendant by the proper Degree or Myſtery, which he was of at the Time of the ſuing out of the Action; but he ſubmitted it, that it was otherwiſe in the Caſe of a Man's Place of Abode, and that in ſuch Caſe the Deſcribing him by a nuper was ſufficient. For this Purpoſe he relied upon the Words of the Statute of Additions, and likewiſe the Comment upon them in 2 Inſt. 669. He ſaid likewiſe, that he apprehended, the Law was ſo well ſettled in this Point, that the Court would relieve upon Motion. Mr. Draper on the other Side argued, that there are Caſes in the Books, which make this Point doubtful; and particularly cited 4 E. 4. 10. But the Court thought proper to ſet the Plea aſide; and accordingly made a Rule for that Purpoſe.

When a Defendant pleads in Abatement, that he has not his proper Addition given him, how far the Court will ſet aſide a Plea of that ſort upon Motion.

The King *and* Franklyn.

MR. Bootle now moved, that the Verdict obtained in this Cauſe might be ſet aſide, for that the Jury, which tried it, had no Authority. The Iſſue, he ſaid, was joined in Eaſter Term laſt, and a Venire ſued out, returnable in Trinity Term. In Trinity Term the Attorney General applied to the Court for a ſpecial Jury in Purſuance of the Statute paſſed in 3 Geo. 2. which was granted him; and the Rule was drawn up in this Manner, that there ſhould be a Jury ſtruck by the Maſter in the Form that ſpecial Juries are, ad triandum exitum in hac cauſa ad Seſſionem de Niſi prius poſt hunc Terminum. The Cauſe came on accordingly to be tried at the Sittings after that Term; but a Remanet was entred pro Defectu Juratorum; and a Vic' non miſit breve entered upon the Diſtringas, that was returnable the firſt Return in Mich. Term. A ſecond Diſtringas was afterwards ſued out, teſted in that Term, and returnable in this, with a Clauſe of Niſi prius in it for the Sittings after that Term. The Cauſe then accordingly came on again to be tried at that Sittings; and was tried by twelve of the ſame Panel that were returned upon the firſt Diſtringas, being Part of the Twenty-four ſtruck by the Maſter, though not the ſame Perſons that were actually ſworn, when the Remanet pro Defectu Juratorum was entered. This, he ſaid, was the State of the Fact, and he ſubmitted it to be irregular; for that the Time, in which the Court gave the Attorney General to try this Cauſe

Vide ante 88.

in

in by a ſpecial Jury, was expired; and conſequently this Cauſe ought to have been tried in the common Way by Balloting, as the Statute of 3 Geo. 2. directs. He obſerved, that before this Act, ſpecial Juries were never granted in this Court, but by Conſent; though in the Courts of Common Pleas and Exchequer they were frequently without it. That Statute allows them to be granted in all Informations and Indictments for Miſdemeanours, as well as in Civil Cauſes. But in all Caſes, except in thoſe of a ſpecial Jury, the Trial at Niſi prius muſt be by balloting, as the Statute directs. The Queſtion therefore is how the preſent Trial can be ſupported by Virtue of the Rule for the ſpecial Jury. The Rule was for trying it within a limited Time; and the Trial has been at a Time beyond what was limited. He obſerved, that it would be no Objection to ſay, that this Miſtake ought to have been inſiſted on at the Trial, and taken by Way of Challenge; for where any Miſtake is diſcovered, that ſhews that either the Judge or Jury had no Authority to try the Cauſe, ſuch Miſtake may be ſhewn at any Time. And theſe Exceptions have been allowed and taken after a Trial, where there has not been a ſufficient Number returned upon the Panel, as the Law directs, though there have been enough returned to try the Cauſe with. And therefore where Twenty-three only have been returned upon the Panel, and Twelve of them ſworn, that has been held to be an Exception to be taken at any Time. For this Purpoſe was cited Sav. 124. 5 Rep. 37. 1 Cro. 278. Roll's Abr. 800. Though he did agree the Statute of Jeofails had now cured that. He ſaid, it might be difficult poſſibly to ſhew Precedents in this Court, where new Rules for ſpecial Juries have been granted, when ſuch Accidents have happened; but in the Common Pleas they have frequently; accordingly he had two Rules to produce of this Sort, made in that Court between Peirſon and The Biſhop of Cheſter. He obſerved farther, that in theſe Informations Defendants are always under great Diſadvantages by Reaſon of the Difficulty there is to get Copies of the Proceedings. Anciently, he ſaid, he has been informed the Poſtea uſed to be brought into Court and filed in Civil Cauſes. Now that is not done; but ſtill a Copy of the Poſtea is never denied in thoſe Caſes. In Criminal Proceedings the Officers of the Court will never allow a Copy of the Poſtea to be made; but how legal this was, he ſubmitted it to the Court. A hard Caſe, he obſerved, that at leaſt it was; becauſe it is well known, that theſe Informations are often altered by Order from the Attorney General with the Allowance of a Judge. He then produced Office-Copies of the two Rules in Court made in the Common Pleas, and likewiſe Affidavits of the Fact, which his Motion was founded upon. But the Attorney General objected to this in Point of Evidence; and ſubmitted it, that the Office-Copies of the Rules ought to be verified by Affidavits by Reaſon that they are made by Officers of another Court; and as to the Fact, viz. which of the Jurymen were ſworn, that ought to be taken only from the Record. Then as to the giving Copies of theſe Records, he ſaid, the Defendant had had Copies

of the Venire and Diſtringas, neither of which he was intitled to. But to have a Copy of the Poſtea, he believed, was never before attempted on the Crown-Side. Then as to the amending theſe Informations by Order from him, that is never done, but where the Miſtakes are very ſmall; in other Caſes the Court is always moved. The Court, however, thought theſe Office-Copies ſufficient Evidence, without Affidavits to prove them to be true Copies; and that ſuch Office-Copy is always credited, when an Officer from the Court of Common Pleas attends here with a Rule of that Court to amend the Record ſent up by a Writ of Error, by the Tranſcript of it in that Court. And as to the other Objection, that the Fact of the Jury's being ſworn ought to be taken from the Record, and not from Affidavits, the Counſel of the other Side anſwered it, by ſaying, that this was a Motion to ſet aſide the Verdict, and not a Motion in Arreſt of Judgment. Then as to the giving Copies of the Poſtea in the Crown-Side the Court ſaid, they were informed by their Officers, that this is never allowed of. Accordingly theſe Office-Copies were allowed of, and the Affidavits relating to the other Fact were read likewiſe. And then the Attorney General prayed Time till Tueſday, to anſwer the principal Objection, which was accordingly granted him. The King's Counſel came at the Day appointed, to anſwer the Objection. They ſaid, the Objection was, that the Jury had no Authority to try the Cauſe; and the Reaſon given was, becauſe the Rule of Court gave them their Authority; and that Rule of Court was expired before they acted under it. The Anſwer, which they beg'd Leave to offer, was, that the Rule of Court is not the Thing which gives them their Authority, but the King's Writ of Venire facias. The Rule of Court is only an Authority to the Officers to appoint the Jurors; but the Venire facias is the Authority of the Jurors to try the Cauſe. If therefore there ſhould be any Defect in the Rule, the Venire facias is ſtill an Authority to the Jurors to try the Cauſe; for which Reaſon it cannot be ſaid that they had no Authority. But in Reality they obſerved, that the Rule itſelf was ſufficient, without any Enlargement or Amendment. And that, becauſe the Words of the Statute of 3 Geo. 1. expreſly are, that the Jurors appointed by the Officer in Purſuance of the Rule, ſhall be the Jurors which the Sheriff ſhall return upon the Venire, and they ſhall try the Cauſe. The Jurors were ſtruck by the Maſters in Purſuance of the Rule; and the Act ſupplies the reſt. Then as to what Objection may be made from the Words in the Rule ad triandum Exitum, &c. the ſame Objection might be made to all the common Rules, where the Words are, ita quod trietur ad proximas Aſſiſas; but ſuch Objection was never attempted. In the Rules drawn up for a View, this Clauſe is conſtantly inſerted; but where a Remanet is entred, a new Rule is never applied for. And the ſame is it of Rules for Special Juries in Trials at Bar. They ſaid too, that they were informed the conſtant Practiſe is ſo in the Court of Exchequer, even in ſpecial Juries granted for Trials at Niſi prius. As to the Practice of the Court of Common Pleas in this Reſpect, they ſaid, they did agree it to be ſo; but it has been ſo no longer than the Statute of 7 & 8

Will. 32. and that depends upon a Reaſon, which the preſent Caſe will be not at all affected by. That Statute provides, that in any Trial intended to be had at the Aſſizes, if the Plaintiff or Demandant ſhall not think proper to proceed then, he may bring the Cauſe down to Trial at any other Aſſizes, by Venire facias de novo; and upon that Venire a new Panel ſhall be returned. It is no Wonder then, that in the Common Pleas, where Special Juries were frequent before the Statute of 3 G. 2. if a Special Jury did not try the Cauſe within the Time preſcribed by the Rule, another Rule was moved for; becauſe another Venire was to be, and another Panel returned upon it. But the Statute, they ſubmitted it, did not extend to the Crown. And in Fact, no new Venire has ever been granted in the Caſe of Crown Proſecutions, unleſs where the firſt iſſued irregularly; and in thoſe Caſes, and no other, a Venire de novo always iſſued before that Statute. They obſerved farther, that if this Objection could ever have been good, it ought to have been taken by way of Challenge to the Array, at the Time of the Trial; and the Objection comes now too late. The Reaſon for this, they ſaid, was evident; becauſe the Objection ariſes from a Matter of Fact, and is an Objection to the whole Array of the Panel; which therefore ought to have been tried and judged of by Eliſors choſen for that Purpoſe. In the preſent Caſe too there was a ſtill ſtronger Reaſon to ſhew that this Objection was too late; becauſe the Defendant actually challenged one of the Polls at the Trial; and therefore this Objection, which is a Challenge to the Array, cannot now be made. For this Purpoſe was cited 3 Cro. 574. and likewiſe an Anonymus Caſe, 13 Will. 3. That was an Action for Words, and the Defendant obtain'd a Rule for a good Jury; a common Jury was however returned; and for this Reaſon he moved for a new Trial. But, becauſe he had made a Defence, the Court refuſed the Motion. This was the Subſtance of what was urged by the King's Counſel in Anſwer to the Objection, and the Court gave the Defendant's Counſel till Thurſday next, to reply. The Defendant's Counſel came at the Day, and ſaid, that they hoped, the Anſwers given by the King's Counſel would not be thought ſufficient. They took Notice, that the King's Counſel would have it imagined, that the Authority of this Jury depended wholly upon the Venire facias, and in no Part upon the Rule; but they ſubmitted it, that if it was not for the Rule, the Venire facias to return twenty-four only, would be erroneous; and conſequently their Authority muſt depend upon the one, as well as upon the other. The Rule therefore muſt be regarded, and it muſt be ſeen, whether that can give the Jury, that tried the Cauſe, the leaſt Authority for doing it. They ſaid they would not go over the Objection again, which they before relied upon, taken from the Words of the Rule; but ſubmitted it, that the Court could not have made a Rule, by which the Jury ſhould have been obliged to continue attending any longer Time than the next Sittings at Niſi prius; and if they could, the Act of 3 G. 1. might be wholly evaded. They obſerved, that the two great Deſigns which were aimed at by that Statute, were to prevent the Jury's being known before the Trial, as much as poſſible, and likewiſe their being bound to

long Attendances from one Aſſizes to another. But they apprehended, that if the preſent Practice ſhould once prevail, theſe two great Deſigns of the Legiſlature would be ineffectual; for according to this Doctrine, theſe Juries might always be forced to continue upon the Panel, till the Parties ſhould think proper to make an End of the Cauſe; and by this Means an Opportunity would be offered of applying to them in the mean Time, and of continuing their Attendance to their great Vexation. Theſe Objections, they ſaid, they begged Leave to offer againſt the preſent Rule; and now they deſired to conſider the Objections inſiſted on by the other Side againſt a new Rule. They obſerved, that they were founded upon this, that a Venire de novo could not be awarded. But they apprehended, that it might by the very ſame Reaſon, as a new Diſtringas was. In Order for the iſſuing that, they obſerved, that it was neceſſary that an Entry ſhould be made upon the Roll, quod Vicecomes non miſit breve, which was a direct Falſity. For he did return his Writ, and eleven of the Jury were actually ſworn in Purſuance of it. But by the ſame Reaſon, that that was done for the awarding a new Diſtringas, the like might have been done for the awarding a new Venire; and then the whole Intention of the Legiſlature would have been preſerved. In order too to ſhew that the like has actually been done, they cited 5 Rep. 41. Allen 18. 2 Rol. Ab. 720. and Hob. 130. They ſaid farther, that the Words quoted out of the Statute of 3 Geo. 1. in order to ſhew that ſuch ſecond Venire could not be in this Caſe, were not as were cited. For they are, that the forty-eight in the one Caſe, and the twenty-four in the other, ſhall be the Jury returned to try the Cauſe, and not the Jury which ſhall try it. And this Obſervation, they ſaid, the Chief Juſtice made upon the Act at the Sittings at Niſi prius, when this Cauſe was firſt intended to be tried. A Tales there was prayed by the King's Counſel pro defectu Juratorum; the Defendant's Counſel urged, that it could not be by Law, and principally relied upon this Part of the Act; but the Chief Juſtice then over-ruled them, and ordered that a Tales ſhould be granted; indeed it was not had; becauſe the Attorney General conſented then to withdraw a Juror. They obſerved farther, that the Counſel for the King had inſiſted, that the Defendant was too late in this Objection, in Point of Time. But to this they ſubmitted it in the firſt place, that this Exception could not be taken by way of Challenge; and for this Purpoſe cited 2 Ven. 58. and farther relied upon the Authorities before cited by them; as being directly in Point. The Court then debated the Matter a little between themſelves; and ſaid, that they would give their final Opinion on Monday. Vide Poſt.

The King *and* The Inhabitants of Drakemaſt.

ON Rule to ſhew Cauſe, why an Aſſeſſment of a Poor's Rate ſhould not be returned upon a Certiorari, Mr. Reeves ſaid, that this Aſſeſſment was appealed from by one of the Inhabitants that were aſſeſſed, and the Court of Seſſions only made an Order relating to that Man; for which Reaſon they were not Vide ante 83.

not obliged to return upon the Certiorari, any Thing more than that Order, which they have done; and as to the other Part of the Rate, that the Seſſions have not meddled with; and conſequently it is no Part of their Records, nor any Act of that Court. Serjeant Birch on the other Side anſwered, that the Words of the Certiorari requires the Juſtices at their Seſſions to ſend up all Orders concerning the Pariſh of Drakemaſt, cum omnibus ea tangentibus; the Order which they have ſent up, takes Notice of a Poor's Rate which had been appealed from; for which Reaſon he ſubmitted it, that they had a Right to ſee the Rate itſelf, which the Order was made upon. He obſerved, that where an Order of two Juſtices for a Removal, is appealed from to the Seſſions, and a Certiorari is ſent down to the Seſſions, requiring them to return up all Orders, the original Order is always returned, as well as the Order of Seſſions made in Purſuance of it. He took Notice too, that an Appointment of Overſeers is removeable up by Certiorari; and in general ſaid, that all Acts coming before the Seſſions are removeable up, unleſs where the Poor in the mean Time will be left in a ſtarving Condition. He did agree, that in the Caſe of The King and Egleſhall, Mich. 13 Geo. 1. where the Examination of Witneſſes was returned, the Court did declare, that they could do nothing upon that; but that, he ſaid, was barely Matter of Evidence. And in the preſent Caſe he ſaid, that there was more particular Reaſon to remove up this Rate, than generally happens; becauſe he had an Affidavit to produce, that the Rate was ſigned only by one Juſtice. The Court would not allow the Affidavit to be read; but as to the principal Point, Judge Page ſaid, that he did believe Certiorari's have removed Aſſeſſments of this Nature; otherwiſe he could not ſee how the Court could have given ſo many Opinions as they have done, about the Legality and Illegality of them. He ſaid too, that according to his Remembrance, a Rate of this ſort was removed up in the Caſe of The King and Tawney, and likewiſe in the Caſe of the Pariſh of St. James. He obſerved, that in the laſt Caſe the Certiorari was filed upon the Return; and then indeed the Court were under ſome Difficulties, whether they could ſend the Rate back or not, in order to be levied upon the Inhabitants. Judge Probyn and Judge Lee ſeemed too to be of the ſame Opinion; but Judge Lee ſaid, that he did not take this to be ſo ſtrong a Caſe, as that of the Order of two Juſtices before cited; becauſe the Order of two Juſtices is a judicial Act; but this is not ſo. And therefore in Mandamus's requiring two Juſtices to ſign theſe Rates, it has been determined, that they can make no Return in Excuſe for not ſigning them. However, as the Chief Juſtice was not in Court, they ſaid, it might be proper to move this again; and therefore enlarged the Rule, directing their Officer in the mean Time to ſearch for Precedents. Serjeant Birch then ſaid, that he had found that the Rule for the Certiorari, which had removed up the Order of Seſſions, was drawn up wrong; for it was, that a Certiorari ſhould go to remove up an Order, quaſhing a Poor's Rate; but he obſerved, that that Order had only quaſhed it in Part, and not in the whole; for which Reaſon he moved, that it might be amended. But the Court

ſaid, there muſt be then a new Rule made for there going a new Certiorari. Accordingly the Serjeant moved for ſuch Rule; and it was granted. Vide Poſt.

Floyd *and* Jones.

UPON a Writ of Error on a Judgment in the Common Pleas in an Action for Words, Mr. Strange took an Exception to one of the Counts where the Words were, ſpeaking of the Plaintiff, I will have him tranſported for Perjury and Forgery. He ſaid, the Import of theſe Words were no more, than that the Plaintiff deſerved to be tranſported. And he obſerved, that in Yel. 90. and likewiſe in Rol. Ab. 44. it is held, that to ſay of a Man, that he deſerves to be hanged is not actionable. But Judge Page and Judge Probyn ſaid, that they believed it was never determined, but to ſay of a man, that he deſerved to be hanged for robbing upon the High-way, would be actionable. Beſides too, there were ſpecial Damages found in the preſent Caſe. Accordingly, the Chief Juſtice abſent, the Jugment was affirmed.

How far the charging a Man with Perjury ſhall be ſaid to be actionable.

The King *and* Heber.

ON Rule to ſhew Cauſe, why an Information ſhould not be granted againſt the Defendant, who was a Juſtice of Peace, for convicting two Perſons, Hargrave and Lancaſter, for killing the Game without a Licenſe; the Complaint in Relation to Hargrave was, that the Defendant ſent his Warrant for him, by which he was arreſted, without any previous Information upon Oath; and when Hargrave came before him, and was convicted by him, the Defendant took a Note for the Money of Hargrave, without ſending any Perſon to inquire whether there was not a ſufficient Diſtreſs upon the Premiſſes; and beſides, after this the Defendant tore the Note, and then made out an Order of Diſtreſs, which was afterwards executed. The Complaint againſt him farther in Relation to Hargrave was, that the Defendant being informed, that Hargrave had ſpoke diſrepectfull Words of him for this Tranſaction, ſent his Warrant for him to bring him before himſelf; ſo that in that he acted both as Judge and Party. The Complaint in Relation to Lancaſter was, that he happened to be preſent at the Time the Defendant was making his Conviction againſt Hargrave; and upon that the Defendant took an Opportunity of convicting him too, without giving him any previous Summons, by which he might prepare himſelf for his Defence. The Court, Chief Juſtice abſent, were very clear, that an Information ought to go againſt the Defendant for his Behaviour in Relation to Lancaſter; for they ſaid, it was a moſt known Rule of common Juſtice, that no man ought to be convicted of an Offence, till he has previous Notice given him of the Charge, that he may be prepared to put in his Anſwer to it. Accordingly the Rule was made abſolute, as to him. As to that Part of the Complaint, re-

Vide ante 77. How far the Court will grant an Information againſt a Juſtice of Peace.

lating to Hargrave, whereby the Defendant was charged with acting both as Judge and Party, the Court seemed to agree, that was regular enough. For the speaking disrepectfull Words of a Magistrate is a publick Offence, which any Magistrate is a proper Judge of. But as to the two other Matters relating to Hargrave, Judge Probyn said, that he should have thought the Rule ought to be made absolute against the Defendant, were it not that Hargrave had brought an Action for this matter, and by that had determined his Election. He said, a Warrant deprives a Man of his Liberty; and therefore a Summons ought only to issue, and not a Warrant without an Information upon Oath. He said likewise, that the Justice ought not to have accepted barely of the Party's Note, without first inquiring of the Premisses, whether there was a sufficient Distress or not. But when he had done so, he ought to have been contented with it, and should have taken no other Execution. But the other two Judges declared their Opinion, that an Information ought not to have went against the Defendant, for any Matter of Complaint relating to Hargrave, though Hargrave had not brought an Action. Accordingly the Rule was discharged as to that Matter.

The King *and* Pownal.

How far the Court will grant an Information for a Challenge.

ON Rule to shew Cause, why an Information should not go against the Defendant for writing a Letter to one Mr. Willis, supposed to amount to a Challenge. The Court now declared their Opinions, that it did not; accordingly were discharging the Rule. But then Mr. Fazacherly said, that he submitted it, the Letter would at least amount to a Libel; for in it the Defendant calls Mr. Willis a Scoundrel. He observed, that in the Case of The King and Pilbrough, the Court granted an Informamation against him for calling Mr. Barnardiston a Fool, and a Rascal, in a Letter which he sent to him; and he submitted it, that it was as great an Offence to call a Man a Scoundrel. Mr. Abney on the other Side said, that he believed the Court had never gone so far in any Case, as they did in that of The King and Pilbrough. But still, he said, taking the whole of that Letter together, which was sent to Mr. Barnardiston, he took it, there were Words of a greater Insult, than barely calling a Man a Scoundrel. But if the Court had any Doubts with themselves in that Point, he prayed a farther Day for answering the Gentlemen of the other Side, as to that. For now, he said, they have thought of a quite different Offence to maintain their Rule upon, from what they thought of at the Time they obtained it. Accordingly the Court enlarged the Rule to a farther Day. Vide Post.

—— *and* Glover.

THE Plaintiff having brought twenty-eight Actions against as many Subscribers of a Policy of Assurance, Serjeant Eyres moved, that the Plaintiff's Proceedings might be stayed in all these Actions, but one, upon the Defendants being all willing to enter into a Rule, that the Event of their several Actions shall depend upon the Event of the Trial of this one. He said, he was apprehensive the Plaintiff would object possibly, that the Sums which the several Defendants have subscribed for were different, and consequently the Plaintiff was intitled to different Damages; but he observed, that those Damages might be proportioned according to the different Subscriptions; and therefore he had got an Authority from the several Defendants to consent likewise, that if the Trial shall go against that one Defendant, whom the Plaintiff shall pick out, the Defendants will enter into a Rule, that the Damages, which they shall be answerable for, shall be proportioned according to their several Subscriptions. Mr. Reeves on the other Side said, that he had no Authority to consent to such Rule. Accordingly, Chief Justice absent, the Court declared, they could do nothing in it.

How far the Court will not stay Proceedings in one Action, notwithstanding the Defendant agrees to submit to the Event which shall be in another.

Perry *and* Cortesoes.

MR. Fazacherly moved to discharge a Rule, which required the Defendant to plead such a Plea as he would stand by. He said, that before the Plaintiff had obtained this Rule, he had made up the Paper Book, given a Rule upon it for the returning it, by which it is always understood, that the Defendant should join Issue, or demur; and the Defendant had actually demurred. For which Reason he submitted it, that the Rule, that the Plaintiff had obtained, was intirely irregular. But the Court said, a Demurrer is a Plea. Accordingly refused to discharge the Rule.

How far the Court will not require a Defendant to plead such a Plea as he will stand by.

Catherol *and* Cowper.

AN Action having been brought against the Defendant as Collector of the Turnpike between Chelsea and Fulham, and the Plaintiff having been nonsuited at the Trial, Mr. Abney said, that the Defendant was intitled to treble Costs by the Statute of 12 G. 1. which created this Turnpike. But he observed, that the Action, which the Plaintiff had brought, was a common Action, not appearing at all upon the Face of the Record to have been brought upon this Statute; and therefore he submitted it, that it would be Error in the Court to give treble Costs, without a Special Entry being first made upon the Postea, that it appeared upon the Trial, that the Action was brought upon this Act. And therefore he moved that such Entry might be made. He did agree, that such Costs are generally

When a Defendant is intitled to treble Costs, what is the proper Method of his taking Advantage of them.

ly given upon a Certificate of a Judge; but that is only done in such Cases, when Statutes have given Power to Judges to certify. And that he observed was the Case upon the Statute of 7 Jac. 5. made perpetual by 21 Jac. 12. upon 22 Car. 2. 9. 8 & 9 W. 11. and 4 & 5 W. 18. But the very Thing which he now prays, he said, was done in the Case of The King and Poland, Pasch. 3 Geo. 1. The Defendant was there indicted on the Statute of 5 Elizabeth, for exercising the Trade of a Glover, without having served a legal Apprenticeship. On Evidence it appeared, that he was a Soldier, and had served in the late Wars; by Reason of which he was intitled to set up any Trade within the express Words of the Statute of 9 W. 3. accordingly he was found Not guilty. Upon that Serjeant Cheshire said, that the Statute of 9 W. 3. gave the Defendant treble Costs; and therefore he prayed, that such an Entry might be made on the Postea, as is desired in the present Case; and it was granted him. He said likewise, that Serjeant Cheshire in his Motion cited the Case of Bateman and Wallis, Trin. 9 W. 3. where the same Thing had been allowed once before upon that Statute. Mr. Fazakerly on the other Side argued, and said, that he submitted it, the treble Costs in this Case could only be allowed upon a Certificate of the Judge that tried the Cause. It is well known, that it is the constant Practice of the Assises to apply to a Judge to certify, without at all regarding whether any Statute has given the Judge such Power or not; and he apprehended, such Certificates were always credited by the Court above, as being the proper Evidence of what happens upon the Trial, and does not appear upon the Record. But he submitted it, that the Defendant was too late now to take this Remedy; and consequently too late to have any Remedy at all. Certificates of this Sort, he observed, are constantly moved for to be made by a Judge of Assise, as soon as the Cause is tried. In the Case of The King and Mott, Mich. 1 Geo. 2. an Application was made to a Judge at his Chamber to certify; it was argued there by Counsel on both Sides, whether he had a Right to do it now or not; and upon Conference with many of the Judges, he at last declared his Opinion to be, that he had not. Upon a Bill of Exceptions between Wharton and Marriot in the Court of Exchequer, it was determined that that could not be signed but by the Judge in open Court, as soon as the Cause is tried. And the same was determined in the Case of Carve and Wright, afterwards in this Court. He said, as to the Case of The King and Poland, which the other Side has relied upon, that might very well be allowed for Law, without any Ways affecting the present Case. For that was an Indictment; and therefore it would have been Error to have given any Costs without a special Entry. But here, he said, in every common Case the Defendant is intitled to some Costs; and whether those Costs are trebled or not, need not appear upon the Record. The Court declared, that they saw no Reason, why the Master could not ascertain these Costs upon Affidavits; and therefore made a Rule to shew Cause for that Purpose. And Judge Lee said, though in general Cases a new Trial is granted only upon

the Certificate of a Judge; yet in the Case of Lord Chief Justice Prat's dying before such Certificate could be made, the Court granted a new Trial upon Affidavits. Vide post.

The King *and* Bell.

How far the Court will not quash an Indictment by Reason that the Offence contained in it is too great for that Purpose.

AN Indictment having been found against two Constables jointly and severally for disobeying an Order of Sessions, Motion was made to quash it; because there ought to have been several Indictments. But the Court said, they thought this Offence too great to quash an Indictment for it; and therefore left them to their ordinary Remedy by Demurrer.

Hart *and* Harrison.

Scac. ON Motion for a new Trial upon an Issue directed out of the Equity-side of the Court of Exchequer; because the Defendant was now prepared with better Evidence, than he could be at the Time when the Cause was tried; the Court declared, that that never should be any Reason with them for granting a new Trial upon such Issue, any more than upon a common one. And Baron Carter said, that if any such Issue should come to be tried before him, with Directions from a Court of Equity to admit Evidence, which was not legal, he would never comply with such Direction.

Maynard *and* The Manucaptors of Harvey.

MR. Filmer came now to shew Cause, and said he did agree, that this was a Judgment against Bail by two Nihils only, and not upon a Scire facias; but yet he did submit it, that the Court would not relieve in a summary Method. He said in Salk. 264. Lord Chief Justice Holt declared, that upon two Nihils the Court will relieve on Motion, unless where the Party has a Release to rely upon, or some such Matter of Fact. Which is a direct Admission, that where the Party has a Matter of Fact to be relieved upon, he shall not be relieved on Motion. Now this, he observed, was directly the present Case. For the Bail alledge, that the Principal died before the Suing out of the Capias ad Satisfaciendum. He said likewise, that in Skin. 120. there was another strong Case to the same Purpose. But the Court declared, that they thought the Case in Salk. must be understood, that the Court will not relieve on Motion, where the Fact is controverted; but here there are Affidavits on one Side, and no Affidavits on the other; and therefore the Fact must be taken for granted. Accordingly they made the Rule absolute.

Vide ante 88.

Anonymus.

The Time which a Person is allowed to put in his Traverse to a Return to a Mandamus.

A Return to a Mandamus having come in last Term to swear in an Officer of the Corporation of Limington, Mr. Strange moved, that the other Side might be obliged to put in their Traverses to this Return before the last Day of the Term, in order that he might have an Opportunity to move for a Trial at Bar. He said, upon these Returns the Party has it in his Power to traverse every distinct Fact of it; and he was informed, the other Side intended to do so in the present Case. For which Reason there would be a direct Necessity for trying this Cause at the Bar; but in order to prevent their doing this, the other Side has resolved not to put in their Traverse to it till the last Instant of the Term. He said, if his Motion could not be granted in this Way, he would desire to turn it another; and that was to move for a Trial at Bar now, though the Issue was not joined. He observed, that in Ejectments such Motions were frequent; yet there the Tenant may plead Antient Demesne, or demur. But the Court said, that they could not restrain the Time, which the Law gave the Defendant to put his Traverse in. And as to the Case of the Ejectment, that was peculiar to itself. Accordingly both Parts of the Motion were refused.

The King *and* Franklyn.

Vide ante 88.

THE Chief Justice now delivered the Resolution of the Court. He said, they were unanimously of Opinion, that the Cause was tried by a Jury that had a Right to do it; and therefore the Verdict ought to stand. The Reason, upon which they had founded this Opinion, he declared, was, that the Case of special Juries was a Case intirely without Alteration made in it by the Act; and left as it was at Common Law. At Common Law there could have been no Occasion to have had a new Rule. The Rule does not give the Jury their Authority to try the Cause, but the Distringas; and besides there are no conditional Words in the Rule to confine the Time of Trial to the Sittings after Trinity Term; for those Words pro triatione, &c. only shew, that the Intention of the Court was to try it then. He said farther, that they were of Opinion, no new Venire could have been in this Case. That the Statute of 7 & 8 W. 3. does not extend to this Case, was manifest. And by the Common Law before that Statute no new Venires went in Cases of this Nature. For these Reasons, he observed, it was clear, that the Exception taken by the Defendant was not good in Substance; and therefore there was no Occasion to determine, whether it could be taken in Point of Time. The Attorney General then prayed, that the Defendant might be committed. He said, he might have prayed this, when the Defendant made the Motion, which he did; and these Things have been allowed even at the Day of

Niſi prius; as the Chief Juſtice ſaid, was done in the Caſe of Mr. Bedford. Accordingly the Court ordered the Defendant to be committed in the preſent Caſe. Mr. Bootle at the ſame Time ſaid, that he had an Exception to offer in Arreſt of Judgment, but deſired Time till to Morrow for arguing it, in order that he might be the better prepared. To this the Attorney General obſerved, that the Defendant had a Right to offer what Exception he would in Arreſt of Judgment, even at the Day the Judgment of the Court is prayed againſt him, and that after Judgment ſigned in the Office; which Mr. Maſterman confirmed. For which Reaſon the Attorney General ſaid, that he would have the Defendant brought up by Rule of Court to Morrow, and would then move for Judgment againſt him; and at the ſame Time the Defendant's Counſel might take their Exception. The next Day this was accordingly done. The Exception, taken by the Defendant's Counſel, was, that the Rule for the ſpecial Jury ought to have been entered upon the Roll in the Nature of a Suggeſtion, to give Authority to the Awarding of this ſpecial Diſtringas. The Words of the Act, they ſaid, were general, that a Jury ſhall be returned according to the balloting Clauſe, unleſs in the Caſe of a ſpecial Jury. This Jury therefore ought to have appeared upon the Record to have been a ſpecial one, in order to have taken this Caſe out of the general Words in the Act. But as it ſtands upon the Record, this is juſt as every common Jury was before the Act. Records, they ſaid, ought to be perfect in themſelves; and every Fact, which is material to the Judgment, ought to be entered upon them. No Proceſs can iſſue on a Record, but there muſt be an Award of it upon the Roll; a Day is given there for the Party's Appearance; the Death of one of the Parties is always there taken Notice of; in Treſpaſs quare vi & armis an Entry is there made quod nihil de fine, quia pardonatur; in the Caſe of a Tales an Entry is there made, that it was ſecundum formam Statut'; of the awarding a Niſi prius, it is the ſame; and ſo in all Motions for pleading Double Notice is taken upon the Record, that this is done cum Licentiâ Cur' ſecundum formam Statut'. To this Purpoſe was cited Yelv. 213. Brown. 114. 2 Cro. 207. They obſerved farther, that the Caſe might have been, that there was no Rule for a ſpecial Jury; if there had been none, they thought it would be very extraordinary to ſay, that this Judgment ought not to be reverſed upon a Writ of Error. What Method then can be taken for the reverſing ſuch Judgment upon ſuch an Exception? If this Method cannot, which is at preſent contended for, by appealing to the Record, whether there is ſuch an Entry or not; it muſt be ſaid, that this Matter ſhall be tried by Inſpection of the Rule itſelf. But ſuppoſe there had been two Proſecutions againſt the preſent Defendant to have been tried the ſame Term, both by a ſpecial Jury, and but one Jury ſhould have happened to have been moved for. On the Aſſignment of ſuch an Error the Rule of Court would be produced between The King and Franklyn; and no Averment could be had to determine in which of the Cauſes this Motion was made. The King's Counſel on the other Side anſwered, that the Act of Parliament

liament has appointed, that these special Juries shall be granted upon Motion; for which Reason, if a Trial should be had by such a Jury without a Motion, an Application ought to have been made to the Court for setting aside the Trial for Irregularity. In the Common Pleas before this Act this was the constant Method of taking Advantage of such Exceptions; and undoubtedly this continues to be so at this Day. For which Reason it would be very strange to suppose, that the Legislature intended, that there should be a different Method of Proceeding in this respect in one Court from what there is in another; especially when the Act expressly declares, that the awarding special Juries was a Thing doubtful in the Courts of Westminster-Hall; and makes no Difference between one Court and that of another. The Court declared their Opinions to be, that this Exception ought not to be allowed. The Reason, they said, which influenced them to over-rule the former Exception would likewise influence them to over-rule this; and that was, that the Case of special Juries is in these respects intirely left as it was at Common Law. The Distinction therefore, which seemed to them obvious in Relation to Entries upon Records, was, between those Cases, which the Legislature allowed to continue unaltered, and those which the Legislature thought proper to alter; that, where the Legislature allows a Thing to continue as it was, there is no Occasion to take Notice of such Allowance by a secundum formam Statut', though the Thing does appear upon the Record; but where the Legislature has made an Alteration, and that does appear upon the Record, there must be Notice taken of this Alteration upon the Record by a Secundum formam Statut'. Accordingly the Court gave Judgment for the King. Vide post.

The Bishop of London *and* The Mercers Company.

Vide ante 64. THE Chief Justice delivered now the Resolution of the Court. He said, the Plaintiffs have set forth in their Declaration, that the Church of St. Mary Mildred and the Church of St. Mary Colechurch were antient Churches within the City of London, and burn'd down by the great Fire. That there was an Act passed 22 Car. 2. for the uniting these Churches amongst others; by which it is provided, that the Patrons of that Church, which was of the greatest Value at the Time of the Act, shall first present, and so on alternatively. That the King was Patron of the Church of St. Mary Mildred; and that the Mercers Company were Patrons of the Church of St. Mary Colechurch; and that the Church of St. Mary Mildred was of the greatest yearly Value. They then set forth, that at the Time of the Fire the Church in Question was full of one Richard Peringchief, Doctor of Divinity; that after the Act King Charles 2. presented to these two Churches Richard Peringchief; that the Churches became vacant by the Promotion of the said Richard Peringchief to a Bishoprick in the Time of King William; by Means of which King William granted them in Commendam to one Britton; that Britton died, by Reason of which

which it belonged to the Plaintiffs to preſent; and accordingly they did preſent one Martin, who afterwards reſigned; that the late Queen preſented one who died; and ſo it belongs to the Plaintiffs now to preſent. The Defendant Lewen by his Plea admits, that the Church was vacant at the Time King Charles 2. preſented Dr. Peringchief, and that Dr. Peringchief was admitted, inſtituted and inducted; but inſiſts that the Plaintiffs were Impropriators of the Church in Queſtion at the Time of the Act; abſque hoc, that they were Patrons. And upon this Iſſue is joined. The Jury have found a Verdict for the Plaintiffs. Upon this Record, he obſerved, that the ſingle Matter, now ſtanding for the Opinion of the Court, was, whether the Objection, taken to the Form of the Declaration, was of ſuch Weight, as by Means of it the Plaintiffs could not recover. The Objection, he ſaid, was, that in the firſt place it is not ſet forth, that the Church was vacant at the Time King Charles preſented; and in the next Place it is not averred, that the Preſentee was admitted, inſtituted and inducted; ſo that what the King then did does not appear to be the ſatisfying his firſt Turn; and conſequently he had a Right to preſent when the Plaintiffs firſt preſented; which would alter the ſubſequent Turns likewiſe; for which Reaſon, it is urged, that the Plaintiffs have not a Right to this Preſentation, but the King. And, he ſaid, it muſt be agreed, that if no Regard was had to any other Part of the Record but the Declaration, the Objection would be fatal; but the Defendant has by his Plea admitted thoſe Facts to be true, which the Plaintiff ought to have diſcloſed in his Declaration; and thereby the Defects in the Declaration are got over. He owned, there does ſeem to be Opinions in 5 Rep. 75. in 8 Rep. Dr. Bonham's Caſe, likewiſe in the ſame Report Turner's Caſe, that ſuch Defects cannot be ſupplied. But in 1 Cro. 288. Sir William Jones 207. Sid. 184. and Lutw. 1492. the Law ſeems to be fully ſettled, that Defects in Subſtance may be ſupplied as well as others. Accordingly the Court affirmed the Judgment.

Halpen *and* Hatch.

How far the Court will reverſe a Judgment in one part of it and affirm it in another.

UPON a Writ of Error on a Judgment by Default in the Common Pleas in an Action upon the Caſe for Words, the Error aſſigned was, that the Inqueſt upon the Writ of Inquiry had given the Plaintiff but 10 s. Damages, and Coſts 3 s. 4 d. yet he had taken Judgment for the Increaſe of Coſts to 14 l. Mr. Strange on the other Side ſaid, that he did believe, this Judgment could not be maintained; but, though the Court might reverſe the Judgment as to the Coſts, yet he ſubmitted it, they might affirm it as to the Damages; accordingly the Court were going to do ſo. But then he ſaid, he did not know, but it might be more for the Plaintiff's Intereſt to have the Judgment reverſed in the Whole, conſidering how ſcandalous the Words were, and how ſmall the Damages for them; for which Reaſon the Court

gave him Time to ſpeak with his Client. The next Term Mr. Strange conſented, that the Judgment ſhould be reverſed in the Whole, which was accordingly done.

Chapman *and* Eaſton.

When an Iſſue is joined relating to another's Appearance, what ſhall be ſaid to be a good Manner of Pleading in ſuch ſort of Caſes.

UPON a Writ of Error on a Judgment in the Common Pleas in an Action upon a Bail-Bond, the Caſe appeared to be, that the Defendant's Plea was, that the Original Defendant appeared at the Day, in Purſuance of the Proceſs, which was returnable Quinden' Paſch. The Plaintiff replied quod non habetur tale Recordum, & petit quod Recordum illud inſpiciatur, without giving the Defendant Liberty to rejoin, quod habetur tale Recordum. Accordingly the Judgment was & ſuper hoc inſpectis Rotulis & Termino prædict', it appeared to the Court that there was no ſuch Record; and therefore they gave Judgment for the Plaintiff. Mr. Parker now argued, that this Judgment ought to be reverſed; in the firſt Place, becauſe the Plaintiff has Iſſue joined too ſoon; and in the next Place, becauſe on the Trial of this Iſſue the Court have inſpected a wrong Roll. The Roll, which they ought to have inſpected, was that of Eaſter Term; but no ſuch Roll is mentioned in this Record; neither is any other mentioned, but that of Mich. Term, which this Action was firſt commenced in; ſo that the Termino prædict' can only relate to the Termino Michaelis. But the Court ſaid, that the Original Action was commenced in the Common Pleas, as well as this upon the Bail-Bond; and therefore the Record appealed to was a Record of that Court where it was pleaded. For which Reaſon, they obſerved, that the Plaintiff had it in his Power to reply in the Manner which he did. And ſo, they ſaid, this Point was ſettled in Carthew 517. Then as to the other Objection, they were of Opinion, that the Clauſe of ſuper hoc viſis, &c. was only a partial Reaſon of the Judgment, and might be rejected as Surpluſage. Accordingly they affirmed the Judgment.

Munos *and* Wilſon.

The Time for executing a Writ of Inquiry.

ON a Writ of Error upon a Judgment in the Court of Common Pleas, the Error aſſigned was, that the Writ of Inquiry was returnable Craſ. Trin. which was of a Sunday, and executed on the Monday following. Mr. Strange ſaid, that this was held to be wrong in Show. 16. Salk. 626. in the Caſe of The King and Gamley, Nat. Brev. 1. 26. and in the Caſe of Beech and Parker Nat. Brev. 3. 26. Accordingly the Court reverſed the Judgment Niſi.

The King *and* Stephens.

ON Rule to ſhew Cauſe, why an Information ſhould not be granted againſt the Defendant, for receiving a Bribe of 100 Pounds, to give his Vote as one Mr. Price ſhould direct, him, in the Borough of New-Radnor; the State of the Caſe, as it appeared now before the Court, was, that one ſingle Perſon made Affidavit, that the Defendant told him, that Mr. Price did give him ſuch a Sum of Money for ſuch a Purpoſe; and the Defendant made Affidavit, that he never did receive ſuch a Sum, and Mr. Price, that he never gave him ſuch a one. The Chief Juſtice, Judge Page, and Judge Probyn were of Opinion, that the Rule ought to be diſcharged, and the Party left to take his ordinary Remedy by way of Indictment. But Judge Lee was of Opinion that the Rule ought to be made abſolute; becauſe the Defendant has not denied that he ever told the other Perſon that he had ſuch Bribe; for which Reaſon, he thought, that there was ſufficient confeſſed to try this Fact in an Information. However, all the Court agreed in this, that if the Fact had been ſworn by one ſingle Evidence on one Side, and poſitively denyed by the Party's Oath on the other, that no Information ought to go. Accordingly the Rule was diſcharged in the preſent Caſe. How far the Court will not grant an Information for Bribery.

The King *and* Roſe.

MR. Varney came now and ſaid, that he had ſeen the Affidavits, which the Defendant had ready to produce to clear himſelf of the Charge that was laid againſt him, and he did own, they were ſufficient for that Purpoſe. But ſtill he hoped, the Inquiſition ſhould be quaſhed, for another Exception upon the Face of it, without going into that which had been before taken. The Exception, which he now relied upon, was, that the Jurors had not affixed their reſpective Seals to the Inquiſition; but had only ſigned it. He ſaid, that he did agree, he could not remember any Caſe, where an Inquiſition has been quaſhed, becauſe the Seals were not put to it; but this he remembred, that Judge Forteſcue directed this to be done upon an Inquiſition taken before him at Shrewsbury Aſſizes. And Mr. Reeves ſaid, that he very well knew, that Orders for the binding out of Apprentices have been quaſhed in this Court; becauſe they have not been under the Seals of the Juſtices. Mr. Fazacherley on the other Side ſaid, that this Exception might equally be taken to every Inquiſition upon a Writ of Inquiry; but he never knew ſuch an Exception taken; and he has been informed, that thoſe Inquiſitions never are ſealed. The Chief Juſtice ſaid, that the Words of every Writ of Inquiry are ſub ſigillo & ſigillis; but if the Precedents have always been not to ſeal them, he ſhould not be for overturning them. However, this was thought to be a proper Exception to be farther conſidered of; and therefore the Matter was ordered to ſtand over. Vide Poſt. Vide ante 82.

The

The King *and* The Inhabitants of Drakemaſt.

Vide ante 99. MR. Abney came now to ſhew Cauſe, and ſaid, that if this Aſſeſſment was removed up, it was clear this Court could not inquire into the Irregularity of it by Affidavits; that Inequality is to be inquired into at the Seſſions; and therefore the Aſſeſſment may be ſet aſide in the whole or in Part, and even a new one made according to the Diſcretion of the Juſtices. The only Reaſon therefore, that can be given for removing up this Aſſeſſment by Certiorari, is, that it may be relieved againſt in this Court, if any Errors ſhould appear upon the Face of it. But that he obſerved, may equally be done in an Action of Treſpaſs or Replevin; and the Parties have actually taken this Method, and the Matter is to be tried the next Aſſizes. He ſaid farther, that he apprehended no Certiorari could lie in this Caſe by Law. The Aſſeſſment is never lodged at the Seſſions; it is only produced in Evidence there, and is exactly like other Pieces of Evidence; for Notice is conſtantly given to the Overſeers to produce it. As ſoon as the Trial is over, the Overſeers conſtantly take it back with them; for which Reaſon he ſubmitted it, it was impoſſible for the Juſtices of the Seſſions to ſend it up. Mr. Fazacherley on the other Side ſaid, that whatever may be the Practice at the Seſſions, of allowing the Overſeers to take their Aſſeſſment back with them, yet ſtill he ſubmitted, that if a Certiorari ſhould go to remove this Aſſeſſment, it would be a Contempt in the Overſeers to with-hold the Aſſeſſment after that, and this Court might puniſh them accordingly. Undoubtedly therefore this Court might enforce their Certiorari. For which Reaſon the only Queſtion was, whether the Certiorari was proper to be awarded in the preſent Caſe. He ſaid, if it was not, he could not apprehend that this Court could properly make any Determination, whether the Juſtices at the Seſſions have done right in their Determination. The Determination of the Juſtices is founded upon the Aſſeſſment; the Aſſeſſment therefore muſt be produced before this Court can judge whether ſuch Determination is right or not. He did agree, that this Court could not inquire into the Merits of the Aſſeſſment in Point of Fact; but many Cauſes there are, which might make the Aſſeſſment bad upon the Face of it. If there are ſuch Cauſes, it is fit the Aſſeſſment ſhould be quaſhed; if there are not, it is fit it ſhould be confirmed, and then there will be a very ſpeedy Remedy for enforcing the Payment of this Rate, viz. by Attachment; which is the Caſe of Oxers of Baſtardy, when they are confirmed here. And he obſerved, that a Certiorari did iſſue out of this Court to remove up ſuch Aſſeſſment, Mich. 9 Ann. in the Caſe of The Town of Marlborough. In that Certiorari there were the very Words omnes & ſingulas ratas; that Certiorari was afterwards returned and filed; and was now produced in Court. The Chief Juſtice ſaid, that undoubtedly this Court were not Judges of ſuch Inequality of a Rate, as ariſes from Matters out of the Rate; but they were the proper Judges of every Thing making the Rate bad, which ariſes upon the Face of it.

And he remembred a Rate out of Suffolk was quashed in Lord Holt's Time; because it appeared upon the Face of it, that a Tenant was tared for his Stock upon the Land. For which Reason, he was of Opinion that the Assessment ought to be returned. Judge Page and Judge Probyn agreed the same. But Judge Lee doubted; accordingly this Matter was ordered to stand over. Vide Post.

Burrey *and* Perrey.

SErjeant Belfield now moved, that the Rule might be absolute; and cited the Case of Philips and Fish, Trin. 1726. The Words there were, He has stole my Hens, which were clearly actionable; special Damage found, and the Plaintiff had his full Costs. Mr. Hussey on the other Side said, that there might be some Pretence to allow the Plaintiff full Costs, where the Words are not actionable, and the Action brought for special Damage; because that is upon the Matter a special Action upon the Case; and cannot properly be called an Action for Words. But where the Words are actionable, and the Damages laid only by way of Aggravation, he submitted it, that that could only be an Action for Words; and consequently fell within the Words of the Act of Parliament. The Question therefore for the Consideration of the Court only was, whether the present Words were actionable or not. He said, he would repeat them exactly as they are laid in the Record. He went up to the Widow Fowler's, and put on a Lock, and at Night broke open the House, Innuendo, Burglariter, and Mrs. Fowler catched him; and his Wife and his Son went up to the Widow Fowler's, and sent to Mr. Brathwait the Ironmonger, and three Persons were there, and b own'd upon their Knees, because she should not prosecute him, and Mr. Brathwait paid six or seven Pounds to make it up. He submitted it, that these Words were clearly actionable; and besides the Case cited by him on the former Motion of Button and Hayward, he took it, the Case of Ward and Reynolds, Pas. 3 Ann. was a full Proof of it. The Words there were, How did your Husband die? The Answer was, As you may do; No, said the Defendant, of the Wound which you gave him. The Chief Justice said, that in the Case of Philips and Fish before cited, he well remembred, that what is now stated as special Damage in that Case was really a distinct Cause of Action, and laid as a second Count; and not by way of Aggravation; for which Reason he did not think that Case came up to the present one. On the other Side, he said, he did think that the Burglariter in the Innuendo could not make the Words actionable, if they were not so without it. However, the Court thought this a Matter proper to be farther considered of. Vide Post.

Vide ante 84.

Anonymus.

How far Notice is neceſſary to be given to the Attorney General.

MR. Kettleby moved for a Habeas Corpus to be directed to the Warden of the Fleet, to bring up the Body of a Priſoner, who was in Execution at the King's Suit, in order that he might be charged with an Indictment of Battery. The Court ſaid, they never grant theſe Motions without Notice given to the Attorney General, even in the Caſe where Bail would ſurrender a Priſoner. They obſerved, that there was an ordinary Remedy, which the Party had, viz. to outlaw the Priſoner; and therefore they refuſed to grant the preſent Motion, till Notice.

The King *and* Knut.

What ſhall be ſaid to be a Libel upon a Company.

MOtion was made for an Information for publiſhing a Libel upon York-Buildings Company, in an Advertiſement put into the Daily Poſt on Tueſday the 8th of February, by charging the Company with raiſing the Value of their Stock, by getting 100000 Pounds under the Credit of their Seal. Accordingly a Rule was made to ſhew Cauſe.

Jackſon *and* Shepherd

How far a Statute ſhall be ſaid to extend to inferior Courts.

SErjeant Chapel moved to make a Rule abſolute againſt the Bailiffs of Exeter, for diſcharging poor Priſoners, that were in Execution for Debt under 100 Pounds, in Purſuance of the late Act of Parliament. The Counſel of the other Side inſiſted, that that Statute did not extend to inferior Juriſdictions. But the Court was of Opinion, that it did; accordingly made the Rule abſolute.

Ateſley *and* Bell.

When a Rule is made only in general, for the Inſpection of publick Books, what ſhall not be ſaid to be a Breach of it.

ON Rule to ſhew Cauſe, why an Attachment ſhould not be granted againſt the Defendant, for not allowing the Plaintiff to take Copies of certain Poll-Books made at an Election of an Officer in the City of Norwich, in Purſuance of a Rule of Court made for inſpecting all publick Books. Mr. Maſterman ſaid, that there ought to have been a particular Rule for inſpecting the Poll-Books; and ſo it was reſolved in Brocas's Caſe, and likewiſe in the Caſe of Sir Peter Delmee. Accordingly the Rule was diſcharged.

The King *and* The Inhabitants of Hornbey.

How far a Perſon gains a Settlement, or not, by living in a Pariſh as an Apprentice.

ON Rule to ſhew Cauſe, why an Order of Seſſions, diſcharging an Order of two Juſtices for the Removal of one Martha D'Anvers from the Pariſh Carleton to the Pariſh of Hornbey, ſhould not be quaſhed; the Fact ſtated by the Order appeared to be, that one Finetta Pinet made her Will, and thereby gave 30 Pound for the binding out ſuch poor Perſons Apprentices in the Pariſh of Hornbey, as her Executor, together with the Miniſter, Churchwardens and Overſeers, ſhould appoint; that Martha D'Anvers was bound out Apprentice in this Pariſh, with this 30 Pounds; that neither the Executor of Finetta Pinet, nor the Miniſter of the Pariſh were Parties to the Indenture, nor did Martha D'Anvers execute the ſame; but that the Church-wardens and Overſeers, with two Juſtices of the Peace, were Parties to it, and that Martha D'Anvers lived in the Pariſh of Hornbey ſix Months accordingly. Upon this State of the Caſe the Counſel ſaid, that they apprehended the Juſtices at the Seſſions were clearly right in diſcharging the Order. They obſerved, that it muſt undoubtedly be admitted, even by the other Side, that Martha D'Anvers cannot poſſibly have gained a Settlement by any thing that has been done, unleſs ſome Statute will warrant it. The two moſt material Statutes, for this Purpoſe are 43 Eliz. 2. (5) and 7 Jac. 1. 3. But the Statute of Eliz. requires, that the two Juſtices, binding the Children out, ſhould be of the Quorum; and likewiſe that Male Children ſhall be bound out till the Age of twenty-four, and Female Children till the Age of twenty-one, or Marriage; nothing of which appears to have been in the preſent Caſe; and therefore the preſent Caſe cannot at all come within the Relief of that Statute. Then as to the Statute of Jac. that requires that no Perſon bound out in Purſuance of that Act, ſhall be above the Age of fifteen; which does not appear to be the Caſe of the preſent Perſon removed; for which Reaſon that Statute cannot be material neither. They took Notice likewiſe, that Martha D'Anvers ought to have executed this Indenture. And this they obſerved was the Caſe of every Infant that is bound an Apprentice, according to the Cuſtom of the City of London; the Infant in that Caſe always executes the Indenture. For which Reaſons they apprehended, that the Settlemeet of Martha D'Anvers in the Pariſh of Hornbey, could by no Means be maintained. The Counſel on the other Side ſaid, that they did agree that Martha D'Anvers was no Party to the Indenture; but they ſubmitted it, that it was not material that ſhe ſhould be; and that the Caſe of the Infant, according to the Cuſtom of the City of London, was a Caſe peculiar to itſelf; and therefore could not influence the preſent one. They did agree farther, that it was not expreſly mentioned in the Indenture, that if ſhe married before the Age of twenty-one, the Apprenticeſhip ſhould determine; but they obſerved, that the Law implies that; and therefore ſuch Clauſe would have been immaterial. Then as to the other Objections that were made, they obſerved, that the Truth of the Fact was with them,

them, and appeared ſo to the Juſtices of the Seſſions, though the Juſtices have not ſtated the Fact ſo upon their Order. For which Reaſon they prayed, that they might be at Liberty to apply to the Juſtices to amend their Return; which the Court accordingly granted; ſo the Matter was ordered to ſtand over. Vide Poſt.

Molden *and* Sir William Stanhope.

What ſhall be ſaid to be a good Teſtatum fieri facias.

ON Rule to ſhew Cauſe why an Execution ſhould not be ſet aſide for Irregularity, Mr. Strange and Mr. Timothy Barnardiſton ſaid, that the Fact was, that this Action was tried at the laſt Day of Sittings in Mich. Term laſt, which was on Friday the 26th of Nov. the next Day the Diſtringas was returnable, and a Rule given likewiſe on the Poſtea for ſigning Judgment, which was out the 2d of Dec. and then the Plaintiff ſigned his Judgment; and took out a Fieri facias directed to the Sheriff of Middleſex, teſted the 27th and returnable the laſt Day of the Term, which was the 29th, and at the ſame Time took out a Teſtatum fieri facias, teſted the laſt Day of that Term, returnable the firſt Return of this; which was executed in the Vacation. They ſaid, that they ſubmitted it, this Execution was clearly regular; for that it was determined in the Caſe of Loving and Avery, Trin. 12 Geo. 1. that the Original Fieri facias and the Teſtatum may be ſued out both at the ſame Time; and they apprehended, that there was no certain Time required between the Teſte and Return of the Original Fieri facias. Mr. Reeves and Mr. Fazakerly argued on the other Side, and ſubmitted it, that before the Plaintiff can be intitled to complete Judgment, Coſts muſt be taxed; for which Reaſon they ſaid the Judgment could only relate to the laſt Day of the Term. They did agree however, that notwithſtanding this, the Plaintiff might have ſued out an Elegit, teſted the laſt Day of the Term, and returnable the firſt Return of this; ſo that he might have had in that Way Execution in the Vacation. But in this Way of Proceeding, the Original Fieri facias could be teſted but the laſt Day of the Term, and returnable the firſt Return of this; ſo that they apprehended the Teſtatum was irregular. The Court ſaid, that their Opinion was, that the Original Fieri facias was well teſted the 27th, and well returnable the 29th; ſo that there was a good Warrant for the Teſtatum. They were farther of Opinion, that the Original one and the Teſtatum were well taken out together. For which Reaſon they held the Execution to be regular. Accordingly diſcharged the Rule.

The King *and* Franklyn.

THE Attorney General prayed now the Judgment of the Court againſt the Priſoner. Accordingly the Information was read; which charged him with publiſhing a Libel againſt the preſent Miniſtry, in a Paper called the Hague Letter, in one of the Craftſmen. And then Judge Page pronounced the Judgment of the Court to be, that he ſhould pay 100 l. Fine, be impriſoned for one Year, and until he ſhould pay the ſaid Fine, and likewiſe till he ſhould find Sureties for his good Behaviour for ſeven Years, himſelf to be bound in a Recognizance of 1000 l. and his Sureties in a Recognizance of 500 l. Vide ante 95.

Catherol *and* Cowper.

THIS Matter now coming on again upon the Rule that was made to ſhew Cauſe, Mr. Abney ſaid, that he had looked a little farther into the Method, which he propoſed, for the Defendant's having his treble Coſts, and was ſatisfied that that Method was well warranted by the Practice of the Court. He took Notice, that in the Caſe of The King and Poland, there was a Caſe cited, where an Indebitatus Aſſumpſit had been brought againſt a Collector of the Land-Tax; the Defendant had a Verdict; but becauſe it did not appear upon the Niſi prius Roll, that this Action was brought againſt an Officer, Motion was made, that this might be entered upon the the Roll to intitle the Defendant to treble Coſts; accordingly the Court ordered an Entry to be made in this Manner; ſuper examination' Materiæ it appeareth to the Court, that the Action was brought againſt the Defendant as Collector; Ideo conſideratum eſt, that he ſhall have his treble Coſts. This Precedent having been cited to the Court in the Caſe of The King and Poland, the Court made the ſame Rule, that the like Entry ſhould be made in that Caſe. He obſerved farther, that in the Caſe of one Walker and Sir William Egerton, Hil. 7 W. 3. the like Entry was made upon the Roll. Accordingly the Court ordered the ſame to be done in the preſent Caſe. Upon which Mr. Fazakerly ſaid, that then the Plaintiff muſt have Liberty to plead to this Suggeſtion, or to demur. The Court agreed that in the Caſe of a common Suggeſtion the Party has a Right to plead or to demur to it; but the preſent Suggeſtion is made by Order of the Court upon the Examination of the Matter between the Parties; for which Reaſon they were of Opinion, that it was concluſive. Vide ante

Evelyn *and* Evelyn.

The Manner of raiſing Portions.

Canc. THIS was a Cauſe, that came on now for the Judgment of the Court. The principal Queſtion in the Caſe was, Whether 8000 l. which were the Portions of younger Children, ſhould be raiſed by Sale of a Term directly, or by the Annual growing Profits? The Difficulty of this Queſtion aroſe upon the Words of a Settlement, wherein the Father of the Plaintiff was made Tenant for Life, with a Power given to certain Truſtees to make Leaſe or Leaſes for any Number of Years, without Impeachment of Waſte for the raiſing theſe Portions to the younger Children; the Remainder of this Eſtate was limited to the Defendant. The Plaintiff now brought her Bill againſt the Defendant in order to have a Sale of the Term ſo raiſed. And upon this Queſtion the Lord Chancellor, with the Aſſiſtance of Lord Raymond and Maſter of the Rolls, delivered their Opinions. The Rule which they in general ſeemed to agree upon was, that where the Words of a Settlement are not ſo expreſs, but what a Court of Equity may put a Conſtruction upon them, the Conſtruction, which a Court of Equity will put upon them is, that the Term ſhall be ſold directly, wherever the Portions are veſted in the Children at a Day certain; but a Term ſhall not be ſold directly, wherever no ſuch Day is certain. This was the Rule, which the Court laid down for their Conſtruction, when the Words are not ſo ſtrict but they may put one upon them; but they ſeemed to agree on the other Hand, that though the Portion ſhould be veſted at a Day certain, the Words of the Party might be ſo ſtrong, as to confine the Payment of it to that Manner of doing it only; viz. by the growing Profits. Accordingly in the preſent Caſe, as there was no fix'd Time mentioned in the Settlement for the veſting of theſe Portions in the Children, the Court diſmiſs'd the Bill. Ex relatu.

Brown & al' *and* Langley & al'.

Before the Maſter of the Rolls, Tueſday Feb. 29, 1731.

How far Parol Evidence ſhall explain a Will.

THIS was a Bill brought by the Plaintiffs as next of Kin to the Deceaſed againſt the Defendants as Executors, in order to have a Diſtribution of the Reſiduum of the Perſonal Eſtate amongſt them. The Defendants ſet forth in their Anſwer, a Clauſe of the Will, whereby the Teſtator gave the Reſiduum of this Eſtate to the Poor of the Pariſh of Kettering in the County of Lincoln. Upon this the Parties joined in Commiſſion. And now the Fact diſcloſed upon the Commiſſion, and ſtated by Mr. Wills, as Counſel for the Defendants, was, that this Pariſh of Kettering was not in the County of Lincoln, but in the County of Northampton; and likewiſe that the Teſta-

tor really thought, that this Reſiduum of the perſonal Eſtate would not amount to above 10l. and that he declared ſo at the Time of making his Will, whereas in Truth it amounted to near 1000 l. Upon which Mr. Wills ſubmitted it, that the Pariſh could not claim any Thing under this Will; but if it could, at leaſt not above what the Teſtator thought the Reſiduum would amount to. But the Maſter of the Rolls declared his Opinion to be, that Parol Evidence ought to be admitted to help out the Deſcription of the Pariſh in this Caſe; and that this was a ſettled Rule in Equity. For which Reaſon he was of Opinion, that the Pariſh of Ketering in the County of Northampton, were well intitled under this Will; but he was of Opinion, that no Parol Evidence ought to be admitted in Relation to the Quantity of the Thing deviſed; and therefore he thought the Pariſh well intitled to the whole. Accordingly diſmiſſed the Bill. Ex relatu.

Lent

Lent-Aſſiſes.

5 Geo. II. 1731-2.

Baynes *and* Reeves.

How far a Title is not proper to be given in Evidence in an Action of Treſpaſs.

IN an Action of Treſpaſs brought for diſturbing a Man in his Freehold, the Defendant gave the beſt Evidence he was able, that he was actually in Poſſeſſion at the Time of the Treſpaſs ſuppoſed, and had been ſo for ſeven or eight Years. But his Evidence not being ſufficient for that Purpoſe, he offered to prove a Title. The Plaintiff's Counſel objected, that a Title was not proper to be inquired into in an Action of this Sort; and ſaid, that Lord Chief Baron Pengelly refuſed once to allow it in this Circuit. But Mr. Baron Commyns, who was the Judge that tried the Cauſe, did allow it; and declared, that any Poſſeſſion longer than ſeven or eight Years would be Evidence of it.

The Bailiffs, Burgeſſes and Commonalty of the Town or Borough of Ipſwich *ver.* Johnſon.

How far a Corporation will not be intitled to exclude Foreignersfrom ſetting up a Trade amongſt them.

IN an Action upon the Caſe the Plaintiffs declared, that the Town of Ipſwich was a Borough by Preſcription, and that during all the ſaid Time the Burgeſſes of the ſaid Town were an Incorporation, and for many Years laſt paſt had been Incorporated by the Name of the Bailiffs, Burgeſſes and Commonalty of the Town or Borough of Ipſwich. That within the ſaid Borough there has been an antient and laudable Cuſtom, viz. that no Foreigner, not being Free of the ſaid Borough, ſhall keep any Shop within the ſaid Borough, Town or Liberties thereof, without a Licence from the ſaid Corporation. Nevertheleſs that the Defendant, not being ignorant of the Premiſſes, did keep a Shop there, being a Foreigner, and without any Licence. To this the Defendant pleaded Not guilty. And now upon Evidence the Plaintiff's Counſel offered to prove that there had been very antiently Courts held within the Borough before the Bailiffs; and this they ſubmitted it, was an Evidence of the Borough's being very antiently a Corporation. But Mr. Baron Commyns was of Opinion, that it was none; becauſe a Borough is of itſelf capable of holding Courts; and therefore that Evidence was not allowed. The Counſel

for the Plaintiff then ſaid, that they would prove, that very antiently the Borough enjoyed the Lands, which, they ſubmitted it, was a full Evidence of the Borough's being at that Time a Corporation; and that Evidence the Court allowed. To encounter this Evidence, the Counſel for the Defendant ſaid, that they would prove, that there was a Time when there was no Seal in this Borough; and that would be Evidence, that at that Time there was no Corporation in it. They ſaid farther, that the Corporation was erected by Charter of 6 John; and relyed upon theſe Words in it, Burgenſes habeant Guildam Mercatoriam. The Judge was of Opinion, that theſe Words antiently would create a Corporation; and for that Purpoſe ſaid there was an Authority in Roll's Abridgment. The Counſel for the Plaintiff then went into their Evidence to prove the Name of the Corporation. For this Purpoſe they produced a Recital of a Charter made in Edward the Fourth's Time; by which the Burgeſſes were incorporated by the Name of the Bailiffs, Burgeſſes and Commonalty of the Town of Ipſwich. The Defendant's Counſel objected, that this would not prove the Name of the Corporation, as laid in the Declaration. They did agree, that ſuch Variance would not have been material in any Action brought againſt the Corporation; but in every Action brought by them, they muſt prove the Name ſtrictly as they have laid it. For this Purpoſe was cited a Caſe out of Bro. Ab. But the Court was of a different Opinion, and cited Dr. Ayray's Caſe 11 Rep. The laſt Thing endeavoured to be proved by the Plaintiff, was their Cuſtom. In order to do that, much written Evidence was produced, and one living one. The living Evidence owned, that he never knew Butchers pay Foreign Fine-Money, neither did he ever know any Foreigner pay it, living within the Liberty and out of the Borough; and that Freemen's Widows were always thought to be exempted, during their Widowhood. The Judge ſaid, that he thought theſe would be pretty material Exceptions againſt the Cuſtom, as laid in the Declaration. But what was the great Difficulty with him was, whether any of the written Evidence had proved the Plaintiff's Cuſtom. The Proof, he ſaid, was beyond Contradiction, that the Foreigners have been for a long Time paſt fined for keeping Shop without a Licence; and that he agreed was very ſtrong Evidence, that the Corporation had a Right to thoſe Fines. An Action of Debt therefore he thought might be well maintained for them. But the Doubt with him was, whether this Evidence would amount to a Proof, that the Corporation might totally exclude Foreigners from erecting Shops arbitarily at their own Diſcretion. He ſaid farther, that he was far from being clear, that the Cuſtom, as laid in the Declaration, was good in Point of Law. But that Queſtion was unneceſſary to be argued now; becauſe his Opinion was, that the Evidence did not maintain it. Accordingly the Plaintiff's Counſel agreed to be nonſuited.

Term. Paſch.

5 Geo. II. 1732.

Perry *and* Corteſoes.

What ſhall be ſaid to be a good Notice of executing a Writ of Inquiry before a Judge.

ON Motion to ſet aſide a Writ of Inquiry, Mr. Fazakerly ſaid, the Fact was, that the Plaintiff gave Notice for executing it before the Sheriffs of London and Middleſex on the 17th Day of February laſt; but the Day after that he had given this Notice he had obtained a Rule for ſhewing Cauſe why the Writ of Inquiry ſhould not be executed before a Judge, and that Rule he did not ſerve upon the Defendant till two a Clock on the laſt Day of laſt Term, which was the 12th of February, and the laſt Motion, which was made that Day, was, that that Rule might be made abſolute, which, not being oppoſed, the Court granted accordingly. On the Tueſday after, being the 15th the Plaintiff gave the Defendant Notice, that this Writ of Inquiry would be executed before the Chief Juſtice on the Tueſday then following, which the Plaintiff did execute in Purſuance of his Notice, and the Defendant made no Defence. Upon this State of the Caſe Mr. Fazakerly ſubmitted it, that the Plaintiff was irregular in two Reſpects, firſt, in getting the Rule made abſolute the laſt Day of the Term, whereas the Rule to ſhew Cauſe was ſerved but at Two a Clock that Day; and in the next Place, becauſe there were not eight Days Notice of the Writ of Inquiry being executed before the Judge; for one of the Days were not taken excluſive, which muſt be done in all theſe Computations. As to the firſt Point, the Court declared their Opinions to be, that the Rule was regularly made abſolute; becauſe they could not ſee, that any probable Cauſe could have been ſhewn to have prevented the Rules being made abſolute. For which Reaſon, they ſaid, this was not like the Caſe of moving to put off a Trial the laſt Day of a Term; there indeed they did agree the Party muſt always have a reaſonable Time for ſhewing Cauſe; becauſe otherwiſe he may be greatly damnified. And beſides in the preſent Caſe they obſerved, that the Defendant did not ſo much as come and pray, that the Time might be inlarged for his ſhewing Cauſe. Then as to the ſecond Point, they ſaid, that no Day is

ever fix'd in the Notice for executing theſe Writs of Inquiry before a Judge, the Notice is only in general given, that the Writ of Inquiry will be executed before a Judge at the Sittings; but the Day for executing it is always left to the Judge's Diſcretion; and for the ſame Reaſon the Hour of the Day neither is ever mentioned in theſe Notices. They obſerved farther, that as this Writ of Inquiry before the Judge was executed after the Day which the Notice was given on for executing it before the Sheriff, the Defendant could be at no Prejudice; and therefore they ſhould have been of Opinion, that if the Defendant had but two Days Notice, it would have been ſufficient. Accordingly the Motion was refuſed.

The King *and* Toms.

What ſhall be ſaid to be a good Preſcription for a Way.

ON Motion for a new Trial in an Information for a Nuſance, by digging a Ditch croſs a Turn-pike Road, Mr. Abney ſaid, that the Information ſet forth, that Time out of Mind there had been a Way for Coaches, Carts and Carriages, leading from Morton-Hindmoſt to the Town of Woodſtock, and that by Act of Parliament there had been a Turnpike erected upon this Way which the Defendant dug a Ditch croſs. Upon this Information the Defendant was convicted. But Mr. Abney ſubmitted it in the firſt place, that no Preſcription could be laid for a Way for Coaches, becauſe Coaches are but of a Modern Invention. He ſaid farther, that it appeared upon the Evidence, that there was no ſuch Town in England as Woodſtock, but only Old Woodſtock and New Woodſtock; and that the Place intended was New Woodſtock. He took Notice likewiſe, that no proper Evidence was given of this being ſuch a Way for Carriages as is deſcribed in the Information; for the Evidence, he ſaid, only was of a certain Perſon, that had ſeen Carriages drive ſometimes upon one Part of the Way, ſometimes upon another; whereas Evidence ought to have been produced of Perſons, that had actually drove theſe Carriages over the Whole of it. But the Court declared their Opinion as to the firſt Point, that the Preſcription ſet forth in the Information was a good Preſcription; for they thought, that a Preſcription for Carriages in general would be a Preſcription for Coaches as well as other ſort of Carriages, though Coaches are but a new ſort of Carriages; and therefore the Information might well ſet forth the Preſcription to be for a Way for theſe ſort of Carriages as well as others. To the ſecond Point they ſaid, that a Town may have various Names, and they thought it a Matter proper to be left to a Jury, whether the Town in Queſtion was not known by the Name of Woodſtock as well as New Woodſtock; and ſo Judge Page, who tried the Cauſe, ſaid, that he directed the Jury. And as to the laſt Point, Judge Page ſaid, that Evidence was given by one, that lived upon the Road between Morton-Hindmoſt and Woodſtock, that he had ſeen Carriages drive from Morton-Hindmoſt to his Houſe, and the next Morning ſet out from

from his Houſe and drove to Woodſtock, which the Court thought undeniable Evidence. Judge Page ſaid likewiſe, that there was indeed one Objection taken by the Defendant's Counſel at the Trial, which he allowed them, and that was, that the Proſecutor would have given in Evidence a printed Paper of an Act of Parliament relating to this Turnpike; but the Act was not printed by the King's Printer; and for that Reaſon he would not allow it to be read. But the Act, he obſerved, was a publick Act, made to be ſo by the Parliament; and therefore there was no Occaſion for producing it. The Chief Juſtice too declared his Opinion to be, that that was a good Objection to the Reading the Act. Upon the Whole the Court refuſed the Motion.

Lofeild *and* Bankcroft.

Vide ante 40. MR. Strange now moved for Judgment for the Plaintiff. He did agree, that the Exception taken on account of its not being laid in the Declaration, that the Words were related of the Plaintiff, muſt be fatal. But ſtill, he hoped, there would be enough upon this Record to intitle the Plaintiff to his Judgment. He ſaid, there were ſeveral Counts in the Declaration, in three of which the Words are laid over various Ways; and then the Declaration charges, that the Defendant wilfully and maliciouſly intending to charge the Plaintiff with Felony on ſuch a Day and Year crimen feloniæ ei impoſuit, & Poſtea eodem die & anno the Defendant took up the Plaintiff and carried him before my Lord Mayor, charged him there with the Felony, and my Lord Mayor diſcharged him. The Jury upon this have given a Verdict for the Plaintiff as to the two laſt Counts, and acquitted the Defendant as to the others. So that, he ſaid, the ſingle Queſtion, which he ſhould offer to the Court, was, whether, beſides the three Counts for the Words, there are not two other Counts; and if ſo, the Plaintiff will be well intitled to his Judgment. Now as to that he ſubmitted it, that the Words crimen Feloniæ ei impoſuit made one Count, and the Words Et Poſtea, &c. made the other. The Words Et Poſtea, &c. contain a Charge of itſelf, which will well ſupport an Action; and therefore that may well be conſidered as one Count intirely independent of the former. However upon looking upon the Poſtea it appeared, that the Jury had expreſsly found the Defendant guilty as to one of the Counts for the Words; and therefore Mr. Strange agreed, that the Judgment ſhould be arreſted, which was accordingly done.

Harris *and* Myers.

ON Motion to ſet aſide a Verdict, Mr. Agar ſaid, that in Michaelmas Vacation the Defendant received Notice of Trial for the firſt Sitting in Hill. Term, which was the 1ſt Day of Feb. but on that Day received a Countermand, with a Continuance of the Notice of Trial for the ſecond Sitting, which was of the 7th of Feb. On the 5th he received another Countermand, with a Continuance for the laſt Sitting, which was on the 10th. On the 9th he received a Countermand for that likewiſe, with a Continuance for the Sitting after Term; and then the Plaintiff brought on the Cauſe, and the Defendant made no Defence. Accordingly the Court made a Rule to ſhew Cauſe, and afterwards made it abſolute.

What ſhall not be ſaid to be a good Notice of Trial.

Winter *and* Morehand.

MR. Deniſon moved on the Part of the Defendant, that the Plaintiff might be obliged to make up his Declaration with a ſpecial Memorandum of the laſt Day of Hill. Term, and not generally of Hill. Term, as otherwiſe he would do. For the Plaintiff, he ſaid, did not ſue out his Bill of Middleſex, till the 9th of Feb. returnable the laſt Day of that Term; and in Fact, the Defendant had tendred the Plaintiff his Money, before the ſueing out of his Writ. But if the Memorandum was made up of Hil. Term generally, the Defendant would not be able to have the Benefit of his Tender. Accordingly the Court made a Rule to ſhew Cauſe. Vide Poſt.

How far the Court will require a Plaintiff to make up his Declaration with a ſpecial Memorandum.

Lomax *and* Holden.

AN Iſſue out of Chancery being to be tried at the Bar this Term, Lord Chancellor directed that the Plaintiff and Defendant both ſhould move this Court, that the Iſſue might be changed, and tried in a feigned Action, which the Parties accordingly did. But the Court ſaid, that it was againſt their Rules to allow a Trial at Bar to be moved for before Iſſue joined. Accordingly they refuſed the Motion. Vide Poſt.

How far a Trial at Bar cannot be moved for, till Iſſue is joined.

The King *and* The Inhabitants of Drakemaſt.

THIS Matter coming on again, Judge Lee ſaid, that he had looked into his Notes of the Caſe before cited of the Town of Marlborough. The Diſpute, he obſerved, there was about a Poor's Rate made upon St. Mary's Pariſh, within that Corporation. He did agree, that the Certiorari was granted in that Caſe; but afterwards, upon Motion, the Rule for granting the Certiorari was diſcharged. And the Reaſon given by the Court in that Caſe was, that the Poor might greatly ſuffer for want

Vide ante 99.

of a Maintenance, if theſe Rates ſhould be removed. For which Reaſon the Court obſerved there, that the Parties ought to be left to their ordinary Remedy, in Caſe a Diſtreſs is made for the Rate. Accordingly the Court was of the ſame Opinion in the preſent Caſe; and the Rule for ſhewing Cauſe was diſcharged. Vide Poſt.

Blakeman *and* Goff.

How far the Court will not grant a ſecond Certiorari, by reaſon that it is moved for with an Intent to reverſe a Judgment.

ON Rule to ſhew Cauſe, why a Certiorari ſhould not be quaſhed for its being teſted Roberto Eyre, whereas it ſhould have been Roberto Raymond, Mr. Fazakerly ſubmitted it, that the Certiorari might be amended; but Mr. Parker obſerved on the other Side, that it could not, becauſe the Fault was in the Teſte of the Writ, and for this Purpoſe cited 1 Lev. 2. Accordingly the Court was of the ſame Opinion; upon which Mr. Fazakerly moved for a new Certiorari. But the Court ſaid, it is well known, that the Party is never intitled to a ſecond Certiorari; and in the preſent Caſe the Deſign of this Certiorari was to reverſe a Judgment; for which Reaſon they declared, they would not grant a ſecond to inform their Conſciences, as they ſometimes do. And Lord Raymond obſerved, that in the Caſe of Ward and Stokoe Lord Chief Juſtice Holt refuſed to amend a Writ of Error ſingly for that Reaſon, becauſe it was to reverſe a Judgment; accordingly the Rule was made abſolute.

Jones *and* Doe.

How far an Ejectment will not lie in the Courts of Weſtminſter Hall, for Lands in a County Palatine.

Vide Vol. 1. 365.

IN Ejectment brought in this Court for Lands lying in the County Palatine of Lancaſter, Mr. Reeves moved for Liberty to plead to the Juriſdiction of the Court. He apprehended, he ſaid, that ſuch Motion was neceſſary; becauſe in Ejectments the Defendant can plead nothing but the General Iſſue, without Leave of the Court, not even the Plea of Antient Demeſne. And he ſubmitted it, that the Court would grant it, becauſe he conceived the Court had granted the like Motion in the Caſe of Thruſtout and Holdfaſt, Trin. 3 G. 2. ſuch Plea too was actually put in in that Caſe, in Purſuance of it, and the Parties reſted under it. In order then to ſhew that the Lands in Queſtion lay in the County Palatine, he produced the Declaration, by which they were deſcribed to lie in Com' Lanc'. Judge Page doubted, whether the producing ſuch Declaration was ſufficient without an Affidavit to verify that the Lands lay within the County Palatine. He did agree, that all the Lands that were Part of the County of Lancaſter, in Edward the Fourth's Time, were made Part of the County Palatine; but it did not appear to him, but there might be other Lands added to the County ſince, which would not be Part of the County Palatine; for which Reaſon he thought it requiſite, that an Affidavit ſhould be made, that theſe Lands were Part of the County Palatine. The Chief Juſtice ſaid, that after the Tenant has entred into the Rule to confeſs Leaſe, Entry and Ouſter, he did agree, the Tenant could plead

no Plea but the General Issue, without Leave of the Court, but as he had not done that yet, he could not see but that the Tenant might plead what Plea he should be advised to. And in the Case of Thrustout and Holdfast he doubted, whether the Court said any Thing more, than let the Party plead as he shall be advised. Accordingly the Court thought that the Rule made in that Case ought to be looked for; and in the mean Time made a Rule to shew Cause. But a few Days after the Plaintiff discontinued, on Payment of Costs.

Machin *and* Elliot.

THE Defendant and another had been Security for one Lanman, a Prisoner in the King's Bench at the Time when Machin was Marshal, in order for Lanman's having the Benefit of the Rules. And for that Purpose the Defendant gave a Warrant of Attorney to confess a Judgment to Machin; accordingly the last Day in Hil. Term last, the Court upon Motion, made a Rule for entring up Judgment upon it. Three Days after Term the Plaintiff signed his Judgment; and in the Vacation took the Defendant in Execution, by a Testatum Capias, notwithstanding at that Time no Capias into Middlesex had been sued out, though now indeed such a one was produced. Mr. Ketelby upon this moved, that the Execution might be set aside; and insisted, that as he had a Rule of Court to produce, by which it appeared, that the Judgment could not be entred up till the last Day of Hil. Term, the Judgment that was entred up in Pursuance of it, could by no Means relate to the first Day of that Term, as in other Cases it does; for that would be to aver against the Records of the Court. For which Reason he submitted it, that the Capias into Middlesex could only have been tested the last Day of that Term, returnable the first of this, in order to found the Testatum upon it. But besides, he observed that in Fact there was no Capias into Middlesex at all taken out to found the Testatum upon at the Time of the Execution, and that, he submitted it, was another Irregularity. But the Court were of Opinion, as to the first Point, that this Rule of Court could not alter the general Notions of Law, of all Judgments relating to the first Day of the Term; for which Reason they were of Opinion that the Capias in London, bearing Teste the first Day of that Term, returnable the last, was regular enough. And as to the Time of suing out that Capias, they said, they would not inquire into it; a regular Capias into Middlesex was produced before them, and they would not examine into the Time of obtaining it. In the Common Pleas they said, it was well known, that the Original is often sued out after the Writ of Error brought. Accordingly the Court refused the Motion.

How far a Judgment shall be said to relate to the first Day of the Term.

What shall be said to be a good Testatum Capias.

The

The King *and* Lofeild.

How far the Court will grant an Information for a Libel, and will not leave the Party to take his Remedy by way of Indictment.

ON Rule to shew Cause, why an Information should not be granted against the Defendant for a Libel, Mr. Fazakerly said, that the Fact was, that the Defendant had brought an Action against one Bankcroft, for maliciously causing it to be printed in the News that he was guilty of Felony, and for procuring him to be carried before the Lord Mayor of London on the Suspicion of it. In that Action the present Defendant recovered 1100 l. Damages; and upon this he put it into the News, That *Bankcroft* had conspired to charge him with this Felony, that in Vindication of his Character he had brought an Action against *Bankcroft* for so doing, and had recovered 1100 *l.* Damages against him. Mr. Fazakerly observed, that every Word contained in this Advertisement was true; and though the Truth of it could not be justified upon pleading, yet he submitted it, that it was a Reason why the Court should not interpose, but leave the Party to his ordinary Remedy. Accordingly Mr. Strange, who was of the same Side, observed, that the Court was of this Opinion in the Case of The King and Bickerton, cited in the Case of The King and Dormer, Easter 1727. But Mr. Fazakerly carried it even farther, and submitted it, that the Advertisement was no Libel at all, nor punishable in any Manner whatsoever. He said, it is well known, that when a Verdict is obtained against a Man for lying with another's Wife, such Piece of News is constantly put in the Papers, yet an Action for the Scandal was never attempted to be brought. But the Court said, that the present Advertisement has falsly represented the Fact; for Lofeild did not bring his Action for a Conspiracy, but for Bankcroft's malitiously charging him with Felony, and a Conspiracy requires an infamous Judgment. They said farther, that they well remembered, that this Advertisement was published just before the Trial; and it might be of dangerous Consequence to allow of such Practices, which might tend to influence Juries. Judge Lee said too, that the Court was of the same Opinion as to this last Point in the Case of The King and Chambers. Accordingly the Rule was made absolute. Vide post.

Vide ante Vol. I. 13.

Palmey *and* Swan.

How far the Court will direct that an Attorney's Bill shall be taxed, notwithstanding he has obtained a Security for his Money.

AN Attorney having brought an Action upon two Bonds given by the Defendant November last, in Satisfaction of a Bill of Law Charges, Mr. Strange moved, that the Plaintiff might deliver in a Bill, that it might be refer'd to the Master to be taxed, and that in the mean Time all Proceedings might be staid. He said, that after an Attorney has had his Bill paid him, the Court will even grant, that the Bill may be taxed; and therefore there was much stronger Reason for granting the Motion in the present Case; which the Court accordingly did.

Anonymus.

A Mandamus was moved for to be directed to Sir William Dudley, a Juſtice of Peace, to ſwear in two Perſons Conſtables, who were choſen at the Leet, but were not preſent in order to be ſworn there. 'Twas ſaid, the Seſſions could not appoint the Conſtables in this Caſe; becauſe the Leet had. And the Conſtables could be ſworn no where in this Caſe, but by particular Juſtices; to which Purpoſe was cited Salk. 175. Accordingly the Mandamus was granted.

How far a Mandamus will lie to Juſtices of Peace to compel them to ſwear in a Conſtable who was choſen at the Leet.

Winter *and* Morchand.

MR. Harper came now to ſhew Cauſe, and ſaid, he could not oppoſe the Memorandum being made up of the 9th of February, which was the Day the Bill was ſued out on; but in the Rule drawn up the Memorandum was ordered to be of the 12th, which was the Day the Bill was returned on; and that, he ſubmitted it, was not right. For it might happen, that the Tender was made between the 9th and the 12th, yet certainly the Defendant ought to have no Benefit from it. But the Court ſaid, the Bill, that muſt be filed to warrant the Alteration of the Memorandum, cannot be filed but of the 12th, for till then the Defendant was not in Court. For which Reaſon the Memorandum cannot be made but of the 12th. And if upon this the Defendant ſhould plead his Tender ante exhibition' Bill', and the Fact ſhould be, that the Tender was between the 9th and the 12th, the Plaintiff may reply this, and help himſelf that Way. Accordingly the Rule was made abſolute.

Vide ante 125.

Williams *and* Willis.

SErjeant Chappel moved to ſet aſide a Verdict; becauſe the Iſſue was tried by a Tales, whereas it could not be ſo by Law, in as much as there had been a Rule obtained for a ſpecial Jury. He ſaid likewiſe, that ſeveral of thoſe, that did appear of the ſpecial Jury, were not ſummoned at all by the Sheriff, as they ought to have been by the Statute of Weſt. 2. 30. neither were their Names in the Body of the Diſtringas, as they ought to have been by the Statute of York, but were annexed by Way of a Panel to the Diſtringas. And to ſupport this Fact he appealed to the Notes of Judge Lee, who tried the Cauſe, and obſerved, that the Defendant made no Defence. Judge Lee ſaid, that he believed the Fact was, as the Serjeant had repreſented it; but, becauſe theſe were only ſome Objections taken by the Counſel, when the Jury were ſwearing, he did not greatly attend to them. The Court ſaid, that theſe Facts were proper to be made out by Affidavit; for which Reaſon they directed the Counſel to move this Matter again, and within a few Days, Affidavits of this ſort were produced, and then the Court made a Rule to ſhew Cauſe.

How far the Court will ſet aſide a Verdict, when there is no Defence at the Trial by Reaſon of Defects relating to a Jury.

Chapman *and* Wiſh.

How far the Court will give Leave that a Writ of Error may be amended.

A Plaint in Replevin had been removed up into the Common Pleas by Recordare, and the Univerſity of Cambridge came there and demanded Conuſance; the Court of Common Pleas over-ruled the Claim of Conuſance, and gave Judgment in the Replevin. A Writ of Error upon this was brought in this Court; but in the Writ of Error the Judgment was only ſet out to be ad grave Damnum of the Party in the Action, and not of the Univerſity. Upon which Mr. Reeves now moved, that the Writ of Error might be amended by adding the Words and alſo to the Damage of the Chancellor, Maſters and Scholars of the Univerſity of *Cambridge*; and cited the Caſe of The Sword-Blade Company and Edwards, Hill. 1730. where the like Motion was granted. Accordingly the Court made a Rule to ſhew Cauſe.

Vide Vol. 1. 421.

Vide poſt.

Chapman and others the Aſſignees of Woodward *againſt* Preſtland.

How far the Court will inlarge the Time for the Defendant's pleading till the Plaintiff ſhall deliver back a Book to the Defendant which the Plaintiff has got in his Cuſtody.

ON Rule to ſhew Cauſe, why the Defendant ſhould not have four Days Time to plead after the Plaintiffs have delivered back a Book of Accounts, which they detained from the Defendant, Mr. Filmer ſaid, that this was a Caſh-Book, in which were entered all the Dealings between Woodward and the Defendant, writ with the Hand of the Defendant, and therefore proper to be made uſe of againſt him upon Evidence. He did agree, that there was a general Book of Accounts kept by Woodward, which is always copied from theſe ſeveral Caſh-Books; but no Part of that Book is ſigned by the Defendant, and therefore it could not be made Uſe of againſt him upon the Trial. But Mr. Strange on the other Side ſaid, that ſince the Plaintiffs have had this Book, they have made ſeveral Entries in it in their own Hands out of the General Account Book; and therefore it would be very extraordinary, that they ſhould have it in their Power to give this Book in Evidence. He ſaid farther, that they have actually taken a direct Copy of this Book ſince they have had it in their Poſſeſſion; and therefore that will be ſufficient Evidence. He took Notice likewiſe; that this Book was only lent them at firſt, and now they refuſe to return it. He ſaid too, that he well remembered a Caſe where one of the Parties took away the Papers belonging to the other by Violence from him, and the Court put off the Trial, which was to have been at the Bar, upon that Occaſion. Accordingly the Rule was made abſolute.

Cock *and* Wilkins.

MR. Harvey moved, that the Trial in this Caſe might be put off till the Plaintiff ſhould pay the Coſts of a former Notice. The Court agreed, that they grant theſe Motions in Ejectment, but ſaid they do it in no other Action, upon which the Motion was refuſed. Mr. Harvey then ſaid, that it would be but a fruitleſs Thing to pray an Attachment againſt the Plaintiff, becauſe he abſconded, ſo that he could not be ſerved with it. Upon which the Court ſaid, that you may have a Rule, that Service at his laſt Place of Abode may be a good Service; and accordingly that Rule was granted.

How far the Court will put off a Trial, or not, till the Plaintiff has paid the Coſts of a former Notice.

Petty *and* Hulley.

MR. Parker moved to quaſh a Scire Facias to aſſign Errors, becauſe it was returnable at a general Return-Day, whereas the reſt of the Proceedings were at a Day certain; and ſaid, that the like Motion was granted in the Caſe of Heaton and Wills. Accordingly a Rule was made to ſhew cauſe. Vide Poſt.

How far the Court will quaſh a Scire Facias to aſſign Errors.

Philips *and* Grindel.

ONE of the Bail was ſerved with a Scire Facias, returnable the firſt Day of this Term, on the 22d of April, the other on the 24th; the Bail were not able to take the Principal till the 26th, which was the 1ſt Day of the Term, and then too it was ſo late, that they could not ſurrender him in Court; but did ſurrender him that Day before Judge Probyn at his Chambers. Upon which Motion was now made, that Proceedings upon the Scire Facias might be ſtaid; accordingly the Court made a Rule to ſhew Cauſe. Vide Poſt.

What ſhall be ſaid to be a good Surrender of the Principal.

Wiſh *and* Chapman.

MR. Strange came now to ſhew Cauſe, and ſaid, that the Statute of 5 G. only warrants Amendments of Writs of Error in thoſe Reſpects, wherein the Writs of Error vary from the Record; and in the Caſe before cited of the Amendment, there was ſuch Variance. He ſaid farther, that in the preſent Caſe it does not at all appear, that the Univerſity ever intended to bring a Writ of Error, or gave the leaſt Inſtructions about it. If they did not give ſuch Inſtructions, it would be very extraordinary, that the Univerſity ſhould be allowed to come now and pray that the Writ of Error might be amended, and they made Parties to it, when the Defendant below was ſolely at the Expence of obtaining it. For which Reaſon he ſubmitted it, that there ought to be an Affidavit of that Fact, that the Univerſity gave Inſtructions to the Curſitor to make out the Writ

Vide ante 130.

of

of Error, as well as the Defendant. He took Notice likewiſe, that the Judgment for diſallowing the Conuſance, and the Judgment at laſt given were intirely diſtinct the one from the other; and therefore diſtinct Writs of Error ought to have been brought upon them. But Mr. Reeves on the other Side ſaid, that the Statute of 5 Geo. provides, that Writs of Error ſhall be amended for Variances or other Defect whatſoever. He ſaid likewiſe, that if the Court ſhould be of Opinion, that ſuch an Affidavit as has been mentioned, was requiſite, he believed, that could be eaſily got; for the principal Intention in bringing this Writ of Error was to determine, whether the Court of Common Pleas have given a right Judgment in diſallowing the Conuſance. And as to what was ſaid about bringing two Writs of, Error, he ſubmitted it, that the bringing this one upon the principal Judgment was ſufficient; for the whole Record will be before the Court by this Writ of Error, and in this Writ of Error the Court will take into Conſideration, whether the Conuſance was rightly diſallowed, or not; for if it was not, the whole Judgment muſt be reverſed, for the Court's below not having had a proper Juriſdiction. The Chief Juſtice ſaid, that he thought it might be proper to have an Affidavit of the Fact, that the Univerſity did give Inſtructions for bringing the Writ of Error. He ſaid likewiſe, that he did not ſee but a Writ of Error might have been brought inſtantly, upon diſallowing the Conuſance; and if ſuch Writ of Error had been brought, he knew no Reaſon why this Court could not have proceeded, and have given final Judgment upon the Merits of the Action. The Court however agreed, that this Matter deſerved farther Conſideration; and therefore enlarged the Rule. Vide Poſt.

The King *and* The Juſtices of Willingford.

How far the Court will not quaſh a Mandamus, by Reaſon that the Return-Day is expired.

How far the Court will ſuperſede a Writ, notwithſtanding the Return-Day is expired.

MR. Taylor moved to quaſh a Writ of Mandamus, founded upon 3 & 4 W. & M. 12, (13) requiring Juſtices at a ſpecial Seſſions to ſign a Rate for reimburſing Surveyors of the Highways, for its not being certain enough. The Court ſaid, the Time for returning the Writ was out; and therefore they would not quaſh it upon Motion; if there be any Faults in it, the Party will have the Benefit of it upon the Return. They did agree indeed, that they ſuperſede Writs after the Time for returning them is out, and that without requiring a Return; becauſe that is done quia erronice emanavit. But Mr. Fazakerly ſaid, that the Court does even quaſh theſe Writs after the Time for returning them is out, before the Return is filed. The Court ſaid, that was only for groſs Faults. And Judge Lee declared, that in the Caſe of one of the Inſurance Companies, he well remembred, the Court refuſed quaſhing one of theſe Writs, without a Return, after the Time for returning it was out. Accordingly the Motion was refuſed.

The King *and* Smith.

THE Defendant having been brought up by Habeas Corpus from Oxford Gaol, and Notice having been given to the Judge of the Court of Oxford, who committed him, that he would move to be diſcharged, Mr. Strange took ſeveral Exceptions to the Return. In the firſt Place, he ſaid, the Commitment was for the Defendant's not giving 1000 Pounds Bail to the anſwering a Complaint in Cauſa Injuriæ. Now he obſerved, that the Commitment ought to have let forth, that there was an Affidavit made of the Cauſe of Action's being 1000 Pounds, in order to the juſtifying the Court below, in holding the Defendant to Bail in ſo great a Sum; for he ſubmitted it, if that Court had any Right to hold Bail at all; the Statute that has been made for aſcertaining the Bail, muſt extend to that Juriſdiction as well as to others. But he inſiſted upon it farther, that that Court had no Right to hold to Bail at all. The Civil Law is the Law which that Court proceeds by, and by that Law there is no Right of holding to Bail whatſoever. He ſaid likewiſe, that he apprehended the Words in Cauſa Injuriæ were Words intirely of an uncertain Signification. They will extend to an Ejectment as well as to other Actions; and in an Ejectment that Court has no Juriſdiction. Theſe Objections, he obſerved, might be made to the very Foundation of the Commitment. But then he ſubmitted it in the next Place, that the Commitment is wrong in Point of Form; for by the Commitment the Bedel of the Univerſity is only ordered to take him and carry him to Gaol. No Direction is hereby given to the Gaoler to receive him; nor does it appear what Gaol he was to be carried to. Accordingly the Court diſcharged him.

When a Commitment is returned upon a Habeas Corpus, how far the Court will diſcharge the Priſoner.

Leonards *and* Warren.

IN Debt on Bond, the Defendant pleads a Releaſe of all Demands; the Plaintiff replies by Proteſtation denying the Deed, and farther ſets forth quod non Relaxavit the ſaid Demand by the Releaſe ſet forth; et hoc petit quod inquiratur per Patriam. To this the Defendant demurs, and ſhews for Cauſe, that the Plaintiff has neither confeſſed nor denied the Deed of Releaſe. To ſupport the Replication, Mr. Hollins cited Yel. 24. Cro. El. 889. Salk. 138. But the Court inclined to be againſt him; however, ordered this Matter to ſtand over. And the next Day he moved to diſcontinue upon Payment of Coſts.

What ſhall be ſaid to be a good Pleading, or not, relating to a Releaſe.

Midget *and* Tirrel.

How far the Court will give Liberty that a new Count may be laid in the Declaration.

IN an Indebitatus Aſſumpſit, the Plaintiff had delivered his Declaration before the Eſſoin-Day, but all was in Paper; and upon this Mr. Kettelby moved for Liberty to add a new Count. Mr. Monday ſaid, that the Rule of the Court was, that the Plaintiff ſhall not add a new Count after the ſecond Term is over; but before the ſecond Term is over he may. Accordingly the Court made a Rule to ſhew Cauſe; and afterwards made it abſolute.

Anonymus.

Vide ante 75.

THIS Matter coming now on again, Mr. Fazakerly ſaid, that he apprehended clearly, that the two Overſeers appointed by the Juſtices at the Seſſions, had no Authority to inquire into any Erection of a Turnpike made in Kingſton Town; for the erecting it within the Town, is the ſame Thing as if it was erected five Miles beyond the Town, a Matter intirely out of the Power of the Truſtees, for which they are puniſhable by way of Indictment, as for a Nuſance. For which Reaſon he ſubmitted it, that this Act done by the Truſtees, could not be conſidered as an Abuſe of their Authority, of which the two Overſeers could take Conuſance; and conſequently, all that the Seſſions have done in Purſuance of it, muſt be void likewiſe. Accordingly the Court was of the ſame Opinion; ſo the Rule was made abſolute for quaſhing the Orders. But at the ſame Time the Court declared, that the other Objection, which was before made, in relation to the Juſtices making an Order upon the Sheriff to abate this Turnpike, they thought would avail very little; and the Caſe of The Queen and Wyat, Salk. 380. which Mr. Reeves ſaid was determined Trin. 4 Ann. was cited by him as a Caſe very ſtrong for that Purpoſe.

Hornbey *and* Carleton.

Vide ante.

MR. Abney moved now, that the Rule for ſhewing Cauſe, why the Order of Seſſions ſhould be quaſhed, might be diſcharged; and ſaid, that he believed it was ſo clear a Caſe, that the Settlement of Martha D'Anvers was not at Hornbey, that the Counſel of the other Side would not oppoſe it. Mr. Yates ſaid, that the Attorney of the other Side had not been with him lately. Accordingly the Court diſcharged the Rule Niſi.

—— *and* Morrice.

SErjeant Chapel moved that the Plaintiff's Imparlance might be struck out of his Replication, and that the Defendant might have a Week's Time for delivering back the Paper-Book. He said the Defendant had pleaded a special Plene Administravit, and that neither at the Time of exhibiting of the Bill, nor since, she had Assets beyond 1000 Pounds, which are liable to satisfy the Demands set forth in the Plea. This Plea was put in last Term; the Plaintiff imparls to this, and then in his Replication sets forth, that the Defendant had Assets, either at the Time of exhibiting the Bill, or since, beyond 1000 Pounds; and so concludes to the Country. Upon this the Serjeant observed, that if the Plaintiff's Imparlance stood, the Words of the Issue would relate to this Term, whereas they ought only to relate to the Time which the Defendant has pleaded them on. He said farther, that the Plea contained three hundred Sheets of Paper; and therefore would be very necessary that there should be a longer Time for returning the Paper-Book, than is allowed by the Rules of the Court in ordinary Cases. The Court said, that the Imparlance must be struck out; and the Defendant may well justify returning back the Paper-Book, as not accepting it, on Account of the Paper-Book's being made up wrong; and then, by the Rules of the Court, the Defendant will have four Days for returning the Paper-Book, after it is delivered him again. They said farther, that by this Issue the Defendant will not be confined to the exact Sum mentioned in the Plea; and though more should be proved to be in his Hands, yet if they do not amount to more than the Demands set forth in the Plea, the Defendant must have a Verdict. And so they said it was held in the Case of Parker and Hatfield, Salk. 311. Accordingly the Defendant returned the Paper-Book to the Plaintiff in open Court.

How far the Court will give Liberty or not, that an Imparlance shall be struck out.

The King *and* The Inhabitants of Uxeter.

SErjeant Birch came to shew Cause, why an Order of Sessions, discharging a Rate made upon the Parish of Uxeter at large, should not be confirmed; the Justices at the Sessions being of Opinion, that the Townships of Craiton, Drakemast and Strongton, being Hills within the Parish of Uxeter, ought to relieve their Poor separately, at large by themselves. The Exceptions taken to the Order were, that these Townships were not within the Statute of 13 & 14 Ch. 2. 12, 21. and for this Purpose was cited 2 Lev. 142. 3 Keb. 422, 539. It was said farther, that admitting they were within it, yet still it ought to have been adjudged in the Order, that the Parish of Uxeter was so large, as that the Poor could not have the Benefit of 43 Eliz. It was observed likewise, that the Appeal was wrong, it being from all the Townships jointly, whereas there should have been a distinct Appeal from each of the Townships. And likewise it was insisted upon,

Vide ante 125.

upon, that in an Appeal from a Rate the Seſſions can only conſider the Equality or Inequality of it; and cannot try the Bounds of a Townſhip in it. The Counſel of the other Side ſaid, that the Caſe of Stokelyn and Dalton, Hil. 10 Ann. was a Caſe very ſtrong in Favour of them. However, took a Day to ſhew Cauſe. Vide Poſt.

When a Judgment in the Common Pleas is affirmed in the King's Bench, what ſhall not be ſaid to be a good Writ of Execution on ſuch Judgment.

Champion *and* Osbaldiſton.

ON Rule to ſhew Cauſe, why a Capias ad ſatisfaciendum ſhould not be quaſhed; the Exception taken to it was, that it was ſued out upon a Judgment of the Court of Common Pleas affirmed in this Court, and made returnable at a general Return, whereas the Proceedings in the Action below were all at a Day certain; accordingly the Rule was made abſolute.

Petty *and* Hulley.

Vide ante

MR. Marſh came now to ſhew Cauſe, and ſaid, that he did agree, that when Writs of Error have been brought upon Judgments in the Court of Common Pleas, and Proceſs in thoſe Writs of Error made returnable in a different way from the Proceſs in the Court of Common Pleas, ſuch Proceſs has been ſet aſide for that Reaſon. And that was the Caſe of Eadon and Wills, Paſch. 12 Geo. 1. before cited. But in the preſent Caſe, the Writ of Error was upon a Judgment in the Marſhalſea, where the Proceeding was by Plaint, which is in the Nature of an Original: and therefore he ſubmitted it, that it was right in the Court above, that the Proceſs ſhould be made returnable there in the ſame Manner as in Proceedings by Original. But Mr. Parker on the other Side ſaid, that the Proceſs in the Court of Marſhalſea is always returnable at a Day certain; for which Cauſe, he apprehended, that this Caſe was within the Reaſon of that cited, that the Proceſs here ſhould be returnable ſo too. He ſaid farther, that the Scire Facias was made returnable a die Paſchæ in quinden' Dies, whereas it ſhould have been quindecim. The Court ſaid, that the Proceſs, which was returnable in the Marſhalſea in this Caſe, was made returnable at that, which is the common Return-Day in that Court; for they have no Difference between one Return and another; and therefore the Proceſs here ought to be returnable at that, which is the common Return-Day in this Court. Then as to the other Exception, they ſaid, quinden' was a good Abbreviation for quindenos; and they did not ſee why that was not very right likewiſe. Accordingly they diſcharged the Rule.

Billingſley *and* Taps.

THE Plaintiff arreſted the Defendant by Virtue of a Capias teſted the laſt Day of laſt Term, returnable the firſt Day of this; and that four Days before the Teſte of his Original, which was on the 6th of April. Upon which Mr. Strange moved, that the Plaintiff might be obliged to give Oyer of ſuch an Original, as would warrant the Proceedings, or elſe that the Proceedings might be ſtaid. Mr. Fazakerly on the other Side ſaid, that Writs iſſuing out of this Court can only be teſted in Term-Time, though iſſuing out of Chancery they may; for which Reaſon, though the Original in this Caſe bore Teſte in the Vacation, yet there was a Neceſſity that the Capias ſhould bear Teſte in the Term before it. And he ſaid, the Court has been of this Opinion before in the Caſe of Andrews and Dingley. The Court ſaid, that regularly one Part of the Proceſs ought always to bear Teſte upon the Return of the other; and that was held ſo in the Caſe of Bradley and Banks, Yel. 204. But yet they thought, that an Appearance would cure ſuch Defect, and had done ſo in the Caſe before them; for which Reaſon the Court refuſed to make any Rule. Vide Poſt.

How far an Appearance ſhall cure a Defect in Proceſs.

Wiſh *and* Chapman.

MR. Reeves now produced ſuch an Affidavit as was required, and therefore moved, that the Rule might now be made abſolute for the Amendment. But Mr. Strange on the other Side argued, that ſtill this Amendment was out of the Intent of the Act of Parliament. The Defect before the Act, he ſaid, was, that Writs of Error were brought, that would not remove the Record up, and when a great deal of Time had been ſpent in examining the Proceedings of the Court below, then the Plaintiff in Error would diſcover, that his Writ of Error had not removed up the Record, and conſequently that the Court above had no Authority to affirm the Judgment. He would then move, that his own Writ of Error might be quaſhed; and examine into all the Proceedings again, by bringing a new one. This was the Defect which the Parliament intended to remedy; and this was the Defect which muſt be underſtood by thoſe Words in the Act, Variance or other Defect whatſoever. He then obſerved that the preſent Writ of Error was ſufficient to remove up the Record; and the Diſtinction for this Purpoſe, he apprehended, was, between leaving out of the Writ of Error Part of what is in the original Record, and adding to the Writ of Error more than is in the original Record; the firſt Sort of Writs of Error, he ſubmitted it, would remove up the Record; the ſecond he agreed would not. The Court ſaid, that they did allow the preſent Writ of Error had removed up the Record, and that the principal Miſchief before the Act was, in the Caſes where Writs of Error did not. But ſtill they thought that ought not to hinder them from giving Relief in

Vide ante 130.

other Caſes, where the Words are general enough for that Purpoſe. Accordingly the Rule was made abſolute.

Anonymus.

How far the Court will grant an Information againſt a Perſon for aſſerting his Right in a violent and forcible Manner.

SErjeant Belfield moved for an Information againſt one Delameer, Mayor of the Town of Helſton, for aſſaulting a Farmer, throwing down his Corn, and hindering him ſelling in the Market, under Pretence that he would not pay his Toll. He ſaid, that the Court would not allow of ſuch a violent Proceeding in a publick Magiſtrate's aſſerting a Right. Accordingly a Rule was made to ſhew Cauſe. Vide poſt.

Anonymus.

How far the Court will grant an Information or not, for a Libel, when a Body of Men are reflected on by it.

MR. Fazakerly moved for an Information againſt one Oſborn, for printing a Libel reflecting upon the Portugueſe Jews, that lately came over, in charging them with being guilty of burning a Baſtard Child begotten by a Chriſtian on the Body of a Jewiſh Woman. He ſaid too, that ſeveral Jews have been inſulted by the Mob upon this Occaſion. Lord Raymond ſaid, that he believed the Court could do nothing in this Matter, by Reaſon that no particular Jews could be able to ſhew to the Court, that they were pointed at more than any others; and thought that Lord Chief Juſtice Holt was of this Opinion in the Caſe of Orm and Nut. However the Court made a Rule to ſhew Cauſe. Vide poſt.

The King *and* Beamond.

How far the Court will grant an Information for a Riot.

ON Motion to make a Rule abſolute for an Information for a Riot, Mr. Fazakerly ſaid, that he had got Affidavit againſt Affidavit, and owned that then the Rule was to make the Rule abſolute, that the Fact might be tried. But ſtill he ſubmitted it, that the Court would make it Part of the Rule, that no Proceedings ſhould be upon the Information, till the Matter of Right, which was in Queſtion, was tried in a feigned Action. The Chief Juſtice ſaid, that he has known Lord Holt refuſe to try an Indictment, where a Right was in Queſtion; and Judge Page ſaid, that he has known Lord Trevor refuſe the ſame. Accordingly the Rule was made abſolute; but ſuch Clauſe was added to it, as has been mentioned.

Billingſley *and* Taps.

Vide ante 137.

THE Defendant had ſince the laſt Motion demanded Oyer of the Capias, and pleaded, that he was arreſted upon it four Days before the ſuing out of the Original, but had not verified this Plea by Affidavit. Upon which Mr. Fazakerly moved that the Plea might be ſet aſide, and that with Coſts, as being a-

gainst the Opinion of the Court. The Chief Justice said, that he thought, that the Defendant was well intitled to Oyer of the Capias, but that he could not have Oyer of the mean Process without having Oyer of the Original one, and that he had not demanded. Accordingly the Plea was set aside with Costs.

Eads *and* Mason.

MR. Taylor moved to make a Rule absolute for the Defendant's having Liberty to withdraw his Plea of the general Issue, and plead another Plea of a Tender. Mr. Moreton said, that he was ready to shew Cause, and submitted it, that the Court had never gone so far, and that they would not go so far in this Case especially; because Issue was already joined, and Notice of Trial actually given. The Court however were of Opinion, that the Rule was proper; accordingly upon Payment of Costs and the Defendant's agreeing to accept short Notice of Trial made it absolute.

How far the Court will give Liberty that a Plea shall be withdrawn.

Ash *and* Mathews.

ON Rule to shew Cause, why Judgment in Ejectment should not be set aside, Mr. Monday informed the Court, that on the last Day of every Term he keeps a separate Paper, in which he enters down the Minuets of those Motions, that are made that Day for Judgment in Ejectment, and within a Day or two after he makes out that Paper in Form fit for Attornies to come and peruse; but the Motions of this Sort, that are made in the other Parts of the Term he takes down in this Common Paper-Book with the other Motions, and at his Leisure after the Term he generally makes out a particular Paper of them too. On the 3d of February last, Motion was made in this Cause for Judgment in Ejectment; within two Days after the Term the Defendant's Attorney came and searched in the Paper of Ejectments made out for the last Day of the Term, and finding no Motion made that Day in this Cause, he did not enter into the common Rule to confess Lease, Entry and Ouster; and upon that the Plaintiff signed his Judgment. Mr. Floyd upon this said, he did agree, that the Judgment was strictly regular; but yet as this was owing merely to a Mistake in the Defendant's Attorney, he submitted it that the Court would set it aside; especially as the Defendant has lost the Benefit of making a Defence at the Trial. Accordingly the Court made the Rule absolute upon Payment of Costs.

How far the Court will set aside a Judgment in Ejectment on payment of Costs.

Throg-

Throgmorton *and* Smith.

When an Ejectment is brought by an Infant, how far the Court will direct that the Infant should nominate a good Lessee in order to be answerable for the Costs of the Suit.

IN Ejectment Mr. Strange moved, that the Lessor of the Plaintiff, being an Infant, might nominate a good Lessee for the Plaintiff, or else that Proceedings might be staid. The Reason for making this Motion, he said, was, that otherwise there would be no one, whom the Defendant could recover his Costs against. And the same Thing, he observed, was done in the Case of Noke and Windham, East. 12 Geo. 1. Mr. Abney on the other Side said, that he submitted it, this Motion was intirely needless; for that, as he apprehended, the Lessor of the Plaintiff would be obliged to pay Costs. He took Notice, that in 2 Leon. 217. it is held, that an Infant may make a Lease to try a Title. And in 3 Keb. 347. is the Opinion of Twisden, that this Rule will subject the Infant to pay the Costs. But Judge Lee said, that he well remembered the Case of Noke and Windham before cited, and he was of Counsel in it. The Defendant there moved for a Trial at Bar, and likewise that the Lessor of the Plaintiff might nominate a good Plaintiff; and on the Rule to shew Cause for that Purpose it was the declared Opinion of the Court, that such Motion ought to be granted; upon which Mr. Gapper, who was one of the Counsel for the Lessor of the Plaintiff, consented, that the Lessor's Father should be made Plaintiff. The Court was of the same Opinion in this Case; accordingly they made a Rule for this purpose Nisi on Saturday.

Hayes *and* Warren.

Vide ante 71.

THIS Matter coming now on again, Mr. Hussey argued for the Plaintiff in Error, and said, that the Promise laid in the Declaration only was, that Quod cum prædictus querens fecisset & performasset diversa Opera & Labor' pro eodem Carolo, ipse idem Carolus postea eodem Die & Anno promised to pay for them, as much as they were worth, without setting forth any Request, that there was for the doing this Work. He observed, that this was a past Consideration, and therefore according to the general Rule of Law no Promise could be founded upon it, unless there was such a Request. In some Books it has been carried so far as to be held, that, though there was a Request made by the Defendant that the Consideration should be performed; yet, when once that Consideration is past, that can be no Consideration sufficient to support a future Promise. For which Purpose he cited 3 Cro. 741. But he submitted it, that in all the Books it is held, that, wherever such past Consideration is allowed, at least there must be a Request laid for the Performance of it. And so is it held in 1 Roll's Abr. 11. Pla. 1. Cro. Eliz. 442. 3 Leo. 91. and of this Opinion Judge Powel declared himself to be in the Case of Cowel and Sir Thomas Coke, Pasch. 11 Ann. Mr. Strange on the other Side argued, and said, that he did agree, that wherever the Consideration past concerned the Be-

nefit of a Stranger only, a Requeſt is neceſſary to charge the Defendant. But wherever the Conſideration is for the Benefit of the Defendant, he ſubmitted it, that no ſuch a Requeſt was neceſſary, when there is an expreſs Promiſe laid in the Declaration. For this Purpoſe, he ſaid, it is held in 2 Leo. 111. that if A. promiſes B. to pay him 20 l. in Conſideration that he has married A.'s Daughter, that is good. The ſame Caſe is allowed in Hutton 84. It is likewiſe held there, that if a Man promiſes another to indemnify him for having been Bail for him, that is ſufficient; ſo if he promiſes to give him a Horſe for ſuch paſt Service; and likewiſe it is held there, that if a Man promiſes a Carpenter, that in Conſideration of his having well built his Houſe, he will pay him 5 l. that is good. And the principal Caſe there is of a Man's promiſing his Servant to pay him ſuch a Sum in Conſideration of his faithful Service which he has performed him; that was held a ſufficient Conſideration; and Judgment given for the Plaintiff. He likewiſe relied upon Raymond 260, and ſubmitted it, that the Caſe cited by the other Side out of 3 Cro. 741. could not be Law. He obſerved farther, that as this Declaration was laid, the Conſideration did not appear to be paſt at the Time of the Promiſe; for the Promiſe is laid to be on the ſame Day with the Conſideration; and the Law will admit of no Fractions in a Day; for which Purpoſe he cited Latch 150. and 1 Roll's Rep. 414. And ſubmitted it in the laſt Place, that there was a Requeſt ſufficiently laid; for the Work is laid to be done for the Defendant, and if the Defendant had not ordered it to be done, it could no more be ſaid to have been done for him than for a Stranger; it is laid likewiſe, that proinde the Plaintiff deſerved of the Defendant ſo much, and that the not paying this by the Defendant was to the Plaintiff's Damage, which could not be, if the Work had not been done at the Defendant's Requeſt and Approbation. But he thought, there could be no Doubt, but this Declaration muſt be ſufficient, ſince there is Judgment by Nil dicit, and the Statute for the Amendment of the Law has extended the Statute of Jeofails to thoſe Judgments as well as others. The Court declared, that they took the Rule of Law to be, that no paſt Conſideration is ſufficient to ſupport a ſubſequent Promiſe, unleſs there was either a Requeſt of the Party expreſs or implied at the Time of performing the Conſideration. Some Acts, they ſaid, were of ſuch a Nature as that the Law would imply a Requeſt, as the being Bail for one, curing one's Child of a ſudden Sickneſs, performing the Part of a Servant, &c. and therefore in thoſe Caſes they did allow, that a ſubſequent Promiſe might be well founded upon ſuch paſt Conſideration. They did agree likewiſe, that where there was an expreſs Requeſt at the Time of the paſt Conſideration's being performed, that might in all Caſes be ſufficient to ſupport a ſubſequent Promiſe. And therefore the Chief Juſtice ſaid, he could not agree the Caſe cited out of 3 Cro. 741. to be Law. But in the preſent Caſe the Act done by the Defendant was by no Means of ſuch a Nature as to be ſufficient for the Law to create a Requeſt upon it; and therefore an expreſs Requeſt was neceſſary to have been

laid. They ſaid then, that they thought there was by no Means an expreſs Requeſt laid in this Caſe; and however this Declaration might be ſufficient after a Verdict by the Common Law, they were of Opinion, that this was by no Means ſo ſtrong a Caſe upon a Judgment by Nil dicit. For this Purpoſe Judge Lee ſaid, that he well remembred the Caſe of Colliers and Lowther, Paſch. 1713. where the Diſtinction taken by the Court upon this Statute for the Amendment of the Law was, that all ſuch Defects were cured upon Judgments by Nil dicit, as were cured by the former Statute of Jeofails upon Judgments after a Verdict, but not ſuch Defects as were helped by Verdicts at Common Law. They ſaid likewiſe, that they thought this Conſideration muſt be a paſt one, as laid in the Declaration, by Reaſon of the Word Poſtea. Accordingly reverſed the Judgment unleſs Cauſe.

Goodtitle *and* Pettoe.

Vide ante 90. THE Chief Juſtice delivered now the Reſolution of the Court, and ſaid, that they were unanimouſly agreed, that the Defendant had no Title, upon Account of there being no Conſideration ariſing from her, which the Covenantor could have any Benefit from; though they did agree, that if the Covenant had been to the Uſe of the Wife in Fee, and then ſhe had appointed the Defendant to have taken Benefit of the Uſe, that would have been good. He ſaid, that they were agreed likewiſe, that the Plaintiff had a good Title, upon Account of the Perſon being aſcertained in the Deed, whom he claimed under, and conſequently an Averment of a Conſideration may be well allowed, which he may take Benefit from; and its being ſtated by the Caſe, that the Fact was, that he was Nephew to the Covenantor, they thought, that was a ſufficient Averment of a Conſideration. He obſerved, that their Reſolution was founded upon Bredon's Caſe, and Mildmay's Caſe in 1 Rep. and in Harpur's Caſe in 11 Rep. Accordingly Judgment was given for the Plaintiff.

Hall *and* Godley.

How far the Eccleſiaſtical Court ſhall not have Juriſdiction in a Suit for a Rate for the Repairs of the Church.

ON Rule to ſhew Cauſe, why a Prohibition ſhould not be granted to the Eccleſiaſtical Court, Mr. Fazakeyly ſaid, that the Suggeſtion ſets forth, that the Plaintiff below has libel'd upon a Rate, by which the Inhabitants of the Pariſh of St. Clement's in Haſtings, that lived there in the Year 1729, are required to pay a certain Pound Rate towards the Building of a Church, that was finiſhed in the Year 1736. The Suggeſtion farther ſet forth, that a Suit was inſtituted in the Court of Exchequer, by the Workmen, againſt ſome of the Inhabitants, wherein there was a Decree againſt thoſe Inhabitants, and the Rate farther ordered, that the reſt of the Inhabitants ſhould be contributory towards the Expence of that Suit; and upon that Part of the Rate the Libel was founded likewiſe. Upon each of theſe Parts of the Libel, Mr. Faxakerly ſubmitted it, that the Eccleſiaſtical Court had a Juriſdiction. But

the Court was of Opinion, that they had not; accordingly the Rule was made abſolute.

Buckle *and* Brown.

IN a Replevin of a Diſtreſs taken by the Officers of the Tower, for Trophy-Money, ſuppoſed to be due upon the Statute of Ch. 2. Mr. Robinſon moved, that the Defendant might have Liberty to plead two Pleas; one, De injuria ſua propria; the other, that the Defendant is a City Attorney, and thereby diſcharged from all Offices of bearing Arms, and all Duties of this Sort. He ſaid, that in the Caſe of one Smith, which the Chief Juſtice was of Counſel in, it was determined, that they were diſcharged; but ſtill this Point is endeavoured to be called in Queſtion again; accordingly the Motion was granted.

How far an Attorney ſhall be diſcharged from the Payment of Trophy Money.

The King *and* Pexley.

MR. Kettleby moved to quaſh an Indictment, tried before the Juſtices at Hicks's Hall, againſt the Defendant for taking above 5 Pounds per Cent. and ſubmitted it, that upon none of the later Statutes which have made it illegal at different Times, to take above 8 Pounds per Cent. 6 Pounds per Cent. and 5 Pounds per Cent. the Juſtices at the Seſſions have Juriſdiction; tho' he did agree, that upon the Statute of Eliz. which makes it illegal to take above 10 Pounds per Cent. they have; and for this Purpoſe he relied upon 2 Salk. 680. Accordingly, the Chief Juſtice abſent, a Rule was made to ſhew Cauſe.

How far the Seſſions have no Juriſdiction to hold Plea in an Indictment on the Statutes relating to Uſury.

Mitchel *and* King.

IN an Action in this Court, the Defendant pleaded, that the Plaintiff had impleaded him for the ſame Cauſe of Action in the Court of Common Pleas, which Action in the Court of Common Pleas was commenced before the Suit began in this Court, and was ſtill ſubſiſting at the Time of the Plea. Upon this the Plaintiff replied Nul tiel Record; and a Day being now given to verify his Plea; he produced an Entry of the Writ of Quare clauſum fregit upon Record, with an Affidavit, that the Plaintiff ſued out this Writ, in order to declare againſt him for the ſame Cauſe of Action as this was ſued againſt him; which Mr. Agar ſubmitted it, was ſufficient. But Judge Page, the Chief Juſtice abſent, declared, that the Plaintiff could not be ſaid to have impleaded the Defendant, till he declared againſt him; accordingly was of Opinion, that the Defendant had failed of his Record; and thereupon was awarding a Reſpondeas Ouſter. But Mr. Bootle Junior ſubmitted it, that as Iſſue was joined upon Nul tiel Record, and the Defendant had failed upon the Trial, the Plaintiff was intitled to final Judgment. Judge Page ſaid, that he was not of that Opinion, though he agreed this would have been ſo, if the Iſſue had been tried by the Country. However

When the Defendant pleads in Abatement that the Plaintiff has commenced another Action againſt him, which is yet depending for the ſame Cauſe, with the preſent one, and the Plaintiff joins Iſſue upon it; how far the Defendant ſhall be ſaid to fail in his Plea.

How far a Perſon ſhall not be ſaid to have commenced his Action till he has declared.

ever, gave the Plaintiff Liberty to ſign what Judgment he thought proper, at his Peril.

The King *and* Bowden.

When a Conviction is made upon the Statute of 7 & 8 W. relating to Tithes; how far ſuch Conviction ſhall be ſaid to be good, or not.

MR. Pilſworth moved to quaſh an Order of Juſtices made upon the Statute of 7 & 8 W. 6. for its not being ſet out in the Order, that there had been a Demand made of the Tithes before the Application to the Juſtices. He ſaid likewiſe, that the Party ought to have ſtaid twenty Days after the Demand, before he applied to the Juſtices; and this ought to have appeared in the Order likewiſe. Accordingly, the Chief Juſtice abſent, the Court made a Rule to ſhew Cauſe. Vide Poſt.

Perington *and* ——.

How far Judgment in Ejectment muſt be moved for the ſame Term, that the Declaration is ſerved in.

MR. Abney moved for Judgment in Ejectment upon an Affidavit of Service of the Copy of the Declaration in Hill. Term laſt; the Reaſon, why this Motion was not made before, he ſaid, was, that the Defendant till now inſiſted upon his Privilege. But Mr. Strange objected, that the Court never allows of theſe Motions but in the very Term which the Declaration is ſerved in; and he ſaid it might be reaſonable to make the Tenant ſearch one Term to ſee, whether he is obliged to enter into the Rule to make himſelf Defendant, but it would be unreaſonable to make him ſearch longer. The Court too was of the ſame Opinion; accordingly diſallowed the Motion.

Salter *and* Williams.

How far the Court of King's Bench cannot make a Rule upon a Judge of an inferior Court, to give Judgment in a Cauſe which is depending before him.

ON a Rule to ſhew Cauſe, why the Judge of a Hundred-Court ſhould not be obliged to give Judgment; the Chief Juſtice ſaid, that he never knew a Rule made upon ſuch an Occaſion; but a Mandamus was the proper Remedy; accordingly it was diſcharged.

The King *and* Paterſon.

When a Motion is made that the Defendant may ſubmit to a ſmall Fine, what Kind of Affidavits are proper to be read on ſuch Occaſion.

THE Defendant having been indicted for an Aſſault, and confeſſed the Indictment, Mr. Fazakerly moved that he might ſubmit to a ſmall Fine. Upon which Mr. Strange produced Affidavits, that this Aſſault was upon an Officer in the Execution of his Office. But Mr. Fazakerly ſubmitted it, that theſe Affidavits proved the Fact to be of a different Nature from that charg'd in the Indictment, and the Defendant had confeſſed no more than that which was charged in it; for which Reaſon they ought not to be read againſt him. However, the Court was of Opinion, that they well might; and they were read accordingly.

Howel *and* Walker.

ON Rule to ſhew Cauſe, why an Attachment ſhould not go againſt the Defendant for Breach of an Award; Mr. Marſh objected, that the Rule was obtained upon the Affirmation of a Quaker, which ought not to have been admitted; becauſe the End of the Attachment is to puniſh the Defendant in a criminal Manner, for a Contempt of the Court; and to ſhew that ſuch Affirmations have been actually refuſed in theſe Caſes, he cited that of The King and Wych. But the Maſter ſaid, that theſe Attachments iſſue out of the civil Side, and the End of them is only to recover a Duty of a civil Nature, and in the Caſe of one Jaſper it was allowed. The Court too were of the ſame Opinion; but enlarged the Rule, that Precedents might be ſearched.

When a Motion is made for an Attachment, how far the Affirmation of a Quaker may be read, or not, in Support of ſuch Motion.

The Biſhop of London *and* The Mercers Company.

THE Judgment of the Court of Common Pleas having been affirmed by this Court; Serjeant Belfield moved, that the Defendant in Error might have Damages given him in Purſuance of the Statute of 3 H. 7. 10. and that to the Value of the Living. And for this Purpoſe cited 1 Cr. 145, 173, and Dy. 77. Accordingly a Rule was made to ſhew Cauſe. Vide Poſt.

Vide ante 108.

Anonymus.

SEveral Perſons having been ordered by the Court to attend, and the Court having now thought it proper that the Matter ſhould be inquired into more ſtrictly before the Maſter; Mr. Kettleby moved, that they might be committed in the mean Time. But Mr. Strange ſaid, that upon theſe References to the Maſter for a more ſtrict Inquiry, the Court always allows the Party to go at large upon his own Recognizance; though he did agree, that after the Party is taken upon the Attachment the Recognizance of other Perſons is requiſite, as well as his own. Accordingly each Party was allowed to go at large, in the preſent Caſe, upon his own Recognizance.

How far a Perſon ſhall be diſcharged upon his own Recognizance.

More *and* Eyles.

IN Debt brought againſt an Heir upon the Bond of his Anceſtor, the Defendant pleaded his Infancy, and prayed, that the Parol might demur; but no Affidavit was made to verify the Plea at the Time of its being put in. Upon which Mr. Timothy Barnardiſton moved, that the Plea might be ſet aſide for this Reaſon. But the Court was of Opinion that the Plea was a temporary Plea in Bar, and not a Plea in Abatement; accordingly refuſed the Motion, the Chief Juſtice and Judge Lee abſent.

What ſhall be ſaid to be a Plea in Bar, and not in Abatement.

Maynard *and* Harvey.

How far the Court will require a Perſon to give Oyer of a Writ.

IN a Scire facias againſt Bail the Defendants pleaded, that a Capias ad Satisfaciendum was ſued out againſt the Principal, and that he was taken in Execution on it. The Plaintiff's Counſel now ſaid, that if there was any ſuch Writ, it muſt be a Record of this Court, and therefore they moved, that the Defendants might be obliged to give Oyer of this Writ, and if they did not, that Judgment might be entered againſt them; and for this Purpoſe cited a like Caſe of Hunter and Wiſeman. Accordingly the Court made a Rule to ſhew Cauſe, the Chief Juſtice and Judge Lee abſent. Vide poſt.

Lomax *and* Holden.

Vide ante.

ON Rule to ſhew Cauſe, why the Iſſue in this Cauſe ſhould not be tried at the Bar, Mr. Strange ſaid, he ſhould not oppoſe it, but ſubmitted it, that it muſt be upon Terms that the Defendant will pay Bar-Coſts, and receive Niſi prius ones; becauſe he had an Affidavit, that the Plaintiff was not worth 5 l. in all the World, beſides the Eſtate in Queſtion. Mr. Reeves on the other Side obſerved, that this was an Iſſue out of Chancery, which that Court had directed to be tried at the Bar, and therefore this Court would put no Terms upon the Parties. Accordingly the Rule was made abſolute without impoſing any Terms upon the Parties at all; the Chief Juſtice and Judge Lee abſent.

Cole *and* Cockerel.

How far a Demand ſhall be ſaid to be neceſſary, or not.

IN a Quantum meruit for Lodging and Diet for the Defendant's Wife, which the Plaintiff declares, that he delivered to the Defendant's Wife at the ſpecial Inſtance and Requeſt of the Defendant; the Defendant pleads, that at the Time ſuppoſed by the Declaration his Wife eloped from him; abſque hoc, that the Goods were delivered to his Wife at his Requeſt modo & forma. Upon this Iſſue was joined; and upon the Trial no ſpecial Requeſt could be proved; accordingly a Caſe was made for the Opinion of the Court upon this Point, whether a Requeſt was neceſſary. Mr. Acherly argued, that it was neceſſary; and ſubmitted it upon this ſingle Point, that in the preſent Caſe a ſpecial Iſſue was joined, which muſt be proved ſpecially as it is laid; and for this Purpoſe cited 7 H. 4. 11. and 2 Saund. 317. But the Court was of Opinion, that the Requeſt in this Caſe was implied by the Law upon the Delivery; and that the Rule, that has been mentioned, does not extend to ſuch Things, as the Law implies; but to thoſe Things only, which the Law does not imply; accordingly, Judge Lee abſent, they gave Judgment for the Plaintiff.

The King *and* Lady Lawley.

THE Defendant having been examined upon Interrogatories for a Libel publiſhed by her on the Proceedings of the Court, and the Maſter now reporting her in Contempt, Mr. Marſh ſubmitted it, that it appeared upon her Examination, that what ſhe did was by the Inſtance and Direction of her Huſband, and therefore the Puniſhment ought not to be inflicted upon her, but upon her Huſband. But, if the Court ſhould be of Opinion, that ſhe was anſwerable for this Offence, at leaſt the Court would bail her, till they could be prepared to paſs the Judgment. The Chief Juſtice ſaid, that the Excuſe that has been mentioned could be none in theſe Offences, though it is in Felonies. And as to bailing her, the Court declared, that a Report of the Maſter was in the Nature of a Conviction, and therefore they could not do it. Accordingly the Motion was diſallowed, Judge Lee abſent.

How far a Maſter's Report ſhall be ſaid to amount to a Conviction.

The King *and* Britton.

THE Defendant having been indicted upon the Statute of 5 Eliz. for exerciſing the Trade of a Cutler, without having ſerved a legal Apprenticeſhip. Mr. Draper took an Exception to it, which, he ſaid, had often been allowed, that the Trade was laid in the Indictment to be uſed infra hoc Regnum Angliæ at the Time of the Act; whereas there was now no ſuch Kingdom. For this Purpoſe he cited the Caſe of The King and Windgrove, Hill. 3 Geo. 2. which was determined upon the Caſe of The King and Paris, which had been before determined upon the Caſe of The King and Hog, Trin. 9 Geo. 1. The Caſe of The King and Windgrove, he ſaid, was an Indictment for exerciſing the Trade of a Baker. The Caſe of The King and Thompſon, he obſerved too, was to the ſame Purpoſe, and that was an Indictment for exerciſing the Trade of an Ironmonger. And ſo that of The Queen and Robinſon, Eaſter 1714. for exerciſing the Trade of a Barber. Serjeant Chappel on the other Side argued, and ſaid, he did agree, that Indictments have been quaſhed upon this Exception, where the Trade, which the Party is indicted for exerciſing, is not one of thoſe, which is by Name mentioned in the Statute; but the Trade which the preſent Defendant is indicted for exerciſing is one of thoſe; for which Reaſon he ſubmitted it, that it was unneceſſary to have averred, that the Trade was uſed in England at the Time of the Act; becauſe the Act itſelf has expreſly declared it to be ſo; and therefore he apprehended, that the Clauſe of infra hoc Regnum ſhall be rejected as Surpluſage. To which Purpoſe he cited the Caſe of White and England, 3 Salk. Accordingly the Court ordered this Matter to ſtand over, Judge Lee abſent. Vide poſt.

When a Perſon is indicted for exerciſing a Trade without having ſerved a legal Apprenticeſhip contrary to the Statute of 5 Eliz. how far ſuch Indictment ſhall be ſaid to be good, or not, in reſpect of its deſcribing the Trade to be exerciſed within this Kingdom at the Time of the Act.

The

The Pariſh of Northfetherton *againſt* The Pariſh of Horſington.

How far an Order of Removal ſhall be ſaid to be concluſive to all the World.

ON Rule to ſhew Cauſe, why an Order made by two Juſtices for the Removal of one John Powen, Mary his Wife and three Children to the Pariſh of Northfetherton, which was affirmed at the Seſſions, ſhould not be quaſhed; and why an Order of Seſſions, diſcharging an Order of two Juſtices made afterwards for the removing the ſaid Mary by the Name of Mary Hellior, and four Children, as being Baſtard Children, to the Pariſh of Horſington, where they were born, ſhould not be likewiſe quaſhed; and the ſaid laſt Order of two Juſtices confirmed; Mr. Forteſcue ſaid, that he apprehended, the Law was very clear, that wherever an Order of two Juſtices is made for a Removal, and that Order not appealed from at the next Quarter-Seſſions, or affirmed upon the Appeal, that Removal is concluſive to all the World. Now he obſerved, that there was ſuch an Order in the preſent Caſe for a Removal to the Pariſh of Northfetherton, which was actually affirmed at the Seſſions; and therefore he ſubmitted it, that the ſubſequent Order of two Juſtices was clearly irregular. Mr. Reeves on the other Side argued, and ſaid, he ſhould not contend, but the Rule of Law was as has been mentioned; neither ſhould he contend, but the Fact really was, that the ſame Woman with three of the ſame Children was ſent to the laſt Pariſh of Horſington. But he ſaid, upon ſtating the Whole of the Caſe it would appear, that the Pariſh of Horſington was the Pariſh, which ought to be charged with theſe Perſons; and therefore, if the Merits could in any Way be come at, the Court would certainly allow it. The Whole of the Caſe, he obſerved, was, that this Mary Hellior was indeed married to this John Powen; but he was at that very Time married to another Woman; and conſequently the Marriage with Mary Hellior was a mere Nullity; the Children were Baſtards; and therefore Mary Hellior and her Children in Conſcience ought to be maintained by the Pariſh of Horſington, which was the Place where her Settlement was, and the Place where the Children were born. Now the Way, in which this Order of Removal to Horſington might be made good, he apprehened, was, by conſidering, that the Perſon removed by the Name of Mary Powen, and the Perſon removed by the Name of Mary Hellior, could not upon theſe Orders be taken to be the ſame Perſon. The Court doubted, whether this laſt Order could be maintained in the Manner that has been mentioned; but if it could in any Way, they ſaid, it certainly ſhould. Upon this Judge Probyn took two Exceptions to the Order of Removal to Northfetherton; firſt, that the Order was only ſaid to be made upon due Examination and other Circumſtances; ſecondly, that the Ages of the Children were not mentioned in it. Accordingly, Judge Lee abſent, this Matter was ordered to ſtand over. Vide poſt.

Maynard *and* Harvey.

THIS Matter coming now on again upon Motion to make the Rule abſolute, the Chief Juſtice ſaid, that he did not think, that this Caſe came up to the Caſe of Hunter and Wiſeman; for that was of a Judgment pleaded of this Court; and there indeed the Party pleading the Judgment is obliged to give a Note of the Roll which the Judgment is of, otherwiſe the Search might be endleſs. But Writs are always upon the File, and the Search therefore by no Means ſo difficult. For which Reaſon, Judge Lee abſent, the Rule was diſcharged. And the Chief Juſtice ſaid, as this Caſe was, he did not think that the Party was intitled to Oyer; but his Remedy is by pleading Nul tiel Record. Vide ante 105.

Wildiſh *and* Lunden.

A Judgment in Ejectment having been referred to the Maſter for Irregularity, he reported the Fact to be, that the Tenant had entered into the Rule to confeſs Leaſe, Entry and Ouſter; but before Plea pleaded gave Judgment to the Plaintiff by Cognovit Actionem. The Landlord upon this prayed (though he had not obtained a Rule to make himſelf added, Defendant) that the Judgment might be ſet aſide. And the Maſter reported the Practice of this Court to be, that, after the Tenant has entered into this Rule, he cannot give Judgment by Cognovit Actionem; but muſt enter a Relicta Verificatione; though he did agree, the Practice was otherwiſe in the Common Pleas. Accordingly, the Chief Juſtice and Judge Lee abſent, the Court ſet the Judgment aſide. And Judge Page ſaid, that the Landlord has a Right to make himſelf added Defendant, at any Time after the Tenant has entered into this Rule to confeſs; and that, though he did not actually make the Leaſe to the Tenant; ſo as he ſhews a reaſonable Evidence to the Court, that he is the Perſon in Poſſeſſion. When the Tenant has entered into the Rule to confeſs Leaſe, Entry and Ouſter, how far he cannot give Judgment by Cognovit Actionem.

The King *and* Bolton.

MR. Reeves came now to ſhew Cauſe, and ſaid, that he ſubmitted it, no Certiorari would lie in this Caſe; becauſe it did appear, that the Right of the Tithes came in Queſtion, and where it doth not, the Juſtices of Peace are made final Judges. For which Reaſon he ſubmitted it, that the Certiorari was improperly awarded. Then as to the Merits of the Order, he obſerved, that it was recited in it, that a Demand of the Tithes had been made, and the Twenty Days elapſed, before the Complaint was made; and the Adjudication does require the Defendant to pay Tithes for ſo much Time ſubſtracted as aforeſaid; which, he ſubmitted it, muſt take in the Time of the Demand, as well as the Time after. Mr. Pilſ- Vide ante

worth on the other Side ſaid, that he had an Affidavit to produce, that the Right of Tithes did come in Queſtion before the Juſtices; and that Evidence of that Sort was offered, but it was refuſed. And as to the laſt Matter, he apprehended, that an expreſs Adjudication of theſe Matters was requiſite. Accordingly, the Chief Juſtice and Judge Lee abſent, the Order was quaſhed.

Philips *and* Grindel.

Vide ante 131.

MR. Strange came now to ſhew Cauſe, and ſaid, that by Law the Bail in all Caſes ought to ſurrender the Principal before the Return of the Capias ad Satisfaciendum againſt him. He did agree indeed, that the Indulgence of the Court has of late been ſhewn ſo far to Bail, as that the Court will ſtay Proceedings againſt them, provided they ſurrender the Principal before the Return is out of two Nihils upon two Scire facias's, or a Scire feci. But he obſerved, that that Return, as well as all other Returns, is out by the riſing of the Court; yet in the preſent Caſe, he ſaid, the Fact was admitted to be, that the Surrender was not made till the Court had actually roſe on the Day of the Return. And therefore he ſubmitted it, that the Surrender muſt have been out of Time. The Court too was of the ſame Opinion, and ſaid, that they believed this Point had been often ſo determined. For which Reaſon they diſcharged the Rule.

Anonymus.

In Debt on Bond, how far the Bail muſt juſtify themſelves in double the Penalty of the Bond.

ON Motion to juſtify Bail upon a Writ of Error in Debt upon Bond, Mr. Parker ſubmitted it, that the Practice of the Court was, that the Bail need only juſtify themſelves in double the conditional Sum, and not in double the Penal one. But the Court declared it to be otherwiſe; for, they ſaid, it was uncertain what the Intereſt upon the Bond might amount to.

Anonymus.

How far the Court of Exchequer will not allow a Plaintiff to file Exceptions to an Proſecution.

Scac. ON Motion in the Court of Exchequer Baron Carter declared, that the Court had made an Order this Term, not to allow of Exceptions to be filed to an anſwer, after the Defendant is intitled to move to diſmiſs the Bill for want of Proſecution.

Anſwer, after the Defendant is intitled to move to diſmiſs the Bill for want of

Term. Trin.

5 Geo. II. 1732.

Aſh *and* Mathews.

MR. Reeves now moved for the Court's Direction to the Maſter in Relation to the allowing Coſts. The Plaintiff, he ſaid, had a regular Judgment and Execution; and whilſt he was in Poſſeſſion of the Eſtate in Purſuance of it, he was at ſome Charges about the plowing and ſowing of the Ground; the Expence of which, he ſubmitted it, the Maſter ought to allow within the Intention of the Word Coſts in the former Rule; or at leaſt the Court would amend the Rule now, and make the Terms of it to be, that the Plaintiff ſhould allow for thoſe Expences. The Court were of Opinion, that this was not within the Meaning of the former Rule; neither did they think proper to make it any Part of this. Accordingly the Motion was diſallowed. Vide ante 139.

Anonymus.

ON Motion to file a Return to a Certiorari, directed to the Commiſſioners of Sewers, the Court ſaid, that in theſe Caſes they only make a Rule to ſhew Cauſe; accordingly did ſo in the preſent Caſe. When an Order of Commiſſioners of Sewers is removed up by Certiorari, how far the Court will not direct that the Return to it ſhall be filed without making a Rule to ſhew Cauſe.

Anonymus.

ON a Motion for an Attachment againſt the Sheriff of Suffolk, for not returning a Writ, an Affidavit was produced that Hill. 3 Geo. 2 was the Term in which the Return ought to have came in, and that Search had been made among all the Returns of that Term; but no ſuch Return could be found. The Chief Juſtice doubted, whether the Affidavit was full enough; becauſe the Return might have come in in any of the Terms after, and that would have been ſufficient. But it was anſwered, that when a Return does come in, it is always filed of the Term when it ought to have come in. Accordingly the Motion was granted. How far Returns to Writs are filed as of that Term when they ought to have come in.

The

The Pariſh of Horſington *againſt* The Pariſh of Northfetherton.

Vide ante 148.

THIS Matter coming now on again, the Court declared their Opinions, that the Order made upon the Pariſh of Horſington, could not be maintained. And though Mr. Reeves ſubmitted it, that if a Man was removed by the Name of John, and that was his wrong Name, yet he might at any Time be removed by the Name of Thomas, being his right Name; the Court ſaid they took the Law to be otherwiſe. For there is as much Reaſon for the Pariſh, to which he is removed, to take ſuch Exception to the Order of Removal, within Time, as any other. Then as to the two Exceptions taken by Judge Probyn upon the former Argument to the firſt Order, he and the reſt of the Court now agreed, that they could be of no Force. For as to the Order's being ſaid to be made upon due Examination and other Circumſtances, they were of Opinion, that the Words other Circumſtances ſhould be rejected, as Superfluſage; and as to the Ages of the Children being not mentioned, they ſaid, the Juſtices have adjudged the Pariſh of Northfetherton to be the Place of the laſt legal Settlement of the Children; and therefore the Ages of the Children need not be ſet forth. Accordingly the laſt Order was quaſhed, and the original Order confirmed.

The King *and* Lofield

Vide ante 128.

ON Rule to ſhew Cauſe, why the Defendant ſhould not pay Coſts, for not praying a Tales at the Trial, and ſo upon the Matter not compleatly carrying down the Record; Mr. Fazakerly ſaid, that the Defendant had obtained a Rule for a ſpecial Jury, and had got a Warrant ſigned by the Attorney General for a Tales, which he actually produced at the Trial, and which the Proſecutor might have made uſe of, if he had thought proper, and have prayed a Tales upon it. He obſerved, that at Niſi prius in civil Actions, where the Record is made a Remanet, the Entry always is pro Defectu Jurator'; yet theſe Coſts are never granted. The ſame Entry is made upon the preſent Record; accordingly the Court diſcharged the Rule.

Wills *and* Williams.

How far the Court will give Time for moving to change a Venue.

IN an Aſſumpſit for certain Toll ariſing from a Borough in Cornwall; Serjeant Belfield moved to change the Venue from Middleſex into Cornwall. He ſaid, that the Declaration was ſerved but on Saturday Night laſt, ſo that it was impoſſible yet to get an Affidavit from the Defendant who lives in Cornwall, that the Cauſe of the Action, if any, did ariſe in Cornwall. However, he had an Affidavit from an Attorney, who was Neighbour both to the Plaintiff and Defendant, and he ſwears that he believes neither

of them was ever in Middlesex in their Life-Time. The Serjeant observed too, that the Rules for Pleading would be out on Tuesday next; but he was afraid, if they had moved for Time to plead, it would have been too late after that to have moved to change the Venue. The Court upon these Circumstances made a Rule for shewing Cause on Thursday sevennight, why the Venue should not be changed; by which Time the Defendant's Affidavit would be able to be in Town. And as to enlarging the Time for pleading, they said, that the doing that would be unnecessary. For upon the Matter the Question is whether the Declaration is regularly delivered.

Doyly *and* Daniel.

How far the Court will give the Plaintiff Leave to change his Venue.

MR. Strange moved to discharge a Rule for changing the Venue from Norfolk into Essex, and that the Venue might be laid in Middlesex which was the proper County, upon an Affidavit on the Behalf of the Plaintiff, that the whole Cause of Action arose either in London or Middlesex. He observed, that the Action brought was for Fees in Agency Business; and though the greatest Part of the Business was done in Middlesex, yet some of the Offices are in London, and therefore it was impossible but some of the Business must have arose there. He said, that this Motion is made before the second Term is over, and till that Time the Plaintiff is intitled to move to change his own Venue. For which Purpose he cited Sid. 442. The Court said, that the proper Motion was for Leave to amend the Declaration upon Payment of Costs and that would have the same Effect with a Motion to discharge the Rule for changing the Venue. Accordingly that Motion was granted.

Anonymus.

How far the Court will not give Leave to compound a Prosecution.

IN a Conviction for building a House in London without Party-Walls, contrary to the late Act of Parliament, Mr. Theed, moved, that the Prosecutor might have the Leave of the Court to make up this Prosecution; but without Leave he said, he could not do it by the express Words of the Statute of 18 Eliz. 5. The Court said, that they thought that Act did not extend to Convictions; especially not to Convictions made in Pursuance of Statutes that were made after 18 Eliz. Accordingly the Motion was refused.

Bird *and* Smith.

How far the Court will not ſtay the Proceedings in one Action till the Coſts of a former one are paid.

THE Plaintiff had brought a former Action as Adminiſtrator, but in the Declaration had left Blanks for the Time when the Adminiſtration was committed, and for ſome other Particulars relating to it; the Defendant demurred to the Declaration for this Reaſon; but the Plaintiff, inſtead of moving to amend his Declaration, got Leave of the Court upon a Side-Bar Motion to diſcontinue without Payment of Coſts, as being an Adminiſtrator. Notwithſtanding this, the Plaintiff had ſince brought another for the ſame Cauſe as the former. Upon which Mr. Strange moved, that Proceedings in it might be ſtaid, till he paid Coſts in the former. But the Court refuſed the Motion, by Reaſon that an Adminiſtrator is a Perſon indemnified by the Law from all Coſts on commencing any Action.

Cowel *and* Waller.

Within what Time an Umpire may make his Umpirage.

ON Rule to ſhew Cauſe, why an Attachment ſhould not go againſt the Defendant for not performing an Award, Mr. Marſh ſaid, that the Fact was, that the Plaintiff and Defendant entered into Bonds of Arbitration the beginning of December laſt, ſo as the Arbitrators made their Award by the 17th of January following, and if the Arbitrators ſhould not make their Award within the Time given them, then the Parties obliged themſelves to ſtand to ſuch Determination, as any Perſon, indifferently choſen by the Arbitrators, ſhould make, ſo as he made his Determination by the 1ſt of Feb. The Arbitrators choſe an Umpire on the 24th of Decem. and that Umpire made his Umpirage on the 14th of January. The Queſtion, he ſaid, upon this was, Whether the Umpirage was good, in as much as it was made three Days before the Time ended, which the Arbitrators had given them for making their Award in. He did agree, that the Caſe of Mitchel and Harris, Salk. 71. ſeemed to be a pretty ſtrong Authority to ſupport the Umpirage; but yet he ſubmitted it, that it was diſtinguiſhable from the preſent Caſe; for there the Umpire was choſen but on the very Day, in which he was confined to make his Umpirage in. He did agree likewiſe, that there was another Caſe exactly in Point with the preſent one, which came before the Court of Common Pleas lately; the Name of it was Ogel and Cogdel, and there the Court did incline to think, that the Umpirage was good; but ſtill there was another Matter, which they founded their Judgment upon, viz. that an Award was pleaded in Bar by way of a Satisfaction, and not Payment in Purſuance of it. He obſerved then, that if theſe Caſes ſhould be allowed to receive ſuch Anſwer, as has been offered, there were other Caſes in the Books, that ſtrongly inforced the Opinion, which he contended for. And for this Purpoſe he cited one reported 1 Leo. 32. and Raymond 206. and another in Salk. 70. Mr. Theed argued too of the ſame Side,

but, beſides inforcing the Point of Law that has been mentioned, took an Exception to the Affidavit upon which the Rule was made, that the Words of it only were, that the Deponent ſaw the Umpire ſign, ſeal and execute the Umpirage, bearing Date the 14th of *January*, without ſaying, that he ſaw him execute it on that Day. Mr. Wirley on the other Side ſaid, that if this Exception to the Affidavit ſhould have any Weight with the Court, it would be unneceſſary now to go into the Argument upon the Point of Law; however he ſubmitted it, that the Court would allow of a ſupplemental Affidavit, and would not require, that the original Motion ſhould be made de novo. The Court declared the Exception to the Affidavit to be a fatal one, and ſaid, that they never allow a ſupplemental Affidavit, but where a Matter of Fact wants Confirmation; but here the material Fact has been not at all ſworn to. They obſerved then, that it would not be neceſſary to declare any final Opinion as to the Point of Law; however, they ſaid, they were all ſatisfied, that the Umpirage might be maintained. And this not only upon the Authority of the Caſes that have been allowed; but upon the Authority likewiſe of Roll's Abr. 262. (5). and Sir Thomas Jones 167. However the preſent Rule was diſcharged.

Anonymus.

THE Defendant having been brought up by Habeas Corpus, Mr. Strange moved, that he might be diſcharged, upon an Exception taken to the Commitment, that it only charged him generally with inſulting three Juſtices of Peace in the Execution of their Office, without ſpecifying what he ſaid or did, in order that the Court may judge, whether it amounted to an Inſult or not. Mr. Marſh on the other Side ſaid, that he himſelf once took the ſame Exception in the Caſe of the Judge of the Court of Twynman, and Mr. Juſtice Page in the Chief Juſtice's Abſence over-ruled it. Accordingly the Court did ſo in the preſent Caſe, and the Defendant was only bailed.

How far a Commitment ſhall be ſaid to be good, notwithſtanding ſome Uncertainties in deſcribing the Fact for which the Party was committed.

Burry *and* Perry.

THIS Matter coming now on again, the Court declared their Opinions, that the Words were Actionable in themſelves; and for that Reaſon the ſpecial Damage could not intitle the Plaintiff to full Coſts; accordingly the Rule was diſcharged.

Vide ante. 113.

Jacobs

Jacobs *and* Crosley.

The Certainty in a Plea of Tender, with Regard to describing the Place which the Tender was made in.

IN Assumpsit the Plaintiff declared, that the Defendant agreed, in Consideration that the Plaintiff would transfer to him so many Shares of Stock in the York-Buildings Company, that the Defendant would pay him after the Rate of 11 l. 7 s. per Cent. upon transferring the same immediately after the Opening of the Books. The Plaintiff sets out that the first Day for transferring after the Opening was the 29th of February, that the House called the York-Buildings House, was the usual Place for transferring the Stock of the Company; and that the Hours from Three to Five in the Afternoon, was the usual Time for that Purpose. The Plaintiff then avers, that he was present at the House aforesaid on the 29th of February, all the Time before the Hour of Three till after the Hour of Five, ready to transfer the Stock to the Defendant, but that no one was there ready on the Part of the Defendant to receive the same. The Plaintiff farther declares, that the Defendant has not paid the said Money, nor any Part thereof, in Pursuance of his Contract, which he lays to his Damage. To this Declaration the Defendant puts in a general Demurrer; and the Exception taken to it by Mr. Fazakerly was, that the Tender ought not to have been laid at the House generally, but in that Part of it, where the Books are kept for making Transfers. He observed, that in Case of Tender of Rent for a Piece of Ground, the Law was known to be, that the Tender must be made at the Gate belonging to the Piece of Ground; so in Debt for Rent for a House, the Law was known to be, that the Tender must be made at the Door of the House; and therefore he submitted it, that in the present Case the Tender ought to have been made in that Part of the House, where the Books are kept; for that is the most notorious Place in this Case, as the Gate and the Door are the most notorious Places in the other. The Court said, that they did agree, that the Tender ought to have been made in that Part of the House where the Books are kept; but upon this Declaration they would not intend that there were any other Parts of it. A House, they said, ex vi termini signifies nothing but some Building; and it may be a Building of one Room only, as well as of more. Judge Page said, if the Tender was to have been made at Guild-Hall or Westminster-Hall, it would have been enough to have laid in the Declaration, that the Tender was made at Guild-Hall or Westminster-Hall, without saying it was made at the Door of the Hall, or any other particular Part of it. The Chief Justice observed too, that if the Defendant had pleaded the General Issue in this Case, the Plaintiff would have been obliged to have proved his Tender in that very particular Part of the House, where the Books are kept. However the Court thought this a Matter proper to be farther considered of. Vide Post.

More *and* Gates.

IN an Aſſumpſit the Defendant pleaded the Statute of Limitations; to which the Plaintiff replies, that he ſued out a Bill of Middleſex in Hill. Term, with an Intent to declare in this Action, and that before that Time the ſir Years did not incur; the Defendant rejoins, that though by the Courſe of the Court, a Bill of Middleſex is ſuppoſed to iſſue only in Term-Time, yet in Fact this Bill of Middleſex was not ſued out till the 20th of March following, at which Time the ſir Years were incurred; and to this the Plaintiff demurs. Mr. Draper argued on the Part of the Plaintiff, and ſubmitted it, that the Court would not allow ſuch Averment out of the Record, as that which the Defendant has attempted; and for this Purpoſe cited the Caſe of Jones and Burnet, in the Common Pleas, Paſch. 5 Geo. 1. An Aſſumpſit was there brought by the Plaintiff, as Indorſee of a Promiſſory Note, againſt the Defendant, being an Attorney of the Court, by Writ of Privilege; the Defendant pleaded, that the Attachment iſſued the 12th of February, and that at that Time the Note was not indorſed by the Plaintiff; the Plaintiff replies, that in Fact he did not ſue the Attachment out till the 25th of March, teſted the 12th of February, and that the Indorſement was before the Arreſt. Upon this Caſe the Court was of Opinion, that no ſuch Averment could be taken, and thereupon they awarded, quod Breve caſſetur, as being ſued out before the Time. Mr. Deniſon on the other Side argued, that Bills of Middleſex and Writs of Latitat were diſtinguiſhable from other Proceſs; a Bill of Middleſex has no Teſte to it, and a Writ of Latitat may be ſued out before the Cauſe of Action, though the Party cannot be arreſted by it before; and for this Purpoſe cited 2 Cr. 561. and 2 Keb. 198. As to the Caſe of the Attachment, he obſerved, that that was conſidered in the Common Pleas to be in the Nature of an Original. Accordingly the Court ordered this Matter to ſtand over. Vide Poſt.

When the Statute of Limitations is pleaded, what ſhall be ſaid to be a good Rejoinder in ſuch Action. How far an Averment may be allowed, in order to aſcertain the Time of ſuing out a Bill of Middleſex.

The Biſhop of London and Lewen *and* The Mercers Company.

MR. Fazakerly came now to ſhew Cauſe, and ſaid, that he ſubmitted in the firſt place, that no Damages ought to be given in this Caſe, becauſe the Statute ſpeaks only of ſuch Writs of Error as are brought merely for Delation; but this Writ of Error appeared to be brought with the Intent of having the Opinion of a ſuperior Court in a difficult Matter of Law. However, if Damages ought to be given at all, he ſubmitted it, that the Quantum of them ought to be only the Intereſt of the Damages and Coſts recovered in the Action below. The Patron, he obſerved, was the only Perſon before the Court to pray any Damages; the Damage to the Patron can only ariſe

Vide ante 64.

from his being kept out of the Money which he was intitled to by the former Recovery; the Patron has nothing to do with the mean Profits of the Living; they belong to the Presentee from the Instant of his Presentation. For the securing them to the Presentee, the Statute of 28 H. 8. 11. has appointed, that whilst the Right of Presentation is under Contest, the Living shall be put into the Hands of Sequestrators. The Sequestrators are bound by that Act to account to the Presentee for all the mean Profits, except such as are allotted for the providing a Curate. So that if the Patron was to recover that, which is found to be the Value of the Church, in Damages, he would recover Satisfaction for that which he was not intitled to; and Mr. Lewen would account for that which he never received. Serjeant Belfield and Mr. Strange argued on the other Side, and said, that they apprehended, the Court would not enter into an Inquiry of what the Intent was in bringing the Writ of Error. The Event of the Writ of Error is the only Rule to determine the Intention of the Parties by; and as the Event has been against the Plaintiffs in Error, it is reasonable they should pay the Damages. Then as to the Quantum of the Damages, they submitted it, the proper Rule to go by was the Value of the Church which is found, and as there were three Years spent between the Commencing the Writ of Error and the determining of it, there ought to be three Times that Value given. They observed, that there was a real Damage to the Defendants in Error, besides that of their being kept out of their Money, viz. that they could not have sold the Advowson in the mean Time. An Advowson is Assets in the Hands of the Heir of the Patron; and the Statute of Westminster 2. 5. has appointed, that the Patron shall have Damages found for him according to the Value of the Church. The Court declared themselves very clear in Opinion, that some Damages ought to be given in this Case; but the Chief Justice in particular said, that he was not satisfied they ought to be according to the Value of the Living. However, this Matter stood over. Vide Post.

Anonymus.

ON Rule to shew Cause, why the Gaoler of the County of Leicester should not deliver over the Possession of the Prisoners, and of the Gaol, to one whom the present Sheriff had appointed to have the Custody of them; Mr. Abney said, that many of the Prisoners were committed in the Custody of former Sheriffs; so that till those Sheriffs had assigned them over to the present Sheriff, he submitted it, the present Sheriff had nothing to do with them. He observed farther, that admitting the former Sheriffs should make such Assignment, yet still this Court would do nothing in an Affair of this Nature, by way of Motion. And of this Opinion, he said, the Court was in the Case of one Stafford. However, in the present Case, the Court thought proper to make a Rule upon the former Sheriffs to assign over their Prisoners to the present

Sheriff, and likewiſe upon the Gaoler to deliver the Poſſeſſion of the Priſoners and of the Gaol to the Perſon, whom this Sheriff appointed to have the Cuſtody of them.

The King *and* The Inhabitants of Utoxeter.

THIS Matter coming on again, Mr. Reeves argued in Suppoꝛt of the Dꝛder. And the pꝛincipal Matter now debated, was, whether the Statute of 13 & 14 Ch. 2. 12. (21.) extended to other Counties, beſides thoſe mentioned by the expꝛeſs Woꝛds of the Statute. To ſhew that it did, he cited the Caſe of The King againſt The Inhabitants of Stokelane, Doulton and Lucome-Lodge, Hill. 11 Ann. The Juſtices had appointed Dverſeers in Lucome-Lodge, in dꝛder to make a Removal there. One of the Points befoꝛe the Court was, whether the Juſtices could appoint Dverſeers in this Place, in as much as it was not within any of the Counties mentioned by the Woꝛds of that Clauſe in the Act of Parliament; the Court was of Dpinion that they might; and the Reaſon given was, that the Woꝛds of the Act were, and other Counties within *England* and *Wales*; now none of the Counties mentioned are within Wales, and theꝛefoꝛe the Statute muſt extend to other Counties beſides thoſe that are mentioned. Howeveꝛ the Court did agree in that Caſe, that Lucome-Lodge did not appeaꝛ to be a Place where there was above one Houſe in it; and theꝛefoꝛe the Dꝛder was held bad upon that Account. The Chief Juſtice ſaid, that though there were thoſe general Woꝛds ſaid in that Caſe, that the Statute extended to other Counties, beſides thoſe mentioned in the Act; yet the particular Caſe then befoꝛe the Court, did not come up to the pꝛeſent one; foꝛ there the Doubt befoꝛe the Court was, whether the Statute allowed Dverſeers to be appointed in other extraparochial Places, beſides thoſe lying within the Counties mentioned by the Act. The Court there was of Dpinion, that it did, and this Caſe has conſtantly been held foꝛ Law, though the Loꝛd Chief Juſtice Holt was alwaꝛys of Dpinion, that Dverſeers could not be appointed in extraparochial Places. Howeveꝛ, he obſeꝛved, that in that Caſe the Pooꝛ muſt have been left ſtaꝛving, if Dverſeers could not be appointed; but heꝛe there is a Pꝛoviſion foꝛ them by the Pariſh, at large. Upon which the Court thought, that this Matter requiꝛed faꝛther Conſideration; accoꝛdingly oꝛdeꝛed Copies of the Caſe to be laid befoꝛe them. Vide Poſt.

Vide ante. 135.

Thruſtout *and* Holdfaſt.

IN an Ejectment the Plaintiff had laid his Demiſe back ſo faꝛ as 9 Geo. 1. which Mr. Fazakerly ſaid was done, in oꝛdeꝛ to pꝛevent the Defendant giving in Evidence the Statute of Limitations, upon which he moved, that the Demiſe might be ſhoꝛtened. He did agree, that if the Demiſe had been laid ſo faꝛ back, only to have intitled the Plaintiff to have bꝛought an Action foꝛ mean Profits foꝛ ſo long, the Court would not have ſhoꝛt-

How faꝛ the Court will require the Plaintiff, oꝛ not, to ſhoꝛten the Demiſe which he has laid in his Declaꝛation.

ſhortened the Demiſe. But he obſerved, that if this Method was allowed in this Caſe the Statute of Limitations would wholly be made ineffectual. For by confeſſing Leaſe, Entry and Duſter, the Defendant admits an Entry almoſt for all Purpoſes, but to avoid a Fine. And he obſerved, that at Niſi prius before Mr. Baron Carter in Northumberland, he non-ſuited a Plaintiff for laying his Demiſe above Twenty Years back. The Chief Juſtice, ſaid, that the confeſſing Leaſe, Entry and Duſter would certainly have ſuch an Effect, as Mr. Fazakerly mentioned, but yet he did not ſee, that the Court could do any Thing in it. However the Court made a Rule to ſhew Cauſe.

Reed *and* Chapman.

How far the Admiralty Court has no Juriſdiction in a Suit for Wages due to a Maſter of a Ship.

ON Rule to ſhew Cauſe, why a Prohibition ſhould not go to the Admiralty-Court, Mr. Parker ſaid, that the Foundation of the Suit in the Court below was for Wages due to the Plaintiff as Mate, and the Plaintiff there only ſuggeſts farther, that the Maſter of the Ship died in the Voyage, and that the Plaintiff thereupon for Neceſſity ſake took upon him the Buſineſs of Maſter, and thereupon prays, that in Conſideration of that he may be allowed 6l. per Month for that Time, as Maſter's Wages. Mr. Parker upon this obſerved, that undoubtedly the ſettled Rule of the Court was, that for Wages of Mariners or Mates of Ships the Admiralty-Court ſhall be allowed Juriſdiction, but for Wages of Maſters they ſhall not. However in the preſent Caſe he ſubmitted it, that the Suit for Wages, as Maſter, was only an Incident to the other. However the Court was of a different Opinion; accordingly ordered the Rule to ſtand as to the Wages of a Maſter, and diſcharged it as to the Wages of Mate.

Cowper *and* Norman.

How far the Court will not give Oyer of a Scire facias to aſſign Errors.

ON Rule to ſhew Cauſe, why the Plaintiff in Error ſhould not have Oyer of a Scire facias to aſſign Errors, Mr. Parker ſaid, that the Fact was, that after Judgment the Plaintiff below became a Bankrupt, and thereupon the Aſſignees under the Commiſſion have ſuggeſted this upon the Roll, and prayed a Scire facias to aſſign Errors. Mr. Parker obſerved, that it was a Rule of the Court, that nothing ſhall be pleaded to a Scire facias to aſſign Errors, which Point was ſo determined in the Caſe of Miles and Wilſon, for which Reaſon he apprehended, that the granting Oyer would be intirely ineffectual; and he took Notice farther, that in the Caſe of Executors or Adminiſtrators ſuing out theſe Scire facias's the granting Oyer is always refuſed. Mr. Yates on the other Side cited 1 Mod. 93. to ſupport the Rule. But the Court thought proper to diſcharge it.

Nichols *and* Swordpainter.

IN an Aſſumpſit brought by the Indorſee of a Promiſſory Note, the Defendant pleads the Statute of Limitations; the Plaintiff replies a Bill of Middleſex ſued out Trin. 5 Geo. 2. and that he did ſue it within the ſix Years; the Defendant in his Rejoinder prays Oyer of the Bill of Middleſex, of the Indorſement of it, and of the Return to it; upon which Oyer it appeared, that the Writ was ſtamp'd the firſt Day of October 1731, and thereupon he ſets forth the Statute made the 9th and 10th of W. 3. 25. (59.) by which it is provided, that no Officer ſhall make out any Proceſs, till it is ſtamp'd, and thereupon avers, that this Bill of Middleſex was not ſued out within the ſix Years, and ſo concludes to the Country. Upon this the Plaintiff demurs, and ſhews for Cauſe, that the Matter of the Rejoinder is all nugatory, and the Concluſion of it wrong. Mr. Agar argued to ſupport it; and ſaid, that a Bill of Middleſex has no Teſte to it at Common Law, therefore it could not be known upon the Face of it, when it was ſued out; but he apprehended, that the Statute of W. 3. has appointed a Method, by which it may be known upon the Face of it, when the Writ was ſued out, viz. by providing, that no Writ ſhall be made out, till it is ſtamp'd. But the Court was of another Opinion, and ſaid, that though a Writ is not ſtamp'd, till after it is made out, yet the Writ does not thereby become void. However the Chief Juſtice ſaid, that he did not know, but all that Part of the Rejoinder might be rejected, and ſo the Concluſion be made good. Upon which this Matter ſtood over. Vide poſt.

How far an Averment is allowable in order to aſcertain the Time when a Bill of Middleſex was ſued out.

When the Statute of Limitations is pleaded, what ſhall be a good Rejoinder in ſuch Action.

Bigley *and* Pechey.

IN Treſpaſs for taking Goods, the Defendant pleads, that at the Time of the Treſpaſs ſuppoſed to be committed, Richard, Lord Biſhop of Wincheſter, was ſeiſed in Fee of a Market in the Town of Croydon, and that the Defendant, as Bailiff to the ſaid Biſhop, diſtrained the Goods in Queſtion for Damage-feaſant. The Plaintiff replies, that the late King by his Letters Patent granted the ſaid Market to Jonathan, Lord Biſhop of Wincheſter, and alledges, that at the Time in the Declaration mentioned he brought the Goods into the ſaid Market for Sale, till the Defendant took them of his own Wrong. The Defendant by his Rejoinder craves Oyer of the ſaid Letters Patent, and pleads, that the Plaintiff brought his Goods there without Payment of Toll, upon which the Defendant deſired him to remove away his ſaid Goods, which the Plaintiff did not notwithſtanding, and thereupon the Defendant diſtrained them, as he well might. To this the Plaintiff demurs, and ſhews for Cauſe, that the Defendant has demanded Oyer of Letters Patent, which were not pleaded with a Profert; that he has not alledged, that any Toll was due; nor for

How far Toll ſhall not be ſaid to be due.

for what it is due; nor in what Manner it is due; nor that any was denied; and that the Rejoinder is a Departure from the Bar. Mr. Draper now argued for the Plaintiff, and said, that all Markets were of a publick Nature, free for all People to come into; and therefore, admitting that Toll was due, yet still by refusing to pay it, the Plaintiff would not become a Trespasser upon the Soil of the Market. For which Reason the Goods brought by him into the Market, could not be distrained for Damage-feasant; and for this Purpose he cited, 3 Cro. 75, 627. But he submitted it, that Toll was not due in this Case; because it is not mentioned in the Letters Patent, and is not due of common Right as incident to a Market; in Proof of which was cited 2 Inst. 221. and Lutw. 1329, 1336. He observed farther, that the Nature of Toll was such as to be due from the Buyer only, and not from the Seller; and for this was cited 2 Inst. 220. And took Notice, that in all Demands of Toll the Quantity of the Toll ought to be set forth, that the Court may judge, whether it was reasonable or not, 2 Inst. 222. and the Nature of it ought to have been set forth, because some is in Specie and others not, 2 Rolls Abr. 123. Serjeant Belfield argued on the other Side, and did agree, that the Rejoinder could not be maintained; but he submitted it, that the Replication was bad; and if so Judgment must be for the Defendant. He observed, that the Plaintiff has admitted by his Replication, that he brought his Goods to Sale into the Market; but before he did do so, the Serjeant submitted it, that the Plaintiff ought to have tendered Stallage to the Lord's Bailiff; and for this Purpose he cited a Case determined 15 Jac. 1. in Rolls Abr. 123. relating to the Town of Cambridge. The Court declared themselves by no Means satisfied, that Toll or Stallage was due to a Market without an express Clause in the Grant or Prescription for that Purpose; but if these Duties were incident to Markets of common Right, they thought that Stallage could not be necessary to be tendered before the Goods were brought into the Market, and that it was enough to do it, after they were brought in. And as to the Case cited out of 2 Rolls Abr. 123. the Chief Justice and Judge Page declared, that they doubted, whether it was Law. Accordingly Judgment was given for the Plaintiff, unless Cause on Thursday next.

Traverse *and* Wood.

When a Writ of Error is brought upon a Judgment in Ireland, the Method which the Court makes use of to hasten the Plaintiff in Error to assign his Errors.

UPON a Writ of Error on a Judgment in Ireland, Mr. Wynn moved, that the Defendant in Error might be at Liberty to sign a Nonpros, in case Errors are not assigned within a Week's Time after Notice stuck up in the Office, there having been one Notice of that sort given already. Mr. Strange said, that there have been several Rules made by the Court to this Purpose; accordingly they made such Rule in the present Case.

Anonymus.

What ſhall not be ſaid to be a ſufficient Conſent that a Submiſſion to Arbitration be made a Rule of Court.

ON Motion by Mr. Floyd, that a Submiſſion to an Arbitration might be made a Rule of Court, it appeared, that the Conſent was only, that the Award ſhould be made a Rule of Court. Mr. Monday ſaid, that the Court has often refuſed making Submiſſions to Arbitration Rules of Court upon ſuch Conſent; accordingly this was refuſed in the preſent Caſe.

Twiſeldon *and* Newel.

What ſhall be ſaid to be a good Scire Facias to aſſign Errors.

ON Rule to ſhew Cauſe, why a Scire Facias to aſſign Errors ſhould not be quaſhed, for its being teſted on the 22d of May, being on Monday and the laſt Day of Eaſter Term, and returnable Craſt. Trin. being the Monday Fortnight after; ſo that there were not fifteen Days between the Teſte and the Return, without taking both Days incluſive, whereas in theſe Computations one of the Days ought always to be taken excluſive. Mr. Amroe ſaid, that he apprehended, this was help'd by the Statute of 16 Ch. 1. 6. (7.) Mr. Draper ſaid likewiſe, that he remembred the ſame Rule diſcharged upon his Motion. Accordingly the Court diſcharged this Rule in the preſent Caſe.

Anonymus.

When a Perſon is in Cuſtody for Contempt, how far the Court will not diſcharge him, notwithſtanding the Delay of exhibiting Interrogatories againſt him.

SErjeant Girdler moved, that a Man who was committed for a Contempt, might be diſcharged, upon Account of there never having been any Interrogatories filed againſt him, though he had lain in Cuſtody for a conſiderable Time. Mr. Maſterman ſaid, that by the Practice of the Court, Interrogatories need not be filed againſt a Man, till within four Days after Security given by the Party to anſwer them. The Court were of Opinion, that the Party's giving Security was not neceſſary as he is in Cuſtody; and that the four Days ſhould be computed from the Time of the Party's being ſworn to anſwer them. Accordingly the Party was ſworn for this Purpoſe.

Nichols *and* Swordpainter.

Vide ante 161.

MR. Bootle Junior now argued for the Plaintiff, and ſubmitted it, that though the beginning of the Rejoinder was nugatory and Surpluſage, yet by the Plaintiff's demurring to it, and ſhewing that Matter ſpecially for Cauſe, it was made material and could not be rejected. For this Purpoſe he cited a Caſe in 2 Lut. 1445. and 39 H. 6. 35. He ſaid farther, that he apprehended, that upon the whole of this Record Judgment muſt be for the Plaintiff, notwithſtanding it ſhould be admitted, that the Action did not commence till the 1ſt of October laſt. For the Note which the Plaintiff has declared upon, is payable ſix Months

Months after Date, and bears Date the 2d of April 1725. These Months, he did agree, must be computed as Lunary ones, and not according to the Calendar; yet still they did not end till the 7th of October 1725. Now the Defendant by his own Argument admits, that the Action was commenced the 1st of October 1731; and consequently well brought within the Time limited by the Statute of Limitations. The Court declared, that they were well satisfied, that the Beginning of the Rejoinder might be rejected, as Surplusage, notwithstanding the special Demurrer for that Cause. But as to the other Point, they thought proper to consider of it.

Anonymus.

How far a special Agreement made between an Attorney and his Client shall be said to be binding.

IN an Action brought by an Attorney for fifty Guineas upon a special Promise of the Defendant, for Business done in his Profession; Mr. Hussey moved, that it might be referred to the Master to see what was due, and that upon paying the same, all Proceedings might be staid. The Court said, as this Action was founded upon a Special Agreement, they could do nothing in it. Accordingly the Motion was refused.

Ball *and* Knight.

Vide ante

MR. Draper now Argued for the Plaintiff in Error, and submitted it, that the Custom to award a Tales was in itself void. The first Statute which gave a Tales, he said, was that of 35 H. 8. 6. and that was at the Prayer of the Plaintiff; the next Statute was that of 14 El. 9. and that was at the Prayer of the Defendant. But there is an express Clause in the Statute of 35 H. 8. that that Statute shall not extend to Cities or Towns Corporate; and therefore there is no Pretence, that the Tales in the present Case can be supported by that Act of Parliament. The Question therefore is in Relation to the Validity of the Custom. The Rule of the Law, he apprehended, was, that no Custom of an inferior Court shall be allowed of, which breaks in upon the fundamental Rules of Proceeding in the superior Jurisdictions. For this Reason, a Custom in an inferior Court to try an Issue by six Jurymen, was held void in 1 Cr. 259. so a Custom to award a Capias before a Summons, was held the same, in 1 Rol. Ab. 563. And besides, he observed, that the very Custom now in Question was doubted to be void, in the same Page of Rol. Ab. and there is another Case there cited, where this Custom was absolutely disallowed of. That Case was determined 11 Ch. 1. and he produced the Roll now in Court, where the Judgment below appeared to be reversed. He took Notice farther, that the Custom, as laid in the present Record, was particularly bad; for the Custom is laid to be, to chuse a Tales de Circumstantibus in general, without saying de Vicineto; whereas the Statute of H. 8. appoints the Tales to be of Men living within the Body of the County; and therefore he submitted it, that it was absolutely unfit and unreasonable, that

the Tales ſhould be of Men reſiding in the remoteſt Part from that Juriſdiction, provided they happened to be ſtanding there preſent. Serjeant Eyres argued on the other Side, and ſaid, that he apprehended the Rule of Law to be, that no Cuſtom in an inferior Court, ſhall be held to be againſt Law, merely becauſe it differs from the eſtabliſhed Rules of Proceedings in other Juriſdictions, unleſs ſuch Cuſtom be in itſelf an unreaſonable Cuſtom. For this Reaſon a Cuſtom in Cheſter, that the Plaintiff in Error ſhould pay Coſts, where the Judgment is affirmed, was allowed, though it was againſt the eſtabliſhed Rules of Proceeding in the Courts above, to give Coſts in any Caſes by the Common Law. To which Purpoſe was cited Rol. Ab. 564. So where a Cuſtom was in an inferior Court, that in an Action upon Bond, the Defendant might acknowledge the Action, but pray that the true Sum might be inquired into, which was bona fide owing, that Cuſtom was allowed, as appears by 3 Cro. 894. and 1 Mod. 96. The Queſtion therefore was, whether the preſent Cuſtom was an unreaſonable one, or not. To ſhew that it was not, he ſaid, he thought, no other Proof was requiſite, than that the Statute of H. 8. has made ſuch Practice univerſal in all the ſuperior Juriſdictions. And beſides, he obſerved, that in 2 Rol. Ab. 672. it is actually held, that ſuch Cuſtom to award a Tales is good. The Chief Juſtice and Judge Probyn inclined to be of Opinion that the Cuſtom was good; Judge Page, that it was not, upon Account of the Generality of it, that the Tales ſhould be granted of any Perſons, that happened to be preſent. Accordingly the Matter was ordered to ſtand over. Vide Poſt.

The King *and* The Inhabitants of Ruffborough.

How far the Court will ſtay Proceedings on a Preſentment for not repairing a Highway.

THE Defendants having been indicted at the Seſſions, for not repairing a Highway, and the Right ſolemnly tried at the Aſſizes, by Conſent of all Parties, and found, that they were not bound to repair it; and a ſingle Juſtice having ſince taken upon himſelf to preſent theſe ſame Perſons for not repairing this Highway, which Preſentment had been removed up into this Court by Certiorari; Mr. Fazakerly moved, that Proceedings upon this Preſentment might be ſtay'd; and accordingly the Court made a Rule to ſhew Cauſe. Vide Poſt.

Oldham *and* Long.

How far a Plea to the Juriſdiction of the Court is neceſſary to be verified by Affidavit.

ON Rule to ſhew Cauſe, why a Plea to the Juriſdiction of the Court ſhould not be ſet aſide, for there being no Affidavit annexed to it; Mr. Parker ſaid, that this was an Action of Aſſault and Battery, and the Plea is, that the Aſſault and Battery aroſe in the County Palatine of Cheſter, and that the Defendant is now, and was at the Time, when the Action aroſe, reſident within the ſaid County Palatine. The Subſtance of the Plea, he obſerved, was good beyond all Manner of Diſpute; and therefore the only Objection againſt it could be, that there

there was no Affidavit annexed to it. Now as to that, he said, the Fact was, that no Affidavit, verifying the Plea, was made at the Time the Plea was put in, and the Attorney ordered his Clerk to annex it to the Plea; but the Clerk by Mistake omitted it, He observed, that there was a Case in this Court very much like the present one, which was that of Solales and Durant, Hill. 1 Geo. 2. There on a Rule to shew Cause, why a Plea of Coverture should not be set aside for there being no Affidavit annexed to it, the Court discharged that Rule on Mr. Dival's Motion, upon producing to the Court an Affidavit, verifying the Marriage. And he submitted it, that there was great Reason for this Indulgence; for the Words of the Statute for the Amendment of the Law are, that no such Plea shall be received, unless there is an Affidavit annexed to it, or other probable Matter to induce the Court to believe the Truth of it. The Court said, that in the Case cited, the Plaintiff confessed the Fact; but in the present Case he has not done so; accordingly the Rule was made absolute.

Anonymus.

How far the Court will not grant Informations against Church-wardens.

MR. Agar moved for an Information against the Church-wardens of a Parish, for refusing to let the Parishioners meet in the Church about publick Business, in Pursuance of a Notice given there for that Purpose. But the Court thought this an Offence not great enough to require an Information; accordingly refused the Motion.

The King *and* Osborn.

Vide ante 138.

MR. Strange coming now to shew Cause, he submitted it, that the present Case was exactly like that of The King and Orm before cited; for there certain Ladies were reflected on, that were unknown, and here certain Jews were. But the Court said, that in the present Case it is related in the Paper, that the Fact there told, is a Fact which the Jews have frequently done; and therefore the whole Community of the Jews are struck at. And wherever that is the Case, they thought this Court ought to interpose. Accordingly they made the Rule absolute.

Trolop *and* Trolop.

What shall not be said to be a sufficient Plea of a Purchase for a valuable Consideration without Notice.

Scac. AN Original Bill had been filed against the Defendant and his Father, setting forth, that the Grand-father died seised of certain Lands in Fee-simple, and by his Will devised the same to the Plaintiff. The Bill farther suggested, that the Father had Knowledge of this Will, but secreted it, and kept the Possession against Right and good Conscience, and therefore the Bill prayed a Discovery. The Father put in his Answer to this Bill, and thereby denied the whole of this Matter

ter that was ſuggeſted. The Son put in his Anſwer likewiſe, and owned, that he had heard of there being ſuch Will, but knew nothing of it. The Father died, and thereupon there was a Bill of Reviver againſt the Son, and likewiſe a Supplemental Bill, ſuggeſting, that the Will had been kept in the Hands of one Mr. Collins, a Sollicitor, and that immediately after the Death of the Father, it was delivered into the Hands of the Son. To this Supplemental Bill the Son put in a Plea, that in 1690, his Father was ſeiſed of the Lands in Queſtion, and that upon a Contract of Marriage being depending, he levied a Fine, and ſettled the ſame to the Uſe of himſelf for Life, the Remainder to his intended Wife for Life, the Remainder to his firſt and other Sons in Tail Male; that he was the firſt Son, and ſo pleaded this Matter in Bar of a Diſcovery. The Validity of this Plea had been before argued, and the Chief Baron and Baron Cummins were of Opinion, that it ſhould be over-ruled; but Baron Carter and Baron Thompſon were of Opinion that it ought to ſtand. The Court having been thus divided, the Plaintiff applied by Petition to Sir Robert Walpole, Chancellor of the Exchequer, informing him that no Judgment could be given in this Caſe, unleſs he thought proper to attend; and that this Plea would be ſet down in the Paper for ſuch a Day, at which Time his Preſence was deſired. The Chancellor did attend in Purſuance of this Petition: and now the Matter was again ſolemnly argued before him and the reſt of the Court. The Barons continued reſpectively of their former Opinions; and now the Chief Baron and Baron Cummins declared their Objections againſt the Plea, and ſaid that it did not amount to a Purchaſe for a valuable Conſideration, without Notice. They did agree, that upon a Marriage Settlement a Wife is conſidered as a Purchaſer for a valuable Conſideration, and that the Children are conſidered as Purchaſors likewiſe. But then they obſerved it was ſtrictly neceſſary, that the Wife ſhould have no Notice of any Defects in the Settlement at the Time of the Execution of it, in order that the Children may have the Benefit of Purchaſors without Notice. They did agree, that it was impoſſible for the Children to have Notice; becauſe they are not born at the Time of the executing the Settlement. They did agree likewiſe, that it could not be incumbent upon the Son to have pleaded in this Caſe, that his Mother had no Notice; for a Plea is upon Oath; and no Man can be obliged to ſwear poſitively to that which cannot be of his own Knowledge. However, they ſaid, he might have ſworn, that he did or did not believe that his Mother had no Notice; and ſo far he ought to have ſworn. For which Reaſon principally they were of Opinion, that the Plea was bad. They ſaid likewiſe, that the Defendant ought to have ſet forth in his Plea, that his Father was ſeiſed of ſuch an Eſtate, as he might have levied a Fine of; whereas in the preſent Caſe it does not appear, that he was ſeiſed of any greater Eſtate than that for Life only; and this was the other Objection to the Plea, which they thought fatal likewiſe. The other two Barons declared their Opinions to be, that the ſetting forth what the Defendant believed, was

not

not neceſſary in a Plea, becauſe it is a Matter not traverſable. And as to the not ſetting out the Nature of the Father's Eſtate, they were of Opinion that it was ſet out with ſufficient Certainty. The Chancellor agreed with the Chief Baron and Baron Cummins; accordingly the Plea was over-ruled. Ex relatu.

Chapman *and* Lamb.

How far goods which a Perſon buys abroad for his own Uſe, ſhall pay Cuſtom, or not.

IN an Action brought againſt the Defendants for taking fourteen Shirts, ſix Handkerchiefs, a Night-Gown and a Velvet Cap, they juſtified as Cuſtom-houſe-Officers; and upon the Trial a Caſe was made for the Opinion of the Court; wherein it was ſtated, that the Goods in Queſtion were Foreign Goods, and bought by the Plaintiff in his Travels beyond Sea; that the Goods were neceſſary wearing Apparel for the Plaintiff, and bought by him for his own private Uſe, and not by way of Merchandize; that the ſaid Goods were landed by the Plaintiff at Dover, and that the Defendants, as Cuſtom-houſe-Officers, demanded Duty for them; but that the Plaintiff refuſed to pay any, whereupon the Defendants ſeiſed them. Mr. Kettelby argued for the Plaintiff, and ſaid, that he apprehended, the only Statute, which gave any Colour to ſupport this Seiſure, was that of 12 Ch. 2. 4. (3.) But he ſubmitted it, that upon examining that Statute it would appear, that no Goods are ſeizable by Virtue of it, but ſuch as are bought with an Intent to be ſold again by way of Trade and Merchandize; and the Caſe has expreſsly ſtated it, that the preſent Goods were not ſo. He cited too Vau. 165. for this Purpoſe. Mr. Reeves on the other Side argued and ſubmitted it, that it would be a Thing of dangerous Conſequence to the King's Cuſtoms, to put the Officers into an Inquiry concerning the Intent of the Party buying Foreign Commodities; the only Rule, which he apprehended the Officers of the Cuſtoms could go by, was, the Goods being foreign or not Foreign; for which Reaſon he conceived, that if a Man brought over a Hogſhead of Wine with him, there was no Pretence to ſay, but the Wine muſt pay the Duty. The Court ſeemed to agree the Caſe put by Mr. Reeves; but thought the preſent one diſtinguiſhable from it. However, upon the Attorney General's deſiring to be heard on Behalf of the Crown, the Matter was ordered to ſtand over. Vide Poſt.

Aſhley *and* Bradwood.

When a Formedon in Remainder is brought, what ſhall be ſaid to be a good Plea in ſuch Action.

UPON a Writ of Error in a Formedon in Remainder, brought for Lands lying in the County Palatine of Lancaſter, it appeared, that the Demandant had counted, how that Thomas Enquiſon being ſeiſed of the Lands in Queſtion, in his Demeſne as of Fee, in 1572 deviſed the ſame to Alexander his eldeſt Son, in Tail; the Remainder to Thomas his ſecond Son in Tail; the Remainder to William his third Son in Tail; that Thomas the Father, and Alexander and Thomas his Sons, are all dead, without

without Iſſue, by Means of which the Lands belong to the Demandant, as Heir of the Body of William. To this the Tenant pleads, that Thomas the Son, Frater & Hæres to Alexander, made a Deed of Feoffment of the ſaid Lands with Warranty, which Warranty deſcended upon the Demandant. The Demandant put in an immaterial Replication, to which there was a Demurrer; and therefore the ſingle Queſtion aroſe upon the Validity of the Plea, whether this Warranty ſhould be conſidered a collateral Warranty; and if ſo, the Title of the Demandant was barred; or whether it ſhould be conſidered a Warranty commencing by Diſſeiſin, for want of its being ſaid, that Alexander was dead without Iſſue at the Time of the Feoffment; and if ſo, the Title of the Demandant continued good. Mr. Bootle Junior argued for the Tenant, and ſubmitted it, that in as much as the Tenant had pleaded that Thomas the Son & Hæres to Alexander had made the Feoffment, that was a ſufficient Averment, that his Brother was dead without Iſſue, at the Time of the Feoffment; and if the Demandant had joined Iſſue upon that Fact, and it had been proved upon Evidence, that Alexander was not dead without Iſſue at that Time, the Iſſue muſt have been found for the Demandant. For which Purpoſe he cited Dyer 299. Hob. 51. and ſaid, that the ſame Matter is pleaded ſo in Coke's Entries 308. and Raſtall 361. However the Court had ſome Doubt, whether the Plea was good in this Reſpect. Accordingly the Matter was ordered to ſtand over. Vide Poſt.

Anonymus.

MR. Kettleby moved for a Prohibition to be directed to the Deputy Earl Marſhal of England for holding Plea in a Court, called The Court of Honour, againſt one Mary Radbourne, in a Suit inſtituted againſt her, for bearing the Arms of her late Husband, without having proper Authority. He ſubmitted it, that if there was ſuch a Court, it could only be holden before the Conſtable and Earl Marſhal; and for this Purpoſe cited a Precedent in Lilly 316, 228. Accordingly a Rule was made to ſhew Cauſe.

How far the Earl Marſhal alone, without the Conſtable of England, has a Right to hold Plea in Matters relating to Heraldry.

Anonymus.

ON Rule to ſhew Cauſe, why a Prohibition ſhould not be directed to the Biſhop of Lincoln, to prevent his executing a Sentence given by his Commiſſaries againſt Dr. Wilmot, upon a Viſitation at the Doctor's Suit againſt King's College in Cambridge; the Chief Juſtice took an Exception, that it did not appear upon the Face of the Proceedings below, that the Commiſſaries had not a Juriſdiction, for which Reaſon he thought, that the Doctor was too late now to move a Prohibition, merely upon a Suggeſtion of certain Statutes in the College, to ſhew, that the Commiſſaries had no Juriſdiction. He ſaid, he thought this Matter ought to have been pleaded below. And cited the

How far a Prohibition may be granted, or not, after Sentence.

Cases of Mouling and Sands and Doyle and Hunt, where the Court was of Opinion, that a Prohibition would not lie to the Admiralty Court after Sentence, unless it appears upon the very Face of the Proceedings, that they have no Jurisdiction; and said, that he could not see any Distinction between those Cases and this. However upon Mr. Reeves's desiring to consider of this Exception, the Court enlarged the Rule. Vide post.

The Bishop of London and Lewen *and* The Mercers Company.

Vide ante 108.

THIS Matter now coming on again, the whole Court declared their Opinions to be, that the Rule for ascertaining the Damages in this Case ought to be the Interest of the Damages recovered in the Court below, to be computed from the Time of the Plaintiff's bringing the Writ of Error to the Time of Affirmance of the Judgment. Accordingly under this Direction they refer'd it to the Master to settle what the Interest came to.

The King *and* The Inhabitants of Utoxeter.

Vide ante 135.

THIS Matter coming now on again, Judge Lee said, that he doubted, whether the Appeal by the three Vills was not regular enough. Then as to the Power of the Justices upon Appeal, he observed, that it was certain, they were not confined either to quash or confirm the Rate appealed from; but they might make a new one; and he did not know, whether they were tied up to precise Forms in their Orders. The Statute, which gives these Appeals, he observed, requires, that they should be by the Party grieved; but he remembered a Case in this Court, which was determined upon Debate and Search of Precedents, that an Order made upon such Appeal would be good, though it did not appear upon the Face of it, that the Appeal was by the Party grieved; and the Order was confirmed notwithstanding such Exception. Then as to the Form of the present Order, he did agree, that the Sessions had declared their Opinion in it, that the three Vills ought to maintain their own Poor separately; but then there comes afterwards another Clause in the Order, which seems intirely independent of the former Clauses, and in these Words, And we do farther order, that so much of the Rate, as requires the Parish of *Utoxeter* at Large to be any Ways contributary to the Relief of the Poor of the three Vills, shall be quashed. So that he did not see, why this Order was not a general Order. For which Reason he thought it might be confirmed. But the rest of the Court inclined to be of another Opinion. Accordingly the Matter was ordered to stand farther over. Vide post.

Anonymus.

THE Plaintiff having diſcontinued his Action, which he brought againſt an Officer, who juſtified as ſuch in the Execution of his Office, Mr. Draper moved for double Coſts upon the Statute of 4 Jac. 1. 3. Accordingly a Rule was made to ſhew Cauſe.

How far double Coſts ought to be granted upon the Statute of 4 Jac. 1. 3.

Haycock *and* Yeates.

A Writ of Elegit having been ſued out requiring the Sheriff to deliver Poſſeſſion of a Moiety of the Defendant's Lands in Purſuance of a Judgment ſigned by the Plaintiff 30th of November laſt; and there having been a Miſtake as to the Day when the Judgment was ſigned in the Inquiſition taken in Purſuance of the Elegit; the common Serjeant moved, that the Inqueſt might be amended in this reſpect by the Writ. The Court ſaid, this would be to alter what the Jury have found upon their Oaths. However they made a Rule to ſhew Cauſe.

When an Inquiſition is taken upon an Elegit, how far the Court will allow an Amendment of it, or not.

The King *and* Empſon.

MR. Crowle came now to anſwer the Objections, that were before taken, and mentioned all of them, except the the Third, viz. its not appearing, that Howdenſhire was within the Juriſdiction of the Commiſſioners. To the firſt, he ſaid, he did agree, that the Introduction to the Order was by way of Recital; but the Order itſelf is ſet forth in hæc verba; for which Reaſon he ſubmitted it, that the Introduction, which was only the putting in of the Clerk without any Authority, might be rejected as Surpluſage. To the ſecond, he obſerved that the Book of Pains was a Technical Word appropriated to the Commiſſioners of Sewers; and therefore could only belong to them. To the fourth, he ſaid, the Commitment was not for making Raſures in the Book, but for not anſwering, whether he had made any; for which Reaſon it could not be material to ſet out in what Places the Raſures were; the Contempt in not anſwering, whether he had made any at all being the Foundation of the Commitment. To the fifth, he ſubmitted it, that by anſwering the preſent Queſtion the Defendant would not accuſe himſelf; for though he ſhould have anſwered it in the ſtrongeſt Manner againſt himſelf, viz. that the Book was not in the ſame Condition, when it was delivered to him, yet this would be far from convicting him for altering it; for the Book was intruſted to the Care of every one of the Jurymen, as well as the Foreman; and therefore it might have been any one of them, that altered it; and there was as much Proof of that, as there was of the Defendant's doing

Vide ante 66.

doing it. To the laſt Objection, he ſaid, that the Defendant is convicted for refuſing to take the Oath; and therefore it could not be ſaid to be uncertain whether the Oath was tendered. The Chief Juſtice declared, that he thought all the Exceptions were anſwered but the laſt but one; and as to that, all the Court agreed it to be fatal; for if the Defendant had anſwered, that the Book was not in the ſame Condition, when it was delivered to him, it would have been a very ſtrong Evidence againſt him, as he was Foreman of the Jury; and would have turned the Proof upon him, that ſome other of the Jurymen altered it. Accordingly for this Reaſon the Conviction was quaſhed.

The King *and* Britton.

Vide ante 147.

THIS Matter coming now on again, Mr. Fazakerly would have argued for the Proſecutor; but the Court thought it ſo clear a Point againſt him, that they immediately gave Judgment for the Defendant. And Judge Lee ſaid, that the Caſe of The Queen and Robinſon, Trin. 13 Ann. was the firſt determined upon this Point after the Union.

The King *and* Walker.

What ſhall not be ſaid to be a good Indictment for not repairing a Highway.

IN a Writ of Error upon an Indictment for not repairing a Highway, Mr. Vauks took two Exceptions to the Indictment, firſt, that the Way was only laid to be Via Regia, and not communis & alta Via Regia; ſecondly, that a private Perſon was indicted for not repairing it, and it was not laid, that he was bound to do it ratione Tenuræ, or any other way. The Court ſaid, that either of theſe Exceptions was fatal; accordingly they reverſed the Judgment.

Anonymus.

How far the Court will not require a Perſon to enter up his Judgment, notwithſtanding there will be an Occaſion for the Judgment in order to indict another of Perjury.

THE Plaintiff having been nonſuited by Reaſon of one of his Witneſſes giving an Evidence, that was unexpected, and the Witneſs having thereupon been indicted for Perjury, Mr. Bootle, Jun. moved, that the Defendant in the firſt Action might be obliged to enter up his Judgment upon the Nonſuit, in order that this Judgment might be given in Evidence upon the Indictment againſt the preſent Defendant. But the Court thought they could do nothing in it; accordingly the Motion was refuſed.

The King *and* The Biſhop of Lincoln.

MR. Reeves now cited 12 Rep. 77. in Point, and ſaid, that he ſubmitted it, that would be enough for making the Rule abſolute, in order that the Parties may declare in Prohibition. But Mr. Filmer on the other Side mentioned the Caſe of Barker and Wharton, where this Point is determined directly to the contrary; and ſo the Chief Juſtice ſaid it was in the Caſe of Wright and Allen, Mich. 10 G. 1. for which Reaſon he thought that the other Caſes could not be Law. Judge Lee ſaid, that he was well ſatisfied, that in every ſettled Juriſdiction, it is too late to apply for a Prohibition, unleſs Defect of Juriſdiction appears upon the Face of the Proceedings. But the Doubt with him was, whether in thoſe Inſtances, where there is a Juriſdiction only in particular Circumſtances, the Admiſſion of the Party can preclude the Court from ſupporting the Right of the Crown. For this Purpoſe he cited 2 Inſt. 602, where he did not think that what is laid down could be maintained, unleſs it was applied to ſome ſuch Caſe as this. Accordingly the Court enlarged the Rule farther. Vide Poſt. Vide ante

Holt *and* Ward.

THE Chief Juſtice now delivered the Reſolution of the Court. He ſaid, the Declaration ſets forth, that on the 14th of March 1726 there was a Diſcourſe between the Plaintiff and Defendant concerning Matrimony, and in conſideration that the Plaintiff promiſed the Defendant to marry him, when ſhe ſhould be requeſted, the Defendant promiſed to marry her, when he ſhould be requeſted; the Declaration avers, that the Plaintiff was always ready to marry the Defendant, and that the Plaintiff did on ſuch a Day requeſt the Defendant to marry her, but he refuſed, which ſhe lays to her Damage. There were two other Counts in the Declaration, much to the ſame Purpoſe. To this the Defendant pleaded two Matters; one, the General Iſſue; the other, that the Plaintiff was within Age, viz. Seventeen, at the Time of the Promiſe. To the laſt of theſe Pleas the Plaintiff demurred, and ſhewed for Cauſe, that it amounted to the General Iſſue; and upon the Trial of the firſt, the ſame Point came in Queſtion, which now does upon Demurrer; accordingly there was a Caſe upon Evidence made for the Opinion of the Court; and the ſingle Queſtion was, whether in as much as the Plaintiff was an Infant at the Time of the Promiſe, there was a ſufficient Conſideration on her Part to found the Promiſe upon, made by the Defendant. The Chief Juſtice obſerved, that in Carter 236. Lord Vaughan made a Doubt, whether an Action could be maintained upon a Promiſe of this Sort made by any Perſon whatſoever. And in the Caſe of Kite and Harriſon, Lord Holt was of Opinion, that ſuch Action could not be maintained by a Man, though it might by a Woman; for that the Loſs of Marriage Vide ante 12.

cannot be eſteemed to be a Diſadvantage to him, though it may to her. However, he ſaid, the Law was in both theſe Points ſettled at this Day; and now there was no Queſtion to be made, but ſuch Action would well lie; and that by the Man, as well as the Woman. The Difficulty then ariſes from the Circumſtances of the preſent Caſe, viz. in as much as there was clearly no Method to compel the Plaintiff to perform her Part of the Promiſe by the Common Law, and by the Arguments of the Civilians he thought there was none in the Eccleſiaſtical Court. But ſtill the Court, he ſaid, had come to this Determination, that the Promiſe on the Part of the Infant carried with it an Appearance of Benefit to the Infant; for which Reaſon they were of Opinion, that it was not void, but voidable only. The Conſequence of which, he obſerved, clearly was, that at the Time of the making it, there was a ſufficient Foundation for the Defendant to ſupport a Promiſe upon it. The Caſes upon which the Chief Juſtice founded his Argument, were principally 1 Cr. 303, 502. 1 Sid. 41. 2 Sid. 109. Ven. 51. Mod. 25. Sir William Jones 161. Accordingly the unanimous Opinion of the Court was, that the Action was well maintainable. Upon which Serjeant Chappel ſaid, that upon a former Motion for a new Trial for exceſſive Damages (the Damages being 2000 Pounds) the Court reſerved the Conſideration of that Queſtion till this was determined; for which Reaſon the Court now made a Rule to ſhew Cauſe, why a new Trial ſhould not be granted. Vide Poſt.

Hewke *and* Whight.

When an Action is brought againſt a Perſon for not taking away his Tithe, how far by the Common Law Notice of Tithing need not be proved.

Bury Aſſizes. IN an Action upon the Caſe brought againſt the Defendant, Proprietary of the Tithes of the Pariſh of Sutton, for not taking away the Tithe of Oats, Peas, and Rye, after they were ſet out; it was inſiſted on by the Counſel for the Defendant, that the Plaintiff ought to have given Notice of tithing, after the Tithe ſet out, and before the nine Parts were removed and carried away from the Tenth. Judge Lee, who tried the Cauſe, agreed, that ſuch Notice was neceſſary to be given, according to the Eccleſiaſtical Law; but by our Law he thought it not neceſſary. And Mr. Proctor cited the Caſe of Chaiſe and Way, where this Point is expreſsly adjudged. Accordingly the Defendant conſented, that the Jury ſhould find a Verdict for the Plaintiff.

The King *and* Smith.

How far a Perſon cannot be indicted of Robbery, by Reaſon that at the Time he took the Goods, he claimed a Property in them.

Bury Aſſizes. IN an Indictment againſt the Defendant for robbing one Thomas Holder, a Cuſtom-houſe Officer, of Goods belonging to Perſons unknown, the Fact appeared upon the Evidence to be, that Holder, who lived at Ipſwich, had lately made a Seizure of the Goods in Queſtion, for being run, and hid clandeſtinely in a Barn belonging to a Town near that Place. When Holder was riding off with theſe Goods, which he

had made a Seizure of, and carrying them upon the Road towards Ipſwich, the Defendant met him, demanded the Goods, inſiſting upon it that they were his, preſented a Piſtol to him, and threatened to kill him if he did not deliver them. Theſe Goods were a Parcel of Tea. And upon that Holder ſaid to the Priſoner, if I was to give you Part of them, you would laugh at me another Time. No, the Priſoner told him, he would not, and he would be contented. Holder upon this delivered him Part of the Tea; and for taking this Parcel of Tea ſo delivered to him, the Priſoner was indicted of Robbery. The Counſel for the King inſiſted, that by the Seiſure Holder gained a ſpecial Property in the Tea, and though he made the Offer of parting with ſome of it, to ſave the reſt, yet that Offer was made under Terror of the Threat, and conſequently could not leſſen the Offence. However, Judge Lee was of Opinion, that as this was only a Claim of Property by the Priſoner, the Indictment could not be maintained; accordingly the Priſoner was diſcharged.

Term. Mich.

6 Geo. II. 1732.

Holt *and* Ward.

Vide ante. 173.

MR. Reeves came now to ſhew Cauſe, and ſaid, that he ſubmitted it, unleſs the Damages were very exceſſive, the Court would not interfere. But he apprehended, that conſidering the Circumſtances of this Caſe, the Damages were very Moderate; for the Defendant had an Eſtate in Poſſeſſion of 1100 l. per Ann. though the Plaintiff had little or no Fortune, and the Courtſhip between them was carried on for above three Years without Intermiſſion. In the Caſe of one Mr. Alſop, a Clergyman of Oxford, the Jury gave the ſame Sum, as they have done here, viz. 2000 l. and that Verdict was never attempted to be ſet aſide for the Exceſſiveneſs of the Damages. He obſerved farther, that in Actions of Scandalum Magnatum the Court never ſets aſide the Verdict upon ſuch a Reaſon. The Caſe of The Duke of Richmond was a late Inſtance of that in the Common Pleas; the Jury there gave 10000 l. Damages, a new Trial was moved for on that Account, but the Court refuſed to do any Thing in it. The Court in the preſent Caſe thought proper to recommend an Accommodation to the Parties; accordingly nothing was farther done in this Matter at preſent.

Anonymus.

How far the Court will grant an Information againſt Church-wardens, or not.

MR. Kettleby moved for an Information againſt one of the Church-wardens and one of the Overſeers of the Pariſh of Lambert, for cauſing a Libel to be read in the Church againſt the Truſtees and Managers of a Workhouſe there, by charging them (without mentioning any of their Names in particular) with being guilty of ſuffering ſeveral Abuſes in that Truſt by their pretended Authority. Accordingly a Rule was made to ſhew Cauſe.

Bailey *and* Dolben.

IN an Action upon the Case for Goods sold and delivered, Mr. Taylor moved in Arrest of Judgment, that the Declaration was in Latin, whereas by the Act of Parliament, that passed the last Sessions, it ought to have been in English, by Reason that the Damages recovered were under 10 l. though they were laid more in the Declaration. Accordingly a Rule was made to shew Cause. Vide post.

Construction upon the Statute of 2 G. 2. which requires that Law Proceedings shall be in English.

Anonymus.

MR. Hollins moved on the Part of the Crown for a Certiorari to remove an Indictment of Felony found at the last Assises at Durham; and the Certiorari was granted.

How far a Certiorari may be granted to a Justice of Oyer and Terminer to remove an Indictment of Felony.

Wilkinson *and* Raper.

MR. Denniſon moved to ſet aſide a Verdict, where there was no Defence at the Trial, by Reaſon of a material Variance between the Plea and the Copy of the Iſſue. He ſaid likewiſe, that the Paper-Book of the Copy of the Iſſue was made up by the Plaintiff's Attorney, and not by the proper Officer, which was another Reaſon why the Verdict ought to be ſet aſide. The Court declared their Opinion, that the firſt Cauſe was not ſufficient, by Reaſon that the Defendant had cured this Defect in the Copy of the Iſſue by accepting of it; though they did agree, this was otherwiſe in caſe of Variances between the Copy of the Iſſue and the Niſi prius Roll. But the ſecond, they ſaid, might be a Reaſon; accordingly for that made a Rule to ſhew Cauſe.

When a Verdict is obtained without any Defence at the Trial, how far the Court will not ſet it aſide, notwithſtanding there is a Variance between the Plea and the Copy of the Iſſue.

Hayward *and* Newton.

SErjeant Darnel moved for a new Trial upon account of the Damages being too ſmall in an Action for Words; the Words being ſpoken of a Wine-Marchant, charging him with ſelling by falſe Meaſure, and the Damages only 20s. He did agree, that theſe Motions are not often made, but ſometimes he ſaid, they have been granted; and particularly cited the Caſe of Woodford and Kneve, where a Writ of Inquiry was ſet aſide for this Reaſon. The Chief Juſtice ſaid, that he remembered the Caſe cited; but, as he took it, the Reaſon given in that Caſe was, that there was a Writing appeared, which aſcertained what the Damages ought to have been. He obſerved, that where the Damages are exceſſive, the Court has ſometimes interfer'd; in ſome Inſtances they have even increaſed

How far the Court will not grant a new Trial, notwithſtanding the Smallneſs of the Damages which were given.

them themſelves, and that in violent Batteries, though anti-ently they uſed to do it only in Mayhems; however he never knew the Court ſet aſide Verdicts of this kind for the Damages being too ſmall, and has often known theſe Motions refuſed; and ſo the reſt of the Court declared. For this Reaſon Judge Page ſaid, in a Caſe where he was Counſel, when the Jury gave but 6 d. Damages, and Baron Hatſel that tried the Cauſe, directed the Jury to go out and conſider again of their Verdict, he adviſed his Client to be nonſuited upon the Jury's coming in the ſecond Time; and after that another Action was brought, and then the Plaintiff recovered 80 l. Accordingly in the preſent Caſe the Motion was refuſed.

Lomax *and* Honeby.

How far a Perſon ſhall be ſaid to be a competent Witneſs, notwithſtanding another Perſon is produced who ſwears, that he heard the firſt Perſon confeſs that he was to gain by the Event of the Cauſe.

IN a Trial at Bar upon a feigned Iſſue out of Chancery, wherein the Queſtion to be tried was, whether the Plaintiff was ever the lawful Son of one Caleb Lomax, or not; Mr. Wills, as Counſel for the Plaintiff, called one Mrs. Mottram, who was Wife to the Clergyman that married them, in order to be a Witneſs to the very Ceremony of Marriage, which ſhe herſelf was preſent at. Upon this Mr. Reeves on the other Side objected to her being ſworn, by Reaſon that he had an Evidence to produce, one Mrs. Davis, who would ſwear, that ſhe heard Mrs. Mottram ſay, that in caſe the Marriage could be proved the Plaintiff's Mother would take Care that ſhe ſhould never want during her Life. He ſaid, this very Exception was allowed in the Caſe of Sir George Saunders againſt Coleby and others, at a Trial at Bar laſt Eaſter Term. Judge Lee ſaid, that he very well remembered that Caſe, and the Doubt there was, whether that Exception was fatal to prevent the Witneſs being admitted an Evidence, or whether it only went to the Credit of the Witneſs. Judge Page, he ſaid, was of Opinion, that the Exception only went to the Credit of the Witneſs, but the reſt of the Court inclined to be of a different Opinion. Upon this the Court in that Caſe deſired him to go into the Exchequer to know the Opinion of the Barons. Baron Commyns was not in Court then, but the Chief Baron with the two other Barons agreed, that this Exception ought to prevent the Witneſs from being examined as an Evidence. He ſaid, he reported this Opinion of the Barons to the Court here, and accordingly the Rule was given, that the Witneſs ſhould be examined. The Counſel, that called the Witneſs in that Caſe, upon this ſaid, that they muſt tender a Bill of Exceptions. For which Reaſon, in order to prevent Delay, the Counſel of the other Side agreed, that the Witneſs ſhould be examined, and he was then examined accordingly. Lord Raymond ſaid, it was very true, that that Caſe was as has been ſtated. But yet he obſerved, that in a latter Caſe, which came before the Houſe of Lords, relating to the Charitable Corporation, the Houſe of Lords were of a contrary Opinion, and notwithſtanding that Exception the Witneſs there was

allowed an Evidence. He ſaid, that he had conſidered of this Caſe by himſelf ſince, and he was apprehenſive, that it might be a Thing of dangerous Conſequence upon ſuch an Exception totally to exclude a Perſon from being an Evidence. He ſaid, an honeſt Witneſs might have a Well-wiſhing to one Side of a Cauſe, and in the Zeal of his Heart might ſay, it would be better for him, if the Cauſe went on the Side he wiſhed it would. Yet perhaps, if this Perſon was to be examined upon his Oath, it would be found, that he would not be one Six-pence the better for the Event of it. For which Reaſon he had altered his Opinion, which he was of before; and now declared, that he did think Mrs. Mottram ought to be examined as an Evidence. Judge Probyn and Judge Lee declared themſelves now too ſatisfied, that ſhe ought to be examined. Mrs. Davis however was firſt called; but when ſhe came to be examined, ſhe ſaid nothing that was material. Accordingly Mrs. Mottram was examined immediately. The Plaintiff's Counſel went on farther in Evidence, and did ſeem to give undeniable Proofs of the Marriage, which the Defendant's Counſel was not able to ſay much againſt. However what they principally relied upon was, that admitting the Marriage to be proved, and the Plaintiff to be born within the Time of it, yet ſtill he ought not to be conſidered the lawful Son of Mr. Lomax; becauſe Mr. Lomax was not capable at that Time of getting a Child. The Chief Juſtice ſaid, that the Defendant might well be allowed to give that Matter in Evidence; and of ſuch Opinion, he obſerved, the Court was laſt Eaſter Term in the Caſe of Pendill and Pendill. Accordingly ſuch Evidence was given in this Caſe; but notwithſtanding this the Jury gave a Verdict for the Plaintiff.

Jacobs *and* Croſsley.

MR. Reeves now argued the Exception, that had been before taken to this Declaration by Mr. Fazakerly; but the Court ſoon over-ruled it, for the very ſame Reaſons that were given before. Upon which Mr. Reeves offered another Exception, which was, that the Contract ſet forth required the Plaintiff to tender to the Defendant 2000 l. of the Common Stock belonging to the York-Buildings Company; but the Averment only is, that the Plaintiff was ready to tender 2000 l. of the Joint Stock of the Company. Mr. Marſh argued on the other Side, and ſaid, that he did agree that the Words were Communis in one Caſe and Conjunct' in the other, and that thoſe Stocks ſo deſcrib'd might poſſibly be different. But he obſerved that the Words in the Averment were, that the Plaintiff was ready to tender prædict' ſeparal' duas mille Libras of the joint Stock, which Word prædict' was inconſiſtent with the Word conjunct'; for which Reaſon, he ſubmitted it, that the Word conjunct' ſhould be rejected. Judge Page ſaid, where the Words in a Declaration are, quod Querens obtulit prædict Thomæ for prædict Johanni, the Court often rejects Thomæ; accordingly the whole Court was of the ſame Opinion; and Judgment was given for the Plaintiff.

Vide ante 156.

Waſher

Waſher *and* Smith & Ux'.

How far a Perſon ſhall be intitled, or not, to more Coſts than Damages, notwithſtanding the Damages were under 40 Shillings.

ON Rule to ſhew Cauſe, why the Plaintiff ſhould not have more Coſts than Damages in an Action of Aſſault and Battery, by Reaſon that the Damages were under 40 Shillings, and that there was no Certificate from the Judge of the Battery being ſufficiently proved; Mr. Marſh ſaid, that the Defendant had ſpecially juſtified in this Caſe, by a Molliter manus impoſuit upon the Plaintiff, for his entering into the Defendant's Garden; by which the Defendants have admitted the Aſſault and Battery; for which Reaſon he apprehended, that the Certificate of the Judge was unneceſſary. Mr. Filmer on the other Side ſaid, that the Statute which he founded his former Motion upon was the 22d of Ch. 2. 9. (136.) and the Conſtruction upon this Act may poſſibly have been, that there ſhall be no Occaſion for a Certificate, where the Defendant by his Plea expreſly admits a Battery, which is the Caſe, where he pleads de ſon Aſſault demeſne; though he obſerved, that he never remembred even that Point determined. But in the preſent Caſe he ſubmitted it, that the Defendant had not confeſſed Battery; but only an Aſſault; for which Reaſon, he apprehend, that the Rule ought to be made abſolute. Judge Lee inclined to be of that Opinion; and ſaid, that the Words of the Act were, That the Plaintiff ſhall recover no more Coſts than Damages in theſe Inſtances, unleſs where a Judge certifies, that the Battery was ſufficiently proved. And he doubted, whether the Battery was confeſſed in this Caſe. The Chief Juſtice and Judge Page inclined to be of a different Opinion; and Judge Page ſaid, that he remembred Lord Holt would allow a ſmart Beating to be admitted by this Plea. Accordingly the Rule was enlarged. Vide Poſt.

Dobſon and others *againſt* Dobſon.

When a Writ of Dower unde nihil habet is brought, what are the Damages which the Party will be intitled to recover in ſuch Action.

UPON a Writ of Error on a Judgement in the County Palatine of Lancaſter in Dower unde nihil habet, Mr. Robinſon took ſeveral Exceptions, in order to reverſe the Judgment. He obſerved, that the Statute of Merton, Ch. 1. was the firſt Statute that gave Damages in this Action, and the Value of the Land is appointed by this Statute to be the Meaſure of the Damages. But from what Time, and to what Time this Value was to be computed, he ſaid, might be ſome Queſtion. The Words of the Act are, that it ſhall be computed from the Day of the Death of the Husband to the Day when the Demandant ſhall recover her *Seiſin* by the Judgment of the Court. Upon theſe Words Lord Coke has been of Opinion, in Co. Lit. 32. that the Demandant muſt not delay bringing her Writ of Dower; and if ſhe does, ſhe ſhall not take Advantage of her own Laches. But in the preſent Caſe, the Action was not brought for above two Years after the Death of her Husband; for which Reaſon he ſubmitted it, that the Value of the Land ought to have been computed only from the Time of bringing the Action; but yet ſhe has recovered

covered the full Value, equally as if there had been no Neglect in her, even from the Day when her Husband died. Then as for the Time, which the Value of the Land ought to have been computed to, he apprehended it to be clear, that it ought to have been computed no longer than the Time when Judgment went againſt the Tenant by Default, which was the Award of the Writ of Inquiry. For upon that Judgment a Writ of Error lies, as appears by Sid. 188. and Sal. 252. So that that is the Day, when the Demandant may be properly ſaid to recover her Seiſin. But in the preſent Caſe ſhe has recovered her Damages even to the Time of executing the Writ of Inquiry, which was above two Years after the Award of it. He conceived likewiſe that the Entry of the Judgment was wrong. In Judgments by Default it is always taken Notice of, that the Tenant was ſummoned by the Sheriff, and did not appear; but here it is only ſaid, & ſum' &c. which may be underſtood to be only that a Summons was awarded. In this Record likewiſe, the Grand Cape is awarded, without giving the Party a Day to appear at the Demand of it, which, he ſaid, was a Diſcontinuance. In ſetting out the Default likewiſe, it is entred, quod ipſi non venerunt, without ſaying nec aliquis eorum venit. The Continuances likewiſe ought to have been to a Day certain; but they are ad prox' Seſſion' generally. He took Notice likewiſe, that the Jury have given 5 Shillings Damages, for what the Demandant ſuffered occaſione detentionis Dotis, beſides the Value of the Land, which they found to be 28 Pounds per Annum. For all which Reaſons he ſubmitted it, that the Judgment was clearly erroneous. Serjeant Chappel was Counſel of the other Side; but he took a Day to anſwer the Objections. Vide Poſt. 207 - 443

Patton *and* Smith.

IN an Action upon the Caſe brought by the Plaintiff, as Bailiff of the City and Liberty of Weſtminſter, he declared, that the Dean and Chapter of Weſtminſter, had by Letters Patent under the Great Seal, the Return of all Writs and Proceſſes executed within the City and Liberty aforeſaid, and that the ſaid Dean and Chapter had under their common Seal granted the ſaid Privilege to the Plaintiff during his Life, to be enjoyed in as full manner as they themſelves had it, virtute cujus he was poſſeſſed of the ſame, till the Defendant executed a Warrant himſelf within the ſame Bailiwick, viz. at ſuch a Place, to the Plaintiff's Damage of 100 Pounds. To this Declaration the Defendant demurred, and ſhewed for Cauſe ſpecially, that the Plaintiff has alledged, that he was poſſeſſed of this Privilege; whereas it appears upon his own ſhewing, that he was ſeiſed of it, by Reaſon that he had an Eſtate for Life in it. Serjeant Hawkins argued for the Defendant, and ſubmitted it, that this was a good Cauſe of Demurrer; for which Purpoſe he cited Littleton, Sect. 324. He ſaid, he apprehended, that it would be no Anſwer to this Objection, that bare Poſſeſſion was ſufficient to maintain this Action, and that the ſetting forth a Title

When an Action is brought by a Bailiff of a Franchiſe, for an Injury done to his Franchiſe; what ſhall be ſaid to be a good Declaration in ſuch Action.

was Surpluſage; for if Surpluſage is ſet out at all, the Plaintiff at his Peril muſt ſet it out formally; otherwiſe he conceived the Defendant might Demur. The Serjeant obſerved farther, that the Declaration was bad in Subſtance. He took Notice, that there were ſeveral Writs, which by Law the Sheriff had a Right to execute in theſe Bailiwicks, as Writs of Waſte, Diſſeiſin, Partition, Non omittas &c. for which Reaſon the Plaintiff ought to have ſhewn, what this Warrant was, that the Defendant executed, in order that it might have appeared, that it was not one of thoſe that have been mentioned. But this he has intirely omitted; and has only ſaid in general, that the Defendant executed a Warrant. The laſt Exception taken by the Serjeant was, that the Word Liberty ſet forth in the Declaration was of an uncertain Signification. For which Purpoſe he cited the Caſe of Wadingford and Hall, adjudged in the Common Pleas, about the End of the laſt King's Time. The Defendant there pleaded in Abatement, that he lived within the Liberty of ſuch a Place, abſq; hoc, that he lived at the Place, where the Plaintiff had ſtiled him of. The Court were of Opinion, that the Word Liberty had an uncertain Signification; for which Reaſon the Plea was over-ruled, by Reaſon that the Plaintiff had not given the Defendant a better Writ. Mr. Wynne argued on the other Side, and ſubmitted it, that the Word Poſſeſſion was oftentimes uſed promiſcuouſly for Seiſin; and to this Purpoſe cited Co. Lit. 17. 153. and for which Reaſon he apprehended, that the Forms of Pleading did not require, that thoſe Words ſhould be uſed ſo ſtrictly in the different Senſes, that have been mentioned. To the ſecond Objection, he ſaid, that the Plaintiff had not the Warrant to produce; and for that Reaſon it could not be incumbent upon him to ſet it forth. And to the laſt he anſwered, that the Words City and Liberty of *Weſtminſter*, are conſtantly uſed as Words Synonymous, and which ſignify Places that are co-extenſive. Accordingly, the Chief Juſtice abſent, the Court gave Judgment for the Plaintiff, niſi. As the Court was making this Rule for Judgment the Serjeant prayed, that the Defendant might have Liberty to withdraw his Demurrer, and plead the General Iſſue. Judge Page ſaid, he believed the Court has granted ſuch Motions ſo late as this is made, in Actions that are brought to try a Right; but never in Actions that are founded upon a Tort, as the preſent one is.

Evans *and* Bevis.

In what Court an Attorney's Bill is proper to be taxed.

MR. Kettleby moved to diſcharge a Rule, made for taxing an Attorney's Bill, and for ſtaying Proceedings in an Action brought upon it, by reaſon that the Action was for Expences that the Attorney was at in becoming Bail for the Defendant, the Recognizance of Bail being eſtreated; and farther, becauſe no one Item of this Bill was for Buſineſs done in this Court. However, the Court ſaid, that they were poſſeſſed of the Cauſe by the Action's being brought upon the Bill in this Court, and the Plaintiff's being Bail for the Defendant was occaſioned by his being Attorney for him; accordingly the Motion was refuſed.

The King *and* Jenner.

ON Rule to ſhew Cauſe, why an Information ſhould not go againſt the Defendant for publiſhing a Libel upon one Mr. Hayward, a Wine-Merchant, in the Daily Advertiſer, the Subſtance of the Advertiſement was, This is to give Notice, that Mr. *Hayward* ſells Wine or Brandy by the Gallon, Quart or Pint, and is to be met with at any Hour every Afternoon at one of the Taverns in *Smithfield*. *N. B.* Mr. *Hayward* ſells an Excellent Salve made by a Relation of his in *Dublin*, to cure Women's Breaſts with, which may be had at 12 *d.* a Bottle. The Defendant's Counſel inſiſted, that this was no Libel. But Mr. Fazakerly ſubmitted it, that it was, by Reaſon that it tended to leſſen a Man in his Trade, and make him ridiculous. However the Court thought that it would be going too far to grant an Information for ſuch a Paper; it was enough to leave the Party to his ordinary Remedy; accordingly the Rule was diſcharged.

How far the Court will not grant an Information for a Libel, notwithſtanding the Matter may poſſibly be Libellous.

The Bank of England *and* Morrice.

IN an Action brought againſt the Defendant, as Adminiſtratrix to her late Husband, for a conſiderable Sum of Money due by ſimple Contract, ſhe pleaded a Bond of 600 l. given by her ſaid Husband to one Mr. Congreve for the good Behaviour of one Joſiah Maxwell, as Deputy in an Office to the ſaid Mr. Congreve for ſix Years, two of which Years remained at the Time of the Plea pleaded, and the Condition of this Bond farther was for Payment of a Sum of Money and ſome other Particulars; in ſome of which Particulars ſhe laid a Breach; ſhe pleaded likewiſe another Bond of 3600 l. Penalty, with Condition for performing certain Articles, as Payment of Seamens Wages, Commiſſion Money, &c. which were reduced to a certain Sum, as appeared by the Agreement, and then ſhe aſſigned two Breaches in the Seamens Wages, and Commiſſion Money not being paid; ſhe farther pleaded a Bond of 53000 l. with Condition for Payment of ſeveral diſtinct Sums at different Inſtallments, and averred, that ſome of theſe Payments were not made; ſhe likewiſe pleaded other Bonds with common Conditions for Payment of Money, ſome at a Day paſt at the Time of the Plea pleaded, and others not paſt at that Time; and then concluded her Plea, that ſhe had not Aſſets beyond ſuch a Sum not ſufficient to ſatisfy the Debts aforeſaid. To this Plea the Plaintiffs put in the uſual Replication; and upon that Iſſue was joined. A Trial was accordingly had before the Chief Juſtice at Niſi prius, and a Verdict given for the Plaintiff of 28000 l. Mr. Reeves upon this moved a few Days ago for a new Trial; and becauſe the Court thought that there was ſome Difficulty in the Exceptions, they ordered a Paper to be given of them. The Exceptions taken were principally two; one was, that the Penalties in all theſe Bonds ought to have been allowed the Defendant in Evidence to cover

How far an Executor ſhall be allowed to cover Aſſets by the Plea of Bonds ſtanding out.

ver the Assets with, whereas according to the Chief Justice's Opinion nothing ought to have been allowed, but what was bona fide due according to the Condition; and so he directed the Jury to find. The other was, that whereas there were Ships out at Sea belonging to the Intestate, and Man'd by his Servants, but were not returned home till after the Plea pleaded; yet the Chief Justice was of Opinion at the Trial, that these were present Assets for the Defendant to be charged with; and so he directed the Jury to find likewise. Serjeant Eyres argued on the other Side, and said, that he did agree, that the Penalty of the 6000 l. Bond the Defendant ought to be allowed to cover the Assets with; because a Breach in this Bond was actually made in the Life of the Intestate, so that the Bond might be said to be in Strictness forfeited; and it was impossible to ascertain what in Conscience and Equity would be due upon it, by Reason that two of the Years mentioned in the Bond were not past at the Time of the Plea pleaded. On the other Side, he said, he apprehended, that the Counsel for the Defendant must admit, that the Penalties of those Bonds, which were made for Payment of Sums certain, ought not to cover the Assets; because the Sums, which were in Conscience and Equity due, might be ascertained with the greatest Ease imaginable, by computing only Principal and Interest. He said, that Experience shews, that this is constantly done upon Trials, and he conceived, that the Construction upon the Statute for the Amendment of the Law, Sect. 13. well warranted it. The Debate then will principally arise upon the Bond of 3600 l. whether that Penalty ought to be allowed or not. And as to that he submitted it, that it ought not; for though many of the Conditions of this Bond are for doing collateral Acts, yet those Conditions, which the Breach is assigned in, are reduced to a Sum certain; for the Seamens Wages and Commission Money are settled by the Articles at a certain Rate. However if the Penalty of this Bond should be allowed, yet the Fact was, that the Defendant was still overcharged. But he submitted it farther, that the Defendants Counsel were totally irregular in taking Part of these Exceptions now; because at the Trial they directly waived the Benefit of the 53000 l. Bond, and of the other Bonds for Payment of Sums certain. Besides, he said, that no Exception ought to be taken in moving for a new Trial, unless it shews that the Judge misdirected the Jury. Then as to some of those Bonds he observed, that the Day was not come for the Payment of them; for which Reason as to them there was no Colour that the Defendant should take Advantage of the Penalties; he said, that they should be allowed. The Chief Justice said, that as to the Bonds of 6000 l. and 3600 l. Penalties he was indeed of Opinion at the Trial, that nothing ought to be allowed upon them, but what was bona fide and in Conscience due, and as to the other Bonds the Plaintiff's Counsel themselves did not insist upon the Penalties. However upon considering more fully of the Matter, he was of Opinion, that the Defendant had a Right to have every one of these Penalties allowed. For the Penalty is the Debt, which a Court of Law must consider to be due; and this Court cannot consider Things of

this Nature in that Light, which Courts of Equity do. And as to the Statute for the Amendment of the Law, he thought that made no Difference in this Caſe; becauſe the Manner of taking Advantage of that Statute has not, nor could have been taken Advantage of in this Caſe. He did agree, that where a Bond-Creditor is contented to take the Principal and Intereſt, and the Executor will not pay it, but keeps the Bond on Foot to cover the Aſſets, if ſuch Bond is pleaded in Bar, that the Plaintiff may well reply, that the Bond was kept on Foot per fraudem; and then nothing ſhall be allowed the Executor upon Evidence, but what was in Conſcience due upon it. And ſo is the expreſs Authority of 3 Lev. 368. But otherwiſe he thought the Executor had an Advantage of covering the Aſſets with the Penalty, which in a Court of Law he was well intitled to. Then as to the Plaintiff's Counſel being too late to take this Exception now with Relation to the Penalties of thoſe Bonds they admitted, he ſaid, it appeared to the Court upon the Face of the Record, that they ought not to have admitted it; upon the Record this Court is to judge; and therefore will not take Advantage of the Admiſſion of Counſel in Detriment of ſuch Right. But if the Matter had not appeared upon the Record, he agreed it would have been otherwiſe. As to thoſe Bonds, where the Day was not come for the Payment of them, he ſaid as to them likewiſe, he thought they ought to be allowed. He did agree, that if ſuch Bond had been for the Performance of a collateral Condition, and the Day not come for the Performing it at the Time of Plea pleaded, the Bond would not be allowed the Executor to cover the Aſſets with; and ſo is Harriſon's Caſe, Coke's Rep. But where it is for the Payment of a Sum certain, he took the Law to be otherwiſe. He ſaid likewiſe as to the ſecond Exception about the Ship's being Aſſets he had great Doubts with himſelf, whether that Opinion was right. The reſt of the Court declared their Opinions with the Chief Juſtice, in Relation to the firſt Exception taken by the Plaintiff's Counſel; but as to the ſecond they thought it unneceſſary to deliver an Opinion. Accordingly the whole Court were making the Rule abſolute for a new Trial. However upon ſome Doubts ariſing, whether there ſhould be a Repleader awarded, as there was in the Caſe before cited out of Leo. or whether the Action ſhould be begun de novo, the Court thought that Matter might require a little farther Conſideration; accordingly only enlarged the Rule. Vide poſt.

Morley *and* Morris.

A Special Demurrer was made to a Declaration for want of Pledges. But in the Copy of the Declaration delivered there was the Word Pleg', &c. and upon the Roll the Pledges Doe and Roe were entered. Upon which a Motion was made to ſet this Demurrer aſide; and accordingly a Rule was made to ſhew Cauſe. The Chief Juſtice abſent.

How far the Court will ſet aſide a Demurrer by reaſon of its being frivolous.

Anonymus.

How far the Court will ſet aſide a Plea of Miſnomer, by reaſon of its being frivolous.

A Plea in Abatement was put in, that the Defendant's Name was Martin, abſque hoc that it was Marten. On Motion to ſet this Plea aſide, the Court ſaid, that this was ſo clearly a ſham Plea, by reaſon that the Names were exactly of the ſame Sound; accordingly they made a Rule to ſhew Cauſe, and ordered the Attorney to attend. Chief Juſtice abſent.

Anonymus.

How far the Court will give Liberty to enter a Suggeſtion on the Roll, in order to warrant the Award of a Venire.

SErjeant Darnel moved for Liberty to enter a Suggeſtion upon the Roll in an Action qui tam, where a third Part of the Penalty was given to the City of London, that the Sheriffs were Freemen of the City, in order to warrant the Venire's being directed to the Coroner: and a Rule was made to ſhew Cauſe. Chief Juſtice abſent. Vide poſt.

Beach *and* Johnſon.

How far the Court will quaſh a Writ of Error.

MR. Kettleby had moved a few Days ago, that a Writ of Error might be quaſhed for a Variance between the Writ of Error and the Tranſcript of the Record; the Defendant below being named as Adminiſtratrix to her Husband in the Tranſcript of the Record; but that Addition being left out in the Writ of Error, the Court then ordered Notice to be given of the Motion; becauſe they thought the Writ of Error amendable. He now made this Motion over again, having given Notice, but the other Side did not attend; and he ſaid, he apprehended, he had a Right to Coſts upon the Statute for the Amendment of the Law. Judge Page ſaid, he thought that the Writ of Error was pretty clearly amendable; but if the other Side would not move to have it amended, he did not ſee, that the Court was bound to do it ex Officio. Accordingly the Court made a Rule to ſhew Cauſe, why it ſhould not be quaſhed with Coſts. Chief Juſtice abſent. Vide poſt.

Jenner *and* Padington.

When Money is brought into Court, how far the Defendant ſhall not be allowed to have any Part of it back again.

MR. Wirley moved, that 20 l. which had been paid into Court might be reſtored to the Defendant, by Reaſon, that the Plaintiff died before Verdict; and ſeveral Applications had been made to the Executors to take the Money, but they had not done it. Judge Page ſaid, that in the Common Pleas he believed ſuch Motion might be regular, becauſe there the bringing it into Court is not direct Payment; for if the Plaintiff does not prove upon the Trial, that ſo much is due to him, as is brought in, the Defendant is intitled to the Remainder back again. But in this Court it is direct Payment, and though ſo much

Money as is brought into Court should not be proved to be due, yet the Plaintiff is intitled to the whole. Accordingly the Motion was refused, Chief Justice absent.

Manſel *and* Manſel.

Canc. ON an Appeal to Lord Chancellor from a Decree made by the Maſter of the Rolls, there was thought to be ſome Difficulty, and upon that Lord Chancellor thought it proper to have Lord Raymond's and Lord Chief Baron's Aſſiſtance. The Caſe was, that Sir Edward Vaughan was ſeiſed of the Lands in Queſtion in Fee-ſimple, and deviſed the ſame to his Siſter Dorothy for Life, the Remainder in Truſt to preſerve contingent Remainders; the Remainder to her firſt and every other Son in Tail Male. Sir Edward Vaughan likewiſe charged theſe Lands with the Payment of Debts and Legacies. After his Death, Dorothy married Sir Edward Manſel, and during the Coverture, before Iſſue had, Dorothy joined with the Truſtees for preſerving the contingent Remainders, in making a Deed of Feoffment to Sir Edward Manſel, the Intent of which Deed was declared by the Words of it to be, for raiſing and levying Money to pay the Debts and Legacies charged upon this Eſtate by the Will of Sir Edward Vaughan, by demiſing, letting, ſelling or mortgaging the Premiſes, or any Part thereof for that Purpoſe. In this Deed of Feoffment there was a Covenant to levy a Fine, and make ſuch farther Aſſurance as ſhould be adviſeable for ſettling the ſame Uſes; and ſoon after a Fine, with a Leaſe and Releaſe, was executed by Dorothy and the Truſtees above-mentioned, to Sir Edward Manſel accordingly. Sir Edward Manſel makes his Will of theſe Lands, and deviſes them to the Plaintiff his eldeſt Son, begotten on the Body of Dorothy, for Life, the Remainder to his firſt and other Sons in Tail Male, with like Remainders to his other Children, the Remainder to Rawley Manſel, the Defendant, with divers Remainders over. The Plaintiff brought his Bill before the Maſter of the Rolls, praying that he might have an Eſtate-Tail decreed to him out of theſe Lands, in Purſuance of the Will of Sir Edward Vaughan, and the Maſter of the Rolls decreed for him accordingly. Mr. Rider now argued for him before Lord Chancellor. He ſaid, that he conceived the Intent of the Conveyances executed by Lady Manſel and the Truſtees, was by no Means to prejudice the contingent Remainders; but only to veſt the Eſtate in Sir Edward, for this particular Purpoſe, that it might be the ſooner cleared of the Debts and Legacies charged upon it. The Words of the Feoffment, he ſaid, clearly ſhewed this; and if this was ſo, there was a reſulting Truſt for the Benefit of the contingent Remainders; but ſuppoſe it ſhould be admitted, that the Intent of the Parties was to deſtroy this Contingency, yet he apprehended, that as the Caſe was, a Court of Equity would give Relief, and decree the Parties to be in the ſame State, as they would have been, if theſe Conveyances had not been made. He did agree, that the Plaintiff was a Deviſee, and therefore to

How far it ſhall not be in the Power of Truſtees to deſtroy contingent Remainders.

to be considered as a Voluntier only, in a Court of Equity. He did agree too, that in the Case of a Voluntier, the Court will not relieve a defective Conveyance. But the present Relief is prayed by Reason of Trustees breaking their Trust, and the Relief is prayed against Persons, that are meer Voluntiers, and claim under one that had Notice. Had there been no Trustees in this Case to have preserved the contingent Remainders, or had the Defendants been Purchasers without Notice, he would readily have agreed, that this Court would not have given the Relief that is now desired. But as the present Case is circumstanced, he conceived it fell within the common Cases of Relief that is every Day given. It is a Rule, he observed, that the Court will never allow Trustees to purchase an Estate which they are intrusted with; if Trustees do make such Purchase, the Court will set it aside. In the Case of Rumford Market there was a Term for Years in the Market, which was in Trust for the Benefit of an Infant, and was expiring. Application was made by those Trustees to have another Lease made them of the Market, for the Benefit of the Infant, to commence upon the End of the first Lease. The Lord of the Market refused to make them such Lease in the Right of the Infant, but offered to make them such Lease in their own Right, if they would accept of it. The Trustees accepted the Offer, and had a future Term in the Market made to them accordingly. Upon a Bill brought by the Infant, the Court decreed this future Term to be assigned for his Benefit. And that Case, he said, was determined in the Time of the present Chancellor. For which Reason, he said, he apprehended, that the single Declaration of the Lord Harcourt to the contrary, taken Notice of in the Abridgment of Equity Cases 385. would not prevail. The Court inclined to be of Opinion, that for this Breach of Trust the Decree of the Master of the Rolls ought to be affirmed, however made no Decree at present. But in the Vacation after this Term, the Chief Justice, and Chief Baron met at the Chancellor's House, and the whole Court affirmed the former Decree unanimously.

Evans *and* Hamerton.

How far a Certiorari will lie, in Case of a foreign Attachment.

MR. Kettleby moved, that a Certiorari directed to the Sheriff's Court in the City of London might be quashed, by Reason that there had been a foreign Attachment in the Court below, and Proceedings in it so far as Issue joined upon Nil debet, between the Plaintiff and the Garnishee, which Issue, he conceived, this Court could not try. But Judge Page said, that this Process of Foreign Attachment, is only in Default of the Defendant's appearing below, and to the Intent of bringing him into Court; so that if he appears at any Time within a Year and a Day before Judgment given against the Garnishee, the Proceedings against the Garnishee are staid of course. Now he observed, that before the Certiorari is of any Effect in the Court above, the Defendant below must give Bail above, which is an Appearance to the Action here. So that the Plaintiff rather

ther receives a Benefit than a Prejudice by this Certiorari. For which Reason the Court made no Rule upon this Motion. Chief Justice absent.

Crompton *and* Den.

IN an Action brought by the Indorsee of a Bill of Exchange against the Drawer, the Defendant pleaded his Discharge under the late Insolvent Debtors Act; the Plaintiff replied, that he resided within ten Miles of the Place where the Defendant was in Prison, and that he had no Notice given him, by the Defendant within thirty Days of his Discharge, of his Intentions of being discharged; the Defendant rejoined, that he did not know, that this Bill of Exchange was indorsed to the Plaintiff; upon this there was a special Demurrer, and the Cause shewn was, that the Defendant's Excuse in his Rejoinder was set forth in too general a Manner, and likewise that the Rejoinder was a Departure from the Bar. For this Purpose Mr. Spelman cited Show. 334. Salk. 221. Judge Lee said, that for this Part he had some Doubts, whether the Defendant's Rejoinder was not ill in Substance, by Reason that he took it the Defendant was obliged to take Notice who was his Creditor. The Words of the Act, which the Defendant has relied upon for his Discharge, are, That every such Prisoner shall give thirty Days Notice to all his Creditors living within ten Miles of him. The Plaintiff, he said, certainly could not be obliged to give Notice of this Indorsement to the Defendant, by Reason that he could not know, that the Defendant intended to get himself discharged under the Act. For which Reason he doubted, whether the Defendant must not be obliged to take Notice of it. He said, it might be objected possibly, that since the Defendant has got his Discharge at the Sessions, every Thing relating to it shall be taken to be done regularly, and no Averments allowed against any Defects in it. But as to that, he observed, that this Point was expressly over-ruled in the Time of Lord Macclesfield, when he was Chief Justice, in the Case of a Person that was discharged the 7th of December 1711, upon the late Insolvent Debtors Act that was passed at that Time. And Lord Macclesfield declared that all the Judges of England had been consulted upon that Point, and this was their Opinion. The whole Court were clearly of Opinion, that the Rejoinder was no Departure from the Bar; but as to the other Points, they thought this a Matter that deserved to be farther considered of. Vide Post.

Construction upon the Statute of 2 G. 2. which is called the Insolvent Debtors Act.

The Bishop of Landaff *and* The King.

MR. Fazakerly now argued for the Plaintiffs in Error, and stated the Matter relating to the Archbishop's Dispensation more fully than it was before. In this Dispensation, he said, the Petition of Dr. Tyler, then Bishop of Landaff, is recited. And in that Petition it is recited, that the Revenues belonging to that Bishoprick are not sufficient to support the Dignity of a

Vide ante 72.

Biſhop; whereupon it is deſired, that with this Biſhoprick he may have Liberty to hold the Rectory of St. Andrews in Glamorganſhire, which is the Rectory in Queſtion, together with the Rectory of Bedwin in Somerſetſhire, with the Deanary, and one of the Prebends of Hereford. After this Recital of the Petition the Archbiſhop, poſt veram & juſtam Examinationem of the Matter, grants him Liberty to hold theſe Benefices in Commendam, ſo long as he continues Biſhop of this Dioceſe, provided that he has the Queen's Confirmation, that he ſhould do ſo, by ſuch a Day. Mr. Fazakerly ſaid, that the Statute of H. 8. made it requiſite, that the Queen ſhould confirm theſe Letters of Diſpenſation, and the Queen accordingly did confirm them within the Time mentioned. Upon this State of the Caſe, he ſaid, he did agree, that the Archbiſhop was Judge of what was ſufficient to be added to ſupport the Dignity of a Biſhop, and that that Point was not traverſable. But yet he obſerved, that the Archbiſhop ought to have ſet forth in his Diſpenſation, that what the Biſhop was to hold with his Biſhoprick, he did adjudge to be no more than was ſufficient; which, he ſubmitted it, was not done in the preſent Caſe. The Petition indeed of the Biſhop is recited, ſetting forth, that the Revenue of the Biſhoprick was not ſufficient to maintain the Dignity of a Biſhop; but it does not appear but this Biſhoprick, together with the Deanary and Prebendary, and the Rectory of Bedwin, might have been amply ſufficient, without adding the preſent Rectory to them. He ſaid likewiſe, that he apprehended that the Archbiſhop ought to have averred in expreſs Terms, that the Biſhoprick itſelf was not ſufficient. He obſerved, that it is well known, that ſuch Adjudication is neceſſary in Orders of Juſtices of Peace; and he did not know any Difference in this Reſpect, between that Caſe and this. He then ſpoke with Relation to the Commendam itſelf, ſet forth in the Declaration. This Commendam, he ſaid, muſt either be accipere or retinere. If it is taken to be a Commendam retinere, it cannot poſſibly amount to a Preſentation; becauſe that is but a Continuation of the former Right of the Parſon; and ſo is Hob. 143. If it is taken to be a Commendam accipere, it cannot be good; becauſe that ought to be during the Biſhop's Life; and ſo is the ſame Book 149. But this is only during the Time that Dr. Tyler ſhall continue Biſhop of this Dioceſe. Serjeant Chappel argued on the other Side, and ſaid, that as to the Diſpenſation, he apprehended it to be very good. The Archbiſhop's conſenting, that the Biſhop ſhould enjoy all theſe Benefices with his Biſhoprick is an Evidence, that he thought all of them but ſufficient to ſupport his Dignity. Eſpecially he obſerved, that this muſt be good, ſince the Archbiſhop has declared that he granted this Diſpenſation poſt veram & juſtam Examinationem of the Matter in the Petition. Then as to the Commendam, he conceived it to be accipere only; and Commendams accipere granted in the Manner that this is, and even for a Term of Years only, are held good in Vaughan 22, againſt the Authority of Hob. However, he ſaid, be theſe Points ſo or not, he ſhould ſubmit it in the firſt place, that a Preſentation is not neceſſary to be laid in a Quare Impedit brought by the King; and in the ſecond place, admitting it

to be neceſſary, ſo as that the Defendants might have demurred for want of it, yet the Verdict has cured the Defect. The Court declared themſelves clear of Opinion againſt The King in all Points, but this Matter about the Verdict; agreeing that a Preſentation, or what amounted to as much, was neceſſary to be laid in The King's Caſe, as well as private Perſons; that a Commendam accipere would amount to a Preſentation, but that the preſent one was a Commendam retinere, and that that could not amount to a Preſentation; allowing at the ſame Time, that Commendams accipere even for a Term of Years, if the Biſhop lived ſo long, were good, and that the preſent Diſpenſation was good likewiſe. But as to the Verdict, they believed that the Rule was not true, which is ſometimes mentioned, that nothing ſhall be helped by a Verdict, but what muſt have been proved at the Trial; and doubted, whether the preſent Defect was not helped. However, this Matter ſtood over. Vide Poſt.

The King *and* Stephenſon.

THE Defendant having been brought up by Habeas Corpus, Mr. Marſh moved that the Return to it might be read, which was done accordingly. And now upon the Commitment the Fact was ſtated ſpecially, that twelve or thirteen Perſons in Number, one of which the Defendant was, in the Month of September 1730, were together within a Mile of Feverſham in Kent, upon the Sea-Shore, digging up 1400 Pounds of Tea, that had been run and buried in the Ground; that thereupon Captain Clements, a Cuſtom-houſe Officer, came up to them in Order to make a Seizure, but that the Perſons above-mentioned having Arms about them, ordered him to diſmount, which he did accordingly, and then they took the Bridle off his Horſe, and rid off with the Tea; and one of them was going to ſhoot him, but the others prevented him. Upon this State of the Caſe, Mr. Marſh ſaid, that he apprehended, this Commitment could not be founded upon 8 G. 1. 18. Sect. 6. becauſe to make this an Offence within that Statute, the Perſons muſt have been paſſing with the Tea, which they were not. For which Reaſon he conceived, that it could only be founded upon 6 Geo. 1. 21. Sect. 34. and if ſo, it was only a Misdemeanor; accordingly he hoped, that the Defendant ſhould be bailed. He ſaid, that he was informed, that upon Informations on this Statute, the Proceedings are by a common Subpœna, and Mr. Maſterman had acquainted him of two Inſtances where Defendants had been bailed upon this Act, one of which was upon an Information filed againſt one Buckler, the other againſt one Joyce, both in Lord Chief Juſtice Prat's Time. He ſaid, he conceived that this Application was more allowable in the preſent Caſe, by Reaſon that it is above two Years ſince the Offence was committed. The Attorney General on the other Side anſwered, and ſaid, that he did agree, that in Informations upon the Statute of 6 Geo. the Proceſs has been by a common Subpœna and Defendants have been bailed. But the preſent Commitment was well warranted by the Statute of 8 Geo. that has been mentioned

When a Perſon is committed on the Statute of 8 G. 1. which was made to prevent the running of Goods, how far the Court will bail the Defendant, or not.

tioned. He ſaid, the Facts ſtated in the Commitment amounted to an actual paſſing with the Tea, and upon an Indictment would be full Evidence of it. However it was not neceſſary, that the Perſons ſhould be paſſing; for if by Violence they obſtruct a Cuſtom-houſe Officer in the Execution of his Office, it is Felony by that Act of Parliament; for the Words are in the Diſjunctive. Then as to the Diſtance of the Time he conceived it not material in this Caſe; becauſe though the Fact was committed ſo long ago; yet Intelligence was given of it but very lately. The Court was of Opinion, that this Offence was within the 8th of Geo. 1. for each of the Reaſons given by the Attorney General, and they thought he had given a full Anſwer to the laſt Matter likewiſe. The Chief Juſtice ſaid too, that if there had been Doubts upon the Form of this Commitment, whether as it was penned, it was ſtrictly within the Act, or not, he ſhould have thought it well amendable; accordingly the Defendant was remanded.

Spring *and* Seek.

Conſtruction upon the Statute of G. 2. which allows a Defendant to be ſerved with a Copy of a Writ.

THIS was a Proceeding upon the late Act of Parliament, which allows the Plaintiff to enter an Appearance for the Defendant, and to ſerve him with Notice of the Declaration being in the Office. The Plaintiff's Attorney had given this Notice on the 4th of this Month, and for want of the Defendant's putting in a Plea, ſigned his Judgment on the 8th. Upon which a Motion was made, that this Judgment might be referred to the Maſter. The Chief Juſtice at firſt thought that the Judgment was regular; by Reaſon that he took it, that the Day when Notice was given was to be taken inclusively into the Computation of the four Days for pleading; however, upon Mr. Monday's ſaying, that the Practice upon this Act of Parliament had been otherwiſe, the Court granted the Motion.

The King *and* The Inhabitants of Woodbery.

Concerning what Things the Seſſions has no Authority to make Orders upon Overſeers.

AN Order was made by the Seſſions upon the Overſeers of this Pariſh to pay a Surgeon's Bill, and ſome Law-charges. Upon which Mr. Filmer moved to quaſh it; by Reaſon, that the Seſſions had no Power to make ſuch Order. The like Order, he ſaid, was quaſhed in the Caſe of The King and The Inhabitants of Holditch. Accordingly a Rule was made to ſhew Cauſe.

The King *and* Lofeild.

A Rule was made abſolute for granting an Inforʒmation againſt the Defendant, laſt Eaſter Term; but no Inforʒmation was filed againſt him till this Term. Upon which Mr. Strange moved for an Imparlance till next Term; and the Court granted it.

Vide ante. 152

How far the Court will grant an Imparlance in Caſes of Informations.

Anonymus.

MR. Starkey moved for an Inforʒmation in the Nature of a Quo Warranto againſt one for exerciſing the Office of Capital Burgeſs in the Boʒough of New Radnor. He did agree, that this Perſon had the Maʒority of Votes upon this Election; but the Perſons that gave him theſe Votes, had no Authoʒity for Voting, by reaſon that they were not duly ſwoʒn in Capital Burgeſſes. For their Charter requires, that they ſhould be ſwoʒe befoʒe the Maʒoʒ and two Aldermen; but there was an Inforʒmation in the Nature of a Quo Warranto pending againſt the Maʒoʒ at that Time; and Judgment of Ouſter was afterwards pʒonounced againſt him. Accoʒdingly a Rule was made to ſhew Cauſe.

How far the Court will grant an Information againſt a Perſon for exerciſing an Office, by Reaſon that thoſe who elected him had no Authority to do it.

The Counteſs Dowager of Winchelſea *and* Higden

IN Debt upon Bond the Defendant craved Oyer, and the Condition appeared to be for perforʒming Covenants in a certain Indenture, Part of which were in the Affirmative, Part in the Negative. As to the Affirmative Covenants he pleads quod performavit; as to the Negative non infregit. The Plaintiff replies, that one of the Covenants was for Payment of Rent at the uſual Quarterly Feaſts, and that 10 l. 10 s. was arrear of it and unpaid at the Feaſt of St. Michael 1730. The Defendant rejoins, that on the ſaid Day he tendered the Money to the Plaintiff, and ſhe refuſed it. To this there was a Demurrer, and a Joinder in Demurrer; and the Cauſe ſpecially ſhewn was, that this Rejoinder was a Departure from the Plea. Mr. Bootle, Jun. argued on the Part of the Plaintiff, and cited Cro. Car. 76. 2 Saun. 82. Mr. Taylor on the other Side argued, and ſaid he did agree, that if the Defendant had endeavoured to excuſe himſelf from the Perforʒmance of this Covenant by the Act of God oʒ the like, this would have been a Departure. But he ſubmitted it, that upon the Matter this was a Perforʒmance of the Covenant. In the Caſe of Owen and Reynolds this Term in the Common Pleas; the Action was Debt on Bond with Condition to ſave the Plaintiff harmleſs from the Tonnage of Coals, the Defendant pleaded Non damnificatus; the Plaintiff replied a Diſtreſs taken for it; the Defendant rejoined, that none was due. Upon this there was a Demurrer; but that Court held it to be no Departure. The Chief Juſtice

How far a Rejoinder ſhall be ſaid to be a Departure from the Plea.

agreed that Case to be Law; and said, that the Rejoinder there fortified the Bar; but in the present Case there is a Departure; for the Matter in the Rejoinder goes only by Way of Excuse; Tender and Refusal being not Payment, but only discharging the Party from Damages. For this Purpose Judge Page put the Case of solvit ad diem pleaded to Debt on Bond. Upon Evidence, Tender and Refusal will not maintain the Issue; which the Chief Justice agreed. Accordingly the Court gave Judgment for the Plaintiff.

Ball *and* Knight.

Vide ante 164.

THIS Matter coming now on again, Mr. Wright argued for the Plaintiff; and said, he did submit it, that no Custom altering the established Principles of the Law was ever held to be good. The established Principle of Law in this Case he apprehended to be, that every Trial shall be had by twelve Men of the Neighbourhood that there can be no Exception against. But in the present Case the Custom is, that where there is a Defect of a sufficient Number of Jurors, the Defect is to be supplied by any of the By-Standers, of whatever Part of the Kingdom they live, and whatever Exceptions there may be against them. He said, this was by no Means agreeable to the Statute of 35 H. 8. for there the Tales are required to be of the Body of the County; and each Party is allowed his just Challenges. Not that he should have thought it a convincing Argument, if the Custom had been as the Statute is, that therefore the Custom would have been good. For another Statute of H. 8. allows Trials to be by six Jurors in Wales; yet such Custom has been always held to be void. He argued largely upon the general Learning of what Customs are allowed by Law, what not; but the Case which he principally relied upon, was that cited upon the former Argument out of Roll's Abr. where this very Custom is expressly held to be bad. Mr. Prime argued on the other Side, and said, that he had seen the Record of that Case so much relied upon; and there were many Exceptions to it, which the Judgment might have been reversed upon, besides that which Roll takes Notice of; particularly, he said, the Venire is not awarded by Vicineto, neither is the Entry quod Juratores posuerunt se in Juratam, but in Curiam. He observed likewise that in the Book called Trials per Pais, p. 69. the Author is of Opinion, that a Custom to award a Tales is good. The Chief Justice said, that its being averred in the present Record, that the Names of the Tales were added secundum formam Statut', he did not think material in the present Case; because the Custom does not appear to be according to the Statute. And as to the Case cited out of Roll, he said, it was taken at the Bar by Roll himself; and therefore he thought it of great Authority. Judge Probyn said, that the general Principle of the Law was not only that the Trial should be by Twelve, but that they should be Pares likewise; which as the present Custom is set out, may not always be the Case. Judge Lee said, as the present Record is, there

was no Occaſion to give an Opinion, whether the Cuſtom would have been good, if it had been according to the Statute. However even in that Caſe he ſhould have thought it not good, upon the Authority of the Caſe cited out of Roll's Abr. But in the preſent it was much worſe. Accordingly the Judgment was reverſed.

Speak qui tam *and* Bourn.

MR. Filmer now argued on the Part of the Plaintiff, and ſubmitted it in the firſt place, that the Office of Clerk of a Pariſh was merely Temporal. He obſerved, that there were ſeveral Authorities cited upon the former Arguments to prove it to be ſo; and he beg'd Leave to mention a few more out of Godb. 163. Hil. 22 Jac. 1. in the old Edition of Bendloe 141. 1 Leo. 94. and Fitzherbert's Abr. Tit. Annuity 40. which Caſe is likewiſe taken Notice of in Hughes's Parſon's Law 279. If this Office then in the Nature of it was conſidered as Temporal, he conceived, that there would be no Difference, whether he was nominated by the Parſon, or whether elected by the Pariſh. If this Point was with the Plaintiff, he apprehended, that the clear Conſequence would be, that he might make a Deputy, and for this Purpoſe cited Moor 885. 3 Bul. 77. 9 Rep. 48. However ſuppoſing for Argument ſake it was admitted, that the Office was Spiritual, yet he ſaid, no Caſes had been cited on the other Side to ſhew that it was neceſſary for a Clark of a Pariſh to take a Licence; and if that Point was with the Plaintiff, the Prohibition muſt neceſſarily ſtand; for the whole Tenor and Purport of the Libel is upon that Matter ſingly. Mr. Fazakerly argued on the other Side, and ſaid, that all the Citations that have been made, to ſhew that this was a Temporal Office, were only Obiter Sayings of Judges, pretty much about the Time of Jac. 1. except the Caſe in Fitzherbert's Abr. but he apprehended, that that Caſe went a great deal too far; for it is there held, that a Pariſh-Clark is an Officer at Will only. He conceived, that general Experience ſhews this to be otherwiſe, and its having been held, that ſuch Office gains a Perſon a Settlement proves it to be otherwiſe. He obſerved farther, that the Caſe of Mallard and Smith, Hil. 8 Ann. was a much later Caſe than any that has been cited, and was an Authority directly on the other Side. A Clerk of a Pariſh ſued there in the Eccleſiaſtical Court for a Penſion; on Motion for a Prohibition, the Court held, that the Suit would well lie; for that he was a Spiritual Officer. And in the Caſe of Townſend and Thorp, cited on the former Argument, the Court was expreſly of Opinion, that he was to be conſidered as a Spiritual Officer, when he came in by the Nomination of the Parſon, which was enough for the preſent Purpoſe. But, admitting that he was to be conſidered as a Temporal Officer; yet he ſaid, this Office was an Office of Skill; and therefore as there were no Words in his Nomination giving him a Power to make a Deputy, he could not do it. He obſerved farther, that it could not be denied, but

Vide ante 52.

the

the Matters which a Clerk exerciſes himſelf in, were Matters relating to the Church; for which Reaſon he ſubmitted it, that it could not be denied, but the Eccleſiaſtical Courts had a general Juriſdiction over him. A Suit therefore againſt him for Matters relating to the Execution of his Office could not be ſaid, but to be rightly inſtituted; and if there are any Matters thrown into the Libel, which are of themſelves of a Temporal Nature, yet if they relate to him in the Execution of his Office, he apprehended this Court would not grant a Prohibition. And for this Purpoſe cited 1 Leo. 138. 1 Sid. 217. 1 Cro. 65. 1 Ven. 64. The Chief Juſtice declared his Opinion, that a Clerk might make a Deputy, and thought that whether the Clerk came into his Office by the Nomination of the Parſon, or by the Election of the Pariſh, the Office muſt be conſidered the ſame in one Caſe as in the other; and ſo Judge Page was of Opinion likewiſe. Judge Lee ſaid, that he thought there was no Occaſion to determine, whether this Office was Temporal or not; but the Common Law Books were certainly very ſtrong on that Side of the Queſtion; and he had a Note from a Gentleman at the Bar in Lord Holt's Time, where a Suit was inſtituted in the Eccleſiaſtical Courts by a Clerk for his Salary; and on Motion the Court granted a Prohibition. However what the Court in general declared their Opinion upon in this Caſe was, that the plain Tenor of the Libel againſt the Plaintiff was for his not taking a Licence, and they could not ſee any Law that there was to oblige him to do it; for which Reaſon they made a Rule that the Prohibition ſhould ſtand.

Hore *and* Yates.

Vide ante 157.

IN an Action upon ſeveral Promiſes, the Defendant pleaded Non Aſſumpſit infra ſex Annos; the Plaintiff replied, that he ſued out a Bill of Middleſex, Hil. 13 Geo. 1. which Bill of Middleſex was continued down to the Time of the Declaration, and that before the ſuing out this Bill the ſix Years were not incurred; the Defendant rejoined, that though by the Courſe of the Court a Bill of Middleſex ſued out in the Vacation is ſuppoſed to iſſue of the preceding Term, yet in Truth the Bill of Middleſex in Queſtion was ſued out after the End of Hil. Term before mentioned, viz. on the 30th of March, and that before that Time the ſix Years were incurred. To this Rejoinder there was a Demurrer. And now Serjeant Chapple argued for the Plaintiff, and ſaid, he did agree, that a Bill of Middleſex had no Teſte; but yet he ſubmitted it, that there was as ſtrong an Eſtoppel to prevent the Party's ſaying that the Writ was not ſued out in Term, as if it actually bore Teſte of a Day in Term-Time. He ſaid, there were various Caſes to prove, that if this had been a Latitat or an Original, which always bears Teſte in Term, there would have been no Averment admitted, that the Writ was in Fact ſued out after Term. For which Purpoſe he cited, Lut. 332. 1 Sid. 53 and 60. Stiles 156. Carthew 232. 2 Cro. 264. Sid. 271.

1 Roll's Abr. 893. 1 Mod. 188. Cro. Eliz. 181. By many of which Books he ſaid, it appeared, that the Teſte of the Writ is the Commencement of the Suit, and that there was no Difference in this reſpect between Suits by Bill of Middleſex and Suits by Original. If this then was ſo, that the Party ſhall be eſtopped from ſaying, that Writs that bear an actual Teſte, were ſued out on a different Day from that which they bear Teſte of; he ſubmitted it, there was equal Reaſon to ſay, that in Writs, that bear no actual Teſte, but which the Law gives, the Teſte to the Party ſhall equally be eſtop'd likewiſe. Mr. Reeves argued on the other Side, and ſaid, he did agree that the general Rule of Law was, that the Party is eſtop'd from ſaying, that a Writ was ſued out on any Day, but on that which the Writ bears Teſte of. However even to that Rule, he ſubmitted it, that there were ſome Exceptions; as where the Party muſt be manifeſtly prejudiced by ſuch a Fiction; and for this Purpoſe cited 2 Keb. 173, 198. 3 Keb. 213. But in the preſent Caſe he ſaid, there was no Teſte, neither in Fact, nor Judgment of Law; for which Reaſon he apprehended, that clearly there could be no Eſtoppel. Judge Lee ſaid, that there were Exceptions even to that Rule of Eſtoppel, where the Writ bears Teſte in Term; and for that Purpoſe cited Raym. 161. The Rule however in general the Court ſaid certainly was, that of Writs bearing Teſte in Term, the Law conſiders them to be ſued out of the Day they bear Teſte of. But the preſent Caſe they inclined to think diſtinguiſhable from that, by Reaſon that there is no Teſte. However the Matter was ordered to ſtand over. Vide poſt.

Patton *and* Smith.

SErjeant Hawkins now came and ſubmitted it, that in this Action it was neceſſary for the Plaintiff to lay a Title to the Bailiwick, by reaſon that the Sheriff has the general Authority over the County given him by the Law; for which Purpoſe he cited the Caſe of St. John and Moody, out of Lev. that of Star and Rookesby out of Salk. Rep. 7, 24. Lut. 114. Dyer 70. If this was ſo he ſaid, he conceived, that the Law would require it to be ſet out according to the ſtrict Forms of pleading, and therefore that the Virtute cujus poſſeſſionatus was not right; but the Words ought to have been Virtute cujus fuit ſeiſitus. The Chief Juſtice and Judge Page at firſt inclined to think, that as this Action was brought againſt a Wrong-doer, a Title was not neceſſary to be ſet out. However afterwards the Court did agree that it was. But yet the Court ſaid, that the Words ſeiſitus & poſſeſſionatus they would take to be ſynonymous; and if ſo, the Plaintiff had ſet forth a good Title clearly. Accordingly the Rule was made abſolute for the Plaintiff's having his Judgment. Vide ante. 181.

The King *and* The Inhabitants of Utoxeter.

Vide ante 170.

THE Chief Juſtice now delivered the Reſolution of the Court upon this Matter. He ſaid, they were all of Opinion, that one Part of the Order of Seſſions was bad, which appointed Overſeers over the three Mills; becauſe it did not appear, whether they intended to appoint them over the three Mills jointly, or over each of them ſeparately. But the reſt of the Order they thought was good. Accordingly the firſt Part of it was quaſhed, and the reſt confirmed.

Anonymus.

How far the Court will not grant an Information againſt a Perſon for executing a Blank Warrant.

How far the Court will not grant an Information againſt another, by reaſon of the Smallneſs of the Offence.

ON Rule to ſhew Cauſe, why an Information ſhould not go againſt a Man, the chief Complaint, that remained unanſwered, was, that he executed a Blank Warrant; and Mr. Fazakerly ſaid, this was ruled to be bad very lately at the Aſſiſes at Carliſle. But Judge Page ſaid, that upon an Indictment of Murder a Juſtification was made by a Blank Warrant before Mr. Juſtice Powel, and he allowed it to be good. He believed too that in theſe large Counties, as this was in Yorkſhire, the Practice of making out Blank Warrants is very frequent. However the Court in general ſaid, that there was no Occaſion to determine the Legality of this Matter now. The preſent Motion was for an Information; and they did not think this a ſufficient Reaſon for granting it. There is another Remedy open for the Party, if he thinks proper to try, whether theſe Warrants are legal or not. Accordingly the Rule was diſcharged.

Dr. Wilmot *and* The Biſhop of Lincoln.

Vide ante 173.

THIS Matter now coming on again, Mr. Strange and Mr. Filmer argued for the Defendant. They ſubmitted it, that the Rule was general, that in no Caſe a Prohibition ſhould go after Sentence, unleſs the Want of Juriſdiction appeared upon the Face of the Proceedings. For this Purpoſe they cited Lut. 1019. 2 Roll's Abr. 318. The Caſe of Argyle and Hunt, Trin. 5 Geo. 2. in this Court. 1 Cro. 97. And the Caſe of Parker and Wharton, Mich. 13 Geo. 1. But ſuppoſing this Point ſhould be againſt them, yet ſtill they ſubmitted it, that it appeared by the Suggeſtion of the other Side, upon which the Prohibion is now moved for, that the Biſhop might viſit per ſe vel Commiſſarios de Triennio in Triennium; a fortiori they ſaid the Biſhop might viſit by Commiſſaries upon a private Appeal. The Court ſaid, that they thought both Points deſerved Conſideration; accordingly made the Rule abſolute for the Prohibition's going, that the Plaintiff might declare in it. Vide poſt.

Darbey *and* Gould.

THIS Matter coming on again, Mr. Fazakerly ſubmitted it, that the Plaintiff was intitled to his Judgment. He ſaid, it muſt be agreed even by the other Side, that the Plaintiff might well declare upon the Bond generally, without ſetting forth that it was given to him in the Name of his Office, and when the Defendant would avoid this Bond by the Statute of Hen. 6. that the Plaintiff might well reply, that it was given to him in the Name of his Office; and this will be no Departure. The Queſtion therefore for the Conſideration of the Court is, whether the Plaintiff by his Replication has ſufficiently ſhewn, that this Bond was given to him in the Name of his Office. He has averred, that it was given vigore & ſecundum formam Statut'; and that, he ſubmitted it, was a ſufficient Averment after a Verdict, that this Bond was given to him in the Name of his Office. However, if this ſhould not be taken to be a ſufficient Averment after a Verdict; yet he apprehended, the Plaintiff ought to have Judgment; by Reaſon that the Iſſue is joined upon a collateral Matter; and thereby the Averment made unneceſſary. Mr. Benney too inforced this latter Part of the Argument by two Caſes out of 1 Lev. 254. 1 Saun. 156. where ſuch Averment is not in the Record; and yet the Plaintiff had Judgment. Mr. Denniſon argued on the other Side, and ſaid, that he conceived that neither the Want nor Inſufficiency of ſuch an Averment would be cured by a Verdict, and for this Purpoſe relied upon 2 Saund. 177. Judge Lee ſaid, the Difficulty with him was, what Senſe ſhould be put upon the Words vigore & ſecundum formam Statut'. He did agree, that if the Senſe of it was, that the Plaintiff took the Bond exactly according to the preciſe Terms and Directions of the Statute, this would be good after a Verdict, without ſhewing in particular, what thoſe Directions were, that he followed. But, conſidering that the Defendant had pleaded that Birley took this Bond in the Plaintiff's Name, he took the Senſe of that Clauſe to be nothing more, than that the Plaintiff took this Bond under the Statute, abſq' hoc, that Birley took it. For which Reaſon, he thought that the Plaintiff had intirely omitted ſhewing, that he purſued the Directions of the Statute in taking the Bond; which he took to be neceſſary for the Plaintiff to have done, as the Caſe comes out upon the Defendant's Plea, in order to maintain his Action. To this Purpoſe he put the Caſe of a Man's declaring in a general Manner in Debt upon Bond, as the Plaintiff has done here, and the Defendant's pleading the Statute of H. 6. as he has done here likewiſe; ſuppoſe, he ſaid, the Defendant's Plea is ill in ſome Point of Form, and the Plaintiff demurs ſpecially. He took it in that Caſe, it has been held, that the Plaintiff in his Replication muſt ſet forth, that the Bond was given to him in the Name of his Office, otherwiſe the Demurrer will be bad. For which Reaſon he thought the Judgment ought to be arreſted. However, the reſt of the Court was of a different Opinion, and ſaid, they thought the

Vide ante

Words

Words ſecundum Formam Statut' would after a Verdict imply, that the Bond was given according to the Directions and Form of the Statute; though Judge Probyn agreed, if the Words had been vigore Statut' only, it would have been otherwiſe. Accordingly Judgment was given for the Plaintiff.

Anonymus.

Vide ante 186.

MR. Marſh came now to ſhew Cauſe, and ſaid, that the entering a Suggeſtion upon the Roll, was a Thing of Right without Motion, and therefore he hoped, that the Rule that was made upon Serjeant Darnel's Motion ſhould be diſcharged; which accordingly the Court did.

Nichols *and* Butterfield.

How far a Paper Book ſhall be ſaid to be regularly made up.

A Special Demurrer was made to a Declaration, for its being ſaid Pleg' &c. without ſetting forth the Names of the Pledges. Upon this the Plaintiff prays Oyer of the Bill upon the File, where the Names of the Pledges were entered, and joins in Demurrer. The Paper-Book was made up according to the Bill upon the File. Mr. Draper upon this moved that the Paper-Book might be made up according to the Copy of the Declaration. Mr. Agar oppoſed it. But the Court ſaid it muſt be ſo done; accordingly made a Rule for that Purpoſe.

The King *and* Knock.

How far a Perſon ſhall anſwer Interrogatories, in vinculis.

AN Attachment had been granted againſt the Defendant for not paying Coſts; upon which he gave Bail to anſwer Interrogatories; but never appeared to anſwer them. Upon which Mr. Harvey moved, that he might be called upon his Recognizance, and anſwer in vinculis; which the Court accordingly granted.

Hooker *and* Hooker.

How far a contingent Remainder ſhall be ſaid to be deſtroyed, or not.

THIS was a Caſe that came out of Chancery for the Opinion of the Court. William Hooker the Father, Elizabeth his Wife, and William Hooker his eldeſt Son, in 1670 joined in a Fine to certain Conuſees and their Heirs, to the Uſe of the ſaid Conuſees and their Heirs, of the Lands in Queſtion. In the Month of January in the ſame Year, the Conuſees made a Deed of Leaſe and Releaſe to Goldwire and Young and their Heirs, of the ſaid Lands, to the Uſe of them and their Heirs during the Life of William Hooker the elder, the Remainder to the Uſe of the ſaid Elizabeth for her Life, the Remainder to the Uſe of William Hooker the younger for his Life, Remainder to the Uſe of his firſt and every other Son in Tail Male; and for want

of ſuch Iſſue, the Remainder to the Uſe of his Daughters in like Manner, the Remainder to the Uſe of the right Heirs of William Hooker the Elder. In this Deed there was a Proviſo likewiſe, that William Hooker the Younger might make a Jointure of the Premiſſes on any Wife he ſhould afterwards marry. Elizabeth Hooker entered upon the Premiſſes, and enjoyed them during her Life. Anne, the Wife of William Hooker the Younger, at the Time of the Settlement, died; then William Hooker the Younger married a ſecond Wife, and afterwards the preſent Plaintiff. Elizabeth died, and then William Hooker the Younger entered, and died ſeiſed, without any Iſſue. The preſent Plaintiff now brought her Bill in the Court of Chancery, praying amongſt other Things to have Dower of this Eſtate; and whether William Hooker the Younger was ſeiſed of ſuch an Eſtate, as that ſhe ſhould have Dower, was the Queſtion. Mr. Fazakerly argued, that he was not. He ſaid, he apprehended, that the Remainder in Fee was clearly in Abeyance, during the Life of William Hooker the Elder, and he conceived it ſhould continue ſo, till the Time for veſting the contingent Remainder was determined. But admitting the Remainder in Fee ſhould veſt in William Hooker the Younger, upon the Death of his Father, and thereby the Eſtate for Life, and that of the Fee conſolidated in him; yet he ſubmitted it, that theſe two Eſtates were continually ſubject to be divided again upon the Contingency's happening, and therefore he could not be ſaid to be ſeiſed of ſo fixed and ſettled a Fee as is neceſſary to give a Woman Title of Dower. Eſpecially, he conceived, that this ſhould be ſo in the preſent Caſe, by Reaſon that the Remainder came to him by the Act of God, and therefore that ſhall prejudice no one. For this Purpoſe he cited Lewes Bowles's Caſe in Coke's Reports, Raymond 28. and the Caſe of Boothby and Vernon, Paſc. 11 Geo. 1. There Sir Henry Boothby ſeiſed of the Lands in Queſtion in Fee, deviſed the ſame to his only Siſter, being his right Heir, for Life, and if ſhe ſhould die, leaving Iſſue at the Time of her Death, then to ſuch Iſſue in Fee; but if ſhe ſhould have no ſuch Iſſue, then to Bore Boothby in Fee. Sir Henry died, and his Siſter married the Defendant, by whom ſhe had a Son and a Daughter; the Siſter died, and within ſeven Years after her Death, both her Children died likewiſe. The Defendant inſiſted to hold theſe Lands, as Tenant by the Courteſy, and the Plaintiff brought his Bill againſt him in the Court of Chancery, to recover the Poſſeſſion. Lord Macclesfield upon this directed a Caſe to be made for the Opinion of the Court of Common Pleas. That Court was of Opinion againſt the Defendant; but the Defendant was not ſatisfied; and thereupon appealed from Lord Macclesfield's Decree to the Commiſſioners of the Great Seal; but the Decree was affirmed. The Court however were ſtrongly of Opinion in the preſent Caſe, that the Plaintiff had a good Title of Dower. They did agree, that where the Eſtate for Life, and the Remainder in Fee are in one and the ſame Perſon by the ſame Conveyance, there ſhall be an Opening of theſe Eſtates, in Order that the contingent Remainder may veſt. But wherever the Remainder in Fee comes to the Perſon that has the Eſtate for Life, and there is no veſt-

ed Remainder between, in such Case the contingent Remainder is always destroyed; whether such coming of the Remainder in Fee is by the Act of God, or by the Act of the Party. For this Purpose the Chief Justice mentioned the Case of Hartpole and Kemp, Sir Thomas Jones 76. where there was Grandfather, Father, and Son, the Grandfather settled his Estate to the Use of himself for Life, the Remainder to the Use of the Father for Life, the Remainder to the Use of his first and every other Son in Tail Male, the Remainder to his own right Heirs. The Grandfather died before the Birth of the Grandson, whereby the Remainder in Fee came to the Father. The Court was of Opinion in that Case, that the contingent Remainder was destroyed; however this Matter stood over. Vide Post. 232. 370.

Manby *and* Manby.

How far a Reversion shall be said to pass by the Words of a Will.

UPON a Writ of Error on a Judgment in the Common Pleas in an Action upon the Case, it appeared, that two Points had been in Issue; one, whether a certain Writing was the Will of Ventris Manby; the other, whether by that Will the Reversion of certain Land, whereon ten Houses were built in Red-Lyon Street, was conveyed. The Plaintiff in Error was Heir at Law, and the Defendant Henry Manby claimed Part of the Reversion under this Will. To the first of these Issues the Jury found a direct Verdict for the Defendant; and to the other they found a Special one, which was to this Effect. Sir Richard Fisher and others were seised of the Land in Question in Fee, and in 1688 made three Building Leases of it, about sixty Years each, reserving Ground-Rents of 29 Pounds per Annum in the whole. Afterwards Sir Richard Fisher and the others assigned the Reversion of the Premisses by Deed of Bargain and Sale to Ventris Manby. On the 27th of April 1696, Ventris Manby makes his Will, and taking notice in the beginning of it, that he intended thereby to dispose of his worldly Estate, devises 4 Pounds per Annum, Part of his 29 Pounds per Annum Ground-Rents in Red-Lyon Street, to his Daughter Sarah, he then devises the like Sum of 4 Pounds per Annum, by the same Description to his Daughter Elizabeth, the same to his Son Henry, the like to his Son Benjamin, and 6 Pounds per Annum, Part of the said 29 Pounds per Annum to his youngest Son Daniel, the Remainder of the said 29 Pounds per Ann. he devises to his Daughter Mary. All which several Rents he devises to his Children above-mentioned and their Heirs; provided that if one dies without Children, such Share shall be divided amongst the rest of them equally. He then takes Notice, that his eldest Son had been very undutiful to him; so gives him something by himself; and declares he shall take nothing farther by his Will. In 1701 the Testator died, and left his Wife sole Executrix. The Value of this Land, with the Houses upon it, amounted to 264 per Annum; and whether the Reversion of it should pass by the Name of Ground-Rents in the Will, was the Question, which the Jury left to the Discretion of the Court. Upon this Verdict the Court of Common Pleas gave Judgment for the Defendant

dant in Error. Serjeant Eyres argued now in Defence of the Judgment, and cited the Case which is reported in Moor 640. 771. and in Cro. Jac. 104. he relied likewise upon 1 Ven. 322. and a Case which is reported in Duke's Charitable Uses. One Humphrey Davis erected, as that Case states it, an Alms-House, and devised the Rent of certain Land in Support of it; the Rent was at that Time but 10 l. per Annum. The Heir afterwards improved the Rent to 40 l. per Annum; but would have paid the 10 l. only. The Commissioners decreed him to pay the Whole 40 l. per Annum. On an Appeal to Lord Chancellor he ordered a Case to be made for the Opinion of the Judges in one of the Courts; who certified, that the Land itself passed by the Devise of the Rent; and thereupon the Decree was affirmed. The Court were of Opinion in the present Case, that as the Testator declared, that he intended to dispose of all his Worldly Estate by his Will, and as he intended, that his younger Children and their Heirs should enjoy the Benefit of these Rents for ever; and as he intended to disinherit his eldest Son in every Thing, but what he gave him by express Words, that it was very natural to imagine, that the Testator intended, that the Reversion of this Land should pass by the Name of his Ground-Rents. However the Chief Justice did agree, that generally by a Devise of the Rent the Reversion will not pass. For which Reason, he said, it was very natural for Judge Gawdy to say, as it is reported in Moor 640. when the Case was first stated to him, in the Manner that he did. But this Matter stood over. Vide post.

Spring *and* Rugg.

How far the Court of King's Bench will not set aside a Judgment that is regularly signed, by reason that the Plea which is offered to be pleaded, is not such a one as the Defendant ought to be allowed to plead.

THIS was a Judgment, that was regularly signed for want of a Plea; however Mr. Denison said, that the Defendant had a very honest Plea, and he put it into the Office the very Day that Judgment was signed; which Plea was, the Discharge of the Defendant under the late Insolvent Debtors Act. For which Reason he moved, that upon pleading this Matter, Payment of Costs and putting the Party in the same State as he would have been, if this Judgment had not been signed, the Judgment might be set aside. However the Court said, such Plea was not within the Meaning of their late Rule. Accordingly refused the Motion.

The King *and* Sir John Austin and others.

How far the Court will not grant an Information against a Justice of Peace.

ON Rule to shew Cause, why an Information should not be granted against the Defendants for an Abuse of their Authority as Justices of Peace, the Case appeared to be in the Manner following. The Principal Defendants were three Justices of Peace, that on the 5th of June last were holding a special Sessions at Barnet for the Liberty of St. Albans. Mapson,

Mapſon, who was a Diſtiller in Holbourn, had a little before that Time come down to Barnet, and took a Houſe of 6 l. per Ann. there, which he put a Woman into to ſell ſtrong Waters. A few Days before this Seſſions the Church-wardens came to Mapſon, and told him, they did not know who he was, that was come into their Pariſh, and therefore he muſt appear at this Seſſions to ſhew Cauſe, why he ſhould not be removed out of it. When this Seſſions was held, the Church-wardens made their Complaint there againſt him, upon which the Juſtices ſent him a civil Meſſage to deſire him to come. Mapſon refuſed coming without a Warrant. They ſent to him a ſecond Time, and he gave the ſame Anſwer. Upon which they directed their Clerk to make out a Warrant; but the Clerk ſaid, he could not, by Reaſon that no Body could inform him, what the Name of this Perſon was. The Juſtices upon this ordered the Conſtable who carried the former Meſſage, to bring him by Force, if he would not come otherwiſe. The Conſtable accordingly did bring him by Force. When he came before the Juſtices he behaved himſelf in a very inſulting Manner, throwing his Hands about, and was very near ſtriking one of them. Upon this they ſent for a Pennyworth of Whipcord and tied his Hands to his Sides, to prevent his doing Miſchief. He would give no ſort of Account of himſelf, but ſaid, he was as good a Man as any of them were; and upon that they made out a Warrant for carrying him to Hartford Gaol. He offered Bail to this Warrant; but the Juſtices, not knowing the Circumſtances of the Perſons he did offer, refuſed to accept them. In the Evening he made an Eſcape from the Conſtable, who had the Warrant to carry him to Gaol. The next Day he came to Sir John Auſtin's own Houſe, who was one of the three Juſtices, brought with him there undeniable Bail; but Sir John refuſed bailing him; and accordingly committed him to Hertford Gaol for a Contempt done to the ſpecial Seſſions. He brought his Habeas Corpus upon this Commitment, and the Warrant for committing him for the Contempt was returned with it; and then he was bailed. The Queſtion upon this State of the Caſe was, whether the Rule ought to be made abſolute for the Information. Mr. Fazakerly argued, that it ought; he ſaid, he did agree, that Mapſon, when he was brought before the Juſtices behaved himſelf in an improper Manner. But he Apprehended, that Mapſon was brought before them illegally; by Reaſon that there was no Warrant to bring him; and then it was no Wonder, that he treated the Juſtices in the Manner that he did. The binding his Hands with Whipcord too was a farther Aggravation of their Fault. No Man but a Felon ought to be uſed ſo. And then he conceived farther, that the refuſing to bail him was abſolutely unwarrantable. Theſe Obſervations, he ſaid, might be made, even upon a Suppoſition, that the Fact really was, as upon hearing the Defendants Affidavits it ſeems probable enough to be. But he obſerved, that upon the Caſe, as it is ſtated by two Affidavits on the Part of the Complainant, a much heavier Charge is made againſt them. He took Notice, that before the Statute of 4 & 5 W. & M. 18. Informations were filed by the

Coroner of course upon every Complaint laid before him. That Statute indeed has provided, that the Coroner shall not file them without Leave of the Court. But he submitted it, that when Facts are stated one way on the Part of the Complainant, denied and stated another Way on the Part of the Defendant, that was a sufficient Reason for the Court to order the Coroner to file an Information, that the Fact may be tried. So that taking this Case to be either Way, he hoped, the Rule should be made absolute. Judge Lee declared, that in granting Informations of this sort he did not take the Rule to be, as Mr. Fazakerly had mentioned. In Informations of a Quo Warranto, which are to try a Right, he agreed that Rule was just. But in Informations to punish a Man for a Crime, wherever the Fact is denied by the Defendants, he took it the Court always refuses granting it, and leaves the Party to his ordinary Remedy. He remembered too, that this Distinction was expressly resolved by the Court upon Debate, in a Case which Lord Lechmere was concerned in. However the Court agreed, that in the present Case, the Facts complained of were not so much denied by the Defendants, as stated in a different Light by Means of additional Circumstances; and the real State of the Case they took clearly to be in the Manner that has been mentioned. They then began to consider the Objections that had been made in respect of the Justices. As to there being no Warrant, they said, this was not a Charge of a Criminal Matter that Mapson was accused of, and therefore a Summons was much more proper than a Warrant in this Case; and that there was what amounted to a Summons in this Case, they clearly agreed. Judge Probyn for his Part said too, that he thought the Justices might well have made an Order for removing Mapson out of the Parish, without examining him himself, in as much as he refused to come before them; for which Reason he should have thought, that if they had made a Warrant it would have been illegal. But Judge Page said, his Opinion was, that they could not have made such Order without examining the Party himself; for which Reason he should have thought, that the Warrant had been very legal. Then as to the Tying his Hands the whole Court agreed it was very justifiable according to the Circumstances of this Case. And as to the Contempt, as it was done in open Court at a special Sessions, which is a Court of Record, they said it was in their Discretion, whether they would Bail him, or not. And when a Commitment for a Contempt in open Court is returned upon a Habeas Corpus, regularly speaking this Court does not inquire into the Causes of it. For which Reason the Rule for the Information was discharged.

Winchlet *and* Hurghley.

When an Action is brought againſt the Indorſor of a Promiſſory Note, how far it need not be ſet forth in the Declaration that any Demand was made upon the Drawer.

IN an Action againſt the Indorſor of a Promiſſory Note, there was a ſpecial Demurrer to the Declaration, becauſe there was no Demand ſet forth to have been made upon the Drawer. Mr. Taylor however moved for Judgment for the Plaintiff; and no Body being on the other Side, the Court gave Judgment accordingly. Chief Juſtice abſent.

Anonymus.

How far the Court will grant an Information againſt Church-wardens.

ON Rule to ſhew Cauſe, why an Information ſhould not be granted againſt the Church-wardens and Overſeers of Lambeth Pariſh for publiſhing a Libel upon the Truſtees of a Workhouſe there, the Caſe appeared to be this. On the 17th of Auguſt laſt, Notice was given in Lambeth Church by the Church-wardens and Overſeers, That whereas the uſual Time for Meeting by the Truſtues of this Workhouſe had been on a *Sunday*, they ſhould henceforth meet on a *Thurſday*. The Sunday after a Notice was given by the Truſtees, contradicting the former Notice, and declaring, that the Meeting would continue to be on a Sunday. The Sunday after, that the Church-wardens and Overſeers ordered another Notice in Writing to be read in the Church, declaring that the Meeting would be on a Thurſday, notwithſtanding the Abuſes in this Truſt that had been ſuffered by the Truſtees under their pretended Authority. Serjeant Corbet ſubmitted it now to the Court, that this was only a Diſpute about a Right between the Church-wardens and Truſtees; and therefore this could not be called a Libel. Judge Page agreed, that if the Church-wardens and Overſeers had only declared by this Writing, that the Truſtees acted under a pretended Authority, the Court would not grant an Information. But as this Writing charged them with Abuſes in that Authority, the Court thought proper to make the Rule abſolute.

The King *and* Clendon.

When a Perſon is committed for a Contempt, how far his own Recognizance ſhall not be taken.

THE Defendant having been committed for a Contempt, Mr. Strange moved, that he might be bailed to anſwer Interrogatories. He ſaid, that they had given Notice indeed of their Bail; but he apprehended, that the Party's own Recognizance would be ſufficient. Mr. Maſterman ſaid, that formerly the Party's own Recognizance uſed to be thought ſufficient; but of late Years the Court has always inſiſted upon Sureties. Accordingly upon the Defendant's not having one of his Sureties here, the Court did nothing upon the Motion.

The King *and* The Inhabitants of Woodsterton.

THIS was an Order of two Justices made upon the Officers of the Parish of Woodsterton, for paying 5 Pounds upon Account of a poor Inhabitant of that Town, when he was in Gaol, and likewise for paying a Surgeon's Bill, that was due upon his Account; which Order had been confirmed at the Sessions. Mr. Wirley moved, that both might be quashed by Reason of several Exceptions to the original Order; First, that it is not said in the Order, that it was made under Hand and Seal. Secondly, That it does not appear to have been made upon examining the Party on his Oath. Thirdly, That it is neither averred in the Order, that the Justices, who made it, lived within the Parish, nor that there were no Justices living within it; one of which Averments ought necessarily to have been made. Fourthly, That the previous Steps of applying to a Vestry or two Overseers of the Parish were not observed; which ought to have been, by the Statute of 9 Geo. 1. Accordingly the Court made a Rule to shew Cause. Vide Post.

Concerning what Things Justices of Peace cannot make an Order upon Overseers.

Anonymus.

ON Rule to shew Cause, why a Certiorari should not go to the Justices of the County of Stafford, for removing some Orders up, made upon the Parish of Exon, requiring them to be contributory to the Inship of Tindal, the Inship of Tindal having already had a Rule made upon them for above 6 d. in the Pound, towards the Repairs of the Highways within that Inship. Mr. Lacy said, that he did agree, that Certiorari's were taken away by the Statute of 3 & 4 W. 12. Sect. 3. from removing up Orders made upon Parishes in general for not repairing the Highways. But the present Order, he said, was founded upon 7 & 8 Will. 29. and therefore he apprehended, that the Certiorari would well lie. However, the Court had some Doubts, whether it would in as much as the second Statute has a Relation to the first, and the Order to be made upon the Parish at large in this Case, is to be made after the same manner as in the other. Accordingly the Rule was enlarged.

How far a Certiorari shall be said to be taken away within the Meaning of the Statute of 7 & 8 W. 29. relating to the Highways.

Dobson and others *against* Dobson.

SErjeant Chappel came now to answer the Objections. The Words of the Act, he said, were, That the Widow shall recover her Damages from the Death of her Husband. And the Meaning of Lord Coke in the Place before cited, can only relate to such Instances, where the Heir has made an Offer of the Dower, immediately after the Death of his Ancestor, and the Widow has refused accepting it. He said too, that the Construction of that Clause in the Statute, which ascertains the Time to which Damages

Vide ante 180.

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mages are to be recovered, might reasonably be understood to be, that the Damages shall be given to the Time of final Judgment; for till then the Widow has not the compleat Benefit of her Action. Then as to the Exception taken for its being said, Et sum' &c. he observed, the Precedents were all in that short way. As to the Grand Cape, he said, there is a Day given to the Demandant at the Return of the Writ; for it is said, he did appear at the Return of it. But he submitted it, that it was not necessary to be averred in express Words, that he appeared and demanded the Writ; for by its being said, that he demanded the Writ, it must be understood that he came into Court to demand it; there being no other Place where he could demand it. And so is the Entry in Rast. 236. b. relating to an Habere facias Seisinam, and Coke's Entries 181. Then as to the Exception that has been taken, because it is not averred nec eorum aliquis venit, he observed, that in real Actions Several Tenure was a good Plea, and as the present Tenants have not pleaded that, it shall be taken that they were Joint-Tenants. Now he submitted it, that in the Case of Joint-Tenants, the Default of one is the Default of all; and therefore there was no Occasion for such an Averment as has been insisted on. For this Purpose he cited too Rast. 234, 235, 237. Then as to the Continuances, he said, they were ad prox' Session', as has been mentioned. But he observed, that it was not known when the next Sessions will be, as it is when the next Term will, in the Courts above. For which Reason the Continuances can be in no other Way. He said, the Courts in Counties Palatine are superior Courts, and therefore the Courts above will judicially take Notice of their Proceedings. And as to the last Exception, he said, it appears by all the Precedents ever since the Act, that the Jury have constantly given something for Damages, besides the Value of the Land; and therefore however strong the Words of the Act may be, that the Value of the Land is to be the Measure of the Damages, he conceived that a Judgment shall not be reversed, that has followed the Precedents that have been of so antient a Date. For which Reason, he hoped, that the Judgment should be affirmed in the whole. The Court said, that their principal Doubt was in Relation to the Time to which the Damages are given. Upon which Serjeant Chappel said, that supposing there should be a Mistake in the Quantum of the Damages that are given, yet that is no more than a Miscomputation by the Court; and he cited the Case of Green and Chesson, Mich 12 Geo. 1. where for such Cause the Court refused to reverse a Judgment. Judge Page said, that he conceived this was not a Miscomputation in the Court. For by the Writ of Inquiry the Jury have found the Time when the Husband of the Demandant died, the yearly Value of the Land, and that five Years and two Months elapsed from the Time of his Death to the Time that the Writ of Inquiry was executed. Upon this the Court have computed what that Sum amounts to, and have given the whole of it; so that the Fault, if any, is not in the Miscomputation of the Damages by the Court, but in their giving them for a longer Time than they ought.

The Serjeant upon this ſubmitted it, that the Court might abridge the Damages, and rectify them. The Court ſaid, that this Matter deſerved farther Conſideration; ſo ordered it to ſtand over. Vide Poſt. 443

Gore *and* Gore.

THIS was a Caſe that came out of Chancery for the Opinion of the Court. Mr. Bootle ſtated the Fact to be in the Manner following; William Gore was ſeiſed of the Lands in Queſtion in Fee-ſimple, and by his Will bearing Date the 4th of July 1718 deviſed the ſame to certain Truſtees, for the Term of 500 Years, in order that certain Debts and Legacies might be paid out of the Profits of them, the Remainder to the firſt Son of Thomas, who was his eldeſt Son, which ſhould be begotten in Tail Male, the Remainder to Edward his ſecond Son for Life, and afterwards to his Iſſue in Tail Male, the Remainder to William his third Son, in like Manner, the Remainder to his own right Heirs. Soon after the Teſtator died; Thomas his eldeſt Son was not then married, but afterwards did marry, and had Iſſue the preſent Defendant. Edward died without Iſſue Male; and William the third Son of the Teſtator was the Plaintiff. Mr. Bootle now argued for the Plaintiff, and ſubmitted it, that he had a good Title. The principal Queſtion, he ſaid, would be, whether the Defendant can claim theſe Lands by way of executory Deviſe. Now as to that, he ſubmitted it, that the Rule of Law was, that no Perſon can take by executory Deviſe, unleſs he was either in Being at the Death of the Deviſor, or at leaſt muſt neceſſarily be in Being upon the Determination of ſome Life or Lives nominated by the Will. For this Purpoſe he ſaid the Argument of Lord Chief Juſtice Treby, in the Caſe of Scaterwood and Edge, taken Notice of in Salk. 229. but not fully, was very material. He ſaid he had his Argument taken by a Gentleman in Short-hand, that attended at that Time, and he believed it was taken juſtly. He ſaid the State of that Caſe was in this Manner; Edge was ſeiſed of certain Lands in Fee, and deviſed them to Truſtees for 11 Years, the Remainder to the firſt Son begotten of the Body of George Jaques, in Tail Male, the Remainder to the reſt of the Sons of George Jaques in like Manner, provided they ſhould take upon them the Name of Edge; and if they ſhould not take upon them that Name, or if they ſhould die without Iſſue, the Remainder to the firſt Son of Richard Conway in Tail Male, and ſo on to the reſt of the Sons of Richard Conway, provided they ſhould take upon them the Name of Edge, the Remainder to his own right Heirs. George Jaques had no Son begotten on his Body at the Time of the Death of the Deviſor; Richard Conway had one at that Time, who was the Defendant in that Action. Afterwards George Jaques had a Son, who was the then Plaintiff. Upon this Matter found by Special Verdict Lord Chief Juſtice Treby declared his Opinion in the Manner following. As for executory Deviſes, ſaid he, they were complained of in a few Years after the introducing of

What ſhall be ſaid to be a good executory Deviſe.

them, and thoſe that did introduce them lived to repent it. The Bounds to theſe Deviſes, however, he ſaid were ſet; and they were reſtrained to a Life or Lives in Being. For if the Candles are all lighted, it is well. Poſſibly, he ſaid, it may be good to make the Heir of a Perſon capable, though the Perſon himſelf was living at the Death of the Deviſor, for that muſt take Effect at the Inſtant the Perſon dies; but he was not for going an Inch farther. And he put the Caſe of a Child in Ventre ſa Mere; and he held that ſuch Child would not be capable of taking. Accordingly his Opinion was for the then Defendant. Judge Powel and another of the Judges of the Common Pleas were of Opinion for the Defendant likewiſe. But they, indeed, choſe rather to give a different Reaſon, viz. that the Words, to the firſt Son of George Jaques, were de præſenti, *they being to his firſt Son begotten.* Judge Blincoe too was of Opinion with the Plaintiff. However, Mr. Bootle ſubmitted it, that the Reaſon given by thoſe two Judges was not the true one; for Lord Coke ſays, that the Words procreatis and procreandis are ſynonymous. But the Reaſon given by Lord Chief Juſtice Treby ought to be relied upon. And he ſaid this Judgment was affirmed upon a Writ of Error. If this Reaſoning of Lord Treby was to be relied upon, he apprehended it was in Point for his preſent Purpoſe. For Thomas the eldeſt ſon of William Gore had no Iſſue till after the Death of the Deviſor; and it was poſſible, that he might have had none till 40 Weeks after his own Death. He obſerved farther, that the Term of 500 Years, which was to be ſatisfied before the Iſſue of Thomas could take, was another ſtrong Objection againſt him. In the Caſe before cited, there was a Term of 11 Years, and Lord Treby ſaid 10 Years, or perhaps 20 might be allowed; he would not confine it to any certain Number of Years; and therefore Mr. Bootle did agree, that the Term of 11 Years was held to be no Objection in that Caſe. But by the Reaſoning of that Chief Juſtice upon that Term, he conceived, that it fully appeared, that the Term of 500 Years could never be allowed. He obſerved too, that there was no Occaſion for him to rely ſingly upon the Authority of the Caſe before cited; for there were many others very ſtrong for him; and particularly cited 2 Cro. 459. Pal. 355. Sir William Jones 15. Rol. Ab. 613. 1 Sid. 37. 3 Keb. 127, 178. He ſaid farther, that he apprehended the Court had given their Opinions before upon this very Point, upon a Caſe ſent them out of Chancery in 1720. Serjeant Chappel argued on the other Side, and ſaid, he did agree, that the Caſe which Mr. Bootle had ſtated, was pretty much the ſame with that which came out of Chancery in 1720; but in the Caſe that is now ſent, there are many Facts ſtated, which were intirely omitted out of the other Caſe. For which Reaſon he ſtated the Facts particularly in the Manner that they now appear before the Court. The Teſtator had five Children at the Time he made his Will, and likewiſe at the Time of his Death, Thomas, Edward, William, Eſther and Anne. To Thomas he bequeaths an Annuity only of 50 Pounds per Ann. and gives his Reaſons for it, becauſe he had already laid out a great deal of Money upon him, and likewiſe becauſe he would be intitled to have an Eſtate of 400 Pounds per Annum an-

other way. To Edward he gives 2000 l. to be paid as ſoon as may be after his Death. To Eſther he gives 1500 l. to be paid in like Manner; and to William and Anne he leaves conſiderable Legacies likewiſe. The Lands in Queſtion he deviſes to Truſtees for Five hundred Years for the Purpoſes that have been mentioned. He then gives a Power to Thomas to make a Jointure of them; ſo as he ſettles but 10 l. per Annum for every 1000 l. he has with his Wife. The Remainder of theſe Lands he deviſes to the firſt Son, which ſhall be begotten on the Body of Thomas in Tail Male, and ſo on to every other Son of Thomas in like Manner. The Remainder to Edward for his Life with Power to make a Jointure, and Leaſes likewiſe, and afterwards to his Iſſue in Tail Male. The Remainder to William in like Manner; but provides, that if either Edward or William ſhould happen to come to the Eſtate; before their Legacies can be raiſed; then ſuch Legacies ſhould not be paid to them. And then limits a Remainder to his own right Heirs. Upon this State of the Caſe he ſaid, he ſubmitted it, that here was a plain Eſtate by Implication given to Thomas till he ſhould have Iſſue; and if ſo the Deviſe would be clearly good to his firſt Son by Way of contingent Remainder. He ſaid, there is a Power given to Thomas to make a Jointure; but not to make Leaſes; which is an Argument, that he was to have this Eſtate till the Birth of his Son, though not to prejudice him. He obſerved farther, that Edward and William had Legacies given them to provide for them for the preſent; which is another Argument, that they were not to have the Eſtate immediately; nay, it is expreſsly provided, that if the Eſtate does fall to them before their Legacies are paid, they ſhall not be paid at all. However, he ſaid, if this Point ſhould go againſt the Defendant, he ſubmitted it, that he might well take by Way of Executory Deviſe. For the Teſtator ſpeaks per verba de futuro; he gives the Remainder of his Eſtate to the firſt Son of Thomas Gore, which ſhall be begotten; and then the Authority of two of the Judges in the Caſe that has been cited, is expreſly with him. He ſaid, that he apprehended the Law was clear, that a Poſthumous Child, when taken Notice of as ſuch, is capable of taking by way of Executory Deviſe. He did agree, that a Deviſe to the Heirs of J. S. was not good per verba de præſenti; and ſo it was allowed by thoſe two Judges in the Caſe above mentioned. But they expreſly declared their Opinions, that a Poſthumous Child taken Notice of as ſuch, which muſt be per verba de futuro; was capable of taking by Executory Deviſe. And ſo he ſaid, is the expreſs Authority of 1 Roll Abr. 612. He likewiſe cited 2 Cro. 394. Raym. 82. 1 Sid. 153. 2 Mod. 289. Salk. 254. The Chief Juſtice ſeemed clear of Opinion, that the firſt Son of Thomas could not take by Way of contingent Remainder; becauſe the Deviſor plainly intended, that Thomas ſhould have nothing by his Will, but the Annuity of 50 l. per Annum; and therefore he could not deſign, that Thomas ſhould have a Freehold in this Eſtate to ſupport a contingent Remainder. However, he ſaid, it was a Matter which deſerved Conſideration, whether the firſt Son of Thomas could not take by Way of Executory Deviſe. He

ſaid,

ſaid, it muſt be agreed beyond all Queſtion, that if this Eſtate was not to veſt in him till the Term of 500 Years was ſatisfied for the Purpoſes which it was made for, this Deviſe muſt be wholly void to him; but he did not think, that the Term would make any hindrance, but that the Eſtate might veſt in him upon his Birth; though he ſhould not have the Poſſeſſion of it indeed, till the Purpoſes of the Term were ſatisfied. The principal Objection to this Deviſe, he ſaid, ariſes from the Authority of Lord Chief Juſtice Treby in the Caſe that has been cited; and he did agree, that the Opinion of that Chief Juſtice had been truly ſtated. But the two other Judges ſeemed intirely to found their Opinion upon the Reaſon, that the Deviſe was to take Effect per verba de præſenti; admitting, that if it had been per verba de futuro, as the preſent Caſe is, that it would have been good. He took Notice, that in the Writ of Error that was brought upon that Judgment he was of Counſel; and Lord Holt declared at that Time, that there was no certain Bound, which the Law had ſet to theſe Executory Deviſes. He ſaid too, that he had known it ſolemnly determined, that ſuch Deviſe may be good for a Year longer than any Life in Being. And therefore he doubted, whether there was any other Rule which the Court could go by in judging upon ſuch Deviſe, than to conſider, whether it tended to a Perpetuity or not. Judge Page ſaid too, that that was always his Opinion. However the Matter ſtood over. Vide poſt.

Acherley *and* Vernon.

How far a Court of Equity can grant a perpetual Injunction.

Canc. UPON a Bill brought to have a perpetual Injunction, the Defendant pleaded to the Juriſdiction of the Court againſt granting ſuch Injunctions. But it was ſaid, that there have been ſeveral Inſtances, in which ſuch Injunctions have been granted. The firſt was in the Caſe of The Earl of Bath and Shering, and was done by Order of the Houſe of Lords upon an Appeal. Another was between Leighton and Leighton. Accordingly Lord Chancellor put off the Conſideration, whether it ſhould ſo be done in the preſent Caſe, till the Hearing of the Cauſe.

Lamb *and* Chapman.

Vide ante 168.

THE Attorney General came now and ſaid, that he had no Intentions to argue this Caſe at preſent, but only to offer ſome Reaſons to the Court, why the State of the Caſe ſhould be ſomething altered. He ſaid, as the Caſe was drawn up, it was expreſly ſtated, that the Goods in Queſtion were not bought by Way of Merchandize. He did agree, that if it was the Intent of the Jury to find the Fact according to thoſe very Words, the Plaintiff muſt have his Judgment. For theſe are the Words of the Statute of 12 Car. 2. 4. that ſuch Goods only that are brought in by Way of Merchandize, ſhall pay

Duty; and all the ſubſequent Statutes, that have laid Duties upon Foreign Goods, have been conſtrued to have relation to that. But he obſerved, that it was not neceſſary, that the Goods in Queſtion ſhould have been bought with an Intention to be ſold again to make them to be within the Meaning of the Statute of Car. Goods bought by Way of Merchandize. And of that Opinion was the Court of Common Pleas unanimouſly in the Caſe of Pourkney and Bower; though indeed they differed in the principal Point before them, which was, whether Wreck'd Goods ſhould pay Duty; Lord Chief Juſtice Treby was of Opinion, that they ſhould; the other Judges of the contrary one. And he ſaid, he apprehended it to be clear, that Furniture bought abroad muſt pay Duty, though it was never bought with an Intent to be ſold again. Now he ſubmitted it, that the Jury might very poſſibly mean in the preſent Caſe nothing more, than that the Goods in Queſtion were not bought with an Intent to be ſold again. And if ſo he deſired that the State of the Caſe might be altered in that Manner. The Chief Juſtice ſaid, that he underſtood the Meaning of the Jury to be to find the Fact exactly according to the Words, which they had ſtated it in; and therefore the Caſe could not be altered. Accordingly Judgment was given for the Plaintiff.

Throgmorton *and* Norton.

MR. Strange moved for the Court's Direction of the Maſter to tax Coſts for want of a good Countermand of Notice of Trial. The Rule of the Court in this Point, he ſaid, he apprehended, was, that two Days Countermand is requiſite in a Town Cauſe, four Days in a Country Cauſe. This Action was an Ejectment that was to be tried at Warwick; and the Aſſiſe Day was the 19th of Auguſt laſt; but the Countermand was only given on the 16th. Accordingly the Court directed the Maſter to allow the Defendant his Coſts for want of a ſufficient Countermand.

What ſhall not be ſaid to be a ſufficient Countermand of a Notice of Trial.

The King *and* Palmer.

UPON Complaint of Mr. Budgel againſt the Defendant, who was a Bailiff, for refuſing to carry him to the Houſe which he appointed, and for not reading the Clauſe in the Statute of 2 Geo. 2. when he Arreſted him; the Court ordered the Defendant to pay Mr. Budgel 5 l. for his Damages, together with his Coſts; and likewiſe committed him for the Contempt.

Conſtruction upon the Statute of 2 Geo. 2. relating to Arreſts.

Anonymus.

How far a Writ of Inquiry ſhall be ſaid to be unduly executed in reſpect of the Time of the Execution of it.

ON Motion by Mr. Theede to ſet aſide a Writ of Inquiry for its being executed at Half an Hour after 12, whereas the Notice was for executing it between 10 and 12. The Court was of Opinion, that the Party ought to have ſtaid an Hour after the Time mentioned for executing it. Accordingly refuſed the Motion. Chief Juſtice abſent.

The King *and* Hayward.

How far a Perſon's own Recognizance ſhall not be taken alone without other Sureties.

MR. Hayward moved, that the Defendant's own Recognizance might be taken to anſwer Interrogatories; he being one of the Filacers of the Court. Judge Page ſaid, that formerly their own Recognizances uſed to be taken upon ſuch Occaſions, but not of late. Accordingly two Perſons were bound Sureties with him, their Recognizance in 20 l. each; his own in 40 l. Chief Juſtice abſent.

Anonymus.

How far a Certiorari may be granted to Juſtices of Oyer and Terminer, in order to remove up an Indictment for a Miſdemeanor.

MR. Fazakerly moved for a Certiorari to remove an Indictment for a Nuſance found at the Aſſiſes in Shropſhire. He did agree, that regularly Speaking the Court does not grant theſe Certiorari's; but the Reaſon for asking it in this Caſe, he ſaid, was, becauſe the Defendant wanted a View; which he could not have granted him at the Aſſiſes. Accordingly the Court made a Rule to ſhew Cauſe.

Daniel *and* Purkurſt.

When the Court ſets aſide a Verdict that is had upon a Writ of Inquiry, how far Coſts are to be paid or not.

MR. Parker moved to make a Rule abſolute for ſetting aſide a Writ of Inquiry, and that without Coſts, by Reaſon that the Jury had found a Verdict for the Defendant, whereas they neceſſarily ought to have found for the Plaintiff, though they had given but a Penny Damages. Regularly ſpeaking he did agree the Party muſt pay Coſts, where he moves to ſet a Verdict aſide; but in the preſent Caſe the Jury have found a Verdict contrary to the Record; and in ſuch Caſe the Court of Common Pleas lately ſet a Verdict aſide without obliging the Party to pay Coſts. The Name of that was The Earl of Rochford and The Biſhop of Norwich, in Quare Impedit, Trin. 5 Geo. 2. The Plaintiff there had a Verdict at the Aſſiſes; a Writ of Inquiry was afterwards awarded to inquire of the Value of the Church, and of the other Matters in Purſuance of the Statute of Weſtminſter. Upon that Writ of Inquiry the Jury found, that there was no ſuch Church as that in Queſtion. On Motion to ſet aſide that Inqueſt, as being contrary to the Record, the Court did

ſet it aſide, and that without Coſts. Judge Lee ſaid, that in the famous Bewdley Caſe, the Court made the Party pay Coſts, that moved to ſet aſide the Verdict; though the Jury gave it expreſly contrary to the Direction of the Court. But Judge Page ſaid, ſuppoſe the Iſſue was between A. and B. and the Jury find a Verdict for C. he thought the Court would ſet that Verdict aſide without Coſts. The Chief Juſtice inclined too to be of Opinion, that there ought to be no Coſts in this Caſe. However enlarged the Rule. Vide Poſt.

Anonymus.

When a Perſon is committed for being a looſe, idle and diſorderly Perſon, how far the Court will Bail in ſuch kind of Caſes.

ANN Black, a Negroe, had been committed to Bridewell by a Juſtice of Peace; and now upon a Return to a Habeas Corpus the Form of the Commitment appeared to be, to require the Keeper of Bridewell to keep this Woman in Cuſtody for aſſaulting her Maſter, and being a looſe, idle and diſorderly Perſon, for want of Sureties to keep her in Cuſtody. Mr. Kettleby moved that ſhe might be bailed. He ſaid, this was a Commitment by one Juſtice of Peace, and as he thought, clearly no Conviction. Mr. Reeves on the other Side argued, and ſubmitted it, that one Juſtice of Peace had a Power of convicting a Perſon for being looſe, idle and diſorderly; and he apprehended, that this was a Conviction in the preſent Caſe. The Conſequence of which was, that this Court would not interpoſe and bail the Defendant. But the Court ſaid, that the Words of the preſent Commitment were, For want of Sureties keep the Defendant in Cuſtody; ſo that ſhe was no longer to be kept, than till ſhe was able to find Sureties; for which Reaſon they were of Opinion, that ſhe ought to be bailed. Upon this Mr. Reeves ſaid, that there would be Occaſion then to lay a farther State of this Matter before the Court. The Defendant he obſerved was a Negroe, and by the Laws of the Plantations abroad the Maſter has a Property in her; which Property, he ſubmitted it, was not altered by her coming with her Maſter into England. Now if the Court ſhould bail the Defendant, the Court muſt take away from the Maſter that Cuſtody of his Property, which he is intitled to, and muſt deliver her into the Cuſtody of her Bail. The Court ſaid they would not enter into an Inquiry of that Matter upon this Motion for bailing the Defendant; and therefore inquired who was her Bail. It was ſuggeſted upon this, that ſhe was a married Woman, and that her Husband's Name was Carter; but that was denied by the other Side. However, the Court ſaid, that if there was any Doubt of that Matter, they would certainly not take her own Recognizance. Upon which Carter, her ſuppoſed Husband, entered into a Recognizance for her, and ſhe had two other Bail likewiſe. Accordingly ſhe was bound over for her Appearance at the next Weſtminſter Seſſions, by the Name of Anne Carter, alias Anne Black, and then the Court diſcharged her.

Banks

Banks *and* Doyley.

How far the Court will ſet aſide a Plea of Privilege, by Reaſon that there is no Affidavit annexed to it.

A Few days ago Mr. Parker had obtained a Rule for ſetting aſide a Plea of Privilege, there being a Writ of Privilege; but no Affidavit annexed to it. Mr. Proctor came now and moved to diſcharge it, by Reaſon that, as he apprehended, the Writ of Privilege itſelf was ſufficient. But the Court ſaid, that it is not aſcertained by the Writ of Privilege, that the Defendant was an Attorney of the Common Pleas at the Time of the Action commenced againſt him in this Court; for which Reaſon they thought, that an Affidavit ought to have been annexed to the Plea, accordingly refuſed to diſcharge the Rule.

Wrench *and* Hixon and others.

What kind of Plea need not be under Counſel's Hand.

UPON the Maſter's Report, the Caſe came out to be in the Manner following. In an Action brought againſt two Executors, they pleaded diſtinct Pleas; one, Ne unques Executor; the other, Plene Adminiſtravit. The Plene Adminiſtravit was ſigned under Counſel's Hand; but not the Ne unques Executor. Both theſe Pleas were brought upon one Piece of Paper; and appeared upon the Face of them as one Plea; but no Counſel's Hand was at the Bottom of them. However the Plaintiff's Attorney accepted them; but afterwards ſigned his Judgment againſt both the Executors, taking it for granted, that theſe were no Pleas for want of Counſel's Hand to them. As ſoon as he had ſigned this Judgment, he entered it up againſt both; and took out Execution accordingly. Mr. Fazakerly now argued for the Plaintiff, and ſubmitted it, that the Plea of Ne unques Executor ought to have been ſigned by Counſel, as well as the Plea of Plene Adminiſtravit. And though the Plaintiff's Attorney made no Objection to it at the Time he received it; yet he apprehended it was as no Plea; and conſequently the Plaintiff was well intitled to ſign his Judgment againſt him. And if he could ſign it againſt him, there was no Queſtion but he might ſign it againſt the other Executor; for to that Plea there undeniably ought to have been a Counſel's Hand appearing upon the Paper which was brought by the Plaintiff's Attorney. However, he ſaid, if there were any Doubts upon the firſt Point, whether that Plea ought to have been ſigned by Counſel; yet as both theſe Pleas were upon one Piece of Paper, and appeared upon the Face of them as one, a Defect in the laſt ſhall prejudice the firſt, as much as if there was a Defect in both. He ſubmitted it likewiſe, that the whole ought to have been left with the Clerk of the Papers, as both Pleas were upon one Piece of Paper, and as one Plea; whereas in the preſent Caſe, only the laſt Plea was left with him; and for that Reaſon likewiſe he apprehended that the Judgment was regularly ſigned as to both Executors. The whole Court were clear of Opinion that the Plea of Ne unques Executor was good, without being ſigned

by Counſel; and though this Plea was delivered upon the ſame Piece of Paper with the other as one Plea; yet they thought any Defect in that could not prejudice this; for which Reaſon they thought the Judgment ſigned againſt him clearly irregular. And Judge Page put the Caſe of Treſpaſs being brought againſt two Defendants; one of them pleads Not guilty; the other juſtifies; the Juſtification is not ſigned by Counſel, as it ought; both theſe Pleas are delivered upon one Piece of Paper as one Plea; yet he ſaid that Defect in the Juſtification could not make the other Plea bad likewiſe. He ſaid farther, that he doubted, whether the Plaintiff could ſign his Judgment even againſt that Executor, whoſe Plea ought to have been ſigned by Counſel, in as much as he accepted of the Plea; and neither demurred nor rejected it, one of which he ought to have done. However as to that the Chief Juſtice and Judge Probyn ſaid, they thought the Plaintiff might well have ſigned his Judgment againſt that Executor for want of a Plea, notwithſtanding he did not reject it; for a Plea not ſigned by Counſel, which ought to be ſigned by him, is as no Plea. Mr. Fazakerly upon that ſubmitted it, that ſince the Opinion of the Court appeared to be, that the Plaintiff might well have ſigned his Judgment againſt that Executor ſingly, the Court would not ſet aſide the Judgment as to him; for in theſe Caſes the Court goes no farther back, than to ſee where the Irregularity begins. However the Court ſaid, in as much as the Plaintiff had entered up his Judgment intire againſt both in Purſuance of the ſigning, they would ſet the intire Judgment aſide; which they did accordingly; and awarded Reſtitution likewiſe.

Berington *and* Barker.

How far the Court will give Liberty that a Declaration in Ejectment ſhall be amended.

A Few Days ago Mr. Abney had obtained a Rule to ſhew Cauſe, why a Declaration in Ejectment ſhould not be amended by ſtriking out the Word Middleſex amongſt theſe Words, Quæ quidem Billa ſequitur in hæc Verba Middleſex ſcilicet, and by putting in the Words Bucks in the Room of it; and by ſtriking out the Word Tenemen', and puting in the Word Dimiſs' in the Room of it; and farther by ſtriking out the Words quinque ſolid' Reddit' pro Vic' Franc' Pleg', without putting in any other in the Room of them. He did agree at that Time, that the Tenants had entered into the Rule to confeſs Leaſe, Entry and Ouſter. But he ſaid, there had been Inſtances of Amendments in Declarations made later than this is; and particularly cited the Caſe of an Action upon the Statute of Hue and Cry brought againſt the Hundred of Bouthleygroſford in the Court of Common Pleas 1726. The Court allowed them there to amend after Iſſue joined. And he cited likewiſe another Caſe of Hatſel and Grovenor, in an Action brought againſt a Sheriff for not taking ſufficient Pledges; and the Court allowed them there to amend even after the Cauſe had been carried down to Trial. A Day or two after Mr. Fazakerly came to ſhew Cauſe; and ſaid, that in an Ejectment the Court will not allow of any Amendments in the Declaration after the Tenants have made them-

themſelves Defendants; for by entering into the Rule they agree to be Defendants only to ſuch Declaration, as was delivered to them below. For that Reaſon, he ſaid, it has been held, that no Amendment ſhall be made after that by adding another Leſſor, other Lands, other County, or even other Day of the Demiſe. Upon this Mr. Abney ſaid, that the Declaration was right, and the Copy of the Iſſue was only wrong; and he thought clearly, that the Copy of the Iſſue might be made agreeable to the Declaration. Accordingly the Court ſaid, that this Rule is drawn up wrong; for which Reaſon they diſcharged it; and preſently after made another Rule upon his Motion to ſhew Cauſe, why the Copy of the Iſſue ſhould not be made agreeable to the Declaration. Mr. Fazakerly now came to ſhew Cauſe upon this Rule. He ſaid, he did agree, that the Bill upon the File did warrant the Amendments; but in an Ejectment the Copy of the Iſſue can only be amended by the Declaration delivered below to the Tenants. For which Reaſon that Declaration ought to have been ſhewn to the Court at the Time the Rule was made, and an Affidavit ſhould have been annexed to it to verify, that this was the true Declaration delivered; this Affidavit, he ſaid, likewiſe ought to have been mentioned in the Rule; but nothing of this has been done, and therefore he hoped, that this Rule ſhould be diſcharged likewiſe. The Court ſaid, this Affidavit is only to aſcertain what Declaration was delivered to the Tenants; and therefore they thought the Plaintiff was not too late to produce it now; which accordingly he did. However upon looking into it it appeared, that the Copy of the Iſſue was in every Thing agreeable to this Declaration, but in the Word Middleſex; there was indeed a Miſtake in that, and the Word Bucks was in the Declaration delivered. For which Reaſon the Court made the Rule abſolute for this Amendment; but diſcharged the Rule as to the reſt.

Anonymus.

Vide ante 206.

MR. Reeves moved for a Rule to inſpect the Veſtry-Books, in order to be able to lay ſome Facts in the Information for the Libel againſt the Church-wardens and Overſeers of Lambeth Pariſh. But the Court refuſed it, as the Intent of the Motion was to get Evidence from the Defendants themſelves in order to charge them in a Criminal Proſecution. Vide poſt.

Term. Hill.

6 Geo. II. 1732.

The King *and* Sturgeon.

THE Defendant being an Attorney, and having been brought up upon an Attachment for a Misdemeanor in Practice, Mr. Lacey moved, that he might answer Interrogatories in Vinculis, and not be bailed, by Reason that he had been ordered to attend twice, but never did attend, in Contempt of the Court. Mr. Strange submitted it on the other Side, that the ordinary Course of the Court was to bail Persons who are taken upon these Attachments. But the Court said, at least he ought to be committed at present for the Contempt in disobeying the former Rules. And Judge Probyn gave his Reason for it, that otherwise those Contempts would go unpunished; for the Interrogatories must be confined to the Facts charged in the Affidavits; and these Facts relating to the Contempts could not be inserted in the Affidavits; because they happened subsequent. Accordingly the Defendant was committed.

When an Attorney is brought up upon an Attachment for a Contempt, how far the Court will direct, or not, that he shall answer Interrogatories, in Vinculis.

Chadock *and* Laughton.

MR. Parker moved to set aside an interlocutory Judgment for a Variance between the Latitat and the Declaration; the Latitat being by the Name of Cradock, the Declaration by the Name of Chadock. Accordingly the Court made a Rule to refer this Matter to the Master.

How far the Court will set aside a Judgment, by Reason of a Variance between the Latitat and the Declaration.

Anonymus.

ON Rule to shew Cause, why an Information in the Nature of a Quo Warranto should not be granted against one Boreman for exercising the Office of Capital Burgess of the Borough of Yarmouth in the Isle of Wight, and likewise why such Information should not be granted against another Person, for notwithstanding the Length of Time that the Party has been in Possession of his Office.

How far the Court will grant an Information in the Nature of a Quo Warranto.

exercising

exercising the Office of Mayor in the same Borough; Serjeant Belfield said that he submitted it, that the Court would not make a Rule absolute against Boreman, because he had continued in this Office ever since the Year 1697, and that till the Year 1715 his Election was never so much as disputed. And some other Counsel of the same Side said, that in the Case of the Town of Buckinham, where a Member of the Corporation had continued in Possession of his Office for a great Length of Time, Lord Macclesfield allowed the Party's own Oath to prove his having taken the Sacrament, and was of Opinion, that evening Proof at all was necessary. Then as to the Case of the Mayor, the Serjeant said, that his Election intirely depended upon the Validity of the Election of Boreman. For which Reason the Rule ought clearly not to be made absolute as to him, till the Election of Boreman is determined. The Chief Justice said, that where the Election of the Electors as well as the elected is recent, the Court makes both Rules absolute for these Informations at the same Time; but where the Election of the Electors has been passed for a great Number of Years, the constant Course is, that the Rule shall not be absolute against the Elected, till the Election of the Electors is first tried. And so Judge Page said, that this Point was settled in the Western Circuit in the Case of Johns and Johns; for which Reason the Court enlarged the Rule as to the Mayor. But as to Boreman they made it absolute. The Chief Justice said he did agree, that in the Case of taking the Oaths and the Sacrament, Length of Time is an Argument very material against granting these Informations upon such Exceptions; but in other Instances, where the Exception is fully sworn to and notorious, he thought the Length of Time no Objection at all against granting the Information; though it might be proper Evidence to influence a Jury.

Daniel *and* Purkurst.

Vide ante 214.

THIS Matter coming on again, the Court declared themselves to be of Opinion, that the Plaintiff ought to pay Costs; and that this Case was not distinguishable from the common one of setting aside a Verdict for being contrary to Evidence. Accordingly the Rule was made absolute, without Costs.

Bovey *and* Busby.

How for the Ecclesiastical Court has a Jurisdiction between ecclesiastical Persons in the Case of Slander.

THE Parties being both Clergymen, the Plaintiff libelled against the Defendant in the Ecclesiastical Court, for these Words; You are an old Rogue and a Rascal, and a contemptible Fellow, despised and hated by every body; and likewise for saying of him at another Time, You are a Lyar. Mr. Filmer now moved for a Prohibition, notwithstanding the first Set of Words was laid to be spoke against the Plaintiff's Function. The Chief Justice doubted, whether in such Case the Ecclesiastical Courts had

had not a Jurisdiction. However a Rule was made to shew Cause; Judge Page absent.

Launce *and* Draper.

ON Rule to shew Cause, why a Testatum Capias into Bucks should not be quashed, for there being the 12 Pounds Costs omitted in it, which were given upon the Affirmance of the Writ of Error; though this 12 Pounds were inserted in the Capias, which was first sued out in Middlesex; Mr. Strange said, that he submitted it, this was no Variance, and that the Testatum was very regular. He said, he did agree, if the 12 l. had been inserted in the Testatum, and omitted in the first Capias, the Testatum would have been irregular; because it would have contained more Matter than was in the first Capias, and therefore not warranted by it. But as there is less Matter in the Testatum, than in the first Capias, he submitted it, the first Capias well warranted this Testatum, and more. For which Purpose, he observed, that before the Statute of 5 Geo. 1. when Writs of Error used to be quashed for their varying from the original Record, the constant Distinction was, that Writs of Error, that contained more than the original Record, were held to be bad; but those that contained less, never were. Mr. Reeves argued on the other Side, and said, he was forced to admit, that this Testatum could not be quashed on Account of the Exception for the Variance. But he insisted, that it was bad for another Reason, viz. that every Execution ought to be for the whole Sum contained in the Judgment, and such Sum cannot be divided. The Court in general agreed, that the Testatum ought not to be quashed on Account of the Variance; and the Chief Justice said, that the Distinction in Respect of Writs of Error used to be held as Mr. Strange had stated it. But they did think that the Objection, which Mr. Reeves had last made, was material. Upon which Mr. Strange said, that he had a Capias into Middlesex in his Hand, which would well warrant the Testatum, and the Court would not inquire, when it was made out. But the Court said, they took it they should inquire into it; accordingly referred the whole Matter to the Master; Judge Page absent.

How far the Court will quash a Testatum Capias, or not.

The King *and* Medlicoat.

ON Rule to shew Cause, why an Information in the Nature of a Quo Warranto should not be granted against the Defendant Medlicoat, for holding a Court Leet, as Lord of a Hundred, in the Borough of Milbourn-Port; Mr. Fazakerly said, that this Borough did not send Members to Parliament, and therefore he submitted it, that such Information would not lie. Besides he observed, that the Fact was, that this Defendant only said at the Time he was going to hold his Court, that he could hold a Court-Leet as Lord of the Hundred; but that he actually

How far the Court will grant an Information in the Nature of a Quo Warranto, for holding a Court Leet without an Authority.

How far the Court will grant an Information in the Nature of a Quo Warranto, and will not drive the Party to take his Remedy by Quo Warranto only.

held it as a Court-Leet belonging to the Borough, which he had done Time out of Mind. The Court said, that they did agree, in Case a Court-Baron is held without Authority, a Quo Warranto only is the Remedy; but they always took it, when any Court-Leet is held without Authority, an Information in the Nature of a Quo Warranto is constantly allowed. However, for the other Reason that was given, the Court discharged the Rule against the Defendant; Judge Page absent.

The King *and* Davis.

When a Habeas Corpus cum causa is moved for, how far Notice is requisite to be given of the Motion.

MR. Fazakerly moved for a Habeas Corpus cum causa, to remove up an Indictment of Felony found against the Defendant in Brecknockshire, in order that it might be sent down into Herefordshire, being the next English County, that the Defendant might be there tried upon it, according to the Statute of 26 H. 8. 6. (6.) The Chief Justice said, that he doubted, whether in such Motions Notice ought not to be given to the other Side; and that though they are made on Behalf of the Prosecutor, for otherwise the Habeas Corpus may not be made Use of till the Day before the Assizes are held in Herefordshire; so that the Prisoner may be surprized, and not be able to have his Witnesses there. Mr. Fazakerly said, that he did make this Motion on Behalf of the Prosecutor; and in such Case he apprehended there was no Occasion for Notice; nor was there, as he remembred, any such Notice given in the Case of The King and Athoe. But especially in the present Case he observed, that there could be no Inconvenience; because Brecknockshire does in fact adjoin to Herefordshire. Judge Probyn said, that Herefordshire is considered as the next adjoining County to all South Wales, and Shrewsbury to all North Wales. And the Court well remembred the Case of The King and Athoe. That was an Indictment found in Herefordshire, and tried there before Mr. Justice Forteſcue for a Felony committed in Wales; the Defendant was convicted upon it; but the Judge conceived a Doubt, whether he could pass Sentence upon him. Upon this the present Chief Justice, when he was Attorney General, obtained a Habeas Corpus to bring the Defendant up to the Bar, without giving Notice to the other Side; and the Defendant was brought up, and upon great Debate had Sentence of Death pronounced against him in this Court. They said it was certain, that Justices of Gaol-Delivery had a Power to try Indictments the same Assizes they are found at; and that they constantly do exercise it, unless there is some particular Reason in the Case. Accordingly in the present Case a Rule for a Habeas Corpus was granted; Judge Page absent.

Huggins *and* Shirley.

How far the Court will not ſtay the Proceedings in one Action till the Coſts of a Notice of Trial in another are paid.

IN an Action for Words Mr. Agar moved for an Attachment for Non-payment of Coſts of a former Notice of Trial, and that Proceedings on the ſecond Notice might be ſtaid, till the Coſts of the former paid. The Court granted the Attachment; but ſaid, that the latter Part of this Motion is conſtantly refuſed in all Caſes, but in Ejectments; accordingly it was ſo in the preſent Caſe. Judge Page abſent.

Smith *and* Laughton.

How far an Imparlance is proper to be to a Day certain, how far at a general Return-Day.

UPON a Writ of Error on a Judgment in the Common Pleas in a Suit by Bill againſt an Attorney, Mr. Marſh aſſigned for Error, that the Imparlance was to a Day certain, but the Return of the Writ of Inquiry was at a general Return-Day, viz. Craſtino Aſcenſionis Domini. He ſubmitted it, that this was Error, and, as this Proceeding was by Bill, that all the Proceſs ought to have been returnable at a Day certain. For this Purpoſe he cited the Caſe of Kirbey and Ellaſton, Mich. 5 Geo. 2. That was a Suit by Bill in the Common Pleas, and the Writ of Inquiry returnable at a general Return-Day. The Defendant brought a Writ of Error relying upon this Miſtake, and the Plaintiff got this amended in the Court of Common Pleas to prevent the Judgment's being reverſed. Mr. Strange argued on the other Side, and ſaid, he did agree, that this was Error at Common Law; but he ſubmitted it, that this was only a Miſcontinuance of Proceſs. The preſent Caſe indeed is a Judgment by Default; but the Statute for the Amendment of the Law has extended the Statute of Jeofails to ſuch Judgments, as well as others. And he did take it, that this very Exception has been over-ruled in a late Caſe in this Court. Mr. Parker affirmed the ſame. And Mr. Draper ſaid he had a Note of ſuch Caſe, which was Lebor and Hobs, Paſch 3 Geo. 2. The Note that he had taken of that Caſe was thus. An Action in the Common Pleas was brought by Bill; the Writ of Inquiry returnable at a general Return-Day. This was ſpecially aſſigned for Error; but the Judgment affirmed. Mr. Parker ſaid, that this was the very Caſe he meant; and he had the Paper-Book by him; but he believed the Judgment was not affirmed that ſame Term, but another. Upon which the Court ordered this Matter to ſtand over. Judge Page abſent. Vide poſt.

Major

Major *and* ——

Conſtruction on that Part of the Statute of 5 Geo. 2. relating to Bankrupts, whereby it is provided that if any Perſon be arreſted for a Debt due before he became a Bankrupt, ſuch Bankrupt may plead that the Cauſe of ſuch Action did accrue before ſuch Time as he became a Bankrupt.

IN an Action of Debt brought upon a Judgment, Mr. Parker moved, that Proceedings might be ſtaid, by Reaſon that the Defendant became a Bankrupt after the Commencement of the Original Action; though he did not before the obtaining Judgment in it. He founded this Motion upon the Statute of 5 Geo. 2. relating to Bankrupts; wherein there is a Clauſe, that if any Perſon be arreſted for a Debt due before he became a Bankrupt, ſuch Bankrupt may plead, that the Cauſe of ſuch Action did accrue before ſuch Time as he became a Bankrupt, and may give that Act in Evidence. Now he obſerved, that the Cauſe of the preſent Action is the Judgment in the former; and therefore he did agree, that he could not plead, that the Cauſe of this Action accrued before the Bankrupcy. But he ſubmitted it, that the Defendant was plainly within the Equity of that Act; and therefore he hoped the Motion ſhould be granted. Accordingly the Court made a Rule to ſhew Cauſe.

Short *and* King.

How far by the Practice of the Court of King's Bench, it is not neceſſary in an Ejectment that the Defendant's Attorney ſhould enter an Appearance for a Defendant, notwithſtanding the Suit is by Original.

ON Motion for the Maſter's Report he ſtated the Fact to be, that this was a Proceeding by Original in Ejectment, and that the Rule, which in theſe Caſes is entered into at a Judge's Chamber, was ſigned by the Defendant's Attorney; but that he had never after this appeared for the Defendant, though the Terms of the Rule require him to do it. Upon this the Plaintiff had ſigned his Judgment, and got into Poſſeſſion; and whether this was regular or not, was the Queſtion. Mr. Reeves and Mr. Agar argued for the Plaintiff, that the Judgment was regularly ſigned; and ſaid, that the known Diſtinction in the Court of Common Pleas is between Suits by Original and thoſe by Bill; that in thoſe by Original the Defendant's Appearance muſt always be entered with the Filacer; though in thoſe by Bill this is not neceſſary. The Terms of the Rule entered into at the Judge's Chamber require this beyond Contradiction. For which Reaſon, as the Defendant's Attorney omitted to enter this Appearance, they ſubmitted it, the Plaintiff was very regular in ſigning his Judgment. The Maſter reported the Practice of this Court to be different in this reſpect from what it is in the Common Pleas; and that the Defendant's Attorney appearing for the Defendant was not neceſſary. The Court likewiſe held, that ſuch Appearance was not requiſite; and that, inaſmuch as the Attorney had ſigned the Rule, they would make him confeſs Leaſe, Entry and Ouſter, and do all the other Matters, equally as if he had entered his Appearance. For which Reaſon they ſet the Judgment and Execution aſide, and that with Coſts.

Frances *and* Naſh.

A Warrant of Attorney had been given by the preſent Plaintiff for entering up a Judgment againſt him, and thereby he had agreed not to bring any Writ of Error, and that if he did, the Defendant ſhould have Liberty to non-pros it. Notwithſtanding this he did bring a Writ of Error in the Exchequer Chamber upon the Judgment ſo entered up. Upon which Mr. Agar moved, that the Defendant in Error might have Liberty to non-pros it at the Plaintiff's Expence; and the Court made a Rule to ſhew Cauſe.

How far the Court will give Liberty that the Defendant ſhall Non-pros the Plaintiff's Writ of Error at the Expence of the Plaintiff, by reaſon of its being brought contrary to the Plaintiff's Agreement.

The King *and* Harvey.

MR. Fazakerly moved to quaſh an Indictment founded upon the Statute of 2 W. & M. Seſ. 2. 8. (11). againſt certain Scavengers of the Pariſh of St. Giles's for not paying over a certain Sum of Money to the ſucceeding Scavengers, which upon an Account ſtated before two Juſtices it appeared they had in their Hands. He ſubmitted it, that this Clauſe in the Statute only gives the Juſtices Power to take the Account, and that there is no other Remedy for the Money due upon the Account, but an Action at Law; for which Reaſon he conceived, that no Indictment would lie. If this was ſo, he apprehended the Court would quaſh it; and that is like the Caſe of Indictments found at the Seſſions for Perjury at Common Law. There was a great Doubt made, whether the Seſſions had Juriſdiction in the Trial of ſuch Indictments. Upon long Debate the Court held, that they had not. And now it is the conſtant Practice to quaſh ſuch Indictments. The ſame is in caſe of Nuſances, upon an Affidavit that the Nuſance is abated. And if the Court ſhould think it requiſite to have an Affidavit that the Money is paid in this Caſe, he could produce ſuch a one. Judge Page and Judge Probyn both declared, that they doubted, whether an Indictment would not lie; for which Reaſon (Chief Juſtice abſent) the Motion was refuſed.

How far an Indictment will lie on the Statute of 2 W. & M. Seſſ. 2. 8. (11). relating to Highways.

The King *and* Langley.

THIS was an Indictment found at the Seſſions for Northamptonſhire againſt the Defendant for exerciſing the Trade of a Ropemaker in the Village of Eaſthatton, not having ſerved a legal Apprenticeſhip. Mr. Abney moved to quaſh it, by Reaſon that it has been held, that this Statute only extends to Trades exerciſed in Cities and Boroughs, and not to Villages. For which Purpoſe he cited 1 Ven. 51. and 1 Mod. 26. Judge

When an Indictment is found againſt a Perſon upon the Statute of 5 Eliz. for exerciſing a Trade without having ſerved an Apprenticeſhip, how far ſuch Indictment will not be good by Reaſon that the Trade was only exerciſed in a Village.

Page ſaid, that he had often known theſe Indictments quaſhed upon ſuch Exception. And he and Judge Probyn ſaid, that they did not think this Trade was within the Statute. Though Judge Page ſaid, it might be otherwiſe perhaps of a Cable-maker. Accordingly a Rule was made to ſhew Cauſe. Chief Juſtice abſent.

Sir George Caſwell *and* Norman.

When a Writ of Error is brought and a Scire facias is ſued out quare Executionem non, how far an Action may be brought of the original Judgment.

When a Writ of Error is brought and a Scire facias de Recordo is ſued out, what in general relates to ſuch Scire facias.

ON Motion for the Maſter's Report, the Fact was ſtated to be, that after a Writ of Error brought, the Defendant in Error ſued out a Scire facias to aſſign Errors, and a Rule given to aſſign them by the 25th of laſt Month, which Scire facias was quare Executionem non. The Plaintiff in Error did not aſſign Errors upon that. Accordingly the Defendant ſued out another Scire facias to aſſign Errors de Recordo the next Day, and then the Plaintiff did aſſign his Errors. Notwithſtanding this the Defendant in Error brought Debt in the Common Pleas upon the Award of Execution here on the firſt Scire facias. Which, Mr. Yates ſubmitted it, was irregular. On the other Side Mr. Parker argued, and ſaid, that he apprehended, the Scire facias quare Executionem non is merely brought to prevent the Writ of Error's being any longer a Superſedeas to the Execution, if the Plaintiff in Error does not in Purſuance of it aſſign his Errors. Notwithſtanding this Scire facias a Writ of Error ſtill ſubſiſts, and the Judgment is liable to be reverſed upon it, till another Scire facias ſued out to aſſign Errors de Recordo; and if the Plaintiff in Error does not aſſign his Errors upon that, then the Writ of Error is Non-pros'd. If this was the Nature of theſe Scire facias's, he obſerved, that no Reaſon could be given, why the Defendant in Error ſhould not proceed in the Common Pleas upon the Award of Execution here. And he ſaid, that this Point was determined upon Debate in the Caſe of Plaxton and Gardiner, Mich. 7 Geo. 1. A Scire facias quare Executionem non was ſued out, and the Plaintiff in Error pleaded Nul tiel Record; the Defendant joined Iſſue with him upon that; and notwithſtanding that, even after the Iſſue too was delivered, he ſued out Execution. On Motion to ſet this aſide for Irregularity the Court refuſed it; and held, that upon this Scire facias the Plaintiff in Error could do nothing but aſſign his Errors; and, as he did not, but pleaded another Matter, the Defendant in Error was regular in taking out his Execution; though they did agree, that the Judgment might ſtill be reverſed upon this Writ of Error notwithſtanding. For which Reaſon, he ſubmitted it, that the Award of Execution was regular, and ſhould not be ſet aſide; and conſequently that the Action in the Common Pleas founded upon this Award was regular likewiſe. Judge Page ſaid, if this had been a Proceeding by Writ of Error quod coram vobis, a Rule might have been given the Plaintiff to have aſſigned his Errors, without any Scire facias at all. In the preſent Proceeding indeed a Scire facias is neceſſary; but the Plaintiff can do nothing upon it, but merely aſſign his Errors. He ſaid, he took it, that two

Scire Facias's were requiſite, before the Writ of Error could be got rid of; and that each of them was to be ſued out for the different Purpoſes that have been mentioned. For which Reaſon he thought that the Award of Execution, and the Proceedings upon it, were clearly regular. Judge Lee ſaid, when an Action of Debt is brought upon a Judgment in the ſame Court where the Writ of Error is depending, the Court conſtantly grants an Imparlance in that Action, till the Event of the original Judgment is determined. For which Reaſon he thought it proper to be farther conſidered, whether the Court would allow an Action to be brought upon this Award of Execution, pending the Writ of Error. Accordingly (Chief Juſtice abſent) this matter was ordered to ſtand over.

Anonymus.

MR. Prat moved that the Rule might be made upon one Mr. Allen, an Attorney of the Court, to return to Mr. Hill all or moſt Part of the Money he had with him as Clerk, by Reaſon that a great Share of his Buſineſs was fell off; ſo that he had little or nothing to inſtruct his Clerk in. Judge Page ſaid, the proper Rule to make in this Caſe was to refer this Matter to the Maſter to be determined by him; and if he cannot ſettle it, then to give Leave for an Application to the Court; and to order Mr. Allen to attend before him de Die in Diem. Judge Lee ſaid, that the Court made ſuch a Rule upon a late Application of this Nature. Accordingly the Court made ſuch a Rule in the preſent Caſe; Chief Juſtice abſent.

What Kind of Remedy is proper to be taken, when Diſputes ariſe between Attornies and their Clerks.

Anonymus.

MR. Parker moved for an Information againſt the preſent Sheriffs of York, for adjourning the Court of Pleas held before them for ten Days; whereas by the Cuſtom of the Court it ought to be held de Die in Diem at the Requeſt of a Priſoner, when he is in Cuſtody. Accordingly a Rule was made to ſhew Cauſe; Chief Juſtice abſent.

How far an Information ſhall be granted againſt a Judge of an inferior Court.

Paterſon *and* Groſs.

MR. Denniſon moved that Proceedings might be ſtaid in an Action of Debt brought upon an Award, by Reaſon that the Defendant was actually in Cuſtody upon an Attachment for the Breach of it; and the taking that Remedy was a Waiver of this. He obſerved, that the Words of the Rule for granting the Attachment were, Committatur cuſtodiæ Mar' in Execution'; which ſhews, that he is actually in Execution for the Breach of this Award upon the Attachment; and therefore the Court will not allow him to be charged with another Execution upon the ſame Cauſe of Action. And farther cited the Caſe of Chanſey and Richardſon as a Caſe very ſtrong in Favour of his

How far the Court will allow an Action to be brought upon an Award, notwithſtanding the Party has taken a former Remedy upon it, by way of Attachment.

his preſent Motion. Mr. Draper argued on the other Side, and ſaid, that in the Caſe cited, an Action was firſt of all brought upon the Award before the Motion for the Attachment; and therefore he did agree in that Caſe, that the Proceeding upon the Attachment was irregular; for no better Remedy could the Party have upon the Attachment, than he could have upon an Action, which he had already taken. But in the preſent Caſe the Proceeding upon the Attachment is firſt of all began with; and this ſhall not hinder the Proceeding by way of Action, which is a greater and more beneficial Remedy; for if the Party dies in Execution, his Goods may be taken in an Execution; which cannot be upon the Attachment. He ſaid farther, if a Defendant eſcapes out of Cuſtody, he may firſt of all be taken in Execution again, and after that be charged with an Action for the Eſcape; and cited Salk. 73. in Point. The Court was of the ſame Opinion. Accordingly the Motion was refuſed; Chief Juſtice abſent.

The King *and* The Truſtees of the Kingſton Turnpike.

MR. Strange moved to quaſh an Order of Seſſions made the 4th of July laſt. The Order ſet forth, that whereas William Charleworth, Town-Clerk of Kingſton, had made Complaint at the Seſſions for the County of Surrey, that the Truſtees had exceeded their Authority, by erecting a Turnpike in the ſaid Town of Kingſton; and whereas the Truſtees had Notice given them thereof, and no Body had appeared on their Behalf; therefore on hearing Evidence in the Proof of the Charge, the Juſtices at their Seſſions ordered, that the Sheriff ſhould remove the Turnpike, which the Truſtees had erected in the Town of Kingſton, by the 24th of July following. Mr. Strange obſerved, that the Court had before quaſhed ſuch an Order as this for want of Juriſdiction; but he allowed that ſince, by a Statute made in 5 Geo. 2. the Juſtices had an Authority given them to order the Sheriff to remove a Turnpike illegally erected. But the Exception, which he took to this Order, was, that it does not appear, the Truſtees had ſufficient Notice; for the Notice might have been given the Day whereon the Order was made. The Court ſaid, they were not ſatisfied, that any Notice in this Caſe was requiſite, however made a Rule to ſhew Cauſe. Vide Poſt.

The King *againſt* Barfield.

How far the Seſſions has not an original Juriſdiction, but only by way of Appeal.

ON Rule to ſhew Cauſe why an Order of Seſſions ſhould not be quaſhed, Mr. Abney took ſeveral Exceptions to it. The Order, he ſaid, was made upon an Appeal from the Diſburſements of certain Churchwardens and Overſeers of the Poor for the Year 1730. On this Appeal the Court of Seſſions adjudged, that theſe Officers had made ſeveral Diſburſements not warrantable by Law, and therefore ordered, that they ſhould pay the Sum of 11 Pounds, being the Amount of thoſe Diſburſements,

ments, to the ſubſequent Churchwardens. The Exceptions taken to this Order were, firſt, that by the Statute of 43 Eliz. the firſt Application ought to have been to two Juſtices; but in the preſent Caſe, the Application was to the Seſſions in the firſt Inſtance. Secondly, that the Appeal appear'd to have been made at a former Seſſions, and no Order for the adjourning it; ſo that there was a Diſcontinuance. Thirdly, that it does not appear at what Time the firſt Seſſions was holden, which is neceſſary; becauſe by Act of Parliament, theſe Quarter-Seſſions can be held only at particular Times. Fourthly, that the Diſburſements of Churchwardens are not under the Juriſdiction of the Juſtices of Peace, but only the Diſburſements of Overſeers. Fifthly, that the Order is made upon four Perſons to pay the 11 l. whereas it ought to have been ſpecified, what Part each of the Perſons ought to pay. Sixthly, that the Order requires the Money to be paid to the ſubſequent Overſeers, not naming them, and it does not appear that there were any Overſeers then in Being. Mr. Reeves prayed a Day to anſwer theſe Exceptions. Accordingly the Rule was enlarged. Ex relatu. Vide Poſt.

Burden *and* Tomlyn.

THE Defendant having brought a Writ of Error returnable in Parliament, Mr. Jocelyn moved that the Entry, which the Plaintiff had made of a general Judgment, might be vacated, and that a ſpecial Entry might be made, that Judgment was given againſt the Defendant; becauſe the Court was of Opinion, that the Plea ought to have concluded to the Country, and not with an Averment. To prove that the Court has ſometimes allowed ſuch ſpecial Entries to be made, he cited 2 Saund. 264. But the Court declared they thought the Judgment was rightly entered; for though this Court has adjudged the Plea to be ill for one particular Reaſon; yet if the ſuperior Court ſhould think it ill for another, the Judgment ought to be affirmed. And farther they ſaid that if ſuch ſpecial Entry ſhould be made, they thought it would ſignify nothing. For the ſuperior Court muſt judge upon the whole Record; and not whether the Reaſon given for the Judgment be a right Reaſon, or not. Judge Lee took Notice too, that Lord Coke obſerves in 4 Inſt. ch. . Parliament, that anciently it was the Method to enter the Reaſons of Judgments; but ever ſince Edward the Third's Time, he ſays, the Practiſe has been otherwiſe. Accordingly the Motion was refuſed. Ex relatu. Vide Poſt.

Gore *and* Gore.

THIS Caſe coming on again, Mr. Peer Williams argued againſt the Deviſe. In the Caſe of Scattergood and Edge he obſerved it is ſaid, that thirty Years is a reaſonable Time to require an executory Deviſe to take effect in; and no larger Vide ante 209.

Term of Years has ever been allowed. But in the preſent Caſe, there is a precedent Term of 500 Years, before the Deviſe can take Effect; for the Limitation to the firſt Son of Thomas is, from and after the Expiration of the ſaid Term. He obſerved too, that for another Reaſon this Deviſe could not be good; becauſe there are Remainders veſted, which he ſubmitted it ſhould not be deveſted by executory Eſtates, and took a Difference between an Eſtate deſcended to an Heir and one veſted by Purchaſe. The firſt he agreed might be deviſed, but not the latter. He ſaid farther, that the Deviſe in the preſent Caſe is appointed to take Effect by way of Remainder; and therefore cannot operate as an executory one; which appears to be Lord Holt's Opinion in the Caſe of Goodright and Corniſh, Salk. 226. and farther he cited Cro. El. 678. Lut. 798. Mr. Fazakerly argued on the other Side, and ſubmitted it, that by the Words of the Will the Teſtator's Intention clearly appears to be, that the eldeſt Son of Thomas ſhould take; and therefore if by any Poſſibility the Rules of the Law and the Teſtator's Intention can ſtand together, ſuch Conſtruction ſhall be made. And this, he ſaid, might very well be, by conſtruing the Will to operate as an executory Deviſe. The Words plainly import a future Deviſe; for they are to the firſt Son of Thomas to be begotten. It has been inſiſted upon that in Law the Words begotten, and to be begotten, are of one and the ſame Import. But though in a Limitation, where Lands are given to one and the Heirs of his Body begotten, or to be begotten, the ſame Eſtate paſſes; becauſe the Adding the Words begotten, or to be begotten, is merely Surpluſage; yet where thoſe Words are uſed to deſcribe the Perſon who is to take, they certainly muſt have a different Signification; the one denotes a preſent, the other a future Gift. To this Purpoſe he relied on the Caſe of Long and Beaumond on the Equity Side of the Court of Exchequer, and that of Darbyſon and Beaumond in Ejectment, in the ſame Court, both which were determined the 11 of Ann. and afterwards ſettled in the Houſe of Lords, the ſame Point being in both Caſes. The Deviſe there was to J. Pearce for 99 Years, Remainder to his firſt and every other Son in Tail Male, the Remainder to the Heirs male of my Aunt Elizabeth Long begotten. Elizabeth Long was then living, and had three Sons. It was determined there, that the eldeſt Son ſhould take by Deſcent in the Life of his Mother, as Heir apparent. For the ſame Reaſon he ſubmitted it, the Words to be begotten, muſt be conſtrued as a future Deviſe. With regard to the Caſe of Scattergood and Edge, he ſaid the Opinion of ſeven of the Judges againſt Lord Chief Juſtice Treby was, that if the Words of the Will in that Caſe had ſhewn, that the Teſtator intended a future Deviſe, the Deviſe would have been good. And for Authority he cited 1 Lev. 135. Ray. 82. Moor 847. Blanford and Blanford, 1 Rol. Ab. 612. Show. P. C. 137. Ver. 234, 304. The Court gave no Opinion this Time; but ſaid they would take Time to conſider of the Caſe. Ex Relatu. Vide Poſt.

Smith *and* Laughton.

THIS Caſe coming on again, Mr. Strange ſaid the Point in Queſtion had already received a ſolemn Reſolution in the Caſe of The King and The Biſhop of Meath, Paſch. 3 Geo. 1. That was a Quare Impedit by Original in Ireland. On Writ of Error it appeared by the Record, that the Venire was awarded returnable at a Day certain. Upon this two Queſtions were made; one, whether this was a Miſcontinuance aided by the Statute of Jeofails; the other, whether the Statute of Jeofails extended to the Civil Suits of the Crown. After a good deal of Deliberation, Lord Chief Juſtice Parker delivered the Reſolution of the Court. With regard to the firſt Point they held it to be a Miſcontinuance, and therefore aided by the Statute of Jeofails; to which Purpoſe Co. Lit. 325. was cited, where a Miſcontinuance is deſcribed to be, the Giving an improper Day to the Party. With regard to the ſecond Point, they were of Opinion likewiſe, that the Statute of Jeofails did extend to the Civil Suits of the Crown. Mr. Parker ſaid too, that he was of Counſel with the Plaintiff in Error in the Caſe of Lipper and Hobbs, and upon looking into the Caſe of The King and The Biſhop of Meath, he adviſed the Party to waive the Exception, and pay the Money recovered, which he did. Accordingly in the preſent Caſe the Court affirmed the Judgment. Ex relatu.

Vide ante 223.

Williams *and* Brown.

IN Ejectment a Point was ſaved at the Trial by Judge Denton with reſpect to the Conſideration of a Will, which was in the following Manner. The Deviſor having two Daughters, Mehethobel and Martha, deviſed the Lands in Queſtion to the Uſe of all and every Child and Children, Male and Female, born and to be born of the ſaid Mehethobel and the Heirs of their Bodies, equally to be divided, and for Default of ſuch Iſſue, to the Children of Martha in like Manner; the Remainder to his own right Heirs. Mehethobel had two Daughters, Mehethobel and Speed. Martha had ſeven Children. Mehethobel, the Daughter of Mehethobel died without Iſſue; and now the Queſtion was, whether her Part ſhould go to her Siſter Speed by way of croſs Remainder, or to the Children of Martha. Serjeant Hawkins argued, that there ſhould be croſs Remainders, and cited 2 Jon. 174. 2 Roll's Abr. 416. Skin. 17. 2 Jon. 72. 2 Keb. 202. 3 Keb. 788, 834. Gilbert and Witts, in 2 Roll's Rep. and 2 Cro. 655. Serjeant Chappel argued on the other Side, and cited 1 Saund. 180. Dyer 326, 330. The Court ſaid, the Daughters of Mehethobel were plainly Tenants in Common, and they ſeemed to think that the Words of the Will were not ſufficient to create croſs Remainders. However this Matter ſtood over. Ex relatu. Vide poſt.

How far croſs Remainders ſhall be ſaid to be created by a Will, or not.

Hooker

Hooker *and* Hooker.

Vide ante. 200.

THIS Matter coming on again, Serjeant Hawkins argued on the Part of the Wife, Mr. Reeves on the other Side. Serjeant Hawkins cited 11 Rep. 79. 2 Jon. 77. 2 Saund. 387. 3 Keb. 500. 2 Lev. 202. 2 Cro. 260. Ray. 28. 1 Lev. 11. 1 Roll's Abr. 677. Mr. Reeves cited 1 Roll's Abr. 677. 1 Inst. 42. 1 Ven. 206. Pol. 199. 2 Lev. 202. 2 Cro. 260. The Court declared their present Thoughts to be, that William Hooker was seised of such an Estate, as that his Wife was endowable, but said, they would consider of the Case, and deliver their Opinions in Writing to the Lord Chancellor. Ex relatu. Vide post.

Bumfeild *and* James.

How far the Court will require an Attorney to enter an Appearance for the Defendant, according to his Undertaking.

A Bill of Middlesex having been sued out, an Attorney subscribed on the Back of it, that he would appear for the Defendant; but since refused it; because the Defendant would not give him an Authority to appear. However on Mr. Theede's Motion the Court made a Rule upon him to shew Cause, why he should not appear according to his Undertaking. Ex relatu.

Burden *and* Tomlyn.

Vide ante 229.

THE Judgment not being entered up completely, for that there was a Blank left for the Costs, the Master not having tared them; Mr. Jocelyn moved, that the Defendant in Error might be obliged to complete his Judgment. Mr. Bootle, Jun. on the other Side produced an Affidavit, that the Parties had compounded the Matter by Agreement, and that the Defendant in Error had delivered up the Note, which this Action was brought upon, so that if the Judgment should be reversed, he cannot maintain another. Accordingly the Court declared, that they would not oblige the Defendant in Error to complete his Judgment. And the Chief Justice said, that he would not carry up to the House of Lords a Judgment that is not complete; so that there can be no Benefit of the Writ of Error. Ex relatu. Vide post.

The King *and* Rayner.

When an Information has been granted against a Person for a Libel, and a Recognizance of Bail has been given, what shall be said to be the Construction of such Recognizance.

THE Defendant had been indicted at Hicks's Hall for printing and publishing a Libel against the Government, called Robin's Game or Seven's the Main. He removed the Indictment by Certiorari into this Court, and one James Robinson and Henry

Raſtall entered into a Recognizance according to the Statute of William, with Condition, that the Defendant ſhould appear to this Indictment the firſt Day of laſt Hilary Term, that he ſhould plead to it the ſame Term, and at his own Expence ſhould either try it the ſame Term or the Sittings after, unleſs the Court ſhould appoint another Time for the Trial; and in ſuch Caſe ſhould carry it down to Trial at the Time appointed by the Court. At the Trial on this Indictment the Defendant was convicted; which Trial was not had till the Sittings after laſt Michaelmas Term. This Term he was called upon his Recognizance to appear; and for not appearing a Rule was made for eſtreating his Recognizance. Mr. Marſh and Mr. Strange now ſaid, that the Recognizance entered into by the Defendant's Sureties was put into the Rule for eſtreating the Defendant's Recognizance; whereas the Defendant himſelf was no Party to it; for which Reaſon they moved, that this Part of the Rule might be diſcharged. The Attorney and Solicitor General argued on the other Side, and ſaid, that the Recognizance of the Sureties had certainly been broken; for it appears by the Record, that the Defendant did not appear till Eaſter Term; and in fact at the Sittings after Mich. Term the Indictment was tried at the Expence of the Crown. Beſides they ſubmitted it, that the Defendant's not appearing after Conviction was a Breach of this Recognizance; for though the uſual Words in Bail Recognizances, namely, That the Defendant ſhall not depart the Court without Licence, be not put into theſe Recognizances entered into on granting Certiorari's; yet they apprehended by the Courſe of the Court they muſt be ſo underſtood; for otherwiſe they would ſignify little. The Court ſaid it would not now be neceſſary to determine, what Conſtruction theſe Recognizances ought to receive; for certainly the Recognizance of the Sureties ought not to be eſtreated on a Rule made for eſtreating the Defendant's. Accordingly this Part of the the Rule was ordered to be ſtruck out. But Rayner being found in the Hall, was brought into Court and committed, there being a Capias pro fine out againſt him. However the Court ſaid, he might at any Time move in Arreſt of Judgment before the Fine is ſet by the Court. Vide poſt.

Richardſon *and* Martin.

When an Action is brought by an Attorney on a Bill of Law-charges, what ſhall be ſaid to be a ſufficient Evidence in ſuch Action.

Bury Aſſiſes. IN an Action brought by the Plaintiff, as Attorney, for a Bill of Law-charges, he produced one Witneſs to prove, that the Defendant approved of his Proceedings, and that, his Counſel ſubmitted, was a ſufficient Evidence of a Retainer; and produced another Witneſs to prove, that a Bill was delivered before the Action brought, and that, his Counſel ſubmitted, was a ſufficient Evidence of the Truth of the Items in it, without proving the ſeveral Particulars. Serjeant Urlyn objected to the contrary. But Mr. Juſtice Page, who tried the Cauſe, was of Opinion for the Plaintiff in both Points.

Harvey *and* Syliard & Ux'.

How far an Action of Trover will not lie againſt a Servant, but only againſt the Maſter.

Bury Aſſizes. IN Trover brought againſt the Defendant in the Right of his Wife for a Box with 80 Pounds in it, which was delivered to her as Book-keeper to her Brother, who was a Carrier, in order to be ſent by the Wagon to London; which 80 Pounds was afterwards loſt; Mr. Pilſworth objected, that the Action would not lie againſt her; but that it ought to have been brought againſt the Brother himſelf. Serjeant Urlin ſubmitted it, that it would, in as much as it was founded upon a Tort. However, the Judge was of a contrary Opinion; accordingly the Plaintiff was nonſuited.

Term. Paſch.

6 Geo. II. 1733.

Anonymus.

When a Perſon has the Cuſtody of the publick Books of a Corporation, how far a Mandamus will lie in order to require him to produce them at a Corporate Aſſembly.

MR. Fazakerly moved for a Mandamus to be directed to one of the Bailiffs of the Town of Carne, requiring him to produce the publick Books of the Corporation at the next Aſſembly of the Corporation, in order that an Entry may be made in them of the Election of a new Member. He ſaid he had an Affidavit to produce, that this Bailiff refuſed to produce them at the laſt Aſſembly; and therefore ſubmitted it, his Motion was now regular. Judge Probyn ſaid, that he did not ſee but the Corporation might make a new Book to enter their Acts in; and that ſuch Entry would be as valid, as in the Old ones. However Judge Page ſaid, in the Caſe of The Corporation of Eſham ſuch Entry was made in a new Book, and that Book produced as Evidence at a Trial at Bar; but the Court refuſed that Evidence, and the Corporation was nonſuited. He ſaid Mr. Reeves and he were Counſel in that Cauſe; but he did own, that if ſuch Caſe ſhould come before him, he ſhould be of a different Opinion; and ſo Judge Probyn declared likewiſe. Judge Lee ſaid, that he took it, the Court would by no Means grant ſuch a Motion as this, without an Affidavit of the Fact, that the Officer had been guilty of ſome Default of this Sort before. And he ſaid he remembered, when Mandamus's were firſt moved for upon the Statute of Anne, to go to the Election of a Mayor, an Affidavit was always produced; though of late this has been omitted. For this Reaſon he thought it neceſſary that the other Side ſhould have Liberty given them to ſhew Cauſe. Accordingly the Court made a Rule, that the Mandamus ſhould go, unleſs Cauſe to Morrow. The next Day Mr. Strange came to ſhew Cauſe; but the Court made the Rule abſolute.

Anony-

Anonymus.

How far the Court will set aside a Plea in Bar, by Reason of its being frivolous.

IN Debt on Judgment the Defendant pleaded Nil debet; and Motion was made to set this Plea aside, as being a frivolous one. Judge Page said this was a Plea in Bar; however made a Rule to shew Cause. Vide post.

Anonymus.

How far the Court will give Liberty, or not, that a Declaration may be amended in respect of the Damages laid in it.

MR. Theede moved for Liberty to amend his Declaration by altering the Damages from 200 l. to 2000 l. Judge Page said this would be to make a new Action; and Judge Probyn doubted; however the Court made a Rule to shew Cause.

Anonymus.

When a Mandamus is granted in order to require a Corporation to go to an Election, how far it is necessary, or not, that the Mandamus should specify the Time when the Election is to be.

A Mandamus had been granted a few Days ago, to go to an Election of an Officer of the Corporation of Eſham in the County of Worceſter, upon an Affidavit, that there was a Vacancy, and that the Corporation had not filled it the laſt Charter-Day appointed for that Purpoſe. Mr. Wills came now and prayed, that that might be ſuperſeded, unleſs a Day be appointed in the Writ, when the Election is to be. By the Uſage in this Borough, he ſaid, the Notice to be given of Corporate Aſſemblies need not be above Twenty-four Hours. He produced an Affidavit, that one of the Members of the Corporation was a Member of Parliament for the Borough, and by Reaſon of that was now obliged to attend in Parliament; ſo that it would be impoſſible for him to attend upon ſuch ſhort Notice. And beſides, he ſaid, in all Caſes it would be greatly expedient, that a Day ſhould be appointed in the Writ to prevent Surprize to the Parties. Mr. Fazakerly on the ſame Side ſaid, that he did own, a good deal of Pains had been taken to find Precedents of Mandamuſſes at Common Law, wherein a Day for the Meeting of the Corporation is appointed, and that they had met with little Succeſs. (Mr. Draper ſaid there was one in the Caſe of the Corporation of Plymouth; but that appeared to be by Conſent.) However, he ſaid it appears from every Day's Experience, that theſe Writs are always moved for in open Court, and can never be had but in Term-Time. He obſerved, that a Rule for a Mandamus's iſſuing is ſo neceſſary, that the Mandamus by the Practice of the Court muſt bear Teſte the very Day the Rule is made. For this he appealed to Mr. Maſterman, who aſſented to the ſame. This, he conceived, ſhew'd that theſe Writs were in the Breaſt and Diſcretion of the Court; and therefore they might very well ſuperſede them, when they are granted, or refuſe to grant them when they are applied for; unleſs the Party applying for them, will conſent

to do what is reaſonable; that is, in the preſent Caſe, will conſent to appoint a Day. In Caſes of Attachment for Non-payment of Coſts, or diſobeying a Rule of Court, which are Writs, that do not iſſue but upon Motion, and are in this reſpect upon the ſame Footing with Writs of Mandamus, if the Party offers to pay the Money immediately, or otherwiſe to clear the Contempt; the Court conſtantly lays their Hand upon the Writ, and orders it to lie in the Maſter's Hand for a few Days. The Counſel of the other Side declared, they had no Authority to conſent; and thereupon the Opinion of the Court was taken; which was, that a Mandamus cannot iſſue but upon Motion; but they thought it a Motion of Courſe, and declared, that a Mandamus was a Writ which the Party is intitled to de jure. Judge Probyn ſaid, then an Attachment is for a Contempt of the Court; and therefore he thought that Writ to be in the Breaſt and Diſcretion of the Court. Accordingly the Motion was refuſed. Vide poſt.

Anonymus.

MR. Varney moved for an Information againſt Mr. Fowle, who was Deputy Recorder of the Town of for acting as Juſtice of Peace there for about ſeven Years together. He ſaid he did agree, that by the Charter the Recorder himſelf is appointed to be one of the Juſtices; but he ſubmitted it, that though a Deputy has all the Privileges which the Principal himſelf has, belonging to the Nature of his Office; yet ſuch collateral Privileges as theſe, he ſubmitted it, he has not. He ſaid he did own the Recorder himſelf was now dead, and that therefore now Mr. Fowle does not take upon him to act as Juſtice of Peace; for which Reaſon he did not pray an Information in the Nature of a Quo Warranto, but a common Information only. Accordingly a Rule was made to ſhew Cauſe.

How far a Deputy has not in him the Power of his Principal.

Harcourt *and* Seagrave.

MR. Strange came now to ſhew Cauſe, and ſubmitted it, as this was a Plea in Bar, the Court would by no Means ſet it aſide upon Motion. Mr. Bootle Jun. on the other Side ſaid, that as the Circumſtances of this Caſe were he ſubmitted it they would. The Defendant firſt of all demurred to the Declaration. The Plaintiff joined in Demurrer; the Paper Book was made up, and delivered to the Defendant; the Defendant writ on the Back of it, that he withdrew his Demurrer; and pleaded Nil debet. By the Rules of the Court, he ſaid, a Defendant cannot withdraw his Demurrer, but on pleading the general Iſſue. And Nil debet is by no Means the general Iſſue in Debt on Judgment, but a bad Plea, which the Plaintiff might clearly take Benefit of upon a Demurrer. Judge Page ſaid, that Nil debet is the general Iſſue in ſome Actions; and if the Defendant had pleaded Not guilty, he did

Vide ante

not ſee but it muſt have ſtood. Accordingly the Rule was diſcharged.

Anonymus.

How far Words which charge a Perſon with Lewdneſs, are Actionable or not.

IN an Action for Words, where there were ſeveral Counts and intire Damages, Mr. Top moved in Arreſt of Judgment, that one Set of Words was not Actionable. They were theſe. We caught the old Fox in an unlawful Room with *Frances*'s Wife, and he would have lain with her. And the Court made a Rule to ſhew Cauſe. Vide poſt.

Anonymus.

How far a Notice of Trial ſhall be ſaid to be ſufficient or not.

MR. Draper moved to ſet aſide a Verdict, where there was no Defence, for the Notice of Trial being too ſhort, as the Circumſtances of this Caſe were. He did agree, that the Notice was given the 27th of February, and that the Commiſſion-Day was the 7th of March, and therefore there were the eight Days which are generally given. But he ſaid the Defendant's Witneſſes lived 125 Miles from the Place where the Aſſiſes were held; ſo that it was impoſſible for him to have them there at the Trial. However the Motion was refuſed.

Doyly *and* Burow.

How far a Writ of Inquiry may be returnable at a general Return-Day notwithſtanding the Suit is by Bill.

UPON a Writ of Error in an Action brought againſt an Attorney in the Court of Common Pleas by Bill, Mr. Parker aſſigned for Error, that the Writ of Inquiry was returnable at a general Return-Day, whereas it ought to have been a Day certain. He did agree, that in the Caſe of Smith and Laughton, there was an Exception taken, which appeared to be ſomething like this; but upon comparing the two Caſes together, he apprehended they were diſtinguiſhable. For there the Imparlance was right, to a Day certain, and therefore that Defect in the Writ of Inquiry could only be a Miſcontinuance. But in the preſent Caſe, he ſubmitted it, there was a Miſawarding of Proceſs; and no Defect of that Sort is helped by the Statute of Jeofails. However the Court thought the two Caſes to be the ſame; accordingly affirmed the Judgment.

The King *and* Taylor.

What is the proper Judgment to be given in an Information in the Nature of a Quo Warranto.

IN an Information brought againſt the Defendant in the Nature of a Quo Warranto, for exerciſing the Office of Capital Burgeſs in the Borough of Eſham, from the 20th of Auguſt laſt, the Defendant pleaded that true indeed it was, that from the 20th of Auguſt to the 29th of September he had not proper Authority to act in that Office; and accordingly for that put himſelf

himſelf into the King's Mercy; but for the reſt of the Time he juſtified. Several Iſſues were joined upon the ſeveral Parts of the Juſtification; and for thoſe a ſpecial Verdict found. The laſt Vacation, Judgment was entered againſt the Defendant, for ſo far as he had confeſſed. But Mr. Wills ſubmitted it, that that Judgment was entered up in a wrong Manner; and therefore prayed it might be rectified. For a Judgment of Duſter was entered up againſt him; whereas there ought only to have been a Fine ſet upon him for his Uſurpation for that Time, and a Capias pro fine awarded. The Court thought it might be proper to examine into the whole Record; and therefore ordered that they ſhould be attended with Copies of it; and farther made a Rule to ſhew Cauſe. Vide Poſt.

Anonymus.

MR. Prime moved, that the Irregularity of a Judgment might be referred to the Maſter. He ſaid this was an Action of Aſſumpſit, and the Defendant pleaded Non Aſſumpſit infra ſex annos ante exhibitionem Billæ. The Plaintiff replied, that he ſued out a Latitat on ſuch a Day, and ſo continues it down to the Time of exhibiting the Bill, and avers that the Defendant did aſſume within ſix Years before the Suing out ſuch Latitat. To this the Defendant rejoined, that he did not aſſume within ſix Years before the Suing out ſuch Latitat, and ſo concludes to the Country. This Rejoinder, he ſaid, was put in in Time; but notwithſtanding, the Plaintiff had ſigned his Judgment. Mr. Parker on the other Side ſaid that he did agree the Fact was as Mr. Prime had ſtated it; but the Rejoinder was not ſigned by a Counſel's Hand, which he apprehended it ought to have been, though it was a common Rejoinder only, and concluded to the Country; in as much as it was a Rejoinder to a ſpecial Replication. The Court ſaid this might be proper to be conſidered of upon the Maſter's Report; but at preſent they muſt refer it to them; which accordingly they did. Vide Poſt.

When a Rejoinder is put into a ſpecial Replication, how far the Rejoinder muſt be under the Hand of Counſel.

The King *and* Jones.

ON Rule to ſhew Cauſe, why a Mandamus ſhould not be directed to the Defendant, a Juſtice of Peace, to levy the Penalty of 104 Pounds upon a Scavenger, in Purſuance of a Conviction made by him on the Statute 2 W. & M. S. 2. 8. (5.) Mr. Abney ſaid, that he did agree it was ſworn by the Affidavit, on which the Rule was made, that the Juſtice, after hearing the Evidence on both Sides, did ſay to the Scavenger, you are guilty, you are to forfeit the Penalty, and directed the Attorney, who appeared for the Proſecutor, to draw a Warrant for levying the Penalty, and yet that he had not executed that Warrant, nor any other for that Purpoſe. But ſtill he ſubmitted it, that the Rule for the Mandamus iſſuing ought to be diſcharged. He ſaid he had an Affidavit to produce, that the Default of the Scavenger charged by the Information, before the Juſtice, was that

How far a Juſtice of Peace ſhall not be ſaid to have made a Conviction.

that he omitted doing his Duty according to the Clauſe of the Act that has been mentioned, from ſuch a Time to ſuch a Time, which was fifty-two Defaults in all, ſucceſſively, except on Sundays and Holidays. The Warrant drawn by the Attorney was to levy the intire Sum of 104 Pounds, which came to ſo much by computing each of the fifty-two Defaults at 40 Shillings a Forfeiture. When this Warrant was produced before the Juſtice, the Juſtice told the Attorney, that to his Knowledge the Proſecutor was abſent out of the Pariſh for ſome Part of the Time, in which he had ſworn the Scavenger was guilty of this Default, according to the Clauſe of the Act, that has been mentioned; and therefore for that Time he could not convict him, but offered to convict him for ſuch of the particular Defaults within that Time, as the Proſecutor could particularly and poſitively ſwear to. Upon this State of the Fact, Mr. Abney ſubmitted it, that what the Juſtice ſaid upon hearing the Evidence by no Means amounted to a Conviction; to make it one, that it ought to be under Hand and Seal; and therefore inſtead of moving for a Mandamus to levy the Penalty in Purſuance of the Conviction, the Motion ought to have been for a Mandamus to make a Conviction. Mr. Strange argued on the other Side, and ſaid, that by every Day's Experience it appears, when Certiorari's go down to remove Convictions, the formal Part of it is afterwards drawn up and ſettled by Counſel, and then the Juſtice's Hand and Seal is put to it; but yet it was never doubted but the Judgment pronounced by the Juſtices was the Conviction. In the preſent Caſe the Juſtice did pronounce ſuch Judgment; and therefore it was very extraordinary to ſay that this was not a Conviction. By their Affidavits, he ſubmitted it, it appeared to be one; and therefore if the Affidavits of the other Side contradict it, the Court will not determine which Affidavit is true upon a Motion; but will require the Fact to be returned upon the Writ of Mandamus. Judge Page ſaid, if the Affidavits on one Side directly contradicted the Affidavits of the other, he did agree the Court would require the Fact to be returned upon the Mandamus, in order that the Party may bring an Action for a falſe Return, and ſo have the whole Fact tried before a Jury. But in the preſent Caſe, the Affidavits on one Side only are, that the Juſtice declared that the Scavenger was guilty, and that he muſt pay the Penalty; which are not inconſiſtent with the Affidavits of the other Side, which explain the Meaning of thoſe general Expreſſions; and by that Explanation it is admitted, that the Juſtice did ſay the Scavenger was guilty, and he muſt pay the Penalty; but it is ſworn, that the Juſtice did not ſay how far he was guilty, and how much he muſt pay for the Penalty; ſo that it appears the Conviction was not compleat. For theſe Reaſons the Rule for the preſent Mandamus was diſcharged; and afterwards Mr. Strange moved for another Mandamus, to require the Juſtice to make a Conviction; which the Court accordingly granted.

Anonymus.

MR. Hayward moved for an Information againſt a Juſtice of Peace for making an Order of Baſtardy upon one Fitzgerald, without giving him a Summons to attend. Judge Lee ſaid he thought it had been determined upon Debate, that a Summons in theſe Caſes is not neceſſary; becauſe, if the Party was ſummoned, it was likely that he would run away. Mr. Strange ſaid he believed he remembred the Caſe Judge Lee refer'd to; but upon his Memory, all that was determined in that Caſe was, that it need not appear upon the Face of the Order of Baſtardy, that the Party was ſummoned. And Mr. Hayward ſaid the Juſtice might iſſue his Warrant to bring the Party before him in the firſt Inſtance; and by that all the Danger of his running away would be prevented. However upon the Court's conceiving a Doubt, whether that Caſe was not determined as Judge Lee mentioned, they made no Rule at preſent; but gave Mr. Hayward Liberty to move this Matter again. Vide Poſtea.

How far it is neceſſary, or not, that a Perſon ſhould be ſummoned before an Order of Baſterday can be made upon him.

The King *and* Tremineer.

ON Rule to ſhew Cauſe why an Information ſhould not go againſt the Defendant, late Mayor of the Town of Helſton in the County of Cornwal, for his demanding more Toll in the Market than was due, for his obſtructing a Farmer to come into this Market, becauſe he would not pay that Toll, and for his beating him, when he was in it on the ſame Account, and this whilſt he was in the Execution of that Office. Mr. Forteſcue ſaid, that this very Point concerning the Quantum of the Toll, was tried this laſt Aſſizes, in an Aſſumpſit brought by the Leſſees of the Toll, and a Verdict found in Favour of the Corporation; for which Reaſon he ſubmitted it, this Rule ſhould now be diſcharged; which the Court accordingly did. And Judge Page ſaid he remembred Lord Chief Juſtice Holt would never try a Title to a Man's Eſtate in an Indictment of Treſpaſs.

Vide ante

Catherol *and* Cowper.

IN an Action of Falſe Impriſonment tried before the late Lord Raymond, a Verdict was found for the Plaintiff, ſubject to the Opinion of the Court upon a Caſe. The Counſel on both Sides differed concerning the State of the Caſe. Mr. Kettleby moved now for the Poſtea to be delivered; unleſs the Court ſhould be of Opinion, that a Caſe could ſome way be ſettled by the Notes that Lord Raymond took at the Trial. The Court declared their Opinions, that unleſs the Counſel could agree upon the Caſe amongſt themſelves, the Fact muſt be tried over again in another Action. Accordingly the Motion was refuſed.

When a Caſe is intended to be made for the Opinion of the Court, and the Judge dies before the Caſe is ſettled, how far the Caſe cannot afterwards be ſettled in any other way, than by Agreement of the Counſel.

The King *and* Lynn.

How far the Court will grant an Information for a notorious Offence, notwithſtanding the Facts are totally denied.

ON Rule to ſhew Cauſe, why an Information ſhould not be granted againſt the Defendants for forcing one Elizabeth Mortimer to marry one of the Defendants againſt her Will. Serjeant Birch ſaid, that he had Affidavits to produce, which directly contradicted every one of the Facts charged by the Affidavits, on which the Rule was made. Judge Page ſaid, that that was no Reaſon, why the Court ſhould not make the Rule abſolute, in order that ſo groſs a Crime might be examined into. And ſo he remembered the Court was of the ſame Opinion in the Caſe of one Fazar, a Coachmaker's Wife, who was the chief Inſtrument in a Villany of the like Nature. Accordingly in the preſent Caſe the Rule was made abſolute.

Auſtin *and* Gervas.

How far the Court will grant a Prohibition, or not, to ſtay a Suit in the Eccleſiaſtical Court, relating to a Pariſh Clerk.

UPON a Diſpute between the Plaintiff and Defendant concerning which of them was elected into the Office of Pariſh Clerk, the Defendant entered a Caveat againſt the Plaintiff to prevent his being ſworn in; the Plaintiff inſtituted a Suit in the Eccleſiaſtical Court to take off this Caveat, and prayed there, that he might be admitted. Upon this the Eccleſiaſtical Court inquired into the whole Affair; but in the End admitted Gervas, decreed againſt the Plaintiff, and condemn'd him in Expences. For this the Plaintiff obtained a Rule to ſhew Cauſe, why a Prohibition ſhould not go to the Eccleſiaſtical Courts, on account of their having no Juriſdiction to examine into a Matter of this Nature, it concerning a Right to a Temporal Office. Mr. Fazakerly came now to ſhew Cauſe againſt this Rule; and ſaid, in the firſt place he ſubmitted it, that the Eccleſiaſtical Court had a Juriſdiction; but admitting that they had not, that yet the Plaintiff could not move for a Prohibition to ſtay Proceedings in a Suit which he himſelf had inſtituted. Beſides, he ſaid, he apprehended that Gervas had a Right to be admitted, and the Eccleſiaſtical Court could not refuſe it him; and ſo he ſaid the Court was of Opinion in one Caſe, where a Mandamus went to admit a Churchwarden, that the Eccleſiaſtical Judge was Miniſterial in this Reſpect, that he was bound to admit the Party, who applied for the Mandamus, and that he could make no Return to excuſe himſelf from doing it. Mr. Strange argued on the other Side, and ſaid, that he did agree the Office of Pariſh Clerk was exerciſed about Spiritual Matters; but yet the Office itſelf was Temporal; for which Reaſon he apprehended the Eccleſiaſtical Court had no Juriſdiction concerning it; and for this Purpoſe cited 2 Roll's Abr. 285. in the Caſe of a Regiſter. If this then was ſo, he ſaid it would be no Objection that the Plaintiff himſelf had begun this Suit in the Court below; and of that Opinion he obſerved the Court was in the Caſe

of Dr. Wilmot. The Court declared themſelves to be of the ſame Opinion in the preſent Caſe; and as to what was mentioned concerning the Mandamus, they did agree there was one Caſe to that Purpoſe: but all the Caſes ſince have been againſt it; and now they ſaid it was ſettled, that the Eccleſiaſtical Judge may return upon the Mandamus, that the Party was not elected. Upon this Mr. Fazakerly propoſed, that the Eccleſiaſtical Judge ſhould admit Auſtin, as well as he had admitted Gervas; and that the Parties ſhould try the Merits of their Election in a feigned Iſſue; which Propoſal was accordingly agreed to.

Jones *and* Amys.

When an Action is brought by an Adminiſtrator, how far the Court will arreſt the Judgment, or not, by Reaſon of the want of Jurisdiction in the Perſon granting the Adminiſtration.

IN Debt on Judgment brought by an Adminiſtrator, Nul tiel Record was pleaded. The Record was proved. But now a Motion was made in Arreſt of Judgment, that the Plaintiff has declared under Letters of Adminiſtration granted by the Biſhop of Exeter; whereas it appears by the very Judgment in this Court, which the Action now is founded upon, that the Inteſtate had bona notabilia; for that very Judgment makes it ſo. For which Reaſon the Adminiſtration was void; in as much as it ought to have been granted by the Metropolitan. Accordingly a Rule was made to ſhew Cauſe. Vide poſtea.

Hall *and* Traverſe.

Vide ante

IN an Action for Words, where there were ſeveral Counts, and intire Damages, Mr. Top moved in Arreſt of Judgment for that the Words in one of the Counts were not Actionable, which were theſe following. *Palmer Hall* does lie with other Men's Wives, and gets them with Child, like a Rogue as he is; and he would have lain with my Wife; but he was prevented by our coming into the Room, *Innuendo* the Defendant and another. Accordingly a Rule was made to ſhew Cauſe.

Cock *againſt* Sir Francis Vivyon and others.

How far an Indebitatus Aſſumpſit will lie for Toll or not.

IN an Indebitatus Aſſumpſit, wherein there were eight Counts, and intire Damages, Mr. Robinſon moved in Arreſt of Judgment. In the four firſt Counts, he ſaid, the Plaintiff has declared, that he was poſſeſſed of a Market in the Town of Helſton in the County of Cornwall, and of a Market-houſe there for ſetting down Corn in, that comes to be ſold in the Market, and in Conſideration that he permitted the Defendants to bring their Corn into the Market, and put it down into the Market-houſe, the Defendants promiſed to pay a certain Sum of Money for Picage and Stallage, being the antient cuſtomary Sum for that Purpoſe; and thoſe four Counts, he did agree, were right. But in the three next

Counts

Counts the Plaintiff ſets forth the ſame Conſideration as in the firſt; but then lays the Promiſe to pay a certain Quantity of Toll in Corn, ſpecifying the Quantity, being the antient cuſtomary Toll for that Purpoſe. And in the laſt Count he ſets forth the ſame Conſideration; but then lays the Promiſe to pay as much Corn for Toll, in expoſing the ſaid Corn in the Market, as the Plaintiff ſhould deſerve, according to the Cuſtom aforeſaid. To theſe four laſt Counts he took ſeveral Exceptions. To the three firſt of them, he ſaid, he apprehended that an Indebitatus Aſſumpſit would lie for nothing but Money; and for Toll in Specie he ſubmitted it, the only Remedy was a Diſtreſs. Beſides, he conceived that Toll was due from the Buyer only, and not from the Seller. To the laſt of them he ſaid, he conceived that a Quantum Meruit likewiſe would lie only for a Sum of Money, and not for an uncertain Quantity of Goods in Specie. For which Reaſon he apprehended that the Judgment ought to be arreſted. Judge Lee ſaid that theſe Actions of Indebitatus Aſſumpſit had of late Years been carried much farther, than they were formerly. It is certain now, he ſaid, that this Action will lie for Scavage, for a Fine due to the Lord from his Copyholder; and if the Corn is the Duty, he ſaw no Reaſon, why it ſhould not lie for that likewiſe. The Court in general inclined to think that notwithſtanding the Exceptions the Plaintiff ought to have Judgment. However gave the Defendant Liberty to conſider of this Matter a little longer, and to move them again, if he thought proper. Vide poſtea.

The King *and* Amys.

How far that Part of the Statute of 5 Eliz. which gives Juſtices of Peace a Power to diſcharge Apprentices, extends to no other Trades than thoſe which are mentioned in the very Words of it.

MR. Strange moved to quaſh an Order of Seſſions for diſcharging one Stannard from an Apprenticeſhip of a Carpenter, which he was bound to. He obſerved, that the Trade of a Carpenter is not within the Words of that Part of the Statute of 5 Elizabeth, which gives Juſtices of Peace Power to diſcharge Apprentices; and this Part of the Statute has never been extended to any other Trades, than thoſe that are expreſly mentioned by the very Words of it; though he did agree, that the other Part of the Statute concerning Perſons being bound to ſerve Apprenticeſhip has been extended farther. For this Purpoſe he cited Salk. 471. And accordingly the Court made a Rule to ſhew Cauſe. Vide poſtea.

The King *and* Pickley.

How far a Perſon cannot be indicted for a Cheat.

ON Rule to ſhew Cauſe, why an Indictment ſhould not be quaſhed, Mr. Draper ſaid, that the Indictment charged the Defendant with ſelling a Sack of Wheat containing ſo many Buſhels, as he falſly aſſerted, whereas the Sack Plurimum deficiebat de legali Menſura. To this Indictment he ſaid there had been three Exceptions; Firſt, that this is only a private Cheat;

Secondly, that though it be an Offence by the Statute of 22 & 23 Car. 2. 12, yet it is not ſo at Common Law. Thirdly, that the Plurimum deficiebat is too uncertain. To the firſt he obſerved, that Cheating by falſe Tokens was certainly indictable at Common Law; and he ſubmitted it, that the Sack in this Caſe was a falſe Token. To the ſecond he cited Sid. 409. And to the laſt, he apprehended the Indictment was certain enough. Beſides, he ſaid, ſuppoſing this Indictment could not be maintained upon a Demurrer, yet the Court will not quaſh it; and for this Purpoſe cited the Caſe of The Queen and Orbel, Mod. Caſes 42. Mr. Parker argued on the other Side, and ſaid he conceived that the Sack could by no Means be a falſe Token in this Caſe; for it is not the proper Meaſure appointed by the Law to ſell Corn by. He obſerved, that there was a Caſe very much like the preſent one, which was tried before Lord Raymond at the Sittings the 4th of Geo. 2. the Name of it was The King and Nicholſon. That Indictment ſet forth, that every Chaldron of Coals ſold in London ought to contain 36 Buſhels, and that another contracted with the Defendant for ſix Chaldrons; but that every one of the ſix Chaldrons delivered in by the Defendant wanted a certain Quantity in Meaſure. Mr. Fazakerly was of Counſel there for the Defendant; and he objected, that this was not an Offence indictable. Lord Raymond in that Caſe was of the ſame Opinion; and directed the Jury to acquit the Defendant. Mr. Parker farther cited to the ſame Purpoſe 1 Mod. 71. 288. and that of The King and Bryan. Then as to the Exception for the Uncertainty of the Indictment, he cited 2 Rol. Ab. 80. Placito 13. Cr. 1. 380. Cr. 2. 324. and Salk. 687. And in Anſwer to what was objected, that the Court would not quaſh this Indictment, he obſerved, if this was no Offence indictable at all, the Court certainly would quaſh it; and for this Purpoſe cited Salk. 379. and Mod. 5. 18. The Court in general agreed, that Cheating by falſe Tokens is an Offence indictable by the Common Law; and Judge Probyn ſaid, if the Defendant had been indicted for ſelling by a falſe Buſhel, ſuch Indictment would have been good at Common Law. But in the preſent Caſe the Court was of Opinion, that the Fact charged upon the Defendant was by no Means indictable at Common Law. And Judge Page likened it to the Caſe of a Tradeſman's telling his Chap, there are ſo many Ells in ſuch a Piece of Cloth; the Buyer may eaſily meaſure the Cloth, and ſee whether there are ſo many; and if he will not, it is his own Folly. Accordingly the Rule was made abſolute.

Burden *and* Tomlyn.

MR. Jocelyn came now and produced a Rule of Court made in this Cauſe laſt Michaelmas Term, whereby the Court ordered, that Judgment ſhould be for the Plaintiff; Judgment he ſaid had not been entered in Purſuance of that Rule; and therefore he moved now, that in Purſuance of that Rule the Court would make another Rule, that Judgment ſhould be entred. The Court declared it to be a ſettled Rule, that the Party Vide ante 37, 229.

muſt always give Notice of his Motion, where he moves upon a Rule of Court, in order that they may be informed by the other Side, whether there have not been other Rules in the Cauſe made contrary and ſubſequent to that Rule. For which Reaſon, as no ſuch Notice had been given in this Caſe, the Court refuſed to make any Rule at preſent. Vide Poſt.

Lethely *and* Cowper.

How far a Declaration may be allowed to vary from the Writ.

IN an Action brought upon a Recognizance of Bail, Mr. Fazakerly a few Days ago obtained a Rule to ſhew Cauſe why the Proceedings ſhould not be ſtayed, by Reaſon that ſome ſhort Time before the Declaration ſerved in this Action, the Plaintiff's Attorney writ to the Defendant, who was one of the Bail, to tell him, that he ſhould be obliged ſoon to take out a Writ againſt him, at the Plaintiff's Suit, for Words; accordingly ſoon after he did ſerve him with a Writ of Treſpaſs at the Plaintiff's Suit; but after this declares againſt him upon this Recognizance. Mr. Fazakerly at that Time ſaid, that this was a meer Surprize upon the Bail, and by this Means he was prevented from ſurrendring the Principal in Time, which otherwiſe he ſhould have done. Mr. Fazakerly now moved, that that Rule might be made abſolute. Mr. Strange ſaid he was ready to ſhew Cauſe; and the Cauſe he ſhewed was, that the Plaintiff's Attorney writ the Defendant Word, that he ſhould ſue out a Writ of Treſpaſs againſt him at the Plaintiff's Suit generally, without ſaying for what Cauſe. For which Reaſon, as the Defendant had not annexed the Letter to his Affidavit, to aſcertain whoſe Oath was true; he ſubmitted it, the Rule ſhould be diſcharged. Mr. Fazakerly then ſaid, that admitting this ſhould be thought to be a ſufficient Anſwer, he had another Objection to make to theſe Proceedings, which he apprehended would be fatal. By the Rule of the Court, where the Proceeding is by Action brought upon the Recognizance, the Bail has eight Days to ſurrender the Principal, after the Return of the Writ. The Intention of this Rule is, that the Bail may have timely Notice to diſcharge themſelves; for which Reaſon he apprehended that this Writ ought to have been in Debt, and not in Treſpaſs. And for this Purpoſe he cited a Caſe by the Name of Dupleger and Myat. Mr. Strange argued on the other Side and ſaid, that by the Courſe of the Court, you cannot take out a Writ with an Ac etiam in a Suit by original upon a Recognizance; for which Reaſon the Bail cannot have that exact Notice which was contended for. In theſe Caſes he ſaid, the conſtant Method of Proceeding is only to take out a Proceſs againſt the Party, to bring him into Court; and then you declare againſt him, as you do in other Caſes. But he obſerved farther, that be this Anſwer thought ſufficient, or not, the Rule for ſhewing Cauſe muſt be diſcharged, by Reaſon that the Rule was obtained ſingly upon the firſt Objection. Accordingly the Court did diſcharge that Rule; but made another, that this Matter of Practiſe ſhould be referred to the Maſter, and gave the Party Liberty to produce this Letter before the Maſter, in

order that the whole of the Fact may come before the Court upon his Report.

The King *and* The Inhabitants of Woodſterton.

ON Rule to ſhew Cauſe, why ſome Orders ſhould not be quaſhed, which were made by two Juſtices of Peace upon one Nicholas Baker, Overſeer of the Pariſh of Worceſterton, for the paying the Sum of 15 l. to one Simon Weſton for his Bill in Surgery upon one Joſeph Colleſon, a poor Inhabitant of that Pariſh, and likewiſe for the paying another Sum to the Wife of Richard Ryley for her Attendance in Nurſing this poor Man in his Illneſs. Mr. Parker ſaid, that there had been ſeveral Exceptions taken to the Form of this Order, and likewiſe to the Subſtance. To the Exceptions in Point of Form, he ſaid, he would firſt of all give an Anſwer. The firſt of them was, that the Order does not conclude, Given under our Hands and Seals; but, he obſerved, that in the Beginning of the Order it was ſaid, We, two of his Majeſty's Juſtices of the Peace, whoſe Hands and Seals are hereunto ſet; which he apprehended was ſufficient. The Second was, that the Statute of 2 & 4 W. 11. (11). does not give Authority to any Neighbouring Juſtices to make ſuch Order, but only in ſuch Caſes, where there is none dwelling within the Pariſh; and in the preſent Order it did not appear, but there might be Juſtices dwelling within the Pariſh. In Anſwer to this Objection, he ſaid the Court would not intend that there were Juſtices dwelling within it; and for this Purpoſe cited Hob. 78. and beſides, he obſerved, that the Act was only directory in this Reſpect; and for that relied upon Salk. 473. The Third was, that the Overſeer does not appear to have been ſummoned; whereas the Statute of 9 Geo. 1. requires that no ſuch Order ſhall be made without ſuch Summons. To this he anſwered, that the Court will intend the Party was ſummoned, and for this Purpoſe cited the Caſe of The King and Venables, Trin. 11 Geo. 1. There the Defendant was convicted upon the Statute of 5 & 6 Edw. 6. for keeping a diſorderly Alehouſe. Exception was taken to that Conviction, that it did not appear he was ſummoned; but that Exception was over-ruled. So likewiſe was it over-ruled in two other Caſes of The King and Holland, Trin. 5 Geo. 2. and The King and Drake, Mich. 7 Geo. 1. which were Orders of Baſtardy. The laſt Exception in Point of Form was, that the Statute of 9 Geo. 1. requires, that no ſuch Order of Relief ſhall be made but upon Oath of ſome Matter, which the Juſtice ſhall judge to be a Reaſonable Cauſe for giving the Relief. The Anſwer which he gave to this Exception was the ſame with that he gave to the former, viz. that it ſhall be intended. Mr. Wirley argued on the other Side, and to the firſt Anſwer that was given to the firſt Exception, ſubmitted it, that what was in the Body of the Order was only by way of Recital. To the Anſwer to the ſecond he ſaid, the Words of the Act were, If no Juſtice be dwelling in the Pariſh; which he apprehended was a poſitive Declaration, that if there was a Juſtice dwelling there, he only ſhould determine the

Vide ante 207.

the Matter. Then as to the Want of Summons, which was the third Objection, he conceived the Words of the Statute of 9 Geo. were penned ſo ſtrong, that the Juſtices had not even a Juriſdiction without it; and every Point of Juriſdiction, he ſubmitted it, muſt be fully ſet out, and the Court will make no Intendments in Favour of it. The ſame Obſervation he made to the laſt Objection in Reſpect of the Oath; and for this Purpoſe cited Carth. 365. In that Caſe it is expreſly reſolved, that in Orders of Removal it muſt be averred that the Complaint was made by the Churchwardens and Overſeers, and by the ſame Reaſon he apprehended, that the preſent Order ſhould have appeared to have been made upon Oath. Mr. Fazakerly was of the ſame Side with Mr. Wirley, and as to this Exception in particular, concerning the Oath, he did apprehend, there was a good deal of Weight in it. He did agree that in Orders of Removal made upon the 13th and 14th of Car. 2. this is not requiſite, and ſo he did agree, it had often been determined; but the Reaſon was, that that Statute does not require an Oath; but the preſent Statute of 9 Geo. does require it in the moſt poſitive Terms, and upon the ſame way of reaſoning he urged the Exceptions of the Want of Summons, and the other Requiſites by that Act. Then as to the Subſtance of this Order, he ſubmitted it, it was clearly fatal. The Meaning of the Statute of 3 & 4 W. he ſaid, was nothing more than that the Juſtices of Peace ſhould have a Power to order Pariſh-Officers to relieve a poor Inhabitant, where it was fit he ought to be relieved. But in the preſent Caſe the Pariſh-Officers have actually given the Party Relief; they employed a Surgeon and a Nurſe to take Care of him. The Surgeon and Nurſe have a proper Remedy by way of Action againſt the Officers; and the Juſtices have no Pretence to interfere in this Matter. So he ſaid this Point was ruled in the Caſe of The Queen and The Inhabitants of Belcham, Trin. 7 Ann. and oftentimes it has been ſo in this Court. As to all the Exceptions for want of Form in theſe Orders, the Court declared they thought they were anſwered; and as to the principal of them upon the Statute of 9 Geo. 1. they took it theſe were only Matters of Direction concerning the Proceeding of the Juſtices, and not concerning their Juriſdiction. But as to the Exception in Point of Subſtance in the Order, they thought it muſt be fatal. Upon this Mr. Parker took an Exception to the Certiorari, that it had not rightly deſcribed the Orders; for in the Certiorari they are deſcribed to be made upon one Nicholas Barker, whereas the Orders removed appear to have been made upon Nicholas Baker; ſo in the Certiorari one of the Orders is deſcribed to be made for Payment of a Bill to one Simon Weſton Surgeon, whereas in the Order removed he is deſcribed by the Name of Simon Weſton generally, without an Addition. In the Caſe of a Writ of Error, he ſaid, it was known, if the Party has an Addition, which he has not in the Record below, the Writ of Error is defective. Accordingly the Court made a Rule for quaſhing the Certiorari. Vide Poſt.

The King *and* Mather.

ON Rule to ſhew Cauſe why an Information ſhould not go againſt the Defendant for a Misdemeanor; the Fact appeared to be in the Manner following. Mr. Bingley, an Alderman of the City of Cheſter, came before the Court of Seſſions, which was held there the 27th of May laſt by Adjournment from the 29th of November before, and gave Information upon Oath, that Mary Mackdonnel, who attended there by his Order without any Warrant, was the Evening before walking with two other Women on the Outſide of the City, he was returning into the City on Horſe-back; and as ſoon as he came near the Women, one of them cried out, Huſh, here comes the Alderman. Mary Mackdonnel upon this ſaid Damn the Alderman; and preſently abuſed him to his Face in a very outragious Manner. The Juſtices upon this examined Mary Mackdonnel concerning this Fact; and one of theſe Juſtices was the Defendant, who was likewiſe Chairman and Recorder of the Town. The Woman pretended that juſt before the Alderman came up, ſhe was talking of one Alderman Porter of Dublin, and Alderman Bingley applied to himſelf what ſhe had been ſpeaking only of the other Alderman. She proved likewiſe that ſhe was born in the City of Cheſter, and lived there with her Father at that Time. However ſhe begged Alderman Bingley's Pardon upon her Knees; and he declared that he forgave her. The Juſtices took this Matter up, and of themſelves convicted her on this Evidence, upon the Statute of 12 Ann. 2. 23. (5.) which Conviction was put in Execution, by her being ſeverely whipped the ſame Day. Upon this State of the Fact, Mr. Fazakerly ſubmitted it, that the Rule ought to be diſcharged. He ſaid, it was beyond all Diſpute, that Mary Mackdonnel was miſordering herſelf before Alderman Bingley; and therefore he conceived that ſhe was convicted within the Words of the Act of Parliament. But admitting that this Conviction was not ſtrictly within the Meaning of the Act of Parliament; yet as there appears to have been no Sort of Malice in this Proceeding, he apprehended the Court would not interfere; but leave the Party to her ordinary Remedy. Mr. Wilbraham on the ſame Side ſaid, that the Court that made this Conviction, was a Court of Seſſions; and therefore he conceived they were not puniſhable for any Thing they did in their judicial Capacity. And for this Purpoſe cited Stamford 173. Rep. 12. 23. But ſuppoſing the whole Court ſhould; yet he ſaid it would be very hard to ſingle one particular Perſon of it. The Court ſaid, that they thought they had an undoubted Juriſdiction to puniſh all inferior Judges, when they are guilty of any Oppreſſion in the Execution of their Authority. And ſo Judge Probyn ſaid the Caſe of Sir John Auſtin and others, Mich. 6 Geo. 2. The Court there had no Sort of Doubt, but that they might have granted an Information againſt him, notwithſtanding they were acting as Juſtices in their Petit Seſſions. And as to there being no Information prayed againſt the other Juſtices in this Caſe, they ſaid this

How far an Information may be granted againſt Juſtices of Peace, for what they do in their Seſſions.

was no Objection that the preſent Defendant could make, and ſo conſtant Experience ſhews in Matters of the like Nature. They ſaid they were clearly of Opinion, that upon the Evidence laid before the Juſtices the Woman ought not to have been convicted upon the Statute of 12 Anne, for that Statute does not ſpeak of all Perſons that are miſordering themſelves, but of ſuch Perſons only that are Vagrant and miſordering themſelves; which there is no Pretence to ſay, that the preſent Perſon was, becauſe ſhe was born in the very Place where the Complaint was, and liv'd there in her Father's Family. The ſingle Queſtion therefore for this Court to conſider they ſaid would be, whether according to the Circumſtances of this Caſe the Information ought to go. Now as to that the Original Seſſions appears to have been held the 29th of November before, two Quarter-Seſſions therefore muſt have been held in the mean Time, and it is a Rule, that no one Seſſions can be adjourned into another; for which Reaſon the holding the preſent Court, they ſaid, was plainly irregular. The Woman being there too without a Warrant, Judge Probyn ſaid, was another Circumſtance, that was ſo. But if this had been a regular Seſſions, and the Woman properly before them, Judge Page ſaid he thought the Seſſions had nothing to do with this Matter. They ſaid farther, that Alderman Bingley declared he forgave the Woman; ſo that what the Juſtices did was at that Time without Complaint. They obſerved, that this Conſtruction that was made upon the Words of the Act was ſo notoriouſly groundleſs, that what the Juſtices did they took to be manifeſtly an Act of Oppreſſion; accordingly made the Rule abſolute.

The King *and* Eyres and others.

What ſhall not be a ſufficient Cauſe for granting an Information againſt a Court of Seſſions.

ON Rule to ſhew Cauſe, why an Information ſhould not go againſt the Defendants, who were by Charter appointed Juſtices of Seſſions in the City of Sarum; the Fact came out to be in the Manner following. The Defendants had never held a Court ſince the Year 1723. by Reaſon that the Recorder of the City, who generally aſſiſted at this Aſſembly, was made Chancellor of Ireland, and that they had little or no Buſineſs. However upon a Mandamus coming down to them lately to make a Rate, they were obliged to hold one, which they intended to do for that particular Purpoſe only. When the Court was ſitting, a Bill of Indictment for a Nuſance was offered to be preferred before them; but they had ſummoned no Grand Jury; and upon that they made an Entry in their Books, that this Indictment ſhould be rejected, giving this ſpecial Reaſon for it, that they had aſſembled themſelves as a Court for this preſent Purpoſe only of making a Rate; and yet in the ſtile of the Court they had called themſelves a General Seſſions. The Attorney General ſubmitted it, that this was a very unwarrantable Act of Power, and therefore prayed that the Rule ſhould be made abſolute. Judge Probyn ſaid, that he had a Doubt, whether a General Seſſions had Conuſance

ſance of Indiaments for Nuſances. To this the Attorney General anſwered, that he had heard it often ſaid in this Court, that every Seſſions at Hicks's Hall is a General Seſſions; and yet nothing is more known, than that they hold Plea upon theſe Indiaments conſtantly. However the Court ſaid, that as this was a particular Franchiſe, that had Authority indeed to hold ſuch Court, but held them very ſeldom, they took it there was nothing in this Caſe but a Miſtake in Judgment in the Juſtices, and therefore they diſcharged the Rule.

Macartney *and* Barow.

ON Rule to ſhew Cauſe, why the Defendant ſhould not be diſcharged out of Execution upon the late Act of Bankrupts made 5 Geo. 2. Mr. Strange ſaid the State of the Fact was in the Manner following. In the Months of December and January 1728. the Defendant drew Bills of Exchange upon one Parminteer and others beyond Sea, which were not accepted. On the 13th of the ſame Month of January a Commiſſion of Bankrupcy was ſued out againſt the Defendant, teſted the ſame Day; and in the Months of February, March and April following theſe Bills were returned and proteſted, and Notice was given of this to the Defendant. The Plaintiff has ſince brought an Action upon theſe Notes againſt the Defendant, as Drawer of them, has obtained Judgment and taken the Defendant in Execution. On the Twenty-fourth of March laſt the Defendant obtained his Certificate, and ſince has applied for a Rule to ſhew Cauſe, why he ſhould not be diſcharged out of Cuſtody upon the late Act of Parliament that has been mentioned. Mr. Strange ſaid he did agree, that as no Day is mentioned, on which the Defendant became a Bankrupt, it muſt be taken that he was a Bankrupt only on the Day in which the Commiſſion of Bankrupcy bears Teſte; and therefore that he was not a Bankrupt at the Time the Bills were drawn. But he obſerved the Cauſe of this Action was the Proteſting the Bills as well as the Drawing them. The Proteſting them was after the Commiſſion; and therefore the Subſtance of this Caſe was not within the Relief of the Statute of 5 Geo. 2. But, if the Subſtance was, yet he apprehended clearly, that the Method of purſuing it was not. For the Clauſe in this Statute, which the preſent Motion is founded upon, is the laſt but two in that Act of Parliament; and that Clauſe gives ſuch Perſons as obtain Certificates before the 25th of March laſt only ſuch Relief as was given upon the Statute of 5 Geo. 1. which is by Plea only of the general Iſſue before Trial, and not by Motion after Judgment and Execution. He did agree, the Statute of 6 Geo. 1. allowed Diſcharges by Certificate even upon Motion at any Time; but this Clauſe in the Statute of Geo. 2. having Relation to the Statute of 5 Geo. 1. and not to the Statute of the 6th, he apprehended the Party was not relievable in this Way upon Motion, but muſt take his Remedy by Audita Querela. Judge Probyn and Judge Lee were

Conſtruction on the Statute of 5 Geo. 2. relating to Bankrupts.

were only in Court; and they ſaid, that this Matter came before Judge Page at his Chamber, and therefore directed it to be moved again when that Judge is in Court. Vide poſtea.

Anonymus.

Vide ante. 239. THE Maſter was of Opinion, upon this Matter coming before him, that Counſel's Hand was not neceſſary; accordingly the Plaintiff paid the Defendant the Coſts of his Judgment, and both Parties agreed to take Notice of Trial for the laſt Sittings in Term. Ex relatu.

Jones and his Wife as Adminiſtratrix of Jane Harvey *againſt* Heeman.

Vide ante 243. THIS Matter coming on again, the Record was more particularly opened than before, and was in this Manner. In Debt upon a Judgment in this Court, where the Recovery was for 41 l. the Plaintiffs declared under an Adminiſtration committed by the Biſhop of Exeter as Archdeacon of the Dioceſe of Cornwall; which Adminiſtration was laid to be granted by him at Weſtminſter. The Defendant pleaded Nul tiel Record of that Judgment, which was found againſt him; and now in Arreſt of Judgment Mr. Gapper cited Lutw. 401. in Point; and farther relied upon Moor 145. Salk. 40. 3 Cro. 472. Noy 54, and Dyer 305. Mr. Huſſey argued on the other Side, and ſaid that this Adminiſtration was laid to be granted at Weſtminſter; and he ſubmitted it, that the Court could not judicially take Notice, but Part of the Archdeaconry of Cornwall might extend itſelf into the County of Middleſex; and if ſo, the Adminiſtration was well granted. But admitting, that the Adminiſtration is not rightfully ſet out in the Declaration; ſo that the Defendant might have taken Advantage of this Defect upon a Demurrer; yet, he ſubmitted it, that in Arreſt of Judgment ſuch Defect cannot be taken Advantage of; and that this is cured by the Statute for the Amendment of the Law, or at leaſt by the Statute of 5 Geo. 1. 13. The Court ſaid the preſent Caſe was by no Means like that of a Verdict; but if there had been a Verdict, they ſhould have thought it would have made no Difference; and Judge Lee ſaid the Caſe in Lutw. that has been cited, ſeemed to be a direct Authority in Point. Accordingly the Court made a Rule that Judgment ſhould be arreſted, unleſs Cauſe on Saturday ſeven-night.

Herne *and* Bushel.

A Writ of Error had been brought in this Court upon a Judgment in the Marshalsea, and that Judgment affirmed. Upon this the Plaintiff in Error brought another Writ of Error quod coram vobis residet. Mr. Parker now moved, that the Plaintiff in the Original Action might have Liberty to take out Execution, notwithstanding this Writ of Error. He said, he did agree, that where a Writ of Error in this Court abates by the Death of the Parties, another Writ of Error will lie here quod coram vobis; but he submitted it, that in no other Case upon a Writ of Error in this Court will an Error quod coram vobis lie. Judge Page declared, that he was of the same Opinion; accordingly made a Rule to shew Cause.

In what Cases a Writ of Error quod coram vobis will not lie.

The King *and* Adey.

THIS was a Scire facias upon a Recognizance of Bail, with Condition, that the Defendant should carry down an Indictment to Trial by such a particular Time; the Defendant did not carry it down exactly at that Time; but carried it down soon after, and likewise the Bail had surrendered the Defendant since. Mr. Lacey now moved, that Proceedings on this Recognizance might be staid upon Payment of Costs. The Court said, that they had no Power to dispose of the King's Money; and they thought the only Method the Party had to take was to apply to the Attorney General for a Nolle prosequi, or to compound this Matter in the Exchequer.

When a Recognizance has been entered into that a Defendant shall carry down an Indictment to Trial, and a Scire facias is brought upon that Recognizance, how far the Court has no Authority to stay the Proceedings in it.

Leehill *and* Sir Thomas Reynolds.

IN an Action of Covenant for the Arrears of an Annuity, Mr. Field moved, that upon bringing into Court Principal, Interest and Costs, Proceedings might be staid. He said, in Covenant for Rent, he has been informed, the Court has granted the like Motion; and therefore he hoped they would make the same Rule in this Case. Accordingly a Rule was made to shew Cause. Vide post.

In what kind of Actions the Court will stay Proceedings on bringing into Court the Money which is demanded together with the Costs.

Anonymus.

IN an Indebitatus Assumpsit Mr. Kettleby moved for Liberty to plead Non Assumpsit and a Tender. He said the Court has allowed Not guilty and De son assault to be pleaded in Battery; and therefore he submitted it, they would make the like Rule in this Case. Judge Page said, in the Common Pleas Non cepit and an Avowry were refused in Replevin. And the Court declared, they thought they never ought to al-

How far the Court of King's Bench will not allow of Double Pleas to be pleaded, by Reason that they are inconsistent.

allow theſe Pleas, where they are inconſiſtent with one another. Accordingly the Motion was refuſed.

Dale *and* Mottram.

How far a Demurrer ſhall be ſaid to be an iſſuable Plea.

IN Debt upon an Award-Bond the Defendant applied to Judge Probyn at his Chamber, that he might have Time given him to plead; accordingly the Judge did give him till ſuch a Time upon his agreeing to plead an iſſuable Plea, and take Notice of Trial. The Defendant accordingly did plead No Award; the Plaintiff replied, that there was one and ſhewed a Breach; to this the Defendant demurred, by reaſon that the Plaintiff had not aſſigned a ſufficient Breach. Mr. Fazakerly now moved, that the Plaintiff might have Liberty to ſign his Judgment, by Reaſon that the Plaintiff had replied a Breach only for Form's ſake, and the Defendant ought not to have demurred, in as much as it was againſt his own Agreement, which was to plead an iſſuable Plea. Judge Page ſaid, that he thought a Demurrer was an iſſuable Plea in Law, and every Plea was ſo but a Plea in Abatement. Judge Probyn doubted. But Judge Lee inclined with Judge Page. Accordingly the Motion was refuſed.

Bury *and* Ruſſel.

How far the Plaintiff ſhall be allowed to file common Bail for the Defendant within the Meaning of the Statute of Geo. 2.

THE Plaintiff had filed Common Bail for the Defendant within ſeven Days after the Return of the Writ, whereas by the Rules of the Court the Defendant had till the eight Days were out to do it himſelf in, and after eight Days were out the Plaintiff ſerved the Defendant with a Copy of the Declaration. Mr. Fazakerly ſubmitted it, that this was irregular, and therefore moved, that the Common Bail filed by the Plaintiff might be ſet aſide. But the Court refuſed the Motion.

The King *and* Wothrington.

When an Attorney is committed for Misbehaviour, how far the Court will not bail him, notwithſtanding he has not yet been reported to be in Contempt.

THE Defendant having been committed for very ill Practice as an Attorney, particularly in making a prevaricating Affidavit, Mr. Kettleby moved, that he might be bailed till he ſhould be reported in Contempt; and mentioned the Caſe of The King and Clendon, where the like Motion was granted. The Court ſaid, that they thought the Offence of the preſent Defendant to be much greater, than the Offence of the other; accordingly the Motion was refuſed. But then the Counſel of the other Side offered, that if Mr. Wothrington would go before the Maſter and make the Party Satisfaction for the Injury he had done him, the Interrogatories ſhould be waived; which was agreed to.

Macartney *and* Barow.

THIS Matter coming on again, Mr. Folkes argued for the Defendant. He ſaid he did agree that the Statute of 5 Geo. 1. which was mentioned on the former Motion, was a temporary Act; he did agree that the Statute of 6 Geo. 1. had Relation to the former Statute; but yet as no Time is mentioned for the Expiration of that Statute, he ſubmitted it, it was a perpetual Law, and ſubſiſting at this Day. The Words of that Statute, he ſaid, were that every Bankrupt obtaining a Certificate ſhall be diſcharged from all Debts due and owing at the Time he became a Bankrupt. The Bills of Exchange, which the Defendant drew, by the very drawing them became Debts of the Defendant. For which Reaſon he ſubmitted it, that this Certificate was a full Diſcharge of thoſe Debts by the Words of the Act of Parliament. But if there was any Doubt upon that Statute, the Act of 7 Geo. 1. has made the preſent Caſe more clear; for that Act provides that the Bankrupt ſhall be diſcharged from all Debts contracted at that Time, though payable at a future Day. If this was ſo, he ſaid there would be no Doubt as to the ſecond Objection that was made upon the former Motion, that the preſent Application of diſcharging the Defendant upon Motion, was very regular. Mr. Strange argued on the other Side and ſubmitted it, that it appears from what was allowed by Mr. Folkes, that the Statute of 6 Geo. 1. expired with the Statute of the 5th. And as to the Statute of the 7th he ſaid he apprehended that was confined to ſuch Credit only as is given for Goods ſold in Trade; which appears by the Preamble of that Statute; and he had an Affidavit to produce, that the preſent Bills were drawn for Money lent the Defendant by the Plaintiff. But what he principally relied upon in the preſent Caſe was, that it was incumbent upon the other Side, to aſcertain the Time by Affidavits, when the Defendant became a Bankrupt; the Act of Bankruptcy makes him one, and not the Commiſſion. The Act of Bankruptcy muſt be preſumed to be before the Commiſſion; and it might have been ſo long before, as to have been precedent to the drawing of the Bills. This Fact he ſaid was in their Knowledge, and not in the Plaintiff's; the Proof therefore of that Fact was incumbent upon them, and not upon the Plaintiff. And if the Fact was ſo, that the Bills were drawn after the Act of Bankruptcy, there was no Pretence to ſay that the Certificate was a Diſcharge of them. The Court ſaid as the Fact ſtands at preſent, they would take the Act of Bankruptcy to be juſt before the ſuing out the Commiſſion; and if the Plaintiff inſiſts upon the contrary; if he inſiſts upon it that the preſent Bills were drawn mean between the Act of Bankruptcy and the Commiſſion, that Fact is incumbent upon him to make out, and as he has not done it, they would take it to be otherwiſe. Then as to the Statute of 6 Geo. 1. they were of Opinion it was a perpetual Act, and they thought the preſent Defendant well relievable under it. And if he was not under that Statute, they ſhould have thought

Vide ante 251.

thought he clearly would have been under that of the 7th. Accordingly they made the Rule abſolute.

Innys *and* Sinclair.

What ſhall be ſaid to be a ſufficient Affidavit, or not, in order to hold a Perſon to ſpecial Bail within the Meaning of the Statute 12 G. 1.

MR. Fazakerly moved that the Defendant might be diſcharg'd out of Cuſtody upon a common Appearance. The Statute of 12 Geo. 1. he ſaid, requires that no Perſon ſhall be held to ſpecial Bail, unleſs there is an Affidavit of the Plaintiff's Cauſe of Action made before the Arreſt, and an Indorſement upon the Back of the Writ of ſuch Cauſe of Action. In the preſent Caſe he did agree that there was an Affidavit made before the Arreſt by Grayman, and not by the Plaintiff, that the Defendant was indebted to the Plaintiff in the Sum of 948 l. 17 s. 6 d. but then came the Words, as appeared to this Deponent by a certain Inſtrument under the Hand and Seal of *Henry Goffman*, Notary Publick at *Hambrough*. He ſubmitted it, that this Affidavit was by no Means certain enough; for Grayman does not ſwear poſitively that the Defendant was indebted to the Plaintiff in that Sum, but only as appeared to him by ſuch an Inſtrument. Beſides, he ſaid he had an Affidavit from the Defendant, wherein he ſwears poſitively that at the Time of the Arreſt he did not owe the Plaintiff a Penny. Mr. Strange argued on the other Side, and ſaid that nothing was more certain, than that the Plaintiff himſelf is not obliged to make the Affidavit, which is to hold the Defendant to Bail; for the Words of the Act of Parliament by no Means require it, and beſides, a Book-keeper may very often be able to make ſuch Affidavit, when the Plaintiff himſelf cannot. He ſaid farther, that he took it to be very clear that the Defendant's Affidavit ſhall not be allowed to controvert any Thing in that which is made on the Part of the Plaintiff; for the Act of Parliament only requires, that there ſhall be ſuch Evidence given of the Debt before the Arreſt, as an Affidavit to be made of it; and it is not now to be enquired into, whether that Affidavit be true or falſe. However, he ſaid, he ſhould agree that the Affidavit that was made before the Officer, poſſibly was not certain enough; and if no Affidavit could be produced but that, poſſibly the Defendant ſhould be diſcharged upon a common Appearance. But he obſerved that he had another Affidavit in his Hand made by Mr. Grayman ſince the Arreſt, wherein he ſwears that he ſaw the original Bond at Hambrough under the Hand and Seal of the Defendant, and farther ſwears poſitively, that upon talking with the Defendant ſince the Arreſt, the Defendant owned that he was indebted to the Plaintiff in the very Sum that had been ſworn to in the Affidavit. Mr. Fazakerly by way of Reply ſubmitted it, that the Court ought not to regard this ſecond Affidavit that is produced. The Act of Parliament requires that an Affidavit ſhall be made of the Cauſe of Action, before a Man ſhall have his Liberty taken away by an Arreſt. This muſt be underſtood to be a ſufficient Affidavit. And now it is admitted by the other Side, that the Affidavit was not ſufficient. For which Reaſon he apprehended that clearly

the Defendant ought to be diſcharged. The Court agreed that an Affidavit from the Plaintiff himſelf cannot be requiſite in this Caſe, and likewiſe, that the Defendant's Affidavit could not be admitted to be read. They agreed farther, that if this Matter ſtood ſingly upon the Affidavit that was made before the Arreſt, the Affidavit was not certain enough, and the Defendant muſt be diſcharged upon a common Appearance. But whether this ſecond Affidavit ſhould be allowed, or not, was a Matter which the Court was in Doubt of. Judge Page and Judge Probyn ſaid that they did agree this Certificate from the Notary Publick, which Mr. Grayman ſwears he ſaw, would not be a ſufficient Evidence of the Debt, in our Law; but ſo great Regard is had to ſuch Acts in foreign Countries, that according to the Civil Law, it would be Evidence. By this they ſaid it appears, that the Officer has not acted raſhly in giving that Credit to the Affidavit, as to indorſe the Writ upon it; and by the Act of Parliament the Affidavit is produced before the Officer, and he is to judge upon it. For theſe Reaſons they thought that when another Affidavit is produced before the Court, which they themſelves would judge to be ſufficient, this Court ought to interfere and diſcharge the Defendant out of Cuſtody. Judge Lee was of a contrary Opinion in this Point, and thought that this Matter muſt ſingly depend upon the Affidavit that was made before the Arreſt. As ſoon as the Court had declared their preſent Sentiments in this way, they ſaid they would confer with the Judges of the Common Pleas about this Point; and accordingly, that the Matter might be argued more fully, they made a Rule to ſhew Cauſe, and ordered the Affidavits on both Sides to be filed. Vide Poſtea.

Anonymus.

MR. Benny moved that the Plaintiff might have Liberty to amend his Declaration in ſeveral Miſtakes that were made in the Name of the Defendant; and this notwithſtanding the Defendant had ſet Judgment go by Default. The Terms upon which he made this Motion were, that the Plaintiff ſhould waive his Judgment, and pay the Defendant his Coſts. Accordingly a Rule was made to ſhew Cauſe.

How far the Court will give Liberty that a Declaration may be amended after Judgment.

Kampier *and* Wright.

THIS was a Writ of Error upon a Judgment in the Common Pleas in an Action of Debt upon an Eſcape againſt the Warden of the Fleet; and the Judgment was given upon a Verdict. The Declaration ſet forth, that William Wilkinſon was indebted to the Plaintiff in the Sum of 200 Pounds, and for the Recovery of this Debt the Plaintiff ſued out a Latitat againſt him, upon which he was arreſted and in Cuſtody of the Marſhal of this Court. It was further ſet forth, that ſo being in Cuſtody he was removed by Habeas Corpus before Mr. Juſtice Denton, one of the Judges of the Court of Common Pleas, and

When a Perſon is committed to the Marſhal of the King's Bench, what ſhall be ſaid to be a good Commitment of that Sort, or not.

What ſhall be ſaid to be a good Declaration in an an Action of Eſcape.

that Mr. Juſtice Denton committed him to the lawful Cuſtody of the Warden of the Fleet charged with this Latitat; and that he ſo being in Cuſtody, the Warden ſuffered him to eſcape. Serjeant Hawkins argued that this Declaration was bad in Subſtance, and therefore that the Judgment ought to be reverſed. He ſaid there was no Rule better known, than that no Perſon can be removed from the Priſon of one ſuperior Court into the Priſon of another, unleſs there is ſome Cauſe depending which concerns the Party, in that Court to which he is removed. The Habeas Corpus itſelf did not give Mr. Juſtice Denton a Juriſdiction to remove the Priſoner from the Cuſtody of the Marſhal to the Cuſtody of the Warden; but it was the Habeas Corpus, together with a Cauſe depending againſt the Party in the Court of Common Pleas, that muſt jointly together have given him ſuch a Juriſdiction. As this Matter therefore, namely, of there being a Cauſe depending againſt the Party in the Court of Common Pleas, was a Matter eſſential to the Judge's having a Juriſdiction to remove the Priſoner, it ought to have been ſet forth in the Declaration, that there was ſuch Cauſe depending. To make a Gaoler anſwerable for an Eſcape, it is not enough to ſay that ſuch a one was his Priſoner and eſcaped; but it muſt be ſhewn that he was his lawful Priſoner. And to make a Man to be a lawful Priſoner, it is neceſſary that the Perſon committing him had a lawful Authority to commit him. That Mr. Juſtice Denton had not, no more than a meer private Perſon, unleſs there was ſuch Cauſe depending in the Common Pleas, as has been mentioned. And that Fact ought to have been alledged in the Declaration, in order to ſhew that the Perſon committing had an Authority to commit; that is, in order to ſhew that the Priſoner eſcaping was a lawful Priſoner. And for Authorities to ſhew how Declarations of the like Nature in Actions of Eſcape have been, he cited 1 Rol. Rep. 217, 276. 2 Leon. 84. 3 Cr. 877. 2 Cr. 394. Moor 274. Lut. 1468. Another Exception which he took to the Declaration was, that this Commitment by Mr. Juſtice Denton is to the Warden of the Fleet; whereas it ought to have been Priſonæ de la Fleet. He did agree that Commitments to the Marſhal of the King's Bench are to the Perſon of the Marſhal; but Commitments to the Warden are always to the Priſon of the Warden, the one is perſonal and the other is local. And ſo he obſerved was the conſtant ſettled Form of all the Precedents; which the Court will adhere to. Mr. Denniſon argued on the other Side, and ſaid that this Matter bore great Debate in the Common Pleas for ſeveral Times together, wherein the Court were ſometimes divided; but at laſt they gave Judgment unanimouſly for the Plaintiff. To the firſt Objection he ſaid the Declaration was, that the Priſoner was brought before Mr. Juſtice Denton, charged inter alia with a Latitat. Amongſt theſe alia might have been a Cauſe depending in the Common Pleas againſt the Party. Whatever they were, they were not in the Plaintiff's Privity and Knowledge; and therefore he could not be obliged to ſet them forth. He obſerved that the preſent Declaration was drawn as all other Declarations are drawn of this Sort; and for this Purpoſe cited a Precedent in Lev. 56. Viv. Ent. 181. 2 Brownl. Ent. 13, 14. Rob. Ent.

307. and Lil. Ent. 157, 188. To the ſecond Objection he did agree, that generally the Forms of the Precedents run in that Diſtinction; but this Form is not conſtantly obſerved, and that ſhews the Form is not neceſſary. For this Purpoſe he obſerved, that in Lilly 157. the Commitment is to the Warden of the Fleet; and in Viv. 194. Rob. 302. the Commitment is to the Priſon of the King's Bench; and in 8 & 9 Will. 26. the Words of the Act of Parliament conſtantly run, to the Marſhal of the King's Bench, or Warden of the Fleet. Beſides he obſerved that this Defect could at moſt make the Commitment only erroneous, and not void; and it is a known Rule, that notwithſtanding a Commitment be erroneous, the Gaoler ſhall be anſwerable, if the Priſoner eſcapes. And for this Purpoſe he cited 5 Mod. 19. Salk. 272, and 348. and Carth. 148. The Court declared, as this Matter bore a good deal of Debate in the Common Pleas, it might be proper to be farther conſidered of. But Judge Page ſaid, according to his preſent Thoughts, neither of theſe Exceptions would prevail. To the firſt he ſaid, the Act of the Judge is the Act of the Court; and he thought the Habeas Corpus itſelf gives the Court a Juriſdiction. If there had been no Habeas Corpus, or if the Habeas Corpus had been void, he ſaid it might have been otherwiſe; but he thought it could not be incumbent upon the Plaintiff to ſet out the Cauſe depending in the Court of Common Pleas againſt the Priſoner; becauſe that was a Matter not within his Privity. He ſaid likewiſe, that all the Precedents that he ever ſaw, were in this Form; and therefore he thought the Declaration good, notwithſtanding this Exception. To the ſecond he ſaid, that in general there might be good Reaſon for there being that Difference between the Form of the Commitments to the one Priſon and to the other. He ſaid he has often heard it ſaid in this Court, that the Marſhal of the King's Bench has no particular Priſon which he is confined to keep his Priſoners in; and Lord Holt declared once, that it extended to the Eaſt Indies. The Marſhal is bound to attend upon and follow the King's Bench wherever it ſits; and to his Perſon the Priſoners are always committed. But the Priſon of the Fleet is local and confined to a certain Place. However, he ſaid there was no Doubt to be made, but if the Commitment is to the Priſon of the Fleet, and the Warden is removed from his Office, the Priſoner muſt be turned over to the Warden's Succeſſor; before he is anſwerable with any Eſcape. That ſhews that the Perſon of the Warden is ſuppoſed to have the Cuſtody of the Priſoners, and not the Walls of the Priſon; for which he thought that the Commitment to the Warden was good in Point of Form. But if it was not, it was at moſt erroneous only, and not void; for which Reaſon, notwithſtanding this Exception, the Gaoler muſt be anſwerable for this Eſcape. Judge Probin declared himſelf to be of the ſame Opinion. But Judge Lee did not ſpeak to theſe Points at preſent; becauſe it was agreed that they were to be argued again.

The

The King *and* Jordan.

When a Perſon is brought up by Habeas Corpus, how far the Court will only remand him.

THE Defendant having been brought up by Habeas Corpus, it appeared upon the Return, that he was committed upon an Indictment of Forgery, which was to be tried in the Country this next Aſſizes. Mr. Kettleby moved in Behalf of him, that he might be turned over to the King's Bench Priſon upon an Information granted againſt him by this Court, Trin. 5 Geo. 2. The Court, upon Inquiry of their Officer, ſaid, that he had appeared and pleaded to that Information; ſo that they had nothing to do with him till Conviction upon it; for which Reaſon they ordered him to be remanded.

Leehill *and* Sir Thomas Reynolds.

Vide ante

MR. Hollins came now to ſhew Cauſe, and ſaid, that the Plaintiff had been under a Neceſſity of bringing continually Actions againſt the Defendant for the Arrears of this Annuity; that ſome of the Arrears recovered by thoſe Actions and the Coſts upon them were not paid to this Day; and therefore he ſubmitted it, that the Court would diſcharge this Rule, unleſs the Defendant would agree to bring into Court the Arrears and Coſts upon thoſe Actions, as well as what was due upon this. For he ſaid, when a Man comes for Equity, he ſhall do Equity. Mr. Feild on the other Side ſaid, that he had no Authority to conſent to ſuch Terms as theſe; and therefore deſired a little Time to talk with his Client. The Court ſaid, they would not make this Rule abſolute, unleſs he would conſent to theſe Terms; accordingly diſcharged it, unleſs he ſhould conſent by to Morrow. Vide poſtea.

Herne *and* Buſhel.

Vide ante 253.

MR. Strange came now to ſhew Cauſe, and ſaid he had the Proceedings in his Hand in a late Caſe, which directly juſtified the Proceedings in the preſent one. It was the Caſe of Thomſon and Lyon, Eaſt. 4 Geo. 2. There this very Attorney Mr. Glover, who made the Affidavit which the preſent Rule to ſhew Cauſe was made upon, made an Affidavit in that Caſe, that an Action was brought in the Marſhalſea for Goods ſold and delivered, to which the Defendant pleaded Non Aſſumpſit; that ſhe gave in Evidence her Coverture upon that Plea, but that the Jury were of Opinion againſt her, and found a Verdict for the Plaintiff; that after this ſhe brought a Writ of Error in this Court, and aſſigned the general Errors, but the Judgment was affirmed; and that notwithſtanding all this ſhe brought a Writ of Error quod coram vobis, wherein ſhe aſſigned the ſame Error in Fact, which ſhe had inſiſted upon for Evidence at the Trial, and was found againſt her. Upon this Affidavit the Court made a Rule to ſhew Cauſe, why the Aſſignment of

Errors ſhould not be ſet aſide; but afterwards the ſame Term, on Mr. Strange's own Motion the Court diſcharged it. Mr. Parker deſired Time to look into this Caſe; accordingly the Rule was enlarged till Monday. Vide Poſtea.

Anonymus.

MR. Lacy moved for a Superſedeas to diſcharge the Defendant out of Cuſtody, upon Account of his laying in Priſon ever ſince Trinity Term laſt, and the Plaintiff's having not declared againſt him during all that Time. Mr. Marſh on the other Side, ſaid he did agree, that the Defendant was arreſted upon a Latitat in Trinity Term laſt, and that he had lain in Cuſtody during that Time, without being ſerved with a Declaration. But from Trinity Term till the Beginning of Hillary he was in the Cuſtody of the Sheriff below, and after that, he was brought up into the Cuſtody of the Marſhal; ſo that though he was in Cuſtody above two Terms, yet in the ſame Cuſtody he was not; and the Words of the Rule of Court, which was made for this Purpoſe, Trin. 2 Geo. 1. are & ſic in Cuſtod' remanebit, which, he ſubmitted it, required, that he ſhould be in the ſame Cuſtody. The Court thought that there was no Weight in this Exception; accordingly granted the Superſedeas.

How far the Court will grant a Superſedeas in order to diſcharge a Perſon out of Cuſtody, by Reaſon of his not being declared againſt in due Time.

Hoskins *and* Squire.

ON Rule to ſhew Cauſe why Judgment ſhould not be arreſted, by Reaſon of the Proceedings being in Latin, whereas it was objected, they ought to have been in Engliſh, by the Statute of 5 Geo. 2. 27. Mr. Draper ſubmitted it, that the Proceedings were very regular. The Declaration he ſaid was of Eaſter Term laſt, which was before the Act took Place. After the Act took Place, the Defendant put in his own Plea in Latin, and all the Proceedings followed that; which he apprehended was very Right, that they ſhould do ſo. Accordingly the Rule was diſcharged.

N. B. The Damages laid in the Declaration were 10 l. thoſe found by the Verdict only 7 l. 2 s. but upon this Point the Court gave no Opinion. Vide Poſtea.

Conſtruction on the Statute of 5 G. 2. 27. which requires that Law Proceedings ſhall be in Engliſh.

The King *and* Cotton.

MR. Hayward now moved this Matter again. The Statute of 18 Eliz. 3. he obſerved, requires that the Juſtices, upon Examination of the Circumſtances of the Caſe, ſhall make ſuch Order therein, as in their Diſcretion they ſhall think fit. A due Examination, he apprehended, could not be made, but on hearing the Parties on both Sides. For which Reaſon, even from the Words of the Act of Parliament, he conceived, a Summons was neceſſary. But the Reſolutions, that have been in this Court, he thought had made it ſo very clearly. In the

Vide ante 241.

Caſe of The King and Gregg, Mic. 13. of the late King, and in that of The King and Holland, Trin. 5 Geo. 2. he did agree that the Court were of Opinion, that a Summons need not appear upon the Face of the Order. But according to the Note that he had taken of thoſe Caſes, the Court declared that if there was no Summons you may complain. And in the Caſe of The King and Allington, and The King and Squire, Hill. 12 Geo. 1. as he took it, the Court did grant an Information for the Juſtice's not ſummoning the Party. Judge Lee ſaid, that in thoſe Caſes of The King and Gregg, and The King and Holland, he did not remember that ſuch Thing was ſaid; and as to the two laſt Caſes, he took it, that what the Court founded themſelves upon there, was, that the Juſtices had returned that they had ſummoned the Party, whereas in Fact they had not; ſo that it was for the falſe Return. However in the preſent Caſe the Court made a Rule to ſhew Cauſe why the Information ſhould not go. Vide Poſtea.

Herne *and* Buſhel.

Vide ante 260.

THIS Matter coming on again, Mr. Parker ſaid he did agree, that in the Caſe that was laſt cited a Writ of Error quod coram vobis was brought after Affirmance of a Judgment upon a Writ of Error. But in that Caſe no Objection was taken that it would not lie; and therefore that Precedent could not be of a great deal of Weight. But in the Caſe of Lamben and St. John, Hil. 12 Geo. 1. it was expreſly determined on his Motion, that a Writ of Error quod coram vobis would not lie after Affirmance of a Judgment of this Court in the Exchequer Chamber; yet there a Remittitur is entered of Record, as ſoon as the Judgment is affirmed, and Execution is awarded in this Court. And the ſame Point he ſaid is held in 2 Lev. 38. 3 Keb. 28. Mr. Strange argued on the other Side, and ſaid, that beſides the Precedent that he had cited on the former Motion, the ſame Point appears in Salk. 337. Sho. 349. Yel. 117. 1 Rol. Ab. 755. He did agree that in Rol. Ab. it is ſaid, that a Writ of Error quod coram vobis will lie in Hibernia; but it appears by the Caſe itſelf, that thoſe laſt Words muſt be a Miſtake; and this is made more plain by the Caſe in Yelv. where the Caſe in Rol. Ab. is reported at large. Judge Lee ſaid, that he thought the material Point to be conſidered was, what Error in Fact the Party intended to aſſign; for theſe Writs of Error quod coram vobis, are not de jure; and it is in the Breaſt of the Court, whether it ſhall be a Superſedeas to Execution. And ſo he ſaid this Point appears in 1 Mod. 285. 1 Ven. 208. in the Caſe of Waller and Stokoe, Carth. 369. and in that of Butler and Luſitanoe, Judge Page and Judge Probyn declared too, that they were of the ſame Opinion. Upon which Mr. Strange ſaid, that then the Rule for taking out Execution was applied for too ſoon; for at preſent they had not aſſigned their Errors, and they did not know what Errors were intended to be aſſigned. The Court then ſaid, that they would not ſuffer this Writ of Error to ſtay the Execution; accordingly the Rule was made abſolute.

Court *and* Gilbert.

A Rule had been made upon Churcher, the Plaintiff's Attorney, to shew Cause why he should not deliver back a Counter-part of a Lease, which the Plaintiff had delivered him, in order to bring an Action of Covenant against the Defendant. Mr. Strange came now to shew Cause, and said that the Attorney had some way lost this Deed by an unavoidable Accident; but that the Plaintiff was not without Remedy; for he might bring a Bill of Discovery against the Defendant, to make him set out, whether there was not such Lease, and what the Lease was. He said he did agree that the Attorney ought to be at the Costs of this Discovery; but yet as the Circumstances of this Case were, he submitted it, the Court would not proceed in this Way against him by an Attachment. Judge Page said that he remembred the Court of Exchequer did proceed in this summary way against an Attorney that had his Pocket picked of the Postea, which he was carrying to Lincoln's Inn. He said that he thought the Attorney himself ought to procure a Discovery of this Deed, by a Bill in Chancery; but on the other Hand, that the Plaintiff should allow him to make use of his Name for that Purpose. Accordingly the Court granted an Attachment against him; but ordered it to lie in the Officer's Hand, till farther Direction given.

When a Client intrusts his Attorney with a Deed, and the Attorney happens to lose it by Accident, how far the Court will grant an Attachment against him.

Bailey *and* Colebourn.

MR. Lacy moved now for Judgment. He said the Court of Common Pleas have had several Cases on this Act of Parliament greatly debated before them, and at last they unanimously resolved that the Plaintiff's Cause of Action should be considered what he himself had laid in his Declaration; accordingly they have given this Judgment in four Cases that have been before them; and he hoped this Court would be of the same Opinion. The Court declared that they thought this a Matter which deserved to be spoke to, when the Court was full. Judge Page said his present Opinion was, that the Judgment ought not to be arrested. This Act of Parliament he said has a Relation to that made in 12 Geo. 1. and by that Statute the Plaintiff's Cause of Action is considered what he shall make Affidavit of before the Arrest. This he thought ought to be the Rule in the present Case. And as the Fact was, that the Plaintiff held the Defendant to Bail, and consequently must have made such an Affidavit, he did not see but he was well intitled to Judgment. Judge Probyn and Judge Lee declared their present Thoughts to be, that the Sum ascertained by the Verdict could only be considered the Plaintiff's real Cause of Action. And Judge Lee said, as this was a Motion in Arrest of Judgment, the Court could only judge upon the Record; for which Reason he did not see that they could any ways inquire into the Fact, whether

Vide ante 177.

ther there was ſuch Affidavit, or not. Accordingly this Matter ſtood over. Vide Poſtea.

Burden *and* Tomlyn.

Vide ante 232.

MR. Jocelyn came now and ſaid he did agree that he had not given Notice; but as the Circumſtances of this Caſe were, he apprehended Notice was not neceſſary. He ſaid he had in his Hand a Rule that was made in Mich. Term laſt, whereby the Court ordered that Judgment ſhould be entered for the Plaintiff. He had another Rule in his Hand made laſt Term, which he agreed was upon his Motion, whereby the Court made a a Rule to ſhew Cauſe, why the Judgment ſhould not be perfected by filling up the Blanks in it, which were left for inſerting the Coſts. And a third Rule, he ſaid, he had in his Hand, whereby the Court ordered that the ſecond Rule ſhould be diſcharged. Theſe he ſaid were all the Rules that had been made in this Cauſe. And as there was a Rule that Judgment ſhould be entred, he apprehended he was now intitled to move for another to ſhew Cauſe, why it is not entred. In that manner he agreed he ought to have moved for his ſecond Rule, and not in the Manner he did. For which Reaſon the Rule that was made at that Time was an improper Rule; and conſequently the Diſcharging an improper Rule could not prevent him now from moving for a proper one. The Court declared that they would make no Rule without Notice; and Judge Probyn ſaid he believed, if Notice ſhould be given, the giving it would be ineffectual.

Anonymus.

Where the Court of King's Bench ſets a Fine upon a Perſon, in what Manner they may direct that the Fine ſhall be diſtributed.

MR. Kettleby moved upon the Petition of Mary Reedwilſon, which was verified by Affidavit, ſetting forth, that ſhe was admitted to ſue in forma Pauperis, to proſecute Cox and Charlesworth, and that they were each of them fined 50 Pounds; whereupon ſhe prayed, that ſhe might have Part of theſe Fines. Accordingly the Court made a Rule, that ſhe ſhould have a third Part of them; and ſaid that the Privy Seal gave them no Power to diſpoſe of any greater Share of them.

The King *and* Purſehouſe.

How far the Court will not grant an Information in Nature of a Quo Warranto againſt an Officer of a Corporation, notwithſtanding he was ſworn into his Office by a Mayor de facto.

ON Rule to ſhew Cauſe, why an Information in the Nature of a Quo Warranto ſhould not be granted againſt the Defendants, for executing the Office of Burgeſſes in the Town of Walſham. Mr. Verney ſaid that the Objection, that had been made againſt ſome of them, was, that they had been ſworn into their Office by one who was Mayor de facto only, and not de jure. He ſaid he did agree, that a Mayor de facto cannot hold corporate Aſſemblies to fill up Vacancies; but as to collateral Acts, ſuch as ſwearing in Officers and the like, he apprehended there was no Pretence to ſay but what he does is legal. Judge Page agreed

to this Diſtinction; but becauſe there were other Objections againſt theſe Officers, the Court made the Rule abſolute.

The King *againſt* The Mayor and the reſt of the Corporation of Eſham.

A Mandamus had been granted by the Court againſt the Defendants, requiring them to go to an Election of capital Burgeſſes. They made no Return to it in due Time; and thereupon a Side-bar Rule had been obtained, requiring them to make one. No Obedience had been paid to that Rule; and thereupon a Rule was obtained to ſhew Cauſe why an Attachment ſhould not go againſt them. The Mayor and four of the Capital Burgeſſes had been ſerved with this Rule, and now their Time was come for ſhewing Cauſe. Mr. Willes was Counſel with theſe five Perſons, and ſubmitted it, that this Rule ſhould be diſcharged, by Reaſon that no Affidavit was produced of Service of the Writ of Mandamus at the Time the Side-bar Rule was obtained; at leaſt he ſaid he hoped it ſhould be enlarged, till all the reſt of the Members of the Corporation were ſerved with this Rule for ſhewing Cauſe why there ſhould not be an Attachment, as well as theſe five. Mr. Strange was of Counſel of the other Side, and ſaid that he had an Affidavit in his Hand, of Service of this Writ of Mandamus upon theſe five Members; and it is not uſual to produce ſuch Affidavit at the Time theſe Side-bar Rules are moved for, or even when ſuch Rule is moved for in Court; it is always thought to be enough that the Affidavit is produced when called for, at the Time for ſhewing Cauſe why there ſhould not go an Attachment. And as to the Rule for ſhewing Cauſe for the Attachment being now deſired to be made abſolute upon an Affidavit of Service of the Rule to return the Writ upon theſe five Members, he ſaid it was very juſt and reaſonable. For the Preſence of theſe five Members is neceſſary, in order to hold a corporate Aſſembly; the reſt of the Corporate Body did meet in Purſuance of the Mandamus, and were deſirous to have obey'd it; but for want of the others attending, nothing was or could be done. The Court in general agreed, that where a Mandamus is ſerved upon all the Perſons to whom it is directed, and where an Attachment is deſired againſt all the Perſons to whom the Mandamus is directed, it is enough to produce an Affidavit of Service of the Mandamus, at the Time for ſhewing Cauſe upon the Attachment; neither is the Affidavit even then neceſſary to be produced, unleſs the other Side calls for it. But in the preſent Caſe, where it appears that the Mandamus is only ſerved upon ſome of the Members, and an Attachment is only deſired againſt theſe in particular, Judge Lee declared that he thought theſe particular Members ought to have an Opportunity of anſwering this Affidavit of the ſpecial Service of the Mandamus on them in particular. Accordingly the Rule was enlarged a few Days for this Purpoſe.

Vide ante, 236

Charleton *and* Bancroft.

How far the Court will make a Rule upon a Perſon to non-proſs his Writ of Error at his own Expence, by Reaſon of his having brought it contrary to his own Agreement.

MR. Agar had obtained a Rule a few Days ago, that the Plaintiff in Error ſhould nonproſs a Writ of Error in Parliament at his own Expence, which he had brought upon a Judgment of this Court againſt his own Agreement. Mr. Abney now moved, that the Court would ſet aſide an Execution, which the Plaintiff in the Original Action had made after this Writ of Error was brought, and before the other Rule was obtained. And accordingly the Court made a Rule to ſhew Cauſe. Vide poſtea.

The King *and* Jeffs.

How far a Perſon may change his Attorney, or not, without the Leave of the Court.

IN an Indictment of Barretry againſt the Defendant, Mr. Strange moved, that the Trial might be put off for a few Days, which the Defendant had given Notice of for the Sittings after Term, by Reaſon that the Proſecutor had for ſome Reaſons changed his Attorney, and at preſent was not able to get the Papers relating to this Cauſe out of the Hands of his former Attorney. Judge Page ſaid, that a Man cannot change his Attorney but by Rule of Court. Mr. Strange agreed he could not in Civil Actions; but in Indictments he ſaid he might. However, as there was no ill Practice aſſigned in the Attorney as a Reaſon for his being changed, the Court refuſed the Motion.

The City of London *and* Sir Fiſher Tenſh.

The Certainty which is required in declaring in an Action of Covenant.

IN an Action of Covenant the Plaintiffs declared, that in Purſuance of the Statute made 5 & 6 W. & M. 10. (5). they granted a Licence by Indenture to Sir Thomas Garrard and Sir Fiſher Tenſh, for erecting Lights within the City, during a certain Term not yet expired; and that in Conſideration thereof Sir Thomas Garrard and the Defendant covenated that they or their Aſſigns would pay to the Plaintiffs the Sum of 400 l. every Year at the Feaſt of St Michael. The Plaintiffs alledged, that Sir Thomas Garrard died on ſuch a Day, and that ſince his Deceaſe there was the Sum of 800 l. due for two Years de redditu prædicto at the Feaſt of St. Michael laſt paſt, which ſaid Sum of 800 l. he ought to have paid at that Day, but did not, to the Plaintiffs Damage, &c. The Defendants by their Plea demand Oyer of the Indenture, and then demur ſpecially, and ſhew for Cauſe firſt, that the Plaintiffs have not alledged, that neither the Defendant nor his Aſſigns did pay this Money at the Day; ſecondly, that the Plaintiffs alledge that 800 l. was due de redditu prædicto, whereas this is no Rent; Thirdly, That the Words of the Declaration are, Which ſaid Sum of 800 l. the Defendant ought to have paid at that Day, whereas 400 l. only was the yearly Payment, and therefore

foꝛe 400 l. only could be ſaid to be due at that Day. In Supꝑoꝛt of the firſt of theſe Objections he cited 3 Cro. 348. Salk. 139. 5 Mod. 133. And in Supꝑoꝛt of the ſecond, he cited Browning's Caſe in Plow. 131. He ſaid farther, that the Indenture ſet foꝛth in the Declaration varied in many reſpects from the Indenture ſet foꝛth upon Oyer; and as theſe Variances might have been taken Advantage of at the Trial upon Non eſt factum, he ſubmitted it, they might be taken advantage of equally upon a Demurrer, though they are not ſpecially aſſigned foꝛ Cauſe of it. The Common Serjeant was of the other Side, and deſired a Day to anſwer theſe Exceptions, which accoꝛdingly the Court gave him. Vide poſtea. 25 - 333

Jury *and* Goodwright.

How far a Perſon may be allowed to pay for the Paper Book, at the Time the Cauſe comes on, or not.

UPON a Writ of Eꝛꝛoꝛ on a Judgment in the Common Pleas, Mꝛ. Parker was offering to take an Exception to reverſe the Judgment, but Mꝛ. Fazakerly on the other Side objected that the Defendant in Eꝛꝛoꝛ had delivered all the Paper Books, and theꝛefoꝛe ſubmitted it, that the Plaintiff in Eꝛꝛoꝛ was not intitled to be heard; accoꝛdingly ꝓꝛayed that the Judgment might be affirmed. Mꝛ. Parker upon that offered now to pay foꝛ them. The Maſter infoꝛmed the Court, that the Pꝛactice of the Court of Common Pleas was to allow the Party to pay foꝛ them in Court as the Counſel is beginning to argue any Matter in the Paper; but in this Court the Pꝛactice is otheꝛwiſe. Accoꝛdingly the Court diꝛectly affirmed the Judgment.

Hughes *and* Winter.

How far Words ſhall be ſaid to be Actionable, notwithſtanding the Uncertainty indiſcribing the Perſons whom the Words were ſpoken of.

IN an Action foꝛ Woꝛds the Plaintiff declared, that William Jennings made his Will in Writing bearing Date on ſuch a Day, and that Anne Bolen, Anna Bolen and the Plaintiff were the thꝛee ſubſcribing Witneſſes, which Will they ꝓꝛoved in the Pꝛeꝛogative Court; and in diſcourſing concerning the ſaid Will, the Defendant ſpoke certain ſcandalous Woꝛds of the Plaintiff, which were ſet foꝛth in the firſt and ſecond Count; and in the third Count the Plaintiff declared, that the Defendant ſpoke the Woꝛds following; They, meaning the Plaintiff and Anne Bolen and Anna Bolen, or ſome of them forged the Will; and they are perjured, and I'll prove them ſo. To the two firſt of theſe Counts the Defendant pleaded Not guilty, and to this laſt demurred. Mꝛ. Kettleby now argued in Supꝑoꝛt of the Demurrer, and ſaid, that he appꝛehended the Woꝛds were not Actionable, by reaſon that it was uncertain, which of the thꝛee Perſons the Woꝛds were ſpoken of. But the Court was of Opinion, that the firſt Woꝛds were only introductive to the ſecond, and that the ſecond contained a poſitive Charge of Perjury againſt them all. Accoꝛdingly gave Judgment foꝛ the Plaintiff.

Osborn *and* Oyle.

Conſtruction on the Statute of 5 Geo. 2. which requires, that Law Proceedings ſhall be in Engliſh.

IN a Writ of Erroꝛ upon a Judgment in the Common Pleas, the Declaration was of Michaelmas laſt, and the Damages laid in it 25 l. Judgment by Default; and on the Writ of Inquiry but 9 l. 15 s. Damages given; yet the Proceedings were in Engliſh. Mꝛ. ſubmitted it, that they ought to have been in Latin, accoꝛding to the Reſolution which the Common Pleas have been of in like Caſes. Foꝛ which Reaſon the Court oꝛdered this Matter to ſtand over, till the Court was full. Vide poſtea.

Ruſſel and Pindel *againſt* Stephens.

When a Perſon is taken upon an Attachment out of the Court of Chancery, and a Bail-Bond is given upon it, how far ſuch Bail-Bond ſhall be ſaid to be good, or not.

IN an Action upon a Bail-Bond the Defendant pꝛayed Oyer of the Bond and Condition; then by his Plea ſet foꝛth the Statute of 23 H. 6. and averred, that the Bond was given by him foꝛ Eaſe and Favour of one Joſhua Draper, oꝛ to be diſcharged from his Impꝛiſonment. The Plaintiffs by their Replication ſet foꝛth, that an Attachment iſſued out of Chancery againſt one Joſhua Draper in a certain Suit there at the Inſtance of a pꝛivate Perſon, that thereupon the ſaid Joſhua Draper was arreſted, and foꝛ his Deliverance the pꝛeſent Bond was given; abſque hoc, that it was given foꝛ Eaſe and Favour of the ſaid Joſhua Draper, oꝛ to be diſcharged from his Impꝛiſonment. To this Replication there was a Demurrer, and the Cauſes ſpecially ſhewn, that the Traverſe contains Matter uncertain and untraverſable, and that the Plaintiffs have not ſufficiently averred their Traverſe. Mꝛ. Filmer now argued in Suppoꝛt of the Demurrer; and ſaid, that though the Concluſion of the Defendant's Plea was in the Woꝛds of the Plaintiffs Traverſe; yet it contained in it double Matter and was uncertain; and theꝛefoꝛe the Iſſue ought to have been joined in ſuch a Manner as that the Traverſe ſhould have been of ſuch Matter only, as ſhould have made it ſingle, and likewiſe certain. He ſubmitted it farther, that the Traverſe was not ſufficiently averred; foꝛ it is in the ſingular Number & hoc paratus eſt verificare, whereas it ought to have been in the Plural, by Reaſon that there was two Perſons joint Plaintiffs; ſo foꝛ the ſame Reaſon the Beginning of the Replication was bad likewiſe, foꝛ it is ab actione ſua præcludi non debet. Foꝛ which Purpoſe he cited the Caſe in Lut. 1529, and the Caſe of The Queen and Ingram, Trin. 11 Anne. There two were indicted foꝛ an Aſſault and Battery; in Arreſt of Judgment it was moved, that the Indictment was uncertain, it being inſultum fecit & verberaver'. The Court held they could give Judgment foꝛ the Battery, by Reaſon of the Woꝛd verberaver'; but Loꝛd Macclesfield agreed it was bad foꝛ the Aſſault. He obſerved farther the Bond ſet out upon the Oyer varied from that ſet out in the Declaration; foꝛ in the Declaration it is alledged, that the Defendant was bound by the Name of George Stephens, Mercator in Holbourn in Com' Mid'; whereas

whereas upon the Oyer, the Words in Com' Mid' are omitted. But beſides theſe Exceptions, which went to the Form only of the Proceedings, he ſubmitted it, that the Bond was void, as being againſt the Statute of 23 H. 6. for as he apprehended, no ſuch Bond could be taken upon an Attachment; and for this Purpoſe cited 3 Leon. 208. 2 An. 122. and the Caſe of Beel and Watford, Mich. 4 Geo. 1. in the Court of Common Pleas. There Mugg was taken upon an Attachment, wherein was the very ſame Form of Words as in the preſent one, to anſwer ſuch Matters as ſhould be objected againſt him; a Bail-bond given upon that, and the Court held it to be void. Mr. Agar on the other Side cited Dy. 364. Salk. 608. to ſhew that the Bond was legal. And Judge Page ſaid he remembred in the Exchequer a Man was held to be bailable upon it. However as this Cauſe was too ſpecial for the laſt Paper-Day, it ſtood over.

Anonymus.

How far a Parſon is not obliged to make out a Copy of a Regiſter.

MR. Abney moved for an Information againſt Mr. Ekyns, Rector of the Pariſh Church of Waiton, and againſt Mr. Bonner, Curate of the ſame Church, for refuſing to give Mr. Dormer Copies of certain Parts of a Regiſter belonging to that Pariſh, and likewiſe for refuſing to give him a Certificate of certain Perſons of the Family of the Dormers being born in that Pariſh. He ſaid that an Ejectment was depending in this Court at the Time this Refuſal was made, and ſtill continues to be ſo, between Mr. Dormer and Mr. Parkerſon and his Wife, concerning certain Lands which the Plaintiff claims as Heir Male of the Dormer Family. Several of that Family were born in the Pariſh of Waiton; and for this Reaſon it was neceſſary to have Copies of ſeveral Parts of the Regiſter, and likewiſe a Certificate of the Birth of many in that Family. Accordingly Mr. Dormer made his Application to the Rector and Curate of this Pariſh for this Purpoſe; and offered to pay him for them; but they refuſed letting him have them; and the only Reaſon which they gave for this Refuſal was, that Mr. Parkerſon and his Wife were the Defendants, and they would do nothing to their Prejudice. Of this Fact he ſaid he had an Affidavit; and for ſuch an extraordinary Denial of Juſtice, he hoped the Court would grant an Information. The Court ſaid, you have a Right to inſpect the publick Books of the Pariſh; but cannot oblige the Rector or Curate to make you out either Copies of thoſe Books, or a Certificate; for which Reaſon they could not grant the Motion. Upon this he changed his Motion, and deſired a Rule to inſpect thoſe Books. The Court ſaid, Motions to inſpect the publick Books of Corporations they grant without an Affidavit; but in Motions to inſpect the publick Books of a Pariſh, an Affidavit is always requiſite. By ſuch Affidavit they ſaid too, it muſt be ſworn, that the Copies of them are neceſſary to be produced in Evidence at a Trial of a Cauſe depending, and likewiſe that the Inſpection of thoſe Books to take Copies has been demanded and refuſed. Now in the preſent Caſe, the firſt Part was ſworn to; but not

the latter; for which Reason the Court refused to make any Rule at present.

Pit *and* Still.

How far the Court will not give Liberty that a Judgment shall be amended.

ON Motion to amend a Judgment entered Mich. 5 Geo. 2. upon a Warrant of Attorney, it was said, the Judgment was entered up, Ideo consideratum est quod Joannes Pit, whereas his Christian Name was William. The Counsel observed that the Declaration was right, and so was the Bill upon the File. Judge Probyn said that Judgments are never amended but in the same Term which they are entered up of; but in Declarations and all other Matters, he agreed the Rule was otherwise. Accordingly the Motion was refused.

Anonymus.

When a Suit is instituted in the Ecclesiastical Court, in order to have the Benefit of a Legacy how far the Courts of Common Law will not grant a Prohibition, but will leave the Party to his Remedy by way of Appeal.

A Residuary Legatee libel'd in the Court of Arches against two Executors for his distributive Share in the Effects of the Testator. The Defendants each of them appeared separately, and gave in separate Inventories. Notwithstanding this the Judge of the Ecclesiastical Court sentenced one of the Defendants to pay to the Plaintiff more than ever came to his Hands according to the Inventory. Upon this, this Defendant put in a Suggestion, in order for a Prohibition, and thereby farther alledged that a Note which he had charged himself with in the Inventory was given by him to the Testator so long ago as 1723, and thereby was barred by the Statute of Limitations. Mr. Wynne now moved that a Prohibition might be granted him; he said it was a known Rule, that in Respect of a Legatee, the one Executor shall answer no farther than Assets come to his Hands; though perhaps in Respect of Creditors he may be answerable possibly even for what comes to the Hands of him, who is Co-executor with him. If this be so, he said, the Sentence against the present Defendant was manifestly unjust. It was a known Rule too, he observed, that the making a Debtor Executor, was a Discharge of the Debt; if the Ecclesiastical Court will not allow such Discharge, he submitted it, that was a sufficient Cause for a Prohibition. Like the Case of their not allowing a Release to be proved by one Witness, or of their allowing that to be Evidence, which is not Evidence by Law. Judge Probyn agreed the two Instances put; but he with the rest of the Court was of Opinion, that the present Matter was Matter of Account only; the spiritual Judge was proper to determine, whether this Defendant ought to be charged with the Note, or whatever other Matter he ought to be charged with. For which Reason the present Motion was refused, and the Party left to his Remedy by way of Appeal.

Turner *and* Moreton.

THIS was a Declaration of Mich. Term laſt, wherein the Damages were laid to 20 Pounds, but the finding of the Jury under 10 Pounds. The Proceedings were all in Engliſh. Mr. Kettleby objected, that they ought to have been in Latin; and for this Cauſe moved in Arreſt of Judgment. He did agree, that moſt of the Exceptions, that had been taken of this Sort, had been the other way; but as the Court had not yet come to a Reſolution concerning what Conſtruction the Statute of 5 Geo. 2. ought to receive, he ſubmitted it, the Court would make a Rule to ſhew Cauſe, which accordingly they did. Vide Poſtea.

Conſtruction on the Statute of 5 G. 2. which requires that Law Proceedings ſhall be in Engliſh.

The King *and* Criſp.

THE Defendant having been brought up by Habeas Corpus, it appeared upon the Return, that he was committed to the County Gaol of Surrey, for Robbery upon the Highway; and now Mr. Burnet took ſeveral Exceptions to the Commitment. The Commitment he ſaid was by Mr. Nichols, a Juſtice of Peace; but it is not ſet forth in the Commitment that he was a Juſtice of Peace for the County of Surrey, and therefore his Authority is not ſhewn, which he had to commit to the Gaol of that County. For this Purpoſe he cited 2 Inſt. 52. His ſecond Exception was, that it does not appear by the Commitment, that the Priſoner was ever brought before the Juſtice; ſo that he might have made out his Commitment in his Abſence, and this, he ſubmitted it, was againſt the Intention of the Statute of 1 & 2 P. & M. 13. (4.) Thirdly, he objected, that the Time is not ſet forth, when the Robbery was committed, which it ought to have been, as appears by Rol. Rep. 192, 218. In the laſt Place he objected, that the Place was not ſet forth, where the Robbery was committed, which ought to have been; becauſe if it was ſuppoſed to be committed in Middleſex, the Priſoner would be intitled to take his Trial at the Old Bailey; which would be ſooner over than any Trial can be at the Aſſiſes. And this, he ſubmitted it, was within the Intention of the Habeas Corpus Act in King Charles the Second's Time. He ſaid farther, that he had ſeveral Affidavits, containing very ſtrong Circumſtances, to ſhew that the Priſoner did not commit the Fact; for which Reaſons he hoped he ſhould be diſcharged, or at leaſt be bailed. Accordingly the Court made a Rule to ſhew Cauſe, why he ſhould not be bailed. The Caſes cited to ſhew that Priſoners have been bailed in ſuch Inſtances were, Latch 12. Sir Tho. Jones 322. Ven. 63. Salk. 104. and 5 Mod. 323. Vide Poſtea.

When a Perſon is committed for Felony, how far the Court will bail him by Reaſon of Defects in the Commitment.

The King *and* The Juſtices of Shrewsbury.

When an Information is moved for againſt a Juſtice of Peace, what ſhall be ſaid to be ſufficient Notice of ſuch Motion.

ON Rule to ſhew Cauſe why an Information ſhould not be granted againſt the Defendants; Mr. Forteſcue ſaid, that the Juſtices had not Notice given them of the Motion, at the Time the Rule for ſhewing Cauſe was applied for; and therefore in Point of Form he ſubmitted it, that it ought to be diſcharged. Mr. Fazakerly on the other Side ſaid, that there had been a former Rule made for ſhewing Cauſe why this Information ſhould not be granted; and at the Time that Rule was moved for an Affidavit of Notice was produced. That Rule was diſcharged merely upon an Exception taken to the Affidavits, that the Commiſſioner whom they were ſworn before, was Attorney in the Cauſe. For this Reaſon he apprehended, that the Notice which the Juſtices have had, is ſufficient; accordingly the Court was of the ſame Opinion. Upon this Mr. Forteſcue ſaid, that the Subſtance of the Charge againſt the Defendants was in the Manner following. A Poor's Rate was made by the Churchwardens and Overſeers of one of the Pariſhes in this Town, and ſigned by two Juſtices; but at the Seſſions for the Town, which were held the 6th of October laſt, the Rate was quaſhed. At the ſame Time the Court of Seſſions quaſhed this Rate, they made an Order upon the Churchwardens and Overſeers to make another by the 24th of that Inſtant, or elſe that they would make one themſelves at that Time. For this Purpoſe they adjourned the Seſſions to a Place called the Exchequer in that Town, where the publick Accounts of the Town are generally ſettled at; and this Adjournment they gave Notice ſhould be on the 24th of that Inſtant before-mentioned. Accordingly four of the Juſtices met at the Exchequer at the Time appointed; they there opened their Seſſions; and becauſe the Churchwardens and Overſeers had not made a new Rate within the Time given them, they made one themſelves; and in that new one left out ten Perſons that were put into the old one; and put in ſeveral Perſons that were not in the old one. By the Cuſtom of this Borough, every one that is rated to the Poor, has a Right to vote for Members of Parliament to repreſent it; and it was ſworn by the Affidavits, which the Rule for ſhewing Cauſe was made upon, that it was believed, the putting theſe ten Perſons out of the new Rate was done with an Intention to hinder them from voting at the next Election. This, Mr. Forteſcue ſaid, was the Nature of the Fact charged upon the Defendants; and the Complaint ariſing from it, conſiſts of two Particulars; firſt, that the Juſtices in their Seſſions have no Authority to make a new Rate; Secondly, admitting they have ſuch Power, that ſtill they ought not to make Uſe of it in ſuch a Manner, and with ſuch Deſigns, as to defeat any of the Inhabitants of their Right of voting at an Election. To the firſt of theſe Points he ſubmitted it, that the Juſtices had no ſuch Power; and for this Purpoſe cited Salk. 483. To the ſecond he had an Affidavit from all the Juſtices, that the old Rate was not a ſuitable one, and that the new one,

to the beſt of their Judgments, was in all reſpects fit and juſt. He did agree, that there were no Negative Words in this Affidavit, that the new Rate was not made with a View to the next Election; but whatever the View was, he ſubmitted it, that as the Rate was ſworn to be fit and juſt, the Court would not inquire into this Matter any farther. Mr. Fazakerly argued on the other Side, and ſaid, that no Rule was better eſtabliſhed, than, where an Appeal is given to the Seſſions, the Application to them cannot be made in the firſt Inſtance. The Reaſon of which is, that if ſuch Original Application was allowed, the Appeal of the Party would be taken away, which would be a manifeſt Injuſtice. He ſubmitted it therefore, that the inſerting thoſe Perſons into the new Rate, which were not in the old one was notoriouſly illegal. This of itſelf was ſufficient Cauſe, he ſaid, to have the preſent Rule made abſolute. But as it is not denied neither, that this Alteration was made with a View to influence the next Election, he ſubmitted it, that was a farther Reaſon, why this Matter ought to receive a ſtricter Examination. The whole Court declared their Opinion, that the Appeal to the Seſſions by any particular Perſon, who was included in the Rate, laid the whole of the Rate open to the Inquiry of the Seſſions; and when they had the Rate before them, they thought the Seſſions had full Authority to make what Alteration in the old Rate they thought proper, and thereby make a new one. Otherwiſe Judge Page ſaid, if they ſhould quaſh the old one, and make no new one, the Poor in the mean Time would be left ſtarving. At leaſt the Court ſaid, they would not determine a Point of Law of this Nature againſt the Juſtices upon an Information. If what the Juſtices have done is illegal, Judge Page ſaid the Party has his Remedy open againſt them by Indictment, or by bringing an Action againſt them for ſo much Money had and received to the Party's Uſe, as they have levied by this Rate. Accordingly the Rule was diſcharged.

The King *and* The Inhabitants of Brackley St. Peters in the County of Northampton.

MR. Fazakerly came now to ſhew Cauſe, why an Order of Seſſions ſhould not be quaſhed, which was made upon an Appeal from an Account delivered in by the Church-wardens of this Pariſh. The firſt Objection to this Order was, that it is recited, whereas the Complainants did lodge an Appeal at the laſt Quarter-Seſſion; but it does not appear, that the Proceedings upon the Appeal at that Seſſions were adjourned to this Seſſions; ſo that there was a Diſcontinuance. To this Mr. Fazakerly anſwered, that he did agree, in thoſe Inſtances, where an Appeal is neceſſary to be made at the next Quarter-Seſſions, the Adjournment of the Proceedings muſt appear in the Recital; for otherwiſe the Juſtices at the ſecond Seſſions do not ſhew, that they have any Juriſdiction. But in the preſent Caſe by the Statute of 43 Eliz. 2. (6). the Appeal may be made Vide ante 228.

at any Time; and therefore, as he apprehended, the Adjournment of the Proceedings need not be ſet forth in the Recital. The ſecond Objection was, that the Time when the firſt Seſſions was held did not appear; which, it was ſaid, was neceſſary; becauſe the Appeal is given only to the Quarter-Seſſions; and the Times for holding thoſe Seſſions are fixed by Act of Parliament. To this he anſwered, that the Time for holding the preſent Seſſions expreſly appears; for it is ſaid to be held on the 18th of April 1732, and the firſt Order is recited to be made at the laſt Quarter-Seſſions; which, he ſubmitted it, was ſufficiently certain. The third Objection was, that the Accounts of Church-wardens as ſuch are not ſubject to the Examination of the Seſſions, though the Accounts of Overſeers are. To this he anſwered, that by this Statute the Church-wardens are made Overſeers; and it ſhall be intended, that this Account of the Church-wardens was in that Capacity. The fourth Objection was, that the Appeal would not lie to the Seſſions from the Accounts of theſe Officers in the firſt Inſtance; but the Application ought firſt of all to have been to particular Juſtices. To this he anſwered, that the 6th Sect. of 43 Eliz. gives the Appeal either from the Act done by the Overſeers or from the Act done by the particular Juſtices, according to the Party's Election. The laſt Objection, that was much relied upon, was, that the Complaint to the Seſſions aroſe from one particular Diſburſement chiefly of 11 l. and 5 d. in the Proſecution of a Law-Suit; and this Diſburſement the Juſtices have ordered to be ſtruck out of the Account. Now it was inſiſted upon, that the Juſtices have no Power to order an Account to be defaced in that manner. To this he anſwered, that the Meaning of this Expreſſion only was, that this Sum of Money ſhould not be allowed the Officers in their Account. The Court thought that theſe Objections required ſome Conſideration; for which Reaſon this Matter was ordered to ſtand over. Vide poſtea.

Charleton *and* Bancroft.

Vide ante 266.

MR. Abney moved now, that the Rule for ſetting aſide the Execution might be made abſolute. Mr. Agar oppoſed it; becauſe the Execution was executed on the Monday after the Rule was made for nonproſſing the Writ of Error, and the Plaintiff in Error was preſent in Court at the Time that Rule was obtained. However the Court ſaid, inaſmuch as the Writ of Error was not actually nonpros'd at the Time of the Execution, the Execution was certainly irregular; accordingly made the Rule abſolute. And in this Caſe Judge Page ſaid, that a Writ of Error is a Superſedeas not from the Sealing of it, but from the Allowance of it.

Darbey *and* Gould.

MR. Fazakerly informed the Court, that the Poſtea in this Caſe was loſt by ſome unavoidable Accident, and ſaid, that he had an Affidavit to produce, that the Record of Niſi prius agreed with the Roll; for which Reaſon he moved, that the Plaintiff might have Liberty to make up a new Record of Niſi prius agreeable to the Roll. The like Motion he ſaid was allowed in Ven. 92. in the Caſe of King qui tam and Bolton, Hil. 5 Geo. 1. and in that of Needham and Grenham, Trin. 9 Geo. 1 Accordingly a Rule was made to ſhew Cauſe. Vide poſtea. Vide ante

The King *and* Pixley.

THE Defendant having been brought up by Habeas Corpus, Mr. Marſh moved, that he might be bailed, the only Commitment returned upon it being upon 6 Geo. 1. 21. The Attorney General oppoſed it; becauſe ſince the taking out the Habeas Corpus the Priſoner has been charged with other Commitments upon the Statute of 8 Geo. 1. 18. (6). which makes this Offence of oppoſing Cuſtom-houſe Officers in the Execution of their Office in ſome Circumſtances Felony. The Court ſaid thoſe other Commitments muſt be returned upon the Habeas Corpus, otherwiſe they cannot take Notice of them; and accordingly gave Leave, that the Return might be amended in this Reſpect whilſt the Court was ſitting. The Attorney General came into Court again ſoon after, and ſaid that he was afraid the amending this Return would be to little Purpoſe. For the Habeas Corpus is directed to Mr. Bence High Sheriff of the County of Suffolk to bring up the Body of this Pixley; now the Commitment that is returned, is the only Commitment that the Priſoner is charged with in his Cuſtody. This other Commitment for Felony was made by a Juſtice of Peace for the Borough of Ipſwich only, and that Commitment was directed to the Keeper of the Gaol for that Borough. Under this Commitment the High Sheriff has nothing to do with the Priſoner; though the Fact happens to be, that one and the ſame Priſon ſerves both for the County at large and this particular Borough, and the ſame Perſon is Gaoler in both Capacities. For which Reaſon, he ſubmitted it, that the Court would order the Priſoner to be remanded at preſent, in order that a new Commitment may be made out by the Juſtice of Peace for the County at large upon this Statute of 8 Geo. 1. and that then this new Commitment may be added to the Return. Judge Page ſaid, that he never knew a Priſoner remanded for ſuch Purpoſe as this. Upon this the Attorney General ſaid, that upon this Habeas Corpus the Priſoner could certainly not be intitled to be diſcharged out of the Gaoler's Cuſtody. The Priſoner ought to have obtained two Habeas Corpus's, one to the Gaoler as Keeper of the Gaol for the County at large; another to him as Keeper of the Gaol for this particular Borough. Vide ante 143.

He ſaid too, that he had not ſufficient Notice given him of the Bail. Accordingly the Court ordered the Priſoner to be remanded. Vide poſtea.

Fitch and Goddard *againſt* Still.

MR. Huſſey now moved this Matter again, and cited 3 Cro. 865. Hob. 327. Ven. 217. and Raym. 39. to juſtify the Amendment. Accordingly the Court made a Rule to ſhew Cauſe.

The King *and* Criſp.

Vide ante 271.

MR. Burnet now moved to make the Rule abſolute. He ſaid, in the Examination taken by Mr. Nicholas, the Juſtice of Peace who made the Commitment, it was ſworn that two Perſons joined in committing this Robbery, one of which was the Priſoner. Now he had ſince the laſt Motion got other Affidavits, whereby it was ſworn, that two other Perſons had been committed for this very Robbery, and that they had confeſſed the Fact. The Court accordingly ordered theſe Affidavits to be read, and upon the whole Matter admitted the Priſoner to Bail. He himſelf was bound in a Recognizance of 200 l. and four other Perſons juſtified themſelves each in the Sum of 100 l.

Leehill *and* Sir Thomas Reynolds.

Vide ante 253.

THIS being an Action of Covenant upon an Indenture, of which the Defendant had a Counterpart, the Defendant did not demand Oyer of the Plaintiff, but ſet out the Oyer himſelf according to the Counterpart of the Deed, and then demurred to the Declaration. A few Days ago Mr. Hollins obtained a Rule to ſhew Cauſe, why this Demurrer ſhould not be ſet aſide. Mr. Marſh came now to ſhew Cauſe, and ſubmitted it, that by the Practice of the Court where there are Counterparts of Deeds, the Defendant has this Privilege of ſetting out Oyer according to his Counterpart, and if he ſets it out Wrong, on Complaint to the Court they will ſet it aſide. But in the preſent Caſe there was no Pretence to ſay, that the Oyer was ſet out untruly. He obſerved farther, that was a general Demurrer to the Declaration, and therefore, admitting that it was wrong, he apprehended the Court would not ſet it aſide upon Motion. The Maſter informed the Court, that he knew of no ſuch Practice; and the Court ſaid they took the Oyer ſet out to be manifeſtly irregular; accordingly made the Rule abſolute.

Anonymus.

When a Perſon practices as an Attorney in an inferior Court, without being qualified according to 2 Geo. 2. how far the ſuperior Courts will not grant an Attachment againſt him.

A Motion was made for an Attachment againſt a Man for Practiſing as an Attorney in the County Court, not being regularly admitted according to the Statute of 2 Geo. 2. The Court ſaid, if this Man had practiced in their Court, it would have been a Contempt in him, and they ſhould have granted an Attachment; but as he has practiced in another Court, it is only a Contempt in him to that Court. For which Reaſon they refuſed the Motion, and left him to be proſecuted for the Penalty, as the Act directs.

Term. Mich. 6 Geo. 2. 1733.

Beech *and* Johnſon.

THIS Matter coming on again the Caſe of Gardiner and Merret was cited, where the Court amended ſuch Writ of Error Ex Officio; accordingly they did ſo in the preſent Caſe. Ex relatu. Vide ante 186.

Waſher *and* Smith.

THIS Matter coming on again, Mr. Marſh cited 2 Ven. 195. and Mr. Filmer cited 2 Ven. 180. The Court was clearly of Opinion, that in the Caſe where de ſon aſſault demeſne is pleaded, the Plaintiff is intitled to his full Coſts, provided he has a Verdict. But Judge Lee ſaid, that the Rule is not, that the Plaintiff ſhall be intitled to full Coſts in all theſe Actions of Treſpaſs, where there is ſpecial Pleading; and particularly cited the Caſe of Philpot and Jones, Hil. 1 Geo. 1. In Treſpaſs there for breaking the Plaintiff's Houſe, the Defendant juſtified as Bailiff under Proceſs; the Plaintiff replied, that his Doors were ſhut; upon which Iſſue was joined; Verdict found for the Plaintiff, and Damages 2 d. Motion was in that Caſe for full Coſts; but the Court refuſed it. Ex relatu. Vide ante 180.

Baily *and* Colebourn.

Vide ante. 263.

MR. Lacy came now to ſhew Cauſe, and ſaid, that this Action was begun before the Time that the Act was made that has been mentioned. For which Reaſon it was pretty extraordinary to ſuppoſe the Legiſlature intended, that Part of the Record ſhould be in Latin, Part in Engliſh. Beſides he ſaid, admitting that this Action had begun after the Act of Parliament, yet it would be very Miſchievous, that the Event of a Verdict ſhould determine, whether the Proceedings before were regular or not. But the Chief Juſtice ſaid, that as to the firſt Objection he thought it had very little Weight with it, by Reaſon that there are Numbers of Precedents in the Treaſury of Records that are Part Latin, Part Engliſh. And as to the ſecond Objection, he ſaid the Legiſlature muſt have intended ſomething by the Act which they made. But if it ſhould be in the Power of Plaintiffs to take their Caſe out of the Act, merely by laying their Damages above 10 l. the Act would be wholly eluded. However this Matter was ordered to ſtand over. Ex relatu. Vide poſtea.

Term. Trin.

6 Geo. II. 1733.

Anonymus.

When a Matter is forbidden by a Statute, and a Penalty given by it, how far the Court will not grant an Information, but will leave the Party to take his Remedy for the Penalty in the Manner which the Statute preſcribes.

MR. Gapper moved for an Information againſt Churchey, for acting as Juſtice of Peace in the County of Somerſet, without having a clear Eſtate of 100 Pounds per Annum, according to the Direction of the Statute of 5 Geo. 2. 18. The Court was of Opinion in the firſt Place, that the Affidavit which the Motion was made upon, was not certain enough; and beſides if it had, they ſaid, they ſhould not have granted an Information for this Offence; becauſe there is a Penalty given by the Act, for which an Action will lie; or as Judge Lee ſaid, an Information may be brought for that Penalty of Courſe, without the Aſſiſtance of the Court. Accordingly the Motion was refuſed.

Langfield *and* Walmeſly.

How far the Court will ſtay Proceedings, by Reaſon of a Defect in the Writ which the Defendant was ſerved with.

SErjeant Cummins moved to ſtay the Plaintiff's Proceedings, there being no Cauſe of Action in the Writ; the Writ requiring the Defendant to anſwer the Defendant, and not the Plaintiff, ſuch a Complaint. Accordingly the Court made a Rule to ſhew Cauſe; and afterwards on Affidavit of Service made it abſolute.

Shepherd *and* Crawford.

How far the Court will give Leave that a Trial ſhould be put off a ſecond Time.

THE laſt Term Mr. Strange obtained a Rule for putting off a Trial in this Cauſe till this Term, by Reaſon of ſome of the Defendant's Witneſſes being gone a Voyage to the Weſt-Indies. Mr. Strange now moved upon the ſame Affidavits, that the Trial might be put off till next Term; and ſaid that by the Rules of the Court upon one Motion, a Trial is never put off but for one Term. Accordingly a Rule was made to ſhew Cauſe. Vide poſtea.

— *againſt*

——— *againſt* Pether and Ling.

When Nul tiel Record is pleaded, what ſhall not be ſaid to be a Failure of the Record.

IN Debt upon a Recognizance againſt Bail, the Plaintiff declared, that the Defendants John Pether and —Ling became bound in a Recognizance with Condition, that one James Cook ſhould either ſurrender himſelf or ſhould pay the Money that ſhould be recovered againſt him. The Defendants pleaded Nul tiel Record. And this being the Day given the Plaintiff to verify his Record, Mr. Marſh ſubmitted it, that the Record produced varied from the Record which was declared upon; for in the Record produced John Pether is bound by the Name of John Pether of Baterſey in the County of Surrey, Husbandman, whereas in the Record declared upon, there is no Addition at all; but only John Peter generally. Judge Page and Judge Probyn agreed that if the Addition had been inſerted in the Declaration, and omitted out of the Recognizance, the Variance would have been fatal. But as it is, the Court was of Opinion, that it was no Variance; accordingly Judgment was given for the Plaintiff.

The King *and* Taylor.

Vide ante 238.

MR. Strange came now to ſhew Cauſe, and ſubmitted it, that the Judgment of Ouſter was warranted, as well as the other Part of it for fining the Defendant. He obſerved, that the Judgments in Actions were not variable, according to the Diſcretion of the Judge, but fixed and certain in all Caſes. So fixed and certain he ſaid they were, that if it ſhould happen at any Time that they are entred up otherwiſe, even the Party himſelf, in whoſe Favour the Variation is made, may reverſe the Judgment for that Reaſon. For this Purpoſe he cited Salk. 633, 511. Com. 277. and Skin. 524. In the preſent Information in Nature of a Quo Warranto, as well as in a Quo Warranto itſelf, he conceived, that the Judgment appointed by the Law was, that the Defendant ſhould be ouſted as well as fined; and the Defendant by confeſſing in one Part of his Defence, and juſtifying in the other, ſhall not alter the Form of the Judgment. He obſerved that if there was any Doubt of this at Common Law, the Statute of 9 Ann. 20. (5.) has made this clear beyond Queſtion. The Words of the Act were indeed only, That the Court ſhall and may give ſuch Judgment; but it is well known that thoſe Words are always conſtrued the ſame as muſt. The Caſe of The King and Pendar, Paſch. 10 Geo. 1. he ſubmitted it, was very applicable to the preſent one. That was an Information againſt the Defendant in the Nature of a Quo Warranto, for executing the Office of Mayor of Penrin in the County of Cornwal. The Defendant juſtified, as being elected and ſworn into that Office. The Jury found that he was elected, but not ſworn. The Court was of Opinion in that Caſe, that Judgment of Ouſter ſhould be entered againſt him, which was done accordingly. Notwithſtanding this, he obtained a

Mandamus to be ſworn in. The Judgment of Ouſter was returned to the Mandamus, and the Court held it to be a good Return. Two Writs of Error were brought upon theſe Judgments in the Houſe of Lords; the firſt Judgment was affirmed; and the Court held that a Writ of Error would not lie upon the other; and accordingly the ſecond Writ of Error was quaſhed. Some other Counſel of the ſame Side ſubmitted it, that the Court never interferes themſelves in giving Directions about entring up the Form of the Judgment; but leaves the Party to enter it at his Peril. If he enters it wrong, the ſuperior Court will reverſe it. They ſaid farther, that this Judgment was entred up in Hilary Vacation; the Vacation is always conſidered as Part of the precedent Term; and yet no Application was made to the Court about amending this Judgment, till the firſt Day in Eaſter Term after. They ſubmitted it to be a known Rule, that Judgments are never amended but in the ſame Term in which they are entered up; and therefore they hoped the Rule ſhould be diſcharged. Mr. Wills argued on the other Side, and ſaid he did agree that the Court will not direct the Party what Judgment he ſhall enter up; ſo far his entering up his Judgment is at his Peril; but yet he believed it was never imagined, but if the Party enters up a wrong Judgment, the Court will ſay that is not their Judgment, and will order another Judgment to be entered. To the ſecond of theſe Exceptions he did agree, that in many Reſpects the Vacation is conſidered as Part of the Term precedent; but yet it would be very extraordinary, that this Fiction ſhould deprive the Party of his juſt Right in applying to the Court the firſt Day in which he poſſibly could apply. The principal Queſtion then, he ſaid, would ariſe concerning the Form of the Judgment itſelf. Before the Statute of 9 Ann. he obſerved, it was far from being a clear Point, that Judgments of Ouſter could ever be entred up in Informations in the Nature of a Quo Warranto. Lord Chief Juſtice Holt declared his Doubts of it often. To ſettle theſe Doubts, was the Statute of Ann. made. And in general he ſaid he ſhould agree that Judgment of Ouſter muſt be entred upon them; but if ſuch Judgment muſt be entered in the preſent Caſe, it muſt be taken for granted, that when once a Perſon exerciſes an Office without Authority, ſo long as he does ſo, he is incapable of having a rightful Election; if he is capable of it, the Form of the preſent Judgment muſt be wrong. And he obſerved, it was certain that Judgment of Ouſter has not always been entered upon theſe Informations ſince this Statute. In the Caſe of The King and Hicks, Hil. 5 Geo. 1. the Defendant's Office determined before the Time for entring up the Judgment was come; and he was only fined for the Uſurpation. So in Ejectments, if the Term runs out before the Time for giving Judgment, the Party may indeed take Judgment for the Damages, but cannot have Judgment for the Term, but upon firſt applying to the Court to enlarge the Term laid in the Declaration. And as to the Caſe of The King and Pendar, his Exerciſe of that Office was for the whole Time illegal, and therefore could not be reſembled to the preſent one. Mr. Draper ſaid too, that there were Inſtances to be produced of the Par-

ty's having diſtinct Judgments by ſevering in this Manner in his Juſtification, and for this Purpoſe cited 2 H. 7. 11. and 2 Roll's Abr. 124. Accordingly for theſe Reaſons the Court in the preſent Caſe made the Rule abſolute.

The King *and* Cotton.

Vide ante 261.

SErjeant Corbet and Serjeant Baynes came now to ſhew Cauſe upon this Rule. In Caſe of Convictions they did agree, that the Party muſt be ſummoned before he is convicted, and ſuch Summons muſt appear upon the Face of the Conviction. But in the Caſe of Orders they ſubmitted it, that the Rule of Law was otherwiſe. In Orders of Baſtardy, as well as in Orders of Removal, they obſerved, it was well known, that it is ſeldom ſet out in the Order, that the Party was ſummoned; and the Order is never quaſhed for this Reaſon. In Orders of Removal the Pariſh, on whom the Order is made, in Fact is never ſummoned, nor does the Law ſuppoſe them to be ſo. A Warrant, they ſaid, by Law can never iſſue, unleſs there is a previous Summons; and they apprehended, it would be a Matter of dangerous Conſequence to have it once eſtabliſhed for Law, that the Party muſt be ſummoned; for if ſo, he would always run away and leave the Child to be maintained by the Pariſh. But admitting the Court ſhould be of Opinion, that in Strictneſs the Law did require a Summons or Warrant in theſe Caſes; yet ſtill they apprehended for ſuch a meer Miſtake in Judgment the Court would never grant an Information. Mr. Abney and Mr. Hayward argued on the other Side. They ſaid, an Order was in itſelf a complete Judgment; and they conceived, that the Rule of natural Juſtice required, that no Man ſhould have a Judgment paſs againſt him, without having an Opportunity of being heard againſt it. They did agree, that no Summons need appear upon the Face of theſe Orders; but the Reaſon given by the Court in thoſe Caſes is, that it is meer Matter of Proceeding before the Juſtices, and they will intend there was one. Mr. Abney ſaid he had looked upon his Notes of the Caſe of The King againſt Squire and Ellington, that was mentioned upon the former Argument; and he had taken the Fact to be in this Manner. One of thoſe Defendants was Mayor, the other a Juſtice of Peace of the Town of Hartford. They had made a Conviction upon one Venables for keeping a diſorderly Alehouſe. This Conviction was removed up by Certiorari, and one Exception taken to it amongſt others was, that it did not appear the Party was ſummoned. The Anſwer given to that Exception by the Court was, that they would intend he was ſummoned; and that Conviction was confirmed. After this an Information was moved for againſt thoſe two Defendants Squire and Ellington upon Affidavits, that they had never ſummoned the Party; and the Information was granted. Judge Page and Judge Probyn ſaid, that they believed it might be true, that the Party need not have a Summons ſent him in theſe Caſes for the Danger of his running away, if he had ſuch previous Notice

given him. But when a Baſtard Child is born in a Pariſh (as it muſt be in all Caſes before the Juſtices can at all examine into the Fact) and when Oath is made by the Mother of it, that ſuch a one is the Father of the Child; they declared their Opinions to be, that then the Law clearly juſtified the Juſtice of Peace in iſſuing out his Warrant to apprehend the Party, and that it was illegal in the Juſtices to make an Order upon him, till ſuch Warrant iſſued and returned. They ſaid, they thought that natural Juſtice required this, and that if ever ſuch Complaint ſhould come before the Court again for a Juſtice's making an Order of Baſtardy upon a Man, without giving him an Opportunity to be heard, they ſhould certainly be for granting an Information. But as this was the firſt Time, that they had ever remembered a Complaint of this Sort to come before the Court; they thought the preſent Rule ought to be diſcharged. Judge Lee ſaid, in Convictions he did agree it was neceſſary that the Party ſhould have an Opportunity to be heard, before the Conviction is made upon him; and the Court requires, that it ſhould appear upon the Face of the Conviction, that the Party had ſuch Opportunity given him; but in the Caſe of Orders, or of Convictions for keeping an Alehouſe without a Licence, which are in the Nature of Orders, he doubted whether this was neceſſary. The Reaſon why this muſt appear upon the Face of the Conviction, could not be, he ſaid, becauſe the Party has no Benefit of Appeal given him; for in thoſe Inſtances where an Appeal is given by Act of Parliament, this muſt appear upon the Face of them. So that the true Reaſon, why in the Caſe of Convictions this muſt appear, and in the Caſe of Orders this need not, he took to be, that in the one Caſe it was neceſſary, in the other Caſe it was not. As to the Caſe of The King againſt Squire and Ellington, he took it, that the Reaſon, why the Information went againſt them, was, becauſe they had ſet out in the Conviction, that Venables was ſummoned, whereas in Fact he was not. And ſo Mr. Strange and Mr. Maſterman ſaid, that they remembered that Caſe was. Accordingly the Rule was diſcharged.

The King *and* Butler.

How far Notice muſt be given to the Commiſſioners of Sewers before the Court will make even a Rule to ſhew Cauſe.

MOTION was made for a Certiorari to remove up ſome Orders of Sewers, and Affidavits were produced, that the removing them could be of no Prejudice. But, becauſe there was not likewiſe an Affidavit of Notice of the Motion given to the Commiſſioners, the Court refuſed to make even a Rule to ſhew Cauſe.

Rule to ſhew Cauſe why a Certiorari ſhould not be granted to remove up an Order of their.

Anony.

Anonymus.

How far an Information cannot be moved for against a Mayor, unleſs Notice is given of the Motion.

ON Motion for an Information againſt the Mayor of Eſham for not holding a Court-Leet and Seſſions of Gaol-Delivery in Purſuance of the Charter, Judge Probyn ſaid, that the Mayor was a Juſtice of Peace by the Charter, and therefore Notice ought to be given of the Motion. Mr. Lacey agreed it, if the Information had been moved for againſt him for any Omiſſion of his Duty as Juſtice of Peace; but as it is for an Omiſſion of his Duty in his publick Capacity as Mayor, he ſubmitted it to be otherwiſe. However the reſt of the Court concurred with Judge Probyn; accordingly the Motion was refuſed.

Homes and others *againſt* Mendes Cæſars.

When an Affidavit is made in Order to hold a Defendant to ſpecial Bail, how far ſuch Affidavit ſhall be ſaid to be certain enough, or not.

IN an Action brought by the Plaintiffs as Aſſignees of a Commiſſion of Bankrupcy, Mr. Strange moved, that the Defendant might be diſcharged out of Cuſtody upon Common Bail, the Affidavit, on which he was held to Special Bail, being not certain enough. The Exception taken to the Affidavit was, that the Plaintiffs had only ſworn that the Defendant was indebted to them in the Sum of 678 l. as appeared to them by the Books of the Bankrupt. He ſaid the Court granted the like Motion laſt Term in the Caſe of Innys and Sinclair. Accordingly a Rule was made to ſhew Cauſe. Vide poſtea.

Trevilcock *and* Harvey.

For what Errors a common Recovery ſhall be reverſed.

ON Writ of Error to reverſe a Common Recovery, the Error aſſigned was, that the Vouchee died between the Teſte of the Summoneas ad Warrandizandum and the Return. Mr. Agar, Sen. was of Counſel with the Plaintiff in Error, and no Body on the other Side. Accordingly the Court reverſed it.

Richardſon *and* Roynes.

How far the Court will direct that certain Counts ſhall be ſtruck out of a Declation, by Reaſon of their being unneceſſary.

IN an Action upon the Caſe the Plaintiff had laid in his Declaration ſeven Counts, ſome for Buſineſs done as an Attorney, others for Money lent; but four of them were exactly to the ſame Purpoſe with the other three; upon which Mr. Draper moved, that thoſe four Counts might be ſtruck out of the Declaration. Accordingly the Court made a Rule to ſhew Cauſe, and afterwards it was made abſolute.

Weel *and* Smith.

How far a Writ of Error quod coram vobis ſhall not be ſaid to be a Superſedeas till Bail is given to it.

MR. Agar moved to ſet aſide an Execution, for its being taken out after a Writ of Error quod coram vobis allowed; and likewiſe for its being ſued out by a wrong Name. The Court accordingly made a Rule to ſhew Cauſe. But Judge Lee ſaid, it deſerved to be conſidered, whether a Writ of Error quod coram vobis was a Superſedeas till Bail given. Vide poſtea.

Anonymus.

When a Prohibition is moved for, how far a Copy of the Libel ſigned by the Deputy Regiſter of the Eccleſiaſtical Court, ſhall be ſufficient to be laid before the Court above without an Affidavit that it is a true Copy.

ON Motion for a Prohibition the Libel was produced ſigned by the Deputy-Regiſter; but Judge Page doubted, whether there ought not to have been an Affidavit of its being a true Copy. Mr. Munday ſaid, that the Courſe of the Court was to allow ſuch Copy of a Libel without an Affidavit. Accordingly a Rule was made to ſhew Cauſe.

The King *and* The Inhabitants of Worceſterton.

Vide ante 247.

THESE ſame Orders, which the Court had been of Opinion before were bad, but that they were not properly before them by Reaſon of the Defect in the Certiorari, were now removed up again by a proper Certiorari. Mr. Wirley ſubmitted it, that the Court would not allow theſe Exceptions to be argued again, and therefore that the Orders ſhould be quaſhed without making a Rule to ſhew Cauſe. The Court ſaid theſe Orders are removed by a new Certiorari, and therefore they muſt make a Rule to ſhew Cauſe, which they accordingly did.

Damon *and* Jollieffe.

When a Cauſe of Action ariſes in a Place that is a Town and County of itſelf, how far the Court will not change the Venue into the County next adjoining, notwithſtanding they cannot change it into the Town and County.

MR. Bancks moved to change a Venue from Hampſhire to Dorſetſhire, upon an Affidavit that the Cauſe of Action aroſe in Pool, which is a Town and County of itſelf, and Part of Dorſetſhire. He agreed, that by the Rules of the Court it could not be removed to Pool; but ſubmitted it, that it well might into the County at large. The Court made a Rule to ſhew Cauſe; but ſaid, that a Town and County is no Part of the County at large; and therefore they ſhould not make it abſolute, but upon Conſent. Vide poſtea.

Martin *and* Mutfield.

When a Writ of Error is brought, in order to reverſe an Outlawry, how far the Court will reverſe it, notwithſtanding the Plaintiff in Error does not appear to the original Action.

UPON a Writ of Error brought to reverſe an Outlawry, Mr. Denniſon moved, that the Plaintiff in Error might appear to the original Action, and that in the mean Time, Proceedings in this Writ of Error ſhould be ſtayed. Where a Writ of Error is brought to reverſe an Outlawry for Want of Proclamations, he obſerved, that ſuch Appearance was requiſite by the expreſs Words of the Statute of 31 Eliz. 3. before the Writ of Error ſhall be allowed. The Statute of 4 and 5 W. & M. 18. provides generally concerning the Reverſal of Outlawries, upon any Exception whatſoever; and by the Authority of Carth. 459. Bail muſt be given to the original Action, upon bringing the Writ of Error. Mr. Strange on the other Side ſaid he did agree, that the Plaintiff in Error muſt appear to the original Action before the Outlawry ſhall be reverſed; but he conceived there was no Reaſon why the Plaintiff ſhould not proceed, in order to reverſe it, without entring ſuch Appearance. In Caſes of Orders of Baſtardy removed up by Certiorari, he did agree the Court will not quaſh the Order, till the Party enters into a Recognizance to appear at the Seſſions; but yet he ſaid it is well known that the Party may take his Exceptions to the Order, and have the Opinion of the Court upon them, before he enters into ſuch Recognizance. The Court were of the ſame Opinion; accordingly the Motion was refuſed. Vide poſtea.

Huſt *and* ——.

How far the Court will not ſet aſide a Plea of Outlawry, by Reaſon that it is pleaded in Bar.

IN an Action upon the Caſe for Goods ſold and delivered, the Defendant pleaded Outlawry of the Plaintiff, and concluded his Plea in Bar, but did not plead the Outlawry ſub pede ſigilli. Mr. Field moved to ſet this Plea aſide; but the Court refuſed the Motion, becauſe the Outlawry was pleaded in Bar.

Shepherd *and* Crawford.

Vide ante. 279.

MR. Field ſhewed now for Cauſe, that the Defendant had not paid the Coſts, which the Court directed to be paid on putting off the Trial before. Mr. Strange ſaid, that by the Rules of the Court the Plaintiff ought to have delivered a Bill of Coſts, and to have gone before the Maſter to get it ſettled, neither of which he had done; accordingly the Rule was made abſolute.

The

The King *and* Fuller.

THIS was a Conviction which came on in the Paper, for selling Brandies and other diſtill'd Liquors without Licence. Mr. Draper obſerved that there was three Statutes which related to this Matter; one, that of 12 and 13 Will. 11. (18.) another, that of 1 Ann. 14. and a third, that of 2 Geo. 2. and to this Conviction he begged Leave to take ſeveral Exceptions. Firſt, that it is not ſaid in whoſe Behalf the Complaint was made, whether in Behalf of the Poor of the Pariſh, or in Behalf of the Informer himſelf; and the Penalties given by the Acts are diſtinct in theſe Caſes, viz. 50 Pounds, if the Complaint is in Behalf of the Poor, 40 Shillings only, if in Behalf of the Informer himſelf. Secondly, that it is indeed ſaid that the Defendant undertook to ſell theſe Liquors without Licenſe, but not that he did ſell them without it. Thirdly, That it is indeed ſaid that he did ſell them, but not that he had no Licenſe for that Purpoſe. Fourthly, that it is ſaid he ſold by Retale, without ſaying by what Meaſure; for this Purpoſe was cited the Caſe of Aſtall qui tam and Andrews, Mich. 13 Geo. 1. and it was obſerved, that ſince the Statute of 2 Geo. 2. this was more eſpecially requiſite; becauſe by that Act any Perſon may ſell under a Gallon, without Licence. Fifthly, that it is ſaid the Defendant ſold theſe Liquors to be drank in his Houſe, and not ſaid that they were drank there. Upon one of the Game Acts, a Conviction was made for keeping a Greyhound, without ſaying that the Greyhound was made uſe of in deſtroying the Game. That Conviction was removed up by Certiorari and quaſhed; yet the Words of the Act there only are are, ſhall keep or uſe. Sixthly, that it is ſaid the Defendant was ſummoned, without mentioning by whom; and in real Actions Experience ſhews, that this is neceſſary. Seventhly, that it is not ſaid that Oath was made, that the Party was ſummoned. Eighthly, that it does not appear when or where the Conviction was made. The Information was given, and Evidence examined upon it in one Day, and then the Matter was put off. Laſtly, that it is not ſaid to whom the Forfeiture is to be paid. As to the ſixth and ſeventh Exceptions, the Court ſaid that the preſent Conviction is in the ſame Manner that all others are. To the fifth, Judge Page ſaid that he remembred the Caſe cited, and that it was determined ſo in Lord Holt's Time. But Judge Probyn inclined to be of Opinion, if a Man was to keep Nets in his Houſe, that that might be ſufficient to convict him. Upon the whole, the Court made a Rule for quaſhing the preſent Conviction, unleſs Cauſe. Vide poſtea.

When a Conviction is made for ſelling diſtilled Liquors without a Licenſe, what ſhall not be ſaid to be a good Conviction of that Sort.

The

The King *and* The Truſtees of the Kingſton Turnpike.

Vide ante 228.

THIS Matter coming on again, Mr. Fazakerly and Mr. Strange took ſeveral Exceptions to this Order made by the Juſtices. They ſaid they conceived that the Notice in this Caſe was given too early. The Juſtices had no Juriſdiction over this Cauſe, nor was there any Matter before them, till the Complaint that was made the 6th of July laſt. The Notice therefore was not to be regarded, being given before that Time. They ſaid that no Oath appeared neither to have been made of this Notice, and that was another Exception to it. In all theſe Proceedings they apprehended likewiſe, that Notice of itſelf is not ſufficient; but there ought to be an actual Summons ſerved upon the Party to attend, which was intirely omitted in this Caſe. Another Objection to this Proceeding was, that the Order was made by the Court of Seſſions on the ſame Day in which the Complaint was made before them. They did agree, if the Defendants had appeared and anſwered to the Complaint at the Time it was made, and the Seſſions had been of Opinion, that their Anſwer was inſufficient, that they might have made their Order immediately. But when the Defendants did not waive that Advantage by anſwering, they conceived it was too precipitate a Proceeding to paſs Judgment againſt the Defendants immediately. And laſtly, they ſubmitted it, that the ſubject Matter of the Complaint was not within the Juriſdiction of the Juſtices. The Complaint is of a Turnpike erected in the Town of Kingſton; unleſs this Turnpike was erected in the Road leading from London to Eaſt-Greenſtead, it might as well have been erected in Northumberland. They ſaid they ſhould not contend but Kingſton was in the Road leading from London to Eaſt-Greenſtead; but this Turnpike might have been erected in any Part of the Town of Kingſton, that does not lie within this Road. So that they apprehended that the Complaint ought to have been made of a Turnpike erected in ſome Part of this Road; and for theſe Reaſons they ſubmitted it, the Order ſhould be quaſhed. Serjeant Wright argued on the other Side. To the Objection concerning the Notice, he ſaid he apprehended the Notice was well given. A Notice of an intended Appeal, a Notice of an intended Motion, are frequent in Experience; and by equal Reaſon a Notice of an intended Complaint is good. To the two next Objections, for want of an Oath appearing of the Notice, and likewiſe for want of a Summons appearing; he did agree that if this had been a Conviction, the Objections would have been fatal. But he conceived that the preſent Act of Parliament was a remedial Law, a Law made to prevent the Abuſes of theſe Turnpikes upon the publick Road, by which Law the Juſtices have only a Power given them to remove the Abuſe, and not to puniſh the Party doing it. So that the preſent Act done by the Juſtices cannot be conſidered as a Conviction, but merely as an Order. In the Caſe of The Queen and Coſins, Trin. 3 Ann. an Exception was taken to an Order of Baſtardy, for there being no

Summons appearing upon the Order. The Court there overruled that Exception; and their Reason for doing so he said, according to his Notes, was, that the Statute of 18 Eliz. which the Order was made upon, was a remedial Law, and not a penal one. He observed that in that Case the Court declared, that they would intend the Party was summoned; and therefore an Oath and Summons shall be intended to have been made in the present one. To the Objection for the Order's being made upon the same Day in which the Complaint was; he said it was well known, that Justices in Eyre had that Power, and that Justices of Oyer and Terminer and Gaol-Delivery have to this Day; for which Reason he did not see but the present Justices might have done the same, even admitting that the Defendants had appeared and prayed a Day. But when the Defendants upon due Notice given them, did not appear, he conceived they were well justified in making their Order at that Time. To the last Objection he said, he apprehended that the Word Turnpike necessarily imports a Gate, which is erected to take Toll at; and if the Trustees had erected such Gate in any one Part of the County, the Justices of the Sessions have a Power to remove it. He did agree that upon the first of these Acts of Parliament, the Words were confined in such a Manner, as that the Justices had not this Power; but where the Turnpike was erected in the Road itself. The present Act was made to prevent that Inconvenience, and by that Statute the Justices have a Power to remove it in whatever Part of the County it is erected. Mr. Fazakerly and Mr. Strange argued by way of Reply; they said that they conceived this Adjudication made by the Justices, must be considered in the Nature of a Conviction. The Adjucication made by them is, that the Turnpike shall be abated; the Turnpike was as much the Property of the Trustees, as their own House; the Justices therefore have by a final Adjudication, from which there is no Appeal, taken away from the Trustees Part of their Property; and if this was not a Conviction, they did not know what was. If this was to be considered as a Conviction, they observed that the Counsel of the other Side have admitted that the Adjudication must be bad for the Want of a Summons appearing. But even admitting that this was not to be considered as a Conviction, but only as an Order, yet still they apprehended this must be bad; because the Justices have given this special Reason for making their Order, that the Defendants did not appear upon the Notice given, which shews evidently, that there was no Summons; and wherever that is the Case, that the Justices discover themselves that there was no Summons, it is impossible that the Court can intend that there was one. They observed there has been a Doubt made, and that a very great one, whether the Serving a Summons upon the Party was sufficient, unless he actually appeared upon it; for this Purpose they cited the Case of The King and Simpson, which was a Conviction for Deer-stealing. The Justices set forth upon that Conviction, that the Defendant would not appear before them; upon that they appointed a Time and Place in the Summons for his appearing. Several Times was it argued, whether that was sufficient; at last

indeed the Court was of Opinion that it was; but it never was imagined, but the Serving the Party with a Summons was neceſſary, which they ſubmitted did not appear to have been done in the preſent Caſe. Mr. Strange then in particular took Notice of the Haſtineſs in the Proceeding of the Juſtices, by their determining this Matter the ſame Day on which the Complaint was. He ſaid he was of Counſel with the Proſecutor in the Caſe of The King and Hales, which was an Indictment of Forgery, and tried at the Old Bailey. The Defendant there had taken a Copy of his Indictment, he was actually in Cuſtody, and the Proſecutor inſiſted for a Trial the ſame Seſſions in which the Bill was found. The Defendant deſired that his Trial might be put off till the next Seſſions, and the Court granted it. In the preſent Caſe, Mr. Strange ſaid he apprehended, unleſs the Court would relieve upon this Application, the Party was intirely without Remedy. The Court he ſaid hardly ever grants an Information againſt the Juſtices for what they do at a Seſſions; and the Defendants have offered, and do now, to try this Matter with the Proſecutor in a feigned Iſſue; but it has been refuſed. The Court declared their Opinion in the preſent Caſe, that the Statute, which the preſent Proceeding was founded upon, was a remedial Law, and not a penal one; for which Reaſon they ſaid the preſent Adjudication was to be conſidered as an Order only, and not as a Conviction. They agreed likewiſe, that as the Defendants did not appear at the Day which was given them, to deſire that the Time might be enlarged for their Defence, the Juſtices were well warranted in making their Order the Time they did. And farther they agreed, that upon this ſecond Act of Parliament, the Seſſions had a full Authority to inquire into this Turnpike, in whatever Part of the County it was erected. In ſome other Points they a little varied in their Opinions. Judge Page and Judge Probyn thought that where a Priſoner is in Cuſtody, the Juſtices of Oyer and Terminer and Gaol-Delivery have an Authority to inſiſt upon the Priſoner's making his Defence on the ſame Day in which he is indicted, let his Offence be of whatever Nature it will. Judge Lee was of a contrary Opinion, where the Offence is only a Misdemeanor. Judge Page was of Opinion that a Summons in this Caſe ought to have iſſued forth, notwithſtanding the Notice; but that it ſhould be intended ſuch Summons did iſſue. Judge Probyn and Judge Lee were of Opinion in this Caſe, that as the Act had directed that nothing ſhould be in this Road, but by the Direction of the Truſtees, the Direction which the Truſtees gave, ſhould be conſidered as an Order. That the Authority of the Juſtices in their Seſſions, was not to be conſidered as an original Juriſdiction, but as a Juriſdiction upon an Appeal. That therefore the Notice itſelf was ſufficient, and a Summons need not be intended. However in whichever Light this Matter was conſidered, the whole Court agreed that the Order ought to ſtand, accordingly diſcharged the former Rule.

Dale *and* Mottram.

IN Debt on Bond with Condition for performing an Award, the Defendant pleaded no Award; the Plaintiff replied, that a Reference was made to these Arbitrators of certain Matters relating to a Partnership between the Plaintiff and Defendant, and the Arbitrators awarded, that the Defendant should pay into the Hands of one John Oakes, who was Agent for the Partners, such a Sum of Money in Trust for the Plaintiff and Defendant, and for the Benefit of the Partnership, which he had not done; and to this Replication there was a Demurrer. Mr. Strange argued in Support of the Demurrer, and said, that he apprehended that this Part of the Award, which the Breach was assigned upon, was void, because it requires the Defendant to pay a Sum of Money to a Stranger. In the Case of Lane and Tanner, Trin. 12 Anne, an Award was, that the Defendant should deliver up to the Plaintiff's Possession a House that at the Time of the Award was in the Possession of Sir Thomas Wiseman; and this Award was held to be void. To the like Purpose he cited Roll's Abr. 243. Pla. 6 and 247 Pla. 4. 3 Cro. 4. and Godb. 12. Mr. Fazakerly argued on the other Side, and said, that he should not contend but in the general that the Rule laid down by the other Side was right. But where a Dispute is concerning Partners in Trade, as here it was whether the Defendant had put in his whole Share into the Stock, he did not know how the Arbitrators could do a more proper Thing, than to Award, that the Defendant should pay in the Deficiency to the Agent of the Partnership in Trust for the Plaintiff and Defendant and for the Benefit of the Partnership. He put the Case to be, that the Arbitrators had awarded, that the Defendant should pay a Sum of Money for the Benefit of the Plaintiff to such Person, as the Plaintiff should appoint to receive it; he believed, he said, that it would hardly be contended, but such Award would have been good. The Court was of the same Opinion; accordingly gave Judgment for the Plaintiff, unless Cause before the End of the Term.

What shall be said to be a good Award, notwithstanding it directs that a Sum of Money shall be paid to a Stranger.

Oates *and* Collins.

IN an Action upon a Promissory Note of 20 l. for Value received, the Defendant pleaded Non Assumpsit, and proved upon the Evidence, that the Note was given for Money won upon a Wager at a Horse-Race; this Cause was tried at the Sittings before the late Lord Raymond, and a Case made upon this Matter for the Opinion of the Court. Mr. Fazakerly argued for the Defendant. In the 16th of Car. 2. 7. there was an Act made, which was intitled An Act against deceitful, disorderly and excessive Gaming. He did agree, that the present Note was not included within that Act; but Horse-Racing is one of the Games expressly mentioned in it. In the 9th of Anne 14. another Act was

When Money is won upon a Wager at a Horse-Race, how far such Money shall not be allowed to be recovered.

was made, intitled An Act for the better preventing of exceſſive and deceitful Gaming. That Statute takes Notice, that the Laws then in Force were not ſufficient to prevent the Miſchiefs, which happen by Gaming; and for that Reaſon provides, that all Securities ſhall be void, which are given for Money won by Gaming or Playing at Cards, Dice, Tables, Tennis, Bowls or other Game or Games whatſoever. This Statute, he ſaid, has a plain Relation to the former Statute, and every Game mentioned in the former Statute, he ſubmitted it, was plainly within the Meaning of this. Mr. Spelman argued on the other Side, and ſubmitted it, that theſe were Penal Laws, and therefore to be conſtrued ſtrictly. Horſe-Racing, he obſerved, was an Exerciſe of Diverſion only, and not Gaming, it could not therefore by any Means come within the Deſcription of the Statute of 9 Anne, that has been mentioned. And to ſhew how other Statutes, which contain general Words in them, have been conſtrued he cited 2 Inſt. 478. 2 Rep. 46. 2 Lev. 142. and 3 Lev. 273. Salk. 609 and 625. Judge Page declared his Opinion to be, that the preſent Caſe was not within the Statute of Ann. Gaming he took to be a Reiteration of ſome Chance or Hazard at one and the ſame Sitting. But Horſe-Racing was an Exerciſe of Recreation, and therefore could not fall within the Notions of Gaming. That all Wagers were not within this Act of Parliament, he ſaid was plain, from the conſtant Allowance of Policies of Aſſurance. And he took it, that a Wager about the Running of a Brace of Greyhounds could not neither. Judge Probyn and Judge Lee were of a contrary Opinion. They ſaid, they took it that the Statute of 9 Ann. was only made by Way of farther Inforcement of the Statute of 16 Car. 2. and therefore that all the Games, which are recited in the firſt Statute, muſt be intended to be included in the ſecond. In Ven. 253. Judge Lee ſaid it is held, that theſe Statutes are to be conſtrued liberally. However as the Court did not agree in Opinion upon this Point, the Matter was ordered to ſtand over to be ſpoke to again.

Denail *and* Brickland.

When a Judgment is omitted to be entered up within the Time that by the Rules of the Court it ought to be, how far the Court will not diſcharge the Defendant out of Execution upon that Account.

MR. Fazakerly moved, that the Defendant might be diſcharged out of Cuſtody, by Reaſon that it was ſeven Years ſince the Judgment was ſigned, the Defendant lately taken in Execution upon it; yet to this Day the Record was never made up and entered upon the Roll. Judge Page ſaid that he took it, that the Plaintiff's Attorney has two Terms given him to do it in after ſigning the Judgment. But Judge Probyn and Judge Lee declared, that they took the Rule of the Court to be, that the Plaintiff's Attorney muſt do it before the End of the next Term after ſigning the Judgment; and the Maſter confirmed their Opinion. However the Court agreed, that they could not diſcharge the Defendant out of Cuſtody on ſuch an Omiſſion. They ſaid they could only order the Plaintiff's Attorney to bring in the Record, that the Roll might be made up; which they accordingly did in the preſent Caſe.

The King *and* Rainer.

THE Defendant having been convicted for printing a scandalous Libel upon the House of Lords and Commons, called Robin's Game, or Seven's the Main; the Court now set a Fine of 50 Pounds upon him, committed him for two Years, and until he should pay this Fine, and likewise till he should find Security for his good Behaviour for seven Years. Vide ante 232.

The King *and* Dr. Earbury.

THE Defendant had given Notice to the Attorney General, that he should move the Court, that his Recognizance should be taken off the File and discharged, for certain Errors appearing upon the Face of it. He said he had been taken up by a Warrant from one of the Secretaries of State, signed De la Faye; and he conceived that this Warrant ought to have been signed with the Name of the Secretary of State himself, and not with the Name of one who was but an Officer under him. When he was brought before the Secretary of State upon this Warrant, the Secretary of State committed him; and since a private Justice of Peace has taken upon himself to bail him, requiring him to enter into this Recognizance. No Man, he submitted it, has Authority to bail another, unless he is equal to the Person committing. A Justice of Peace is an Officer inferior to a Secretary of State; and therefore he conceived that this Recognizance must be illegal. He observed farther, that the Terms of this Recognizance are, that he shall keep the Peace; and likewise that he shall appear in the Court of King's Bench, to answer such Matters as shall be objected against him. He did agree that a Justice of Peace has Authority to bind over to the Sessions; but this was the first Time that he ever heard that they had Authority to bind over to this Court. And to shew that they could not have such an Authority, he appealed to the Statute of 18 Edw. 3. 37 Edw. 3. 18. 49 Edw. 3. and 1 & 2 Phil. & Ma. He took Notice farther, that he had entred into this Recognizance so long ago as Mich. Term last; and no Information has been filed against him, nor has he had one single Charge during all this Time. The Court said that they believed it was usual for the Secretaries of State not to sign these Warrants themselves. To the second Objection they could not inquire into it upon this Motion; because the Notice is, that the Court will be moved to discharge the Recognizance, for Errors appearing upon the Face of it. To the third they said, these Recognizances are very frequent in this Court; and therefore they should certainly not order the present one to be taken off the File upon Motion. If the Recognizance is illegal, the Defendant has his Remedy another Way. To the last Objection, they did agree that if there had been a Year passed from the Time that this Recognizance was given, and no Prosecution against the Defendant, he would have been intitled to

When a Person is Committed for a Libel upon the Government, what shall be said to be a proper Recognizance upon such an Occasion.

be diſcharged. But till then, by the Rules of the Court, he cannot; accordingly the Motion was refuſed. Vide poſtea.

Elliot *and* Criſp.

When a Motion is made to put off a Trial, what ſhall be ſaid to be a proper Affidavit upon ſuch Occaſion.

ON a Rule to ſhew Cauſe, why a Trial ſhould not be put off for the Abſence of a Witneſs, an Objection was taken to the Affidavit which the Rule was made upon, that it was only ſworn that the Witneſs would not be back till Auguſt, but not when he would be back certainly; accordingly the Rule was diſcharged. The next Day Mr. Kettleby moved this Matter again, and ſaid that he had now an Affidavit that it was verily believed the Witneſs would be back in September; accordingly the Court held this Affidavit to be ſufficient, and made a Rule for ſhewing Cauſe, why the Trial ſhould not be put off, on Payment of Coſts. They ſaid that theſe Rules are always drawn up on Payment of Coſts, whether there be any Coſts that the other Side are at, or not. Vide poſtea.

Homes *againſt* Mendes Cæſars.

Vide ante 284.

MR. Fazakerly came now to ſhew Cauſe, and ſaid he did agree the Caſe of Innys and Sinclair was as has been mentioned. But he ſubmitted it, that it was diſtinguiſhable from the preſent one; becauſe in the preſent one, the Action is brought by Aſſignees of a Commiſſion of Bankruptcy, who can have no farther Knowledge of the Debts owing to the Bankrupt, than as appears to them by his Books. He obſerved it might be ſaid that the Plaintiffs might get ſome Perſon to ſwear to this Debt poſitively; in Anſwer to this he ſaid, he conceived that this could not be required of them; becauſe till the Time of Trial no Proceſs lies for that Purpoſe. However the Court made the Rule abſolute; and ſaid upon this Act of Parliament they thought there was no Difference between the Caſes.

Clark *and* Paget.

When a Defendant is ſerved with a Copy of a Writ, in Purſuance of the Statute of 5 Geo. 2. 27. what ſhall not be ſaid to be a ſufficient Engliſh Notice, within the Meaning of that Act of Parliament.

ON Rule to ſhew Cauſe why Proceedings ſhould not be ſtaid upon the Statute of 5 Geo. 2. 27. by Reaſon of there being no Name of the Defendant inſerted in the Engliſh Notice; Mr. Strange ſubmitted it, that it was not neceſſary; becauſe the Defendant himſelf was perſonally ſerved with it. However, the Court was of Opinion, that as the Form inſerted in the Act, begins with the Words You A. B. the Letters A. B. muſt ſtand for the Name of the Defendant; and therefore the Name of the Defendant ought to have been inſerted; for which Reaſon they made the Rule abſolute.

Anonymus.

MR. Wheat moved for an Information againſt one Hurſt, for acting as Under-Sheriff of Huntingtonſhire, and as an Attorney at one and the ſame Time. He ſaid this was againſt the Statute of 1 H. 5. 4. Accordingly the Court made a Rule to ſhew Cauſe. Vide poſtea.

When a Perſon acts as Under-Sheriff and Attorney both, contrary to the Statute of 1 H. 5. 4. how far the Court will grant an Information againſt him.

The City of London *and* Sir Fiſher Tenſh.

THE Common Serjeant moved to make a Rule abſolute for amending a Declaration. Mr. Bootle junior ſaid he ſhould not oppoſe it upon Payment of Coſts, and four Days Time to plead, as the Plaintiff had given no Rules to plead this Term, though the Declaration was of laſt Term. The Maſter informed the Court, that if Rules to plead had been given this Term, the Defendant would have been intitled only to two Days Time to plead in; but as the Rules were not of this Term, he thought him well intitled to four Days; accordingly the Rule was made abſolute on thoſe Terms.

What are the Terms which the Plaintiff muſt ſubmit to, when he moves to amend his Declaration.

Bell qui tam *and* Wyat.

IN an Information qui tam upon a uſurious Contract, Mr. Harvy moved that the Proſecutor might have Liberty to compound the Forfeiture. He obſerved that in the Exchequer, ſuch Motions are frequent; and Judge Page ſaid he remembred that the ſame has been allowed here; accordingly the Court made a Rule to ſhew Cauſe.

How far the Court will give Leave that a Proſecutor ſhall compound his Proſecution.

Weſtpee *and* ——

IN an Action brought by the Plaintiff, as Aſſignee of a Bail-Bond, the Bail pleaded Comperuit ad diem; the Plaintiff joined Iſſue upon that Fact. Now Mr. Denniſon ſaid, that the Truth of the Caſe was, that the Defendant did give Bail at a Judge's Chamber; but Exceptions were taken to that Bail in Time, and they never juſtified. A Bail-Piece he ſaid therefore there was ſigned by the Judge, which has a Colour of an Appearance, though not a real one; for which Reaſon he moved, that the Bail-Piece might be taken off the File. Judge Probyn ſaid, if this was the Fact, the Bail-Piece would do the Plaintiff no Prejudice; for there are only the initial Letters of the Names of the Bail, when the Judge ſigns it. The Names are afterwards drawn out at length, if there are either no Exceptions to theſe Bail within Time, or if there are Exceptions to them, and they juſtify to the Satisfaction of the Court. In the

How far a Court will not give Liberty that a Bail-Piece ſhall be taken off the File, by Reaſon that it cannot amount to an Appearance.

the preſent Caſe it is ſaid that the Exceptions to the Bail were put in in Time, and they did not juſtify; the Blanks of their Names therefore could never be filled up; and conſequently this can no way be called an Appearance; for which Reaſon the Motion was refuſed.

The King *and* Amys.

Vide ante 244.

MR. Forteſcue now came to ſhew Cauſe why this Order ſhould not be quaſhed. He ſaid there had been four Exceptions taken to it. Firſt, that the Trade of a Carpenter is not within the Act. Secondly, that it does not appear that the Maſter had any Money with the Apprentice. Thirdly, that the Seſſions cannot order Reſtitution of ſuch Money. And laſtly, that it does not appear that the Maſter appeared, or was ſummoned and made Default. He began with this Anſwer to the laſt Exception firſt. And as to that he ſubmitted it, that this did ſufficiently appear. The Order recites the Complaint of the Defendant's not inſtructing his Apprentice well, which appearing to be true (ſays the Order) and after hearing Counſel and Evidence touching this Matter, it is ordered by this Court, &c. Now Counſel and Evidence could not properly be ſaid to be heard, but by hearing Counſel and Evidence on both Sides. He ſaid further, that he apprehended it was not neceſſary that the Defendant ſhould have been ſummoned at all. The Defendant by being bound over to the Seſſions by the head Officer, whom the Complaint was firſt of all made to, was bound to take Notice of the Time, when he was to appear there; at leaſt he conceived that ſuch Summons need not be ſet forth in the Order; at moſt it is Matter of Proceeding only; and therefore if requiſite, ſhall be intended; and for Authority in Anſwer to this Exception he cited Salk. 67. and 490. By which Caſes the third Exception was anſwered likewiſe; for there it fully appears that the Seſſions may order Reſtitution. In Anſwer then to the ſecond Objection he ſubmitted it, that it could not otherwiſe be intended by the Order, but that the Defendant did receive Money with his Apprentice; for the Words are, That *William Amys* do return and pay back the Sum of 5 Pounds to his Apprentice. Now he ſuppoſed that it would hardly be contended, that a Perſon could pay back Money which he had never received. Then as to the laſt Exception, he did agree that the Trade of a Carpenter is not mentioned within the 3d or 27th Section of the Statute which this Order is founded upon, but within the 30th it is; and the 35th muſt certainly have a Relation to all the Trades that are expreſly mentioned before; and he believed it would be very difficult to aſſign a Reaſon why it ſhould not extend to all Trades in Being at that Time; eſpecially ſince it is admitted that the Clauſe of the Statute, which relates to a Service of ſeven Years Apprenticeſhip, does extend to all. Mr. Strange argued by way of Reply, and ſaid that he apprehended it did by no Means appear that the Defendant was ſummoned in the preſent Caſe. Hearing Counſel and Evidence upon a Complaint, may naturally be

underſtood of hearing Counſel and Evidence on the Side of it; and if the Truth of the Fact had been otherwiſe, undoubtedly it would have been ſet forth in the Order in the common Form, viz. after hearing Counſel and Evidence on both Sides. Then in order to ſhew that a Summons was neceſſary, he ſaid he did agree if the Application had been to the head Officer, before the Complaint came before the Seſſions, there would have been no Occaſion for a Summons; but it is well known that the ſettled Determination of the 35th Section in this Act of Parliament has been, that the Seſſions have an original Juriſdiction, and that that Part of the Clauſe which ſpeaks of the previous Application to the head Officer has been conſtrued to be only directory. The preſent Order therefore muſt be intended to have been made upon an original Complaint to the Seſſions, in as much as the contrary does not appear; and in ſuch Caſe, he conceived a Summons muſt be abſolutely neceſſary. Then in Order to ſhew that the Summons ought to appear, he ſaid he thought that the Caſes cited out of Salkeld by the other Side did in a Manner allow it. In Maintenance of the third Exception, he ſaid he did agree if the Apprentice in the preſent Caſe had been bound out with Money raiſed by the Juſtices, they might have ordered Reſtitution; but as this does not appear, it muſt be taken to be otherwiſe; and therefore he apprehended this Exception would prevail. To the ſecond he ſubmitted it, that the Adjudication of inferior Juriſdictions is not to be taken by Intendment. And to the firſt he did own, that he was not apprized of this Anſwer; and therefore this Exception he was willing to give up. The Court declared their Opinions, that the giving up the firſt Exception was very right; becauſe undoubtedly the Anſwer that has been given is full in this Point. They ſaid likewiſe, that they were of Opinion that the ſecond and third Exceptions were anſwered likewiſe; but as to the laſt, concerning the Summons, the Court were not ſo well agreed in; for Judge Probyn had doubts whether the Summons ought not to have been ſet forth. And upon this the Matter was ordered to ſtand over.

N. B. Mr. Strange in his Argument of this Caſe ſaid that in the Caſe of The King and Walkely, Mich. 12 George I. the Caſe of The King and Gately was cited, and upon the Authority of that Caſe the Order was quaſhed, which was made in the Caſe of The King and Wakely. It was the Trade of a Cutler, which the Apprentice there was bound to; an Order of Diſcharge made by the Juſtices; and the Court held there, that that was not a Trade within this Part of the Statute.

Biſhop *and* Stacey.

How far Law Proceedings ſhall be ſaid to be properly put into Engliſh, or not, within the Meaning of the Statute of 5 Geo. 2.

IN Debt upon a Recognizance there was a ſpecial Demurrer to the Declaration, and two Matters ſhewn for Cauſe; firſt, that in this Declaration, which is in Engliſh, the Plaintiff is ſaid, to bring his Bill againſt the Defendant being in Cuſtody of the Marſhal of the King's Bench, whereas the Form of the Latin Declaration uſed to be in Cuſtod' Mar' Mareſc' in Cur' Domini Regis coram ipſo Rege; ſecondly, that it is ſaid he brings his Bill generally, without ſaying in proper Perſon, or by Attorney, Guardian or Prochein Amy. And Mr. Cay now argued in Support of theſe Exceptions. To the ſecond he ſaid, the Authority of 1 Roll's Abr. 794. is expreſs, that in the Caſe of a Defendant it muſt be ſet out, whether he appears in Perſon or by Attorney, by Guardian or Prochein Amy; and he ſubmitted it, there was equal Reaſon it ſhould be ſo in the Caſe of a Plaintiff. To the firſt he did agree, that in common Speech the Marſhal is called the Marſhal of the King's Bench; but in pleading the Strictneſs of the Stile of his Office muſt be ſet out. Mr. Denniſon argued on the other Side. He ſaid, he did agree, that where it is ſet out, that the Plaintiff brings his Bill per Attornatum ſuum, or per Cuting Attornatum ſuum, that is bad; becauſe the Plaintiff admits, that he brings his Bill by Attorney, and has ſet out that imperfectly. But in the preſent Caſe he apprehended, that it ſhould be intended he brought it in proper Perſon; and therefore ſubmitted it, that that Exception was anſwered. To the other he relied upon Salk. 439 and 602. and ſubmitted it, that the Stile of the Office of the Marſhal is as legally deſcribed by the Name of the Marſhal of the King's Bench, as by that of the Marſhal of the Marſhalſea; and by the Authority of thoſe two Caſes, which he cited, if the Stile of his Office had been ſet out by the Name of the Marſhal of the Marſhalſea, that would have been good. He obſerved farther, that throughout the Statute of 8 & 9 W. 26. this Officer is called Marſhal of the King's Bench Priſon; and therefore ſubmitted it, that that was at leaſt as proper a Deſcription of his Office, as the other. However the Court ſaid, that for the Cauſes aſſigned they were at preſent inclined to think that the Declaration could not be maintained; but ordered the Matter to ſtand over.

Martin *and* Duffeild.

Vide ante

THE Errors to reverſe this Outlawry coming now on in the Paper to be argued, Mr. Strange ſaid, that he did not think it neceſſary to mention above one of them, which was, that the Huſtings are ſaid to be held in Civitat London, and not pro Civitat. Upon Outlawries in the County Courts, he ſaid, this is an Exception conſtantly allowed. Accordingly the Court was of the ſame Opinion, but at preſent would not reverſe it; becauſe the Defendant had not given ſufficient Notice of his

Bail to the Original Action; the Notice being given but last Night, whereas the Court said there ought to have been one whole Day from the Time of giving Notice; and therefore ordered this Matter to stand over till to Morrow, that the other Side might have an Opportunity of inquiring into the Circumstances of the Bail. The next Day the Defendant's Bail justified themselves; and upon that the Outlawry was reversed.

The King *and* Rosamund Robinson.

A Rescous having been returned against the Defendant, Mr. Strange said she was willing to confess the Rescous, but moved, that she might be discharged upon paying a small Fine. He did agree, that upon the Affidavit of two Bailiffs an Attachment was granted against her, and that she now lay in York Gaol in Custody under that Attachment. But he said he had Affidavits of sixteen People to shew, that this Complaint against her was absolutely False, and without the least Colour of Foundation. The Clerk in Court, he observed, would undertake to pay the Fine; and therefore upon these Circumstances, and her Payment of the Fine which the Court should set, he hoped she should have a Superfedeas. Mr. Fazakerly said he should not oppose it, if she should go before the Master. The Court however ordered the Affidavits to be read, and on hearing them read, they set but 6 d. Fine upon her, without requiring her to go before the Master, and likewise granted a Superfedeas.

When a Rescous is returned upon a Person, how far the Court will allow him to submit to a small Fine without requiring him to talk with the Prosecutor.

The King *and* Halpyn.

THE Defendant having been ordered to be examined upon Interrogatories, Serjeant Belfield moved, that he might go before the Master to pay the Prosecutor such Costs and Damages, as the Master should appoint, and on Payment thereof that he might submit to a small Fine. Mr. Kettleby on the other Side said, that he should not oppose it, provided the Defendant would instantly make a Deposit before the Master of such Sum, as he should think reasonable. Serjeant Belfield consented to that likewise. Accordingly a Rule was drawn up by Consent for that Purpose. But Judge Page said, if the Prosecutor had not consented, the Court could have made no Rule in it.

How far the Courts of Law do not require a Person to make a Deposit.

Anony-

Anonymus.

How far the Court will not quaſh an Excommunicato Capiendo, notwithſtanding ſome uncertainty in deſcribing the Offence.

MR. Kettleby moved to quaſh a Writ of Excommunicato capiendo for Uncertainty; the Sentence againſt the Defendant being ſet out to be in a Cauſe of Slander or Defamation. He ſaid he remembered Mr. Strange obtained a Rule for quaſhing ſuch Writ in cauſa Convitii ſive defamationis. The direct Tranſlation of the Word Convitium he took to be Slander; and therefore ſubmited it, that that Caſe was directly in Point with the preſent one. Judge Lee ſaid he remembered, when Mr. Strange made that Motion, he cited a Book which ſhewed, that the Word Convitium in the Civil Law Senſe of it ſignified a different Matter from the Word Defamatio; therefore in that Caſe there was a plain Uncertainty. But in the preſent one the Court ſaid that their Opinion was, that a Charge of Slander and a Charge of Defamation ſignified exactly the ſame Thing; for which Reaſon the preſent Motion was refuſed.

Tonſon *and* Ironſon.

How far the Court will grant an Attachment againſt a Witneſs, by Reaſon of his not attending at the Trial, in Purſuance of a Subpœna.

MR. Banks came to ſhew Cauſe why an Attachment ſhould not go againſt one Bryan Ironſon, who was an Attorney, for not attending at a Trial in Purſuance of a Subpœna, whereby the Plaintiff was forced to be nonſuited. But before he went into his Defence, Mr. Marſh on the other Side deſired Leave, that a Supplemental Affidavit might be read, by which it was ſworn, that this Attorney took the Subpœna into his Hand, and read it or ſeemed to read it; which the Court accordingly allowed of. The Defence then, which Mr. Banks made for this Attorney was in this Manner. He ſaid he had no Opportunity to anſwer the Supplemental Affidavit now produced; and by the Affidavit, which the Rule was obtained upon, it was only ſworn, that he was ſerved with a Ticket annexed to this Subpœna; now in the Ticket he was only required to appear at Weſtminſter before Sir Francis Page at the Court-houſe there; the Court-houſe, he ſaid, was the Place near the Court of Requeſts, where Writs of Inquiry are executed, and there he did attend according to the Time mentioned in the Ticket. It was inſiſted on the other Side by Way of Reply, that the Subpœna was right, as it ought to be; the Ticket now ſince the Engliſh Act cannot be material; and therefore this Attorney ſhall not take Advantage of any Defect in that. The Court were of Opinion, that the Facts contained in the Supplemental Affidavit were Facts of a different Nature from thoſe ſworn in the Firſt; which this Attorney had not an Opportunity of anſwering. They thought that thoſe Facts made the Caſe pretty clear againſt him, though perhaps upon the firſt it might be doubtful; accordingly diſcharged the Rule for ſhewing Cauſe; and gave the Plaintiff Liberty to move for an Attachment upon this Supplemental Affidavit, with the Subpœna annexed to it;

which accordingly was done; and a Rule made to shew Cause upon it.

The King *and* Sandys.

ON Rule to shew Cause, why an Information in the Nature of a Quo Warranto should not go against the Defendant for exercising the Office of Recorder in the Borough of Esham, Mr. Wills said, that the Fact was in the Manner following. By the Constitution of this Borough the Mayor, Aldermen, Recorder, Chamberlain and Capital Burgesses make the Common Council. Upon the Election of a Recorder it is provided by the Charter, that the Chamberlain shall not be present, but that he shall be chose by the Mayor, Aldermen and Capital Burgesses, or the major Part of them. Upon the Election of a Chamberlain it is provided, that the Recorder shall not be present, but that he shall be chosen by the Mayor, Aldermen and Capital Burgesses, or the major Part of them. Notice of an Assembly of the Common Council was ordered by the Mayor to be given for the 29th of September last, which was done accordingly. Eleven of the Body met at that Day, in which Assembly was one Mr. Bolen, who had been Alderman and Chamberlain both for several Years together. When they were met Mr. Barker, the late Recorder, surrendered his Office, and the present Defendant was elected by the Majority in his Room. An Entry was made of that Election to this Effect, At a Common Council held such a Day ——— *Sandys* was elected Recorder by the said Common Council. And at a like Assembly held the second of October following, in Pursuance of the like Notice he was elected into this Office again by the same Majority, and was then sworn into his Office. Mr. Wills said that the Objection made to the Defendant's Election was, that the Common Council consists of the Mayor, Aldermen, Recorder, Chamberlain and Capital Burgesses; that Notice was given to them of an Assembly of the Common Council; that when they were assembled, they could do no Act, but an Act of Common Council; that the Recorder is not to be chosen by any Assembly, which the Chamberlain is a Member of; consequently, it is objected, that he is not to be chosen by the Common Council; and therefore that the Defendant's Election was illegal. Mr. Strange agreed, that the Fact was truly stated, and likewise the Objection; but desired to mention only one Case in Support of it, which was the Case of The King and Carlisle, where it was determined, that when Notice is given of an Assembly of a Common Council, and the Common Council meet accordingly, Part of that Assembly cannot go away, and another Assembly consisting of a less Number, though of the same Persons, form themselves, and transact Business at that less Assembly. Notice was given of the greater Assembly, and not of the less; and therefore what is done at the less Assembly is without Authority. Mr. Parker on the same Side said that he had a Note of that Case, and he had taken it in the Manner following. It came on upon a Return to a Mandamus

How far the Court will grant an Information in the Nature of a Quo Warranto against a Person for executing an Office, by Reason that the Persons who chose him had not Authority to do so.

and was argued firſt of all in Trin. 5 Geo. 1. It was a Mandamus to reſtore one Polter to the Office of Capital Citizen of the City of Carliſle. The Return to it was, that the Mayor, Aldermen, Bailiffs and Capital Citizens form the Common Council of that City; that the Power of removing a Capital Citizen is in the Mayor and Aldermen, or the major Part of them. The Return farther ſet forth, that on ſuch a Day Notice was given of an Aſſembly of a Common Council, who aſſembled themſelves accordingly; that Polter was ſummoned at that Aſſembly, to anſwer ſuch Crimes as ſhould be objected againſt him, for which he was to ſhew Cauſe, why he ſhould not be removed from his Office; that Polter did not appear; whereupon the Mayor and Aldermen, ſic ut præfertur aſſemblat', made an Order for removing him. In Trin. 6 Geo. 1. Lord Chief Juſtice Prat delivered the Reſolution of the Court, that the Return to the Mandamus was bad. He ſaid, they were of Opinion, that the Mayor and Aldermen ought to have been ſummoned in a diſtinct Capacity; and thereupon a peremptory Mandamus was awarded. Mr. Wills then went on in his Argument, and endeavoured to anſwer the Objection. He ſaid he was of Counſel in that Caſe of Carliſle, and ſhould not contend but the Fact might be as it was ſtated; but, if he remembered right, he took it a good deal of the Streſs of the Argument, which the Chief Juſtice delivered, went upon this, that it appeared by the Words ſic ut præfertur aſſemblat', that the Mayor and Aldermen acted in their Capacity as Members of the Common Council; as Members of the Common Council they had no Power to make this Removal; they had this Power in an intire diſtinct Capacity, as making together one diſtinct Body of Mayor and Aldermen; and as it appeared they did not act in that Capacity, the Removal was undoubtedly bad. He ſaid he conceived, that that Caſe by no Means came up to the preſent one. For in the preſent one, he ſubmitted it, that the Common Council have the Power of electing both a Recorder and a Chamberlain; the Charter only provides, that at an Election of a Recorder the Chamberlain ſhall not be preſent. Mr. Bolen, as Chamberlain, was not preſent, nor does it in the leaſt appear, that he acted as ſuch. For which Reaſon he hoped, that the Rule ſhould be diſcharged. The Court ſaid this was by no Means ſo clear a Point in Favour of the Defendant, as to have it determined upon a Motion. Accordingly they made the Rule abſolute.

The King *and* Lloyd.

How far a Clerk of the Peace ſhall be ſaid to be duly removed from his Office, or not.

THIS was a Conviction at the Seſſions againſt the Defendant, late Clerk of the Peace in the County of Cardigan, whereby the Juſtices there removed him from his Office upon a Complaint that was made before them. Mr. Fazakerly ſaid it was founded upon the Statute of 1 W. & M. 21. and he was ready to take ſeveral Exceptions to it. One though, he believed, would be ſufficient at preſent; which was, that the Juſtices have not ſet forth the Evidence upon which they con-

convicted him. In the Case of The Queen and Guery, Pasch. 13 Ann. a Conviction was quashed upon this Exception; and so was another Conviction quashed upon the like Exception that same Term. He said he would give the Gentlemen of the other Side a Note of some more Exceptions, which he should take to it; accordingly this Matter stood over. Vide postea.

Weele *and* Smith.

MR. Fazakerly moved to make this Rule absolute upon an Affidavit of Service; and upon that Serjeant Eyres said he was ready to shew Cause. The Objections to this Execution he observed were two; First, that the Name of the Plaintiff was mistaken in the Fieri Facias. Secondly, that the Execution was taken out pending a Writ of Error; he said he would speak to the last Objection first. The Counsel of the other Side said that they principally relied upon the other Objection; and they hoped that was so plainly with them, that it would be unnecessary to go into the other; which accordingly the Serjeant did. He said he did agree, that in the Fieri Facias which the Sheriff made the Execution upon, there was a Mistake in the Plaintiff's Name. But he observed it was the smallest Mistake that possibly could be, it was the Mistake of the first Letter only in the Plaintiff's Name, an N instead of a W. This Mistake indeed was not discovered till the Writ was executed; but before the Day of the Return of it it was discovered, and a new Writ actually sued out and delivered to the Sheriff before that Time, with the right Name of the Plaintiff in it. He said as this was a mere Mistake, he submitted it, by suing out the new Fieri Facias within that Time, and delivering it to the Sheriff within that Time likewise, it was cured in Point of Law; at least he hoped the Court would not interfere in this summary Method, but leave the Party to his Remedy, if he has any, by way of Action. Mr. Fazakerly argued on the other Side, and said he believed it was never imagined, if a Defendant is arrested upon a bad Writ, that the Plaintiff can take out a good one, whilst he is under the Arrest, and cure the Defect of the bad Writ upon it. For which Reason he hoped this Objection should prevail. Judge Page and Judge Lee said they were of Opinion that this Defect in the Writ of Execution was made good by the Method that had been taken. Judge Probyn was of Opinion to the contrary; However as the Court were not agreed in this Point, Serjeant Eyres went on to shew why he apprehended the second Objection ought not to prevail. He said the Writ of Error that was sued out, was a Writ of Error quod coram vobis. Those Writs of Error the Court will never allow, unless they see a sufficient Reason for that Purpose; and he apprehended they were no Supersedeas even at Common Law, till Bail put in; at least this was the more clear since the Statute of Ch. 2. which requires Bail to be put in to all Writs of Error after a Verdict, and a Verdict there was in the present Case. He observed farther, that in all the Precedents they could find of these Writs of Error, Bail is put in,

Vide ante 285.

in, and particularly he produced one of Bail being put in by Mr. Foreſt the Attorney before Lord Chief Juſtice Raymond. Mr. Lacy on the ſame Side ſaid that in Ven. 207. it was deſired there that a Writ of Error quod coram vobis might be a Superſedeas in a particular Caſe upon putting in of Bail. It was not ſo much as offered there, that it ſhould be a Superſedeas without it. And in the Folio Edition of Lilly's Practical Regiſter 528. he obſerved it was ſaid, that on Motion at the Side Bar the Court gives Leave that this Writ ſhall be a Superſedeas. Mr. Fazakerly on the other Side ſaid that he conceived the Authority of the Caſe cited out of Lilly was ſtrongly in Favour of their Side; for it is admitted by that Caſe, that by the Leave of the Court, this Writ of Error is a Superſedeas without Bail; and as to asking Leave of the Court for this Purpoſe, he knew no Law that required it. Then as to the Caſe in Ventris, the Authority of that he ſaid was of no Weight; for there it is agreed that the Writ of Error that was brought would not lie by Law; it is deſired by the Counſel that it may be a Superſedeas upon putting in of Bail, and the Court refuſed it. The Statutes that require Bail upon Writs of Error he obſerved were reſtrictive upon the Liberty of the People; and therefore have always been conſtrued ſtrictly; for this Reaſon it is, that they are held not to extend to Executors. It appeared then he ſaid that the Arguments that have been uſed by the Defendant in Error, to ſhew that this Writ is no Superſedeas till Bail put in, were of little or no Weight. Then in order to ſhew that it was, he obſerved that there was no Officer to take Bail. The Maſter informed the Court, when he brought one of theſe Writs of Error once he put in none, and he never knew that the Practice of the Court required it. Mr. Fazakerly ſaid too that he ſubmitted it, that the Saying of Lord Coke in 3 Bulſt. 62. was ſtrongly to that Purpoſe. Judge Lee ſaid that a ſecond Writ of Error is no Superſedeas to an Execution, and this appears by the Caſe of Butler and Luſitanoe. In the Caſe of Walker and Stokoe in Carthew, he ſaid too, it appears that Bail was put in. Judge Page went out of Court before the Argument of this Objection was over; accordingly the Matter was ordered to ſtand over. Vide poſtea.

Oates *and* Neſs.

When an Arreſt is irregularly made, how far the Court will not ſtay the Proceedings, by Reaſon of the Length of Time ſince the Arreſt was made.

UPON the Maſter's Report the Fact came out to be, that a Bailiff had ſerved a Writ upon the Defendant out of his Bailiwick; the Defendant gave the Plaintiff Notice of this, and ſtill he proceeded. Yet becauſe the Defendant did not complain to the Court of this Irregularity, till after the Declaration delivered, and Notice of Writ of Enquiry which was executed, the Judgment being by Default, and after Execution executed upon the final Judgment, the Court refuſed to ſet it aſide. Accordingly the Rule of Reference to the Maſter was diſcharged.

Collins *and* Hodſden.

MR. Gapper moved in an Ejectment, that the Landlord, Lord Weymouth, might be made a Co-Defendant, and that Mr. Tanner, upon whoſe Demiſe the preſent Ejectment is brought, might produce the original Leaſe of Lord Weymouth at the Trial; he being Leſſee under Lord Weymouth, and having aſſigned Part of the Lands contained in that Leaſe to the Defendant. Judge Page ſaid he very well remembred the ſame Motion, as the latter Part of this is made in an Ejectment, which he was Counſel in, in Lord Holt's Time, where the original Demiſe was by the late Queen Dowager, and it was refuſed. Accordingly this Part of the Motion was refuſed in the preſent Caſe; though the other Part of it was granted.

How far in an Ejectment the Court will not direct that Deeds ſhould be produced at the Trial.

Elliot *and* Criſp.

THIS Matter coming on again, a new Affidavit was produced, and now Mr. Strange came to ſhew Cauſe, and ſaid he did agree this Affidavit was a little more certain than the former; in the former it was only ſaid that before Notice of Trial given the Witneſs went over to France generally; in this it is ſworn he went over to Roan in Normandy. But he obſerved that Roan was not much farther off than York; and therefore the Plaintiff might have had him over by the Time of the Trial, if he had thought proper. Judge Probyn ſaid the Plaintiff could have no Proceſs to bring him hither; accordingly the Rule was made abſolute.

Vide ante 249.

Ruſſel *and* Lacey.

ON Motion to juſtify Bail, Mr. Bootle, junior, ſaid that the Notice was given but yeſterday at two a Clock, and he ſubmitted it, that by the Rule of the Court there ought to be a Day intervening; for which Reaſon he deſired that the Bail might come again To-morrow, in Order that the Plaintiff might have an Opportunity in the mean Time to inquire after them. The other Side ſaid that one of theſe Bail lived in Grays-Inn Lane, the other in Southwark, and was a near Neighbour, and well known to the Plaintiff. Upon which the Court asked the Maſter whether there was ſuch a Rule of the Court; and he informed them that there was not. Accordingly the Bail were allowed to juſtify themſelves now.

When Notice is given of juſtifying Bail, what ſhall be a ſufficient Notice of that Sort.

Damon *and* Jollieffe.

Vide ante 285.

MR. Draper came now to ſhew Cauſe, and ſubmitted it, that by the Rule of the Court the Venue in this Caſe could not be changed into Dorſetſhire, and he had no Authority to conſent. Mr. Banks on the other Side ſaid, that he ſubmitted it, the Rule ſhould be made abſolute. He obſerved, that where a Certiorari goes to remove a Cauſe above 51. out of the Juriſdiction of Pool, which is ſent up accordingly, and afterwards the Cauſe is ſent down to be tried, the Trial is always had in Dorſetſhire. He obſerved too, that the Freeholders in Pool actually vote for Repreſentatives for Dorſetſhire; though the Legality of thoſe Votes is now under Diſpute. Which Facts, he apprehended, were a ſufficient Evidence, that Pool is conſidered as Part of that County. Judge Page did agree the Fact relating to the Certiorari to be as has been mentioned. But yet the Court ſaid they always took it, that Pool was a Town and County of it ſelf; for which Reaſon they diſcharged the Rule.

Godwyn *and* Brooks.

When a Scire facias is brought in order to revive a Judgment, what ſhall be ſaid to be a ſufficient Return-Day, or not, in ſuch Writ.

UPON a Scire facias to revive a Judgment, affirmed in the Exchequer Chamber, the Defendant appeared and demurred. Mr. Strange now took an Exception to the Return of the Writ. He ſaid the Return was on Monday in five Weeks from the Feaſt of Eaſter, as if that Return, which is called the five Weeks from the Feaſt of Eaſter, was on a Monday. Now he obſerved, that that Return-Day was on a Sunday; and ſo is Quinden' Sanctæ Trinitatis, and all others of the like Nature. To which Purpoſe he cited Show. 60. 6 Mod. 250. Salk. 626. and the Caſe of The King and Gumley. For this Reaſon he ſubmitted it, that the Return ought to have been on Monday next after the five Weeks from the Feaſt of Eaſter; and as it was not ſo, the Writ was a void Writ upon the Face of the Record. Mr. Parker on the other Side ſaid, that he apprehended the Defendant had waived the Exception by appearing and demurring generally to the Writ. Mr. Strange by Way of Reply ſaid, that he conceived this Defect in the Return made the Writ abſolutely void. This Defect appears upon the Face of the Record; and if ſo, the Demurrer to the Writ was the proper Way to take Advantage of it. The Court ordered this Matter to ſtand over. Vide poſtea.

Guibert *and* Jones.

THIS was a Scire facias, brought by the Plaintiff Mary Guibert, as Executrix to Philip Guibert, against the Defendant the Lady ——— Jones, as Executrix to the late Earl of Ranelagh. The Scire facias ſet forth, that Philip Guibert had had a Judgment againſt the late Earl of Ranelagh; that the Plaintiff obtained Judgment upon it againſt the Defendant as Executrix to him, unde conſideratum eſt quod Maria Guibert recuperaret, &c. that thereupon the Plaintiff ſued out a Fieri facias againſt the Defendant, to levy the Money, unde convictus eſt, upon the Goods of the Teſtator, the Earl of Renelagh; that an Inqueſt was taken thereupon, who found that the Defendant had waſted the Goods of the Teſtator to the Amount of 900 l. and thereupon the preſent Writ required the Defendant to ſhew Cauſe, why this Sum of 900 l. ſhould not be levied upon her own Goods. To this Writ the Defendant demurred; and Mr. Filmer now argued in Support of the Demurrer. All Writs which the Plaintiff does not declare upon, and which notwithſtanding the Defendant is allowed to plead to, he ſubmitted it ought to be as certain, as Declarations themſelves. That he ſaid was the preſent Caſe; and he conceived that the Writ was by no Means certain enough. There is no Scire facias ſet out, which the Plaintiff obtained her Judgment upon; and a Scire facias undoubtedly ſhe ought to have ſued out in order to have revived the Judgment of her Teſtator. The Judgment therefore, he conceived, muſt be taken to be void; and conſequently all that was done upon it to be void likewiſe. He obſerved farther, that the Judgment is ſet out by way of Recital; it ought therefore to have been ſet out in the preterperfect Tenſe by the Words Conſideratum fuit, whereas it is ſet forth in the preſent Tenſe by the Words Conſideratum eſt. For this Purpoſe he cited Carth. 403. The Inqueſt too, he ſubmitted it, did not appear to be rightly taken. The Writ upon which it was taken was returnable Die Lunæ prox' poſt Quinden' Sancti Martini, and was ſued out in the Year 1728. That Return-Day in that Year was at leaſt the laſt Day in Mich. Term, if not the Day after. The Inqueſt appears to have been taken on that Day, and it is not ſhewn to have been executed, before the Court was up, and conſequently not before the Term ended. To the firſt of theſe Exceptions Mr. Fazakerly ſaid, that the preſent Judgment is ſet forth, as all other Judgments of the like Sort are; the Writ was neceſſary and incident to the Judgment, and every Thing that was neceſſary and incident to it ſhall be intended. To the ſecond he did agree, that where the Words Conſideratum eſt are in the Form of a Judgment, they ſhall be taken in the preſent Tenſe; but in other Caſes they ſhall be taken in their true and proper Signification, which is in the preterperfect Tenſe. To the laſt he ſaid, it had been determined, that where a Writ, upon which an Inqueſt is to be taken, is returnable on a Day within the Middle of the Term, and the Inqueſt appears to be taken on the Day of the Return, the

When a Scire facias is brought by an Executor to revive a Judgment which was recovered by his Teſtator, the certainty which is required in ſuch Writ.

the Inquest need not appear to have been taken before the Court was up; yet there if it was taken after, it was without Authority; and consequently upon Motion would be set aside. He submitted it, that that Case did not differ from the present one; and thereupon prayed Judgment for the Plaintiff. Judge Probyn said that his present Opinion was, that the second Exception must prevail. He did agree, that the Words Unde convictus est were right, for this is the constant Expression in all Recitals of this Sort. But the constant Expression of all Recitals of Judgment is Unde consideratum fuit. Judge Page and Judge Lee were of a contrary Opinion. Accordingly Judgment was given for the Plaintiff, unless Cause before the End of the Term.

Anvert *and* Ennover.

How far it is inbumbent on the Party to alledge by his pleading that he made an Offer.

IN Debt on Articles the Plaintiff declared, that by a certain Deed executed between the Defendant and her, she covenanted with the Defendant on her Part, to assign over to the Defendant at his proper Costs and Charges all her Right and Interest in a certain Tavern, called The Bell-Tavern, and two Messuages thereto adjoining, on or before the 24th of June next following the Date of the Deed. And farther the Plaintiff covenanted with the Defendant, that if he chose to enter into the same before the said 24th of June, he should have free Liberty so to do. In Consideration whereof the Defendant covenanted on his Part to pay to the Plaintiff the Sum of 209 l. 15 s. on the said 24th of June, and if he should enter into the Premisses before that Day, he would pay all the Rent and Taxes that should be in Arrear at that Day. The Plaintiff avers, that the Defendant did not pay her this 209 l. 15 s. on that Day, nor any Part thereof, and for this she brings her Action. The Defendant pleads, that the Plaintiff did not offer any Assignment to him of the Premisses on or before the Day mentioned in the Deed; nor did he before or at any Time since enter upon the Premisses. To this Plea the Plaintiff demurs. Serjeant Chappel argued in Support of the Plea, and said, that he conceived the offering the Assignment was a Condition precedent to the Tender of the Money; and as it is not pretended, that the Plaintiff did make such Offer, he submitted it, she was not intitled to bring this Action. In the Case of Turner and Goodwyn, Trin. 13 Ann. the Defendant agreed to pay 1500 l. to the Plaintiff upon his assigning a Judgment. Lord Macclesfield declared there, that where there are no Words to determine the Priority of the Acts, a Middle Way is to be chosen. The Party is not obliged to make an absolute Tender of the Money first; but by such Words as these, I tender you the Money, so as you make an Assignment. And farther to this Purpose the Serjeant cited Salk. 171. Lutw. 244 and 490. Dyer 76. Mr. Draper on the other Side said, that in the present Case he submitted it there were mutual Covenants on both Sides, and in such Case the Acts to be done on the one Side shall not be considered as Conditions precedent to Acts to be done on the

other. For this Purpose he cited Roll's Abr. 415. 2 Saund. 155. The Court inclined to be of Opinion for the Plaintiff. However this Matter stood over. Vide postea.

The King *and* The Inhabitants of the Parish of Langley.

How far a Person shall be said to gain a Settlement by living as a Servant.

MR. Stephens came to shew Cause why an Order of Removal should not be quashed. The Fact was specially stated in it, that Martha Brewer let herself for a Quarter of a Year to — in the Parish of Strowd, and if she and her Master should like one another, then the Agreement was, that she should live with him for a Year, and have 3 Pounds Wages. She entered upon her Service at the Beginning of the Quarter, continued on till the End of the Year, and received her 3 Pounds Wages. This was held below to be no Settlement. This Court was of a different Opinion; accordingly made the Rule absolute for quashing the Order.

Hutchins *and* Smith.

When an Action is brought by an Assignee under a Commission of Bankruptcy, how far it need not be set forth in the Declaration, how he became Assignee.

IN an Action brought by the Plaintiff, Assignee of a Commission of Bankruptcy, the Defendant demurred to the Declaration, for its not being set forth how he became Assignee. Mr. Agar senior argued in Support of the Demurrer, and said he did agree, if the Action had been brought against an Assignee, such a general Declaration would have been good; but as it is brought by one, he submitted it to be otherwise. Serjeant Chappel on the other Side said that most of the Declarations in Actions brought by these Assignees have been in this Way. Accordingly Judgment was given for the Plaintiff, unless Cause before the End of the Term. Judge Probyn absent.

Ray *and* Marriford.

How far a Person shall be said to have taken an immaterial Traverse to a Declaration in Prohibition to a Suit for a Rate.

IN Prohibition the Plaintiff declared, that the Defendant libelled against him in the Ecclesiastical Court, as Churchwarden of the Parish of Holling cum Withringsey in the County of York, upon a Rate for the Repairs of the said Parish Church; he set forth that the Lands, for which he was so rated, contained so many Acres of Meadow, so many Acres of Pasture, and averred that those Lands did not lie in the Parish of Holling cum Withgrinsey, but that they lay in the Parish of Hampton in the said County. He alledged that the Trial of the Bounds of Parishes belonged to the Temporal Courts, and not to the Ecclesiastical; and therefore prayed that the Prohibition might stand. The Defendant for a Consultation pleaded, that true it is, that the Lands mentioned in the Declaration did lie in the Parish of Hampton; but averred, that the Plaintiff occupied other Lands, which lay in the Parish of Holling cum Withringsey. He set forth that the Plaintiff was rated for those other Lands lying in the Parish of Holling cum Withringsey, absq' hoc, that he

he was rated for those lying in Hampton. To this Plea the Plaintiff demurred, and shewed specially for Cause, that the Defendant had traversed Matter not traversable. Mr. Robinson argued in Support of the Demurrer. He said he did agree that the Plaintiff had alledged in his Declaration, that the Lands for which he was rated, lay in the Parish of Hampton; but the Alledging that they lay in Hampton was merely Matter of Form; in whatever other Parish they lay, so that they did not lie in Parish of Holling cum Withringsey, it was the same Thing to the Plaintiff; and therefore the Traverse was bad, for its confining the Plaintiff to prove that they lay in this particular Parish of Hampton. He said the Defendant should only have pleaded that the Plaintiff occupied other Lands in the Parish of Holling cum Withringsey, for which he was rated. Where he ought to have rested; and then the Traverse, denying that he had other Lands in the Parish of Holling cum Withringsey, would naturally have come on in the Replication; which was the material Point to be put in Issue. To this Purpose he cited Saun. 206. Sid. 405. Lev. 263. Plow. 95. 1 Lev. 43. Sid. 227. and Carth. 116. Mr. Agar, senior, argued on the other Side; but Judge Page and Judge Lee inclined to be of Opinion that the Traverse was bad. However this Matter stood over, Judge Probyn absent.

Anonymus.

How far the Court will grant an Information against an Officer, for taking Fees which are not Legal.

Mr. Abney moved for an Information against Mr. Robe, who was Clerk of the Market belonging to the King's Household; and likewise against Burden Anderson, who acted under him, for taking small Fees for the viewing of Weights and Measures within his Jurisdiction, whether such Weights and Measures upon such View were found deficient, or not. He did agree that the Jurisdiction of this Clerk of the Market is a very large one, that it extends ten Miles round the King's Court, wherever it resides, and so this Point was lately settled by a Verdict. But yet he said the Practice of gathering these small Fees all over this Jurisdiction was a very dangerous one; and was condemned as illegal by all the Judges of England, which appears by 4 Inst. 274. Accordingly the Affidavits were read; but upon reading them it did not appear that Mr. Robe was any ways assenting to this Practice; for which Reason a Rule to shew Cause was only made upon Burden Anderson; Judge Probyn absent. But afterwards it was made upon Mr. Robe likewise. Vide postea.

The King *and* Lloyd.

An Information in the Nature of a Quo Warranto had been obtained against the Defendant, to know by what Authority he acted as Clerk of the Peace of the County of Cardigan. Mr. Fazakerly said that there was now depending before the Court a Conviction of the Sessions, by which the Defendant was removed from his Office; and till that be determined, the Defendant

dant cannot know what to plead to this Information; for which Reason he moved for Time to plead, till this Conviction is determined. The Court upon these Circumstances gave the Defendant till the second Day of next Term. Judge Probyn absent. Vide postea.

The King *and* Jokam.

THIS was an Information against the Defendant at the Sessions upon the Statute of 5 & 6 Edw. 6. 14. (9.) for selling Cattle again after he brought them, without keeping them five Weeks. Mr. Filmer moved to quash it upon two Exceptions; First, for the Offence's appearing to have been committed after the Beginning of the Sessions. Secondly, for the Affidavit's, which the Statute of 21 Jac. 4. (3.) requires, appearing to have been made by a meer Stranger, and not by the Informer, as the Act directs. To the first he did agree that this Conviction was at an adjourned Sessions, and that the adjourned Sessions was after the Time when the Fact was committed; but the Sessions began the 9th of January last, the Fact was not committed till the 11th, and the Time for holding the adjourned Sessions, together with the Time for holding the Sessions at first of all, is considered but as one Day in Law. To the second he said, that the Statute of Jac. requires, that the Affidavit should be of Record before the Exhibiting the Information; accordingly this Affidavit is sent up with the rest of the Proceedings; so that this Exception appears upon the present Record likewise. For these Reasons the Court made a Rule to shew Cause. Judge Probyn absent. Vide postea.

When an Information is brought on a penal Statute, how far the Affidavit which 21 Ja. 4. sect. 3. requires, must be made by the Informer, or not.

Woodby *and* Holdfast.

ON Motion for Judgment in Ejectment, the Service of the Copy of the Declaration against the casual Ejector upon the Tenant appeared not to be made in the usual Way. The Tenant James Cook had no Wife, and absconded. The Service of the Copy of the Declaration was upon Nethercot his Maid-Servant, and she was desired by the Person that served it to give it her Master. The Maid-Servant made Affidavit that she did give it her Master, and that he said he would take Care of it. Upon these Circumstances the Court was of Opinion that this was a good Service; accordingly the Motion was granted. Judge Probyn absent.

What shall be said to be a good Service of a Declaration in Ejectment.

Goodwyn *and* Brooks.

MR. Parker moved now to discontinue on Payment of Costs; which the Court accordingly granted.

Vide ante 306.

Weel

Weel *and* Smith.

Vide antea 203.

MR. Agar now moved that the ſecond Writ of Execution might be ſet aſide for its being taken out the 19th of May, which was within Term, and yet teſted the laſt Day of laſt Term, returnable the 9th of June. He likewiſe moved that they might give Bail to this Writ of Error, that thereupon it might be a Superſedeas; and that the Defendant in Error might bring in the Roll and have the Judgment docketed, in order that the Plaintiff might aſſign his Errors. Judge Lee ſaid, that certainly Bail muſt be put in upon this Writ of Error, as it is after a Verdict, as well as upon any other; and ſo this Point was determined in the Caſe of Merryfeild and Wellen, Trin. 1 G. 2. But Judge Page thought this Motion too ſpecial to be made without Notice; accordingly the Court directed Mr. Agar to file his Affidavits, give Notice to the other Side, and move this Matter again. Judge Probyn abſent. Vide poſtea.

Darbey *and* Gould.

Vide antea 275.

MR. Strange now came to ſhew Cauſe upon this Rule; he ſaid the Rule was that a new Record of Niſi prius might be made out agreeable to the Roll; and for this Purpoſe that there ſhould be a new Writ of Niſi prius, and a new Writ of Diſtringas returned by Sir Iſaac Shard and late Sheriffs of the County of Middleſex, and that the Verdict might be indorſed on the Back of the Record of Niſi Prius, according to the Notes of the Aſſociate. He obſerved that this was a very extraordinary Rule, and ſuch a one, as according to the Circumſtances of the preſent Caſe, he believed no Precedent could Warrant. Sir Iſaac Shard and the other Sheriff he ſaid had for ſome Time been out of their Office; and if that was the only Objection, he thought the Court could hardly make a Rule upon them to ſign a Return to this Writ. But he obſerved farther, that the Names of the Jurors could not now be known; it was not pretended that the Aſſociate had taken Notes of them; and that was another Reaſon why the Return to the Diſtringas could not be made. He took Notice likewiſe, that the Chief Juſtice who tried the Cauſe was ſince dead; and this was a Circumſtance which diſtinguiſhed the preſent Caſe from all the Caſes that had been cited on the other Side. Mr. Fazakerly ſubmitted it, that the Caſes that have been cited did well warrant the preſent Motion. That of Needham and Graynoe, Hill. 8 Geo. 1. was the principal one they relied upon. The Rule that was made in that Caſe was now read, and appeared to have been obtained on the Motion of Mr. Juſtice Probyn, when he was Counſel. It was that a new Writ of Niſi prius, and a new Writ of Diſtringas, and a Verdict might be entered a-new on the Back of the Record of Niſi prius, according to the Notes taken per Communem Clericum of Briſtol. The Names of the Jurors he ſaid are never entered on the Back of the Record of Niſi prius, but only where there is a Tales, which was not had in the preſent

Caſe; and therefore there could be no Occaſion, that the Aſſociate ſhould have taken a Note of the Names of the Jurors. The Aſſociate has made an Affidavit, that he did take a Note of the Verdict; which he apprehended was the beſt Evidence that could be had, as the preſent Caſe is circumſtanced. The Court was of the ſame Opinion; accordingly the Rule was made abſolute. Judge Probyn abſent.

Murrel *and* Anderſon.

IN Treſpaſs brought againſt the Defendant for entering the Plaintiff's Shop, and taking away two Shirts, the Defendant juſtified, for that he was Chief Bailiff of the Liberty of Stepney, and as ſuch all Amercements within that Liberty were due to him; that an Amercement of 3 s. 4 d. was ſet upon the Defendant living within that Liberty; that Proceſs iſſued out of the Exchequer to levy it, directed to the Sheriffs of London and Middleſex, and that the two Shirts were taken on Account of the 3 s. 4 d. being refuſed to be paid. To this Plea there was a Demurrer. But the Court thought it ſufficient, notwithſtanding it was not ſet out on what Account the 3 s. 4 d. was due. Judge Page ſaid, theſe Allowances to Bailiffs are ſettled in the Office of the Foreign Apoſer in the Exchequer, he thought therefore, that that Court was the proper Place for the Plaintiff to apply to, and not to this. Accordingly Judgment was given for the Defendant, unleſs Cauſe.

The Fees which are due to Bailiffs for executing a Proceſs.

Wirley *and* Budder.

THE Plaintiff having brought three ſeveral Actions againſt three ſeveral Indorſers of one and the ſame Note, Motion was made, that the Plaintiff might make her Election againſt which of the three ſeveral Defendants ſhe would proceed, and that Proceedings might be ſtaid againſt the other two. Judge Page ſaid that the Plaintiff could not take out Execution but againſt one of the Defendants; however thought that the Plaintiff had a Right to proceed to Judgment againſt all. Accordingly the Motion was refuſed. Judge Probyn abſent.

When ſeveral Actions are brought for one and the ſame Cauſe, how far the Party ſhall have a Right to proceed to Judgment in all of them.

The King *and* Cotton and others.

ON Rule to ſhew Cauſe, why an Information ſhould not be granted againſt the Defendants, the Fact came out to be in the Manner following. A Court-Leet was held for the Liberty of Weſtminſter lately, in which Mr. Cotton, one of the Defendants, ſat as Deputy-Steward. Another Court was likewiſe held at the ſame Time and Place by Virtue of an Act of Parliament paſſed the 27th of Queen Elizabeth, in which all the Defendants ſat as Judges. That Statute gives the Defendants Power to inquire into all Breaches of the Peace,

How far the Court will grant an Information againſt a Perſon for abuſing a Judge of an inferior Court.

and certain other Offences arising within the Liberty of Weſtminſter. By that Statute there is a Power given them to Fine and Impriſon; and if they do impriſon, they are required to give Notice of the Impriſonment within Twenty-four Hours to ſome Juſtice of Peace for the County of Middleſex. When theſe Courts were ſitting a Complaint was made before them of a Breach of the Peace upon the Watchmen by one Smith, who was Conſtable that Year, and a wealthy Man in the Liberty of Weſtminſter. Smith was ſummoned to appear before them, and he accordingly attended. When he came there he behaved himſelf in a very contemptuous Manner towards the Court, ſeveral Times deriding Mr. Cotton by the Name of Jack Cotton, calling for Drink, and ſetting himſelf in the Place of one of the Juſtices. For this Contempt they told him they would commit him. Upon that he deſired to give Bail; one Perſon ſwore he offered to be Bail for him; the Juſtices not approving of him, Smith asked them, whether they would have Dukes, Lords or Earls; whichever of them they would have he could procure to be bail for him. The Defendants made him no Anſwer, but ordered him to be committed for Twenty-four Hours, and in the mean Time they gave Notice of this Commitment to two Juſtices of the Peace for the County of Middleſex, who accordingly bailed him. Upon this State of the Caſe Mr. Strange, as Counſel for the Defendants, ſubmitted it, that the Rule ought to be diſcharged. He ſaid he did agree, that poſſibly the Commitment for Twenty-four Hours might not ſo ſtrictly be juſtified; but commit the Defendants certainly could do. A Steward of a Court-Leet may do it for a Contempt committed in Court, and ſo has it often been determined. Mr. Cotton was Deputy-Steward; and therefore the Commitment might well be juſtified, as to him. The Defendants have all of them likewiſe a Power given them to commit for Breaches of the Peace. That contemptuous Behaviour before the Court, he ſubmitted it, was a Breach of the Peace; and therefore the Commitment might well be juſtified, as to them all. And even as to the Time of Twenty-four Hours, he obſerved that the Act of Parliament gives them Power to commit; and within Twenty-four Hours they are to give Notice to ſome Juſtice of Peace; the Defendants have committed for Twenty-four Hours; if this be a Miſtake, at leaſt it is ſuch a one, that might eaſily be made. It is ſaid then, that Smith did offer Bail, and the Juſtices refuſed to bail him. In Anſwer to this, Mr. Strange obſerved, that but one Perſon by Name he did offer; that Perſon the Juſtices thought not ſufficient; and beſides, for a Contempt committed in Court, he did not know that the Court was bound to bail him. Mr. Wynn argued on the ſame Side, and for Authorities relied upon Fitz. Nat. Brev. Engliſh Tranſlation 182. 7 Cromp. Rep. 11. 44. and the firſt Caſe in Vent. Rep. Serjeant Belfield argued on the other Side, and ſubmitted it, that what Mr. Smith did was only a Misbehaviour; the moſt therefore, that the Defendants could have been warranted in doing, would have been to have committed him, in caſe he had not offered Bail, and that not for a determined Time, but gene-

rally only, and then to have given Notice. Judge Page ſaid that he did agree, that the Commitment for that determined Time might be illegal; but his Opinion was, that the Juſtices were a Court of Record by the Statute of Eliz. in as much as they have a Power given them to Fine and Impriſon; and for a Contempt done in ſuch Court undoubtedly the Judges of it may commit. He ſaid likewiſe in the preſent Caſe he took it the Defendant was guilty of a Breach of the Peace; not for calling one of the Judges Jack Cotton; (for Words perhaps will not make ſuch an Offence) but for ſitting in the Place of one of the Judges. If any Man ſhould do that in this Court, he ſhould think him to be guilty of a Breach of the Peace. And if this was ſo, the Juſtices had Conuſance of this Offence within the expreſs Words of the Statute of Eliz. But admitting, that this Offence ſhould be conſidered as a Contempt only done in a Court of Record, he thought that Court was not bound to bail him; and if ſuch Return was made to a Habeas Corpus, he thought this Court could not do it neither. Judge Lee ſaid he believed the regular Way in theſe Caſes of Contempts was for the Court to ſet a Fine upon the Party, and to commit him for not paying it. However the moſt that could be objected againſt the Defendants was, that they have been guilty of a Miſtake in Judgment. Accordingly the Rule was diſcharged for the preſent Information. Judge Probyn abſent.

Weele *and* Smith.

MR. Agar now moved this Matter again upon Notice. Accordingly the Court allowed him to put in Bail; and made a Rule to ſhew Cauſe, why the ſecond Writ of Execution ſhould not be ſet aſide, and the Roll brought in, and the Judgment docketed, in Purſuance of the other Part of the Motion. Judge Probyn abſent. Vide poſtea.

Vide ante 285.

The King *and* Pinder.

MR. Fazakerly moved, that a Rule for quaſhing a Capias with Proclamations might be diſcharged, for its being made above a Twelve-month ago, and never drawn up, nor ſerved during all that Time. Judge Page ſaid, that he thought Delay of it ſelf only was never a Reaſon for granting ſuch Motion. Accordingly it was refuſed. Judge Probyn abſent.

How far the Court will not diſcharge a Rule by reaſon of the Length of Time ſince it was drawn up.

Wells *and* Southwell.

Of what Term common Bail muſt be filed.

ON Motion to ſet aſide a Judgment, for the common Bail's not being filed for the Defendant the ſame Term, in which the Writ was returnable; the Writ being returnable the firſt Day of Hil. Term laſt, and the common Bail not being filed till Eaſter Term following; the Court referred this Matter to the Maſter. Judge Probyn abſent.

The King *and* Taylor.

Vide ante 280.

MR. Wills now informed the Court, that though the Form of the Judgment after the Ideo conſideratum eſt was altered according to the Directions of the Court; yet the Prayer of that Judgment continued as it was before. He ſubmitted it, that the Prayer of the Judgment by the Party, entered upon the Roll, ought to be agreeable to the Judgment pronounced by the Court; accordingly moved, that this might be amended likewiſe; and a Rule was made to ſhew Cauſe. Judge Probyn abſent. Vide poſtea.

Anonymus.

What ſhall be ſaid to be a ſufficient Notice, or not, to Truſtees of a Turnpike.

MR. Lacy moved to quaſh an Order of Seſſions made for the Removal of a Turnpike upon the Road leading from Fulham to Hamerſmith. His Exception taken to the Order was, that Notice of the Complaint to the Seſſions againſt the Truſtees of this Turnpike was only given to five of them, whereas there are near ſeventy appointed by the Act; and in Default of their appearing to anſwer the Complaint upon this Notice the Order was made. He ſubmitted it, that Notice ought to have been given to each of the Truſtees in particular, or at leaſt, when they have a general Meeting. But the Order was not in Court; accordingly no Rule was made at preſent. Vide poſtea.

Anonymus.

Whenan Action is brought upon the Statute of 21 H. 8. 13. relating to Eccleſiaſtical Perſons, what kind of Pleas will be allowed by the Court to be pleaded in Bar of ſuch Action.

IN an Action qui tam brought upon the Statute of 21 H. 8. 13. for Non-reſidence, and for buying Goods by way of Merchandize, in order to ſell again, Mr. Agar moved for Liberty to plead as to the Non-reſidence, that the Defendant was a Chaplain retained, that thereby he was enabled to hold two Benefices; and that he reſided upon his other Benefice; as to the Buying Goods to ſell again, he moved to plead, that the Goods were bought for the Uſe of his Family; and likewiſe he moved to plead, as to the Whole of the Declaration, Nil debet. Accordingly the Motion was granted. Judge Probyn abſent.

The King *and* The Mayor of Shrewsbury.

MR. Fazakerly moved, that the Officer, that has the Custody of the publick Books of the Corporation, might attend with them at the Trial, upon an Affidavit, that there was a Rasure in one of them. Judge Page said, that he never knew that the Court made an Order upon the Officer in such Case to attend with any more of the Books, than the Affidavit swears there are Rasures in. And that too is never granted, but upon the Party's being at the Costs of it, that makes the Motion. Accordingly a Rule was only made in this Case, that the Officer should attend with that particular Book, at the Prosecutor's Expence. Judge Probyn absent.

When there is occasion to produce a Book in Evidence, and there are Rasures in it, what kind of Orders shall be made by the Court concerning the producing it.

Tasker *and* Keary.

ON Rule to shew Cause, why an Umpirage should not be set aside, Mr. Fazakerly said, that there had been two Exceptions taken to it; one, that the Umpire has only compleated what the Arbitrators begun; the other, that the Umpire made his Umpirage upon the State of the Facts made to him by the Arbitrators, without convening the Parties before him. He observed, that the Submission to this Award had been made a Rule of Court according to the Statute of 9 & 10 W. 15. and before any Exceptions could be argued to such Award, he submitted it, that there ought to have been a Suggestion made of them upon the Roll. This has been omitted in the present Case, and therefore on that Account he conceived the Application to this Court was irregular. Then as to the Exceptions themselves he said, that the Arbitrators determined the whole Matter referred to them, excepting one single Part of it, which related to an Account of Interest, which was to be taken. To settle this Matter they appointed an Umpire, as they had a Power by the Submission to do. He took the Facts to be, as the Arbitrators had stated them; and made his Umpirage concerning that Account of Interest only accordingly. The Statute that has been mentioned, he observed, requires that no Umpirage shall be set aside, but for some Misbehaviour in the Umpire; there appeared to be nothing of that in the present Case; but every Thing was fair and regular; and therefore he hoped, the Rule should be discharged. Mr. Strange argued on the other Side, and said, that he took it to be a known and certain Rule, that the Parties to the Submission must have Notice given them, before the Arbitrators make their Award. In the present Case they had not that; but the Umpire made his Umpirage upon hearing the Arbitrators only, and not hearing the Parties. The Umpire too must have the Whole of that Authority, which the Arbitrators had; this he had not in the present Case; and for these Reasons he hoped the Umpirage should be set aside. Judge Page said, that he did agree there was one Case soon after the making of the Statute

How far an Umpirage shall not be good, by Reason of its only compleating what the Arbitrators begun.

of William, wherein the Court held, that such Suggestion upon the Roll, as has been mentioned, was necessary. But that was the single Case, he believed, where it was ever done; and therefore the want of that could be no Objection against taking the present Exceptions. He said he took it, that an Umpire must have the whole Authority which the Arbitrators had, and cannot have Part of it only. The Umpire too must make his Umpirage upon hearing the Parties to the Submission, and not upon hearing the Arbitrators only. And therefore for these Reasons he thought the present Umpirage ought to be set aside. Judge Lee said that he was of Opinion, the Parties to the Submission ought to have Notice given them before the Arbitrators make their Award. He agreed likewise, that the present Umpirage ought to be set aside for their hearing the Arbitrators only, and not the Parties of the Submission. He said farther, that he was of Opinion, the Umpire could not determine Part, without determining the Whole. Accordingly the Rule was made absolute. Judge Probyn absent.

Anonymus.

Vide ante. 316.

MR. Lacey moving this Matter again, Judge Page declared his Opinion, that, unless some Confederacy could be shewn between those Trustees, that have had Notice given them, and those that complained to the Sessions, the Notice was a good Notice. Judge Lee agreed the same. Accordingly no Rule was made upon this Motion. Judge Probyn absent.

Griffith *and* Allcock.

When a Person who resides in a County Palatine of Chester is served with a Copy of a Latitat, how far it is necessary that he should be likewise served with a Copy of a Mandate from the Chamberlain.

MR. Baily moved, that the Irregularity of a Judgment might be referred to the Master, by Reason that the Defendant was only served with a Copy of a Latitat directed to the Chamberlain of the County Palatine of Chester, and not with a Copy of a Mandate from the Chamberlain. Accordingly the Motion was granted. Judge Probyn absent. Vide postea.

Gregory *and* Warren.

When a Writ of Error in Parliament is brought, upon what Terms the Court will ſtay Proceedings againſt Bail pending ſuch Writ of Error.

ON Rule to ſhew Cauſe why Proceedings upon a Scire Facias againſt Bail ſhould not be ſtaid, pending a Writ of Error in Parliament, upon the ſame Terms as were allowed in the Caſe of Myre and Arthur; the Fact came out to be in the Manner following; In Trinity Term laſt the Plaintiff recovered a Judgment for 987 Pounds. Writ of Error was brought in the Exchequer Chamber, and the Judgment affirmed. A Capias ad ſatisfaciendum taken out againſt the Principal; two Scire Facias's taken out againſt the Bail. On the Day before the Return of the ſecond, the preſent Motion was made, and the Writ of Error allowed in Parliament Yeſterday. Mr. Strange came now to ſhew Cauſe, and ſaid that he has often heard it ſaid by the Court, that they would never extend theſe Rules in Favour of Bail, farther than was done in the Caſe of Myre and Arthur. He ſaid he had a Note of that Caſe; and it appeared there, that the Motion was made in Favour of the Bail, before any Scire Facias taken out; in the preſent one it is not made till the Day before the Return of the ſecond. The Court ſaid where there is no Writ of Error ſued out, the Bail may ſurrender the Principal at any Time before the Return of the ſecond Scire facias. They ſaid they thought there was the ſame Reaſon, where the Writ of Error is brought, that the Bail may at any Time before the Return of the ſecond Scire Facias apply, that Proceedings may be ſtaid againſt them, till the Event of the Writ of Error determined, upon entring into a Rule, according to the Caſe of Myre and Arthur, to pay the Money recovered, or ſurrender the Principal within four Days after Affirmance of the Judgment. Accordingly the Rule was made abſolute. Judge Probyn abſent.

The King *and* Mathews.

How far a Commitment ſhall be ſaid to be bad by Reaſon of the Uncertainty of the Time for which the Party was committed.

THE Defendant having been brought up by Habeas Corpus directed to the Keeper of the Gaol in Oxford, the Return was that the Defendant was committed by Order of the Vice-Chancellor, till he pays the Coſts that were taxed, and afterwards ſhould be taxed in a Suit inſtituted before him. Serjeant Hawkins ſubmitted it, that this Commitment was illegal, by Reaſon that Part of the Coſts were not taxed, and perhaps never would be; ſo that this was in the Nature of an Impriſonment for Life. Accordingly he moved that the Defendant might be diſcharged, or at leaſt be bailed; and he ſaid he had given Notice of this Motion to the Vice-Chancellor, and to the Plaintiff in the Suit below. Judge Page and Judge Lee agreed, that that Part of the Commitment in relation to the future Coſts, was certainly illegal; but doubted whether the Commitment might not ſtand good for the other Part of it. They ſaid this was a Point of too great Difficulty to be determined the laſt Day of a Term. Accordingly ordered him to be remanded. Judge Probyn abſent.

Tho-

Thomas *and* Biſhop.

How far Bill of Exchange ſhall be ſaid to be void, by Reaſon of the Uncertainty of the Fund, out of which the Money is required to be paid.

IN an Action brought by the Plaintiff upon a Bill of Exchange, the Bill was drawn in theſe Words, May 29, 1732, Sir, At 30 Days Sight pray pay this my firſt Bill of Exchange, the ſecond not paid, unto *John Somerville*, or Order, the Sum of 200 Pounds Sterling, Value received of him, and place the ſame to the Account of the York-Buildings Company, as by Letter of Advice. To *Humphry Biſhop*, Caſhire of the York-Buildings Company, at their Houſe in *Wincheſter-Street*, *London*. The Defendant accepted this Bill, and ſigned his Name to it Humphry Biſhop. The Trial in this Cauſe came on at the Sittings before Judge Page, and he directed the Jury to find a Verdict for the Plaintiff, which they accordingly did. Mr. Kettleby now moved for a new Trial; and ſubmitted it, that as the Bill was drawn on the Caſhier of the York-Buildings Company, on the Company's Account, the Action ought to have been againſt the Company, or at leaſt againſt the Defendant, as Servant to them, and ſo this ought to have appeared upon the Face of the Declaration. But the preſent Declaration is againſt the Defendant perſonally in his own Right; and therefore he ſubmitted it, that the Evidence did not maintain it. The Court ſaid they could not give an Opinion upon this Matter, without ſeeing the Bill itſelf; and the Plaintiff's Attorney had not the Bill here; accordingly this Matter ſtood over. Judge Probyn abſent. Vide poſtea.

The King *and* Taylor.

Vide antea 316.

THE Counſel for the Proſecutor having now ſhewn Cauſe upon this Rule, Judge Page declared his preſent Opinion to be, that the Court could not alter the Prayer of the Judgment; however the Rule was enlarged, that this Point might be farther conſidered of. It was then ſaid by the Defendant's Counſel, that the Proſecutor had not altered the Judgment of Ouſter itſelf to this Day. The Court upon that made a Rule that it ſhould be altered immediately. They ſaid they would ſo far give Directions in it, that the Judgment ſhould be, that the Defendant ſhould be fined upon his Confeſſion of the Uſurpation for the Time mentioned in his Plea. But declared they would not give Directions about the Form of Words, which the Judgment ſhould be penned in.

Weele *and* Smith.

Vide antea 315.

THIS Matter coming on again, the Court made the Rule abſolute for ſetting aſide the Writs of Execution, by Reaſon they recited a Judgment recovered in the Common Pleas, and they allowed the Writ of Error to be a Superſedeas on Affidavit of the Truth of the Facts to be aſſigned for Error.

The King *and* Pixley.

Bury-Aſſizes. THIS was an Indictment againſt the Defendant upon the Statute of 6 G. 1. for aſſaulting Cuſtom-houſe Officers in the Excution of their Office. This Indictment had been removed up into the King's Bench by Certiorari, and was ſent down to be tried at Niſi prius. Upon Evidence the Defendant's Counſel objected that the Perſons aſſaulted ought to ſhew the Authority, which they acted under as Cuſtom-houſe Officers. The Judge ſaid, that he well remembred there was a Statute which made it unneceſſary. Accordingly the Objection was over-ruled.

Vide ante. 275.

Farr *againſt* Criſp and others.

Bury-Aſſizes. IN Replevin the Defendants avowed the taking under a Warrant from the Commiſſioners of Sewers. Mr. Proctor objected that the Defendants ought to produce the Inquiſition, which is neceſſary to be taken by the Commiſſioners, before any Warrant can be made out. But the Judge did not allow of this Objection; upon which Mr. Proctor made another, that the Warrant appeared to be illegal upon the Face of it; for it required the Defendants to levy a certain Penalty upon ſuch Perſons, as ſhould refuſe to pay the Rate, and did not mention the Names of theſe Perſons. This Objection the Judge allowed of; accordingly the Plaintiff was nonſuited.

When a Juſtification is made under a Warrant from Commiſſioners of Sewers, how far ſuch Warrant ſhall be ſaid to be legal, or not.

Term. Mich.

7 Geo. II. 1733.

Naylor *and* Boyce.

How far a Rule to aſſign Errors ſhall be neceſſary to be given, or not.

IN a Writ of Error upon a Judgment in the Common Pleas the Defendant did not give Rules to the Plaintiff to aſſign his Errors, but ſerved him with a Scire facias quare executionem non, to which the Plaintiff pleaded Nul tiel Record; the Defendant joined Iſſue with him upon that, and delivered him a Copy of the Iſſue with two Days Notice to verify the Record, and for want of his paying for it ſigned his Judgment upon the Scire facias. The Plaintiff told the Defendant, that he was irregular in not giving Rules to aſſign Errors; and thereupon the Defendant did give ſuch Rules in Purſuance of which the Plaintiff aſſigned his Errors; the Defendant pleaded In nullo eſt Erratum; the Paper-Book was accordingly made up; and the Errors intended to be argued this Term. But notwithſtanding this the Defendant took out Execution on the Judgment upon the Scire facias. Upon which Mr. Fazakerly moved, that the Judgment and Execution might both be ſet aſide. The Judgment he ſaid was irregular, becauſe there were no Rules given to aſſign Errors; and likewiſe, becauſe there ought to have been four Days Notice to verify the Record. But, if the Judgment itſelf was not irregular, at leaſt, he ſaid, the Execution was. For the Writ of Error was clearly depending at the Time the Execution was taken out; and ſo the Party himſelf took it, by giving Rules to aſſign Errors, and thereby waiving the former Judgment. The Court declared their Opinions, that the Judgment was clearly regular, by Reaſon that the Plaintiff did not pay for the Copy of the Iſſue. And Judge Probyn ſaid his Opinion was, that two Days Notice was ſufficient, in as much as the Proof of the Iſſue lies in this Caſe upon the Defendant; though he did agree it to be otherwiſe, where the Proof of the Iſſue lies upon the other Side; which the Maſter confirmed. The Court were farther of Opinion, that the Execution was regular likewiſe; and yet they did agree, that the

Writ of Error was depending; accordingly the Motion was refused.

Doe *and* Roe.

MR. Hopkins moved to discharge a Rule of Reference to the Master, by Reason of its being last Easter Term, and no Appointment taken out upon it. Which the Court accordingly did.

When a Rule of Reference is made to the Master, how far the Court will discharge it by Reason of their being no Appointment taken out upon it.

Price *and* Webb.

MR. Draper moved to set aside a Judgment, by Reason that the Declaration was delivered but the last Day of last Term; whereas it ought to have been delivered four Days before the End of it, the Defendant being an Attorney. Accordingly a Rule was made to shew Cause.

When an Attorney is sued, and a Declaration delivered against him, within what Time it is that the Plaintiff will be intitled to sign his Judgment for want of a Plea.

Mariner *and* Thrustout.

IN Ejectment, to which the Tenants had not appeared, the Common Serjeant moved, that the Declaration might be amended, by striking out the Words three Acres of Ground, and putting in the Words three Acres of Arable Land in the Room of them; and cited a Case Trin. 2 Geo. 1. where a Declaration in Ejectment was amended before Appearance; the Declaration delivered being de Messuagio five Tenemento, and the Words five Tenemento struck out. Judge Page agreed that Case; because there nothing was added to the Declaration. But here the Motion is made to add one Description of Land in room of another; and there can be no Way of compelling the Tenant to appear to such Declaration, in as much as he was never served with it. Upon which the Common Serjeant moved, that the Words three Acres of Ground might be struck out of the Declaration, without inserting the other Words; and that Motion Judge Page and Judge Lee, being only in Court, granted.

How far a Declaration in Ejectment shall be allowed to be amended.

The King *and* Jokam.

MR. Lacey came now to shew Cause, and said, with regard to the first Exception, that he did agree, if the Adjournment had not appeared upon Record, the Exception would have been fatal. But as the Adjournment does appear, the Conviction is equally good, as a Declaration is, where the Cause of Action arises in the same Term as the Declaration is of, and

Vide ante 311.

and there is a ſpecial Memorandum. To the ſecond he obſerved, that the Affidavit appears upon Record to have been made by John James of the City of London Butcher, Relator in this Cauſe, and the Statute of Jac. allows the Affidavit to be made either by Informer or Relator. Beſides, he ſaid it has been held, that ſuch Exception cannot be taken Advantage of upon a Writ of Error, for which Purpoſe he cited 1 Cro. 316. 4 Inſt. 272. and he ſubmitted, it could not be taken Advantage of in this Way neither. And farther he obſerved, that this was an Information qui tam, wherein the Plaintiff may be nonſuited, and is in the Nature of a Civil Suit; and therefore could not be quaſhed. As to the firſt Exception Judge Page and Judge Lee, being only in Court, agreed, that it had received a proper Anſwer. To the ſecond they agreed too, if it ſhould be allowed, that it could not be taken Advantage of upon a Writ of Error. But Judge Page ſaid his Opinion was, that the Words Informer or Relator may ſignify different Perſons; the Informer, the Perſon that makes the Complaint, the Relator, the Perſon on whoſe Teſtimony it is made; and therefore he thought the Affidavit made by either of them was good. He took Notice farther, that an Information qui tam was as much a Civil Suit as an Action of Debt qui tam; and therefore the Information could not be quaſhed. Judge Lee ſaid, that though ſometimes the Words Informer or Relator may ſignify different Perſons, yet in this Statute he doubted whether they did not ſignify the ſame. And if the Affidavit was bad upon this Exception, he thought that this was the proper Manner of taking Advantage of it. Accordingly the Court not agreeing in Opinion, this Matter was ordered to be ſpoke to again. Vide poſtea.

Wilcox *and* Cockel.

How far the Court will not ſtay Proceedings in an Action upon a Bail-Bond, till Bail above is actually put in.

MR. Gapper moved that Proceedings upon the Bail-Bond might be ſtaid upon putting Bail above. Judge Page ſaid, that the Court could not grant this Motion till Bail actually put in. Mr. Gapper anſwered, that he made this ſame Objection in a like Caſe about two Years ago, and Lord Raymond over-ruled him in it, ſaying that of late the Court had allowed theſe Motions upon putting in Bail above. But Judge Probyn and Judge Lee agreed with Judge Page; accordingly the Motion was refuſed.

Anonymus.

How far an Infant ſhall not be capable of being choſen a Capital Burgeſs of a Corporation.

MR. Abney moved for an Information in the Nature of a Quo Warranto againſt one to know by what Authority he exerciſed the Office of Burgeſs in the Town of Caln in the County of Wilts. The Objection againſt him was, that he was an Infant at the Time of his Election. The Court ſaid, that Infants were capable of ſitting in the Houſe of Commons, till a late Act of Parliament was

made againſt it. However they made a Rule to ſhew Cauſe. Vide poſtea.

Hughes *and* Stout.

IN an Action of Covenant the Plaintiff made Affidavit that the Defendant was his Tenant, and that he had broke ſeveral Covenants in his Leaſe to his Damage of 100 l. and thereupon held him to ſpecial Bail. Mr. Strange upon this moved, that the Defendant might be diſcharged on common Bail; becauſe the Damages were merely uncertain, and the Plaintiff had obtained no Order of a Judge, whereby ſpecial Bail was required. In Covenant for Rent he did agree it was otherwiſe. Accordingly a Rule was made to ſhew Cauſe; and afterwards it was made abſolute.

How far a Defendant ſhall not be held to ſpecial Bail, without an Order of a Judge for that Purpoſe.

Anonymus.

MR. Prime moved, that certain Articles of the Peace, that were exhibited againſt one Mr. Brindloe and Mary Perkins his Servant, might be ſet aſide. With regard to Mr. Brindloe, he ſaid, that there was no Fact charged upon him in the Articles. The Woman that exhibited them, has only ſworn that he threatned to do her Buſineſs, and ſaid ſome other general Expreſſions to her, by Means of which ſhe ſwears, ſhe went in Fear of her Life. Articles of this uncertain Nature, he ſubmitted it, were bad upon the Face of them. But he had Affidavits beſides which explained the Senſe thoſe Words were ſpoke in, he would do her Buſineſs for her, and ſhewed they ought to receive a very innocent Conſtruction. With regard to Elizabeth Perkins, he apprehended, that there was no Charge at all ſworn upon her. For the Words are, That the ſaid *Brindloe* together with *Elizabeth Perkins* have ſeveral Times, &c. Judge Page and Judge Probyn ſaid, that they never knew Affidavits to be read in ſuch Caſes as this; accordingly were of Opinion, that they ought not. Judge Lee however ſaid, that where an Expreſſion in Articles is in it ſelf doubtful, he did not ſee the Reaſon why they might not. However they all agreed that there was another Expreſſion in the Articles, which was clearly ſufficient; and that was, That Mr. *Brindloe* threatned the Complainant to throw her into a Horſe-Pond. Accordingly Mr. Brindloe gave Bail to theſe Articles. But the Servant was diſcharged by Conſent.

How far the Court will not ſet aſide Articles of the Peace, notwithſtanding ſome Uncertainty in them.

Anonymus.

How far Exceptions for ſuperſeding a Writ, muſt be taken before the Return of it.

MR. Abney moved that a Writ of Mandamus might be ſuperſeded, which was directed to Mr. Pilkinton and another, Overſeers of the Pariſh of St. George's, requiring them to deliver over to Mr. Bletſow and another all publick Books, Papers and Writings relating to the Poor of that Pariſh, which were in their Cuſtody. In the Caſe of Utoxeter, he ſaid it was lately determined, that a Certiorari would not lie to remove Poor's Rates; and by the ſame Reaſon, he ſubmitted it, the preſent Mandamus would not. He obſerved farther, that there was a Conteſt now depending between theſe very Perſons concerning the Right of Election; and as Mr. Pilkinton and the other Perſon had got the Poſſeſſion of the Books, the Court would certainly not take it from them. Judge Probyn ſaid, that the Reaſon why the Court does not grant Certiorari's to remove Poor's Rate is, becauſe there is an Appeal given to another Juriſdiction; and therefore till an Order of Juſtices is made upon them, the Court has nothing to do with them. But in the preſent Caſe, when the Office of Overſeer determines, which is within a limited Time, it is certain that the Books ought to be delivered to his Succeſſor; and therefore undoubtedly the Court will grant a Mandamus for that Purpoſe; which the reſt of the Court agreed to. As to the Fact concerning the Conteſt about the Election, they ſaid that would properly come upon the Return; and Judge Lee ſaid, another Reaſon why the Court would not ſuperſede this Writ of Mandamus was, becauſe the Return was out; and he ſaid it was determined in the Time of Lord Raymond, that an Exception for ſuperſeding a Writ muſt be taken before the Day of the Return of it.

Anonymus.

How far an Information in the Nature of a Quo Warranto ſhall be granted againſt a Perſon, by Reaſon of his not being choſen into his Office at the Time he ought to have been.

MR. Fazakerly moved for an Information in the Nature of a Quo Warranto, againſt William Poole for exerciſing the Office of Bailiff in the Town of Liverpoole. The Objection againſt his Election was, that by the Charter theſe Bailiffs are appointed to be choſen on St. Luke's Day, which is the 18th of October. The Corporation aſſembled accordingly on that Day. But notwithſtanding this the Mayor, Mr. Brereton, at 10 a Clock in the Morning of that Day adjourned to the next Day, and then William Poole was elected. Accordingly a Rule was made to ſhew Cauſe. Vide the next Caſe.

Anonymus.

How far the Court will grant an Information against a Person for adjourning an Assembly illegally.

MR. Strange now moved for an Information against Mr. Brereton, for adjourning the Assembly in the Manner that is mentioned in the foregoing Case; and said this was plainly an Offence within the 11th of Geo. 1. Accordingly the Court made a Rule to shew Cause in this Case likewise. Vide the former Case.

Markweth *against* Reynolds and Westwood.

When an Action of Assault is brought, and one of the Defendants justifies as Servant to another, how far such Justification shall not be said to be good.

IN an Action of Assault and Battery, the Defendants severed in their Justification. Reynolds pleaded De son Assault, and upon that Plea Issue was joined. Westwood pleaded that he was Servant to Reynolds, and that the Plaintiff having assaulted Reynolds at a certain Time and Place, he did then and there assault the said Plaintiff in Defence of his Master; to this Plea there was a Demurrer. Mr. Agar submitted it, that the Plea of the Servant was bad for two Reasons; First, that the Servant could only justify defending his Master, and not assaulting the Plaintiff in the Defence of him; for this Purpose he cited 11 H. 6. 8. Secondly, that the Assault of the Plaintiff might have been of a Time past; for the Words of the Plea are, that the Plaintiff having assaulted Reynolds. Mr. Moreton argued on the other Side; with Regard to the first Exception he submitted it that the Plea was well warranted by the Authorities in the Books; for this Purpose cited 9 Edw. 4. 48. b. Bro. Abr. 283. b. Pla. 189. Rol. Ab. 546. Salk. 407. With Regard to the second, he said the Defendant has pleaded that he did then and there defend his Master; which he submitted it was sufficient Certainty, that the Defence was at the same Time and Place that the Assault was. The Chief Justice, with the rest of the Court, was of Opinion, that the Plea of this Defendant was not good; accordingly as to him, Judgment was given for the Plaintiff; Judge Lee absent.

Griffith *and* Allcock.

Vide ante 318.

THIS Matter now coming on upon the Master's Report, and he reporting the Fact to be according to the Exception before taken; Serjeant Birch submitted it, that the Judgment was irregular. Before the Statute of 12 Geo. 1. for preventing frivolous and vexatious Arrests, he said he believed it would not be contended, but a Mandate from the Chamberlain to the Sheriff was necessary, before the Process directed to the Chamberlain could be executed; for this Purpose he cited 4 Inst. 210. Salk. 500. And he submitted it, that the Mandate was equally necessary in Cases within this Act of Parliament; because the Words of the Act are general, and the Intent of them could not be to take away the Privilege of inferior Jurisdictions. Mr. Fazakerly on the other Side said, that by the same Reason that

that it was inſiſted on in this Caſe, that a Warrant from the Chamberlain was neceſſary, it might be inſiſted on, that a Warrant from the Bailiff of every Liberty was neceſſary, before a Copy of the Proceſs could be ſerved within his Bailiwick. But he ſaid the conſtant Practice has been otherwiſe ſince this Act, in thoſe other Caſes; and therefore he ſubmitted it, that it was not neceſſary in the preſent one. The Chief Juſtice ſaid that a Mandate from the Chamberlain could not be called a Proceſs; becauſe it iſſues out of no Court; and therefore by this Act of Parliament it could not be neceſſary that the Party ſhould be ſerved with a Copy of it. He ſaid farther, that he did not think this Caſe differed from that, where a Bailiff has a Liberty of Retorna Brevium. Judge Page and Judge Probyn declared themſelves too to be of the ſame Opinion. However, as this was a Conſtruction of a new Act of Parliament, they ſaid they would conſider of it again, before they gave a final Opinion. Judge Lee abſent. Vide poſtea.

The King *and* Tallard.

How far Acts of Immodeſty ſhall be ſaid to be indictable, or not.

THE Defendant was indicted for encouraging Hacon to run naked from his Waiſt upwards, in Chapel Field in the City of Norwich, which Hacon did accordingly. Mr. Strange ſubmitted it, that this was no Offence indictable; accordingly moved that the Indictment might be quaſhed. And the Court made a Rule for that Purpoſe; Judge Lee abſent. Vide poſtea.

Hootle qui tam *and* Beck.

When Affidavits are intended to be made uſe of in the Court of King's Bench, in what Office they ought to be filed.

IN the Beginning of this Term Serjeant —— obtained a Rule to ſhew Cauſe, why Proceedings by Bill upon the Statute of 12 Ann. for Uſury ſhould not be ſtaid, by Reaſon that there was no Affidavit filed in the Bill of Middleſex Office, that the Offence aroſe within a Year, &c. which there ought to be, by the Statute of 21 Jac. 4. A few Days after, Mr. Robinſon came to ſhew Cauſe, and ſubmitted it, that the Affidavit on which the former Rule was obtained, was not ſufficient; becauſe it was only ſworn in it, that the Affidavit upon the Statute of 21 Jac. was not filed in the Bill of Middleſex Office. He conceived that that was not the proper Office for filing the Affidavit in; but it ought to be filed in that Office where the Bill is upon the File; for the Act requires that the Affidavit ſhall be annexed to the Bill upon the File. He ſaid farther, that he ſubmitted it, no Affidavit was neceſſary; becauſe this is a Proſecution upon a Statute ſubſequent to that of 21 Jac. and for this Purpoſe cited the Caſe of The King and Gall, Salk. 372. Serjeant Wright on the other Side ſaid, that the Statute of Jac. required that this Affidavit ſhould be filed, before any Bill or Information ſhould be made out; and therefore the Affidavit ought to have been filed in the Bill of Middleſex Office. Then in Anſwer to the Caſe of The King and Gall he ſaid, that Reſolution was to be underſtood of ſuch ſubſequent Statute, as allows the Bill

or Information to be in any Court of Record. As to those indeed, he did agree that the Statute of Jac. was repealed pro tanto; and so is the Resolution of all the Judges in the Case of The King and Hicks, which is the very next Case in Salk. to that of The King and Gall. But in the present Statute of 12 Ann. he observed there were no such Words, as allow the Bill or Information to be in any Court of Record; and therefore the Statute of 21 Jac. well extended to the present Case. The Court agreed that if the Affidavit was necessary, the Bill of Middlesex Office was in this Case the right Office to file it in. But Judge Page and Judge Lee were of Opinion that it was not necessary. Judge Probyn of Opinion that it was; accordingly the Rule was then enlarged. Serjeant Wright now moved that it might be made absolute; and said Mr. Robinson had Authority to consent on the other Side, which Mr. Robinson accordingly did; and then the Rule was made absolute. Judge Lee absent.

The King *and* Kempson.

MR. Abney moved that an Order might be quashed, which was made upon the Defendant to pay a certain Sum weekly to his Son's Wife, by Way of Maintenance, his Son, having run away from her as soon as he married her. The Exceptions that he took to the Order were two; First, that this was an Order of Sessions made upon an Appeal, and the Statute of 43 Eliz. gives them an original Jurisdiction; for this Purpose he cited 2 Salk. 476. The second Exception was, that the Statute only extends to natural Relations; for this Purpose he cited the Case of The King and Monday, Trin. 5 Geo. 1. where an Order upon a Man to relieve his Wife's Mother was quashed; accordingly a Rule was made to shew Cause. Judge Lee absent. Vide postea.

How far that Part of the Statute of 43 Eliz. ch. 2. which directs that Parents shall provide for their Children, shall be construed to extend only to natural Relations, and not to Relations in Law.

Cown *and* Murrey.

IN Debt on a Bond for Payment of Money in the Month of July, the Defendant pleaded that after the Sealing of the Bond, and before the Exhibiting of the Bill, viz. in the Month of March, he paid the Money, upon which Issue was joined, and a Verdict found for the Plaintiff. Mr. Kettleby moved in Arrest of Judgment, that the Issue was joined upon an immaterial Fact. Serjeant Belfield on the other Side said he believed he must consent to a Repleader. Accordingly Judgment was arrested, unless Cause To-morrow; and then no Cause was shewn. Judge Lee absent. Vide postea.

When an Action of Debt is brought upon a Bond, what shall be said to be an immaterial Issue, or not, in such Action.

The King *and* Latter.

The Certainty required in a Significavit, in order to Warrant an Excommunicato Capiendo.

IN a Writ of Excommunicato capiendo the Significavit ſet out, that the Defendant was excommunicated for not appearing to anſwer Interrogatories to be exhibited againſt him ex Officio for the Health of his Soul and Reformation of his Manners. Mr. Kettleby moved that this Writ might be quaſhed; Firſt, becauſe the Defendant's Name had no Addition to it, which the Statute of Eliz. requires. Secondly, becauſe the Offence mentioned in this Significavit, is not one of thoſe mentioned in the Statute. Thirdly, becauſe the Interrogatories were not then exhibited, and perhaps never would. The Chief Juſtice ſaid he did agree that if this Excommunication had been after Sentence, the Significavit muſt have ſet forth particularly the Cauſe for which he was excommunicated; and therefore where a Significavit has ſet forth, that the Defendant was excommunicated for not paying Tithes, five alia jura Eccleſiaſtica, it has been held to be bad. But as this was an Excommunication for the Party's not appearing, he thought it good enough. However a Rule was made to ſhew Cauſe. Judge Lee abſent. Vide poſtea.

The King *and* Sympſon.

When an Attachment is granted againſt the Bailiff of a Liberty, for not returning a Writ, upon what Terms the Court will diſcharge it.

ON Rule to ſhew Cauſe why an Attachment ſhould not go againſt the Defendant, being Bailiff of the Honour of Pomfret, for contemptuouſly refuſing to return a Writ, Mr. Abney ſaid he believed he could not juſtify the Defendant; and therefore propoſed to pay the Plaintiff his Coſts. Mr. Strange on the other Side ſaid that he was inſtructed the Fact was, that by this Neglect in the Bailiff, the Plaintiff has actually loſt his Debt; for now the Defendant in the Action is worth nothing; and therefore he deſired that it might be referred to the Maſter to inquire into the Fact; and if the Maſter ſhould report the Fact to be ſo, that the Bailiff ſhould pay the Debt as well as the Coſts, before the Attachment ſhould be diſcharged. Judge Page and Judge Probyn ſaid, that they never knew of ſuch a Referrence to the Maſter; accordingly on Payment of Coſts only, the Rule was diſcharged. Judge Lee abſent.

The King *againſt* Holford and others.

When a Mandamus is granted, in order to require certain Perſons to deliver over to others certain Books, to whom ſuch Mandamus ought to be directed.

MR. Strange moved that a Writ of Mandamus directed to four Members of the Corporation of Eſham, requiring them to deliver certain publick Books to Mr. Bullen, who was of late wrongfully turned out of an Office in that Corporation, might be ſuperſeded. The Reaſon for this Motion was, that it appeared by the Affidavits on which the Rule was obtained, that Yarnel, one of the Perſons mentioned in the Rule, and who was Chamberlain in this Corporation, was the only Perſon

that had the Poſſeſſion of them; and likewiſe that it appeared by theſe very Affidavits, that Bullen the Perſon obtaining the Rule, was in Fact out of his Office; and therefore the firſt Application ought to have been for a Mandamus to reſtore him. The Chief Juſtice ſaid, that the firſt Reaſon he believed would hardly be thought ſufficient; but the ſecond ſeemed to be a good one; accordingly a Rule was made to ſhew Cauſe. Judge Lee abſent. Vide poſtea.

Baynes *and* Pettifer.

ON Rule to ſhew Cauſe, why a Verdict ſhould not be ſet aſide for there being too ſhort Notice of Trial given, and no Defence made, Mr. Pilſworth ſaid that the Fact ſworn in the Affidavit, on which the Rule was made, was this; that the Defendant lived in Halton, a Hamlet in the Pariſh of Aylesbury, that Aylesbury was forty-two meaſured Miles diſtant from London, and yet that he had but eleven Days Notice of Trial. In Anſwer, Mr. Pilſworth produced the Affidavits of ſeveral Perſons, that the reputed Diſtance of Aylesbury from London was but thirty-three Miles, that Walton was of this Side of the Town of Aylesbury; and ſubmitted it, that the Court was to guide themſelves by the reputed Diſtance of Places, and not by the meaſured one. The Chief Juſtice ſaid, that where Actions have been brought againſt the Poſt-Office, the meaſured Miles is the Rule to go by; becauſe an Admeaſurement of thoſe Roads was made by the Direction of the Act of Parliament; but in the preſent Caſe he thought the reputed Diſtance was the Rule to go by; accordingly the Rule was diſcharged. Judge Lee abſent.

How far the reputed Diſtance of one Place to another is the proper Rule to go by, and not the meaſured one.

Smith *againſt* Boucher and others.

IN an Action of Falſe Impriſonment, the Defendants juſtified, that in the Commiſſary's Court of the Univerſity of Oxford there was a Cuſtom, that any Perſon perſonally appearing and complaining before the Chancellor, Commiſſary or Deputy, that he has an Action of perſonal Damage or Injury within the Precinct of the Univerſity againſt any Member of the Univerſity, and making Oath before the Commiſſary or his Deputy of his ſaid Action and Damage, and that he believes the Party will not appear, but rather run away, the ſaid Chancellor, Commiſſary or Deputy have uſually iſſued a Warrant for the apprehending and detaining ſuch Party in Cuſtody, till he find Sureties at the next Court in ſuch Sum as the Judge ſhall think proper. The Defendants farther pleaded, that in the 13th of Elizabeth all Cuſtoms belonging to the Courts of the two Univerſities were confirmed by Parliament. They ſet forth farther, that on ſuch a Day —— Boucher, Doctor of Laws, came before the Chancellor, and complained that he had a perſonal Action of 1000 l. againſt the Plaintiff, and that he ſuſpected he would run away; and made Oath of and

How far a Perſon who juſtifies under Proceſs of an inferior Court, ſhall be ſubject, or not, to an Action for doing ſo.

and upon the Premiſſes in Manner aforeſaid. Whereupon a Warrant iſſued out for the apprehending the Plaintiff, and he was detained three Days thereon for want of Sureties. To this Plea the Plaintiff replied, that before the Iſſuing ſuch Warrant no Oath was made, that the Cauſe of Action was true according to the Form of the Statute in that Caſe made and provided. And to this Replication the Defendants demurred. Serjeant Chappel argued for the Defendants, and ſubmitted it, that the Replication was bad. He did agree, that the Statute of 12 Geo. 1. required, that Oath ſhould be made of the Plaintiff's Cauſe of Action before the Defendant ſhould be held to Bail. But there are no Words in the Act, which make the Proceſs void, where an Oath is wanting. In Proceedings on the Statute of 5 Geo. 2. 27. the Words of the Act are, That the Proceſs ſhall be void where it does not purſue the Statute. The ſame Words are in the Statute of 7 Ann. 12. But there are no ſuch Words in the Statute of 13 Car. 2. Sect. 2. 2. nor in the Statute of 23 H. 6. 10. and on theſe Statutes the Proceſs was never thought to be void; and particularly upon the Statute of 23 H. 6. it is expreſly held ſo in 1 Cro. 196. Serjeant Hawkins on the other Side ſaid, that he ſhould principally inſiſt, that the Plea was bad; and then whatever became of the Replication would not be material. The Plea he ſaid, was joint between the Judge, Officer, Gaoler and Plaintiff in the Suit below; and therefore if the Plea was bad as to any one of them, it would be bad as to all. The Cuſtom itſelf as laid, he ſubmitted it, was even bad. It is to hold a Man to Bail till the next Court (when that Court is to be held does not appear); and that even upon the Complaint of an Injury. A Cuſtom that a Capias ſhould iſſue in a perſonal Action before a Summons, is held to be void in Roll's Abr. 563. and Mod. 236. and the preſent Cuſtom is that, and worſe. And farther upon this Head he cited Dyer 175. and 3 Cro. 467. If this particular Cuſtom was void, he obſerved, that a general Confirmation by Statute of the Cuſtoms belonging to theſe Courts would not make it good. For this Purpoſe he relied upon 2 Inſt. 381. Salk. 203. Plow. 399. and Hob. 85, 86 and 87. He inſiſted farther, that even this Cuſtom, bad as it is, does not appear to have been purſued. It is ſaid, that the Action complained of was a perſonal Action; but what a perſonal Action is is a Matter of Law, of which the Court are Judges; for which Reaſon the Nature of the Action ought to have been ſet forth, in order that it might have appeared to have been one. The Oath is ſaid too to have been made of and upon the Premiſſes; but thoſe Words are ſo uncertain, that it is impoſſible to ſay from them that the Cuſtom in this Part was purſued. Accordingly for theſe Reaſons he prayed Judgment for the Plaintiff. Serjeant Chappel by way of Reply ſaid, that, as to the Cuſtom itſelf, he did apprehend it to be good, eſpecially as it is confirmed by Parliament. For this Purpoſe he mentioned ſeveral Cuſtoms of the City of London, as variant from the Rules of Law, as the preſent one; and relied upon 3 Cro. 409. 8 Rep. 121 and 9 Rep. 68. Then as to the Execution of it, he con-

ceived that the Words of the Plea had followed the Custom; accordingly prayed Judgment for the Defendants. The Chief Justice said, with regard to the Replication, that he thought it clearly bad. For though the Act did extend to this Custom by Reason of the Negative Words in it; yet the Process is not made void thereby; but the Party obtaining such Process without an Affidavit, is subject to an Action upon the Case for so doing. Then as to the Plea, he thought the Custom not bad, especially as it is confirmed by Parliament. And as to the Custom being bad, that a Capias should issue before a Summons, that was to be understood only in Actions of Debt, and such other Actions, and not in Actions of Trespass. The principal Difficulty in the present Case he thought was, whether the Justification under the Custom was bad, or not. And as to that, though the Custom might not appear to be strictly pursued; yet as the Court below had a general Jurisdiction over the Cause, he thought that neither the Judge, Officer, nor even the Party himself could be subject to an Action of False Imprisonment. For this Purpose he relied upon the Case of Pool and Gwynn, Lutw. 935 and 1560. The rest of the Court clearly agreed with the Chief Justice in all the Points, but the special Justification; and as to that they inclined to be of a contrary Opinion. Accordingly this Matter stood over. Vide postea.

The City of London *and* Sir Fisher Tensh.

THIS Matter coming on again, Mr. Bootle relied now only upon the first of the former Exceptions which he took before; and likewise took a new one, that the City of London have not duly executed the Power, which they have set forth the Act of Parliament gave them. For they have set forth that the Act of Parliament gave them a Power of making Leases for One and Twenty-one Years, that is, Twenty-two Years; whereas the Lease they have declared upon, is for Twenty-one Years only. In answer to the first Exception the common Serjeant submitted it, that the Court would not intend there was an Assignment; and besides it is expressly alledged in the Declaration, that the Defendant hucusque enjoyed the Term, which is an Averment, that he did not assign it. In answer to the second he submitted it, that a Power to make Leases for Twenty-two Years included in it a Power to make Leases for Twenty-one. Accordingly the Court gave Judgment for the Plaintiffs. Vide ante 295.

Cowper *and* Alton.

Conſtruction upon the Statute of 5 Geo. 2. which requires that Law Proceedings ſhall be in Engliſh.

THIS was a Queſtion, that aroſe upon the Statute of 5 Geo. 2. which requires the Proceedings of all Actions to be in Engliſh, where the Cauſe of Action is under 10 l. The Actions here was Treſpaſs; the Damages laid in the Declaration were 40 l. the Damages found by the Jury were only 1 s. and the Proceedings were in Latin. The Motion came on in Arreſt of Judgment. The Chief Juſtice was of Opinion, that the Words Cauſe of Action were not to be underſtood the Damages found by the Jury; becauſe thoſe ſame Words in another Clauſe of the Act, which relates to the Plaintiff's holding the Defendant to Bail, cannot receive that Meaning. The Reſt of the Court were all of the other Opinion. Accordingly they ſaid they would conſider of this Caſe amongſt themſelves, and then deliver their Opinion. Vide poſtea.

Anonymus.

How far a Mandamus will lie to the Eccleſiaſtical Court, in order to require them to grant Adminiſtration.

MR. Strange moved for a Mandamus to be directed to a Judge of the Eccleſiaſtical Court, requiring him to grant Adminiſtration to the Reſiduary Legatee, the Executors having renounced. The Will he ſaid was of one Mr. Kynaſton, who left behind him two Sons; one of which he made his Reſiduary Legatee, and the Judge of the Eccleſiaſtical Court has refuſed granting him Adminiſtration, till he has had a Return made to a Commiſſion of Appraiſement, which he has iſſued forth. In the Caſe of Lord Londonderry's Will, the Eccleſiaſtical Court refuſed to grant Probate, till ſuch Commiſſion returned. The Court there held ſuch Commiſſion to be illegal, and granted the Mandamus, without making a Rule to ſhew Cauſe. He remembered, he ſaid, lately before the Delegates the Civilians of all Hands agreed, that the Courſe of their Courts is conſtantly to grant Adminiſtration to the Reſiduary Legatee, where the Executors renounce. Accordingly ſubmitted it, that the Mandamus was equally reaſonable in the preſent Caſe. But the Court thought the preſent Caſe much differed from the Caſe cited. In the Caſe cited the Party had a Right by the common Law to have the Probate granted; and therefore it was proper for the Court to grant a Mandamus, that the Right of the common Law might be executed. But in the preſent Caſe at moſt the Party has a Right to Adminiſtration only by the Rules of the Eccleſiaſtical Court; and therefore it was not proper, that this Court ſhould interfere by granting a Mandamus. However a Rule was made to ſhew Cauſe. Vide poſtea.

Thomas *and* Biſhop.

THIS Matter coming on again, Mr. Kettleby inſiſted, that there were ſome other Circumſtances appearing at the Trial, which made the Caſe more clear in Favour of the Defendant. The Perſon, that drew the Bill, was Mr. Charles Mildmay, who was employed by the Company to act as Servant for them at Fronſhen in Scotland. At this Place the Bill was drawn; and from this Place the Letter of Advice was dated, which was directed to the Governour and Court of Aſſiſtants of the York-Buildings Company at their Houſe in Wincheſter-ſtreet, London. In Purſuance of this Letter the Governour and Court of Aſſiſtants met and made an Order upon the Defendant to accept the Bill; which Fact the Defendant was prepared at the Trial to prove, but the Judge refuſed to admit Evidence of it. Upon theſe Circumſtances Mr. Kettleby ſubmitted it, that the Plaintiff had a good Remedy againſt the Company, that he had no Remedy againſt the Servant; and therefore for the Misdirection of the Judge, he hoped a new Trial ſhould be granted. The Court ſaid, this was not a Bill drawn upon the Company, but a Bill drawn upon the Defendant. The Direction of the Bill to Humphrey Biſhop, Caſhire of the Company, &c. was only a Deſcription of his Perſon for the better finding of him, and what Account he was to place the Money to, when he had paid it, they thought was not material. They ſaid they thought no Evidence ought to be admitted in theſe Caſes, that is extrinſic of the Bill, where Actions are brought by Indorſees, as the preſent one was. Accordingly the Rule was diſcharged. Vide antea 320.

Cown *and* Murrey.

SErjeant Belfield came now and informed the Court that by Conſent this Matter was not moved again the next Day as by the Rule of the Court it was ordered. And therefore now he begg'd Leave to lay before the Court his Reaſon, why the Plea was good. He did agree, that by the viz. the Time of Payment was tied up to the 26th of March; but as the Defendant had alledged before the viz. that after the Sealing of the Bond, and before the Exhibiting the Bill he paid the Money, the Defendant might give in Evidence Payment on any Day before the Exhibiting the Bill; and therefore the viz. ſhould be rejected. The Court were of the ſame Opinion; accordingly Judgment was given for the Plaintiff. Vide antea 329.

Shake-

Shakeſpear, on the Demiſe of Mills, *againſt* Hymer and others.

How far the Court will not put off the Trial in an Ejectment, notwithſtanding the Party wants the Inſpection of Deeds which are in the Cuſtody of another.

IN Ejectment the Defendants moved that the Trial might be put off till the Sittings after Term, upon Affidavits that the Plaintiff's Attorney was in Poſſeſſion of certain Deeds, material for the Defendants to produce in Evidence, and had refuſed to deliver them. The Chief Juſtice ſaid, that though the Leſſor of the Plaintiff himſelf had been in Poſſeſſion of thoſe Deeds, that would have been no Reaſon for putting off the Trial in Ejectment; accordingly the Motion was refuſed.

Donalt *and* Lowther.

How far the Tithe of a Corn-Mill ſhall be ſaid to be predial Tithes, or not.

THE Defendant had libelled in the Spiritual Court for the Tithe of a Corn-Mill as predial Tithe. The Plaintiff ſet forth in his Anſwer, that he conceived the Tithe of a Corn-Mill to be a perſonal Tithe; and therefore prayed to be allowed all his neceſſary Charges in attending the Mill, before the Tithe ſhould be paid. The Judge over-ruled this Plea, and decreed that the Plaintiff ſhould pay theſe Tithes without any ſuch Deduction. Upon which Mr. Denniſon moved for a Prohibition, and cited the Caſe of Chamberlain and Clifton, determined in the Houſe of Lords the 20th of June 1706, wherein it was reſolved, that the Tithe of a Corn-Mill was perſonal Tithe; accordingly a Rule was made to ſhew Cauſe.

Holloway *and* King.

Conſtruction upon the Statute of 5 G. 2. which requires that Law Proceedings ſhall be in Engliſh.

IN a Suit by Bill againſt an Attorney, Mr. Agar had obtained a Rule for referring the Irregularity of the Proceedings to the Maſter; who accordingly reported the Fact to be in this Manner, That the Damages laid in the Declaration were 20 l. Judgment by Nil dicit, that on the Writ of Inquiry the Jury had found but 6 l. Damages and that all the Proceedings were in Latin. Mr. Strange now moved for Judgment upon the Maſter's Report. The Queſtion he ſaid ariſes upon an Act of 5 Geo. 2. The Act recites the Inconvenience of Perſons being arreſted, and detained in Cuſtody for frivolous Demands; and therefore provides, that in all Matters under 10 Pounds the Defendants ſhall be ſerved with a Copy of the Proceſs, and the Proceedings ſhall be in Engliſh. He ſubmitted it, that this Act was to be underſtood only of ſuch Actions, where the Defendant uſed to be ſerved with a Proceſs to take his Body; and therefore provides that in ſmall Demands the Defendant ſhall not be arreſted by ſuch Proceſs, but ſerved with a Copy of it only. In Suits by Bill againſt an Attorney, the Defendant is always ſuppoſed to be preſent in Court; and therefore he conceived, that the Act did not extend to the preſent Caſe. The

Court was of another Opinion, however said that this Matter would still depend upon the Question which the Court has reserved, whether the Damages in the Declaration was to be considered the Cause of Action, or the Damages found by the Jury; accordingly this Matter stood over. Vide postea.

Griffith *and* Allcock.

SINCE the Time that this Case was last argued, the Chief Justice said that he had looked upon the Statute of 5 G. 2. which explains and amends the Statute of 12 Geo. 1. and he found there was a Proviso in it, which enacts, that in particular Franchises and Jurisdictions the proper Officer there shall execute such Process, and he doubted whether that Proviso did not extend to the present Case; upon which this Matter came now to be argued again. Serjeant Birch said that Chester is always considered as a Franchise; and therefore was within the very Words of the Proviso, but submitted it farther, that this Case was within the 12th of Geo. 1. which he relied upon before; and for this Purpose cited the Case of Peek and Smith in the Common Pleas, Mich. 1 Geo. 2. The Defendant there lived within the County Palatine of Durham, and the Question was, whether the Defendant should be served with a Copy of the Process issuing out of this Court, or a Copy of the Mandate under the Seal of the Bishop of Durham. The Court of Common Pleas was of Opinion that the Defendant ought to be served with a Copy of the Mandate under the Seal of the Bishop of Durham. The Court said that notwithstanding the Case that has been cited, they must continue of the Opinion that they were of before, upon the first Act of Parliament; and Judge Lee who was now in Court, said he intirely concurred in that Opinion. They inclined to be of Opinion too, that Counties Palatine were not within the Words particular Franchises and Jurisdictions; for they are considered as superior Courts. However said that they would consider of this Case a little farther. Vide antea 327.

Amcock *and* Ennover.

THIS Matter coming on in the Paper again, Serjeant Eyres appeared for the Plaintiff; and no Body being on the other Side, Judgment was given for him unless Cause on Saturday. Vide antea 308.

Osborn *and* Oyle.

THIS Matter now coming on again, Mr. Fazakerly said that he could say nothing new upon this Subject, unless it was that he submitted it, the Statute for the Amendment of the Law cured this Defect, if it was any, the Judgment being by Nil dicit. The Court thought that such Defect could not be cured; because a former Act had required that all Proceedings Vide antea 268.

should be in Latin. However this Matter stood over for the Opinion of the Court upon the general Consideration of the Statute of 5 Geo. 2. Vide postea.

Stephens *and* Lofty.

Construction upon the Statute of 2 G. 2. which allows one Debt to be set off against another.

UPON a Writ of Error on a Judgment in the Common Pleas in Debt on Bond, Mr. Draper said that the Penalty of the Bond which the Plaintiff had declared for, was 76 l. 10 s. Upon Oyer, the Condition appeared to be for Payment of 38 l. 5 s. and then the Defendant pleaded that on the 1st of April 1732, which was after the Day mentioned in the Condition of the Bond, the Plaintiff was indebted to him in the Sum of 70 l. for Money had and received to his Use. To this Plea there was a Demurrer. Mr. Draper said that the Question arises upon an Act of Parliament made 2 Geo. 2. for setting one Debt against another. It was objected by the Plaintiff's Counsel in the Court below, that this Plea was bad in two Respects; First, that the Penalty of the Bond was the Debt, and that being 76 l. 10 s. the Sum of 70 l. could not be pleaded against it. Secondly, that the Debt by simple Contract cannot be set against a Debt by Bond, the Debt by Bond being a Debt of a higher Nature. And accordingly in the Court below the Plaintiff has had Judgment. In Answer to these Objections Mr. Draper submitted it, that where Debts are set one against another, by Virtue of this Act of Parliament, the Courts of Common Law are in those Cases to consider Debts in the same Light that the Court of Equity do; and if so, he submitted it, that both these Objections would be answered. He said farther, that even supposing the Penalty should be considered the Debt, yet under this Act of Parliament the setting another Debt against it must be considered as Payment; and if so, the Plea of Payment of a less Sum than the Penalty, and greater than the Sum in the Condition will be good by the Statute for the Amendment of the Law. To the second Objection the Court were something divided in Opinion. The Chief Justice and Judge Probyn thought that a Debt by simple Contract might be set against a Debt by Bond. Judge Page of the contrary Opinion. And Judge Lee gave no Opinion to this Point at all. But as to the other Objection the Court clearly agreed that it was fatal; accordingly affirmed the Judgment.

The King *and* Lloyd.

Vide antea 302.

MR. Fazakerly now relied again upon the Exception he before took, that the Evidence ought to have been set out. He farther said, that the Misdemeanors, of which the Defendant is convicted, are Extortion in his Office as Clerk of the Peace at the Sessions for the County of Anglesey; but the Sessions is not sufficiently described. For it is only said that the Defendant committed these Offences at a Sessions held before his Ma-

jesty's Justices of Peace, Quorum unus, without mentioning who they were, or describing their Authority. Mr. Draper argued on the other Side, and said, that in Convictions before two private Justices, the Depositions are always taken in Writing; and therefore he did agree that in those Cases the Evidence must be set forth in the Conviction. But at a Sessions the Testimony of the Witnesses is not taken down in Writing; and therefore in the present Case he submitted it, that it was unnecessary. In the Case of The Queen and Horrel, Mich. 11 Ann. and in the Case of The King and Harland, which were Convictions at the Sessions, the Evidence was not set out, and yet no Exception taken on that Account. To the second Objection he submitted it, that as this was only a Description of an Act done at another Sessions, the Names of the Justices were not necessary to be set out. The Chief Justice said with Regard to the second Objection, that if the Names of the Justices had not been inserted in the Stile of the Conviction itself, he should have thought the Objection would have prevailed; and he has known both Indictments and Orders of Removal quashed upon such Objection. But as the present Conviction is, he thought the Objection was answered. As to the other, he was of Opinion that it was a fatal Objection; many Convictions before private Justices undoubtedly have been quashed on this Account, particularly in the Cases of The Queen and Brown, The Queen and Guerey, and The Queen and Randes, Pasch. 13 Ann. And he could not see any reasonable Distinction between those Convictions and the present one. Judge Lee said that he doubted whether this was a Conviction in the present Case, or only an Order. Those of Basketday are considered only as Orders; and yet the Party is subject there to be sent to the House of Correction. But supposing it to be a Conviction, yet still he doubted whether the Evidence was necessary to be set out; and particularly he mentioned the Case of The Queen and Baynes, which he said bore a good deal of Argument, and deserved to be looked into; accordingly this Matter stood over. Vide postea.

Whitewood qui tam *and* Jokam.

THIS Matter coming on again, Mr. Lacey relied upon the Answers he had given before, and farther submitted it, that supposing an Information qui tam might be quashed, and supposing the Affidavit was not good for the Exception that had been taken to it; yet still he observed that this was no Fault appearing upon the Face of the Information. An Information cannot be quashed but for such Faults; and therefore at all Events the present Rule must be discharged. The Chief Justice said, in the Case of The City of London, where a Motion was made to supersede a Writ of Mandamus, Lord Macclesfield and the present Chief Justice of the Common Pleas laid it down for clear Law, that a Writ could not be quashed, but for such Errors; accordingly the Rule was discharged. Vide antea 323.

Dr.

Dr. Wilmot *and* The Biſhop of Lincoln.

Vide antea

IN the Declaration that was drawn in Prohibition, the Members of King's College, that were cited before the Commiſſaries, were not made Parties; upon which Mr. Strange obtained a Rule a few Days ago to ſhew Cauſe, why theſe Members of the College ſhould not be added Defendants with the Biſhop. Mr. Graves came now to ſhew Cauſe upon the Rule. But the Court thought proper to make it abſolute. And the Chief Juſtice ſaid that this Method of declaring in Prohibition is allowed, not only to bring the Judge, but the Party before the Court.

Anonymus.

When a Rule is made to ſhew Cauſe why an Information in the Nature of a Quo Warranto ſhould not be granted, and that Rule is moved to be enlarged, upon what Terms the Court will enlarge it.

MR. Strange moved to enlarge a Rule made upon the Mayor of Weeram to ſhew Cauſe, why an Information ſhould not go againſt him for a Miſdemeanor. He deſired only to enlarge it till the latter End of this Term; and in Caſe the Rule ſhould be made abſolute, he ſhould conſent to appear, as if the Rule was made abſolute. Where indeed a Motion is made to enlarge a Rule of this Sort till next Term, he did agree the Party muſt conſent to plead as well as to appear within the ſame Time as he would be obliged to do, if the Rule was made abſolute directly. Mr. Maſterman informed the Court that the Practiſe was ſo; accordingly upon theſe Terms the Rule was enlarged.

Anonymus.

When there are Raſures in Records, how far the Court will make a Rule that the Records themſelves ſhall be produced.

MR. Abney moved for a Rule upon Mr. Blandey, the Steward of a Court-Leet, called Osborn Court, to attend with the Records of the Court at a Trial, where thoſe Records would be wanted, upon an Affidavit, that there were ſome material Raſures made in the Records. He ſaid the ſame Motion was granted in the Caſe of Nichols and Philips upon the like Affidavit; accordingly the Court made ſuch Rule in the preſent Caſe.

Anonymus.

When a Perſon is found by the Coroner's Inqueſt to be guilty of Manſlaughter, how far the Court will not allow him to be bailed.

MR. Parker moved that Ruſſey Carter might be bailed, who was found by the Coroner's Inqueſt to be guilty of the Manſlaughter of Wotton; he ſaid he moved this upon the Foundation not only of the Coroner's Inqueſt, which had found the Fact againſt the preſent Defendant very uncertainly; but upon the Depoſitions which were taken at the Time the Coroner's Inqueſt was found, and likewiſe upon Affidavits of Circumſtances very favourable on the Part of the Defendant.

he cited too Latch 12. and Salk. 104. where the Depoſitions of the like Nature were read. Upon hearing the Inqueſt read, the Court ſaid that they thought the Facts ſpecially ſtated amounted to Murder. And though the Inqueſt have found the Defendant only guilty of Manſlaughter, the Conſequence of which is, that if the Defendant was tried upon this Inqueſt, he could be found guilty of nothing more; yet they thought upon this Inqueſt an Indictment of Murder might well be found, and poſſibly the Defendant convicted upon it. Upon hearing the Depoſitions, they ſaid the Fact appeared to be Murder upon them likewiſe. And they would not allow any Affidavits to be read, which were not Part of the Depoſitions; accordingly the Motion was refuſed.

Foſter *and* Grayham.

How far a Codicil ſhall be ſaid to explain a Will.

UPON a Writ of Error on a Judgment in the King's Bench in Ireland in Ejectment for Lands in the County of Meith, a ſpecial Verdict appeared to have been found in the Manner following. James Earl of Angleſey, being ſeiſed of the Lands in Queſtion, and of divers other Lands in the Kingdom of Ireland, of an Eſtate in Fee-ſimple, on the 13th of May 1701, made his Will in Writing, and thereby deviſed all his ſaid Lands to certain Truſtees and their Heirs, for Payment of his Debts and Legacies, the Remainder to his Brother Arthur Aneſley for Life, and afterwards to his firſt and other Sons in Tail Male, and in Default of ſuch Iſſue, to his Daughters and the Heirs of their Bodies, Share and Share alike, reſpectively; the Remainder to Richard Lord Altham for Life, and afterwards to the Iſſue Male of his Body, and in Default of ſuch Iſſue, to his Iſſue Female, in like Manner as aforeſaid; the Remainder to his Uncle Charles Lord Angleſey for Life, and afterwards to his Iſſue, in like Manner as aforeſaid; the Remainder to his own right Heirs. He then gave the reſpective Perſons, to whom he had deviſed his Eſtate, a Power of making Leaſes of thirty-one Years, reſerving the beſt Rent that could be got for them. Richard Lord Altham died; and afterwards on the 1ſt of June 1731 the Deviſor added a Codicil to his Will in the Manner following; He thereby deviſed all his Lands in England and Wales to Arthur Lord Altham, eldeſt Son of Richard Lord Altham deceaſed, for Life, and afterwards to his Iſſue in like Manner as aforeſaid; the Remainder to his Brother Arthur Aneſley for Life, and afterwards to his Iſſue as aforeſaid; the Remainder to his Uncle Charles Lord Angleſey as aforeſaid; the Remainder to his own right Heirs; and then came the following Clauſe. Item, I deviſe all my Manors, Lands, Tenements and Hereditaments in the County of *Meith* and in the Town of *Nuroſs* in the County of *Wakesford* to *Arthur* Lord *Altham* for Life, and afterwards to his Iſſue, as aforeſaid; the Remainder to *Arthur Aneſley*, as aforeſaid; the Remainder to *Charles* Lord *Aneſley*, as aforeſaid; the Remainder to go to the ſame Perſons; and with and under the ſame Powers as my ſaid other Eſtates, deviſed to them as aforeſaid, are appointed to go. And then he declared his Meaning to be, that theſe Eſtates in the County of Meith and

the Town of Nuroſs ſhould not be charged with the Payment of his Debts and Legacies, which before they were ſubject to. On the 18th of June 1731 the Deviſor died; Arthur Lord Altham entered upon the Lands in Queſtion, and demiſed the ſame for the Term of thirty-one Years to Andrew Cordwell, reſerving the beſt improved Rent. Arthur Lord Altham died without Iſſue. And whether this Term of thirty-one Years ſhould bind Richard Aneſley in Remainder, was the Queſtion. Mr. Fazakerly ſaid the Court below was of Opinion with the Tenant in Poſſeſſion, and he ſhould agree, if the Will was to be conſidered without Regard to the Codicil, the firſt Perſon that was to take by the Will would have a Power to make theſe Leaſes as well as the Remainder-man. But he ſubmitted it, with regard to the Lands in Queſtion the Codicil is a new Deviſe. And he conceived that by the Codicil the Power of making Leaſes is intirely confined to thoſe in Remainder. The Chief Juſtice ſaid, if the Codicil was to be conſidered by itſelf, there might perhaps be ſomething in the Objection. But when the Will and the Codicil are conſidered together, he thought the Intention of the Codicil only was, to alter the Order of taking deſcribed by the Will, and to let the other Parts of the Will intirely remain. Judge Page declared, that he was of the ſame Opinion. The two other Judges ſaid nothing. But this Matter was ordered to ſtand over. Vide poſtea.

Bracey *and* Dawſon.

How far Aſſignees under a Commiſſion of Bankrupcy, ſhall be intitled, or not, to the Goods of the Bankrupt as againſt other Perſons who claim a property in them.

THIS was an Action of Trover brought by the Plaintiff as Aſſignee under a Commiſſion of Bankrupcy, againſt the Defendant, who was a Commiſſioner of the Land-Tax. At the Trial before Lord Raymond a Caſe was made for the Opinion of the Court in the Manner following. On the 7th of July 1731. Fairclough, a Collector of the Land-Tax, became a Bankrupt. On the 16th of the ſame Month the Commiſſioners of the Land-Tax, one of which the Defendant was, iſſued out their Warrant to ſeiſe the Goods of —— Fairclough, for Arrears of the Land-Tax, which were in his Hands. The Conſtable to whom the Warrant was directed, ſeiſed the Goods in Queſtion in the Hands of Fairclough the ſame Day, and detained them in his Hands. The next Day a Commiſſion of Bankrupcy iſſued out againſt Fairclough, and his Goods aſſigned over to his Creditors on the 21ſt. On the 6th of Auguſt a Sale was made by the Conſtable in Purſuance of the Seiſure, and the Plaintiff, as one of the Aſſignees, thereupon brought this Action. Serjeant Darnel ſubmitted it, that the Action might well be maintained. The Inſtant that the Plaintiff committed the Act of Bankrupcy, the Property of his Goods was no longer in him. The Property of his Goods was in no one till the Aſſignment; in the ſame Manner, as the Property of an Inteſtate's Goods is in no one, till Letters of Adminiſtration granted. If this had been the Caſe of an Execution of a private Man coming againſt the Bankrupt, the Aſſignment afterwards would have over-reach'd the Execution. To this Pur-

poſe was the Caſe of Andrews and Sir Matthew Decker, Eaſter 3 Geo. 2. in the Common Pleas at the Sittings before the Chief Juſtice. That was an Action of Falſe Return brought againſt the Sheriff for returning Nulla bona upon a Writ of Execution. On Evidence the Defendant juſtified his Return by Reaſon that the Party, againſt whom the Writ iſſued, was become a Bankrupt, and a Commiſſion taken out againſt him at the Time of the Delivery of the Writ to him to be executed. Yet no Pretence was there, that an Aſſignment of the Goods was made, till ſometime after the Return. Notwithſtanding this the Chief Juſtice of the Common Pleas allowed the Return to be good. He ſaid there would be no Occaſion to conſider how this would be in the Caſe of an Extent. In the preſent Caſe there was no Extent; but the Goods were ſeiſed by a Warrant from the Commiſſioners of the Land-Tax under the Act of Parliament. Serjeant Eyre argued on the other Side, and cited 3 Keb. 14. Sir William Jones 202, 203. 1 Cro. 189. 3 Lev. 191. and the Statute of 21 Jac. 19. (10.) The Chief Juſtice ſaid, that he did agree an Aſſignment from the Commiſſioners has to many Reſpects a Relation to the Time when the Act of Bankrupcy was committed. And therefore if after ſuch Act the Bankrupt diſpoſes of his Effects, the Aſſignment ſhall certainly over-reach it. He agreed the ſame too, where a Sheriff takes Goods in Execution of a Bankrupt, and does not deliver them over to the Party, before the Aſſignment made. But where the Sheriff does deliver them to the Party before the Aſſignment made, the Aſſignment ſhall not have a Relation to defeat that Execution: becauſe there the Execution was compleated. He ſaid he could not agree, that the Bankrupt ceaſed to have the Property of his Goods at the Time of the Act of Bankrupcy committed. The Property does continue in him even till the Aſſignment. The Property is never in the Commiſſioners; they have only a Power given them of aſſigning the Effects from the Bankrupt. If this had been an Extent of the Crown in the preſent Caſe, undoubtedly the Goods of the Bankrupt would have been bound from the Day the Extent bore Teſte; and no Aſſignment could have overreached it. For the Statute of 29 Car. 2. does not extend to Extents of the Crown, He ſaid, he thought the preſent Caſe did not differ from that. The Land-Tax is Money belonging to the Crown, though appropriated to particular Purpoſes. And the Parliament giving the King a more ſpeedy Remedy, than an Extent, cannot be ſuppoſed to have put the King in a worſe Condition, than if an Extent had iſſued. As to the Opinion, that was cited of Lord Chief Juſtice Eyres, he owned he could not agree with it. And Judge Lee ſaid the Caſe in Salk. 111. is againſt it. However this Matter ſtood over. Vide poſtea.

Aſtley

Aſtley *and* Brandwood.

Vide ante 168.

THIS Matter coming on again, Mr. Bootle the Elder argued in Support of the Plea, and cited Bro. Abr. Tit. — Pla. 59. 1 Inſt. 303. 3 Lev. 219. Hob. 51. Dyer 349, and Yelv. 27. The Chief Juſtice ſaid, that this was a Plea of a Collateral Warranty in Bar of the Demandant's Title; and therefore ought to be pleaded as ſtrictly, as if it was the Plea of an Eſtoppel. He ſaid he did agree, if a Stranger had diſſeiſed Alexander, the collateral Warranty would have barred the Demandant's Title. But ſome Sort of Seiſin was neceſſary in order to make the Feoffment with Warranty of any Effect. But he did not think ſuch Seiſin was ſufficiently averred in the Plea; accordingly inclined to be of Opinion with the Demandant. However this Matter ſtood over. Vide poſtea.

Strawn *and* Fletter.

How far a Remittitur of Damages is neceſſary to be entered.

MR. Abney moved that a Writ of Inquiry might be ſet aſide, on Account of the Damages given by the Jury being 100 l. whereas the Damages laid in the Declaration were but 20 l. The Chief Juſtice ſaid, that a Remittitur entered by the Plaintiff might cure this Defect. However he pronounced a Rule, that the Plaintiff ſhould bring in the Writ of Inquiry, that the Defendant might move in Arreſt of Judgment on this Exception. For he ſaid, unleſs the Plaintiff does enter ſuch Remittitur, the Judgment would be erroneous. Vide poſtea.

Chapman *and* Brown.

How far the Court will ſtay the Proceedings, or not, on a ſecond Notice of Trial till the Coſts of a former are paid.

THE Plaintiff as ſoon as he had brought his Action againſt the Defendant, which was Aſſault and Battery, went a Voyage to the Indies; but left Inſtructions with his Son and with his Attorney, that if the Defendant would pay the Coſts, they ſhould proceed no farther. The Defendant had offered to pay the Coſts. Notwithſtanding this the Plaintiff's Attorney gave Notice of Trial; but yet did not bring the Trial on. Lately he had given freſh Notice of Trial. Mr. Strange ſaid, that the Defendant in this Caſe cannot have the Benefit of the uſual Remedy of an Attachment for Non-payment of Coſts; becauſe the Plaintiff is out of the Kingdom. For which Reaſon he moved, that Proceedings upon this ſecond Notice might be ſtaid till Coſts of the former paid. He ſaid, in an Information qui tam he moved that the Proſecutor might give a Note of his Place of Abode. It came out, that the Proſecutor was gone beyond Sea. Upon this the Court ſtaid Proceedings there; becauſe otherwiſe the Defendant would have had no Remedy for his Coſts. Which he ſubmitted it was a Caſe of the ſame Nature with the preſent one. The

Court inclined to think that they never grant these Motions but in Ejectment. Upon which he moved that the Attorney might shew Cause, why he proceeded in this Cause against the Plaintiff's Directions. The Court said they never knew such Motion granted. However they gave him Liberty to move this Matter again, if he could find any Case to warrant it. The next Day he mentioned the Case of Nokes and Watts, Pasch. 7 Geo. 1. The Plaintiff there was a Pauper. And for that Reason Proceedings on the second Notice were staid till the Costs of a former paid. Judge Probyn said, that in such Case of a Pauper, he remembered another Answer had been given to such Motion, which is that he may be dispaupered. And Mr. Strange owned there was a Case to that Purpose in Salk. 506. Judge Lee said too, that Pasch. 5 Geo. 2. on Mr. Harvey's Motion, the Court said they never grant these Motions but in Ejectment. Mr. Gapper said too, that the Case of Nokes and Watts was upon his Motion, and that was an Ejectment. However the Chief Justice made a Rule to shew Cause. But afterwards it was discharged by Consent.

The King *and* Tallard.

MR. Filmer came now to shew Cause, and said, that this Court is the Custos Morum of all the King's Subjects. And for this Reason it is, that the Printers of obscene Books have been punished by Indictment and Information. The Printer of Lord Rochester's Poems was indicted for doing so. And Mr. Curl had an Information granted against him upon the like Occasion. To the like Purpose he cited Sid. 168, and Keb. 491. Mr. Strange argued on the other Side, and said, that a Man's being strip'd from the Middle upwards could be no indecent Sight. If it was so, the Legislature would not have ordered, that Men shall be whipp'd in that Manner; as they have done by several Acts of Parliament. The Court was of the same Opinion. Accordingly the Rule was made absolute. Vide antea 328.

The King *and* Hurst.

MR. Fazakerly came to shew Cause, and said that he did agree it was sworn in the Affidavit, on which the Rule was made, that the Defendant was an Attorney of the Court of Common Pleas. But that Fact ought to have been verified by a Certificate from the Records of the Court. For which Reason he submitted it, that an Affidavit was not sufficient. But the Court was of Opinion, that the acting as Attorney and Under-Sheriff at the same Time was an Offence within the Statute of H. 5. though perhaps the Defendant was not regularly sworn an Attorney. Accordingly the Rule was made absolute. Vide antea

The King *and* Dr. Earbury.

Vide ante 293.

MR. Josling moved, that a certain Recognizance, by which the Defendant was bound to appear in this Court, might be taken off the File; that so much of a Rule of this Court, as related to the Defendant's appearing to this Recognizance, might be discharged; that the Defendant's Papers, seised by Virtue of a Warrant from one of the Secretaries of State might be restored to him; and that a Satisfaction might be awarded to him for the Imprisonment he suffered under this Warrant. He took Notice that some Time before the Beginning of last Michaelmas Term, a Warrant was issued forth in the Name of the Duke of Newcastle, one of the Secretaries of State; which was directed to two of the King's Messengers, requiring them, taking a Constable to their Assistance, to make diligent Search in the House of the Defendant, the Author of a treasonable Paper, intitled The Royal Oak Journal, for all Papers of what Kind soever, in his Custody, and to bring the said Defendant with the said Papers before him. The Messengers, without taking a Constable to their Assistance, entered into the Defendant's House, seized his Papers, and brought them, together with the Defendant, before Mr. De la Faye, who was the Duke of Newcastle's Secretary, and a Justice of Peace. No one was examined by Mr. De la Faye, to prove the Defendant to be the Author of this Paper; nor did the Defendant confess it. However, Mr. De la Fay told the Defendant he must commit him, if he did not enter into a Recognizance in the Sum of 100 Pounds, with two sufficient Bail, conditioned for his Appearance in the Court of King's Bench the first Day of last Michaelmas Term, and not depart the Court without License. To avoid being committed, the Defendant with two sufficient Bail entered into such Recognizance; and the Recognizance was signed Ch. De la Faye. The Defendant appeared in the Court of King's Bench on the first and last Day of last Michaelmas Term, and on the first and last Day of the three following Terms; but on the last Day of Trinity Term last, as soon as he had moved to have his Appearance recorded, he prayed to be discharged. Upon this the Attorney General exhibited two Informations against him in open Court, and moved that he might be charged with them. Mr. Masterman accordingly demanded of the Defendant, whether he appeared to them. The Defendant did not by any open Act either assent or dissent to the Question demanded of him; but insisted, that the Recognizance by which he was bound over to this Court, was illegal, and that he ought to be discharged from it. The Court told him that they could not discharge his Recognizance. Upon that he went out of Court, and the Officer recorded his Appearance to the Informations. This, Mr. Josling said, was the State of the Fact; and upon this State of it he apprehended that his Motion was regular. He said he should not contend but it has been resolved, that a Secretary of State's Warrant to seize a Person suspected of treasonable Practices, was legal. But this Resolution was but a late

late one, founded only upon Precedents, and not one antient Reſolution in the Books to juſtify it. However it never was yet reſolved, that a Secretary of State could grant a Warrant to ſeize a Perſon's Papers, and it manifeſtly is againſt the Rights and Liberties of the Subject. As the Warrant itſelf was illegal, ſo was the Execution of it likewiſe. For it was done without the Aſſiſtance of a Conſtable, and the Defendant not brought before the Secretary of State himſelf, as the Warrant directed, but a Secretary under him. He then objected to the Recognizance; he ſaid he ſhould not contend but there were Precedents to juſtify a Juſtice of Peace in binding a Man over to this Court; but there was not one Reſolution in the Books antient or modern, to juſtify ſuch a Practice. A Juſtice of Peace has a Juriſdiction which is confined within the Bounds of his County. And it would be a Matter very inconvenient to the Subject, if it ſhould once be ſettled for Law, that a Juſtice of Peace in Cumberland might bind a Man over to this Court ſitting at Weſtminſter. The Manner of taking the preſent Recognizance was illegal too, in as much as there was the Oath of no one, nor the Confeſſion of the Party, at the Time it was required of him. The Form of it is likewiſe bad; for the Defendant is bound over to appear at the Court of King's Bench at Weſtminſter; whereas the Stile of this Court is coram Rege ubicunque; it is not inſerted in the Recognizance for what Cauſe he is to appear; the Recognizance is ſigned too, Ch. De la Faye; ſo that the Chriſtian Name of De la Faye is imperfectly ſet out; and it no where appears in the Recognizance, that he was a Juſtice of Peace. Mr. Joſling then ſpoke to the Appearance of the Defendant; and ſubmitted it in the firſt Place, that the Defendant in fact did not appear to theſe Informations; and in the next Place, that he legally could not. He did agree that when the Queſtion was aſked the Defendant, whether he appeared, he did not in Words directly refuſe it; but he contended that the Recognizance by which he was brought into Court was illegal; which was the ſame Thing as if he had in Words directly contended that he was not obliged to appear. He ſubmitted it therefore, that when the Officer of the Court demands of the Party whether he appears, the Party inſiſts that he is not bound to appear; the Court tells him that he is bound to appear, and if he does not his Recognizance will be forfeited; the Party upon that goes out of Court, that may as well be conſtrued a Departure without Licenſe, as an Appearance; for which Reaſon with Regard to the Fact he ſubmitted it, the Officer did wrong in recording that the Defendant did appear to theſe Informations. But ſuppoſing the Fact to be that he did ſubmit to appear; yet as the Recognizance, which is in the Nature of a Proceſs, to bring the Party in to appear, was illegal, for the Reaſons he had before given, he conceived that the Appearance could not be legal neither; and for Authorities to ſupport the ſeveral Parts of his Argument he cited Godb. 118, 147. 39 H. 6. 27. Archbiſhop of Canterbury's Caſe, 4 Jac. 2. Sid. 32. Lut. 951. 11 H. 4. 7. Lamb. 89. Cr. 3. 646. The Chief Juſtice ſaid that in the Caſe of Kendal and Roo, it was ſettled upon ſolemn Debate, that a Secretary

of

of State might iſſue out his Warrant to apprehend the Perſon of any Man on Suſpicion of treaſonable Practices; and therefore did not think that that Part of the preſent Warrant would have been diſputed at this Day. As to the other Part of it, with Regard to ſeizing the Defendant's Papers, he would not give an Opinion, whether it was legal, or not. This Court could not make a Rule upon the Meſſenger, that did ſeize them, to reſtore them; and therefore that Queſtion was not properly before the Court for their Determination. There was no Occaſion to determine neither, whether in general Juſtices of Peace have Authority to bind over to this Court. The Perſon that did this in the preſent Caſe, was a Juſtice of Peace for the County of Middleſex, and undoubtedly he might bind over to this Court; this Court having a Juriſdiction of Oyer and Terminer for that County. However he had before him ſeveral Precedents of Juſtices of Peace of other Counties binding over to this Court likewiſe. He had likewiſe before him ſeveral Precedents of Recognizances taken by Judges of this Court and Juſtices of Peace, wherein the Stile of their Authority was not inſerted. He had ſeen ſeveral too, which are only in this general Form ad Reſpondendum, &c. And as to the other Exceptions, with Regard to the Form of this Recognizance, if there was any Weight in them, the Defendant might have taken Advantage of them, if a Scire facias had been brought upon it. But what the Defendant has done, has in Judgment of Law amounted to an Appearance; and as that is ſo, all Defects in the Recognizance are thereby cured; for this Purpoſe the Chief Juſtice mentioned the Caſe of Widrington and Charlton, Trin. 11 Ann. that was an Appeal of Murder. The Defendant did not appear till the Exigent; and when he did appear, his Appearance was entred in the moſt cautious Manner that could be, for it was in theſe Words, Et prædictus Defendens, ſalvis ſibi omnibus Advantagiis & Exceptionibus tam ad breve Originale quam ad Proceſſum, venit; and thereupon for Faults in the Exigent demurred. Lord Macclesfield, Mr. Juſtice Eyres, and Mr. Juſtice Powis held, that all Defects in Proceſs were cured by the Party's Appearance. Mr. Juſtice Powel indeed was of another Opinion, as this was a Writ of Appeal; but agreed ſuch Defect would have been cured by Appearance in every other Action. The reſt of the Court agreed with the Chief Juſtice in the preſent Caſe; accordingly the Motion was diſallowed of.

Anonymus.

Vide antea

DR. Straughan coming now to ſhew Cauſe, he ſaid that the granting Commiſſions of Appraiſement in theſe Caſes is according to the conſtant Courſe of the Eccleſiaſtical Court; but as ſoon as the Commiſſion was returned, Adminiſtration with the Will annexed would undoubtedly be granted. The Commiſſion in the preſent Caſe was a Commiſſion of Inſpection as well as Appraiſement, in order that the Papers of the Deceaſed may be look'd into, and likewiſe that the Perſonal

Eſtate may be appra's'd and inventory'd. The Juſtice ſaid, in theſe Caſes of Adminiſtration the Court would not interfere by granting a Mandamus; but where the Party applying for Adminiſtration is intitled to it by ſome Act of Parliament; or where the Eccleſiaſtical Judge is unreaſonably dilatory in his Proceedings. He did not think that this was any ways the preſent Caſe; accordingly the Rule was diſcharged.

The King *and* Harper.

THE Defendant having been brought up by Habeas Corpus, the Subſtance of the Commitment appeared to be in the Manner following; To the Keeper of the Houſe of Correction for the City and Liberty of *Weſtminſter*. Whereas *John Harper* has been brought before me, one of his Majeſty's Juſtices of the Peace for the County of *Middleſex* and City and Liberty of *Weſtminſter*, and Oath has been made by two credible Witneſſes that the ſaid *John Harper* is a common Player of Interludes, without the King's Licence, in the Pariſh of *St. Martin in the Fields* in the County of *Middleſex* and City and Liberty of *Weſtminſter*. And whereas it appears to me upon Examination of the ſaid *John Harper* upon Oath, that the ſaid *John Harper* has not any viſible Way of Livelyhood, but is a common Player of Interludes. I do hereby adjudge the ſaid *John Harper* to be a Rogue and a Vagabond, in Purſuance of the Statute in that Caſe made and provided. Theſe are therefore in his Majeſty's Name to require you to take into your Cuſtody the Body of the ſaid *John Harper*, and to keep him to hard Labour till the firſt Day of the Seſſions to be next holden for the City and Liberty of *Weſtminſter*. Thomas Clarges. Mr. Abney and ſeveral others were Counſel for the Defendant, and upon this Return they moved that he might be diſcharged; they ſubmitted it, that the Warrant on which the Defendant was committed, was a Conviction; by Reaſon of thoſe Words in it, I do adjudge. And if ſo, it was clearly bad for want of the Evidence being ſet out in it. But if it ſhould not be conſidered as a Conviction; at leaſt it was a Commitment in Execution. And upon ſuch Commitment the Defendant is not bailable; for which Reaſon there ought to be as much Certainty in it, as in a Conviction. But ſuppoſing it to be only a bare Commitment; yet there were ſuch Exceptions to the Form of it, as that the Defendant ought to be diſcharged. The Statute upon which it is founded, is 12 Ann. 2. 23. And by that Statute ſuch Juſtice only as lives near the Place where the Fact is committed, has a Juriſdiction over the Cauſe; but nothing of this is ſet forth in the preſent Commitment. The ſecond Section of this Statute requires too, that the Complaint ſhould be made by a Conſtable, or other Inhabitant; but in the Commitment it is no where ſet out on whoſe Complaint it was founded. It is not ſet out neither, before whom the Oath was taken, which the two Witneſſes made. The Time when the Fact was done is not ſpecified; and it does not appear, that that Part of the Pariſh of St. Martin in the Fields, in which the Fact was done, was within the City or Liberty of Weſtminſter. The Time too, for which the Defendant is committed,

What ſhall be ſaid to be a good Commitment, or not, of a Perſon who acts Stage-Plays without a Licenſe.

is likewise uncertain; for Non constat when the Sessions for the City and Liberty will be held; whereas the Sessions for the County at large is settled by Act of Parliament. The Defendant's Counsel then excepted even to the Substance of the Commitment, and submitted it, that he was not within the Words or Intention of the Act, by Reason that it was not pretended he was a Vagrant. And it appears by the whole Completion of this Act, that Vagrancy is necessary to make the Persons specified in the Act, Offenders within it. They conceived likewise, that Stage-Players and Comedians do not fall within the Description of any of the Persons specified in the Act. And it was well known, that the Defendant was a Stage-Player and Comedian, and one that acted too with great Reputation. They submitted it, that such Persons could by no Means be comprized under those Words in the Act, Common Players of Interludes. They could by no Means be understood by the Act to be declared Rogues and Vagabonds; if they were, even his Majesty's License to the Theatre Royal would hardly be found to be legal. The Court were of Opinion that this was not to be considered as a Conviction; but yet they inclined to think that the Warrant was bad; because it was not set forth in it that the Defendant was a Vagrant. However, that the Parties might have an Opportunity of agreeing to try the Merits of this Question in a feigned Issue, it was consented to on all Sides, that the Defendant should be discharged out of Custody, upon his own Recognizance to appear in Court the last Day of this Term.

The King *against* Holford and others.

Vide antea 330.

SErjeant Hawkins coming to shew Cause, he submitted it, that the Mandamus was well directed to the four Persons mentioned in the Rule. He did agree that one of them only had Possession of the Books, but yet all of them were assisting in forcibly taking them away. A Certiorari is directed to all the Justices in the County, though one only can have the Possession of the Thing which is to be removed. And he had a Precedent in his Hand of a Mandamus directed to four Persons to deliver over to the Register of the Bishop of Hereford Books belonging to his Office; which Precedent was 6 Will. 3. He conceived likewise, that there was no Occasion for a Mandamus to restore Mr. Bullen to his Office before he has the Books delivered to him. He did agree that there were Words in Bullen's Affidavit importing that he was turned out of his Office. But when the whole Affidavit is considered together, it appears that in Fact he was not turned out. The Corporation of Esham consists of nineteen Members; no Act can be done but by the Majority of the Persons present. The Mayor had given Notice of a Town-Meeting, and declared that the Intent of it was only for admitting Freemen; sixteen of the Members assembled accordingly for that Purpose; but when they were there the Mayor proposed the turning out Mr. Bullen, eight of the Assembly declared that this was against the Intent of the Meeting,

ing, and therefore went out of the Room. As they were going out of the Hall Doors they found it shut against them. Upon which they returned to the Room, and demanded of the Mayor Liberty to be let out, which he accordingly gave them. After this the eight Persons that remained, concurred in a Vote for the turning out Mr. Bullen. The Serjeant submitted it, that in Judgment of Law this was no Removal, in as much as there was not a competent Number of Persons concurring in it. He produced a Precedent too, Hil. 9 Anne, where a Mandamus was directed to one Mr. Belley to deliver over to William Thorney the Records of the Tower belonging to the Steward of the Court. The Return made to it was, that Mr. Thorney had no Right to them. This was tried. And afterwards a peremptory Mandamus awarded. The other Side came into a Consent, that in Case the Court should be of Opinion to grant an Information in the Nature of a Quo Warranto against Yarnel, the Books should be delivered within a Week. And thereupon the Rule was discharged.

Middleton and his Wife *against* Croft.

DR. Andrews came to shew Cause, why a Prohibition should not go to the Consistory-Court of the Bishop of Hereford, to stay the Proceedings on certain Articles exhibited against the Defendants below for a Clandestine Marriage, on the Promotion of Croft. The Articles set forth, that by the Canons of the Church no Persons ought to marry, unless the Banns of Marriage between them are solemnized three Times, or they obtain a Licence from the Ordinary for so doing; that by the Canons the Hours of Matrimony are appointed between eight and twelve in the Morning; and that every Marriage ought to be solemnized openly in some Church or Chapel. The Articles charged the Defendants, that contrary to these Canons they married without Banns and without a Licence; that they married between the Hours of One and Eight in the Morning; and that they were married in the House of Thomas Allen a Clergyman. The Defendants suggested, that by the Statute of 7 & 8 W. 3. 35. the marrying without a Licence is made a Temporal Offence, and that the Ecclesiastical Courts have no Jurisdiction in it. They farther suggested, that by the Canon Law two competent Witnesses are required to every Fact; whereas by the Common Law one Witness is allowed sufficient; that they were lawfully married in the Diocese of the Bishop of St. David's, and not in the Diocese of the Bishop of Hereford in the Manner as set forth; and that they have but one Witness only to prove this Fact. Whereupon a Rule was obtained to shew Cause, why a Prohibition should not be granted. Mr. Strange was of Counsel on the same Side with Dr. Andrews, and they submitted it, that the Rule ought to be discharged. They said there was no Pretence for the Rule's being made absolute on Account of the Defendant's Proof; because they ought to have offered their Proof before the Ecclesiastical Judge, and to have made Affidavit here, that he refused it, which the De-

How far the Laity shall not be said to be bound by the Canons.

Defendants have intirely omitted. There was no Pretence neither of having the Rule made abſolute on that Part of the Articles which related to the Time of the Defendants marrying; for that is aſcertained by the 102d Canon made in 1603, and the Statute in Queſtion does not relate to it. There was no Pretence neither of having it made abſolute on that Part of the Articles, which related to the Place where the Defendants were married; for that is aſcertained by the ſame Canons likewiſe; and the Statute in Queſtion has no regard to it. The Prohibition could not be made abſolute neither with regard to the Wife; for though there is Remedy againſt her by the Eccleſiaſtical Law; yet there can be none on this Act of Parliament. The Queſtion therefore will ſingly remain, whether the Prohibition ought to ſtay the Proceedings againſt the Husband on that Part of the Articles, which charges him with marrying without Banns and without a Licence. As to that it deſerved to be conſidered, how the Law ſtood before the Act of Parliament. By the antient Canons of Archbiſhop Stratford long before the Time of H. 8. it is provided in theſe Words; Sacerdotes Matrimonia clandeſtina celebrantes, ac hujuſcemodi intereſſentes, Sententiam Excommunicationis incurrant. Linwood takes Notice of this Canon, and explains the Meaning of it to be, that all Perſons of what Sort ſoever aſſiſting in ſuch clandeſtine Marriage, are within the Danger of the Penalty. By the 105th Canon in 1603 it is declared likewiſe, that every Licence granted againſt the Canons ſhall be void, and the Parties marrying contrary thereto ſhall be ſubject to the Penalties of clandeſtine Marriages. So that they preſumed, that before this Statute there could be no Sort of Doubt, but the Parties marrying without Banns and without a Licence were puniſhable in the Eccleſiaſtical Court for ſo doing. The Difficulty then ariſes upon this Act of Parliament. They ſaid, there were many Caſes both in the Common and Statute Law to be found, wherein the Temporal and Eccleſiaſtical Courts have a concurrent Juriſdiction. In the Caſe of Kerby and Savil in this Court 1716, Savil had brought an Action in the Marſhalſea Court againſt Kerby for calling her Bawd; ſhe recovered Damages there, and afterwards commenced a Suit againſt Kerby for the ſame Words in the Eccleſiaſtical Court. A Rule to ſhew Cauſe was obtained, why a Prohibition ſhould not be granted. Dr. Andrews himſelf came to ſhew Cauſe upon that Rule, and it was diſcharged; becauſe the Suit in the Temporal Court was for Damages, the Suit in the Eccleſiaſtical Court for Reformation of Manners; and ſo diverſis Rationibus ventilatur. To the like Purpoſe are many other Caſes at the Common Law; to prove which Latch 244. Hob. 187, 192. 1 Lev. 198. Ven. 3. Sid. 146. Fitz. Nat. Brev. 50. and Townſend and Thorp, were cited. The like appears by various Inſtances on the Statute Law. By the Statute of Articuli Cleri, & Circumſpecte agatis of 32 H. 8. 7. (2). by 2 & 3 Edw. 6. 13. (13). by 22 & 23 Car. 2. 10. Remedy is given to the Eccleſiaſtical Courts, where they had none before; yet the Remedy which the Temporal Courts had before, is not thereby imagined to be taken away. So by the Statute of H. 8. of Pluralities and Non-Reſidence, Remedy is given to the

Temporal Courts; yet the Jurisdiction, which the Ecclesiastical Courts exercised before this Statute is enjoyed at this very Day. They said farther, that this would appear more plain in the present Case, if the Design of the Statute of William was considered; for it would be found, that it chiefly was to secure the Duty on Marriage Licences granted by a former Act. Mr. Clive and Mr. Gundry argued on the other Side. They said, they should not insist, that the Prohibition could be maintained on that Part of the Suggestion, which related to the Defendants Proof; but on the other Part of it they apprehended it well might. They said they by no Means took it to be a clear Point, that these Canons of the Archbishop bound the Laity, in as much as no Authority has been produced, that it was ever allowed in the Courts of the Common Law that they did. And as to the Canons in 1603, it has been determined, that they do not bind the Laity; for which Purpose they cited Salk. 412. But supposing the Ecclesiastical Courts had Authority to punish Lay Persons marrying without Banns and without a Licence before the Statute of William, by that Statute the Authority of Ecclesiastical Courts is taken away. They said there was no Pretence to say, that there was any Saving of their Jurisdiction in this Act of Parliament. And wherever there is no such saving Clause, the Nature of the Offence is altered by the Act; it is made Temporal, as before it was Spiritual; and consequently the Jurisdiction, which was before exercised, is thereby taken away. For this Purpose they mentioned the Cases of Sodomy, Rape, Witchcraft, and others of the like Nature. And where the Legislature has intended that the Ecclesiastical Jurisdiction should continue, a Saving is always put into the Acts, whereby their Jurisdiction is continued. This is so in the Statute of 1 Eliz. 2. 21 Eliz. 1. 1 Jac. 11. 4 Jac. 1. and 10 Ann. 19. (176, 177.) And particularly they relied upon Sir Thomas Jones 131. as a Case in Point for their present Purpose. The Chief Justice said, that undoubtedly the Canons of 1603 do not bind the Laity; and he doubted whether this particular Canon did of Archbishop Stratford for the Reason that has been mentioned. However he inclined to think, if the Ecclesiastical Courts had a Jurisdiction to punish Lay Persons before the Act for marrying without Banns and without Licence, the Statute did not take their Jurisdiction away. Judge Lee said that he likewise doubted, whether this Canon of Archbishop Stratford did bind the Laity. In the Case of Matthews and Burnet a Doubt was, whether the Ecclesiastical Courts could compel a Man to take a Licence for teaching a School. Lord Keeper Wright was of Opinion, that they could. But the Judges inclined to be of another Opinion. However, if the Jurisdiction of the Ecclesiastical Courts in the present Case could be made out before the Statute of William, he did not think that by that Statute their Jurisdiction was taken away. For this Purpose he mentioned the Case of The King against Sankey and Tibber in Lord Holt's Time. The Defendants there were Quakers, and sued in the Spiritual Court for Tithes. They came into this Court and insisted, that by the Statute of 7 & 8 W. 6. they were to be proceeded against

before two Juſtices; and thereby the Authority of the Eccleſiaſtical Court was taken away. Lord Chief Juſtice Holt agreed, that where a Statute makes a Spiritual Offence to be an Offence of a higher Nature, the Nature of it is ſo far changed, as that the Spiritual Courts have no longer any Authority over it. But in the Caſe, that was before the Court at that Time, that Chief Juſtice ſaid, that the Spiritual Court continued to have a Juriſdiction notwithſtanding that Statute, and inſtanced the Caſe of a Penſion, where he ſaid the Eccleſiaſtical Courts have a Juriſdiction, notwithſtanding the Opinion of Coke to the contrary. The reſt of the Court inclined to be of the ſame Opinion with the Chief Juſtice and Judge Lee in the preſent Caſe. However, that theſe Points might receive a more ſolemn Determination, the Parties were ordered to declare in Prohibition by Chriſtmas next. Vide poſtea.

Clark, Executor of Sarah Simonds, *againſt* Smith.

How far a Quantum meruit will lie for Rent, or not.

MR. Abney having before moved the Court, that one of the Judges would apply to Mr. Baron Carter to report the State of the Evidence in this Caſe, that appeared to him at the Trial, Judge Lee ſtated the Fact in the Manner following. There were two Counts in the Plaintiff's Declaration; one an Indebitatus Aſſumpſit for the Rent of certain Lands contained in the Declaration; the other a Quantum meruit on the ſame Account. The Land had been enjoyed by the Defendant upwards of Twenty Years, and one certain Rent of Seventy-ſeven Pounds five Shillings had been Annually paid for it. The half Year's Rent, that was due at Michaelmas laſt, the Teſtatrix demanded of the Defendant, and he told her he never paid the Michaelmas Rent till Candlemas, but then he would pay it. Upon this Evidence Baron Carter was of Opinion, that the Plaintiff could not recover; ſo directed the Jury to find a Verdict for the Defendant, which they accordingly did. Mr. Abney and Mr. Noel ſubmitted it, that the Plaintiff was well intitled to recover upon this Declaration; for which Purpoſe they cited Lev. 179. Skin. 238, 242. 3 Mod. 73. 8. (7). 22. (22). 2 Keb. 8. and Sid. 279. And for this Reaſon they hoped, that a new Trial ſhould be granted. Mr. Denniſon was on the other Side, and prayed a Day to ſhew Cauſe, which the Court accordingly gave him. But afterwards, no Body appearing to ſhew Cauſe, the Rule was made abſolute.

Gore *and* Gore.

THERE being a new Chief Justice now in Court, Mr. Peer Williams and Mr. Fazakerly argued this Case again. Mr. Peer Williams was Counsel for the Plaintiff, and stated the Case to be in the Manner following. The Testator William Gore, seised in Fee of the Manor of Barrow and the Manor of Carter-Haven in Somersetshire, made his Will in Writing the 15th of July 1718. The Manor of Carter-Haven he devised for Payment of his Debts. The Manor of Barrow he devised to Trustees for the Term of 500 Years without Impeachment of Waste, in Trust for the Paying an Annuity of 50 l. per Ann. to Thomas his eldest Son during his Life, and in Case the Annuity should be in Arrear, he gave Power to his eldest Son to distrain for the same in the Lands so devised to the Trustees. The Trust of this Term was farther declared to be for Payment of Debts and Portions for his younger Children, and in Case his eldest Son should marry, for raising a Jointure of 100 l. per Annum for every 1000 l. he should have with his Wife. He likewise gave Power to his younger Sons to charge this Term with Portions for their younger Children, viz. the Portions of the Issue Male to be paid at their Age of 21 Years, the Portions of their Issue Female to be paid at their Age of 21 Years or Marriage, which should first happen. The Remainder of these Lands he devised to the first and every other Son of Thomas his eldest Son to be begotten in Tail Male; the Remainder to Edward his second Son for Life, the Remainder to the Trustees in Trust to preserve Contingent Remainders; the Remainder to William his third Son in like Manner; the Remainder to certain other Persons; the Remainder to his own right Heirs. Some Time afterwards the Testator made two Codicils to his Will, thereby charging this Term with other Portions, and on the 4th of February 1718 he died. After the Death of the Testator Thomas the eldest Son married Mary Ward, and on the second of November 1728 had Issue by her William the present Defendant. Edward the second Son died without Issue. And now William the third Son brought his Bill against William the first Son of Thomas the eldest Son. And whether William the Defendant had any Title, was the Question for the Consideration of the Court. Upon this State of the Case Mr. Peer Williams submitted it, that the Defendant had no Title. He said he should not contend but the Intent of the Testator was, that the Issue of the eldest Son should take. And at the Time of making of the Will it was certainly possible that he might take. For Thomas might have married and had a Son before the Testator's Death; and if so, the Freehold would have vested in the Son immediately on the Testator's Death, and he would have taken by Way of a vested Remainder. But as the present Case happened to be, it was impossible that he could take by Way of vested Remainder, because he was not in Being at that Time. If he could not by Way of vested Remainder, his only

Vide antè 229.

only Title must be by way of contingent Remainder, or else by way of executory Devise. His Title cannot be by any way of contingent Remainder; because there is no Freehold, but only a Term in the Trustees to support it; and therefore the Difficulty to be considered in this Case is, whether he can take by way of executory Devise. It has been said that he shall, by Reason that the Limitation in the Will is to the Issue of Thomas to be begotten, and not to the Issue of Thomas begotten. But Mr. Peer Williams submitted it, that those Words have one and the same Signification both in Wills as well as Deeds; and for this Purpose he cited Co. Lit. 20. Ver. 545. He conceived then, that the present executory Devise was void, for three Objections that may be taken to it. First, that no legal or alienable Estate vested in the Son of Thomas till the Determination of the precedent Term. Secondly, because the Freehold is not to descend to the Heir at Law in the mean Time, but is devised over to Edward. Thirdly, because the Words of the Will have given him a Remainder, so that he must take in that way, and not in any other. With Regard to the first, every executory Devise is considered as an Original independent Devise, not to be executed till the Time appointed for its springing into Possession; which is the Reason why it is called executory. And in the present Case the Time appointed for its springing into Possession is not to be till the Term of 500 Years determined. So this Case is to be considered in a Court of Law; for the Trusts of the Term in this Court cannot be regarded. But even supposing the Trusts of the Term should be regarded, yet still the present Devise cannot be good; because it by no Means appears that these Trusts will determine in twenty or thirty Years, which is the longest Time given for the expecting of such Interest, in the Case of Scatergood and Edge, Salk. 229. And farther on this Head was cited 3 Cr. 878. To the second Objection he observed, that the manifest Intent of the Testator was, that Thomas the Heir at Law should have no Benefit from this Estate, but the Rent-Charge of 50 l. per Annum; and therefore it would be a very extraordinary Thing to be said in a Court of Law, that a Freehold should descend upon him; and he submitted it, that the Freehold manifestly vested in Edward; the Estate was in him by Purchase; and when it is so, it shall never be devested out of him upon any Contingency happening afterwards. The Distinction between a Purchase and Descent in this Respect is taken in Co. Lit. and the Reason for the Difference is this; When an Estate is thrown upon one by Act of Law, it shall be devested out of him again when it is reasonable it should be so, because the Act of Law will do Prejudice to no one. But when an Estate is vested in one by Purchase, so it shall continue; because it was the Party's own Fault that he did not provide for the Contingency in a better Manner. He said likewise he conceived, if the Freehold descended upon the Heir at Law, there would be a Merger of his Rent-Charge; and thereby an Act of Injustice done to him. Then in Support of the third Objection he cited Salk. 226. And farther he relied upon the Authority which the former Resolution of this Case

had received. Mr. Fazakerly on the other Side said he should not contend, but in Limitations by Way of Descent the Words begotten and to be begotten have one and the same Construction; but in Purchases he conceived they did signify a different Description of the Person; for this Purpose he cited the Case of Darlyson and Newman, Hill. 11 Ann. in the Court of Exchequer; and farther relied upon Lev. 135. and Raym. 82. He said he should not contend likewise, but the Opinion which the Judges of this Court had before given in 1720 was something against him. He owned they did give their Opinions that the Freehold vested in Edward, and that the Issue of Thomas could not take by way of executory Devise; because the Time limited for their taking was not such a reasonable one as is limited by the Law for these Purposes. But he observed that William the present Defendant was not born when the Court gave that Opinion; and therefore this Fact happening since, the Point in Question is now more immediately before the Court than it was at that Time. And as to that, he said he conceived that immediately upon the Birth of William the Estate vested in him by way of executory Devise, and was then executed, and that in the mean Time the Freehold descended upon the Heir at Law. He said this would be no Merger of the Rent-Charge; because he has not the Possession of the Freehold, so as that he can have any Profit arising from it; and therefore he may well enjoy the Rent-Charge out of the Term notwithstanding. If this Devise then was to take Effect in William immediately upon his Birth, it certainly must take Effect within the Compass of a Year after the Lives in Being. And to shew that this Court has allowed the Time for these executory Interests longer than the Lives in Being, he cited Moor 847. Rol. Abr. 612. (3.) Shower's Parliament Cases 137. Ver. 234. The Case of Hodgkins and Andrews, Pasch. 1730, and more particularly relied upon the Case of Pots and Pots, determined by the Master of the Rolls the 6th of July 1732, and affirmed by the Lord Chancellor this present Term. The Court said that they would take Time to Consider of this Case before they gave their Opinions; Accordingly ordered it to stand over. And on Saturday January 16, 1733, the Court certified their Opinions, that the Devise was good.

Kent and May *against* Kent.

When an Error is in the Judgment itself, how far the Party for whose Advantage the Error is, may assign it for Error.

UPON a Writ of Error on a Judgment in the King's Bench in Ireland affirming a Judgment of the Common Pleas there, a special Verdict appeared to have been found to the Effect following; that after the first of May 1721, the Demandant married her late Husband, who was at the Time of his Marriage with her under the Age of twenty-one Years. They find that at the Time of Marriage his Father was seised of an Estate of Inheritance of 50 l. per Annum, and that the Marriage was had without Consent of his Father, Guardian, or Lord Chancellor. They farther find, that the Demandant used no subtle Means to induce the Deceased to marry her; and whether

whether upon theſe Circumſtances the Demandant ſhould be barred of her Dower, was the Doubt, which they ſubmitted to the Court. Upon this Verdict the Court of Common Pleas in Ireland gave Judgment for the Demandant. Mr. Strange now argued on Behalf of the Plaintiffs in the Writ of Error, and ſubmitted it, that the Judgment was erroneous. The Queſtion in this Caſe he ſaid ariſes upon an Iriſh Act 6 Ann. 16. 137. which is intitled An Act to prevent Perſons marrying Children againſt the Will of their Guardians. The firſt Clauſe of the Act provides, That if any Perſon ſhall by any ſubtle Means marry a Man under the Age of twenty-one Years, having an Eſtate of Land of the yearly Value of 50 l. or perſonal Eſtate of the Value of 500 l. or ſhall procure the eldeſt Son of ſuch Perſon to marry her without Conſent of his Father, Guardian, or Lord Chancellor, ſuch Perſon ſhall be barred of her Thirds, and every other Proviſion out of his ſaid Eſtate. The next Clauſe follows in theſe Words; And be it enacted by the Authority aforeſaid, that all Perſons who ſhall be acceſſory, aiding, abetting or procuring before the Fact committed in all and ſingular the ſeverel Offences herein before mentioned, being lawfully convicted thereof, ſhall ſuffer three Years Impriſonment. Upon the State of this Caſe Mr. Strange ſubmitted it, that the Intent of this Act of Parliament was to prevent a great Inconvenience, which before happened in young Gentlemen of Eſtates, or who were Heirs to Eſtates, marrying without proper Advice of their Friends and Relations. For this Reaſon the Act was to be conſtrued largely, in order to remedy the Miſchief more effectually. And therefore he conceived that in the preſent Caſe, though the Demandant uſed no ſubtle Means to procure the Marriage; yet in as much as ſhe did marry the Party without the Conſent required by the Act, ſhe was an Offender within the Meaning of it. He then took Exceptions to ſeveral Parts of the Record; Firſt, that it appears by the Placita, the Writ of Dower was not brought till two Years after the Death of the Husband; ſo that the Demandant has voluntarily delayed herſelf; and yet ſhe has recovered Damages to the Value of the Land, from the Time of her Husband's Death; for which Purpoſe he cited Co. Lit. 32. Secondly, upon computing the ſeveral Parts of the Damages and Coſts given in the Common Pleas, it appears that ſhe ought to have recovered 158 l. 16 s. 3 d. ½ whereas by the Quæ quidem Damna ſhe has Judgment only for 158 l. 15 s. 3 d. ½ ſo that 1 s. is omitted; and he apprehended that in the Caſe of Tenſh and Dalton, Paſch. 3 G. 1. it was clearly agreed that every Thing given by the Jury muſt be diſpoſed of either by a Remittitur or other Ways. Thirdly, in the Judgment of the King's Bench below, the Sum of 312 l. 12 s. 9 d. ½ is given for Damages, and 35 l. 4 s. 7 d. for Coſts, which can only be in Purſuance of the Statute of 3 H. 7. 10. and yet it is not ſaid in the Judgment, to be given pro dilatione Executionis; whereas all the Precedents are in that Manner. Fourthly, it appears by the Record, that there had been a former Writ of Error brought by May, an Anceſtor of one of the preſent Plaintiffs in Error, together with Kent the other Plaintiff in the Writ of Error; that May died, whereupon the Writ abated; that thereupon May, one of the preſent Plaintiffs in the Writ of Error, joined in a new Writ of Error with Kent, and

conſequenty May, one of the preſent Plaintiffs in Erroꝛ ought to have been ſubject to have anſwered the Damages upon this Writ of Erroꝛ on the Affirmance of the Judgment, as well as Kent; and yet the whole Sum of 312 l. 12 s. 9 d. ½ and the 35 l. 4 s. 7 d. are charged upon Kent only. Laſtly, that the Plaintiffs in Erroꝛ are amerced pro falſo Clamore, which they ought not to have been. Mꝛ. Parker argued on the other Side, and as to the Conſtruction of the Act of Parliament, he ſubmitted it, that the Demandant by no Means ought to be debarred of her Dower; foꝛ this Purpoſe he cited Hob. 182. Cr. 481. and And. 115. which are Conſtructions upon 3 H. 7. 2. an Act ſomething in the ſame Nature with the preſent one. He then anſwered the ſeveral Exceptions that had been taken to the ſeveral Parts of the Recoꝛd. To the firſt he ſaid the Writ of Dower was not removed up by Certiorari; and therefoꝛe the Plaintiffs in Erroꝛ could not take Advantage of this Exception. Beſides he ſaid they did not come in upon the Summons the firſt Day, and offer to render Dower, pleading that they always were ready and ſtill are to do ſo, which they ought to have done by the very Authority of Co. Lit. 32. which has been cited, in oꝛder to have diſcharged themſelves from Damages. To the ſecond, this is only a Miſcomputing of the Sums, and therefoꝛe may be rectified by the Court. To the third, the Court is not bound to give a Reaſon foꝛ their Judgment; foꝛ which Purpoſe he cited Stiles 290. Farreſley 154. Beſides, if this Part of the Judgment was wrong, the Judgment may be reverſed as to this Part, and affirmed as to the other; becauſe this Part of the Judgment is by Statute, the other by Common Laꝛ. Foꝛ this Purpoſe he cited the Caſe of Waller and Green, 13 Will. 3. Rot. 20. To the fourth, the Heir is joined only to exonerate the Lands; foꝛ which Reaſon he had nothing to do with the Damages. 1 E. 3. 12. 3 E. 3. 11. And to ſhew that in like Inſtances the Party has not paid Coſts upon the Statute of H. 7. Mꝛ. Parker cited Cr. 425. Lev. 146. Ray. 134. Ven. 88. To the laſt Exception, he ſaid that by an Iriſh Act all the Statutes of Jeofails here, are in Foꝛce there; and here this Defect after a Verdict would certainly be cured by the Statute of Ch. 2. The whole Court were clear of Opinion that all the Exceptions were anſwered, except the laſt but one. And even as to that, the Chief Juſtice doubted whether the Plaintiffs in Erroꝛ could take Advantage of it, in as much as they had both joined together in the Aſſignment of Erroꝛs, and had not ſummoned and ſevered, there being no Damages given againſt May, is foꝛ his Advantage. Kent is the only Perſon that has Reaſon to complain of that; and if he would take Advantage of it, he ſhould have ſummoned and ſevered. That he has not done; and therefoꝛe he inclined to think that Matter could not now be taken Advantage of. However, a few Days after, the Chief Juſtice ſaid, that he and the reſt of the Judges of this Court had conſidered together upon this Point; and in as much as this ſeems to be an Erroꝛ in the Judgment itſelf, they inclined to be of Opinion that even the Party foꝛ whoſe Advantage the Erroꝛ is, may aſſign this Matter foꝛ Erroꝛ; foꝛ this Purpoſe he mentioned Bercher's Caſe, Rep. 8. Yel. 107. and Rol. Ab. 759. Judge Lee

ſaid

ſaid too, that 4 Leon. 61. was to the ſame Purpoſe. However the Court agreed, that they might reverſe the Judgment in this Part, and affirm it as to the other; becauſe this Part of the Judgment is by Statute, the other by the Common Law. But this Matter was ordered to ſtand over to be farther conſidered of. Vide poſtea.

The Pariſh of Oakhampton *againſt* The Pariſh of Kent.

How far a Perſon ſhall be ſaid to gain a Settlement, or not, by paying to the Pariſh Rates.

IN an Order of Seſſions the Fact was ſpecially ſtated, that one Edward Lake came into the Pariſh of Kent, and lived there between two and three Years as a Tide-waiter; that he was charged with the Land-Tax by the Pariſh Officers the firſt Year; which he accordingly paid; but afterwards this Money was repaid him by the Collector; and the Collector himſelf paid this Tax the remaining Part of the Time, that he continued in the Pariſh. Upon this State of the Fact the Juſtices in their Seſſions were of Opinion, that this was no Settlement. Serjeant Chappel ſubmitted it, that it was by 3 & 4 W. 11. and for this Purpoſe cited Comb. 410. 1 Mod. 331. though he did agree, that by 9 Geo. 2. the paying to the Scavenger's Rate for the Repairing the Highways gains no Settlement. Accordingly the Court made a Rule to ſhew Cauſe, why the Order ſhould not be quaſhed, And the laſt Day of Eaſter Term following the Rule was made abſolute.

Strawn *and* Fleter.

Vide antea 344.

MR. Taylor brought in the Writ of Inquiry; but ſubmitted it, that the Plaintiff was well intitled to enter ſuch Judgment as he could by Law. The Court was of the ſame Opinion. Accordingly the former Rule was diſcharged. Ex relatu.

Anonymus.

Vide antea

MR. Marſh came now to ſhew Cauſe, and ſaid that the Fact was, that the Defendant was elected the 5th of April laſt, came of Age the 20th, ſworn in the 26th, and did not act till afterwards. Upon this State of the Fact he ſubmitted it, that as the Defendant was of Age before he was ſworn into the Office, it was clear that he was capable of acting afterwards. And, even ſuppoſing that the Defendant had not been of Age at the Time he was ſworn in, he apprehended, the Law was the ſame. He did agree, that an Infant was not capable of a judicial Office, but of a Miniſterial one he is. For this Purpoſe he cited Co. Lit. 3. And ſaid, that at Common Law he believed it was always thought that an Infant was capable of ſitting in the Houſe of Commons. The Chief Juſtice ſaid, that he believed the laſt Caſe that was mentioned was never ſolemnly determined. And as to the principal Caſe he inclined

to be of Opinion againſt the Defendant. Accordingly the Rule was made abſolute.

Anonymus.

ON Rule to ſhew Cauſe why a Mandamus ſhould not be directed to Dr. Betteſworth, Judge of the Prerogative Court, requiring him to grant Adminiſtration of the Goods of the late Earl of Suffolk to the preſent Earl of Suffolk his Son, the Counteſs Dowager having renounced; Dr. Hiſham ſaid, that the State of the Fact was in this Manner. On the 17th of October laſt, ſoon after the Death of the late Earl, a Caveat was entered by his Creditors. On the 2d of November the Counteſs Dowager executed a Deed, thereby renouncing all Right and Title to the Adminiſtration. Her Proctor produced this Renunciation before the Officer, and he admitted it. Upon which the Creditors withdrew their Caveat. On the 13th of November Complaint was made to Dr. Betteſworth, that the Renunciation ought to have been upon Oath; and that the Caveat therefore was withdrawn by Surprize. Upon which Dr. Betteſworth ordered, that the Counteſs Dowager ſhould either exhibit an Inventory, or declare upon Oath, that ſhe had not intermeddled with the Effects, before the Renunciation ſhould be admitted; and that when ſhe had ſo done, and not before, Adminiſtration ſhould be granted to the preſent Earl. Upon this State of the Fact Dr. Hiſham ſubmitted it, that the Proceedings below were very regular; and therefore the Rule ought to be diſcharged. The Chief Juſtice ſaid he did agree that the Judge of the Eccleſiaſtical Court has a Power to object to the Security which any Perſon ſhall offer, who prays for Adminiſtration; and therefore that a Caveat for that Purpoſe is very proper. However he did not know, that in the preſent Caſe the Judge of the Eccleſiaſtical Court had any Method of compelling the Counteſs Dowager to deliver in ſuch an Inventory, or to make ſuch an Oath; and therefore he could not think that the Adminiſtration could be delayed to be granted till that Time. For which Reaſon he thought the Mandamus ought to go. The reſt of the Court were likewiſe of the ſame Opinion. And Judge Page ſaid, in caſe where there is a Will, he did agree that a Renunciation of the Executor is neceſſary; becauſe he has ſomething in him before Probate. But the Widow or next of Kin have nothing in them before Letters of Adminiſtration granted; and therefore in ſuch Caſe he could not think a Renunciation was reaſonable. Judge Probyn ſaid that Dr. Betteſworth himſelf has ordered, that in Caſe the Counteſs Dowager renounces, the Adminiſtration ſhall be granted to the preſent Earl; therefore now the Mandamus is proper to be directed, that the Adminiſtration ſhall be granted to the preſent Earl by Name; otherwiſe it might properly have been excepted to the Mandamus, that it ought to have been general. Judge Lee ſaid that he thought it very proper, that Dr. Betteſworth ſhould make a Return to this Writ. Accordingly the Rule was made abſolute.

How far a Mandamus is proper to be granted, in order to require the Eccleſiaſtical Court to grant Adminiſtration to a particular Perſon.

Hall *and* Chapman and others.

When there is a Verdict on one Part of the Record, and a Demurrer on the other Part of it, how far the Court will not arrest the Judgment till the Event of the Demurrer be determined.

IN Falſe Impriſonment brought againſt three, one of the Defendants pleaded Not guilty to the Whole; the other two pleaded Not guilty as to Part, and juſtified as to the Reſidue. The Plaintiff joined Iſſue with that Defendant, that pleaded Not guilty to the Whole; and Verdict found for the Plaintiff. He likewiſe joined Iſſue with the other Defendants on that Part of their Plea, which was Not guilty, and demurred to their Juſtification. The Demurrer was not yet determined. Upon which Mr. Draper obtained a Rule a few Days ago to ſhew Cauſe, why the Judgment ſhould not be ſtaid upon the Verdict, till the Demurrer determined. Serjeant Belfield came now to ſhew Cauſe, and ſubmitted it, that the Court would not arreſt the Judgment on this Account; but would leave the Plaintiff to do as he could by Law. The Court was of the ſame Opinion; accordingly the Rule was diſcharged.

Clever *and* Jordon.

How far the Court will not arreſt a Judgment notwithſtanding a Defect in the joining of the Iſſue.

AFTER a Verdict, Serjeant Girdler moved in Arreſt of Judgment, that in joining the Iſſue by the Plaintiff in his Replication the Chriſtian Name of the Defendant was repeated, and the Chriſtian Name of the Plaintiff quite omitted. In the Caſe of Cowper and Spencer, Michaelmas 12 Geo. 1. he ſaid the Opinion of the whole Court was, that if the Similiter is omitted, that Defect is not cured after a Verdict, by the Statute of 16 & 17 Car. 2. 8. That Caſe he ſaid was put into the Paper to be argued, and Mr. Strange and himſelf were both of Counſel in it. In the preſent Caſe likewiſe he apprehended, that this Defect was not cured by the Statute; becauſe the Defendant could not have demurred, and ſhewn this for Cauſe; ſo that he ſubmitted it, the Defendant had no other Way to take Advantage of the Defect, but this. The Chief Juſtice ſaid, in Lord Holt's Time this very Exception was over-ruled. And ſo Judge Lee ſaid it was in the Caſe of Rawborn and Hitchman, Paſch. 9 Geo. 1. and of Probyn and Chapman, Mich. 5 Geo. 2. Accordingly the Serjeant took nothing by his Motion.

Carey *and* Hintol.

IN Treſpaſs for entering a Cloſe, called Pinſworth-Feild, the Defendant pleads, that the Cloſe in Queſtion was the proper Land of the Defendant; the Plaintiff replies, that the ſaid Cloſe was the Eſtate of Inheritance of the Plaintiff, and not the proper Land of the Defendant. Upon which Iſſue was joined, and a Verdict found for the Plaintiff. It was moved in Arreſt of Judgment, that this was an immaterial Iſſue; and a Rule made to ſhew Cauſe for that Purpoſe. Mr. Denniſon came now to ſhew Cauſe, and ſaid that he did agree the Iſſue was Informal, like the Caſes in 5 Rep. 43. 2 Bulſt. 1. Moor 464. and Sid. 289. but ſubmitted it to be nothing more; and therefore pray'd that the Plaintiff might have his Judgment. The Chief Juſtice ſaid, that that Part of the Replication, namely, that the ſaid Cloſe was the Eſtate of Inheritance of the Plaintiff, cannot be ſufficient; for that imports no more, than that the Plaintiff had an Eſtate of Inheritance in the Land, which of itſelf is not ſufficient to maintain an Action of Treſpaſs. And as to the other Part of it, namely, that the Cloſe was not the proper Land of the Defendant, that imports no more than that the Defendant had not the Property in it; which he thought would hardly be ſufficient neither. Judge Page was of a contrary Opinion. The Plaintiff, he ſaid, by his Replication, has followed the Words of the Defendant's Plea. He did agree that the Plea would have been bad upon a Demurrer; but then the Judgment ſhall be againſt him that commits the firſt Fault. For which Reaſon he was of Opinion, that Judgment ſhould be for the Plaintiff upon the Declaration. The reſt of the Court inclined to be of Opinion with the Chief Juſtice. Judge Probyn ſaid, if the Plea was bad, the Plaintiff's Iſſue joined upon it muſt be bad likewiſe; and therefore the preſent Caſe differed from that, which it would have been in Caſe of a Demurrer. Judge Lee ſaid that he did believe the Intent of the preſent Plea, now in Engliſh, was to anſwer the Plea of Liberum Tenementum, when in Latin. But the Meaning of that Plea was, that the Defendant had an immediate Right to enter upon the Poſſeſſion, as his Freehold. He thought the Words of the preſent Plea could not ſignify that; accordingly this Matter ſtood over. Vide poſtea.

How far an Iſſue ſhall be ſaid to be immaterial, or not.

Chart *and* Withers.

THE Irregularity of this Judgment having been referred to the Maſter, he reported the Fact in this Manner; The Plaintiff by Miſtake gave Rules to plead in the Common Pleas, inſtead of this Court. The Defendant not knowing of this Miſtake applied to Judge Page, that the Rules for pleading might be enlarged. The Plaintiff attended upon the Summons taken out for that Purpoſe, and the Rules were enlarged to a certain Day by Conſent of both Parties. The Defendant did

How far a Defect ſhall be ſaid to be cured by enlarging the Rule.

did not plead within the Time given him by the inlarged Rule; and upon that the Plaintiff signed his Judgment. Mr. Murrey submitted it, that this Judgment was irregular for two Reasons; First, because the original Rules for pleading were as no Rules. Secondly, because the Plaintiff did not call for a Plea after the inlarged Rule. The Chief Justice said as the inlarged Rule was by Consent, he thought it cured all Defect in the original one; and he should have been of the same Opinion, if no Rule at all had been given originally. He said likewise, that this second Rule being by Consent, the Defendant has thereby agreed to plead within the Time mentioned in it; and therefore the calling for a Plea was unnecessary. Accordingly the Court held the Judgment to be regular.

The King *and* Kempson.

Vide antea 329.

MR. Parker coming now to shew Cause, Mr. Abney took a third Exception to this Order, beside the two other, which he had before taken, which was, that the Son's Wife appeared to have been an Adultress; for it is stated in the Order, that the Husband for some Years had no Access to her, and yet that she had had a Child in the mean Time; and therefore he apprehended the Husband himself would not have been bound to maintain her; a Fortiori the Husband's Father could not. To shew that the Husband himself would not, he cited Lord Raymond's Opinion at Nisi prius, in the Case of Morris and Martin, 12 Geo. 1. That was an action brought against the Husband for Necessaries laid out by the Plaintiff on Account of his Wife. The Husband proved that his Wife lived in Adultery with another Man. Lord Raymond was of Opinion for this Reason, that the Action would not lie against the Husband, though the Plaintiff had no Notice of her living in this Manner. Mr. Parker then answered the several Exceptions that had been taken. To the first he said, this Order is mentioned to be made on Appeal against Samuel Kempson the Elder, not against any Order of Justices before made; and therefore he conceived the Word Appeal there signified no more than Complaint. To the second he observed, that Orders of Maintenance made upon Relations in Law, have often been allowed, as well as upon Natural Relations; for this Purpose he cited Bul. 345, 346. Keb. 489. To the last he said, whatever Effect this Act of the Wife might have upon the Husband, it could not have any upon the Parish. The Chief Justice said that he thought the first Exception and the last were both answered. But as to the second, he was of Opinion that it was fatal. He said he well remembred the Case of The King and Monday that has been cited. The Cases that Mr. Parker has mentioned, were cited in that Case; and yet upon great Debate the Court was of Opinion the Act did not extend to Relations in Law. Accordingly in the present Case the Rule was made absolute.

The King *and* Latter.

MR. Fazakerly coming now to ſhew Cauſe, he urged the ſame Reaſons which the Chief Juſtice had before mentioned; accordingly the Rule was diſcharged. Ex relatu. Vide antea 330.

The King *againſt* The Biſhop of Litchfield and Coventry.

A Few Days ago Mr. Parker obtained a Rule for ſuperſeding a Writ of Mandamus directed to the Defendant, requiring him to grant a Licenſe to Mr. Ruſhworth, appointed Uſher of the Free Grammar School of Coventry, founded by John Hales in the Time of Henry the Eighth, for the teaching this School. He then ſaid that by the ſeventy-ſeventh Canon in 1603. the Biſhop of the Dioceſe is intruſted with granting theſe Licenſes. In this he acts judicially, and not miniſterially; and for that Reaſon the preſent Mandamus cannot be proper. In Caſe the Biſhop refuſes a Licenſe without Reaſon, the Party may appeal. And of this Opinion, he ſaid, the Court was in the Caſe of Tatler and Reynolds, Mich. 10 Will. 3. And in Pollice's Caſe afterwards, Lord Macclesfield, Judge Eyres and Judge Powis inclined to be of Opinion that a Mandamus would not lie. He ſaid the Buſineſs of a School-Maſter is not an Office, but an Employment. But the preſent Caſe is not even ſo ſtrong as that; for Mr. Ruſhworth is only appointed Uſher. He obſerved likewiſe, that the preſent School is a private one, and not a Royal Foundation. Serjeant Birch and Mr. Makepeace now moved to diſcharge the Rule for ſuperſeding this Writ. They ſaid they believed it was never yet ſettled, that an Uſher was bound to take a Licenſe; and therefore it was proper that the Biſhop ſhould make a Return to this Mandamus, in order that that Point might be fully ſettled. But if a Licenſe was neceſſary, they conceived that a Mandamus was a proper Remedy, in order to obtain it; for this Purpoſe they cited ſeveral other Caſes of the like Nature, in 1 Sid. 107, 94, 169. 2 Inſt. 309. 3 Keb. 855. Ven. 115, 187, 143, 153, 335. And the Serjeant ſaid a Mandamus was before moved for againſt this very Biſhop, requiring him to grant a Licenſe to one to teach the School of Brumfield in Derbyſhire. Indeed it was not granted, becauſe the Affidavit which the Motion was made upon, was not ſufficient. But he took the Opinion of the Court to be, that a Mandamus would lie. The Chief Juſtice ſaid he did not think it a clear Point, that a Licenſe was neceſſary in the preſent Caſe; and therefore it was proper that a Return ſhould be made, in order that the Point might be ſettled. But if it was neceſſary, he did not ſee but a Mandamus was the proper Remedy. He did agree, that the Buſineſs of a School-Maſter was only an Employment; but yet it is a temporal Employment, and therefore this Court might interfere. In the Caſe of Colefat and Newcomb, Mich. 4 Ann. The Opinion

How far a Mandamus is proper to be granted, or not, in order to obtain a Licenſe for a School-Maſter.

nion of Mr. Justice Powel was, that the Court might grant a Mandamus in Case of a License for a Preacher, by the Statute of 13 & 14 Car. 2. 4. And in the Case of Mr. Vincent, this Court did actually grant a Mandamus for the License of Preaching at the Lectureship of St. Dustan's; though afterwards for some particular Reasons the Rule was discharged. No Instance he said had been produced, that ever an Appeal lay in these Cases. And if a Mandamus would lie in the Case of a School-Master, he did not think but it equally would in Case of an Usher. Judge Lee said that he remembred Pollice's Case cited by Mr. Parker. Mr. Justice Prat was strongly of the other Opinion, even upon the first Argument; and upon the second, the three other Judges came over to his; accordingly the Rule was discharged for superseding the Writ in the present Case. Vide postea.

Term Hill.

7 Geo. II. 1733.

Anonymus.

How far the Canons of 1603 do not bind the Laity.

MR. Marſh moved for a Prohibition againſt the Biſhop of Peterborough to ſtay Proceedings againſt Philip Doderidge for keeping an Academy and Diſſenting Meeting Houſe at Northampton, without a Licence, which the Canons in 1603 require. A Suggeſtion was made in the firſt Place, that thoſe Canons do not bind the Laity; and in the next Place, that the Statute of 1 Jac. 1. 4. hath given a Penalty for this Offence; accordingly he cited the Caſe in Carth. 464. and the Court made a Rule to ſhew Cauſe. Ex relatu. Vide poſtea.

Cumber *and* Hill.

How far the Words of a Will ſhall be ſaid to convey Croſs Remainders, or not.

IN Ejectment for the Moiety of certain Lands in Suſſex, on the Demiſe of John Jervis and Anne his Wife, a ſpecial Verdict was found to the Effect following; That Richard Holden ſeiſed of the Premiſſes in Queſtion in 1698 made his Will, and after having deviſed certain intermediate Eſtates, the Words of the Will followed in this Manner; I give and deviſe my ſaid Lands to my Grandſon *Richard*, the Son of my Son *Thomas Holden*, and to my Grandaughter *Elizabeth Holden*, equally to be divided between them, and to the Heirs of their reſpective Bodies; and in the Default of ſuch Iſſue, I give the ſame to my Grandaughter, *Anne Holden* and her Heirs for ever. The Jury found that Richard died without Iſſue, and that Anne Holden married with John Jarvis the Leſſor of the Plaintiff. Serjeant Darnel argued for the Plaintiff, and ſaid that the ſingle Conſideration for the Court was, whether the Words in the Will conveyed Croſs Remainders. He ſubmitted it, that they did not; and ſaid that there were no Words in the Will diſcovering ſuch Intent. Serjeant Belfield argued on the other Side, and ſaid he did agree that the Caſes in 2 Rol. Abr. 416, and 2 Cr. 655. were Authorities againſt him, but ſubmitted it, that the Caſe in 4 Leo. 14. and that of Holmes and Meynel, reported in Ray. 452. Pol. 425. Sir Thomas Jones 172. and reported likewiſe in Skin. 17. were Authorities full in Point for his Side of the Queſtion. He obſerved that this Caſe of

Holmes

Holmes and Meynel was directly against the Case in 2 Cr. 655. and that the Case in 2 Rol. Abr. 416. was cited in the Case of Holmes and Meynel directly denied to be Law. Serjeant Darnel by way of Reply said, that he well remembred the Case of Holmes and Meynel; there the Words of the Will were, I devise all my Lands to my two Daughters, and in Case they die without Issue, then to my Nephew *Francis*. In that Case great Stress was laid on the Word all, that Francis was to have all the Lands, and it was insisted upon, that he ought to have them all together. Great Stress was likewise laid upon the Words in Case they happen to die without Issue, and it was insisted that they both must die without Issue, before Francis could have them. And great Stress was laid on this Circumstance likewise, that Francis the Nephew was a remote Relation. Nothing of which was in the present Case. The Chief Justice and Judge Page inclined to be of the same Opinion with the Plaintiff. However, this Matter stood over. The next Term it was argued again; and then was adjourned for the Opinion of the Court. Vide postea.

The King *against* Griffin and Banyere.

Vide antea

THIS Matter now came on in Arrest of Judgment. Serjeant Eyres and other Counsel argued for the Defendants. They submitted it, that the Writing which the Information was founded upon, was no Libel. The Purport of it was, that the Church-wardens declared that they would adhere to their first Notice, as to changing the Time of Meeting from Sunday to Thursday, and desired the Parishioners to meet in order to correct the several Abuses, which by Reason of the pretended Authority of the Trustees have been suffered to be committed. The Counsel observed, that the Persons publishing this Notice were Church-wardens and Overseers, whose Office required them to look into all Abuses relating to the Poor; and therefore they conceived that these Officers could not be charged with doing any Thing beyond their Duty in this Matter. They then took several Exceptions to the Form of the Information; they said it was no where set forth by what Authority the Workhouse was erected, and they conceived that no Workhouse could be erected but by Authority of Parliament. The only two Statutes which give Countenance to this Matter are those of 39 Eliz. and 9 Geo. 1. The 39 Eliz. relates only to private Endowments; no such Endowment is shewn in the present Case; and therefore this Workhouse cannot be justified under that Act of Parliament. The 9 Geo. 1. requires several Particulars, not one of which appear to have been observed; and therefore this Workhouse cannot be justified under that Act of Parliament neither. Another Exception taken by them was, that the Names of several of the Trustees are omitted in the Information; and they conceived that the Names of all of them should have been set forth, in order that a Conviction on this Information might be pleaded in Bar of another; and for this Purpose they cited Brook's Abridgment, Title Indictment.

Pla. 21. Shower 381, 391. Carthew 267. and 2 Leon. 39. And laſtly they inſiſted upon it, that the Perſons deſcribed in the Information did not appear to be the ſame with thoſe mentioned in the ſuppoſed Libel. This Paper plainly referred to a former one written by the Truſtees themſelves, and in that they have declared them to be Truſtees appointed by the Veſtry; but in this Information the Perſons deſcribed to be injured, are only ſaid to be Truſtees appointed by the Pariſhioners. A Meeting of the Pariſhioners only, does by no Means make a Veſtry; but a Meeting of them under a Notice given in the Church; for which Purpoſe he cited Lane 21. And for theſe Reaſons ſubmitted it, that the Judgment ought to be arreſted. The Chief Juſtice ſaid that he did not indeed think that there was any Thing more charged upon the Truſtees, than the Breach of a private Truſt; but yet ſuch Charge might be libellous, and he thought the Import of the preſent Paper plainly of that Effect. He then conſidered the Objections with Regard to the Form of the Information. In anſwer to the firſt of them he thought it by no Means requiſite to be ſet forth by what Authority the Workhouſe was erected. With Regard to the ſecond, he did allow that in Informations for Libels on private Perſons, the Names of ſome one muſt be inſerted; but never underſtood that the Law required that all their Names muſt be ſo. The laſt Objection ſeemed to him to be of the greateſt Weight; but yet he thought it might be anſwered; for there ſeemed to him no Inconſiſtency between that Deſcription of the Perſons ſet forth in the Libel, and that ſet forth in the Information. For the Truſtees might have been appointed by the Pariſhioners, and yet by Order of the Veſtry; and great Reaſon is there for underſtanding that they were ſo, in as much as by the Innuendo it is alledged that three of the Truſtees by Name, with the reſt of them, were reflected on by the Libel. Judge Lee ſaid that indeed in the Caſe of The King and Orm, Trin. 11 Will. the Court were of Opinion that the Information for the Libel was not good, becauſe the Names of no one Perſon injured by it were inſerted; but he never thought the Names of all of them were neceſſary to be ſo; accordingly the Court gave Judgment for the King.

Burdy *and* Hoſier.

THE Defendant had been diſcharged out of Cuſtody for not having been taken in Execution in due Time; and now the Plaintiff brought Debt upon the former Judgment. Upon which Mr. Marſh moved, that the Defendant might be admitted to common Bail. But the Court refuſed the Motion; by Reaſon that this was not the ſecond Action brought on the Judgment, but the firſt. And for this Purpoſe Judge Lee mentioned the Caſe of Chambers and Robinſon. However afterwards the Court made a Rule to ſhew Cauſe.

When an action of Debt is brought upon a Judgment, how far ſpecial Bail ſhall be required, or not, in ſuch Action.

The King *againſt* Duffin and others.

How far the Preſence of a Mayor is neceſſary to be at a Corporate Aſſembly.

MR. Abney moved, that a Rule to ſhew Cauſe might be made abſolute, for granting an Information in the Nature of a Quo Warranto againſt the Defendant Duffin, for acting as Mayor of the Borough of Orford, and likewiſe againſt ſeveral other Defendants for acting as Capital Burgeſſes of the Borough, the Validity of whoſe Election depended on the Election of Duffin. The Conſtitution of this Borough conſiſted of a Mayor, eight Portmen, and 12 Capital Burgeſſes. The Capital Burgeſſes have a Power of nominating two of theſe Portmen to the Inhabitants, and the Inhabitants appoint one of them to be Mayor for the Year enſuing. The Charter-day is the Monday before the Feaſt of St. Michael. And when Duffin was choſen to be Mayor on the Charter-day no Mayor was preſent at the Aſſembly, by Reaſon that Scolden the former Mayor had at that Time Judgment in Quo Warranto given againſt him. Upon this State of the Caſe Mr. Abney ſubmitted it, that the Election of Duffin was illegal, and the Court inclined to be of the ſame Opinion. The Chief Juſtice ſaid he did agree, that wherever any Buſineſs is to be done by a particular Part of a Corporation only, the Preſence of the Mayor is not requiſite at the Aſſembly; but wherever the Buſineſs is to be done by the whole Corporation at large, the Preſence of the Mayor is abſolutely neceſſary. In the preſent Caſe he thought all the Members of the Corporation had a Voice in the Election; accordingly the Rule was made abſolute.

The King *and* Trew.

How far a Member of a Corporation ſhall be ſaid to be duly ſworn into his Office, or not.

ON Rule to ſhew Cauſe, why an Information in the Nature of a Quo Warranto ſhould not be granted againſt the Defendant for acting as Mayor of the Borough of Weeram; the Caſe appeared to be in this Manner. By the Affidavits, on which the Rule was made, two Objections were made againſt the Defendant; the firſt touching his Election; the other, the Swearing into his Office. As to his Election, the Affidavits were not ſo poſitive as they ought to have been; and on the other Hand, the Objections were only anſwered by the Affidavit of the Defendant himſelf, though they related to ſuch Matters, as others might have made Affidavit concerning. As to the Swearing into his Office, it was objected it was not done in a proper Manner, by Reaſon that the Charter requires, that no Court of Record ſhall be held but before the Mayor or his Deputy, and it was inſiſted upon that he ought to have been ſworn in at ſuch Court, which was not done; for he was only ſworn in before two Capital Burgeſſes, the late Mayor being abſent. As for this laſt Objection the Charter appoints, that the Election of the Mayor ſhall be on the Tueſday next after the Feaſt of St. Luke, and if the Mayor elect be preſent, he ſhall then take his Oath of Office; if he be not preſent, he ſhall

take his ſaid Oath at the next Court of Record to be holden before the late Mayor, if ſuch late Mayor be alive and preſent; and if ſuch late Mayor be dead or abſent, tunc coram aliis Capitalibus Burgenſibus, vel duobus eorundem tunc ibidem præſentibus. Upon this State of the Caſe, the Counſel for the Defendant ſubmitted it, and the Rule ought to be diſcharged. The Objections with regard to his Election they ſaid were but imperfectly made out even by the Affidavits themſelves, on which the Rule was obtained, and theſe Objections were fully anſwered by a poſitive Affidavit of the Defendant. As to the Manner of his being ſworn in, they conceived it to be clearly regular. In caſe the late Mayor had been dead, for Neceſſity ſake the Swearing would have been good before the two Capital Burgeſſes; and they thought there was equal Reaſon to ſay it ſhould be ſo under the preſent Circumſtances. With regard to the firſt Exception, the Chief Juſtice ſaid he ſhould have intirely been for diſcharging the Rule, had the Affidavit on the other Side been made by any other Perſon but the Defendant. But in theſe Informations, which are to try a Right, he thought the Rule for ſhewing Cauſe ought never to be diſcharged meerly upon the Affidavit of the Defendant himſelf, where other Affidavits might have been had. As to the laſt Objection he inclined indeed to be of Opinion, that the Swearing was regular, for the Reaſon that had been offered. However as this was a Queſtion depending on obſcure Words of the Charter, he thought this Matter might deſerve farther Examination. The reſt of the Court were of the ſame Opinion; accordingly the Rule was made abſolute. Vide poſtea.

The Biſhop of Landaff *and* The King.

THIS Matter now coming on again, Mr. Strange argued for the Plaintiff in the Writ of Error. He ſaid, there were three Points to be conſidered in this Caſe. The firſt, whether a Preſentation was neceſſary to be laid in the Count. Secondly, Whether the preſent Commendam amounted to a Preſentation; and thirdly, if it did not, Whether the Want of it was cured by the Verdict. With regard to the firſt he took the Rule of Law to be general, that in the King's counting in Quare Impedit as well as in a private Perſon's, a Preſentation muſt be laid, unleſs in ſome particular Caſes for which particular Reaſons may be given. He ſaid the Precedents in Co. Ent. 493, 509, 512, 514, 516, 520. Raſt. Ent. 505, 528, 529, 530. Lutw. 1078, 1083, 1086, 1090. are all in this Manner; and ſo is it held to be neceſſary in Fitz. Nat. Brev. 33. Roll's Abr. 378. and Vau. 53, 56, 57. With regard to the ſecond Point, he ſaid the preſent Commendam was a Commendam retinere; for that is the Word made uſe of in it; and though a Commendam accipere may amount to a Preſentation, yet a Commendam retinere cannot. For this Purpoſe he cited Hob. 143, 156. Beſides, he ſaid it is alledged in the preſent Declaration, that the Church was vacant at the Time of the Commendam granted; and therefore the Commendam muſt have been

Vide antea 189.

been absolutely void. With regard to the last Point he said, he could not understand, that the Want of any Averment could be cured by a Verdict, unless such Matter must necessarily have been given in Evidence upon the Trial. The Issue in the present Case singly was, whether the King was seised, or not; the Matter of the King's Presentation was out of the Question, and therefore the want of such Presentation could not be cured by the Verdict. For this Purpose he cited the Case of Dale and Newton, Hil. 10 Anne. there Trespass was brought Quare duo claustra cepit. Issue was joined upon Not guilty, and a Verdict found for the Plaintiff; yet Judgment was arrested, because no Possession was laid in the Plea. And for the like Purpose he cited Skin. 657. Salk. 662. 1 Sid. 184. and 2 Cro. 46. The Chief Justice said he was clearly of the same Opinion, with regard to the two first Points; and inclined likewise to be so with regard to the last, but thought that Matter deserved to be argued again. The rest of the Court clearly agreed with the Chief Justice, with regard to the two first Points; but Judge Lee doubted whether the Verdict did not cure the Defect in the Declaration by the Statute of 16 & 17 Car. 2. accordingly this Matter stood over; and the Court directed, that this last Point only should be spoke to again. Vide postea.

When an Order of Removal is made upon an Appeal, how far such Order shall be said to be good, or not, in Point of Form.

The King *and* The Inhabitants of Rippon.

MR. Parker moved, that an Order of Sessions setting aside an Order of two Justices, might be quashed, by Reason that it was only said upon an Appeal the Court doth order, without saying that the Cause was heard or any Thing more done than barely the Appeal received; however the Court thought this sufficient; accordingly the Motion was refused.

Eleanor Arthur, Executrix of——, *against* Vanderbank and Smith, Executors of the Countess of Ranelagh.

How far an Action of Covenant will lie against an Executor of the original Lessee, notwithstanding the Lessor has accepted the Rent of the Assignee.

IN Covenant for Non-payment of Rent, the Defendants pleaded that their Testatrix assigned over the Term, and the Plaintiff accepted the Rent from the Hands of the Assignee; on which the Plaintiff demurred. Serjeant Baynes argued for the Plaintiff, and said that after such Acceptance he did agree the Debt could not be maintained against the Defendants; but as the present Action is Covenant, he submitted it, that it would well lie; because the Defendants are sued upon the express Contract of their Testatrix. This Difference between these two Actions he said was well established in the Books; and for this Purpose cited 1 Jones 223. 1 Cro. 188, 580. The Court were intirely of the same Opinion; accordingly gave Judgment for the Plaintiff.

Redhead *and* Cathgut.

IN Debt on a Charter-Party, the Plaintiff declared on a Deed made in the joint Names of Balckwood and Cathgut, but executed by the Defendant only. To this Declaration the Defendant pleads, that the said Charter-Party was not the Deed of the said Blackwood and the Defendant. Upon which Mr. Filmer moved that this Plea might be set aside as frivolous. Mr. Draper on the other Side said, that this was intended to be a Plea of the General Issue, and therefore, if there were any Mistakes in it, the Court would not set it aside. But he apprehended the Plea was a good one, and for this Purpose cited Matthew's Case 5 Rep. and 2 Lev. 220. where it is held, that if two Persons execute a Deed, and the Seal of one of them is torn off, the Deed is made void as to both. The Court thought the Cases cited plainly differed from the present one, and that the Plea in Question could in no Manner be maintained; accordingly set it aside.

How far the Court will set aside a Plea, by reason of its being frivolous.

Doddridge *against* Rand and others.

ON Rule to shew Cause, why a Prohibition should not be granted to the Ecclesiastical Court in a Suit against one for Teaching a School without a Licence. Serjeant Eyre said that two Matters are contained in the Suggestion. First, That the Canons in 1603 do not bind the Laity; and secondly, that since the Statute requiring a Licence, the Ecclesiastical Courts have no Jurisdiction. But he apprehended, that the Suggestion in both Parts was wrong; and for this Purpose cited 2 Lev. 222. However the Court made the Rule absolute, and gave the Party to the first Day of next Term to declare.

Vide ante

Davnish *and* Murtin.

IN Trespass against the Defendant for taking away a Gun, the Plaintiff discontinued his Action on Payment of Costs. And now Serjeant Baynes moved for the Direction of the Court concerning the Taxing them. He said the Defendant was a Justice of the Peace, and took away the Plaintiff's Gun for his killing the Game with it, not having a Qualification. And therefore as the Plaintiff has discontinued his Action, the Defendant was intitled to double Costs by the Statute of 7 Jac. 5. but nothing of this appears upon the Record, that what the Defendant did was in the Execution of his Office; and therefore he moved, that either the Defendant might be at Liberty to suggest this Matter upon the Roll, or else that the Court would give Direction to the Master to allow the Defendant double Costs. Mr. Hayward on the other Side said, he should not defend the Motion at this Time; but in case the Court should

When the Plaintiff has obtained a Rule for Leave to discontinue on Payment of Costs, how far the Court will give Liberty to the Defendant to enter a Suggestion upon the Roll, that he is an Officer of Justice, and intitled to double Costs.

should be of Opinion that a Suggestion on the Roll was proper, he hoped the Court would only make a Rule to shew Cause, in order that the Plaintiff might have an Opportunity to controvert the Fact of the Affidavit, which swore that what the Defendant did was in the Execution of his Office; for in Case the Suggestion should be allowed by the Court, he was afraid it would be too late to controvert it then. Mr. Clark informed the Court that he took the Practice to be not to require a Suggestion, but that the Court should give him Directions, which would justify in allowing double Costs in these Cases. The Chief Justice however inclined to think that a Suggestion was necessary. Judge Lee said too, that the Court was of the same Opinion in the Case of Catherol and Cooper, accordingly the Court made a Rule to shew Cause. Vide postea.

The King *and* Dr. Earbury.

Vide ante 346. What Fees are due on filing Affidavits.

MR. Josling moved that Mr. Athorp, an Officer of the Court, might answer the Matters of an Affidavit, for taking the Sum of 11 l. 12 s. for filing and copying certain Affidavits of the Defendant, when he was his Clerk in Court, and likewise for taking the Sum of 41. 19 s. 4 d. for other Fees. He said that by the Common Law Officers of Justice were paid by the King, and had no Fees at all due to them; for this Purpose he cited Dalton and 2 Inst. 74. He said he had in his Hand a Table of Fees made in 1693, where the Fees claimed for filing Affidavits is but 4 d. per Sheet, whereas now the Fees he insisted upon are 8 d. and likewise 8 d. a Sheet for copying; and in Try's Filazer this Fee for filing is said to be an Innovation, and not paid above four or five Years at that Time; accordingly the Court made a Rule that this Matter might be referred to the Master.

The Bank of England *and* Morrice.

Vide antea 183.

SErjeant Chappel came now to shew Cause, why the Replication should not be amended in this Case. He said the Defendant had pleaded the Penalties of Bonds conditioned for the Payment of other Sums, beyond which she had not Assets; the Plaintiffs replied that she had Assets ultra. And now they have obtained a Rule for shewing Cause, why this Replication should not be amended by inserting in it, that these Bonds might be discharged by the Defendant's paying less Sums than those mentioned in the Plea, and that they were kept on Foot per Fraudem. The Serjeant submitted it, that this Amendment would be to make a new Replication. He observed farther, that it is ever since Michaelmas Term was twelvemonth, since the Defendant obtained the Rule for a new Trial, and in all this Time the Plaintiffs never before mentioned this Matter to the Court. Besides, he said, the Defendant has since this Time paid several very large Sums of Money as Executrix to her late Husband; and therefore the Circumstances of her Estate are by no means

they were at the Time the Plea was pleaded; for which Reason it will be very prejudicial to her, that the Replication should be thus amended, and that her Plea should stand as it did before. Mr. Draper on the same Side cited the Case of Reed and Mallory, Trin. 7 G. 1. There an Action was brought against the Defendant, by the Name of Executor. Motion was made to amend this Declaration by charging the Defendant as Administrator cum testamento annexo; but the Court refused it. He likewise cited Salk. 50. Serjeant Eyres on the other Side said that he apprehended the Amendment might be well maintained. He did agree that it was a considerable Time since the Court granted the Rule for the new Trial; but it's being so long was owing to the Defendant's Fault. The Plaintiffs have been all this Time in the Court of Chancery in getting a sufficient Answer from her, in discovering whether these Bonds were not kept on Foot by Fraud; and it is but just now that they have obtained the Discovery. He said they should make no great Objection against the Defendant's amending her Plea; and if that was consented to, he saw no Reason why the Rule should not be made absolute. In the Case of the Dutchess of Marlborough and Widmore, Vol. 1. 408. as considerable an Amendment as this was made, and he submitted it in 3 Lev. 368. the Case is full in Point. The Chief Justice said he thought this Amendment would be to make a new Replication; and for that Reason was of Opinion that it ought not to be allowed. He said likewise, that the Defendant's being an Executrix, and the Length of Time, were other strong Reasons against it; and as to the Case in 3 Lev. 368. he could not see how it could be allowed for Law but by Consent; and if the Repleader could be in that Case, it might be in every other. Judge Page and Judge Probyn were of the same Opinion. Judge Lee did not say any Thing in this Case, because he was a Party interested; accordingly the Rule was discharged. Vide postea.

Stephens *and* Stephens.

What shall be said to be a good executory Devise, or not.

THIS was a Case that came out of Chancery for the Opinion of the Court, wherein the Fact was stated in the Manner following. Sir William Stephens seised of the Premisses in Question, by his Will in Writing, bearing Date the 15th Day of February 1712. devised them to William his Grandson and his Heirs for ever; and in Case the said William should die within the Age of twenty-one Years, then to Thomas his other Grandson and his Heirs for ever. And in Case the said Thomas should die before the Age of twenty-one Years, then to such other Sons of the Body of his Daughter Mary Stephens by his Son in Law Sir Thomas Stephens to be begotten, as should attain the Age of twenty-one Years; the elder of such Sons and the Heirs Male of his Body always to be preferred before the younger of such Sons and the Heirs Male of his Body; and in Default of such Issue Male, then to the Daughters of the said Sir Thomas Stephens on the Body of the said Mary, and the Heirs of the Body of such Daughters, to take respectively as Co-

Parcenors

nants in Common, and not as Joint-Tenants; and in Default of such Issue, he devised the same to his Brother Richard Stephens and his Heirs for ever. Then came the following Clause. Item, All the rest and Residue of my real and personal Estate whatsoever and wheresoever, not hereby before bequeathed, I give and bequeath to my said Son Sir *Thomas Stephens*, to hold the same to him, his Heirs, Executor, Administrators and Assigns for ever. On the 15th of March following Sir William Stephens died, leaving Issue his only Daughter Mary, who had at that Time for Issue only William and Thomas the Devisees mentioned in the Will. On the 18th of May 1713 Susanna the Daughter of the said Mary was born. On the 24th of October 1714 Thomas the Son of the said Mary died without Issue; and on the 14th of September 1718 William the other Devisee died without Issue likewise. On the 14th of March 1719 Mary had Issue a Daughter Mary, who died in 1722. In 1721 another Daughter was born, named Sarah, on the 15th of February 1722 another Daughter Mary was born, who is since dead. And in 1727 Mary had Issue another Son named Thomas. Upon this State of the Case, the Question sent by Lord Chancellor for the Opinion of the Court was, what Estate, Right or Interest, either in present or Contingency, any of the said Parties have in or to the Lands in Question. There were five Parties that put in different Claims to this Estate. Thomas the only surviving Son of the said Sir Thomas and Mary, put in one Claim. Susanna and Sarah put in another. Richard a third. Sir Thomas a fourth. And Dame Mary his Wife a fifth. Mr. Peer Williams appeared as Counsel for Thomas the surviving Son. He said he should admit that Thomas was not to take his Estate till his Age of twenty-one; and possibly he might admit too, that Thomas was only to take an Estate intailed; but yet he submitted it, that a good Estate he was intitled to take, and that by Way of executory Devise. He said the Opinion of the latter Cases has been to allow these executory Interests longer than any Lives in Being. In the Case of Massenburg and Ash, reported in 1 Ver. 234. an executory Devise was allowed to be good, though it might not take Effect till full twenty-one Years beyond any Lives in Being. The Opinion of the Judges of the Common Pleas was taken in that Case before the Chancellor made his Decree, and the Certificate of their Opinion is set forth in hæc verba, in 2 Chanc. Rep. the Octavo Edition 275. For the like Purpose there was the Case of Blew and Marsham, argued before the late Chancellor August 1732. There James Hugh devised his personal Estate to Trustees to the Use of Anne his Daughter for Life, and afterwards to such Children, as she should leave at the Time of her Death, which should attain the Age of twenty-one. The then Solicitor General insisted upon it, that this was too remote a Remainder. The Chancellor took till the next Day to consider of it, and then said, as the Case of Massenburg and Ash was an Authority so strong in Point, he should not go against the Intention of the Will; accordingly decreed for the Children. Mr. Peer Williams observed that the general Rule in all Books is, that such executory Devises are good, provided they are limited to happen within a reasonable Time; and as this Time in the present Case is not to be be-

pond the Minority of the Children, he conceived it to be a very reasonable one; for this Purpose he cited Co. Lit. 224. where it is held that a Condition restraining an Infant from alienating his Estate is good, and the Intent of the present Devise was to do no more. Serjeant Wright appeared for Susanna and Sarah. He said as the Sons and Daughters of Sir Thomas Stephens were all of equal Degree one to another, and of the same Affinity to the Testator, he submitted it, the Intention of the Testator must be supposed to be to give them all an equal Estate, and he apprehended the Words would well bear it. The Daughters have plainly an Estate in Tail, and he conceived that William and Thomas had no more. To the like Purpose he cited Salk. 237. 6 Mod. 209. 2 Cro. 415. Bridg. 84. 1 Lutw. 810. 1 And. 51. 3 Cro. 525. 2 Lev. 162. and 3 Lev. 125. If this was so, he said Susanna would clearly take by way of contingent Remainder; and upon the Determination of her Estate Sarah would well take by contingent Remainder likewise. He submitted it too, they were respectively intitled to Cross Remainders; and for this Purpose cited 1 Cr. 855. 1 Ver. 224. and Dyer 303. Serjeant Eyres appeared of Counsel for Richard the Brother. He said if the Daughters of Mary and Thomas were intitled to take, he submitted it, that Richard must have a good Title likewise. The whole Estate vested in Susanna upon the Death of William, when the first Mary was born in 1719, the Estate opened and let in her Interest according to Lewis Bowle's Case, 11 Rep. upon the Birth of Sarah the Estate opened again and let in her Interest; when Mary died, he submitted it, Richard was plainly intitled to her Share, and that there was no Pretence of Cross Remainders; for which Purpose he cited 2 Roll. Rep. 281. and the Case of Homes and Meynel, Sir Thomas Jones 172. so that in this way Richard was intitled to one Third of the Estate. When the second Mary was born, the Estate opened again and let in her Interest; so that Susanna, Sarah, and that Mary were each of them intitled to one Third only of that Part of the Estate remaining; and then upon the Death of this said Mary, Richard came into her Share likewise; so that in this way he is intitled to one Third of the Whole, and to one Third of the remaining two Thirds; and upon the Death of Susanna and Sarah without Issue, will be intitled to the Remainder of the whole. And of this very Opinion Lord Chancellor was in a Cause that came before him the 25th of June 1722 in a Bill for the Account of the Profits between these very Parties. Mr. Strange appeared as Counsel for Sir Thomas. He said that he conceived it to be very clear, that not only the Lands not particularly devised away, but likewise every Part of the Estate in the Lands in Question, which does not take Effect according to the Words of the Will are given to Sir Thomas, and the Heir at Law disinherited; for this Purpose he cited Allen 28. Salk. 239. 2 Ven. 285. 3 Mod. 289. and 1 Leon. 251. The principal Question therefore will be, whether any of the intermediate Interests continue. Thomas, he submitted it, had no Title; for though indeed of late Years it has been held that an executory Interest may be good some short Time above any Lives in Being; yet that has never gone any farther than to provide for the Interest of an

Infant in Ventre ſa Mere. As to the Caſe of Maſſenburg and Aſh, the Words of the Certificate of the Judges in the Caſe are, that the Deviſe is good; becauſe limited to take Effect within twenty-one Years, and that he ſaid was well conſiſtent with Scatergood and Edge, Salk. 229. Then as to the Intereſt of the Daughters, he conceived that there was as clear an Exception to that as there was to the Intereſt of Thomas, for there is no Pretence that they can take by way of a contingent Remainder; in as much as the two firſt Deviſees had manifeſtly a conditional Fee. And as this Exception goes to the Intereſt of the Daughters, it likewiſe goes to the Intereſt of Richard. Mr. Filmer appeared as Counſel for Mary; he ſubmitted it, that as far as theſe Intereſts deviſed could not take Effect, they were to be conſidered as lapſed, and fell to the Heir at Law. For this Purpoſe he cited the Caſe of Wright and Wall, Mich. 1725, in the Common Pleas. There a Man deviſed all his Eſtate to Carter and his Heirs, the reſt and Reſidue to another; Carter died in the Life of the Teſtator, and the Court were of Opinion that this Eſtate belonged to the Heir at Law. To the ſame Purpoſe was the Caſe of Goodright and Opey, Paſch. 5 Geo. 1. though there the Court gave no Judgment by Reaſon the Party died. The Chief Juſtice ſaid that the Caſe of Maſſenburg and Aſh was that of a Truſt of a Term, and he was not ſatisfied, but that the Court of Chancery had gone farther in allowing Limitations in thoſe Caſes, than the Courts of Common Law have in executory Deviſes. The Court ſaid that this Matter was proper to be argued again; accordingly it ſtood over. Vide poſtea.

The King *againſt* Corbet Kynaſton and others.

How far the Court will grant an Information, or not, for a Diſturbance relating to an Election of a Member of Parliament.

ON Rule to ſhew Cauſe why an Information ſhould not be granted againſt the Defendants, the Caſe appeared to be chiefly to this Purpoſe. Laſt Summer there was a Horſe-Race at Shrewsbury, at which was preſent Mr. William Kynaſton Recorder of the Town, who ſtood Candidate for the next Election. Mr. Corbet Kynaſton one of the Defendants was likewiſe there, who ſtood Candidate on the oppoſite Intereſt. Mr. William Kynaſton was ſitting in a Booth on the Race-Ground; upon which Mr. Corbet Kynaſton came with his Party up to him, made a great Mob, and cried Liberty and Property, no Exciſe, down with Heavy Billey. Mr. William Kynaſton was plainly meant by that Deſcription; and then they ſtruck one or two of his Servants over the Head. Upon this State of the Caſe the Court were of Opinion that no Information ought to go, principally, by Reaſon that this Affray happened at a Race-Ground; though the Chief Juſtice expreſly declared his Opinion to be, that if ſuch Affray had happened either in the Diſturbance of publick Juſtice, or at an Election of Members of Parliament, the Court would have granted an Information on that Account; However, in the preſent Caſe the Rule was diſcharged.

The King *and* De Veil.

ON Rule to ſhew Cauſe why an Information ſhould not go againſt the Defendant, the Complaint againſt him appeared to be ſhortly thus. Five Boys had been committed by him for a Theft; the Goods ſtolen were carried to a Pawn-Brokers; upon which Mr. De Veil ſent to the Pawn-Broker's requiring him to bring the Goods to him, in order that he might have them forth-coming at the Trial. The Goods accordingly were brought; produced by Mr. De Veil at the Trial, and the Boys convicted. When the Conviction was over, the Party robbed applied to Mr. De Veil for the Goods; but Mr. De Veil told him the Keeper of Bridewell, whoſe Cuſtody the Boys were committed to, had been with him and informed him, that he had been at a good deal of Expence in keeping the Boys in Priſon and attending with them at the Trial, which came to 4 s. per Boy; upon which Mr. De Veil told the Party that he muſt pay this Money to the Keeper, and that he ſhould not deliver the Goods to him, till he had paid it. The Money accordingly was paid; but afterwards 8 s. of it was returned. Upon this State of the Caſe the Court made the Rule abſolute, and ſaid that they thought the requiring the Goods to be brought, and the Money paid, were both illegal.

How far the Court will grant an Information againſt a Juſtice of Peace.

The King *and* The Commiſſioners of Sewers in Lincolnſhire.

MR. Abney came to ſhew Cauſe, why a Certiorari ſhould not go to remove up certain Dykes made by the Defendants, and produced an Affidavit, that the Place which the Dykes related to, was not repaired, but continued a great Nuſance to the Inhabitants of the Town. But the Court was of Opinion, that this Affidavit was not ſufficient, by Reaſon it was not ſworn in it, that this Place was a Nuſance to the Country in general. Accordingly (Chief Juſtice abſent) the Rule was made abſolute.

When a Certiorari is applied for, in order to remove up certain Orders of Sewers, and an Affidavit is produced that the Place in Queſtion is not repaired, how far ſuch Affidavit ſhall not be ſaid to be certain enough.

Hooker *and* Hooker.

THERE being a new Chief Juſtice made ſince the laſt Argument, this Caſe came now on to be argued again. Serjeant Belfield was of Counſel for the Plaintiff, and in Support of his Argument relied upon the Caſe of Harpole and Kent, reported in Sir Thomas Jones 76, and 9 Ven. 306. Mr. Fazakerly was Counſel on the other Side, and ſubmitted it in the firſt place, that the Contingent Remainders were not deſtroyed by the coming of the Fee to William Hooker the Younger. He ſaid, it

Vide antea 232.

it could not be ſuppoſed, but William Hooker the Elder had it in his Thoughts at the Time the Settlement was made, that William Hooker the Younger his eldeſt Son would be his Heir; and therefore it could not be ſuppoſed that the Intent of the Parties was, that the coming of the Fee to William Hooker the Younger, on the Death of his Father, ſhould deſtroy the whole Intent of the Conveyance. In Lewis Bowle's Caſe therefore the Judges allowed, that there ſhould be an Opening of the two conſolidated Eſtates in order to let in the intermediate Remainder; and he conceived it was reaſonable that the ſame Conſtruction ſhould be made in the preſent Caſe. To the like Purpoſe he cited 2 Rep. 61. and Raym. 28. He ſaid if this was ſo, that theſe Eſtates were always ſubject to open, in order to let in theſe intermediate Intereſts, he ſubmitted it, that William Hooker the Younger could not be ſaid to be ſeiſed of ſuch a perfect Fee, as is neceſſary in order to give his Wife Title of Dower. His Children likewiſe could never take by Deſcent from him, and for that Reaſon likewiſe the Widow could not have Dower according to Co. Lit. 40. The Chief Juſtice ſaid that he was of Opinion even with regard to the firſt Point, that the Contingency was deſtroyed. He did agree, that where the two Eſtates veſt in the Party at one and the ſame Time by one and the ſame Conveyance, there ſhall be an Opening in order to let in the intermediate Intereſts; but in the Caſe of Harpole and Kent, it is held, that where the ſecond Eſtate comes at a different Time from the firſt, even by Deſcent, the intermediate Intereſt is deſtroyed. In the preſent Caſe indeed there was no Deſcent of the Fee, becauſe it was in Abeyance during the Life of William Hooker the Elder; then the Eſtates came to be conſolidated, and therefore he thought the contingent Intereſt was deſtroyed in this Caſe likewiſe. But ſuppoſing this Point not to be ſo, yet ſtill he thought the Plaintiff had a good Title to Dower, in as much as it is ſtated, that William Hooker the Younger, never had any Iſſue. The ſingle Caſe in the Books that he knew of againſt this, was that in 3 Cro. 316. But in the Caſe of Purefoy and Rogers, 2 Saund. Lord Chief Juſtice Holt, who was then Counſel, ſaid that Lewis Bowle's Caſe and others in the Books were againſt it, and that it was not Law. And in Ejectment brought in Lord Bridgeman's Time that Caſe in Cro. was denied by him likewiſe to be Law; and accordingly the Chief Juſtice ſaid he did not take it to be ſo. Judge Probyn and Judge Lee declared themſelves to be of the ſame Opinion with the Chief Juſtice in both Points. Judge Page declared himſelf to be of the ſame Opinion as to the ſecond Point, but ſpoke nothing as to the firſt: Accordingly the Court ſaid they ſhould ſend a Certificate to this Effect to the Chancellor.

Hore *and* Gates.

THIS Matter coming now on again, Serjeant Wright argued for the Plaintiff, he said he should not contend but the Defendant might possibly take Advantage of that Matter upon Motion, which he has insisted upon in his Rejoinder; but submitted it, that in pleading he could not. For this Purpose he cited the Case of Jones and Burnet, East. 5 Geo. 2. in the Common Pleas. There Assumpsit was brought by the Plaintiff, as Indorsee of a Note, by Attachment of Privilege. The Defendant pleaded, that though the Attachment of Privilege bore Teste the 12th of February, being the last Day of Hil. Term, yet in Fact it was not sued out till the 25th of March, and the Indorsement was not made before that Day. To this Plea there was a Demurrer, and the Court held it to be bad. To the like Purpose he cited the Case of The King and Man, in the Court of Exchequer. There the Defendant claimed Title to Goods, which were taken upon an Extent, Tested the last Day of Trinity Term, 7 Geo. 1. and made out by Mr. Baron Price, the Fifth of October following, the Defendant demanded Oyer of this Extent, and set this Matter out by his Plea, in order to shew that this Extent was bad. The Court was of Opinion, that the Fault could not be taken Advantage of by Plea, but was proper to come on by Motion; which accordingly it did; and then the Court was of Opinion it was bad. To the like Purpose he cited the Case of Fuller and Josling, Vol. 1. 404. and farther cited Co. Lit. 117. Carthw. 70. and 2 Salk. 700. He observed too, that the Counsel of the other Side had agreed upon the former Argument, that no such Averment would be made in the Case of an Original; but would have distinguished this Case from that, by Reason that in a Bill of Middlesex there is no Teste. For his Part he said he could see no Difference; because it is certain, that though such Writ is not taken out but by Application of the Party, yet in Judgment of Law the Court orders it to Issue, which can be done only in Term-Time. Mr. Dennison argued on the other Side, and said he should not contend but in many Respects the Suing out this Bill related to the Term precedent; but this is only a Fiction, and nothing is more certain, than that a Fiction shall work no Wrong. In the present Case, he said the Plaintiff's Right was extinguished by the Statute of Limitations, and if the present Fiction should prevail, the Plaintiff's Right would revive manifestly to the Injury of the Defendant: and for this Purpose he cited 2 Keb. 198. 3 Keb. 213. 1 Ven. 362. and Raym. 161. The Chief Justice and Judge Probyn inclined to be of Opinion for the Plaintiff. They did agree that a Fiction should do no Wrong; but did not think that if this Fiction should prevail in the present Case, there would be any to the Defendant. The Law-makers they said must be supposed to have understood the Law and the Course of the Court, which is Part of it; and therefore they doubted whether the Legislature intended that the Plaintiff should be barred of his Cause of Action, till the End of the Vacation after the six

Vide antea 196.

Years was over. Judge Page and Judge Lee were of a contrary Opinion, and thought that the Intent of the Legiſlature muſt be to require the Plaintiff to put in his Demand within the ſix Years, and not to allow him to do it in the Vacation after. Accordingly this Matter ſtood over. Vide poſtea.

Crompton *and* Den.

Vide antea 189.

THIS Matter coming now on again, the Court declared themſelves to be of Opinion, that the Defendant ought to have given Notice to the Indorſee of his Intent of applying to be diſcharged, though the Indorſee did not give him Notice of the Indorſement. The Reaſon for their Opinion was, that before ſuch Notice by the Indorſee he was certainly a Creditor; and the Chief Juſtice ſaid in caſe a Creditor dies, leaving an Executor, it might be difficult for the Priſoner to give him Notice, but undoubtedly he muſt do ſo before he can be diſcharged. Accordingly the Court gave Judgment for the Plaintiff.

Bracey *and* Dawſon.

Vide antea 342.

THIS Matter coming on again, Mr. Strange argued for the Plaintiff. He ſaid he took it to be a clear Caſe, were it not for the Doubt ariſing for the King being concerned in Intereſt, that the Plaintiffs had a good Title to the Goods. For this Purpoſe he mentioned the Statute of 21 Jac. 16. Salk. 111. and 3 Lev. 69. And as to that Doubt ariſing from the King's being concerned in Intereſt, he apprehended, as this Caſe was, it made no Difference. The Statute, which this Queſtion turns upon, is 3 Geo. 2. 25. and by that Statute he did apprehend, that the Money aſſeſſed upon the Diviſion was not to be conſidered the King's Money, whilſt in the Hands of the Collector, but only after it comes into the Hands of the Receiver General. The Collector is only conſidered, as the Servant to the reſpective Perſons charged in the Diviſion to pay their Money over to the Receiver, and is appointed by them; the Receiver General is conſidered as Servant to the King to pay the Money over to the Exchequer. He did however agree, that an Extent would have reached this Money in the Hands of the Collector, and that from the Time of the Teſte of it; but ſubmitted it, that the Warrant in the preſent Caſe could not have ſuch an Effect; that this Warrant was no Matter of Record; and therefore the Goods of the Collector were not bound by it, till the Time the Warrant was executed upon them. Mr. Moreton argued on the other Side, and even in regard to the firſt Point ſubmitted it to be not ſo clear; for which Purpoſe he cited 1 Ven. 316. and 1 Cro. 109. With regard to the ſecond, he ſaid he did agree that the Diviſion have a Power of appointing two Aſſeſſors, one of which the Collector ſhall be; but the Commiſſioners have the Power of nominating which of the Aſſeſſors ſhall be the Perſon; and therefore he ſubmitted

it, when the Money is paid into the Collector's Hands, it is conſidered as the Money of the King. If this was ſo, he did not ſee but the Goods muſt be bound from the Teſte of the Warrant equally as in the Caſe of an Extent, and that this Warrant no otherwiſe differed from an Extent, than that it is a more expeditious Remedy. The Court ſaid, they would conſider of this Caſe among themſelves, and then deliver their Opinions. Vide poſtea.

The King *and* Mitter.

THIS was a Conviction for killing a Deer belonging to Waltham Foreſt, taken before John Barber, Eſq; and Sir William Thomſon, Juſtices of the Peace for the City of London, and founded upon the Statute 3 & 4 W. 3. c. 10. In this Conviction the Evidence was ſet forth, that Joſeph Chetwyn of Barking in the County of Eſſex made Oath before the ſaid Juſtices, that in the Defendant committed the ſaid Offence in Barking aforeſaid, for which he was apprehended in the City of London. Thereupon the Defendant appeared upon due Summons, and being heard what he could ſay in his Defence, the Juſtices convicted him, and gave Judgment, that he ſhould forfeit 30 l. one Third of the Penalty to the King, another Third to John Battey the Informer, and the remaining Third to the Poor of the Pariſh of Barking. Mr. Strange moved, that this Conviction might be quaſhed, and that for three Exceptions. Firſt, That the Witneſs appears to be intereſted in this Matter. For it is ſtated in the Conviction, that he belonged to the Pariſh of Barking, and the Penalty is given to the Poor of that Pariſh. The ſecond Exception was, that it did not ſufficiently appear that the Defendant was apprehended in the Place which the Juſtices belonged to. He did agree, that either the Juſtices belonging to the Place where the Offence was committed, or the Juſtices belonging to the Place where the Party is apprehended, had Juriſdiction in this; and he did farther agree, that in ſetting forth the Evidence it was alledged, that the Defendant was apprehended in the Place where the Juſtices belonged to; but it does not appear, that that Allegation came from the Witneſs, it might as well have come from the Juſtices themſelves. For this Purpoſe he cited the Caſe of The King and Johnſon, Hil. 6 Geo. 1. that was a Conviction for keeping a Gun. An Exception taken to it, that the Offence did not ſufficiently appear to have been committed in the Place where the Juſtices belonged to. In that Conviction the two Juſtices of the Peace were for Middleſex, and it no otherwiſe appeared, that the Offence was committed within their Juriſdiction, than in the Judgment given by the Juſtices. The Judgment there given was, that he ſhould forfeit a certain Penalty to the Poor of the Pariſh of Chelſea, infra quam the Offence was committed, and upon this Exception that Conviction was quaſhed. The third Exception was, that the Stile of the Juſtices was not ſufficiently ſet out; for they were only ſet forth to be Juſtices of the Peace, and to hear and determine divers Treſpaſſes and Felonies;

How far a Conviction for Deer-ſtealing ſhall be ſaid to be good in point of Form.

nies; and it was not ſaid that they were Aſſigned for that Purpoſe. Mr. Fazakerly argued on the other Side; with Regard to the firſt Exception, he did agree that if the Penalty had been given to the Overſeers of the Poor of the Pariſh, there might have been ſome Weight in it; for then this Penalty would have been for the Benefit of the Rich as well as the Poor; but here it is given merely by way of Bounty to the Poor, and the reſt of the Inhabitants can have no Benefit by it. In anſwer to the ſecond Exception, he ſaid this Matter was ſet forth upon the Evidence itſelf, and therefore it muſt be taken to have been what the Witneſs ſwore. As to the laſt Exception, he ſubmitted it, that it was not neceſſary that any Thing more ſhould have been ſet out, than that the Juſtices were Juſtices of the Peace; for then they would have followed the Words of the Act of Parliament, which is as much as is neceſſary to have been done in theſe Caſes. He obſerved farther, that in the Stile of this Conviction it was ſet forth that the Juſtices of Peace were aſſigned to hear Treſpaſſes and Felonies, and therefore this Matter was not neceſſary to be again repeated. The Court was of Opinion that the Exceptions were fully anſwered; accordingly the Conviction was confirmed.

Cock *and* Vivian.

Vide antea 243.

THIS Matter coming on again, Mr. Huſſey and Mr. Robinſon ſtated their Exceptions in Arreſt of Judgment. They ſaid they apprehended the Law to be clear, that Toll is due from the Buyer and not from the Seller, unleſs a Preſcription warrants it; for this Purpoſe he cited 2 Inſt. 220. A Preſcription they took to be neceſſary, and that a Cuſtom would not be ſufficient. For this Reaſon though the laying this Toll to be due ſecundum conſuetudinem might be good, if a Cuſtom would be ſufficient; yet as they apprehended a Preſcription was neceſſary, they ſubmitted it, that the alledging this Toll to be due ſecundum conſuetudinem, would not be good, though after a Verdict. But ſuppoſing Toll was due from the Defendant in this Caſe, yet they apprehended an Indebitatus Aſſumpſit would not lie for it; for this Purpoſe he cited 2 Roll. Abr. 553. Lutw. 1336. at leaſt they conceived that a Quantum Meruit could not poſſibly be maintained. This Objection, though only taken to the Form of the laſt Count, they ſaid, would go to the Subſtance of the whole Declaration. Upon a Demurrer they agreed this would not be ſo; for there, if any of the Counts are good, the Court will give Judgment for the Plaintiff; but where a general Verdict is given, one defective Count viciates the whole. Serjeant Chappel argued on the other Side, and ſaid he did agree that without a Preſcription Toll could not be due from the Sellers, who were the Defendants; but after a Verdict, he ſubmitted it, that the Alledging it to be due ſecundum conſuetudinem would make it good; with Regard to the ſecond Point, he conceived that an Indebitatus Aſſumpſit would well lie; and for this Purpoſe he cited 2 Lev. 174. 3 Lev. 262. Ven. 298. 3 Keb. 177. 1 Show. 35. 3 Mod. 239. As to the laſt

Point, he said that Pickage and Stallage were considered of several Species of Tolls; to which Purpose he cited Lutw. 1580, and the Place before mentioned in 2 Inst. He observed likewise, that it was expressly alledged in the First of the Counts, that Pickage and Stallage were due to the Plaintiff; so that these Duties might well be included in the last Count, under the Word Tolnetum. Pickage and Stallage, he said, were uncertain Duties; though Toll in the common Sense of the Word might not, and he apprehended there could be no Sort of Doubt, but a Quantum meruit would lie for those Sort of Duties. The Chief Justice said that he did think the second Objection was answered; but he had some Doubt in Regard to the first, and a greater Doubt in Regard to the last. He said he did agree that Pickage and Stallage might sometimes possibly be included in the Word Toll; but certainly the Word Toll is capable of a different Sense, so as not to include them. By the first Count likewise, the Plaintiff hath himself distinguished them, and laid Claim to those different Duties by Name; and in the last he has plainly confined himself to this one particular Sort, according to the common Sense of it; and therefore he conceived that it could in no way be intended to signify the other. The rest of the Court were of Opinion that this last Exception was the most material; and upon that in particular thought this Matter deserved farther Consideration. But in Hill. 8 Geo. 2. the Rule for staying the Judgment was discharged by Consent.

Pathow *and* King.

IN a Writ of Error on a Judgment given in the Common Pleas in Debt on an Award, the Question arose on the Validity of the Award, on Nul tiel Award pleaded. It seemed there had been a Dispute between the Plaintiff and Defendant upon an Execution taken by the Defendant of the Goods of Nathaniel Bacon, and before this Execution was made, the Plaintiff took some of these Goods to himself, and sold them; but then Execution was made of the whole. This Dispute was referred to the Arbitration of Richard Barcley; and he awarded that the Defendant should pay to the Plaintiff 455 l. by the 24th of June, that the Defendant should keep all these Goods which he had taken in Execution, except those which the Plaintiff had taken to himself and sold before the Execution was made; and that thereupon general Releases should be given on both Sides. Mr. Draper submitted it, that this Award was void, by Reason that it was wholly uncertain what Goods the Plaintiff had so taken to himself and sold; for which Purpose he cited 3 Mod. 272. Mr. Strange argued on the other Side, and said that it might easily be ascertained upon Inquiry, what Goods the Plaintiff had taken and sold at the Time; but if this Part of the Award should be void for the Uncertainty, yet still he submitted it, that the Award could not be said to be made for the Benefit of one of the Parties only, and so void in the whole by Reason that mutual Releases are awarded to be given. The

How far an Award shall be said to be certain enough.

Court inclined to be of Opinion, that this Part of the Award was void for the Exception that had been taken; and this Part of the Award being void, would make the whole so, by Reason that these Releases are not to be executed, but upon the Terms precedent; so that then there is nothing awarded for the Benefit of the Defendant; however, this Matter stood over.

Kent and May *against* Kent.

Vide antea 357.

THIS Matter coming on again, the single Doubt for the Consideration of the Court arose upon the two Sums given for Damages and Costs, by Reason of the Delay of Execution by the Writ of Error, that they were not charged upon one of the Plaintiffs in the Writ of Error, as well as the other. Serjeant Chappel submitted it, that for this Reason the Judgment of Affirmance in the King's Bench in Ireland ought to be reversed. He said he doubted whether this Question would depend upon 3 Hen. 7. 10. by Reason that in 1 Sid. 157. it is held that this Statute does not extend to Ireland; but he presumed that there was a like Statute made in Ireland with that of 16 & 17 Car. 2. 8. and he thought the Question would depend on this Statute, rather than the other. He said he did agree that he could not produce any express Authorities, to shew that both the Plaintiffs in Error ought to have the Burden of the Costs and Damages equally, but submitted it, that the Reason of the Thing shewed that it must be so. Serjeant Eyres argued on the other Side; he conceived that the whole of this Question must depend on 3 H. 7. 10. and thought that the Case in Sid. was a very strange one, by Reason that this Statute was made seven Years before Poyning's Law, and by that Law all Statutes then in Force in England, were made to be in Force in Ireland. Then with Regard to that Statute, he conceived the present Case was not within it; by Reason that the Ancestor of one of the Plaintiffs lived for some Time after the Judgment given; and it would be an unreasonable Thing that his Heir at Law should answer for the Damages, by Reason of the Delay of Execution in his Time. Some Cases have been expressly adjudged to be out of the Reason of that Act, and particularly he cited 1 Mod. 77. 3 Lev. 75. 1 Ven. 88. and 166. But supposing this Part of the Judgment should be bad, yet still he conceived that this Court would give the same Judgment as that Court ought to have given; and for this Purpose he cited 1 Cro. 401, 442, 511. The Court said they would consider of this Matter; so ordered it to stand over. Vide postea.

Falhers *and* Corbret.

How far an Indebitatus Assumpsit will lie for Rent.

IN a Writ of Error in a Judgment in the Common Pleas, in an Indebitatus Assumpsit, it appeared that the Plaintiff below had declared, that whereas he was possessed of a House in Newgate-Market, in Consideration that he would permit the Defendant,

dant, being a Butcher, to have the Use of the Passage in it for hanging up his Meat, he would pay him at the Rate of 30 s. per Year for the same; the Plaintiff averred that he did let the Defendant have the Use of this Passage for a Year and Half, by Reason of which there was the Sum of 2 l. 5 s. due to him. Issue was joined on Non Assumpsit, and a Verdict found for the Plaintiff. Mr. Strange submitted it, that Debt for Rent ought to have been brought, and that an Indebitatus Assumpsit would not lie. Mr. Parker on the other Side said that he conceived that this was not a Rent, by Reason that no Part of the House was let, but merely the Use of the Passage agreed for; he conceived therefore, that Debt for Rent would not lie. He observed farther, that this Agreement being to pay after the Rate of such a Sum, was another Reason why such Action could not be maintained. And for this Purpose he cited 4 Mod. 78. But tho' such Action would have lain, yet upon an express Promise, an Indebitatus Assumpsit will lie likewise; and for this Purpose cited Hardres's 366. The Court was of the same Opinion; accordingly affirmed the Judgment.

Starcy *and* Gardiner.

How far a Verdict shall be said to be sufficient, or not.

IN a Writ of Error on a Judgment in the Common Pleas in an Action of Trespass, it appeared that the Plaintiff had declared against the Defendant for breaking his Close, and taking divers Sorts of Cattle. As to the taking of Part of the Cattle, the Defendant pleaded Not Guilty; as to the rest of the Declaration, he justified on a Distress for Rent. Two Issues were taken by the Plaintiff on these two different Parts of the Plea; but at the Trial no Evidence was given on the Issue of Not Guilty; accordingly the Jury omitted to find any Thing as to that; but gave their Verdict singly upon the other Issue; and as to that found a Verdict for the Plaintiff; and Judgment was given for him accordingly. It was objected on the Part of the Defendant that this Verdict was not sufficient, in as much as it had found nothing with Regard to one of the Issues. The Counsel on the other Side submitted it; that if this Issue which the Jury have found nothing to, had been singly upon the Vi & Armis, the Verdict would have been good; for this Purpose they mentioned the Case of Stradford and Neal in this Court, which was founded upon a Case in Saunders. The Court agreed that Case, because the Vi & Armis was merely Matter of Form, but thought that Case was distinguishable from the present one; however this Matter stood over.

Spencer

Spencer *and* The Manucaptors of Donelly.

How far the Court will give Leave that a Vacatur ſhall be entered upon a Record.

ON Motion for the Maſter's Report, the Fact came out to be in this Manner. In the Bail-piece the Defendants had acknowledged themſelves to be Bail for John Donelly, Gent. but in the Recognizance they were entered to be Bail for John Donelly, Eſq. A Scire facias had been brought upon this Recognizance, to which the Defendants pleaded Nul tiel Record. The Record coming before the Maſter to be verified, this Recognizance was produced, and he entered a Protulit recordum. Motion had been made, that the Entry of this Protulit might be vacated, and that the Recognizance might be made agreeable to the Bail-piece; the Court thought this to be reaſonable; accordingly the Rule was made ſo.

Wells *and* Kitchenham.

How far a Writ of Execution ſhall be ſaid to be amendable, or not, in reſpect of the Teſte of it.

ON Rule to ſhew Cauſe, why a Fieri facias ſhould not be quaſhed for its being Teſted Philip, Lord York, whereas it ſhould have been Teſted Philip, Lord Hardwick; Mr. Draper ſubmitted it in the firſt place, that the Teſte of a Writ was not Eſſential to it, but the Sealing it, and for this Purpoſe mentioned the Inſtance of a Bill of Middleſex. But in the next place he conceived, that this Defect was amendable; and ſaid that he had an Affidavit from the Plaintiff's Attorney's Clerk, that this Writ was made out not above two Days after the Chief Juſtice was made a Peer, that he filled up this Teſte himſelf, and that it was a meer Miſtake of his own. He obſerved farther, that this was a Judgment the firſt Day of Mich. Term laſt, that there had been one Fieri facias taken out before this, teſted the laſt Day of that Term, and returnable the firſt Return of this, that the Sheriff had fail'd to make any Return to that, and that thereupon this Alias was ſued out; and to verify this he produced the Record in Court. He ſaid he conceived, that the Court had allowed as ſtrong Amendments to be made in judicial Writs, as this that was contended for in the preſent Caſe. For this Purpoſe he mentioned the Caſe of Hews and Alvares, which came before the Court Mich. 12 Geo. 1. that was an Action upon the Caſe on two ſeveral Promiſes; Judgment by Default, and a Writ of Inquiry brought. By this Writ the Jury were ordered to inquire what Damages the Plaintiff had ſuffered Occaſione præmiſſorum; when this Writ of Inquiry came to be executed, the Plaintiff gave in Evidence only the firſt Promiſe. And upon that Motion was made that this Writ of Inquiry might be amended, by inſerting in it the Words Occaſione primæ Promiſſionis inſtead of the Words Occaſione Præmiſſorum. To ſupport this Amendment was cited 2 Cro. 172. Baker and Cambie, Eaſt. 11 Ann. The Counſel on the other Side cited there 1 Cro. 147. 2 Bulſt. 35. 1 Roll's Abr. 201. Mod. Caſes 263. Sal. 52 and 45. the Court there took Time to conſider of that Caſe till the

next Term; and then ordered the Amendment to be made. Mr. Draper farther cited the Case of Knightly and Coston 1 Nat. Brev. 122. and farther relied upon Rep. 8. Blackmore's Case, 3 Cro. 203, 383. and Sir Thomas Jones 41. Mr. Strange was Counsel on the other Side; but desired Time to look into these Cases; accordingly the Rule was inlarged. Vide postea.

Desbordes *and* Horsey.

How far a Writ of Error shall not be a Supersedeas till Bail is given to it.

ON Rule to shew Cause, why a Capias ad Satisfaciendum should not be quashed, Mr. Strange said, that two Objections had been made to it; first, that it was returnable on a Day impossible; secondly, that it was taken out after the Allowance of a Writ of Error. As to the first Objection, he said that the Plaintiff had taken out another Capias, which was returned and filed. With regard to the second he did agree, that the first Capias was taken out after a Writ of Error allowed; but said that the Plaintiff in Error had not given Bail to it according to the Statute of 3 Jac. c. 8. and as this Case was, submitted it, that Bail was requisite. It was an Action brought upon a Bond with Condition, that the Defendant should pay to the Plaintiff the Sum of 500 l. with Interest at 5 per Cent. being the same Sum as is mentioned in a Defeasance bearing Date the same Day with the Bond. He did agree, that if the Condition of this Bond had been for the Performance of any Collateral Covenants, Bail would have not been requisite; but he submitted it, that this Bond was only for the Payment for a Sum certain, though said to be the same Sum as is mentioned in another Instrument. In the Case of a Bottomry Bond he remembered that the Court was of Opinion three or four Years ago, that such Bail was requisite; because when the Event happens, the Bond is quite certain. So in the Case of a Promissory Note, which was Value received for Meat and Drink, he remembered it was held to be negotiable. Mr. Taylor on the other Side said, that he submitted it, no Bail was requisite by Reason that the Condition of the Bond referred to another Instrument. And as to the Case said to be determined three or four Years ago, for his own Part he knew of no such, and Show. 14. is against it. Then with regard to what was said, that another Capias with a good Return was taken out, he observed that that could be no Reason why the present one should not be quashed. The Court was of Opinion, that as this Case was, Bail was necessary to be given, before the Writ of Error could be a Supersedeas; but for the Reason last mentioned made the Rule absolute.

Law *and* Law.

How far the Court will give Liberty that a Plea may be withdrawn.

IN Debt on Bond, Mr. Fazakerly moved to withdraw a Plea of Solvit ad Diem, and plead another special one on 5 & 6 Ed. 6. 16. that the Bond was illegal, being made on the Sale of a certain Office. The Court at first doubted whether this could be done; because the Defendant did not offer to plead the General Issue, but a Special Plea. Upon which Mr. Fazakerly mentioned the Case of Meard and Philips, Trin 5 Geo. 2. where the Court gave the Defendant Leave to withdraw the Plea of Nil debet, and plead two Special ones. Upon this the Court made a Rule to shew Cause in the present Case. Vide postea.

The King *against* Sir Watkins William Wynn and others.

How far a Charter of a Corporation shall be said to be illegal.

ON Rule to shew Cause why an Information should not be granted against the Mayor, Aldermen and Common Council of the City of Chester, to shew by what Authority they claimed to elect Aldermen, exclusive of the Freemen at Large; and likewise on four other Rules to shew Cause, why an Information should not be granted against the Mayor and three of the Aldermen of Chester for exercising the said Offices; the Nature of the Case appeared to be in the Manner following. By a Charter made in 16 Car. 2. Power was given to the Freemen at Large of joining with the Aldermen and Common Council in the Elections of Aldermen in this City. This Charter was acted under till the 36th Year of that King, and then on a Quo Warranto brought against this Corporation, Judgment was given, that all their Liberties should be seized and the Corporation dissolved. The Year following a new Charter was granted to them vesting this Right of Election in the Aldermen and Common Council, exclusive of the Freemen at Large, and the King thereby reserved to himself a Power of removing them at Pleasure. The Freemen however made some Opposition to the Acceptance of this Charter. In the Beginning of King James II's Time the Judgment of Seizure was pardoned, and they had a full Restitution of their Liberties. In the 4th of James II. there was another Charter granted to them, vesting this Right of Election in the Aldermen and Common Council only, and in the Charter the King reserved to himself a Power not only of removing them at Pleasure, but of appointing new ones in their Room. There was some Opposition made by the Freemen to this Charter likewise; which continued to the Year 1698, but from that Time they intirely acquiesced under the Election made by the others. Upon this State of the Case Mr. Strange and others of Counsel for the Defendants, submitted it, that the Rule ought to be discharged. They said they did agree, that neither the Charter of 37 Car. 2. nor that of 4 Jac. 2. could bind the Freemen, unless the Freemen accepted it; but they submitted it, that a long Acquiescence would be an

Evidence of such Acceptance. An Acquiescence there was in the present Case for 35 Years last past; and they apprehended that the Court would not grant an Information now, which would overturn the whole State of the Corporation. In the Case of Taunton an Information was moved for against certain Members of the Corporation for not having taken the solemn League and Covenant in Pursuance of a Clause in an Act of Parliament. It was argued by the Defendant's Counsel in that Case, that if such Information should be granted on that Account, it would affect the Election of most of the Officers in England. That Argument had a considerable Influence with the Court. The Rule for shewing Cause was never made absolute, and whilst it was depending the Clause in the Act of Parliament was repealed. For the like Purpose they cited the Case in Skin. 574. Mr. Abney and others were of Counsel on the Side of the Rule. They conceived that the Judgment of Seizure in 36 Car. 2. was intirely illegal. If the Corporation had forfeited their Charter, the only Method of taking Advantage of the Forfeiture was by Scire facias to repeal it; and no such Judgment can be in Quo Warranto. For this Purpose they mentioned the Case in 4 Mod. 52. But if the Judgment had been legal, the Restitution in Jac. 2. had intirely taken off the Force of it. Then with regard to the Powers reserved to the Crown by the Charters of 37 Car. 2. and 4 Jac. 2. they said they were of a very extraordinary Nature, and such as made the Charters to be void and not capable of being accepted. But they submitted it, in Fact there was no Acceptance; on the contrary there was an express Opposition, and the Submission to it for 35 Years last past they conceived would not amount to an Acceptance. For this Purpose Mr. Hollins mentioned the Case of the Corporation of Beudley, where the Court were expressly of Opinion that 22 Years would not. The Chief Justice declared his Opinion to be, that the Judgment of Seizure was not according to Law; and with regard to the two last Charters he observed, that the Powers reserved in them could hardly be warranted; and he never new these Sort of Charters in King Charles the 2d's and King James the 2d's Time mentioned by the Judges, but with Censure. By the Charter of 16 Car. 2. the Freemen at Large had undoubtedly a Right in joining in these Elections. And he did not think that the Acquiescence to the contrary by the Freemen for 35 Years together would make any Difference. In the Case of Brecknock there was a Charter granted in the Reign of Philip and Mary, which settled the Election in one way; from 15 Eliz. there had been an unvariable Usage in another. This Matter was found by special Verdict. Yet this Court was of Opinion, that the Usage ought not to prevail; accordingly gave Judgment in the Quo Warranto against the Defendants. On that Judgment a Writ of Error was brought in the House of Lords, and that Judgment affirmed. The least Thing that the Court could do in this Case was to permit this Matter to be tried. The rest of the Court were of the same Opinion; accordingly the Rule was made absolute. Vide postea.

Reed

Reed *and* Doltery.

How far a Prohibition ſhall go to the Eccleſiaſtical Court, in a Suit relating to Tithes.

ON Rule to ſhew Cauſe why a Prohibition to the Eccleſiaſtical Court ſhould not be granted, the Caſe appeared to be in this Manner; The Plaintiff libelled for Tithes of Agiſtment of Cattle, as Curate and Sequeſtrator of the Pariſh of Biſhop-Wilton in the County of York, and in his Libel ſet forth, that by Donation, Endowment, Cuſtom, and Preſcription Tithes, real and perſonal, were due to the Vicar of this Pariſh, his Curate and Sequeſtrator; and likewiſe he libelled for an Offering of 7 Pence per Year. The Defendant by his Plea denied that Tithes were due to the Plaintiff in the Manner ſet forth in his Libel, or in any other Manner whatſoever; and likewiſe denied his Right to the Offering. This Cauſe was heard before the Eccleſiaſtical Judge, and he decreed for the Plaintiff. Dr. Lee came now to ſhew Cauſe on this Rule. He ſaid he did agree that if the Plaintiff had founded his Right to Tithes ſingly upon the Cuſtom, as the Defendant has denied this Cuſtom, a Prohibition would lie; but in Fact the Defendant has founded his Right upon the Endowment, and the Cuſtom is only laid by way of Uſage in Purſuance of it. The Endowment was by Nicholas de Roſs, and he endowed the Vicar and his Succeſſors with Altaragium & Decimam croſtorum infra clauſuras. The Word Altaragium, he ſaid, primarily ſignified ſuch Things only as were immediately for the Service of the Altar; but the Senſe of this Word has been extended much farther, and to ſignify almoſt all Sorts of Tithes whatever. Of this Opinion the Court of Exchequer was, Mich. 21 Eliz. and this Caſe is to be ſeen in the Remembrancer's Office. But if there was any Doubt whether this Word would convey the Right of Tithes to the Vicar; yet certainly the other Words would, namely, the Decimam Croſtorum. He obſerved likewiſe, that by another Clauſe in this Endowment the Right of Offerings was expreſly given; for there are theſe Words in it, Principales & omnes alias oblationes. And if there had not, he conceived that the Eccleſiaſtical Court might hold Plea for Offerings, even though the Cuſtom was denied; for this Purpoſe he relied upon a Clauſe in 2 Ed. 6. 13. But eſpecially he ſubmitted it, that there was no Foundation to grant this Prohibition after Sentence; and for this Purpoſe he mentioned 1 Cro. 595. 2 Keb. 612. and Noy 70. Mr. Bootle argued on the ſame Side, and ſaid he did agree that this Suit was between an Eccleſiaſtick and a Layman; but the Right that came in Queſtion in this Caſe was between two Eccleſiaſticks; the Doubt ariſing, whether the Rector was intitled to theſe Tithes or the Vicar. In theſe Caſes he ſaid he conceived that the Eccleſiaſtical Court might well hold Plea of a Cuſtom; and for this Purpoſe he mentioned 2 Roll. Ab. 310, 311. 2 Roll. Rep. 55. Gouldſ. 149. 2 Bul. 172. and 1 Leon. 59. Then with Regard to the coming after Sentence, he did agree that where a Want of Juriſdiction appears upon the Proceedings, this Defect may be taken Advantage of even at that Time; but where the Defect is only of Trial, he

ſubmitted it, it could not; and for this Purpoſe he cited 2 Keb. 439. and 1 Ven. 3. Mr. Fazakerly argued on the other Side, and ſaid that whatever the Rule might be between Eccleſiaſticks, yet he ſubmitted it, that the Rule was quite otherwiſe in Suits between an Eccleſiaſtick, and a Layman; and that tho' the Right of Eccleſiaſticks is only controverted. If this was not ſo, there might be a manifeſt Injuſtice to the Defendant; for the Continuance of a Uſage for forty Years is allowed a good Cuſtom in the Eccleſiaſtical Court; and therefore on ſuch Uſage the Eccleſiaſtical Judge might well Decree for the Vicar; but in another Suit brought by the Rector in the Temporal Court againſt this ſame Defendant, the Temporal Judge would decree for the Rector. Then with Regard to the Objection that had been made, that after Sentence a Prohibition cannot go for Defect of Trial only, he ſubmitted, the conſtant Courſe of the Court was otherwiſe; and if there were Opinions to the contrary, they could not be Law. In Reſpect therefore of the Offering, he conceived there was no Doubt, but the Rule ought to be made abſolute. And with Regard to the other Part of the Suit, which was for the Agiſtment, he hoped the Rule would be made abſolute for that likewiſe. He ſaid he conceived that the Word Altaragium had never been extended to any Tithes but ſuch as were due by Cuſtom; and as to the other Clauſe, which is ſaid to follow, he obſerved that the Words were not as were ſtated; but they were Decimam bladorum croftorum creſcen' infra clauſur'; ſo that by thoſe Words Tithes of Corn only were granted. For which Reaſon he did conceive that the Rule which the Eccleſiaſtical Judge went by in this Caſe, was only founded upon the Uſage; it appears that Matter was not fit for him to have tried; and therefore according to the Caſe in Salk. 548. the Rule ought to be made abſolute. Mr. Denniſon argued on the other Side, and ſaid that though Offerings are Things of a ſpiritual Nature, yet the Quantum of them muſt be always aſcertained by Cuſtom; and therefore in thoſe Caſes, he conceived that a Prohibition would conſtantly lie after Sentence; for this Purpoſe he cited the Caſe of Tailor and Scot. 2 Lutw. 1059. Salk. 334. and 3 Keb. 123, 527. He obſerved farther, that this Endowment is not ſet forth in the Pleadings, though it appeared in the Proceeding of the Cauſe; but if it had, he ſubmitted it, that this Court would have judged not only upon the Validity, but upon the Conſtruction of it; and for this Purpoſe cited Moor 457 and Lit. Rep. 263. The Chief Juſtice ſaid he thought it very clear that the Rule ought to be made abſolute with Regard to that Part of the Suit, which concerned the Offering; becauſe it appears the Plaintiff founded his Right to that intirely upon Preſcription, and the Defendant by his Plea has denied there was any ſuch Right. With Regard to the other Part of the Suit, which concerned the Agiſtment, he thought that there was ſomething of Difficulty; but even as to that, he inclined that the Rule ought to be made abſolute. His Reaſon was, becauſe it was uncertain upon the Face of the Proceedings, whether the Plaintiff founded his Right upon the Endowment or the Preſcription; the Endowment might have been thrown in only to

prevent a Prohibition; and in the Courſe of the Evidence the Plaintiff might have made out his Title ſingly by the Preſcription. Judge Page and Judge Probyn were of the ſame Opinion in both Points. Judge Lee agreed the ſame as to the firſt of them; but as to the laſt, inclined to think that the Prohibition could not ſtand, by Reaſon that it did not appear that the Spiritual Court have founded their Judgment upon the Trial of the Cuſtom; for this Purpoſe he cited Carth. 33. and 93. However, he did not oppoſe making the Rule abſolute even as to this Point, in order that this Matter might be more ſolemnly determined; accordingly the Rule was made abſolute as to the whole of it. Vide poſtea.

The King *and* The Mayor and Aldermen of Shrewsbury.

How far a Return to a Mandamus ſhall be ſaid to be certain enough, or not.

THIS was a Return to a Mandamus, to reſtore Mr. Corbet Kynaſton to the Office of Alderman in the Town of Shrewsbury, which Return came now on in the Paper to be argued. The Return ſet forth that the Defendants were incorporated by the Name of Mayor, Aldermen, and Burgeſſes of this Town, by a Charter of 14 Car. 2. and that one of the Clauſes of that Charter requires that the Mayor, Aldermen, and Aſſiſtants ſhould be Inhabitants, and conſtantly reſiding either by themſelves or Family in that City, or in the Pariſh of Holy Croſs, or St. Giles adjoining to it, unleſs in the Time of Plague or other contagious Diſtemper. The Return ſet forth that Corbet Kynaſton, one of the Aldermen of that City was not inhabiting or reſiding within it, or in other Places mentioned in the Charter, either by himſelf or Family, for the Space of three whole Years next before the 23d of Feb. 1722; and that during that Time there was neither Plague nor other contagious Diſtemper either in the City or other the Places above-mentioned. The Return farther ſet forth, that on the ſaid 23d of February, the Mayor and major Part of the Aldermen and Aſſiſtants were duly aſſembled at the Guild-Hall, and that at ſuch Aſſembly they entred into a Debate concerning the Non-reſidency of the ſaid Mr. Kynaſton; and becauſe he had been abſent ſo long, and during that Time abided in Places unknown to them, they removed him from his Office. Mr. Strange argued that this Return was inſufficient both in Form and Subſtance. With Regard to the Subſtance of it, he conceived, that the Conſtruction of this Charter muſt be, that though the Plague was not in Shrewsbury, or in the other Places above-mentioned, yet if it was in any other Parts of England, it would be a ſufficient Excuſe for Mr. Kynaſton's leaving the Town. So if on Account of Sickneſs, he was obliged to go and reſide in another Part of England, that would be a good Excuſe for his Non-reſidence likewiſe; for which Reaſon it ought to have been averred in the Return, that Mr. Kynaſton had neither this Excuſe mentioned in the Words of the Charter, nor any other whatſoever. He then took two Exceptions to the Form of the Return; his firſt was, that it was not ſet forth that the whole Body had Notice of this Aſſembly; though he ſubmitted it was abſolutely

neceſſary, in as much as the Meeting was not on a Charter-Day; and ſo this Caſe was reſolved in the Caſe of The King and Strangwayes, Hill. 1 Geo. 1. and if this had been on a Charter-Day, yet the major Part of the Aſſembly could not have gone on to a Determination of this Queſtion, unleſs Notice of their Meeting had been previouſly given. He obſerved likewiſe, that the Manner of ſetting out this Aſſembly was bad for another Reaſon; becauſe it is only alledged that the Mayor and major Part of the Aldermen and Aſſiſtants were preſent. It ought to have been ſet forth, that the whole Body was. It is only by the Operation of the Law that the whole Body are repreſented by the major Part; and Facts muſt be ſet forth in pleading, not what in Judgment of Law amounts to them. And though it was ſet forth that they were duly aſſembled, yet the Word duly could not help it; and for this Purpoſe he mentioned the Caſe of a Conviction upon the Game Acts, where it had been held that the ſetting out, that a Perſon not qualified killed the Game, was not ſufficient, without ſetting forth how he was not qualified. His ſecond Exception to the Form of this Return was, that it was not ſet forth that Mr. Kynaſton had any Sort of Notice given him, before they deprived him. A perſonal Notice, he agreed, might not be requiſite; becauſe it is ſet forth in the Return, that Mr. Kynaſton was in Places unknown to them; but a publick Notice ought to have been given, either at the Baket-Place, Church-Door, or ſome other Place; and to ſhew that Notice of ſome Sort was requiſite, he cited Salk. 434 The Chief Juſtice ſaid, with Regard to the Subſtance of this Return, that he took it to be very good. The Words of the Exception he agreed were general; but yet they muſt receive ſome limited Conſtruction; and that he thought muſt be to the City, or other the Places above-mentioned; eſpecially by Reaſon of thoſe Words or other contagious Diſtemper; and therefore, as the Return has purſued this reaſonable Conſtruction of the Words, he thought that Part to be clearly good. Then with Regard to the Want of Notice being given to Mr. Kynaſton, he thought ſuch Notice unneceſſary, in as much as it is averred that he was in Places unknown to them; and for this Purpoſe cited Show. 305. The ſecond Objection he thought had the greateſt Difficulty. He did agree, that before the Statute of Anne, which allows Traverſes to theſe Returns, theſe Returns ought to have been certain to every Intent, and poſſibly this Rule has not been altered ſince the Statute; but yet he obſerved, that no Caſe had been cited to ſhew that Notice of the Aſſembly was neceſſary to be ſet forth in theſe Returns, even before the Statute; and for this Reaſon he thought it not neceſſary to be alledged. And in pleading, where a Certainty to a common Intent is ſufficient, undoubtedly ſuch Notice is unneceſſary to be ſet forth. The other Part of this Objection, that it is only alledged that the Majority of the Corporation were preſent, he owned, with him had ſome Sort of Difficulty; and at preſent inclined to think that this Exception was fatal; and in pleading he thought this would not be good. Judge Page inclined to think that ſince the Statute of Anne a Return of this Sort might not be more certain than a Plea; however with Regard

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to the other Part of the Objection mentioned by the Chief Justice, he was of Opinion with him. Judge Probyn and Judge Lee inclined to think the Return was Good, even in this Point, as well as the other. Accordingly this Matter stood over. Vide postea.

The King *and* Fuller.

Vide antea 287.

THIS was a Conviction for selling distilled Liquors by Retail without a Licence. Mr. Draper objected to it, that the Information and Evidence was all in the Preterperfect Tense, and likewise that the Judgment was quod forisfecit the Sum of 1 l. whereas it should have been forisfaciat, and cited The King and Hawkes, Vol. 1. 300. Mr. Wynne on the other Side submitted it, that the Law did not require, that Justices should finish these Proceedings in one and the same Day; and therefore with Regard to the Information and Evidence, he submitted it to be good. Then with Regard to the Words of the Judgment, he said, that the first Part of them was, that the Justices adjudge that the Defendant is guilty, and is convicted of the Premisses. Indeed the Conviction goes on and says, that he has forfeited the Penalty; but that, he submitted it, need not have been set forth; for this Purpose he mentioned the Case of The King and Myncton, Mich. 3. Geo. 2. That was a Conviction for Deer-Stealing. No Description was there of the Penalty; yet the Court held the Conviction to be good. An Exception too was taken, that the Words of the Judgment were, Ideo convictus est, and that Exception over-ruled likewise. The Court however were of Opinion that all ought to be in the present Tense; accordingly the Conviction was quashed.

Astley *and* Brandwood.

Vide antea 344.

THIS Matter came on in the Paper a few Days ago, and then Mr. Agar desired that it might stand over till the next Term; because he was not prepared to speak to it. The Chief Justice said he believed the Exception of want of Seisin would be too strong for him to get over; accordingly made a Rule, that the Judgment should be reversed unless Cause today; and no Cause was now shewn.

How far a Plaintiff shall be said to have discontinued, or not, his Action in such a Manner, as to intitle him to bring a new one.

Horn *and* Wood.

ON Rule to shew Cause, why the Defendant should not be discharged out of Custody upon common Bail; the Case appeared to be in this Manner. The Defendant was arrested by Virtue of a Writ returnable on Thursday after the Octaves of the Purification. Term ended on Tuesday after the Octaves. And therefore the Day of the Return was mistaken. A few Days ago the Plaintiff obtained a Rule for discontinuing upon Payment of Costs, and served the Defendant with

it; since that, without having first discontinued, he charged the Defendant in Custody with a second Writ for the same Cause of Action. It was insisted upon by the Defendant's Counsel, that this was irregular in the Plaintiff to charge him with the second Writ while the first was depending, and upon that he obtained the present Rule for shewing Cause. Mr. Kettleby on the Part of the Plaintiff submitted it, that what the Plaintiff had done was very regular. He did agree, that before the Defendant is intitled to plead, the Plaintiff must enter up this Discontinuance in Form; otherwise the Defendant will be intitled to plead the first Action in Abatement of the second. But if the Plaintiff does get rid of the first Action before the Defendant is intitled to plead, it is sufficient. The Chief Justice said wherever a Plaintiff takes out a defective Process by way of Contrivance to charge the Defendant with a good one afterwards, the Court will certainly discharge him upon common Bail, when he is charged in Custody with the second. But in the present Case this appeared to be only a mere Mistake; and therefore he thought that the Plaintiff might charge the Defendant with the second Writ, as soon as he had served him with the Rule for discontinuing. The Court were of the same Opinion, accordingly the Rule was discharged.

Pigot *and* Stibs.

How far an Award shall be said to be good notwithstanding there is some Mistake in Respect of the Name of one of the Arbitrators.

ON Rule to shew Cause, why an Attachment should not be granted against the Defendant for Non-performance of an Award. Mr. Kettleby submitted it, that the Award was void, by Reason that the Submission was to Bouldwill and two others, three Foremen of the Jury. But the Appointment for making the Award, was signed by Baldwin and those two others. The Defendants Attorney attended them in Pursuance of this Appointment, informed them of this Mistake and told them if they should make their Award, neither Party would be bound by it, and therefore he should not attend them with any Evidence on the Part of his Client. One of the Arbitrators thought this a material Objection, and therefore refused to join in the Award; the other two did join in it, and Mr. Kettleby said, that this Defect appeared likewise, even upon the Award itself; for the Recital of the Award is, Whereas a Submission by Rule of Court was, to —— *Bouldmill* and two others, of the Matters in difference, Now know ye that the said —— *Bouldwill* otherwise *Baldwin*, together with one of the other Arbitrators, do make their Award, &c. Another Reason why Mr. Kettleby offered against the Rule was, that the Plaintiff did not make a Demand of the whole Money ordered to be paid by the Award, which he ought to have done. The Sum which he demanded was only 9 l. 4 s. 5 d. but besides this there was another Sum of 15 l. ordered to be paid for Costs, which the Plaintiff omitted to demand. The last Reason against the Rule was, that the Plaintiff had not sufficiently sworn in his Affidavit, that the Defendant was not at the Place for Payment of this Money at the Time appointed. The Place for Payment of this Money at, was an Ale-house. The

Plaintiff ſwore that he was there all the Time, and the Defendant was not there any Part of the Time; for that he frequently went out of the Room where he was ſitting and asked the Drawer whether he was come, and he told him he was not. The Chief Juſtice ſaid, that he thought the firſt Objection would not hold, by Reaſon that a Man may have ſeveral Names, and he thought that in Pleading ſuch Miſtake might be ſet right; beſides by the Award itſelf it appears they are the ſame Perſons. He thought that the ſecond Objection was of no Force neither, but the laſt did prevail with the Court. Accordingly upon that the Rule was diſcharged.

The King *and* The Aldermen of the City of London.

What ſhall be ſaid to be ſuch a kind of Office as that the Court will grant a Mandamus in order to admit the Party into it.

A Few Days ago one Smith had obtained a Rule to ſhew Cauſe, why a Mandamus ſhould not be directed to the Defendants to reſtore him to the Office of Clerk of the Works of the City of London. When that Rule was moved for he made Affidavit that he was admitted into the ſaid Office to hold it for Life, with all Fees and Profits belonging to it, that he took an Oath of Office and likewiſe the Oaths to the Government upon his Admiſſion to it, that he paid the Sum of 600 l. for it, and the Nature of his Office required him to ſurvey all the Works of the City. Serjeant Urlyn and other Counſel came to ſhew Cauſe upon this Rule. They ſaid, they took it that the Rule of Law was, that no ſuch Mandamus would lie, unleſs the Office was of a publick Nature. The preſent Office, if it was to be called one, was only of a private Nature. And they ſubmitted it, that it ought to be conſidered rather a Service or Imployment, than an Office. This very Queſtion that is now before the Court, they ſaid came before them formerly, and then the Mandamus was refuſed; for which Purpoſe they cited 2 Sid. 112, and they took it to be a Caſe in Point. They ſaid there were many other Caſes in the Books depending upon the like Reaſon with this, and for that Purpoſe they cited Mod. Caſes 18, 823. Salk. 232. Sid. 40, 169, 443. Sti. 437. Ven. 143. 1 Lev. 75, 153. Comb. 41, 127, 133, 347. Mr. Fazakerly and Mr. Strange argued on the other Side. They ſaid the Caſe in 2 Sid. 112. is not ſtated with ſuch ſtrong Circumſtances as the preſent Caſe is before the Court. They obſerved that the Caſe in Nat. Brev. 218. was fully with them, and of late Years Mandamuſſes have been granted in many more Inſtances than they were formerly. Judge Lee ſaid ſince Lord Holt's Time Mandamuſſes have been granted for Sextons and Clerks of private Companies; accordingly the Rule was made abſolute.

Griffin *and* Alcock.

Vide antea 337.

THE Chief Juſtice now delivered the Reſolution of the Court upon this Caſe. He ſaid the State of the Fact was in this Manner. A Latitat iſſued out of this Court directed to the Chamberlain of Cheſter or his Deputy, requiring them to

iſſue out a Precept to the Sheriff commanding him to take the Defendant, and to return what he does upon this Writ, to the Exchequer at Cheſter, that the Party may appear at the Day of the Return. The Plaintiff, without going to the Chamberlain or his Deputy, ſerves a Copy of this Proceſs by his Attorney or Agent, upon the Defendant. And upon Oath being made of ſuch Service, and the Defendant not appearing to it a common Appearance is filed for him. Whether this was regular, or not, was the Queſtion. Two Objections, he obſerved had been made to it; Firſt, that this was a Service of the Copy of the Latitat, whereas it ſhould have been a Service of the Copy of the Writ iſſued out by the Chamberlain. The ſecond that this Service ſhould have been made by ſome Officer of the County Palatine, and not by the Plaintiff's Attorney or Agent. This Queſtion he obſerved, depends upon the Conſtruction of two Acts of Parliament, the one made 12 Geo. 1. 29, the other 5 Geo. 2. 27. If this Queſtion had reſted even upon the firſt Act of Parliament, they ſhould have been of Opinion that a Service of a Copy of the Proceſs iſſued out of this Court, would have been ſufficient. That which cauſed the Doubt was the Caſe of Beakon and Smith, Mich. 1 Geo. 2. in the Common Pleas; that was a Proceſs iſſuing to the head Officer of the County Palatine of Durham, which the Defendant was ſerved with a Copy of. The Motion was made to ſtay the Proceedings there, and it is ſaid the Court was of Opinion that the Defendant ſhould have been ſerved with a Copy of the ſame Proceſs, by which he ſhould have been arreſted. As this Caſe was ſaid to have been determined upon Debate, this Court would have conformed with their Reſolution, for the Sake of Uniformity in Practice, had this Caſe happened before the Statute of 5 Geo. 2. but they thought that Statute had put the Doubt beyond all Queſtion. He obſerved that this Statute was a Law explanatory of the firſt; and therefore was to be conſtrued according to the Words of it, without any other Explanation. By the firſt Section of this Statute, the Affidavit of the Service of the Proceſs, which the Defendant is to be ſerved with a Copy of, is to be made before any Judge or Commiſſioner of the Court, out of which ſuch Proceſs ſhall iſſue, authorized to take Affidavits in ſuch Courts. Now the Judge or Commiſſioner, before whom the Affidavit of ſuch Proceſs is to be filed, cannot be ſaid to be the Chamberlain or Barons of the Exchequer in Cheſter; for if it was, the Affidavit could not be read in this Court, and conſequently the Effect of the Act will be evaded, if the Affidavit of the Service of this Proceſs was to be made in that Court. Then the Copy of the Proceſs, which is to be ſerved, muſt be a Copy of the Proceſs of this Court; for the Words of the Act are ſuch Proceſs, and the ſame Proceſs is deſcribed throughout the whole of it. This he ſaid was as much as was neceſſary to be obſerved in Anſwer to the firſt Objection. With Regard to the ſecond, he ſaid the doubt ariſes upon the third Section of the ſecond of theſe Acts. The Difficulty ariſeth, what Senſe the Court are to put upon the Words particular Franchiſes. Counties Palatine, he ſaid, might poſſibly Sometimes be meant by thoſe Words in the larger

larger Senſe of them; but undoubtedly they are conſidered as ſuperior Courts of the Kingdom; for this Purpoſe he mentioned 1 Saund. 73. and in the preſent Caſe he thought they were only intended to mean particular Liberties in Counties, and to ſave the Privileges in thoſe Franchiſes accordingly, he ſaid for theſe Reaſons the Court were of Opinion that the Rule ought to be diſcharged.

The King *and* Bartlet.

Vide antea 328.

MR. Fazakerly and Mr. Noel came to ſhew Cauſe, why an Order of Seſſions ſhould not be quaſhed. This was an Order upon an Appeal from a Diſburſement of Overſeers, and an Allowance thereof. This Order recited that this Matter came before them at the laſt general Quarter-Seſſions; and the Order was upon four Perſons, that were Overſeers of the Pariſh of Brackly St. Peters, in the Year 1730, to pay the Sum of 11 l. 5 d. out of the Diſburſements of the Stock in that Year, to other four Perſons that were Overſeers in the Year 1732, which was done the ſame Year in which this Order was made. Mr. Abney had taken ſeveral Exceptions to this Order; Firſt, that this was an Order made upon an Appeal lodged at a former Seſſions, and it does not appear when that former Seſſions was held, which it ought to have done, in as much as ſuch Appeal could only be lodged at the Quarter-Seſſions; beſides, it was not ſet forth that there was any Adjournment; ſo that this Court that made the Order does not appear to have had a Juriſdiction. Secondly, that there ought to have been an Application to two Juſtices, previous to the Appeal at the Seſſions, which does not appear to have been; becauſe this is only an Appeal from the Diſburſement, and the Allowance thereof, which Allowance might as well have been at a Town-Meeting by the Pariſhioners themſelves, as by two Juſtices; to ſupport this Exception he cited 2 Salk. 471. And Thirdly, that this is an Order upon four Perſons to pay to four Perſons; whereas if the Money was paid either by one of them, or to one of them, this Payment would have been equally good. Fourthly, that the Overſeers in the Year 1730, are ordered to pay to the Overſeers of the Year 1732; whereas the Payment ſhould have been to the next ſucceeding Overſeers in the Year 1731. Laſtly, that this Stock might have been raiſed by private Charities; it doth not appear to have been raiſed by a publick Tax on the Pariſh; and if ſo, the Juſtices of the Seſſions have no Juriſdiction. As to the firſt of theſe Exceptions, the Chief Juſtice ſaid he thought the Order was good enough; for this Order recites the former one to have been made at the general Quarter-Seſſions; as to the Matter of Adjournment, he did not think that the Seſſions were bound to enter their Adjournment regularly, as this Court does. As to the third, he did agree that the Payment made either by one of the Overſeers, or to one of them, would have been ſufficient; but yet he thought the Form of the Order good in this Reſpect. The fourth Objection he ſaid was of no Force; for if

the Order had been, that the Payment ſhould have been made to the Overſeers of the Year 1731, who were then out of Office, it would have been bad. With Regard to the laſt Exception, he ſaid that the Court would intend that the Stock was raiſed by a publick Tax of the Pariſh. As to the ſecond Objection, he inclined to think it was a good one. Judge Page and Judge Probyn agreed with the Chief Juſtice, as to the whole. Judge Lee agreed with him in all but the ſecond Point; but he inclined to think that the Order was good even as to that; and what influenced his Opinion, was a Caſe cited by Mr. Noel out of Salk. 533. Accordingly this Matter ſtood over. Vide poſtea.

Coleby *and* Jenkins.

How far a Prohibition will lie to the Admiralty Court, or not, in a Suit relating to Mariners Wages.

MR. Agar had obtained a Rule for ſhewing Cauſe, why a Prohibition ſhould not be granted to the Admiralty Court in a Suit for Mariners Wages. The Suggeſtion which this Rule was obtained upon was, that this Contract was made between the Mariners and the Proprietor, and not the Maſter of the Ship; that it was a ſpecial Contract for 3 l. for bringing the Ship from Briſtol to London, and likewiſe for 3 l. per Month in going other Voyages with the Ship, after they came to London. Mr. Agar had ſubmitted it, that this was not in the common Form of Contracts for Mariners Wages, and therefore the Prohibition ought to go upon the Authority of the Caſe in Salk. 31. The Counſel on the other Side came now to ſhew Cauſe, and ſaid that the Matter of this Suggeſtion was not pleaded below. Upon that the Rule was diſcharged.

Anonymus.

How far the Court will quaſh an Appointment of Overſeers.

MR. Forteſcue came to ſhew Cauſe, why an Appointment of Overſeers ſhould not be quaſhed upon an Exception taken to it, that they did not appear to be ſubſtantial Houſekeepers in the Pariſh. And the Caſe of Serle and Hantington, Mich. 13 Geo. 1. was cited in Support of the Exception. He obſerved that they were ſet forth in the Appointment, to be Gentlemen living within the Pariſh, and to be appointed according to the Form of the Statute. The Court thought neither of theſe to be ſufficient; accordingly the Rule was made abſolute.

Law *and* Law.

Vide antea 390.

MR. Filmer came now to ſhew Cauſe, and ſaid that this was a Declaration ſo long ago as this Term Twelvemonth, that the Defendant had ſtaid the Plaintiff's Proceedings by an Injunction Bill during all that Time; and therefore he came with a very bad Grace to aſk a Favour of the Court. But he ſaid he did apprehend that it was expreſly againſt the Rules of the Court to give the Defendant Leave to withdraw his Plea, but upon pleading the general Iſſue; for this Purpoſe he mentioned a Caſe which was

Mich. 8 Geo. 1. That was a general Demurrer to the Declaration in an Action of Covenant. Serjeant Glide moved there to withdraw the Demurrer; the Court refused it; because they said a general Demurrer was the same as the general Issue. And according to his Notes of the Case they said farther, that if this had been a special Plea, and the Defendant had moved to withdraw it, he must have pleaded the general Issue. Mr. Fazakerly said on the other Side, that he hoped the Rule should be made absolute; he did agree that in an Action of Assumpsit the whole Merits of a Defendant's Case may come under the Plea of Non Assumpsit; and therefore in such Case, when he moves to withdraw his Plea, it may be reasonable to require him to plead Non Assumpsit, which is the general Issue. But in Actions of Debt upon Bond, a great Part of the Merits of a Defendant's Case cannot be given in Evidence on Non est factum, which is the general Issue. It is as much the Merits of such Defendant's Case to shew a Performance of the Condition, an Excuse for not performing it, or to plead other Matter in Bar, as it is to plead Non est factum. And therefore in such Cases, he submitted it, it might be reasonable for the Court to allow a greater Latitude. He said he conceived too, that the Court had gone as far as this in other Instances; for this Purpose he repeated the Case which he mentioned before of Meard and Philips, Vide antea 3. and further mentioned the Case of Eades and Mason, Vide antea 139. He stated that Case to be a Motion to withdraw a Plea, and to plead Tender in Part, and Non Assumpsit in Part, in Lieu of it; and there the Court allowed it. The Chief Justice said he thought it would be Allowing too great a Latitude, to give Leave to the Defendant to withdraw his Plea, but upon pleading the general Issue; and he never knew such Liberty given but upon those Terms. Judge Lee said, as to the Case of Meard and Philips, the Reason for that might possibly be, because the Pleading Nil debet in Debt for a Penalty, appeared to be a meer Mistake; but here the Defendant has knowingly rested his Defence upon one Matter, and therefore he thought it would be going too far to let him put it upon another, unless upon the common Terms of the general Issue. Judge Page and Judge Probyn said that they never knew such Liberty given, but upon those Terms; accordingly the Rule was discharged.

The King *and* Ellams.

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A Few Days ago Mr. Fazakerly moved for a special Jury on the Part of the Defendant, in an Information in the Nature of a Quo Warranto, which was granted against him for exercising the Office of Alderman in the City of Chester. The Validity of his Election depended upon this Question, whether the Freemen of Chester had not a Right to vote at the Election of Alderman. For this Reason he said he took it for granted, that the Jury would not come out of the City of Chester, but out of the County Palatine, and at large. It was quite uncertain at present out of what Place it would come, because

the Information was not settled, and therefore he prayed that a Rule might be made to shew Cause, why a special Jury should not be granted in this Cause, be the Jury to come out of what Place it would. Mr. Abney came now to shew Cause upon this Rule. He said the Place which the Jury would come from in this Case would be the County Palatine of Chester. And he did conceive the Court could not direct a special Jury in such Case; there was no Pretence that they could, before the Statute of 3 G. 2. 25. That Statute directs that in all Trials at Nisi prius, a special Jury shall be granted at the Request of either Party, in such Manner as special Juries have been and are usually struck upon Trials at Bar had in the respective Courts. Before this Act, nor even at this Day, no Pretence was there, that a Trial could be at Bar of a Cause of Action arising in any County Palatine. The Design of this Act was not that there should be a special Jury at Nisi prius in any Case, but where there could be a Trial at Bar; and therefore it was manifestly out of the Intention of the Act, that there should be a special Jury in this Case. Besides he observed that general Words in a Statute shall not extend to Counties Palatine; and so it appeared, that the Understanding of the Law-makers, was that Counties Palatine was not included to any Purpose by this Act; and for that Reason the Statute of 6 Geo. 2. 35. was made to extend to them to some Purposes. But that Statute extends only to Causes there in Bank; and therefore the present Case was not within the Relief of the Statute neither. Mr. Fazakerly on the other Side said he did agree that this Case was not within the Relief of the second Statute, for the Reason that has been mentioned, but conceived it was within the Relief of the first. Before this Statute he said indeed this Court did not grant special Juries in any Trials at Nisi prius. But the Court of Common Pleas and Exchequer did. And if those Courts had a Power of doing it, he conceived that this Court might have done so likewise, though they did not think proper to use it. The Court of Exchequer granted special Juries in Trials of Nisi prius, before this Act, even in Issues tried in Counties Palatine; for this Purpose he mentioned the Case of Sir George Warburton and Melon, in that Court, Hill. 4 Ann. There was another Case of Sir Roger Mosson and Melon, a few Terms after. And Mr. Bootle observed, that he had a Case taken out of the Notes of Lord Chief Baron Ward, Trin. 1711. That was Thrustout on the Demise of Duke Hamilton against Fleetwood. There a Motion was made for a special Jury in Ejectment in an Issue to be tried in Cheshire. That Matter bore much Debate; but the Motion was at last granted; and the Chief Baron observes in his Notes, that many Precedents were laid before the Court of the like Sort. Since the Act Mr. Fazakerly said there was a special Jury granted in that Court in the Case of Bowes and Mountague, upon his Motion, in an Issue tried in the County Palatine of Durham. That Case was determined on Debate, and was Trin. 3 Geo. 2. There was afterwards the Case of Orde and Clare, Trin. 4. and the Case of Medkefe and Coke, Trin. 6. and several other Cases that have been in that Court. The Chief Justice said

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he thought it certain, that the Court might grant a Special Jury in Cauſes at Niſi prius ſince the Act, though there could be no Trial at Bar; to this Purpoſe he mentioned the Caſe of the City of London and other Places which Juries are not obliged to come out of. He obſerved likewiſe, that though Proceſs does not lie to Sheriffs in Counties Palatine, yet this Court may make Rules upon them, and may certainly puniſh them. He ſaid he could ſee no Reaſon, why the Court could not make a Rule ſince the Act upon the Sheriff of the County Palatine of Cheſter to attend with the Freeholders Books before the Maſter of the King's Bench Office in this Court, eſpecially upon the Caſes cited out of the Court of Exchequer; accordingly the Court made the Rule abſolute. Vide the next Caſe.

Anonymus.

AS ſoon as the Motion in the laſt Caſe was made Mr. Williams moved for a Rule upon the Town-Clerk of Cheſter to attend with the Charter of 37 Car. 2. at the Trial, becauſe it was not inrolled and a Copy of it would not be Evidence. Mr. Strange on the other Side ſaid, that the Proſecutor had already obtained a Rule for Inſpection of all publick Books, Papers and Records relating to this Corporation and for taking Copies of them, ſo that the preſent Rule he ſubmitted it was unneceſſary. The Court however was of another Opinion, accordingly granted the Motion.

Anonymus.

How far a ſecond Certiorari will lie, or not, in order that the Proceedings of an inferior Court may be affirmed.

MR. Strange moved to ſuperſede a Certiorari granted to the Juſtices of Shrewsbury to remove a Rate made for the Relief of the Poor in the Pariſh of St. Chad in that City. He obſerved, that there had been a former Certiorari granted in this Caſe, and a Return made to it, and filed in Mich. Term laſt, to which there had been Exceptions taken, one of which was for want of an Adjournment, and the Court made a Rule to ſhew Cauſe at that Time, why the Order of Juſtices made upon this Rate ſhould not be quaſhed. This Term, inſtead of ſhewing Cauſe upon this Rule, the other Side obtained a Rule to inlarge it; and ſince have obtained a Rule for a ſecond Certiorari in order to ſupply the Defects of the Return made to the firſt. Mr. Strange obſerved, that no Rule was better eſtabliſhed, than that Amendment of ſuch Return ſhall not be made, but in the ſame Term in which the Return is filed. And if this ſecond Certiorari ſhould be granted, that Rule concerning Amendments would be intirely evaded. Mr. Abney on the other Side ſaid, he did agree the Rule concerning Amendments to be as has been mentioned, but he obſerved on the other Hand, that no Rule was more certain than that the Court will grant a ſecond Certiorari in order to affirm the Proceeding of an inferior Juriſdiction, in Caſe the Merits of the Cauſe will

juſtify it. He ſaid they had an Affidavit from the Clerk of the Peace, that the Adjournment was in Fact made, though he omitted to ſet it forth in the Return. And he could ſee no Reaſon why a ſecond Certiorari ſhould not be granted in Affirmance of the Proceedings in a Seſſions, as well as in any other Court. And he remembered the Court had granted the like Motion in Inſtances of this Sort before. He ſaid this was done in the Caſe of the Pariſh of Paulſwalden and Hihilton in the County of Hartford, Eaſt. 13 Geo. 1. and the ſame was done in the Caſe of The King and The Inhabitants of Hetton, the Term following. He ſaid he would not affirm that the two Certiorari's were granted in another Term, but he was certain of this, that they were granted. The Chief Juſtice ſaid he did not think it material, whether they were granted in thoſe Inſtances in another Term or not; accordingly the Court refuſed to diſcharge the preſent Rule, and ſoon after Mr. Hollins moved that the Return to this ſecond Certiorari might be filed, which was done accordingly.

Burdus *and* Hoſier.

MR. Abney came now to ſhew Cauſe, and ſaid, that if this had been the ſecond Action upon the Judgment, he ſhould have agreed the Defendant would have been diſcharged upon Common Bail; but as it is only the firſt, he conceived that Special Bail was due. For this Purpoſe he mentioned the Caſe of Townſend and Maſon, 1724, where Judge Raymond refuſed to diſcharge a Defendant at his Chambers upon Common Bail under the ſame Circumſtances. The Court was of the ſame Opinion; accordingly the Rule was diſcharged. Vide antea 369.

Wells *and* Kitchenham.

MR. Strange came now to offer his Reaſons why the Amendment could not be; but believed it was too late in the Evening to go into this Matter now. The Chief Juſtice ſaid that he was not a Peer at the Time this Writ was ſued out, but Sir Philip York, Knt. and the Writ by which he was made Chief Juſtice by that Name, was inrolled in this Court. For which Reaſon he inclined to think that the Amendment of the preſent Teſte might be made by the Writ. However the Rule was inlarged. Vide antea 388.

Chance *againſt* Dod and others.

Thetford Aſſiſes. IN Ejectment for Lands, part Freehold and part Copyhold, to prove an Admiſſion to theſe Lands, Mr. Procter, as Counſel for the Plaintiff, produced in Evidence a Paper Book of the Acts of the Court, in which the Admiſſions and Surrenders of the Copyhold Eſtates were entered. He ſaid that ſuch a Book has conſtantly been allowed in Evi- What ſhall be ſaid to be good Evidence of an Admiſſion to a Copyhold Eſtate.

dence at the Aſſiſes for the Counties of Norfolk and Suffolk to prove Admiſſions and Surrenders of Copyhold Eſtates lying in theſe Counties. But Mr. Baron Carter, that tried this Cauſe, was of Opinion, that this Book was no Evidence. The Roll he ſaid ought to have been upon Parchment, and in Strictneſs ſhould have been in the Form of Rolls made up in the Courts above; but if the preſent Admiſſion had been entered in a Parchment Book he ſhould have allowed it for Evidence. He ſaid he did agree, that in a late Caſe the Chief Baron and two of the other Barons were of Opinion, that ſuch Paper-Book was good Evidence; but at that Time he declared his Opinion to the contrary, and of this Opinion he ſtill continued. Mr. Procter then produced a Copy of this Admiſſion as Evidence of it, which the Judge allowed, and ſaid it had often been ſo. Mr. Procter then went on to prove that the Party made a Surrender of theſe Lands to the Uſe of his Will, and for this Purpoſe produced a Paper-Writing teſtifying ſuch Surrender made unto the Lord of the Manor ſigned by himſelf; and to prove this Surrender taken the Plaintiff's Attorney ſwore that it was ſigned by the Hand-Writing of the Lord himſelf, which the Judge allowed to be good Evidence, though Mr. Clark ſubmitted it, that the Lord of the Manor ought to have been here to have proved it. Mr. Clark farther objected, that this Surrender ought to have been preſented at the next Court; but this the Judge thought not to be neceſſary, as it is in the Cuſtody of the Lord himſelf, and taken by him afterwards at the ſame Aſſiſes at Bury in the Caſe of Street and Roper, which was an Ejectment for Copyhold Lands. Mr. Prime objected that no Evidence could be given to prove theſe Lands to be Copyhold, but the Rolls themſelves; but the Judge was of a different Opinion. A paper Book was then produced in Evidence of an Admiſſion, which was not allowed; but a Parchment Book of the Admiſſion the Judge did allow.

Pitcher *and* Rinter.

How far the Minutes of the Proceedings of a Court ſhall not be allowed to be read in Evidence.

Thetford Aſſiſes. IN an Action for a malicious Proſecution brought againſt the Defendant for indicting a Bailiff for forcibly taking away his Goods without a legal Authority, the Plaintiff to juſtify his having Authority, produced the Minutes of a Judgment in the Court-Baron, and likewiſe a Warrant for Execution made upon it; but the Judge was of Opinion, that the Judgment ought to have been drawn up, and that the Minutes were not Evidence of it. Accordingly the Plaintiff was nonſuited; though Serjeant Urlyn ſubmitted it, that 2 Mod. 306. is contrary to the Judge's Opinion.

Archer *and* Franklin.

Thetford Assises. IN Treſpaſs for breaking the Plaintiff's Houſe and falſe Impriſonment, the Defendant pleaded that a Capias ad reſpondendum was ſued out againſt the Plaintiff, and a Warrant made out to the Defendant as Bailiff thereupon; he came to the Plaintiff's Houſe and found the Outward Door open, and upon that he entered, and came to an Inward Door of a Chamber, wherein the Plaintiff was, which inward Door was ſhut; upon which he requeſted the Plaintiff to open the Door, but on his refuſing to do ſo he broke it open and arreſted the Plaintiff by Virtue of the ſame Warrant. In Evidence to ſupport this Plea the Defendant produced this Warrant; but his Attorney owned that it was a blank one, and he filled it up; but notwithſtanding this the Judge was of Opinion that the Warrant was legal; and in the Caſe of an Indictment of Murder tried before Mr. Baron Lovel he obſerved that Judge was of the ſame Opinion. The Defendant then went on to prove the other Part of his Juſtification, but becauſe he failed in proving the Requeſt the Judge directed a Verdict to be for the Plaintiff.

How far an Officer may juſtify under a Blank Warrant.

Evererd *and* Cob.

Bury Aſſiſes. IN Trover for a Ship the Judge would not allow Evidence to be given of the Defendant's taking the Cables, Rigging or Tackle, as it was not ſpecially ſet forth in the Declaration, and in order to juſtify the Taking of the Ship the Defendant proved that ſhe was ſtranded on Part of the Manor of Southwold; Nobody was then on board her, upon which he then boarded himſelf, thereupon detained her as Bailiff to Sir Charles Bloyce who was intitled to all Wreck and Salvage in the Manor of Southwold as Lord of this Manor. The Judge thought this a Matter of two great Difficulty to be determined at Niſi prius, accordingly a Verdict was given for the Plaintiff, ſubject to his Lordſhip's Opinion.

How far the Lord of a Manor may juſtify, or not, Detaining a Ship for Salvage.

Knipe *and* Payman.

Bury Aſſizes. IN Treſpaſs againſt the Defendant, for driving a Diſtreſs of Cattle, and impounding them above three Miles from the Place from which they were taken, the Plaintiff declared upon a Statute made the 12th of November in the firſt Year of Philip and Mary. To this Declaration the Defendant pleaded Not guilty; and on Evidence, Serjeant Urlyn ſubmitted it, that the Plaintiff ought to prove that the Statute was made on the Day mentioned in the Declaration; but the Judge was of another Opinion, and ſaid, that if the Defendant objected, that the Statute was miſrecited, it was incumbent upon

When an Action is brought upon the Statute of Ph. & M. relating to Diſtreſſes, what ſhall be ſaid to be a good Declaration in ſuch Action.

upon him to ſhew that it was ſo. The Serjeant then ſaid that he was ready to ſhew by the printed Volume of the Statutes, that this Parliament was held on the 11th of November, and not on the 12th; upon which Mr. Clerk produced a Copy of this Act of Parliament from the Records of the Tower, wherein it appeared, that the Day mentioned in the Declaration was the right one; accordingly a Verdict was given for the Plaintiff.

The King *againſt* Blumfield and others.

When two Defendants are joined in one Indictment, how far one of them cannot be a good Witneſs for the other, notwithſtanding no Evidence is given againſt him.

Bury Aſſizes. IN an Indictment for a Battery, Mr. Procter ſubmitted it, that one of the Defendants ſhould be a good Witneſs for the other, in as much as no Evidence was given againſt him; but the Judge was of another Opinion, as the Grand Jury has found the Bill againſt this Defendant, as well as the other; accordingly the Judge was of Opinion that the Indictment was ſufficiently proved; upon which Mr. Lloyd ſaid that he believed Circumſtances of Aggravation would not be ſo proper to be given in Evidence here, as to be laid before the Court above by Affidavits, when they are ſetting the Fine. But the Judge ſaid theſe Circumſtances would be proper to come from his Report; accordingly theſe Circumſtances were entred into.

The King *againſt* Malet and others.

How far a Perſon ſhall be ſaid to be a ſufficient Inhabitant, or not, in order to be capable of being choſen a Member of a Corporation.

Bury Aſſizes. ON five Informations in the Nature of a Quo Warranto, againſt ſeveral Defendants, for exerciſing the Offices of Capital Burgeſſes in the Borough of Orford, there were four Iſſues joined in each of them; Firſt, that the Defendants were not Inhabitants at the Time they were choſen, which the Charter requires they ſhould be. Secondly, that Robert Duffin who preſided at their Election, was not Mayor. Thirdly, that the Defendants were not duly elected. And laſtly, that they did not take the Oaths proper on ſuch Occaſion. In Evidence on the firſt Iſſue, the Counſel for Malet, one of the Defendants proved that he was born in the Town, that he ſerved an Apprenticeſhip with his Father, and lived a Journyman with him ever ſince. On the other Side we ſubmitted it, that this was not ſufficient to make the Defendant an Inhabitant. To make him ſo, he ought to have been a Houſekeeper; and for this Purpoſe I cited 2 Inſt. 703. The Judge likewiſe declared his Opinion, that to make the Defendants Inhabitants within the Intent of the Charter, they not only ought to have been Houſe-keepers, but even to have payed Scot and Lot to the Poor; accordingly the Judge directed the Jury to find a Verdict againſt three of the Defendants, for their not being able to prove ſuch an Inhabitancy. In two other of the Informations the Defendants Counſel were able to prove ſuch an Inhabitancy; upon which they went on to prove their ſecond Iſſue, that Robert Duffin was Mayor at the Time he preſided,

and ſubmitted it, that the proving him to be ſo de facto, would be ſufficient; but the Judge was of a different Opinion, and ſaid that they muſt prove him in all Reſpects to be Mayor de jure; and for this Purpoſe directed them to ſhew that he had taken the Oaths to the Government duly, according to the Statute; but when the Defendants Counſel proceeded in the Proof of that, it appeared that the Seſſions held for the Borough wherein he took theſe Oaths, were not held at the Time limited by the Charter; accordingly a Verdict went for the King on theſe two Informations, as well as the others.

Term. Paſch.

7 Geo. II. 1734.

How far an Information ſhall be granted, or not, againſt Juſtices of Peace for making an unequal Rate.

Anonymus.

MR. Strange moved for an Information againſt the Juſtices of the Town of Shrewsbury, for making an unequal Rate for partial and corrupt Purpoſes, and the Court made a Rule to ſhew Cauſe. Vide poſtea.

The King *and* The Juſtices of the Peace of the County of Surry.

How far a Mandamus will lie to require an Officer to do an Act which a Statute directs.

MR. Strange came to ſhew Cauſe, why a Rule ſhould not be made abſolute for granting a Mandamus to the Juſtices of the County of Surry requiring them to direct the Clerk of the Peace to aſſign over the Effects of Anne Robinſon to Richard Metcalf, in Purſuance of the Statute of 2 Geo. 2. 22. He ſaid, he ſhould not diſpute but this Court may grant a Mandamus to an inferior Juriſdiction to put in Execution the Powers they are intruſted with; and therefore if the preſent Rule had been prayed for a Mandamus to the Juſtices, requiring them to order the Clerk of the Peace to make an Aſſignment of the Effects of Anne Robinſon to one of her Creditors generally in Purſuance of the Act, he ſhould not have oppoſed its being made abſolute; but a ſpecial Mandamus, as this is, to make an Aſſignment to one particular Creditor by Name, he believed was never granted. Mr. Wynn argued on the other Side, and ſaid that the Court has granted Mandamuſſes to receive the Appeal of a particular Perſon, and in the late Caſe of Lord Suffolk they did grant a Mandamus for Letters of Adminiſtration to be made out to him by Name, and for the like Purpoſe he mentioned Ven. 184. he obſerved likewiſe in the preſent Caſe, that the Aſſignment could not properly be made to any one but Richard Metcalf, for Anne Robinſon had but five Creditors beſides Metcalf, four of them are Priſoners as well

well as herſelf. Sir William Jolliff is the fifth, and he has had the Poſſeſſion of her Effects for a long Time together, even before her Impriſonment, ſo that he was not a proper Perſon to have the Aſſignment made to him neither. He ſaid he had the Affidavits of ſeveral Perſons, that Richard Metcalf was a Creditor, and the other Side had not one Affidavit to the contrary, though he owned they did not allow him to be ſo. The Chief Juſtice ſaid, that he thought their not Owning it was of it ſelf ſufficient to prevent a Mandamus going in this particular Manner. And as to the Caſe of Lord Suffolk, he remembered the Reaſon why that Mandamus was granted ſo, it was becauſe it was owned on both Sides, that he was the proper Perſon to whom it ought to be granted; accordingly the Court refuſed making the Rule abſolute in this Manner, but amended it and made it to be, that a Mandamus ſhould go to the Juſtices, requiring them to order the Clerk of the Peace to make an Aſſignment of the Effects of Anne Robinſon to one of her Creditors generally in Purſuance of the Statute.

Hancock *and* Duboys.

THE Defendant was ſerved with a Copy of a Proceſs by the Name of Duboys. And the Plaintiff filed an Appearance for him by that Name in Purſuance of the late Act, and ſince that ſigned Judgment againſt him for want of a Plea, whereas his Name was Davoys and not Duboys. Upon which Mr. Draper moved that the Judgment might be ſet aſide; but the Court was of another Opinion. They ſaid before this Act it was certain, that if a Defendant's Name had been miſtaken in the Proceſs, which he was ſerved with, no Advantage could have been taken of it, but by a Plea of Miſnomer. They thought this was the ſame Thing under this Statute; accordingly refuſed the Motion.

When a Perſon is ſerved with a Copy of Proceſs by a wrong Name, how far no Advantage can be taken of it but by Plea of Miſnomer.

Anonymus.

MOTION was made for a Certiorari to remove up an Aſſeſſment of a Poors Rate made originally at the Seſſions. The Counſel ſaid that he conceived that this was not like the Caſe of Utoxeter, Vide antea 198. for there the Aſſeſſment was made by two Juſtices, and if the Certiorari had been granted the Appeal of the Parties would have been taken away, accordingly a Rule was made to ſhew Cauſe. Vide poſtea.

How far an Aſſeſſment of a Poors Rate ſhall be ſaid to be good, or not.

The

The King *and* Gibſon.

When a Defendant is convicted upon an Indictment, how far he ſhall not be allowlowed to make any Motion relating to the Proceedings, unleſs he is preſent in Court.

ON Motion to ſet aſide a Verdict in an Indictment of Forgery. Mr. Strange objected that the Defendant ought to be preſent in Court; he ſaid he did agree in the Caſe of a ſpecial Verdict this is not neceſſary; becauſe there the Defendant is not found guilty; and of that Opinion the Court was in the Caſe of The King and Hays, Vol. 1. 166. but in the Caſe of a Motion to ſet aſide a Verdict, he muſt be preſent equally as in Motions in Arreſt of Judgment; becauſe a Jury hath found him guilty of the Fact. Mr. Marſh on the other Side ſubmitted it, that this Caſe was diſtinguiſhable from that of Arreſt of Judgment; but ſaid he would look into the Caſes, and move this Matter again. The next Day the Chief Juſtice ſaid that he had himſelf found two or three Caſes upon this Head, where the Court had been of Opinion, upon Debate, that the Defendant muſt be preſent in theſe Motions, as well as in thoſe in Arreſt of Judgment; for this Purpoſe he mentioned the Caſe of The King againſt Lunt and Woamwelh, Mich. 7 Will. and that of The Queen and Rickbath, Paſch. 12 Ann. both in Point; and the Court was of the ſame Opinion. Vide poſtea.

Burtlet *and* Smith.

When ſeveral Arbitrators are appointed, how far an Award may be made by ſome of them without giving Notice to the reſt.

MR. Abney came to ſhew Cauſe, why an Attachment ſhould not go againſt the Defendant, for not performing an Award made the 22d of January laſt. There were two Objections that he made to it; the firſt was, that one of the Arbitrators had no Notice given him of the Meeting, when this Award was made. The ſecond, that the Arbitrators had made their Award before upon the 19th. As to the firſt, he did agree that the Reference was made to three of the Arbitrators, or two of them, but in all ſuch Caſes every one of the Arbitrators muſt have Notice of the Meeting, which in this Caſe one of them had not. As to the ſecond, he did agree that the Award was not ſealed nor Stamped till the 22d, but was ſigned on the 19th, which makes it a compleat Award; and on the 22d, Alterations were made in it. The Counſel on the other Side ſaid, that the Arbitrators had Notice on the 19th, and then one of them declared he would not meet any more; for which Reaſon they conceived that no farther Notice was requiſite. They obſerved farther, that though there was a Paper-writing ſigned on the 19th, yet that was never delivered by the Arbitrators till after the 22d; and therefore till then they could not be ſaid to have executed their Authority. The Court were of Opinion that both the Exceptions were anſwered; accordingly the Rule was made abſolute.

Baycroft *and* Liſter.

THE Defendant had been arreſted in the Marſhalſea Court with a Writ for 8 l. and had been held to Bail for that Sum; but the Plaint was entred only for 5 l. and on Certiorari, the Officer returned that the Cauſe of Action was for no more; upon which on Mr. Agar's Motion the Court made a Rule, that the Præcipe and Bail-Bond ſhould be produced, that the Plaintiff's Attorney ſhould anſwer the Matters of the Affidavit, and that all Proceedings in the mean Time ſhould ſtay. Vide poſtea.

When a Certiorari or Habeas Corpus has iſſued in order to remove up the Proceedings of an inferior Court, how far the ſuperior Court will rectify the Proceedings below.

Harris qui tam *and* Reney.

IN Debt upon the Statute of 15 Car. 2. 8. there was no Affidavit made, that the Cauſe of Action accrued within a Year before the Commencing the Suit, which Serjeant Wright ſubmitted it ought to have been by the Statute of 21 Jac. 1. 4. and therefore he moved that the Proceedings might be ſtayed. He ſaid, in the Caſe of Hotel qui tam and Beck, this Point was not fully examined into; but went off by Conſent; and therefore he prayed a Rule to ſhew Cauſe, which the Court accordingly made. Vide poſtea.

How far that Part of the Statute of 21 Jac. 1. c. 4. which directs that the Party in certain Caſes ſhall find an Affidavit that his Cauſe of Action aroſe within a Year before the Commencing of the Suit, ſhall extend, or not, to Actions brought upon ſubſequent penal Statutes.

The Pariſh of Thatcham *and* The Pariſh of Bucklebury.

AN Order of Seſſions removed up by Certiorari being now confirmed by this Court, Mr. Emmet moved for Coſts upon the Statute of 5 Geo. 2. which the Court upon ſome Conſideration gave, though at firſt the Chief Juſtice ſomething doubted.

The Conſtruction upon that Part of the Stat. of 5 Geo. 2. which gives Coſts in Caſes of Orders made upon Appeal.

The King *and* Helſop.

MR. Filmer took three Exceptions to an Order of Baſtardy; First, that one of the Juſtices did not appear to be of the Quorum. Secondly, that it was only ſaid in the Recital that the Child was born in the Pariſh, and not in the Adjudication; to ſupport which Exception he cited the Caſe of The King and Godfrey, Trin. 12 Geo. 1. Thirdly, that the Juſtices have ordered the Defendant to give Security to the Pariſh; accordingly a Rule was made to ſhew Cauſe. Vide poſtea.

How far an Order of Baſtardy ſhall be ſaid to be good, or not, in Reſpect of the Form of it.

Anonymus.

How far in Trover the Defendant can plead but two Sorts of Pleas in Bar; namely, Not guilty, and a Releaſe.

IN Trover, the Defendant had pleaded that he made no Converſion of the Goods of the Plaintiff; and this Cauſe having come on to be tried before the Chief Juſtice, he was of Opinion that the Defendant had admitted a Property in the Plaintiff, and thereupon there was no Defence; upon which Mr. Strange now moved for a new Trial, and that the Defendant might have Liberty to plead de novo, by Reaſon that this was a meer Miſtake in the Pleading. The Chief Juſtice ſaid it has been often held that there are but two Pleas in Trover, Not guilty, and a Releaſe; and therefore the preſent Manner of pleading was owing to a Miſtake; accordingly a Rule was made to ſhew Cauſe, why a new Trial ſhould not be granted; but the Court ſaid the other Part of the Motion, with Regard to pleading de novo, muſt be made afterwards.

Rennick *and* Jones.

How far a Deed ſhall be directed only to ſtand as a Security for the Money which was bona fide advanced.

Chanc. JOHN Rennick, the Plaintiff's Brother, had an Eſtate left him of 25 l. per Annum, when he was very young and went to School with the Defendant who taught him Writing and Latin, and ſupplied him with all Neceſſaries. Afterwards the Defendant put him out an Apprentice, which coſt him 40 l. but never received any Thing for his Trouble; ſoon after the Time that he came of Age he fell ill of a Conſumption, and returned to the Defendant's Houſe as a Viſitor. While he was there, the Account was made up between the Defendant and him, and a Ballance of 160 l. found due to the Defendant, for which a Bond was given, and within a Day or two after he was perſuaded to make a Deed to the Defendant, by which he gave him all his Eſtate in Fee-ſimple; this Deed was ſaid to be made in Conſideration of 200 l. and for divers other good Conſiderations, whereas the Debt of 160 l. was the only valuable Conſideration. Upon this a Bill was brought to ſet this Deed aſide. This Cauſe was heard before the Maſter of the Rolls, and he decreed accordingly. And now upon an Appeal the Chancellor was of the ſame Opinion, and this for two Reaſons; Firſt, becauſe the Recital of the Conſideration was falſe in itſelf. Secondly, Becauſe he had reſerved no Eſtate to himſelf during his Life; and therefore ordered that the Deed ſhould ſtand for a Security only of the 160 l.

Anonymus.

MOTION was made to ſet aſide a Trial had at Huntingtoh Aſſiſes, for that the Defendant lived above forty Miles from the Place where the Trial was, and yet that there was not fourteen Days Notice given. The Chief Juſtice ſaid that ſuch Notice of Trial is only requiſite to be given where the Cauſe is tried in London or Middleſex, and the Defendant lives at forty Miles Diſtance from that Place; accordingly the Motion was refuſed.

How far it is requiſite, or not, that there ſhould be fourteen Days for Notice of Trial.

Blagrave *and* Hupkins.

IN the Declaration delivered, there wanted Pledges, for which Cauſe the Defendant demurred; and the Plaintiff demanded Oyer of the Bill, on which Pledges were entered, and then joined in Demurrer. Motion was now made, that the Paper Book might be made agreeable to the Declaration delivered; and the Motion was granted.

How far the Court will direct that Paper Book ſhould be made agreeable to the Declaration delivered.

Anonymus.

IN a Suit by Bill brought againſt the Defendant as Attorney, he pleaded that he was one of the Clerks of Mr. Ventris, and did not traverſe that he was an Attorney; but verified his Plea by Affidavit. Motion was now made to ſet this Plea aſide; Firſt, becauſe being Clerk to Mr. Ventris, and Attorney of the Court is the ſame Thing. Secondly, becauſe he did not conclude his Plea with a Traverſe. To the firſt of theſe Matters, the Chief Juſtice ſaid that a Perſon might be Clerk to Mr. Ventris, and not Attorney of the Court; to the ſecond he ſaid, that might be a Cauſe for demurring to the Plea, but not for ſetting it aſide; accordingly the Motion was refuſed.

How far the Court will not ſet aſide a Plea in Abatement.

Price *and* Ginkins.

MR. Strange moved that an Under-Sheriff might anſwer the Matters of an Affidavit for granting a Replevin upon a Diſtreſs after the five Days were expired appointed by the Stat. of Ann. 8. 14. for taking inſufficient Sureties on the Replevin, and likewiſe for ſuffering the Plaintiff's Attorney to ſit as Judge in it. But the Court thought neither of theſe Cauſes ſufficient to grant the Motion. To the firſt they ſaid, a Replevin may be granted at any Time before Sale. To the ſecond, that the taking Sureties was only for the Under-Sheriff's own Indemnity. To the third, that he ought not to anſwer criminally for the Plaintiff's Attorney acting againſt his Duty. However the Court made a Rule upon the Plaintiff's Attorney, that he ſhould anſwer the Matters of the Affidavit.

How far the Court will not direct that an Under-Sheriff ſhall anſwer the Matter of an Affidavit, notwithſtanding a Complaint made againſt him, relating to a Replevin.

Williams

Williams *and* Brown.

Vide antea THIS Matter coming on again in the Paper, the Subſtance of the Caſe appeared to be in the Manner following. Thomas Spead having two Daughters by different Venters, Mehethobel and Martha, deviſed a Moiety of his Lands to certain Truſtees and their Heirs, in Truſt for Mehethobel for Life, and after her Deceaſe To the Uſe of all and every Child and Children both Male and Female born and to be born of the Body of the ſaid *Mehethobel*, equally to be divided between them, and to the Heirs of their reſpective Bodies lawfully to be begotten, and for want of ſuch Heirs then to the Uſe of the Children of *Martha*. The other Moiety of his Lands he deviſed to the ſame Truſtees, in Truſt for the raiſing a Term for the Benefit of Martha for Life, for her ſole and ſeparate Uſe, until her Husband Thomas Golney ſhould ſettle 100 l. per Ann. for every 1000 l. he received as Fortune with her, on her for Life, the Remainder to the Children of their two Bodies begotten, with Words of croſs Remainders, or ſuch as were to the like Effect. And in caſe ſuch Settlement ſhould be ſo made, then he limited the Truſt of this Term to be to Thomas Golney for Life, the Remainder to Martha for Life, the Remainder of the Term to attend the Inheritance; and then he deviſed the Inheritance of this Moiety to the Children of Martha, exactly in the ſame Manner as he had deviſed the other Moiety to the Children of Mehethobel; and in Default of ſuch Iſſue of the Body of Martha, then he deviſed the ſame to the Children of Mehethobel; the Remainder of both Moieties to his own right Heirs. After the Death of the Teſtator, Mehethobel had two Daughters, one of which married Spead; the other that married Smith. Martha had ſeven Children, three of which died, and Thorp married one of the ſurviving Daughters. Mehethobel died, one of her Daughters that married Spead died, and upon her Death Thorp entered into a Quarter-Part of the Lands belonging to that Spead, who was the Daughter of Mehethobel. Upon which Smith brought an Ejectment againſt him, inſiſting that he was intitled to it in the Right of his Wife by Way of croſs Remainder. Serjeant Birch argued on the Part of the Plaintiff, and for Authority cited 4 Leon. 14. Ven. 224. but more particularly relied upon the Caſe in 2 Cro. 655. Serjeant Wright argued on the other Side, and for Authority cited Bro. Tit. Deviſe 38. Dyer 303. and Sir Thomas Jones 79. The Chief Juſtice ſaid, that he did own the Authorities in the Books were pretty ſtrong, that theſe croſs Remainders ſhould not be admitted, unleſs the Intent of the Teſtator plainly appears in Favour of them; and therefore he did agree, that if there were no particular Circumſtance in the preſent Deviſe, but only the common Words and for want of ſuch Iſſue, a croſs Remainder could not be allowed of. But in the preſent Caſe he thought it a Circumſtance by no Means to be diſregarded, that the Teſtator's Daughters were by two Venters, and therefore he could not be ſuppoſed to intend, that one of the Venters ſhould be any ways

benefited by the Eſtate given to the other till all the Children ariſing from that Venter were dead. To this Purpoſe he obſerved the Words of the Will were To all and every the Child and Children. He obſerved likewiſe that the Fact was that Mehethobel had but two Children, therefore though for Argument ſake it might be admitted to be a Doubt, if there were more Children, yet as there happens not to have been more, the Caſe ſeems much the ſtronger. And under this Circumſtance it ſeems to agree with what is admitted by the Judges in 2 Cro. before cited. He obſerved likewiſe, that in that Caſe there were three diſtinct Houſes ſeparately deviſed to three diſtinct Children; Difficulties therefore there might well ariſe, if the Children ſhould take by Way of croſs Remainder in what Manner they ſhould take. Here there can be no Difficulties of that Sort; for if croſs Remainders ſhould be allowed, undoubtedly the Children will take the croſs Remainders as they took the firſt Intereſt. He ſaid likewiſe if the Judges could take Notice how the Truſt would be conſtrued in this Caſe in a Court of Equity, that would much confirm this Opinion; for there undoubtedly there are to be croſs Remainders. But of that likewiſe he owned he a good deal doubted; and for this Purpoſe mentioned the Caſe of Papilion and Boyce, lately in the Court of Chancery. There Lands were deviſed to one for Life, Remainder to Truſtees to preſerve contingent Remainders, Remainder to the Heirs of his Body lawfully begotten. And likewiſe by the ſame Will a Sum of Money was deviſed to be laid out in the Purchaſe of Land to be ſettled to the ſame Uſes. In a Bill brought to have this Land and Money ſettled in ſtrict Settlement, and that the Deviſee ſhould be only Tenant for Life, with Remainder to his firſt and other Sons in Tail-Male, the Maſter of the Rolls was of Opinion that the Lands ſhould be decreed ſo, as well as the Money ſhould. Upon a Rehearing the late Chancellor was of the ſame Opinion as to the Money, but not as to the Land; and the Chief Juſtice inclined to be of the ſame Opinion with the Chancellor. However he ſaid, upon the Whole, his preſent Thoughts were, that the croſs Remainder ought to be admitted in the preſent Caſe; but for the Difficulty the Matter ſtood over. Vide poſtea.

The King *againſt* Tyrer and others.

How far the Court will not give Leave that the Party may withdraw his Demurrer.

THE Defendants had demurred to an Information in the Nature of a Quo Warranto, and now Mr. Strange moved that they might withdraw it, being willing that the Proſecutor ſhould ſign his Judgment. But the Court ſaid this could not be done without Conſent; accordingly refuſed the Motion.

The King *and* Gibſon.

Vide antea 412.

SINCE this Matter came on before, the Defendant had been committed by the Court, and now upon its coming on again it was not thought neceſſary that he ſhould be brought up by the Marſhal, for his being in Cuſtody was ſaid to be ſufficient; though this is otherwiſe in Capital Offences, for there the Priſoner muſt always be at the Bar. Now Motion was made for a new Trial upon the following Exception. The Indictment charged the Defendant with forging a Note, purporting to be a Note under the Hand of Lady Margaret Mecartney, whereby ſhe acknowledged herſelf to be indebted to the Defendant for divers Sums of Money, which ſhe had borrowed and received of him, for other Sums which he had paid on her Account, and likewiſe for Money paid by him for Goods to her Uſe, which Sums amounted in the Whole to 221 l. 12 s. and then the Indictment ſet forth the Note in hæc verba. But the Defendant's Counſel inſiſted that the Purport of the Note was not duly ſet forth; for by the Purport of it the Goods that are mentioned are ſaid to have been bought of others by the Defendant for the Uſe of the Lady; but in the Note itſelf they are ſaid to be delivered by the Defendant to the Lady, and that might either be by the Defendant's Selling of thoſe Goods or by his Buying them for her. But the Court declared their Opinion to be, that this Variance was not made out; becauſe it does not appear by the Note but the Goods delivered might be bought for her by the Defendant. But even ſuppoſing it to be a Variance, the Chief Juſtice, Judge Page and Judge Probyn, ſeverally declared their Opinions, that it would ſignify nothing; for as the Note is ſet forth in hæc verba the declaring the Purport of it is only to be conſidered the Senſe which the Grand Jury had of it; accordingly for theſe Reaſons the Motion was refuſed.

Bridgman *and* Skinner.

When a Defendant pleads that the Plaintiff ſtruck him firſt, how far he ſhall not be allowed to give in Evidence a very violent Battery by way of Juſtification under that Plea.

At the Sittings at Guild-Hall.

IN an Action of Aſſault and Battery, the Defendant pleaded De ſon Aſſault; and now upon Evidence the Fact appeared to be, that upon ſome few Words ariſing between the Plaintiff and Defendant about a Fork which the Plaintiff had in his Hand, the Defendant endeavoured to take it from him, upon which the Plaintiff gave him a ſlight Blow or two; and upon that the Defendant ſtruck the Plaintiff ſo violent a Blow over the Eye, that the Cure of it coſt the Plaintiff two Guineas. Upon this Evidence the Chief Juſtice declared to the Jury, that the Defendant's Endeavouring to take the Fork from the Plaintiff, was an Aſſault; and therefore for that Reaſon they ought to find a Verdict for the Plaintiff; but even ſuppoſing this Circumſtance had been out of the Caſe; yet ſtill he ſaid, the Plaintiff's giving the Defendant a ſlight Blow could not juſtify the Defendant's returning

it in ſo violent Manner. Thereupon on both Accounts he thought the Jury ought to find a Verdict for the Plaintiff, which they accordingly did; however they gave him but 12 d. Damages; becauſe they thought him to blame as well as the Defendant.

Bycroft *and* Lyſter.

MR. Benny coming now to ſhew Cauſe, it appeared, that the Intention of the Parties was, that the Suit below ſhould be but for 5 l. And that the Writ's being for 8 l. was owing to a Miſtake of the Officer; accordingly the Return of the Statute of Jac. 1. was allowed; but becauſe the bringing this Habeas Corpus was in ſome Meaſure owing to the Plaintiff's Attorney, he was obliged to pay the Coſts of it; and upon thoſe Terms the Rule was diſcharged. Vide antea 413.

Day *and* Seirl.

ON Rule to ſhew Cauſe why a Prohibition ſhould not go to the Admiralty Court, Mr. Marſh ſaid, that the Suggeſtions upon which the Rule was obtained were of two Sorts; Firſt, that this was a ſpecial Agreement between the Mariners and Maſter of a Ship containing ſpecial Covenants; ſecondly, that this Agreement was in Writing under Hand and Seal. In Anſwer to the firſt of theſe Matters he ſaid, that theſe Covenants were only of the ſame Import with the Statute of 2 Geo. 2. 36. ſo the Party has covenanted that he will not do that, which that Statute ſays he ſhall not do. In Anſwer to the ſecond, he ſaid, the ſame Statute requires that the Contract between the Mariners and Maſters ſhall be in Writing; therefore ſuch a Circumſtance as there being a Seal to it, he hoped would make no Difference. Beſides he ſaid, that even before this Act, Contracts being under Hand and Seal, he conceived, was no Cauſe of a Prohibition. The Caſe in Salk. 31. is the only one on that Side of the Queſtion, and in 3 Lev. 60. there are two Caſes to the contrary. Mr. Draper argued on the other Side, and ſaid that he did agree, that ſome of the Covenants were in Purſuance of the new Statute; but others of them are againſt it; particularly he ſaid that the Mariners have Covenanted, that they will not deſert their Maſter's Service to go into that of the King's, which the new Statute gives them a Power of doing. And as to the Caſes cited out of Levintz, they appear to have related to Charter-Parties, which are Contracts between the Maſter and the Owners, and therefore not applicable to the preſent Caſe. The Court was of the ſame Opinion in both Points; accordingly the Rule was made abſolute.

How far a Prohibition ſhall go, or not, to the Admiralty Court, in a Suit relating to Mariners Wages.

The

The King *and* Betſworth.

How far a Mandamus will not lie to the Eccleſiaſtical Court, in order to require them to grant Letters of Adminiſtration.

A Mandamus having been granted to the Defendant, requiring him to make out Letters of Adminſtration, Mr. Taylor moved, that it might be ſuperſeded upon an Affidavit that there was a Suit now depending concerning the Probate of the Will. He ſaid he hoped the Court would not expect a Return of this Matter; and for this Purpoſe he cited 5 Mod. 374. The Chief Juſtice ſaid that it appeared by the Affidavit, that the Suit was commenced ſince the granting the Mandamus, and therefore it could hardly be a Reaſon for ſuperſeding it; however, a Rule was made to ſhew Cauſe. A few Days after, this Matter came on again, and then Mr. Strange conſented that the Writ ſhould be made abſolute.

Harris qui tam *and* Rene.

Vide antea 413.

Mr. Kettleby came now to ſhew Cauſe, and relied upon the Caſes in Salk. 372, 373. as Authorities for him in Point. Serjeant Wright argued on the other Side, and ſaid that he conceived the Reaſon of the Caſe was plainly with him; and as to the Authorities cited out of Salk. he ſaid the firſt of them was likewiſe reported in Carth. 495. and there no ſuch Reſolution was mentioned; and with Regard to the ſecond Caſe he ſaid the Reporter himſelf ſtates it, that Lord Chief Juſtice Holt was of a different Opinion. The Chief Juſtice ſaid that the firſt Section of the Statute of Jac. is plainly confined to Offences then in Being; and the third Section, which the preſent Caſe depends upon, only relates to the ſame Offences; for which Reaſon he thought that in Reaſon the preſent Caſe was out of that Statute; and the Caſe in Salk. ſeemed to him to be Authorities in Point. Judge Page ſaid that he was of Counſel in the firſt of thoſe Caſes reported in Salk. and he remembred Lord Chief Juſtice Holt delivered the Opinion of the Judges, as is there mentioned; and Judge Lee ſaid that he had a Manuſcript Note taken at that Time, which directly confirms the Caſe as ſtated in Salk. Accordingly the Rule diſcharged.

The Pariſh of Hever *and* The Pariſh of Sundridge.

How far a Perſon ſhall gain a Settlement by being in Poſſeſſion of a Leaſehold Eſtate.

In an Order of Seſſions, confirming an Order of two Juſtices, the Fact was ſpecially ſtated in the Manner following; Thomas Gates, the Father of the Perſon removed, had ſome Years ago a Leaſe of a Tenement for ninety-nine Years made to him, at the Rent of 5 s. per Annum, which was ſtated to be the full Value of it, for any Thing that appeared to the contrary. Gates made his Will and deviſed this Tenement to his Son, upon Condition that he paid to his Mother 20 l. if ſhe had Occaſion for it; his Mother died ſoon after, ſo the Money was never paid her. Upon this State of the Caſe, the Juſtices

adjudged that there was no Settlement in the Son by this Term. Mr. Strange moved that this Order might be enlarged. He ſaid in the Caſe of Worſly and Gaundborough, Trin. 4 Geo. 1. it was held that ſuch a Term would gain a Settlement, as a Copyhold Eſtate. Accordingly a Rule was made to ſhew Cauſe; but afterwards the Court conceiving ſome Doubt in this Matter, the Rule was enlarged. Vide poſtea.

The King *and* Helſop.

MR. Strange came now to ſhew Cauſe; and as to the firſt Exception he ſaid, that this was an Appeal to the Juſtices of the Borough of Richmond, from an Order made by two Juſtices living in a Pariſh within that Borough; and in ſuch Caſe he ſubmitted it, it was neceſſary that the Juſtices making the Order ſhould appear to be of the Quorum; and for this Purpoſe he relied upon the Words of the Statute of Car. 1. 4. (15.) which give the Juſtices of particular Diſtricts the ſame Power as Juſtices of the County at large, without requiring them to be of the Quorum. To the ſecond of the Exceptions he did agree, that if there was no Adjudication that the Child was born in the Borough of Richmond, the Order would have been bad; but he ſubmitted it there was one. For the Order ſets forth, Whereas *Mary Dodſworth* was delivered of a Female Baſtard Child in the Borough of *Richmond*, which is now living and likely to become chargeable. So that this was not a Recital of a Complaint that the Child was born there, but of the Fact that ſhe actually was ſo; and therefore amounted to an Adjudication. To the laſt he did agree, that the Juſtices had no Power to require the Defendant to find Sureties; and therefore ſo much of the Order as related to that muſt be quaſhed; but the other Part would be good notwithſtanding. The Court was of Opinion the firſt Exception was not anſwered, and the Chief Juſtice ſaid that as the Clauſe of the Statute of Car. 1. has given Juſtices in particular Liberties the ſame Power of determining theſe Matters, as Juſtices in the County at large have by the Statute of Eliz. the Statute of Charles muſt be conſtrued to have given it them in the ſame Manner; accordingly upon this Exception the Order was quaſhed; and then the Court bound the Defendant over to appear before the Juſtices of the Borough of Richmond, before whom the Appeal was, taking his own Recognizance for that Purpoſe. Vide antea

Wainwright and Church *againſt* Bradſhaw.

When a Suit is inſtituted in the Eccleſiaſtical Court, relating to Church-wardens Accounts, how far a Prohibition is proper to be granted.

ON Rule to ſhew Cauſe, why a Prohibition ſhould not go to the Court of Litchfield, Mr. Abney ſaid this was a Suit that was inſtituted below, in Order to compel the Defendants, who are Church-wardens, to bring in their Accounts before the Pariſhioners. To this the Defendants pleaded, that there was a Pariſh Meeting, and that they delivered in there their Accounts of Receipts, Expences and Diſburſements, according to the antient

antient Uſage and Cuſtom of the Pariſh, and that the ſaid Account was examined and allowed by the Miniſter and a great Majority of the Inhabitants and Pariſhioners there preſent, according to Law, and that they ſubſcribed their Names thereto. Mr. Abney ſaid that by the eighty-ninth Canon in 1603, the Eccleſiaſtical Court has a Juriſdiction of compelling Churchwardens to bring in their Accounts before the Miniſter and Pariſhioners, and no other Perſons have a Power of Allowing thoſe Accounts but themſelves. However, in the preſent Caſe, the Churchwardens have pleaded, that their Accounts were allowed by the Inhabitants at Large, as well as the Pariſhioners, and the Inhabitants at Large have nothing to do in this Matter. Mr. Strange and Mr. Denniſon argued on the other Side, and ſaid it was certain the Eccleſiaſtical Court could do no more than compel the Church-wardens to bring in their Account before the Veſtry, and ſo this Point was determined, on Debate in the Caſe of Hutchins, Church-warden of Hammerſmith, againſt Robinſon and Cary, Mich. 1 Geo. 2. and in that of Hortrey and Caudrick, Eaſter Term laſt, both which Caſes were in the Court of Exchequer. And therefore the ſingle Queſtion muſt neceſſarily depend upon the Defendant's Plea; and as to that they thought it might well be underſtood that no other Inhabitants were meant, but thoſe that were Pariſhioners. The Court declared their Opinions to be the ſame; accordingly the Rule was made abſolute.

Hollowday *and* Pit.

To what Time Privilege of Parliament ſhall be ſaid to extend.

THE Defendant being a Member of the laſt Parliament, and taken in Execution by the Sheriff of Surrey, within two Days after its being diſſolved, Serjeant Darnel ſaid that the Privilege of thoſe Members laſts forty Days after the End of the Parliament; for which Purpoſe he cited 2 Lev. 72. and thereupon prayed that he might be diſcharged out of Cuſtody; accordingly a Rule was made to ſhew Cauſe. Vide poſtea.

Harris *and* Burley.

When a Writ is brought quod coram vobis, how far the Court will give Leave to take out Execution.

ON Motion for Leave to take out Execution, notwithſtanding a Writ of Error Quod coram vobis; the Counſel ſaid that Coverture was now aſſigned for Error, which was tried in the Original Action in the Palace Court, and found to be falſe; and they cited the Caſe of Han and Buſhel; accordingly a Rule was made to ſhew Cauſe. Vide poſtea.

Reynolds *againſt* Hyde and others.

What Share in a perſonal Eſtate ſhall be ſaid to be bequeathed by a Will.

Canc. UPON an Appeal before Lord Chancellor, the Queſtion depended upon the Conſtruction of a Will. Humphrey Hyde had three Sons and two Daughters, and deviſed three Parts of his perſonal Eſtate amongſt his three Sons equally;

the fourth Part of it he deviſed to his two Sons likewiſe, to laid out by the Approbation of his two Daughters, Elizabeth, who married King, and Margaret, who married Reynolds the Plaintiff; and after the Money ſhould be ſo laid out he deviſed the Intereſt of it to his two Daughters reſpectively for their Lives, and afterwards to their and either of their Child or Children, and for want of ſuch Children, to his three Sons, equally to be divided between them. His Daughter King died without Iſſue; his Daughter Margaret died leaving one Son behind her; which Son conveyed all his Right under the Will to his Father the Plaintiff; and what Share the Plaintiff was intitled to was the Queſtion before the Court. The Maſter of the Rolls had been of Opinion that he was only intitled to an eighth Part of the Perſonal Eſtate, namely, to ſuch a Share of it only, as his Wife was intitled to at the Time of her Death. The Chancellor was now of a different Opinion; he did agree, that Elizabeth and Margaret were only Tenants in common, by Reaſon of the Word Reſpectively; but yet he thought that the whole Share of the two Daughters belonged to any of the Child or Children, which either of the Daugters ſhould have, by Reaſon of the expreſs Words of the Will for that Purpoſe. Accordingly decreed a fourth Part of the Teſtator's perſonal Eſtate to the Plaintiff.

Hemmet *and* Hughes.

Canc. HUGHES deviſed an Eſtate to Truſtees for the Payment of 30 l. yearly to a Parſon who ſhould preach twice on a Sunday, and for the Payment of 10 l. yearly to a Schoolmaſter, who ſhould Teach ten poor Children to read and write, and appointed his Brother to be Parſon and Schoolmaſter for his Life. Upon a Bill brought for Directions of the Court concerning this Charity, and upon its appearing on the Maſter's Report, that the Brother who was ſo appointed had preached but once on every Sunday, and that he had got another to teach the School for him, without ever teaching it himſelf, the Maſter of the Rolls had decreed, that Half of his Salary as Parſon ſhould be deducted, for his having performed but Half his Service, and that as to his Imployment of Schoolmaſter, he ſhould be deprived of it for his having not ſerved it himſelf. This Cauſe coming now to be re-heard upon an Appeal before the Chancellor, he confirmed that Part of the Decree, which related to the Deduction of Part of the Salary; but upon the Party's promiſing for the future to teach the School himſelf diſpenſed with the Forfeiture at preſent; however, gave the other Side Liberty to apply to the Court again in Caſe of his not performing his Promiſe.

How far the Court will direct that Part of a Parſon's Salary ſhall be deducted.

How far the Court will direct that a Perſon ſhall be deprived of an Office by Reaſon of his not attending it.

The

The King *againſt* Archer and others.

How far the Juſtices of Peace belonging to a Corporation ſhall be ſaid to have a Juriſdiction, or not, excluſive of the Juſtices of the County at large.

ON Rule to ſhew Cauſe why an Information in the Nature of a Quo Warranto ſhould not be granted againſt the Defendants, for holding and adjourning a Seſſions in the Borough of Warwick, Mr. Abney ſaid that the Foundation, upon which the former Rule was maintained, was, that only the Charter-Juſtices have a Power of acting in the Borough of Warwick, and not the Juſtices for the County at large. But he conceived that the Juſtices at large have ſuch Juriſdiction equally with thoſe of the Borough. He did agree that this Town was incorporated in the Year 1693, and by that Charter the Town-Juſtices are appointed; but there is no excluſive Clauſe in that Charter which takes away the Juriſdiction of the Juſtices at large. And therefore by the Authority of the Caſe of St. Albans in the Time of Henry the Seventh, the Juſtices at large may ſtill act within this Borough, as well as they could before. But their Caſe was much ſtronger; for ſince this Charter, a Statute was made in 6 Will. 3. which by expreſs Words gives them a Power of acting as Juſtices, and holding Seſſions within the Borough equally with the Juſtices appointed by the Charter. This was a Statute that was made ſoon after a Fire that happened in Warwick, to encourage the Gentlemen of the County to come and reſide in it. He did agree, that it was a private Statute; but they had a Copy of it printed by the King's Printer, which would be good Evidence even at Niſi prius; and the Court of Common Pleas was of that Opinion a Term or two ago, in a Caſe that came before them. But ſuppoſing this Point ſhould be againſt them, he ſaid the Fact which the Defendants did, was not ſufficient to ſhew that they acted as Juſtices. He did agree that there was a Seſſions for the Borough held, at which the Defendants were preſent, as well as the Charter-Juſtices. A Queſtion came before them concerning a Rate, which they were of Opinion ought to be adjourned. A Doubt aroſe, whether it ſhould be adjourned to the 21ſt of February, or the 15th of April following. The Majority even of the Charter-Juſtices were of Opinion that it ought to be adjourned only to the 21ſt of February. However they roſe up in ſome Heat, the Books of the Court were carried away on a ſuddain; and the Defendants only gave Directions to one Man to enter a Minute of the Adjournment, and to another to make an Adjournment in Purſuance of it; and even then Brainsford the firſt of the Senior Aldermen, and who was of the Quorum, was preſent. And laſtly, he concluded, that ſuppoſing all this ſhould be againſt them, the preſent Application was not proper. He ſaid if the Court ſhould be of Opinion, that the Charter-Juſtices had a Juriſdiction excluſive of the Juſtices at large, the Corporation was intereſted in this Matter. The Corporation therefore might maintain an Action againſt the Defendants, for intruding into their Franchiſes; and that was a much more proper Remedy, than this which has been taken. Mr. Strange argued on the other Side and ſaid, as to the Conſtruction

ſtruction of the Charter, he conceived that the Juſtices at large were excluded by it. The Charter appoints that the preſent Mayor, the preceding Mayor, the Recorder, the three ſenior Aldermen, and certain others of the Aldermen ſhall be Juſtices within the Borough for the Time being, of which the Mayor, and the Recorder, and one of the three Senior Aldermen ſhall be one. Theſe Affirmative Words in the Charter imply a Negative, that no other ſhall be Juſtices; and therefore was it not for the Statute there could be no Pretence for other Juſtices joining with them in holding a Seſſions. The Streſs of the Argument therefore that has been made, ariſes from that Statute. And he ſubmitted it there could be no Colour for ſaying, that the Juſtices at large could hold a Seſſions, without the Preſence of one of the Juſtices appointed by the Charter to be of the Quorum; and little Reaſon was there to maintain, that a Seſſions could be held without the Preſence of another Charter-Juſtice, as well as of him that is of the Quorum. If ſo, there could be no Pretence to ſay that that was a legal Seſſions, where the preſent Act was done; for it is agreed on all hands, that no other Charter-Juſtice was then preſent, but one that was of the Quorum. The Queſtion therefore will reſort to this, whether what they did was a judicial Act; and upon the Fact as ſtated on the other Side, he ſubmitted it clearly to be ſo. And with Regard to the laſt Objection, he ſaid there was no Occaſion to conſider whether the Corporation could maintain an Action or not; if what he had ſaid before was true, that the Defendants had uſurped a Franchiſe which did not belong to them, there could be no Sort of Doubt but the King might call them to an Account for it. The Chief Juſtice ſaid, that where there are no excluſive Words in a Charter, the Juſtices at large may act within the Borough, but cannot act as Juſtices for the Borough. They cannot therefore hold a Seſſions for Matters ariſing in it; for which Reaſon, if the preſent Queſtion had depended ſingly upon the Conſtruction of the Charter, without the Aſſiſtance of the Statute, he ſhould have had no Sort of Doubt but an Information would lie for the Juſtices at large holding a Seſſions within it. The great Queſtion therefore depends upon the Conſtruction of that Statute. And as to that he did indeed think that the Preſence of one of the Charter-Juſtices, appointed to be of the Quorum, was ſtill neceſſary to conſtitute a Seſſions; but yet his Opinion was, that one of the Juſtices at large, together with ſuch Quorum Juſtice, might well make one. He thought therefore, that ſuppoſing it ſhould be admitted, that what the Defendants did, together with that Quorum Juſtice, did amount to a judicial Act; yet ſtill the Court ought to diſcharge the Rule. But his Opinion was, that in Reality it was no ſuch Act; for the Act of the Court was done before, when the Majority voted for adjourning it till the 23d of February, and the ordering a Minute of it to be entred, was what any Stranger might have done; and the actual Adjournment was only in Conſequence of it. As to the Remedy that had been taken, he owned it would have been a proper one, provided a Caſe has been laid before the Court, ſuitable to require it. But as he was fully perſuaded that this was

not ſuch a one, and as the Corporation may take the other Remedy that has been mentioned, he was of Opinion the Rule ought to be diſcharged. The reſt of the Judges concurred in the ſame Opinion; and the Rule was diſcharged accordingly.

Anonymus.

How far a Mandamus will lie to make a Rate, or not.

MR. Forteſcue moved for a Mandamus to be directed to the Governors of the Workhouſe of Plymouth, requiring them to make a Rate in Purſuance of the Statute of 6 Anne, by which they were Incorporated. He did agree, that Motions to make an equal Rate the Court has ſometimes refuſed, and by the preſent Statute where the Rate is unequal, he did agree an Appeal is given. But in the preſent Caſe the Complaint is not that any Perſons are unequally rated, but that ſome Perſons are rated who ought not to have been rated at all. The Court unanimouſly agreed, that if a Diſtreſs was made upon theſe Perſons they might bring an Action of Treſpaſs, for that as to them the Rate was merely void; accordingly the Motion was refuſed.

Vernon *and* Acherly.

Vide antea 212.

Canc. THIS Matter now coming on again, upon the Hearing of the Cauſe, the Lord Chancellor declared his Opinion, that a perpetual Injunction ought to be granted. He ſaid it appeared to him now upon the Hearing, that Mr. Acherly himſelf, together with his Wife and Daughter, had in the Time of Lord Macclesfield brought a Bill in this Court againſt Mr. Vernon, praying that certain Deeds and Writings might be delivered up to him, relating to ſome Fee-Farm Rents which he ſuppoſed himſelf intitled to in the Right of his Wife as Heir at Law; and likewiſe praying an Account of the mean Profits. Mr. Vernon by his Anſwer ſet forth a Will of the Perſon, whom Mr. Acherly's Wife was ſuppoſed to be Heir at Law to, and by that Will all the Real and Perſonal Eſtate of that Perſon was conveyed to him. The Teſtator indeed had not thoſe Fee-Farm Rents at the Time of making his Will; but ſoon afterwards bought them and then made a Codicil to it. Mr. Vernon likewiſe preferred a croſs Bill againſt Mr. Acherly; and upon a Hearing before Lord Mackelsfield, Mr. Acherly's Bill was diſmiſſed and a Decree made in Favour of Mr. Vernon. Upon this Mr. Acherly appealed to the Houſe of Lords; the Judges were ordered to attend; the Queſtion was propoſed to them, whether the Codicil amounted to a Republication of the Will; accordingly they were of Opinion that it did. The Queſtion then was particularly propoſed to the Lords, whether that Part of the Decree relating to the Fee-Farm Rents ſhould be reverſed; and they were of Opinion, that it ſhould not. The Queſtion then was generally propoſed to the Lords, of what Opinion they were concerning the Decree, and they reſolved that it ſhould be affirmed in toto. Since this Mr. A-

cherly has brought a Replevin in one of the Courts of Law to try this Matter over again. The Lord Chancellor obſerved, that in the Caſe of Sherwin and Sherwin, and of that of Leighton and Leighton. Upon full Debate the Court granted ſuch an Injunction as this which is prayed, where there had been four Verdicts concurring for the Party; and ſuch an Examination as the preſent Queſtion has received, he took to be at leaſt Equally, if not much more ſolemn; and for theſe Reaſons he founded his Opinion, that the perpetual Injunction ought to be granted.

The King *and* Robe.

MR. Marſh and Mr. Strange having now come to ſhew Cauſe upon this Rule; the Chief Juſtice was of Opinion, that it ought to be made abſolute, and that for two Reaſons. Firſt, That for that one Efit, by Robe's Direction, took 1 s. 2 d. for marking fourteen Pint Pots, and never did mark them; ſo that this Fee could only be for examining them, which is clearly illegal. Secondly, That ſeveral Perſons were fined by him for not appearing at his Court, which is illegal likewiſe; for they ought only to have been amerced. The reſt of the Court were of the ſame Opinion; accordingly the Rule was made abſolute. And at the ſame Time the like Rule was made ſo againſt Anderſon, for that it appeared that he acted as Servant to him. Vide poſtea.

Vide Vol. 1. 263.

Doe, on the Demiſe of Savile, *againſt* Boorlace.

A Rule having been made to ſhew Cauſe, why Judgment ſhould not be arreſted for the Demiſe in an Ejectment being laid after the Memorandum; Mr. Noel ſaid he did agree, that the Memorandum was of Michaelmas Term laſt, and the Demiſe was of Hillary Term following; but he ſaid the Action is held to commence from the Time of the Bill filed, and not from the Time of the Memorandum; for which Purpoſe he mentioned 2 Lev. 13. And the Plaintiff has filed his Bill ſince the Time of the Demiſe; for which Reaſon he ſhould pray, that the Memorandum may be amended by that. The Court ſaid that would be a ſufficient Anſwer. But becauſe Mr. Noel was not able at preſent to verify his Fact of the Filing the Bill, the Rule was enlarged for a Day or two. Afterwards he did make out his Fact, and then the Amendment was made, and the Rule diſcharged.

How far a Demiſe ſhall be ſaid to be rightly laid, or not, in an Ejectment.

Foſter

Foſter *and* Grayham.

Vide antea 341. THIS Matter coming on in the Paper again, Serjeant Eyres ſaid, that he was ready for the Defendant in Error; but believed the other Side gave the Point up. Accordingly no Body appearing for the Plaintiff, Judgment was affirmed, unleſs Cauſe within a Week.

The King *and* The Biſhop of Litchfield and Coventry.

Vide antea 365. THIS Matter now coming on again upon the Return, Serjeant Birch prayed, that a peremptory Mandamus might be granted. He ſaid the Return ſets forth, that there was a Repreſentation drawn up by ſeveral Inhabitants of the Town of Coventry, ſetting forth great Immoralities of Mr. Ruſhworth, and that there were Affidavits made, charging him with great Misbehaviours, and a Certificate to the ſame Effect. The Return farther ſet forth certain Articles in hæc verba, exhibited againſt him in the Biſhop's Court for ſeveral Spiritual Offences; that a Caveat was entered in Purſuance of them, that Mr. Ruſhworth appeared to theſe Articles by his Proctor, and that they were now depending againſt him. It was farther alledged, that by one of the Canons in 1603, which were confirmed by the King's Letters Patent on the 6th of September 20 Jac. 1. it was neceſſary for every School-maſter to take a Licence from the Biſhop. And that the old Canons made before that Time required the ſame. That Mr. Ruſhworth was a Clergyman; and that for the Reaſons above mentioned he ſuſpended granting him this Licence. The Serjeant ſubmitted it, that this Return was inſufficient. He ſaid that in Salk. 432. it is laid down, that the Law requires the moſt exact Certainty in theſe Returns; but in the preſent one it is not ſet forth with any Certainty what the Purpoſe of the Affidavit was, nor that it was ſworn before one having a legal Authority, and if this was in the Caſe of an Indictment of Perjury, the ſetting forth an Affidavit in this Manner would not be ſufficient; and ſo is Latch 39, 133. The ſame Objection may be made to the Certificate; and as to the Articles againſt Mr. Ruſhworth that could be no Objection in his Way; for a Charge can be of no Force againſt a Man till he is convicted upon it. He obſerved farther, that it was not ſet forth in this Return that ever the Biſhop gave Mr. Ruſhworth Notice to appear and anſwer theſe Charges; and in the Caſe of Dr. Bently, who was degraded by the Univerſity of Cambridge, he took the clear Opinion of the Court to be, that in a Suſpenſion, as well as Degradation, it was neceſſary that the Party ſhould have an Opportunity to be heard. Theſe Objections he ſubmitted it might well be made to ſhew, that the Cauſe returned by the Biſhop for refuſing the Licence was not ſufficient; and were it not that Mr. Ruſhworth had applied for a Mandamus, and ſo had in ſome Meaſure admitted that a Licence was neceſſary, he

could produce many Authorities in the Law to ſhew, that no Licence was neceſſary at all. For this Purpoſe he mentioned 1 Ven. 41. and he ſaid there were diverſe others to the ſame Purpoſe. Mr. Parker argued on the other Side, and ſubmitted it to be very certain, that in theſe Caſes a Licence is neceſſary. The Statute of 1 Jac. 1. 4. (9) and 13 & 14 Car. 2. 4. (8) take Notice of it to be ſo. In the old Canons made by the Popes this is required in 1 Mod. 3. the Caſe ſtated in 1 Ven. 41. is reported contrary, and the Authority of 2 Lev. 222. is full in Point. He obſerved farther, that the Granting ſuch Licence is a judicial Act, and may be well compared to a Biſhop's refuſing to admit a Perſon to a Living who is preſented, and in ſuch Caſe it is held in 5 Rep. 57. that no Mandamus will lie. He conceived that there was the ſame Reaſon that it ſhould not in the preſent Caſe, and for this Purpoſe mentioned 1 Keb. 5. Sid. 40. and Sty. 457. But ſuppoſing it ſhould, he ſaid, the Return was a full Excuſe for not complying with the Writ. The Return has ſet forth the Reaſons why the Biſhop ſuſpends the Granting his Licence at preſent; Articles are exhibited againſt the Party, he appears to them; by which he himſelf takes Notice of them; and till he has acquitted himſelf of the Charge, he conceived it to be highly reaſonable that the Licence ſhould be ſuſpended; and to ſhew that ſuch general Returns have been allowed, he cited 5 Rep. 158. and Show. Par. Ca. 88, 96. The Chief Juſtice ſaid, that as it is ſet forth in the Return, that the Party applying for a Licence was a Clergyman, he believed it muſt be admitted that a Licence was neceſſary; becauſe the Canons in 1603, require it, and it muſt be admitted that they do bind the Clergy; but he did not think they bound the Laity, as they were never confirmed by Parliament. He ſaid it has not been made to appear, that thoſe antient Canons that have been mentioned were ever allowed of by the Courts of the Common Law; therefore he could not ſee that by any Canon it could be made appear that a Layman could be obliged to take ſuch Licence. He ſaid, with regard to the general Queſtion of taking theſe Licences, he thought it very material to be eſtabliſhed, that the Laity were not bound to take them by the Canon Law. If they were, a Mandamus could never be granted requiring them to be made out to one particular Perſon; but an Appeal would be the proper Remedy. If on the other Hand this Obligation ariſes only from the Statute Law; though the Biſhop may be ſaid to act in ſome meaſure Judicially, a particular Mandamus may be granted. The principal Queſtion therefore in the preſent Caſe reſorts to this, whether the Biſhop has not ſet forth a ſufficient Excuſe for refuſing to grant this Licence at preſent, and as to that he thought that he clearly had upon Account of the Articles containing a Criminal Charge being exhibited againſt the Party; he having appeared to them, and that Matter not being yet determined. The reſt of the Court were of the ſame Opinion; accordingly a peremptory Mandamus was refuſed to be granted. However the Matter ſtood over. Vide poſtea.

Harris *and* Burley.

Vide antea 422.

MR. Strange came now to ſhew Cauſe, and ſaid that he did agree, that the only Difference that he could find between the Caſe of Hern and Buſhel and the preſent one was, that there Coverture might be ſpecially pleaded in the Action below, here it was given in Evidence upon the General Iſſue, and therefore there the Court would not allow of that Matter of Fact to be aſſigned for Error, becauſe there might poſſibly be a Diſagreement upon Record in the two Verdicts. However he ſaid, that the Caſe of Thomſon and Lion, Eaſt. 4 Geo. 1. was directly contrary to that of Hern and Buſhel. He produced now the Affidavit and the ſeveral Rules, that were made in that Cauſe, and the Caſe appeared to be exactly the ſame as ſtated by him in that of Hern and Buſhel, Mr. Parker argued on the other Side, and ſaid it was a ſettled Rule in the Law, that no Man ſhould be at Liberty to aſſign both Errors in Fact and Errors in Law upon the ſame Judgment, and therefore he conceived, that no Writ of Error quod coram vobis would lie after Affirmance of the Judgment, unleſs the firſt Writ of Error was for ſome Cauſe abated; for this Purpoſe he ſaid, it has been held in 1 Ven. 207. that ſuch Writ of Error will not lie after Affirmance of a Judgment in the Exchequer Chamber. He did agree, that the Caſe as ſtated in Salk. 337. is againſt this; but it appears by Lilly's Ent. 278. That that Caſe is miſtated, and that the firſt Writ of Error abated by the Death of the Party. The Chief Juſtice, Judge Page and Judge Probyn declared their Opinions, that as it was a ſettled Rule that Errors in Fact and Errors in Law could not be both aſſigned in the ſame Judgment; they thought that Rule ought not to be evaded in this Manner, and therefore that no ſuch Writ of Error would lie after the Affirmance of a Judgment. Judge Lee ſaid it was certain upon the Authority of the Caſe of Walker and Stokoe, Car. 368. that no Writ of Error quod coram vobis is any Superſedeas without Leave of the Court; that there was no Reaſon for allowing this Writ of Error to be ſo. Accordingly they all concurred, that the Rule ought to be made abſolute. However that the Caſe of Thomſon and Lion might be looked into, the Rule was inlarged for a Day or two. Vide poſtea.

The King *and* The Juſtices of the Peace of Lancaſter.

When a Mandamus iſſues in order to appoint Overſeers and a Return is made to it, how far ſuch Return ſhall be ſaid to be certain enough in point of Form, or not.

UPON a Return to a Mandamus for appointing Overſeers, Mr. Denniſon excepted to it, that it was only ſaid that in Purſuance of the Mandamus we do humbly certify, that did nominate and appoint, &c. without ſaying that we did. Accordingly upon this Exception the Return was diſallowed.

Harris *and* Burley.

THE Chief Justice said now, that he had considered farther of this Case, and was fully satisfied of his former Opinion. He said the only Cases, that inclined the other Way, are those in Roll's Abr. 675. and Salk. 337. but as to the Case in Roll's upon the Face of it there appears to have been a Mistake in it, and there is a much more true and perfect State of it in Yelv. 117. and as to the Case in Salk. that appears to have been mistaken likewise, and was truly answered by Mr. Parker. Judge Lee said he had looked into his Notes for the Case of Thomson and Lion, and could not find that he had taken any Notice of it. He said that these Writs of Error ought to be allowed in open Court; and he did not see any Reason for allowing the present one; accordingly the Rule was made absolute.

Vide ante 430.

Dobs, on the Demise of Lurken, *against* Pascher.

IN an Ejectment the Tenant was served with a Declaration the 3d of January last, he did not appear to it; accordingly Judgment was signed against him the 15th of February following. The Landlord had no Notice of any Thing of this, till the 25th of February, and then obtained a Summons against the Plaintiff's Attorney before Judge Lee to shew Cause, why Proceedings upon this Judgment should not be staid. The Judge ordered, that upon the Tenant's consenting to appear, and entering into the Common Rule to take Notice of Trial for the next Assises, which were to be on the 6th of March, and on Payment of Costs, Proceedings should be staid. Notwithstanding this Execution was taken out, and upon that a few Days ago Mr. Strange obtained a Rule to shew Cause, why the Execution should not be set aside. Mr. Abney came now to shew Cause upon this Rule, and said he should not contend but that the Ordinary Rule of the Court now was to set aside regular Judgments, where there has been no Trial had, upon the Party's taking Notice of Trial at the same Time as otherwise it would have been, on Payment of Costs, and in all Cases putting the Plaintiff into the same State as he would have been in case Judgment was not signed. But he submitted it, that that Rule did not extend to Ejectments; because the Defendant may easily try his Title by being Plaintiff in a new Ejectment; and for this Reason it is, that this Action does in many respects differ from others. Mr. Strange on the other Side said that he conceived, that there was rather stronger Reason for setting aside these Judgments in Ejectments than there was in other Actions, by Reason of the very great Consequence that Possession is always found to be of in these Suits; and for this Reason it is, that though formerly the Rule of the Court used to be not to grant new Trials in Ejectment, yet of late they have been always allowed of. The Chief Justice said, if the

How far the Court will set aside a Judgment in Ejectment on Payment of Costs, notwithstanding the Judgment be regular.

the Landlord had omitted making his Complaint before the Judge ſo long, as that the Leſſor of the Plaintiff could not have prepared himſelf to have gone to Trial by the laſt Aſſiſes, he ſhould not have thought that the Motion would have been regular. However, as nothing of this is pretended, he thought it was ſo; and he obſerved that he himſelf, as well as ſome other of the Judges of this Court, had inquired of the Judges of the Common Pleas, how the Practiſe of their Court was in this Reſpect, and they informed them that there was no Difference in this Matter between this Action and others. The reſt of the Court was of the ſame Opinion; accordingly the Rule was made abſolute.

Devniſh *and* Mirkins.

Vide antea 573.

SErjeant Baynes now moved that the Rule might be made abſolute. Mr. Hayward on the other Side ſaid, that the Leave for diſcontinuing was founded upon his Motion; and if the Court was of Opinion that the Plaintiff ought to pay double Coſts, he ſhould not deſire to make Uſe of that Rule, as no Diſcontinuance has been entred in Purſuance of it. The preſent Rule for Coſts he ſaid was founded upon that Rule; and therefore as he was willing to conſent that that Rule ſhould be diſcharged, he ſubmitted it, that would be a ſufficient Cauſe, why this ſhould not be made abſolute. But if the Court ſhould be of another Opinion, he was ready to lay before them Affidavits to ſhew that the Defendant did not act as Juſtice of Peace; and if that could be done, he Conceived that would be a ſufficient Cauſe ſhewn upon this Rule beyond all Queſtion. The Court did not think that his conſenting to withdraw his former Rule, was a ſufficient anſwer to this Motion; nor did they think that the Affidavits were; becauſe they were not in themſelves ſufficient. However a Doubt aroſe amongſt the Court, whether in this Caſe the double Coſts ought not to be obtained by Rule of Court, rather than upon a Suggeſtion. The Chief Juſtice ſaid, that the Statute of Jac. gives theſe Coſts to Officers, where the Defendant obtains a Verdict, or the Plaintiff becomes nonſuited, or diſcontinues, and theſe Coſts are given according to the Courſe of the Court. He obſerved in the Caſe of a Verdict or Nonſuit, the Court gives theſe Coſts upon the Judge's Certificate; and in Caſe by any Accident the Certificate cannot be had, the Court will allow it to be ſupplied by a Suggeſtion. For there, even in the Caſe of the Nonſuit, the Defendant is not out of Court; though the Plaintiff is; but here by the very Diſcontinuances being entred, both Parties are out of Court; and therefore the Suggeſtion comes too late. For which Reaſon he thought that a Rule of Court was the proper Method; that would be a Juſtification to the Officer to allow them, and is according to the Courſe of the Court in like Caſes. Judge Page and Judge Probyn were of the ſame Opinion. Judge Lee had ſome Doubts, whether this could not be done by way of Suggeſtion. In the Caſe of Catherol and Cowper, Vide antea 241. where there was a Nonſuit, it was done

in this Manner. In the Caſe of The King and Poland, where there was a Verdict, which is cited in the Caſe of Catherol and Cowper, it was done by Suggeſtion likewiſe. The ſame was done in the Caſe of Sir Philip Egerton, Commiſſioner of the Land Tax, and likewiſe in that of Bateman and Wallis. If ſuch a Suggeſtion ſhould be allowed by the Court, it could not be traverſed or demurred to; it is only entred in this Form, Et quia conſtat per Sacramentum, &c. Ideo, &c. and therefore at preſent he did not ſee but that it might be allowed. Accordingly upon the Court's having a Doubt in this Matter, the Rule was enlarged. Vide poſtea.

Hollowday *and* Pit.

AT the Time of the former Motion it appeared, that there were ſeveral other Perſons that had charged the Defendant in Cuſtody with Declarations, and accordingly Rules were made upon them to ſhew Cauſe likewiſe. Mr. Wynn now appeared as Counſel for one of them, whoſe Name was Green. He ſaid the State of the Fact with Regard to him was, that a few Days after that the Defendant was arreſted in the Manner that has been mentioned in the former Motion, he voluntarily removed himſelf by Habeas Corpus out of the Fleet, where he was in Cuſtody for other Actions, and turned himſelf over to be charged with thoſe in the King's Bench; ſoon after that, Mr. Green charged him in Cuſtody with a Declaration, which Mr. Wynn ſubmitted it he was well intitled to do. He ſaid, that he conceived that there was no Privilege due to any Member after a Parliament is diſſolved. In all the Books that he could find, the Privilege of Members is only deſcribed ſitting the Parliament; for this Purpoſe he mentioned 4 Inſt. 46. and Hackwel's Modus tenendi Parliamentum 69, 208. Wages were never pretended to be due to a Member after the Diſſolution of Parliament; to which Purpoſe he cited 4 Inſt. 48. and conceived therefore that Privilege could not be ſaid to laſt longer. But if ſuch Privilege could be allowed at all, at leaſt it could only be allowed the Party for a reaſonable Time eundo & redeundo; this is the Caſe of a Witneſs ſubpoened to attend a Trial; for which Purpoſe he mentioned Raymond 100. And it is not pretended in the preſent Caſe, that for two Days after the Parliament was diſſolved, the Defendant made any Offer to return to the Place of his Abode. He ſaid farther, that ſuppoſing what the Plaintiff did, would of itſelf have been a Breach of Privilege, yet what the Defendant did was a Waiver of it; for he has brought himſelf into this Court voluntarily by a Habeas Corpus; and for this Purpoſe he cited Dy. 33. 2 Rol. Abr. 69. and Brook, Title Privilege 25. And if all this ſhould be againſt the Plaintiff, yet the Method, which the Defendant has purſued, to take Advantage of this Privilege, was intirely irregular. He ſaid he ſhould have pleaded this Matter, or obtained a Writ of Superſedeas; and for this he cited Lach 48. Salk. 544. and he believed, that there was not one Inſtance could be produced, in which ſuch Breach of Privilege could be taken

Vide ante 422.

Advantage of by Way of Motion. Mr. Denniſon was Counſel for another of theſe Plaintiffs, one Mr. Neal; he relied chiefly upon the Irregularity of the Manner in which the Defendant would take Advantage of his Privilege; and for this Purpoſe cited 13 Rep. 63. and Sid. 29, 42. Some other Counſel argued for ſome other of the Plaintiffs. Serjeant Darnel, Serjeant Chappel, and Mr. Strange argued for the Defendant. With Regard to the Point of Privilege itſelf, they took it to be beyond all Queſtion, that for ſome Time the Privilege of Parliament laſts after the Diſſolution of it. The Statute of 12 & 13 Will. 3. 3. expreſly takes Notice of this, and in 4 Inſt. 46. the Words are Exinde ad propria redeundo. The Caſe in Lev. which was before cited, allows it to be forty Days; but if that was not ſo, at leaſt a reaſonable Time was given them for returning to their proper Abodes. For this Purpoſe Mr. Strange relied upon Elſyn, Part 2. 103, 108. intitled The antient Method of holding Parliaments, and Mr. Juſtice Doderidge's Preface to another Book, called The Opinions of certain Antiquaries concerning the Parliament, printed 1658. To the other Queſtion, with Regard to the bringing the Habeas Corpus, he ſaid the Fact was by no Means made out that the Defendant brought it; according to their Inſtructions the Plaintiffs did it themſelves; but if the Defendant had ſued it out, he conceived that this would have been by no Means a Waiver of his Privilege; becauſe this might have been done to diſcharge him from his Impriſonment. And to the laſt Objection made to the Manner of taking Advantage of the Breach of Privilege, they conceived it to be a very proper one; for if the Defendant ſhould be forced to take the other Methods that have been mentioned, the Time which is given for the Privilege would be a good deal ſpent, before the Party could have the Benefit of it. The Chief Juſtice thought this a Queſtion of a good deal of Conſequence; accordingly directed the Plaintiffs to make an Affidavit of that Fact, that the Habeas Corpus was ſued out by the Defendant, if ſuch a one they could make, and ſaid the Court would take Time to conſider of the Caſe. Vide poſtea.

Daunnage *and* Watkins.

When an Action of Debt is brought upon a Judgment pend- in Writ of Error, how far ſpecial Bail ſhall be neceſſary to be given, or not, in ſuch Action.

THE Plaintiff having brought an Action of Debt upon a Judgment pending a Writ of Error, in which the Sum recovered in the original Action was but 3 l. 3 s. beſides Coſts of Suit. Mr. Denniſon had obtained a Rule to ſhew Cauſe, why common Bail ſhould not be excepted, and Proceedings ſtaid pending the Writ of Error. Mr. Strange came now to ſhew Cauſe, and ſaid that if this had been a ſecond Action brought upon the Judgment, he did agree that common Bail might be ſufficient. But as this was only the firſt Action, he conceived that they were intitled to ſpecial Bail; and as to the other Part of the Rule, he ſaid that there was no Reaſon for its being made abſolute, unleſs it was conſented that Judgment ſhould be given in it to ſtand for a Security, in Caſe the firſt Judgment ſhould be affirmed. With Regard to the firſt Part of

the Rule, the Chief Juſtice ſaid, that as the Plaintiff could not have held the Defendant to Bail in the firſt Action, by Reaſon that the Debt was but 3 l. 3 s. he thought there was no Pretence for holding him to Bail in this neither. As to the laſt Part of the Rule, he took the Practice of the Court to be to grant Imparlances in theſe Caſes from Time to Time, till the Writ of Error ſhould be determined. The reſt of the Court were of the ſame Opinion. Accordingly the firſt Part of the Rule was made abſolute, and the laſt Part of it amended, by ordering Imparlances to be granted in the Manner mentioned by the Chief Juſtice.

Robinſon *againſt* Lorkin and others.

Chanc. ROBERT Pit made his Will, and appointed two Perſons his Executors, and gave to each of them a Legacy of 100 l. but directed that in Caſe one of them ſhould refuſe to act as executor, then he ſhould not have his Legacy. As to the other, he directed that though he ſhould refuſe to act as Executor, yet ſtill he ſhould have his Legacy, ſo as he ſhould be aiding in getting in the Teſtator's Effects. That Executor who was to have loſt his Legacy in Caſe he refuſed acting in the Executorſhip, did act in it, the other Executor did not; but renounced the Probate of the Will; however at the Deſire of the acting Executor, he did aſſiſt in getting in the Teſtator's Eſtate, and by his great Diligence did ſo much Service to it, that it appeared he deſerved 500 l. for his Trouble. Upon a Bill of Account brought by the reſiduary Legatees againſt theſe Executors, it was inſiſted upon before the Maſter of the Rolls, that this Defendant, who had taken ſo much Pains in the Management of the Teſtator's Affairs, beſides this Legacy of 100 l. ought to be allowed 400 l. more for his Trouble. However his Honour would not give him more than the Legacy, and decreed a general Account to be taken. Upon this an Appeal was brought before Lord Chancellor, and it was inſiſted on by the Attorney and Solicitor General, that by the Defendant's renouncing the Executorſhip, and aſſiſting in the Management of the Teſtator's Affairs at the Requeſt of the acting Executor, he appeared to act in this Affair as Servant to the other Executor; and therefore he ought to have been allowed what any other indifferent Perſon would. But the Chancellor ſaid, that the general Rule of this Court was, that where a Truſtee or Executor manage the Eſtate themſelves, they ſhall not be allowed any Thing by way of Reward for their Trouble. That Rule he ſaid he took to be ſo very right a one, that where two Truſtees or Executors are appointed, and one of them refuſes to act in the Truſt or Executorſhip, he would not ſuffer it to be evaded by the acting Truſtee's, or Executor's employing the other, under Pretence of a Servant. But the preſent Caſe, he ſaid, was much ſtronger, for though this Defendant refuſed to act as Executor, yet by the Terms of the Will he might act as Aſſiſtant, and nothing appeared to him, but that he did ſo; accordingly the Decree was affirmed.

When a Sum of Money is given a Perſon for acting in any particular Matter, how far he ſhall not be intitled to Recover any greater Sum for his Extraordinary Care and Trouble.

The

The King *and* Reſt.

What kind of Fees ſhall be ſaid to be due to the Clerk of a Market.

THE Defendant had been convicted upon an Indictment for taking 14 d. for examining, marking and ſealing 14 Pint Pots, as Servant to one Mr. Robe, Clerk of the Market to the King's Houſhold. Mr. Strange now moved in Arreſt of Judgment, and ſaid that it appeared by 4 Inſt. 274. that the Fee of a Penny was due to the Clerk of the Market for marking and ſealing a Pint Meaſure, ſo that there was no Offence laid in the Indictment. The Chief Juſtice ſaid that the Court could not judicially take Notice, that the Fee of a Penny was due to the Clerk of the Market for this Part of his Office. Accordingly the Motion was refuſed.

Carey *and* Hilton.

Vide ante 363.

IN Treſpaſs for breaking the Plaintiff's Cloſe, called Bingsworth-field, the Defendant pleaded, that the ſaid Cloſe was the proper Land of the Defendant. The Plaintiff replied, that it was the Eſtate of Inheritance and proper Land of the Plaintiff, and not the proper Land of the Defendant. On Iſſue joined the Verdict found, that the ſaid Lands were the Eſtate of Inheritance and proper Lands of the Plaintiff, and not of the Defendant. Mr. Kettleby had ſome Time ago moved in Arreſt of Judgment, that this Plea of the Defendant, though intended to anſwer the Plea of Liberum Tenementum, yet was by no Means agreeable to it. He ſubmitted it, that the Iſſue joined was really immaterial, and therefore the Plaintiff could not have Judgment upon it; accordingly he obtained a Rule, that the Plaintiff ſhould bring in the Poſtea. The Poſtea being brought in, Mr. Strange argued a few Days ago, that this was only a Miſ-pleading and cured by the Statute of Jeofails; for this Purpoſe he mentioned the Caſe of Yateman and Muſtard, Trin. 1 Geo. 1. There in Treſpaſs the Defendant pleaded, that A. was ſeiſed and demiſed to him, and laid a Que Eſtate for a Way; Verdict was given for the Defendant; in an Arreſt of Judgment the Plea was held good, though only alledged in it, that the Defendant was ſeiſed without ſaying, that he was ſeiſed in Fee. To the ſame Purpoſe he cited 2 Bulſt. 41. 5 Rep. 43. Salk. 365. and Yelv. 227. However at that Time the Rule was inlarged for ſtaying the Judgment. Mr. Denniſon argued on the ſame Side with Mr. Strange, and cited 3 Cro. 87. 2 Cro. 678. and 2 Saund. 217. The Chief Juſtice ſaid he did agree, that the Plea was bad in it ſelf, and might have been taken Advantage of on a Demurrer. For he took the Meaning of the Words in it only to be, That the Defendant had ſome Sort of Property in the Lands. However, as the Verdict has found that the Defendant had no ſort of Property, he thought the Plaintiff muſt recover. Judge Page and Judge Probyn were of his Opinion. Judge Lee was of another Opinion. He ſaid the Plea of Liberum Tenementum by conſtant Uſage always ſuppoſed

poſed in it a Right to the Poſſeſſion, which this Plea by no Means does. And therefore he thought that a Verdict found in the Words of it could not make it good. Accordingly upon the Court's not agreeing in Opinion, the Matter ſtood over for a Day or two. Vide poſtea.

Anonymus.

How far a Mandamus will lie, or not, to admit a Perſon to a Fellowſhip.

MR. Kettleby moved for a Mandamus to be directed to the Archbiſhop of Canterbury, requiring him to admit Mr. Auſtis to a Fellowſhip in All-Souls College in the Univerſity of Oxford. He ſaid this College was founded by Archbiſhop Chichely, and the Statutes of the College provide, that the Election of the Fellowſhips ſhall be made on All-Souls Day, or within three Days after; that upon every ſuch Election the Founder's Kinſmen ſhall be preferred before any other Perſons. And in caſe the Fellows cannot agree for go to an Election within that Time, the Right of filling them up, ſhall devolve to the Archbiſhop of Canterbury for the Time being. He ſaid there was a Vacancy before laſt All-Souls Day, and Mr. Auſtis, who was the Founder's Kinſman, offered himſelf a Candidate at the Election; but he was refuſed (the College omitting to fill up the Vacancy) and thereby the preſent Right devolved to the Archbiſhop. This Mr. Kettleby ſaid was the State of the Fact; but he owned there was ſome Difficulty in laying it before the Court; for Mr. Auſtis has demanded of the College a Copy of the Statutes which they have refuſed him; ſo that he can only produce to the Court ſuch a Copy of them, which he had from the Burſer of the College; however Mr. Auſtis ſwears he believes it was a true one. The Chief Juſtice ſaid, that in the Caſe of Colleges that are of Royal Foundation he believed the Court has granted Mandamus's, where no Viſitor is appointed, but in the preſent Caſe, which is of a private Foundation, he believed it might be a Doubt, whether a Mandamus could go, though it ſhould be admitted, that no Viſitor was appointed by the Statutes. However he thought at preſent the Court could not inquire into that Matter, by Reaſon that no atteſted Copy of the Statutes was then before them. In the Caſe of Sir Edward Seymour, where an Original Deed was in the Adverſary's Hand, and he would not produce it, he did agree, that parol Evidence was allowed of it; but then it was from one who had read the Deed itſelf, which is not pretended to be in the preſent Caſe. He ſaid it was certain, that this Court could not grant a Rule for the Inſpection of them, till there was a Cauſe in Court between Mr. Auſtis and the College; and even then it might be a Doubt, whether they could do it. However he did think that the Party might have a Sight of them in Chancery by bringing a Bill of Diſcovery; and till that was done, this Court could do nothing in the Affair. The Reſt of the Court were of the ſame Opinion; accordingly the Motion was refuſed.

Heblethwate *againſt* Cartwright and others.

How far a Portion ſhall be raiſed, or not, by the Sale of a Reverſionary Term.

Canc. JAmes Heblethwaite being ſeiſed of certain Lands in Fee-Simple, made a Settlement of them to the Uſe of himſelf for Life, the Remainder to his Wife for Life, the Remainder to the Heirs of the Body of Charles hereafter to be begotten, and in Default of ſuch Iſſue the Remainder for a thouſand Years to certain Truſtees for raiſing Portions for his Daughters, viz. for raiſing the Sum of 5000l. in caſe he ſhould have three Daughters, and ſo in Proportion ſhould he have more or leſs, equally to be divided between them at their reſpective Ages of 21 or Day of Marriage, which ſhould firſt happen; the Remainder to his Brother Charles Heblethwate for Life, and after his Deceaſe to the Heirs Male of his Body hereafter to begotten. In this Deed of Settlement there were two Proviſoes; one was, that the Truſtees ſhould raiſe this Money for the Daughters Portions by the Rents and Profits, or Sale and Mortgage during the Term; the other was, that if James Heblethwate their Father or any of the Remaindermen ſhould give an Equivalent to any of the Daughters, that then their reſpective Portions ſhould not be raiſed in the Manner that has been mentioned. Margaret the Wife of James Heblethwate died without Iſſue Male, leaving three Daughters, each of which were married at the Time of her Death. Charles Heblethwate had Iſſue one Son, named William, born at the Time of the Settlement, but had no other Children afterwards. William had Iſſue a Son, who after the Death of James Heblethwate brought his Bill in this Court againſt the three Daughters, to have a Decree made of this Eſtate, in Purſuance of the Settlement. The Defendants inſiſted upon two Rights; in the firſt place, that they were intitled to the Eſtate; ſecondly, admitting that they were not, that ſtill the Eſtate was chargeable with their Portions, and the Intereſt thereof due from the Death of their Mother. With regard to the firſt of theſe Matters Lord Chancellor ſaid, that the Difficulty ariſes from the Limitation in the Settlement being to the Heirs of the Body of Charles, hereafter to be begotten; but yet he did think that this was an Eſtate-Tail general in Charles; that William himſelf would have been intitled to it, and conſequently that the Plaintiff was ſo likewiſe. He ſaid Lord Coke's Opinion was, that a Limitation in a Deed hæredibus procreatis or procreandis was all one, and Mr. Bootle had cited a Caſe 24 Edw. 5. 28. Paſch. 15. where the Words hos procreaverit were held to be the ſame; and if the Words had been already begotten, Lord Chancellor ſaid he ſhould have thought that the Heirs of the Body born afterwards would have taken likewiſe. With regard to the ſecond Queſtion he ſaid, that it was objected by the Plaintiff, that the Intereſt of the Daughters Portions ought not to commence barely from the Death of the Mother, but from the Death of the Father likewiſe; and to ſupport the Objection, the two Proviſoes in the Settlement are relied upon. By the firſt of them it is contended, that the Words are during the

Term, and till that falls into Poſſeſſion nothing is to be raiſed; by the ſecond, that the Father had all his Life-time to offer the Daughters an Equivalent for their Portions. But his Lordſhip obſerved, that where a certain Day is appointed for Portions becoming due, nothing was more certain, than that Reverſionary Terms might be ſold before they fell into Poſſeſſion; and that though there is no expreſs Clauſe or Sale to warrant it; and as to the other Proviſo, that was only in the Nature of a Power of Redemption. Accordingly a Decree was in Favour of the Plaintiff; but ſubject to his allowing the Daughters Portions, and Intereſt of 4 per Cent. to be computed from the Death of the Mother.

The King *againſt* Scolden and others.

ON Rule to ſhew Cauſe, why Informations in the Nature of Quo Warranto's ſhould not be granted againſt the Defendants, for exerciſing the Office of Capital Burgeſs and other Offices in the Corporation of Orford; Mr. Draper ſaid, that with regard to ſome of the Defendants, he ſhould not oppoſe the Rule's being made abſolute; but as to Scolden and Brady he ſubmitted it, the Rules ought to be diſcharged. With regard to Mr. Scolden, he ſaid, the Charge upon him was for acting as Mayor; and he could not deny but there were two Entries made in the Corporation Books, that he had acted in that Capacity. But thoſe Entries were made by meer Miſtake. With regard to Mr. Brady the Charge was, that he acted as Capital Burgeſs after he left off reſiding within the Borough, and the Words of the Charter are, That no Perſon ſhall continue a Capital Burgeſs longer than he is an Inhabitant within it. He ſaid he ſhould not contend but Mr. Brady chiefly reſided in a Village near adjoining. But he had many Affidavits to ſhew, that Mr. Brady occupied a Houſe within the Borough, which was let out partly to Lodgings, and the other Part was in his own Hands, that he was rated for this Houſe, and Churchwarden this very Year. Mr. Thurſton on the ſame Side ſaid, that he ſubmitted it, that a Perſon might be an Inhabitant in two Places at one Time; for which Purpoſe he cited 5 Rep. 67. and 2 Inſt. 173. Mr. Abney argued on the other Side, and ſaid that he ſhould not contend but that the Occupying Land or a Houſe in a Pariſh would to ſome Purpoſes make a Man an Inhabitant, but conceived that Reſidency was eſſentially neceſſary in the preſent Caſe; and for this Purpoſe mentioned the Caſe of the Borough of Radnor, where the paying Taxes for Land was held not to be ſufficient. The Court ſaid, that it was only ſworn in the Affidavits, on which the Rule was obtained, that Mr. Brady reſided in this other Village, without any Negative Words as to his reſiding within the Borough; and they thought it ſufficiently appeared by the Affidavits on the Part of the Defendants, that Mr. Brady was to be conſidered an Inhabitant in this Borough within the Intent of the Charter. And the Chief Juſtice ſaid, in the Caſe of Sir William Lowther, the Court refuſed granting

How far a Perſon ſhall be a ſufficient Inhabitant to be capable of being choſen a Member of a Corporation.

granting an Information againſt him for exerciſing an Office in the Borough of Pomfret, though it appeared that he took a Houſe in the Borough to qualify himſelf only the Day before the Election. He ſaid likewiſe, that there was no Pretence to make the Rule abſolute as to Mr. Scolding. Accordingly the Rules relating to him and Mr. Brady were diſcharged.

The King *and* Elmes.

Vide ante 484.

MR. Huſſey moved to amend a Plea to an Information in the Nature of a Quo Warranto, though after a Conſilium; and a Rule was made to ſhew Cauſe. Vide poſtea.

Den and Perry *againſt* Mullens.

How far a Court of Law will not allow that one Perſon ſhall defend a Suit with another.

CORteſoes having been in Cuſtody of the Defendant, the Marſhal of this Court, gave a Bond to him of Indemnity to have the Benefit of the Rules; but after this there was a Pretence of his having made an Eſcape, and it was ſaid that there was a Contrivance between the Marſhal and the Plaintiff, at whoſe Suit Corteſoes was in Cuſtody, that this Action ſhould be brought againſt the Defendant; that the Defendant would let Judgment go againſt him upon it, and then would give this Judgment in Evidence in an Action brought upon the Bond of Indemnity. Upon this Mr. Marſh moved, that the Defendant might permit Mr. Corteſoes to defend this Action jointly with him. He ſaid this was in itſelf a reaſonable Motion; but more eſpecially as the Defendant was an Officer of the Court. The Chief Juſtice ſaid, that Motions of this Sort are admitted ſometimes in Chancery; but he believed never in a Court of Law. The reſt of the Judges were of the ſame Opinion; accordingly this Part of the Motion was refuſed. However there being another Part of it with regard to a Complaint againſt the Marſhal for taking a Sum of Money of Mr. Corteſoes againſt the Duty of his Office; the Court made a Rule upon him to ſhew Cauſe as to that.

The King *and* The Juſtices of Peace of Shrewsbury.

Vide ante 394.

MR. Abney came now to ſhew Cauſe, and ſaid that the true Reaſon for the Court's refuſing a Certiorari in the Caſe of Utoxeter was, that if the Rate ſhould be removed up the Poor would be left ſtarving, which he ſaid held in the preſent Caſe equally as in that. Judge Probyn and Judge Lee declared that that was the true Reaſon of that Caſe; accordingly the Rule was diſcharged.

Anonymus.

MR. Pilsworth moved for a Mandamus to be directed to the Justices of Peace in Berkshire, requiring them to hold a Court of Conservancy, in Pursuance of 17 Rich. 2. 9. for that Part of the River of Thames which lies in their County. But the Chief Justice said, that if there are any Complaints concerning these Rivers, they are to be made at the ordinary Court of Sessions by the Words of this Statute, and no particular Court of Conservancy is appointed by the Act for this Purpose. Judge Lee said, that the Court in London is erected by Charter given to the City; accordingly the Motion was refused.

How far a Mandamus will not lie, in order to require Persons to hold a Court of Conservancy relating to the River Thames.

Kent and May *against* Kent.

THE Chief Justice delivered now the Opinion of the Court upon this Record; he said the single Question which remained as a Doubt with them was, with Regard to the Damages allowed upon the Affirmance of the Writ of Error, from the Time of the Judgment given in the Common Pleas in Ireland to the Time of that Affirmance, and likewise with Regard to the Costs given upon the Writ of Error in the King's Bench there. As to that, he said three Questions were to be considered; First, whether the Court of King's Bench below ought to have given any such Damages at all. Secondly, admitting that they should, whether these Damages were rightly given against one of the Plaintiffs in the present Writ of Error. Thirdly, Supposing that they were not, whether this Error can be taken Advantage of by both the Plaintiffs joining in the Assignment of it. With Regard to the first of these Questions, the Court were of Opinion, that such Damages ought to be given; however not upon the Statute of Merton, but upon that of 16 & 17 Car. 2. 8. (4.) which Statute was enacted in Ireland the Year following. But with Regard to the second Question, they were of Opinion that the Damages ought to have been given against them both jointly. The Chief Justice did own, that as it appears upon the present Record, that the Ancestor of one of the present Plaintiffs was alive some Time after the Judgment given in the Common Pleas, it might seem a little hard, that the Heir of that Party, who is one of the present Plaintiffs, should answer for that Part of the Damages incurred between the Time of the first Judgment and that of his Ancestor's Death; but yet as the present Case is, he must answer for that Part of them as well as for the other incurring to the Time of the Affirmance of the Judgment; and this by the Statute of 16 Car. 2. which has been mentioned. For by that Statute, undoubtedly he must join in the Recognizance with the other Plaintiff, and by the Words of it must be subject to satisfy the Damages likewise. He observed farther, that the Court were of Opinion, that these

Vide antea 386.

Damages were not rightly given for another Reaſon, namely, becauſe no Writ of Inquiry was awarded, in order to aſcertain them. He did agree that it might be objected that this was not neceſſary; becauſe the annual Value of the Lands is aſcertained by another Part of the Record; ſo that it may be ſaid that there is only Occaſion for the Court to increaſe theſe Damages in Proportion; but the Statute laſt mentioned required this; and therefore it ought to have been done. And this diſtinguiſhes the preſent Caſe from that upon the Statute of Merton; for there, though Damages are given, the Method of aſcertaining them is left to the Diſcretion of the Court; and the general Rule obſerved by them, has been not to grant a Writ of Inquiry, where the Damages are either admitted by the Party, or aſcertained by the Jury, after giving their Verdict; but in other Caſes to grant it. To this Purpoſe he cited 1 Lev. 92. 1 Lutw. 719, and the Caſe of Burden and Burden, Paſch. 3 Will. 3. Rot. 393. This therefore ſhews that the preſent Caſe is diſtinguiſhable from the others, and there might be ſome Reaſon for the Statute of Car. requiring this; becauſe the Value of Land many Times changes. To the third of theſe Queſtions he did agree that the general Rule of Law was, that the Perſon ſhall not be allowed to aſſign a Matter for Error, which is for his Advantage; and for this Purpoſe he cited 2 Cro. 92. 3 Cr. 891. Yel. 3. and Saund 239. but this Rule does not hold where the Error is in the final Judgment of the Court; and for this Purpoſe mentioned 8 Rep. Beecher's Caſe and Rol. Ab. 765. This Part of the Judgment therefore with Regard to the Damages muſt be reverſed; and ſo muſt that with Regard to the Coſts; upon the Affirmance of the Judgment laid upon one of the Parties likewiſe. But then he ſaid it would be proper to conſider in what Form the Judgment ſhould be, which this Court ought to pronounce. And here though the general Rule is, that the Court above muſt pronounce the ſame Judgment, which the Court below ought to have done; and for this Purpoſe he mentioned 1 Cro. 442, 511. and 2 Cro. 554. yet in theſe Caſes of Writs of Error into Ireland, this Rule does not always hold. And in the preſent Caſe, he ſaid this Court could not direct a a Writ of Inquiry to the Sheriff of Kilkenny, which is the County where the Lands lie. But they can only order the Court below to iſſue ſuch Writ, and that they take Care that Execution be done upon it. This is the ſame Method as is taken in Writs of Error brought in the Exchequer-Chamber on Judgments of this Court; and for this he cited 2 Cro. 206. Yel. 74. and Car. 180. Accordingly the Judgment of the Common Pleas in Ireland was affirmed in the whole of it; and likewiſe that Part of the Judgment of the King's Bench there, which affirmed the Judgment of the Common Pleas, together with the Award of Seiſin upon it, ordered by the King's Bench, reverſed the other Part of that Judgment with Regard to thoſe Damages and Coſts, and directed the Court of King's Bench below to award the Writ of Inquiry, with Execution upon it in the Manner that has been mentioned.

Cumber *and* Hill.

THE Chief Juſtice now delivered the Reſolution of the Court upon this Record; and ſaid they were unanimouſly of Opinion, that in this Caſe no Croſs Remainder ought to be allowed. He ſaid the general Rule in theſe Caſes is, that no Eſtate ſhall ariſe, but where there is an expreſs Declaration of the Party, or a ſtrong Implication to that Purpoſe. But neither of theſe was in the preſent Caſe; for the only Words that give here any Colour of Doubt, are thoſe, and for Default of ſuch Iſſue. But thoſe Words may well refer to the Word Reſpective, as well as to the other Words in the former Sentence; and if ſo, the Leſſor of the Plaintiff is to take after either of the two other Grandchildren dying without Iſſue reſpectively; and as the Plaintiff was of equal Degree of Kindred to the Teſtator with their Brother and Siſter, this much confirms this Conſtruction. The only material Caſe that ſeems of any Weight againſt this Opinion, was the Caſe of Homes and Meynel, reported in Sir Thomas Jones 172. and in other Books. But this Caſe materially differs from that in many Reſpects; for there the Words are, if they die without Iſſue, which ſomething implies, that both of them are to die firſt; likewiſe there was the Word all, which intimates that the Lands were to go all together; ſo there was not the Word Reſpective, and the firſt Deviſee was the Teſtator's Daughter, the Remainder-man only a Nephew. He ſaid likewiſe, this Circumſtance of Difference in Kindred diſtinguiſhed the preſent Caſe from that in Dyer 303, 326, and 4 Ley. 14. Accordingly the Court gave Judgment for the Plaintiff. Vide antea 367.

Dobſon *and* Dobſon.

THIS Matter now coming on again, Mr. Strange argued for the Plaintiff in Error; he ſubmitted in the firſt place, that Damages ought not to have been given at all; for this does not appear to be a Writ of Dower unde nihil habet; the Word Unde being omitted, and Damages are given in no other Writs of Dower, according to Co. Lit. 32. b. He ſaid farther, that theſe Damages are given in the preſent Caſe a morte viri, whereas they ought to have been given only a die Impretationis brevis; for the Demandant herſelf neglected a long while bringing this Writ (her Title of Dower accruing in 1725, and this Writ being brought only in the ſecond Year of the preſent King) and ſhe ought not to take Advantage of her own Laches. He obſerved likewiſe, that the Damages were given too far, for they are given to the Time of taking the Inquiſition, after the firſt Judgment by Default; and they ought to have been given no longer than to the Time of that Judgment; for that is ſuch a one upon which Error might be brought. He took Notice likewiſe, that the Judgment by Default was not rightly entred; for there were four Tenants, and yet the Entry is quod ipſe ſolemniter Vide antea 207.

lemniter exact' non vern'. And laſtly, he concluded, that there was no Day given to the Demandant upon the Writ of Inquiry, which ought to have been, according to Carthew 173. and ſo there was a Diſcontinuance. Mr. Parker argued on the other Side, and ſaid that if the Party would take Advantage of this Defect in the Writ, which has been mentioned, he ought to have removed the Writ up by Certiorari. Then as to the Time from which the Damages are given, they are always computed a morte viri; and this by the Statute of Merton. So by Conſtruction upon this Statute, the Damages have always been given to the Time of the final Judgment; and to this Purpoſe is Leo. 56. and the Caſe of Spiller and Andrews, Hill. 8 Geo. 1. And as to the Judgment by Default, he ſubmitted it, that this could only be ſaid to be defective Latin, and might be made good. To this Purpoſe was the Caſe of Peach and Chapfield, Mich. 4 Geo. 1. That was an Action againſt ſeveral Defendants, and they had concluded their Plea with hoc parat' eſt verificare. The Court was of Opinion in that Caſe, that the Plea was well concluded, and ſaid that they would underſtand the Word Illis. In that Caſe the Caſe of Hales and Owen was cited too, where the Words were, quod breve Domini Regis emanavit, per quod Præcepit; and there the Court ſaid that they would underſtand the Words Dominus Rex before the Word Præcepit. Then as to the Diſcontinuance, he conceived that there was none. He ſaid that the Precedents are conſtantly in this Manner; and cited to this Purpoſe Raſt. 238. b. Pla. 16. Co. Ent. 181. 1 Brown. Ent. 222. and Rob. Ent. 221, 243, 254. But if this was any Diſcontinuance, it was cured by the Statute of 4 Ann. 16. for that Statute extends to all Caſes, where there is to be a Writ of Inquiry; and for this Purpoſe he cited the Caſe of Henwrikes and Atkins, Hill. 10 G. 1. That was a Writ of Error in the Exchequer Chamber, and a Defect in the Judgment given on Demurrer, which was held to be cured by that Statute for this very Reaſon. The Court declared themſelves ſatisfied with the Anſwers to all the Exceptions, excepting that of Judgment by Default; but as to that they inclined to think that the Exception was fatal; becauſe it did not ſeem to them that the Words could be conſtrued in any other Senſe, than in the ſingular Number. Upon which Mr. Parker ſubmitted it, that the Word Ipſe being writ in Court-hand, might be read Ipſæ, there being no Dipthongs in that Hand, that this will be only falſe Latin, and the reſt of the Words being writ with Contractions, that they will ſerve for the plural Number as well as the ſingular; and the Matter ſtood over. Vide poſtea.

When a Scire facias is brought upon a Recognizance of Bail, how far the Recognizance ſhall be ſaid to be rightly deſcribed in it, or not.

Cowper *and* Mapſon.

IN a Scire Facias againſt Bail, to which there was a Demurrer, Mr. Denniſon ſubmitted it, that the Recognizance was ſet forth wrong; for it was, that if one Solomon Smith ſhould not happen to pay the Condemnation Money, or not ſurrender himſelf, &c. whereas it ſhould have been that if he ſhould happen not to pay; and then the Words not ſurrender would be right. The

Chief Juſtice thought this an Exception of ſome Weight; accordingly the Matter ſtood over. Vide poſtea.

The King *and* Ellams.

MR. Abney came now to ſhew Cauſe, and ſaid that if this Amendment ſhould be allowed, it would alter the very Subſtance of the Defendant's Plea. He obſerved, that this was an Information in the Nature of a Quo Warranto brought againſt the Defendant for exerciſing the Office of Mayor in the City of Cheſter. To this Information the Defendant pleads, that by the Charter two Perſons are to be nominated by the Mayor and Aldermen out of the Citizens of the City, Suburbs and Hamlets there adjoining, and that the Mayor for the Year enſuing is to be choſen out of one of them. And the Defendant avers, that he was nominated out of the Citizens and Inhabitants of the City together with another, and that he was duly elected out of one of them, according to the Form of the ſaid Charter. To this Plea there was a General Demurrer. Mr. Abney ſaid, that the Plea was certainly bad in Subſtance; for by the Charter the Defendant confeſſes that the Nomination is to be out of the Citizens of the City, Suburbs and Hamlets; and yet he alledges that his Nomination was out of the Citizens of the City only. The Defendant has joined in Demurrer upon this Matter. And the Record actually made a Conſilium. And therefore, if there was no other Objection in the Caſe than this, he ſubmitted it, that was ſufficient to ſhew, that the Amendment ought not to be. He ſaid likewiſe, that the Proſecutor had loſt a Trial; for this Record was carried down at the laſt Aſſiſes upon an Iſſue to try, whether the Defendant was Alderman at the Time of his Election to be Mayor. The Demurrer was joined even at that Time; but that Iſſue was not tried, the Proſecutor relying upon this Miſtake. He obſerved farther, that he was far from being certain, that this was not to be conſidered as a Criminal Proſecution, for on Motion for a new Trial in an Information of this Sort the twelve Judges were equally divided in Opinion; and a new Trial could not be had. Mr. Strange and ſome other Counſel argued for the Defendant. They ſaid they did conceive, that eſpecially ſince the Statute of 9 Ann. 20. this was a good deal to be conſidered as a Civil Suit. And as to the Loſs of the Trial upon this Account, they ſaid the Fact was plainly otherwiſe; for the Reaſon of this Information's being not tried was merely upon the Proſecutor's being apprehenſive that the Defendant would take the ſame Challenge in this Information, which had been taken in another of the ſame Sort before. Of this Fact they could eaſily procure an Affidavit; and ſo they could, that the Fault in the Plea was not owing to any Deſign, but meerly to a Miſtake; and they ſaid that after a Demurrer the Court has often allowed of Amendments. For this Purpoſe they mentioned the Caſe of Wilks and Rich, Mich. 9 Ann. where an Amendment was allowed after a Demurrer and even Argument had in the Paper.

Vide ante 402.

Paper. So in the Caſe of the Town of Malmesbury, Eaſter 9 Ann. that was an Information in the Nature of a Quo Warranto; there happened to be there a Miſtake in the Name of the Corporation; a Demurrer on that Account; and even after Argument, Amendment allowed. And Mich. 12 Anne, there was the like Information relating to the ſame Town of Malmesbury, Iſſue taken upon Non uſurpavit, in the Poſtea the Iſſue was entered Non Cul', and the Poſtea amended Hil. 12 Geo. 1. in the Caſe of Ballam and Hartford, the Defendant's Plea concluded to the Country, where it ſhould have concluded with an Averment; there was a Demurrer and Joinder in Demurrer on this Account; and yet after that it was amended. So the next Term in the Caſe of Crocket and Jones, the Plaintiff in replying to a Plea of the Statute of Limitations had omitted ſetting out the Continuances of the Writ, which he ſerved out to take the Caſe out of the Statute; yet there even after Argument upon Demurrer the Court gave Leave, that the Continuances ſhould be entered. In the Caſe of The King and Hughes, which was an Information in the Nature of a Quo Warranto for exerciſing the Office of Mayor of the Town of Liverpool; the Defendant ſet forth in his Plea, that the Mayor elect ought by the Charter to be ſworn before the late Mayor, and two of the Bailiffs; and he averred, that he was ſworn before the late Mayor, Peter Witfeild one of the Bailiffs and another Bailiff. But by Miſtake Witfeild's Chriſtian Name was miſtaken, for it was Robert and not Peter. The Record was ſet down to Trial with this Miſtake in it. Upon this there was Application to Lord Raymond at his Chambers in Hil. Vacation 1727, that they might have Liberty to make up a new Record of Niſi prius; and on hearing Counſel he directed, that it ſhould be ſo, and provided this Record could be ſent to the Aſſiſes before the Cauſe was tried upon the other, that the Cauſe ſhould be tried upon this Record and not upon the other. Accordingly a new Record of Niſi prius was made up, ſent down by an Expreſs to the Aſſiſes, got there before the Cauſe came on, and the Cauſe began to be tried upon that Record; but upon a Challenge being taken the Cauſe was withdrawn by Conſent. So in the Caſe of Morton and Tuttey, Mich. 3 Geo. 2. in the Court of Exchequer, that was an Action for erecting a private Nuſance. In Trin. Term before there was a Demurrer to the Declaration for falſe Latin, and a Joinder in Demurrer, yet in Mich. Term following the Court allowed the Demurrer to be withdrawn on pleading an iſſuable Plea, though it was urged there that the Party had loſt the Benefit of a Trial: and to the ſame Purpoſe they cited the Caſe of The King and Hays, Vol. 2. 142. Hutton and Walker, Vol. 2. 220. Dummol and Aldworth, Vol. 2. 291. The King and Charleſworth, Vol. 2. 363. and the Caſe of the Dutcheſs of Marlborough, Vol. 2. 418. and farther relied upon 1 Cro. 144. 1 Show. 273. 2 Mod. 167, and 3 Lev. 347. The Chief Juſtice ſaid, that as this is an Annual Office, it would be a Thing of dangerous Conſequence to allow an Amendment of this Sort as a Thing of Courſe, without laying a proper State of the Fact by Affidavit. For if ſo, it would be in the Power of ſuch Officer at any Time to hold

his Office out, before Judgment could go againſt him; and therefore he thought the preſent Rule ſhould be diſcharged; giving the Defendant Liberty to move this Matter again upon proper Affidavits. The reſt of the Court were of the ſame Opinion. Accordingly this Rule was diſcharged, and the laſt Day of the Term two Affidavits were laid before the Court; one, that the Trial did not go on merely on Account of the Challenging; another that this Fault in the Plea was owing merely to an Overſight in the Counſel, and upon that the Court made a new Rule to ſhew Cauſe, why the Plea ſhould not be amended. Vide poſtea.

The King *and* Witchurch.

How far the Court will not quaſh a Mandamus, by Reaſon that the Return-Day to it is expired.

SErjeant Birch moved to quaſh a Mandamus requiring a certain Mayor to deliver Books over to a Town-Clerk. But the Day of the Return being out, the Court refuſed to do it. And Judge Lee ſaid the like Motion was refuſed in the Caſe of The King againſt The Mayor and Juſtices of Wallingford.

Anonymus.

How far a Certiorari will not lie to the Old Baily in order to remove up an Indictment for a Miſdemeanour.

MR. Parker moved for a Certiorari to be directed to the Juſtices in the Commiſſion of the Old Bailey to remove up an Indictment for Perjury. He ſaid he owned that this Application was made on the Part of the Defendant; but yet as this was only a Miſdemeanor, he ſubmitted it, his Motion was regular, and ſaid he apprehended a like Motion was granted in the Caſe of The King and Forreſt; and the Reaſon he took to be, that the Judges ſeldom attend there after the Trials of the Felons are over. But Judge Probyn ſaid, the laſt Time he attended at the Old Bailey he heard two Indictments for Miſdemeanors himſelf. And Judge Lee ſaid he remembered the like Motion was refuſed in the Caſe of The King and Lady Blunt. Accordingly it was refuſed in the preſent Caſe.

The King *and* Pool.

How far the Court will grant a new Trial, by Reaſon of the Jury's finding a Verdict contrary to the Direction of the Judge.

THE Defendant having obtained a Rule, that Judge Lee would ſpeak with Judge Forteſcue concerning the State of the Evidence in this Cauſe that was tried before him, Judge Lee reported the State of the Fact in the Manner following. This was an Information in the Nature of a Quo Warranto granted againſt the Defendant for exerciſing the Office of Mayor in the Borough of Liverpool. Four Iſſues went down to be tried, and the Judge was ſatisfied with the Verdict on three of them; the fourth Iſſue was, whether the Defendant was duly elected. The Evidence on that Iſſue appeared to be, that the Charter-Day for the Election was St. Luke's Day the 18th of October; there was a good deal of Diſorder upon this Election

Election on that Day; accordingly by Conſent the Poll was adjourned till eight of the Clock in the next Morning; then the Poll went on, and the Defendant had the Majority of Votes. Upon this Evidence the Judge directed the Jury to find a Verdict on this Iſſue for the Defendant; but they found it for the King. Upon this State of the Caſe Mr. Abney ſaid, that he conceived that he was intitled to pray, as a Thing of Courſe, that a new Trial might be granted. And ſo he ſaid in the Bewdly Caſe, which was even a Trial at Bar, where the Court directed the Jury to find a Verdict ſpecially, and they found it generally; eleven Judges were of Opinion againſt one, that a new Trial ſhould be granted; and a new Trial was granted accordingly. Mr. Strange and others of Counſel on the other Side ſaid that they ſhould not contend but the general Rule was as has been mentioned. But in the preſent Caſe, they ſaid the Adjournment of the Poll appeared upon the Record; and as it did ſo, they conceived that by the Record the Adjournment appeared to be illegal; and no Conſent could make it good; becauſe on the Charter-day the Office of the precedent Mayor abſolutely determined; and they ſhould have ſubmitted it to the Court that this Caſe was not within the Benefit of the Statute of 11 G. 1. which allows of Adjournments in certain Caſes. The Court thought this a Queſtion proper to be conſidered of; accordingly the Rule for granting a new Trial was inlarged till the next Term. Vide poſtea.

Hollowday *and* Pit.

Vide antea 422.

THE Chief Juſtice ſaid now, that all the Judges of England, excepting Mr. Baron Carter, had met upon the Conſideration of this Caſe; and their unanimous Opinion was, that even after a Diſſolution, the Members of the precedent Parliament are intitled to ſome Privilege in returning to their reſpective Places of Abode; what Time that Privilege was confined to there was no Occaſion to determine; becauſe ſuppoſing the Time of Privilege to be only a convenient one, their Opinions were, that the Defendant had not even that convenient Time allowed him; he being taken in Execution within three Days after the Prorogation, and two Days after the Diſſolution. The great Queſtion which they doubted upon was, whether the Method, which the Defendant had taken to obtain his Diſcharge out of Cuſtody, was a proper one, or not. As to that, he ſaid all their Opinions were, that if the Defendant had ſued out a Writ of Privilege under the great Seal, that would have been a proper one; whether this was ſo, or not, the Judges differed in Opinion. Accordingly the Reſolution of this Court was, that this Rule ſhould be inlarged till the next Term, that they might have an Opportunity for conſidering more fully, whether this was a proper Method, or not; and in the mean Time the Defendant ſhould have Liberty given him to ſue out a Writ of Privilege, if he thought proper. Vide poſtea.

Cary *and* Hilton.

THE Chief Justice now delivered the Resolution of the Court in this Matter; he said they all agreed that this Plea would have been bad upon a Demurrer; and so if the Jury had found that the Lands were the proper Lands of the Plaintiff, and not of the Defendant, this Verdict possibly would not have made it good. But as they have found that this is the proper Estate of Inheritance in the Plaintiff, they thought it had made it good; because otherwise the Court must intend a particular Estate in Somebody else; and to this Purpose the Chief Justice mentioned the Case in 1 Vent. 123. and that of Yateman and Mustard before cited. Accordingly the Rule was discharged for arresting the Judgment. Vide antea 363.

Devenish *and* Martin.

THE Chief Justice delivered now the Resolution of the Court in this Matter, which was, that as this was a Discontinuance, the only Method of obtaining double Costs was by Rule of Court. The Chief Justice said that none of the Statutes give single Costs in these Cases of Discontinuances; but they are only given by the Court, as Terms which they put upon the Party when he moves to Discontinue. And therefore as single Costs are only given by Rule of Court, the double Costs ought to be given in the same Manner. Accordingly that Part of the Rule which related to the Suggestion was discharged, and the other Part, which related to the Master's Allowing double Costs, was made absolute. Vide antea 373.

The King *and* Brooks.

ON Rule to shew Cause why the Defendant should not have a Copy of the Venire and Distringas, Mr. Strange said that this was an Information in the Nature of a Quo Warranto, brought against the Defendant for exercising the Office of Bailiff in the Town of Liverpool. This Cause he said was tried in the County Palatine of Lancaster, and was sent down by Mittimus; and the Venire and Distringas both issued out of the Court below; therefore these Writs are not to be filed in this Court, and consequently this Court cannot give the Party a Copy of them. In the Case of The King and Franklin, Vol. 1. 37. Motion was made that the Postea might be filed together with the Venire and Distringas, in order that the Party might have Copies of them. But even there the Court was of Opinion that the Postea and Distringas ought to be filed, tho' it was agreed that the Venire should not. The Chief Justice said that where any Motion is intended to be made on the Plea Side, a Rule is drawn up upon Motion that the Plaintiff's Attorney shall attend

When a Record is sent down by Mittimus, in order to be tried in a County Palatine, how for the Court above cannot give Leave that Copies shall be taken of the Venire or Distringas.

tend with the Poſtea; in the Crown Side the Form of the Rule in ſuch Caſes is, that Proceedings ſhall be ſtaid till the Parties bring the Poſtea into Court. In neither of theſe Caſes the Party has a Liberty given him to take a Copy of the Poſtea; but the Party has a reaſonable Time allowed him for looking into the Poſtea, and examining it. The reſt of the Court were of the ſame Opinion; accordingly the only Rule that they made was, that the Poſtea ſhould be brought into Court. Vide poſtea.

Caſwell *and* Norman.

When a Writ of Error is brought by an Executor, how far he ſhall pay Coſts, or not.

MR. Denniſon moved that the Court would give Directions to the Maſter to allow Coſts againſt an Executor, upon a Writ of Error brought by him on a Judgment, charging him with a Devaſtavit. Mr. Parker argued on the other Side, and ſaid he ſhould not contend but in Caſes of this Sort Executors muſt put in Bail upon Writs of Error; and ſo is 1 Sid. 368. but the Statute that gives Coſts upon Writs of Error, he conceived, did not extend to Executors; becauſe they do not pay Coſts upon the original Judgment. The Chief Juſtice ſaid that it was true indeed, that Plaintiffs Executors do not pay Coſts upon the original Judgment; but it has been always held that Defendants Executors do. The ſame Diſtinction he thought ought to be obſerved upon Writs of Error; eſpecially as in the preſent Caſe the Executor is found to be guilty of a Devaſtavit. The reſt of the Court agreed with the Chief Juſtice; accordingly Directions were given to the Maſter to allow the Defendant in Error his Coſts.

Neal *and* Peiſely.

When a Declaration is delivered againſt a Priſoner in Cuſtody, how far the Defendant is obliged to plead, or not, within eight Days.

THE Defendant was arreſted by Proceſs returnable the firſt Return of this Term, and upon that was committed to the County Gaol of Northumberland. The Plaintiff's Attorney delivered a Declaration to him in Cuſtody before menſem Paſchæ; and becauſe the Defendant did not plead in eight Days ſigned his Judgment. Upon this it was referred to the Maſter to inquire into the Irregularity of this Judgment; and now he reported the Fact to be in the Manner that has been mentioned; but with this additional Circumſtance, that there was no Notice to plead within the eight Days annexed to the Declaration. Mr. Agar argued in Support of this Judgment. He ſaid he ſhould not contend but if the Rule of Court that was made to eſtabliſh the Practice upon 4 & 5 Will. & Ma. 21. now ſubſiſted, the Judgment was irregular. But he ſubmitted it, that the late Rule made in 3 Geo. 2. for altering the Time for pleading, extended to Priſoners as well as other Perſons, and thereby the firſt Rule was no longer in force. The Chief Juſtice ſaid that he ſhould have much inclined to have been of Opinion that the laſt Rule did not extend to Perſons in Cuſtody; but there was no Occaſion to give an Opinion upon that Point; becauſe

the proper Notice was not annexed to the Declaration; and therefore the preſent Judgment muſt have been Irregular, if it had depended meerly upon this Rule; accordingly the Judgment was ſet aſide with Coſts.

Jennings *and* Kerridge.

MR. Harvey moved that the Defendant might be at Liberty to enter up a Judgment as of 5 Geo. 1. upon Notice of the Motion given to the Defendant. The Chief Juſtice obſerved that this might be dangerous on Account of Purchaſers; upon which Mr. Harvey ſaid that he was willing to enter into a Rule of Court that the Judgment ſhould not be docketed but of this Term. The Chief Juſtice ſaid, that ſtill the Plaintiff would have it in his Power to docket it as of the Term it was entred up in, and it would only be Contempt of the Court; for this Reaſon the Motion was refuſed.

How far the Court will give Liberty, or not, that Judgment may be entred nunc pro tunc.

The King *and* Winnyat.

MR. Strange took ſeveral Exceptions to an Order of Seſſions made upon the Defendant to pay 30 l. Wages to his Servant; Firſt, that none of the Juſtices appeared to be of the Quorum. Secondly, that the Seſſions are ſaid to be held for the County, and not in the County. Thirdly, that the Service does not appear to have been performed in the County. And laſtly, that the Defendant does not appear to be of the County. Accordingly a Rule was made to ſhew Cauſe; and the next Term the Rule by Conſent was made abſolute.

When an Order is made for Payment of Servants Wages, how far ſuch Order ſhall be ſaid to be good, or not, in Point of Form.

The King *againſt* Friend and his Wife.

THE Defendant having been convicted upon the Statute of 10 Geo. 1. cap. 10. for beating Exciſe-Officers in the Execution of their Office; Mr. Lacy moved in arreſt of Judgment, that there were diſtinct Penalties given of 50 l. the one on the Wife, the other on the Husband; whereas one Penalty of 50 l. ought to have been inflicted upon the Husband only. Accordingly a Rule was made to ſhew Cauſe. Vide poſtea.

When Perſons are convicted upon the Statute of 10 Geo. 1. cap. 10. to prevent the Beating an Officer of the Exciſe, how far there ſhall be diſtinct Penalties given upon that Statute, or not.

Banghan

Banghan *againſt* Lother and others.

When an Action of Treſpaſs is brought for the taking of Goods, how far the Defendant may be allowed to prove a Title to thoſe Goods under an Execution, notwithſtanding he has pleaded the General Iſſue.

Sittings at Guild-Hall. IN Treſpaſs brought againſt the Defendants for taking away Goods, the Plaintiff proved his Poſſeſſion in them as Truſtee for one Davis, upon a Writ of Execution, marked for 300 l. againſt the Goods of Atchenſon. Atchenſon had confeſſed a Judgment for 600 l. to Davis, and a Writ of Execution which was marked for 300 l. came to be levied upon Atchenſon's Goods the 5th of November laſt. The Sheriffs Bailiff upon the Execution levied but 88 l. 4 s. and returned this upon the Writ. As ſoon as this Execution was ſo made, a Bill of Sale was made of the Goods to the Plaintiff, in Truſt for Davis, but Atchenſon's Wife continued in Poſſeſſion of theſe Goods, and carried on the Buſineſs of the Houſe, her Husband being gone off. On the Part of the Defendant, Serjeant Darnel at firſt only endeavoured to ſhew that the Plaintiff had not ſuch a Poſſeſſion in theſe Goods by this Means, as to be able to maintain Treſpaſs; and thought he could not be allowed to ſhew a Title to them under another Judgment and Execution, in as much as the Defendant had pleaded generally Not guilty. But the Chief Juſtice ſaid the Defendant might be admitted to give this Evidence upon this Iſſue, in as much as this is only a Diſpute about the Right of thoſe Goods between two Judgment-Creditors; though he did agree that if this Action had been brought by Atchenſon himſelf, the Defendant muſt have juſtified the Taking ſpecially. Upon this the Serjeant went into the other Part of his Evidence, and ſhewed a Judgment by Default obtained by Lother againſt Atchenſon, and a Writ of Inquiry, aſcertaining the Damages to 17 s. 10 d. And upon the 3d of December an Execution was made upon the Goods in the Hands of the Wife of Atchenſon. Mr. Marſh by way of Reply ſhewed, that Davis had at ſeveral Times aſſiſted Atchenſon with Sums of Money, that at the Time of the Execution there was at leaſt 86 l. bona fide due to Davis; that Atchenſon had been an abſconding Man for ſome Time; and that before and after the Execution, ſeveral Perſons had ſent Goods into the houſe upon the Credit of Davis, believing that Atchenſon's Wife acted only as Servant to him. The Chief Juſtice in ſumming up the Evidence ſaid, that if any open Agreement could have been proved at the Time of the firſt Execution, that Atchenſon's Wife ſhould continue in the Poſſeſſion of the Goods, as Servant to Davis, to make a farther Improvement of them for his Benefit, he ſhould have thought the Verdict ought to have been for the Plaintiff. But as no ſuch Agreement was proved, he thought this Tranſaction ought to be conſidered fraudulent with Regard to the Defendant; and therefore the Jury ſhould find a Verdict for him; which they accordingly did.

Ward *againſt* Dunce and Norton.

Sittings at Guild-Hall.

IN an Action of Treſpaſs and falſe Impriſonment, for taking and detaining the Plaintiff two ſeveral Days, namely, the 28th of March laſt, and the 4th of April following, the Defendant Dunce pleaded a ſpecial Juſtification. As to the Impriſonment on the firſt of theſe Days, he pleaded that he was a Shoe-maker, and that the Plaintiff brought him ſix Skins of Shamois Leather to ſell, that the Defendant examined him what Right he had to ſell them, and that the Plaintiff informed him that he ſold them for one Mr. Dunce, who happened to be the Defendant's Brother. The Defendant upon this ſent for his Brother, and he told him it was an Impoſition; and for this Reaſon this Defendant ſent for the other Defendant Norton, who was a Conſtable, and the Plaintiff was taken into Cuſtody by him, and carried to a Spunging-Houſe for about three Hours. When the Plaintiff was at the Spunging-Houſe, it was too late to carry him before a Juſtice of the Peace, it being about 9 of the Clock on the Saturday Evening, or for the Plaintiff to ſend for his Friends to ſhew how he came by the Goods. Upon the Plaintiff's Requeſt he was diſcharged out of Cuſtody for the preſent, upon his agreeing to leave the Goods with the Defendant's Brother, and promiſing to come again to the Defendant's Brother on the Monday Morning following; and then to juſtify his Right to the Goods, but he did not come according to Promiſe. As to the Impriſonment on the ſecond of theſe Days, the Defendant pleaded that he ſent for the other Defendant Norton, to retake the Plaintiff for his having eſcaped, and to carry him before a Juſtice of Peace, which was accordingly done. The other Defendant being a Conſtable pleaded Not guilty, as to the whole. This Cauſe coming now to be tried before the Chief Juſtice, the Juſtification on the firſt Day was fully proved, and the Chief Juſtice thought it to be a good one in Point of Law. But as to the ſecond Juſtification he at firſt doubted, whether what the Plaintiff did could be called an Eſcape; however, upon farther Recollection he ſaid, that when the Plaintiff was lawfully in Cuſtody in the Hands of the Conſtable, he could not legally be diſcharged out of that Cuſtody, but by a Juſtice of Peace; and therefore what the Plaintiff did was an Eſcape. But then he ſaid, he could not be retaken for the Eſcape, but by a Juſtice of Peace's Warrant. For although for Neceſſity Sake, on Suſpicion of Felony, the Law allows a Conſtable, or even a private Perſon to arreſt another that is ſo ſuſpected, without a Warrant; yet to juſtify a Retaking for an Eſcape, he thought ſuch Warrant was neceſſary; and therefore inclined to think that the ſecond Juſtification was bad. However, becauſe upon the Plaintiff's Evidence the whole Tranſaction appeared to be done out of an honeſt Deſign, he directed the Plaintiff to go into the Proof of his Caſe, and ſaid he would leave the Matter to the Jury. The Plaintiff went into his Proofs accordingly, and ſhewed that though the Plaintiff did not come to Mr. Dunce's Brother

How far a Priſoner may be retaken upon an Eſcape.

at the Time appointed, yet afterwards a Friend of his did come to him and fully ſatisfied him he was well intitled to the Goods. Mr. Dunce the Defendant was acquainted with this; but Norton knew nothing of it. Upon this the Chief Juſtice directed the Jury to find a Verdict for the Defendant Dunce upon the firſt Juſtification, againſt him upon the ſecond; and to find a Verdict for Norton upon the Whole, which they accordingly did.

Proctor and others *againſt* King.

How far a Contract ſhall be ſuppoſed to relate to New Stile how far to Old Stile.

Sittings at Guild-Hall. IN an Action brought upon a Policy of Aſſurance, the Caſe upon the Plaintiff's Evidence appeared to be in the Manner following. On the 17th of December laſt the Ship called the Friends Adventure ſailed from Sevil in Spain laden with a Cargo of Oranges and Lemons. On the 23d when the Ship was out at Sea near the Iſland of Merlune upon the Coaſt of Britany, a very great Storm aroſe and the Ship and Cargo were loſt in it. However there was no Opportunity of giving Advice of it till the 3d of January following, and then a Letter was ſent to one of the Plaintiffs giving an Account of it, which did not arrive till the 14th. Upon the 8th the Policy of Aſſurance was ſubſcribed by the Defendant for 100 l. 10 per Cent. being to be allowed the Defendant in Caſe of a Loſs; but by the Terms of the Policy no Account was to be given of the Value of the Loſs by the Aſſured; and this Policy the Defendant ſubſcribed for the Conſideration of a Guinea and a Half only. Upon the Defendant's Evidence the Caſe appeared to be in this Manner. On the 4th of January Captain Mullens arrived with his Ship, which had ſailed from Sevil likewiſe, and in Buttolph-Lane, which was the Place where the Plaintiffs who were Orange Merchants lived, immediately gave an Account, that the Plaintiffs Ship ſet ſail two Days before him, and that Ship being a much better Sailer than his, and the Sea being at that Time exceedingly dangerous, the common Report about the Neighbourhood was, that the Plaintiffs Ship muſt certainly have been loſt. It was ſworn too by the Defendant's Witneſſes, that at leaſt they believed the Plaintiffs had heard of this Report at this Time, if not had it from Captain Mullens himſelf. Notwithſtanding this Mr. Strafford, one of the Plaintiffs, who was Partner with the others in this Orange Trade, on the 8th of January went to Mr. Prade a Broker, and told him that he had received Advice from his Correſpondent at Sevil, that his Ship had not ſailed from thence the 22d of December, but that it intended to ſet Sail within a Day or two after that Time, and upon that deſired his Broker to get a Policy of 100 l. ſubſcribed for him upon that Ship. Mr. Strafford had this Letter in his Hand when he gave the Directions to the Broker, but did not read it to him, nor did the Broker look upon any Part of it. The Broker likewiſe omitted to aſk any Queſtions, whether Mr. Strafford meant New Stile or Old Stile, when he ſaid the Ship was not ſet out the 22d of December; but the Broker ſwore, that as there

was no particular mention of New Stile he underſtood Mr. Strafford to mean Old Stile; and accordingly repreſented to the Defendant, that the Ship had not ſet Sail the 22d of December, which he underſtood to be according to Old Stile, and the Defendant took him in that Senſe likewiſe. The Plaintiffs in their Reply ſhewed, that the Poſt in going from Sevil to London is never leſs then 22 Days, and therefore as Mr. Strafford had his Correſpondent's Letter in his Hand on the 8th of January, and told his Broker the Contents of it, he could not poſſibly mean any Thing but New Stile. And beſides, upon Reading the Letter now in Court, it appeared, that the Plaintiffs Correſpondent had given them Advice, that Captain Mullens had actually ſailed at the Time the Letter was dated; ſo that the Plaintiffs might very well be ſuppoſed to have given Credit to their Correſpondent rather than to Captain Mullens. Upon this State of the Evidence the Chief Juſtice directed the Jury, that if they were of Opinion, that Mr. Strafford gave ſuch Information to his Broker as might naturally miſlead him, then they ſhould find their Verdict for the Defendant; but if on the Contrary they were of Opinion, that Mr. Strafford gave a common Account of this Matter, and ſuch as the Broker ought to have underſtood in the Senſe of New Stile, then they ſhould find their Verdict for the Plaintiffs. The Jury were of this latter Opinion; accordingly the Plaintiffs had a Verdict and 90l. Damages.

Term. Trin.

8 Geo. II. 1734.

Metcalf *and* Hayes.

How far the Court will make a Rule for referring a Scrivener's Bill to be taxed.

IN an Action brought by the Plaintiff for a Sum of Money due to him as Scrivener, Mr. Field obtained a Rule the laſt Day of the laſt Term for taxing his Bill. Mr. Abney and Mr. Strange moved now, that that Rule might be diſcharged; and for this Purpoſe produced an Affidavit, that all the Items of the Bill related to Buſineſs done by the Plaintiff as Scrivener, and not as Attorney; for which Reaſon they ſubmitted it, that this Caſe was not within the Statute of 2 G. 2. 22. Mr. Marſh and Mr. Field argued on the other Side, and ſaid, that the Plaintiff was admitted an Attorney immediately upon the making of that Act, as they believed all other Scriveners were, thinking that they were included within it. They obſerved farther, that many of the Items related to that which was the proper Buſineſs of Attornies, particularly, that for drawing Precipe and Concord of a Fine; and therefore, though the Plaintiff has ſworn that he did not act in theſe Matters as Attorney; yet they ſubmitted it this Caſe muſt be within the Meaning of the Act. And laſtly, they took Notice, that when the former Rule was obtained, Mr. Strange had Notice given him of the Motion, and he defended it then; for which Reaſon it was too late now to move to diſcharge it. The Chief Juſtice ſaid, that in the Nature of the Thing itſelf, he ſhould have thought this Matter proper for the Examination of the Maſter, as many of the Items relate merely to the Buſineſs of an Attorney. But for the laſt Reaſon that has been mentioned, namely, that the Court made this Rule on hearing Counſel on both Sides, he thought clearly that it ought to ſtand; accordingly the preſent Motion was refuſed.

Jaſper *and* Grovener.

How far the Court will give Liberty, or not, that the Rules for pleading ſhall be enlarged.

IN an Action brought againſt the Defendant as Executor to one, who was Factor to the African Company; Serjeant Wright had obtained a Rule laſt Term for enlarging the Time for pleading to the firſt Day of this Term, upon an Affidavit that the Defendant was ſeized with the Dead Palſey, ſo that he was not able to ſpeak or write his Name, and likewiſe upon his agreeing that the Defendant ſhould not in the mean Time give one Creditor a Preference in Payment to the other. Serjeant Wright moved now that this Rule might be farther enlarged to the firſt Day of next Term, upon an Affidavit that the Defendant continued under the ſame Diſability, and likewiſe upon his conſenting to the ſame Terms as he did before. Mr. Strange argued on the other Side, and ſaid that the Defendant's Counſel had not given the Court any Reaſon to believe when the Defendant will be out of this Diſability; and therefore there was no Ground for enlarging the Time for pleading farther. He likewiſe compared this Caſe to that of a Motion to put off a Trial; where the Court will not grant it, unleſs ſome probable Cauſe is ſhewn, that the Party's Witneſſes will return in a reaſonable Time. The Chief Juſtice ſaid, that in the Caſe of Mr. Pit, who was likewiſe an Executor, and diſabled by the Act of God, in the ſame Manner as the preſent Defendant is, he remembred the Court of Chancery granted a Commiſſion to put the Teſtator's Effects into the Hands of ſome other Perſons; and he thought that would be the proper Application in the preſent Caſe. However, Judge Page and Judge Lee ſaid, that if the Defendant's Counſel would conſent peremptorily to try this Cauſe as of next Term, and ſo ſubmit to the other Terms that were offered, they ſhould think it would be a Reaſon for enlarging the Rule for pleading to the Time that has been deſired; accordingly upon the Defendant's Counſel conſenting to this, the Rule was enlarged till that Time.

The King *and* The Juſtices of the Town of Shrewsbury.

MR. Abney coming now to ſhew Cauſe, it appeared to the Court that there was no Partiality in what the Juſtices did; accordingly the Rule was diſcharged. Vide antea 440.

N. B. In this Caſe Judge Lee ſaid that this has been determined, that Juſtices of Peace are bound to ſign a Poor's Rate, though they have legal Exceptions to it; and a Mandamus will lie for this Purpoſe. The Reaſon, he ſaid, is, that till the Rate is ſigned, the Matter cannot be put into a Method of Trial.

The King *againſt* Nap and others.

How far an Affidavit is neceſſary to be taken Notice of in drawing up a Rule of Court.

SErjeant Chapel moved, that a Rule might be made abſolute for an Information in the Nature of a Quo Warranto going againſt the Defendants, to ſhew by what Authority they claimed to be Freemen of the City of Wincheſter. Mr. Strange on the other Side ſaid, that as to two of the Defendants he ſhould not oppoſe the Rule's being made abſolute. But as to the others, the Cauſe that he ſhewed was, that the Election of theſe Defendants to their Freedom depended upon the Validity of the Election of the late Mayor; that a Rule indeed was made abſolute for an Information in the Nature of a Quo Warranto againſt the Mayor, and that Rule was read, when this Rule for ſhewing Cauſe was obtained; but it does not appear by this Rule that any of thoſe Affidavits, which the former Rule was obtained upon, was read at that Time. Mr. Taylor, who was Attorney for the Proſecutor, however did aver, that he had thoſe Affidavits in Court, and they were both put in, at that Time it was not thought neceſſary that the Affidavits ſhould be read. The Court ſaid, that it was certain, that thoſe Affidavits could not conclude the preſent Defendants, but they ought to have an Opportunity of anſwering them. For which Reaſon they thought that thoſe Affidavits ſhould have been inſerted in the Rule; and becauſe they were not, the Court diſcharged it.

The King *and* The Inhabitants of Crakmarſh.

Vide ante 198.

How far the Court will quaſh an Appointment of Overſeers, or not.

AN Appointment of Overſeers being returned upon a Certiorari, Serjeant Birch took two Exceptions to it; firſt, that it does not appear to be under the Seal of the Juſtices; ſecondly, that this Appointment of Overſeers is for the Hill, not for the Pariſh of Crackmarſh. With regard to the firſt of theſe Exceptions the Chief Juſtice ſaid, that where a Coroner's Inqueſt is ſent up into this Court, he did agree the Seals of the Jurors muſt be affixed to it; becauſe there the Original itſelf is ſent up. But here the Tranſcript is only returned; and as it is ſaid to be under the Hands and Seals of the Juſtices, he thought it ſufficient. With regard to the ſecond Exception he ſaid, that though the Statute of 43 Eliz. 2. has been conſtrued to extend only to Pariſhes; yet the Statute of 13 & 14 Car. 2. 12. (21.) has been held to extend to Extraparochial Places; and ſince that Statute that Overſeers are to be appointed by the Inhabitants of thoſe Places equally as they were before by the Inhabitants of Pariſhes at Large; and if they do not make ſuch Appointment a Mandamus will lie to compel them to do it. Judge Lee ſaid he remembered the Court was of the ſame Opinion in the like Caſe of this very Townſhip, and there they founded their Judgment on the Caſe of The King and The Inhabitants of Stoke-Lane. Mr. Abney ſaid too, in the Caſe of The King and The Inhabitants of Ruffard there was a Mandamus to the Juſtices of the County of Notting-

ham to appoint Overseers, and they returned, that the Place was Extraparochial, but that Return was not allowed of. And he said the Court was of the same Opinion in the Case of The King and The Inhabitants of Belvoyer. Accordingly the present Motion was refused.

Hinshaw *and* Boyle.

IN an Assumpsit Mr. Robinson moved several Exceptions in Arrest of Judgment; first, that the Consideration was illegal, for this Purpose he said the Declaration set forth, that several Actions were commenced against Williamson by his Creditors in the Court of Macclesfield, and thereupon it is agreed between the Attorney for Williamson and the Attorney for the others, one of which the present Defendant was, that the Plaintiff should take the Goods of Williamson into his Possession; that he should be indemnified for so doing, and that in Case any Recovery should be against the Plaintiff for intermeddling with the Goods, it was agreed by the Creditors that he should be reimburst by them in Proportion to their several Debts. Mr. Robinson submitted it, that Attornies can have no such Power over the Estate of their Client; and for that Reason the Consideration cannot be maintained. The second Exception was, that the Breach was insufficient. The Breach was, that Williamson commenced an Action against the present Plaintiff in the Court of Exchequer for taking these Goods, and recovered Damages against him on that Account; that the present Defendant had Notice of this Recovery; but that he did not pay those Damages nor any Part thereof; upon which Mr. Robinson submitted it, that this Breach was insufficient in as much as the Plaintiff had not set forth what the Proportion of the Defendant's Debt came to. The third was, that the Manner of the Recovery is not set forth; so that it does not appear, whether it was by Verdict or by Default. The fourth was, that in the Award of the Venire the qui nec, &c. is omitted. Mr. Bootle argued on the other Side. In Answer to the first Exception he did submit it, that though possibly the Client might have a good Remedy against the Attorney for making such an Agreement; yet if a Stranger meddles with the Goods in Pursuance of it he cannot be answerable; and for this Purpose cited Wynch 48, and Hutton 55. To the second he said, that the Breach assigned was, that the Defendant did not indemnify the Plaintiff from those Damages or any Part thereof; and that he submitted it was sufficient, especially since the Verdict had ascertained it. For which Purpose he mentioned Sir Thomas Jones 125. In Answer to the third of these Exceptions he cited 2 Cro. 10. And as to the fourth he observed, that at most it was but a Misentry of the Clerk, and therefore amendable by the Statute of H. 6. The Court thought none of these Exceptions material saving the last; but as to that the Rule was inlarged; that the Plaintiff might have an Opportunity to move for the Amendment. Vide postea.

When an Action is brought upon an Assumpsit, how far the Consideration shall be said to be illegal, or not.

Pa-

Palucer *and* Cotton.

When an Award is void in part, how far it ſhall be ſaid to be void, or not, in the Whole.

MR. Huſſey and Mr. Strange came now to ſhew Cauſe, why an Attachment ſhould not go for the Breach of an Award. In this Caſe the Award required the Defendant to do three Things; firſt, to pay the Plaintiff a certain Sum of Money; ſecondly, to pull down a Wall which he built upon the Plaintiff's Ground; and thirdly, to pay the Arbitrators a certain Sum of Money for their Expences in their ſeveral Attendances. Then the Words of the Award followed, That on Performance of the aforeſaid Matters the Plaintiff, ſhould give the Defendant a General Releaſe. The Counſel ſaid, that with regard to that Part of the Award which related to the Defendant's paying the Arbitrators a Sum of Money, it was clearly void; and in as much as the Releaſe, which was the only Act to be done by the Plaintiff was not to be given till that Sum of Money was paid by the Defendant as well as the other Acts performed by him, they ſubmitted it the whole of this Award was void likewiſe. For this Purpoſe Mr. Huſſey mentioned the Caſe of Barnardiſton and Poulger, Hil. 12 Anne. Two Exceptions were there taken to the Award; firſt, that the Submiſſion was of all Matters in Difference which Barnardiſton had with Poulger and Love, and the Determination by the Arbitrators was only of ſuch Matters in Difference, which Barnardiſton had with Poulger only. The 2d Exception was, that the Rent was ordered to be paid on the 23d, but that it was not due till the 24th. In that Caſe he took the Opinion of Lord Chief Juſtice Parker to be, that the laſt Part of this Award was void, and as there was a Releaſe to be given on Payment of the Money aforeſaid, he was of Opinion that the whole Award was void likewiſe. But in the preſent Caſe, if this was not a ſufficient Reaſon for ſetting the Award aſide, at leaſt it was hoped that it would be ſufficient to influence the Court not to inforce the Award by Attachment. For this Purpoſe Mr. Strange mentioned the Caſe of Sir Thomas Hails and Taylor, where the Court was of this Opinion. And laſtly they obſerved, that they had an Affidavit that they had actually tendered the Money to the Plaintiff that was due upon the Award, and that they were ready to pull down the Wall, provided the Plaintiff would be bound to enter into a Rule of Court not to bring an Action of Treſpaſs againſt the Defendant for ſo doing. They ſaid there was good Reaſon for inſiſting upon theſe Terms; becauſe the Plaintiff had actually intimated that ſhe would bring Treſpaſs againſt the Defendant for doing this. The Chief Juſtice ſaid, theſe were reaſonable Terms to be agreed to. Accordingly upon the Plaintiff's agreeing to them, the Rule was made abſolute for the Attachment; but Directions given, that it ſhould lie in the Officer's Hand, and not be executed at all, provided the Defendant ſhould pull down the Wall within a Month's Time.

Goodtitle *and* Bourdoy.

How far the Court will give Leave, or not, that an Iſſue ſhall be amended in an Ejectment.

ON Rule to ſhew Cauſe why an Iſſue ſhould not be amended in Ejectment, wherein the Defendant's Name was repeated inſtead of the Plaintiff's, Serjeant Darnel ſaid, that he ſhould not oppoſe the Rule's being made abſolute provided it was on Payment of Coſts. But he ſubmitted it, that Coſts they were well intitled to. For when this Cauſe came down to Trial, the Defendant's Counſel took the Exception, that there was no Iſſue joined, and thereupon the Judge refuſed to try the Cauſe. By this Miſtake of the Plaintiff the Defendant had loſt a Trial; therefore according to the Common Rule of the Court he conceived they were intitled to Coſts upon the Amendment. Serjeant Baynes argued on the other Side, and ſaid that notwithſtanding this Exception was taken at the Trial, the Plaintiff's Counſel offered to proceed, the Defendant's Counſel themſelves were unwilling to go on, and therefore there being no Trial was owing to the Defendant's Choice, and in ſuch Caſes he ſubmitted it, that no Coſts ought to be granted. To this Purpoſe he mentioned a Caſe that was in this Court in Replevin, where there was a Miſtake of the Clerk, and for that Miſtake a Demurrer and a Joinder in Demurrer; and after this Serjeant Knot moved to amend, and the Court allowed it without Payment of Coſts; and to the ſame Point he cited 2 Lev. 117. The Chief Juſtice and Judge Lee ſaid, that they thought that the Caſe that was cited on Serjeant Knot's Motion could not be maintained for Law, unleſs Coſts were granted; and in the Principal Caſe the Court were all of Opinion, that the Plaintiff ought to pay Coſts; accordingly on thoſe Terms the Rule was made abſolute.

Anonymus.

When Goods are taken in Execution, how far the Court will direct, or not, that the Goods ſhall be reſtored.

ON Rule to ſhew Cauſe why Goods taken in Execution ſhould not be reſtored, it appeared that Part of the Goods were Notes and Bonds. The Chief Juſtice ſaid that it had been never determined, that Bank Notes, though aſſignable, could be taken in Execution. He ſaid till the late Statute it was not Felony to ſteal them. Judge Page ſaid that he always thought that Deeds and Writings could not be taken in Execution, and the reſt of the Court were of the ſame Opinion.

The King *and* Bartlet.

Vide antea 400.

THIS Matter coming on again, Mr. Strange ſaid, that there was but one Exception now remaining of any Difficulty with the Court, and that was concerning the Allowance of the Diſburſement he appealed from, viz. The Diſburſement of Churchwardens and the Allowance thereof; as to this he ſubmitted it in the firſt place, that the Seſſions had an original Juriſdiction; for the Words in the 6th Section of 43 Eliz. give the Seſſions a Power to determine all Matters done in Purſuance of that Act, whether the Party finds himſelf aggrieved either by the Act of the Churchwardens or by the Act of the two Juſtices. But what he principally relied upon was, that ſuppoſing the Application to two Juſtices was firſt of all neceſſary, yet in the preſent Caſe it ſufficiently appeared, that there was a previous Application made to them; and the Allowance of the Diſburſement ſhall be intended to have been by the two Juſtices. For this Purpoſe he ſaid, that by 5 Eliz. 4. the Juſtices have a Power to order Maſters to pay their Servants Wages in Huſbandry; but they have a Power of ordering thoſe Sort of Wages only. Yet general Orders to pay Servants Wages have always been held to be good, without ſpecifying the Wages to be due in Husbandry. In the Caſe of The King and The Inhabitants of Bitham, Hil. 7 Geo. 1. it was ſtated in an Order of Removal, that A. was appointed to be Collector of Burials, and lived in a Pariſh as Collector; the Court held that a good Settlement, though it was not ſtated in the Order, that he was appointed Collector for a Year; becauſe they ſaid they would intend him to be ſo in as much as the Statute of 6 & 7 W. 6. (20) required it. But what comes nearer to the preſent Caſe was that of The King and The Inhabitants of Ordmanbury, Trin. 4 Geo. 1. where an Order appeared to be made upon an Appeal; but not ſaid to be on an Appeal of the Party grieved; yet that was held to be ſufficient. Judge Lee ſaid, that in Carthew 158. it is held upon the firſt Clauſe of this Statute of Eliz. that an Application muſt be to two Juſtices before the Parties can come to the Seſſions; and he thought there was equal Reaſon for the ſame Conſtruction upon the ſecond Clauſe in this Statute relating to the Diſburſement. And as to the 6th Section the Chief Juſtice and he agreed, that the Words muſt be taken diſtributively. Then as to the ſecond Obſervation made by Mr. Strange the Chief Juſtice ſaid, that the ſetting forth this Matter concerning the Allowance of the Diſburſement is Matter of Juriſdiction; and therefore the Court muſt require ſtrict Certainty. But in the preſent Caſe he ſaid it is far from being neceſſarily to be intended, that the Juſtices did make this Allowance, becauſe the Pariſhioners themſelves may allow it in ſome Caſes, namely, by acquieſcing under it. The Caſe of Wages the Chief Juſtice did agree, becauſe the Words of the Statute are there followed. Judge Lee ſaid that the Caſe of The King and The Inhabitants of Ordmanbury deſerved to be looked into; but for the preſent he ſaid he

inclined to be of Opinion with the Chief Juſtice. The reſt of the Court were of the ſame Opinion; however the Rule was enlarged, that that Caſe might be looked into.

Clerk *and* Crow.

ON a Writ of Error on a Judgment in the Common Pleas, this appeared to be an Action brought on Articles, by which the Defendant agreed not to exerciſe a certain Trade within the Weekly Bills of Mortality. Mr. Bicknal ſaid, that ſuch Agreement was determined to be good in the Caſe of Jaſpen and Lamper, Hill. 13 Geo. 1. and likewiſe in the Caſe of Michel and Reynolds; for which Reaſon the Court affirmed the Judgment directly.

How far an Agreement which is made in Reſtraint of Trade ſhall be ſaid to be binding, or not.

Shepherd *and* Brand.

ON Rule to ſhew Cauſe, why an Award ſhould not be ſet aſide, ſeveral Exceptions were taken to it; but the Court over-ruled them all, excepting one, which was, that before the making the Award the Arbitrators inſiſted upon three Guineas apiece to be paid them by each of the Parties for their Trouble and Expences. The Defendant refuſed doing it on his Part; upon which the Plaintiff paid the whole Money. The Court ſaid that they thought it might be ſomething dangerous to ſuffer one Side only to give Money to Arbitrators; accordingly for that Reaſon the Rule was made abſolute.

How far an Award ſhall be ſet aſide, or not, by Reaſon of the Arbitrators receiving Money for making their Award.

Hore *and* Gates.

THIS Matter coming on again, Mr. Parker argued for the Plaintiff; he ſubmitted it, that the Averment of the Bill of Middleſex being ſued out in the Vacation could not be maintained. To this Purpoſe he cited the Caſe of Rouſe and Ball, Hill. 1 Geo. 1. Rot. 47. That was an Action upon a Bail-Bond, wherein the Plaintiff declared, that the Party was arreſted the 27th Day of Auguſt 1714, by Virtue of a Proceſs returnable coram Domino Rege, the firſt Return of Michaelmas Term. To this Declaration there was a Demurrer, and upon Argument it was objected that this Proceſs appeared to be taken out in the Vacation, and conſequently void; for the Demiſe of the late Queen was not till after Trinity Term in that Year, and the Proceſs being made returnable before the King, it thereby appeared that it muſt have been taken out in that Part of the Vacation, that was after the Demiſe of the Queen; and upon this Exception being taken, the Plaintiff moved to diſcontinue. To the ſame Purpoſe he cited the Caſe of Buckeridge and Wright, Hill. 12 Geo. 1. That likewiſe was an Action upon a Bail-Bond; the Writ upon which the Bail-Bond was given, appeared to be taken out in the Vacation, and the Court held the Writ to be void, and conſequently the Bail-Bond likewiſe. Mr. Strange argued

Vide antea 319.

argued on the other Side, and ſaid that he did agree that the Term and Vacation are to many Purpoſes conſidered but as one Day in Law. But this is only a Fiction; and therefore ſhall hold, or not, according as it is right that it ſhould do ſo. For this Purpoſe it has been held, where an Arreſt was made in Vacation, without ſuing out a Proceſs, and afterwards Proceſs ſued out teſted of the Term preceding, that ſhould not make the Arreſt to be legal; and ſo it is reſolved in Sir Tho. Jones 142. Ray. 161. 2 Keb. 173, 198. and 3 Keb. 213. To the ſame Purpoſe he cited the Caſe of Waring and Newbury, Trin. 4 G. 1. There a Landlord died inteſtate, and Execution was taken out againſt the Tenant; after that, Letters of Adminiſtration were granted; and then Motion was made on Behalf of the Adminiſtrator, that a Rule might be made upon the Sheriff to pay a Year's Rent to him out of the Goods taken in Execution. But the Court refuſed the Motion; becauſe a Relation ſhould not deveſt a legal Intereſt; though it was agreed in that Caſe, that ſuch Adminiſtration ſhall maintain Trover for Goods taken away before the Letters of Adminiſtrator granted; in as much as the Relation there is only to puniſh a Tort. But this Matter he ſaid was more clear ſince the Statute of 5 & 6 Will. & Ma. 21. (4.) which requires the particular Day to be marked upon the Writ when the Proceſs is ſued out. And beſides, he ſaid, the Statute of Limitations expreſly requires that the Actions ſhall be ſued out as well as commenced within the ſix Years. The Commencing the Proceſs may indeed ſignify only the Awarding of it; which in the Nature of the Thing muſt be ſuppoſed to be done in Term-Time ſedente Curia; but the Suing it out can ſignify only the actual Beſpeaking it of the Officer; for which Reaſon this is neceſſary to be done within the ſix Years, as well as the other; whereas in the preſent Caſe it is expreſly averred by the Record, that this was not done within that Time. The Chief Juſtice ſaid, that his Opinion was, that the preſent Averment could not be admitted. The Suing out a Bill of Middleſex was only making a Copy of the Award itſelf upon the Roll; and the Attempt of making ſuch an Averment, either in Suit by Original, or Suit by Bill, does not appear to have been once made ſince the Time of the Statute, which is One hundred and eleven Years. That ſuch an Averment could not be made, he ſaid, was expreſly taken for granted in the Argument of Mr. Holt, reported by Sir Thomas Jones before-mentioned; and that it could not be allowed, he thought the Caſe of Eaſtwick and Coke was a ſtrong Authority. Judge Lee ſaid, in the Caſe of Parſons and Gill, Mich. 13 Will. Gill acknowledged a Judgment, which was ſigned the 2d of April; on the 9th following he died, and afterwards Execution was taken out againſt his Goods teſted the 23d of January before. Serjeant Broderick moved to ſet this Execution aſide; but the Court refuſed it, in as much as the Writ was actually taken out before the Signing the Judgment; for which Reaſon, as this Fiction of Law is ſo well known, he thought it might well be ſuppoſed to agree with the Intent of the Legiſlature, that the Plaintiff ſhould not be debarred of his Action till the End of the Vacation after the ſix Years. The reſt of

the Court were likewiſe of the ſame Opinion, upon which Mr. Strange excepted, that the Continuances of the firſt Writ were not regularly entred; accordingly the Matter ſtood over at preſent, that this Affair might be looked into. Vide poſtea.

Smith *and* Hickſon.

IN an Action for a malicious Proſecution, the Plaintiff had declared that the Defendant maliciouſly proſecuted an Indictment againſt him and his Wife for receiving ſtolen Goods, knowing them to be ſtolen, to the Prejudice of the Huſband and the Wife, whereby they loſt their good Name and Reputation; and likewiſe the Plaintiff alledged, that thereby he ſuffered much in his Trade of a Taylor, to his Damage, &c. To this Declaration the Defendant pleaded Not Guilty; and the Jury found that the Proſecution was not malicious as to the Huſband, but was malicious as to the Wife; and thereupon they gave 40 s. Damages. Serjeant Eyres moved now in Arreſt of Judgment, and took two Exceptions; Firſt, that the Wife ought to have been joined with the Huſband in this Action. And ſecondly, admitting that not to be neceſſary, yet the Plaintiff could not recover; becauſe he has declared that the Proſecution was malicious as to them jointly, and the Jury found it to be malicious as to one of them only; and in Support of this laſt Exception, he cited 1 Lev. 299. 2 And. 48. and 3 Cro. 147, 157, 524. Serjeant Chappel argued on the other Side, and with Regard to the firſt Exception ſaid this Point is determined in Favour of the Plaintiff, in Sir William Jones 440. reported likewiſe in 1 Cro. 553. In Anſwer to the ſecond Exception he ſaid, that in Actions founded upon Tort, wherever there is ſufficiently found by the Jury to prove an Injury by the Defendant. the Judgment ſhall be againſt him; and therefore the preſent Caſe is very diſtinguiſhable from thoſe that are cited. The Chief Juſtice ſaid, that in the Caſe of Savil and Roberts, Salk. 13. Lord Holt was indeed of Opinion that an Action would not lie for maliciouſly preferring an Indictment, unleſs the Indictment contained in it a Charge of a ſcandalous Nature. But in the Caſe of Jones and Gwynn, which was an Action brought for maliciouſly preferring an Indictment on the late Statute concerning Chapmen and Badgers, Lord Macclesfield and the whole Court denied that Caſe to be Law; and therefore it muſt now be taken to be a ſettled Point, that an Action will lie for maliciouſly preferring an Indictment of any Sort. In the preſent Caſe, the Indictment did certainly contain a Charge of a ſcandalous Nature, and as to that, the Queſtion in the firſt Place is, whether it was neceſſary that the Wife ſhould be joined in this Action. As to that he did agree, that in an Action for Words ſpoken againſt the Wife, ſhe muſt be joined; but in the preſent Caſe ſhe need not; becauſe by preferring this Proſecution againſt the Wife as well as the Huſband, there might be a ſpecial Damage to the Huſband by this Means; and therefore this Caſe may be reſembled to that of a Battery committed on the Wife, per quod the Huſband conſortium amiſit.

When an Action is brought for a malicious Proſecution, what ſhall be ſaid to be a good Commencement of ſuch Action.

With regard to the ſecond Exception he thought Serjeant Chappel had anſwered that likewiſe. The reſt of the Court were of the ſame Opinion. Accordingly the Rule was diſcharged, that had been obtained for bringing in the Poſtea.

The King *and* Lloyd.

Vide ante 310.

MR. Denniſon now argued on behalf of the Defendant. He ſaid he ſhould confine himſelf ſingly to that Exception, that the Evidence was not ſet forth. In Caſes of Convictions before Juſtices out of Seſſions, he believed it would hardly be contended at this Time of Day but that it was neceſſary to ſet it forth. In the Caſe of The King and Baker, Trin. 6 Geo. 1. this was ſolemnly ſettled. Some Doubt he ſaid had been made, whether in the preſent Caſe this was to be conſidered a Conviction; and for this Purpoſe the preſent Caſe has been compared to orders of Baſtardy; and if this Caſe was compared to that, he would readily agree the preſent Exception could not avail. To this Purpoſe was the Caſe of The King and Blackwell, which was an Order of Baſtardy; but held that a Summons, though neceſſary, need not be ſpecified. But the preſent Caſe he ſubmitted it differed from that; becauſe in this the Defendant is to loſe his Freehold. He ſubmitted it therefore, that the Determination of the Juſtices below in the preſent Caſe muſt in all Reſpects be conſidered a Conviction; and if ſo the only Doubt remaining would be whether a Conviction at the Seſſions differed in this Reſpect from a Conviction of Juſtices out of it, he conceived that it by no Means did. In the Caſe even of ſuperior Courts he ſaid, the antient Rule of Law was, that where thoſe Courts were Judges of the Fact, as in ſome Caſes they were, the Evidence on which they founded ſuch Judgment, was neceſſary to be ſet out. To this Purpoſe he mentioned the Caſe of a Trial by Witneſſes in Writ of Dower; and for this cited 1 And. 20. the Record of which Caſe is in Raſtal 228. The ſame is it in the Caſe of proving a Suggeſtion in Prohibition; the Oath of the Witneſſes is ſet out on the Record; and for this he cited Co. Ent. 363. Raſt. 444. and 3 Cro. 736. He conceived therefore, that the only Reaſon why the Court has held it neceſſary to ſet forth the Evidence in Convictions of Juſtices out of Seſſions has been, that this has been the antient Practice of ſuperior Courts in Caſes of the like Nature; and if ſo there was exactly the ſame Reaſon, that this ſhould be neceſſary in Convictions of Juſtices in Seſſions. Mr. Strange argued on the other Side, and ſaid that he conceived this was to be conſidered meerly as an Order. He ſaid theſe Matters have always been allowed to be in Engliſh, which Convictions never were, and he could by no Means diſtinguiſh the preſent Caſe from that of an Order of Baſtardy, but ſuppoſing this ſhould be conſidered a Conviction; yet ſtill he ſubmitted it the Exception ought not to prevail. For this Purpoſe he mentioned the Caſe of The King and Ford, Trin. 9 Geo. 1. That was a Conviction on the Statute of 3 Car. 1. for keeping an Alehouſe. Exceptiſ-

on was taken, that by the Words of that Statute the Justices had no Jurisdiction, where the Party is punished before by the Statute of Edw. 6. and that it did not appear in that Case, but that the Defendant had been punished on the former Statute. But notwithstanding this Exception, the Conviction was confirmed. So in the Case of The King and Thebe, Mich. 11 Geo. 1. that was a Conviction for obstructing Excise Officers in the Execution of their Office. Exception was taken, that it did not appear the Obstruction was in the Day-Time, and if it had been in the Night there ought to have been a Constable present. But the Court held that Conviction to be good. So in Convictions upon the Game Acts the Justice adjudges the Party not qualified, that Adjudication is good; though if in the Evidence of the Witnesses set out it be alledged in that Manner, that is not sufficient, because they ought to swear how he is not qualified. These Cases he said were all of them probable Arguments, that supposing this to be a Conviction at the Sessions the Evidence need not be set out, but a more direct Proof of this was, that in all the Cases of Removals of Clerks of the Peace that have been upon this Statute, the Evidence has not been set out. For this Purpose he mentioned the Case of The Queen and Baines, Salk. 680. that of The Queen and Horwel, Mich. 11 Ann. and that of The King and Harland. He said the Court had always had a regard to that which has been the constant Course and Forms of Proceedings, and that is the Reason why in Writs of Excommunicato capiendo where there is no other nominative Case before the Words Excommunicatus est but the Official or other Officer of the Spiritual Court; yet that Form of the Writ has always been held to be good. The Chief Justice said, that there were two Reasons which determined him to be of Opinion that it was not necessary the Evidence should be set out in the present Case. In the first place, he took this to be an Order equally as that of Bastardy is; and in the next Place the Authority of the Case of The Queen and Baines. As to the first, he said an Order of Bastardy is an Adjudication, which may be followed with a Punishment; and the present Adjudication is no more. As to the Case of The Queen and Baines he did agree, that the Order that was made in that Case was quashed, and that this Exception was not directly taken, but he said it was a Case that received the most serious and solemn Examination. The Order was first removed up by one Certiorari, Exceptions taken to it, and the Order quashed. Another Order was made, that removed up by Certiorari, and several Exceptions taken to it. The Opinion of all the Judges of England were taken upon it. Then the Matter was argued again by all the Judges of this Court; and therefore, as this Exception was not taken in that Case, he thought that a strong Authority that it could not. As to the Case of The Queen and Horwel, he did agree, that this Exception was taken there by Lord Letchmere, when he was Solicitor General. Serjeant Pengelly of Counsel on the other Side relied upon the Case of The Queen and Baines in Answer to it. The Court there gave no Opinion as to that Point; however said that if there

was

was a material Exception in the Case of The Queen and Baines, that was not taken, but might have been taken, they would consider of it. Upon that the Matter stood over in that Case; and the Defendant died before farther Argument. The Chief Justice however said, that for the Reasons before given he was of Opinion that the Exception ought not to be allowed. Judge Page agreed the same, but he thought this was a Conviction; and his Reason why the Evidence need not be set forth was, that this was a Conviction at the Sessions; and not by Justices out of it. Judge Probyn and Judge Lee were likewise of Opinion that the Exception ought not to be allowed; but their Reason was that this was to be considered as an Order; and Judge Lee cited the Case of The King and Venables, Trin. 11 Geo. 1. which was an Adjudication for suppressing an Alehouse for Disorders; and the Court held in that Case that the Summons was not necessary to be set forth, being of Opinion that that was only an Order. However in the present Case the Court said that they would not now deliver their Opinion, but did not desire that the Matter should be spoke to again; upon which Mr. Marsh said he was retained for the Defendant. But the Court said they should not expect to hear a farther Argument, unless he should in a few Days declare, that he had some Thing material to offer. Vide postea.

The King *and* Brooks.

Vide ante 449.

THE Defendant's Clerk in Court having now had a Sight of the Postea, Mr. Abney and others that were of Counsel for him, took several Exceptions. First, that in the Postea the Cause is said to be tried before our Justices at Lancaster, and it does not appear what those Justices were. Secondly, that the Return to the Venire is not said to be made by such a one Sheriff; but the Name of his Office is omitted. Thirdly, that the Name of one of the Jurors was different in the Venire from what it was in the Distringas; the Name being John Hill in the Venire and John Kell in the Distringas. And to support this Exception, was cited the Case of The King and Willis, Mich. 2 Geo. 2. and that of The King and Brown, the same Day, both determined to this Purpose. Fourthly, that the Distringas required the Sheriff to have the Names of the Jurors there instead of their Bodies. Fifthly, that the Venire was to try an Issue in a certain Information in the Nature of a Quo Warranto; but did not describe what the Nature of the Right was, which was to be tried. Sixthly, that there was no Description neither of the Nature of this Right in the Panel. Seventhly, that the Form of the Verdict was who say the Truth elected sworn, without saying being elected. And lastly, that the Names of the Jurors are said to be impanelled and not panelled. On these Exceptions a Rule was made to shew Cause. Vide postea.

Henſham *and* Boyle.

MR. Bootle, Jun. now moved as a Motion of Courſe for Liberty to amend the Entry of the Award of the Venire, and that without Coſts; and for this Purpoſe cited 3 Mod. 112. and the Caſe of Wilkinſon and Mayer, Eaſt. 10 Geo. 1. there the Entry was tam ad triand' quam ad inquirend'; Motion was made to ſtrike out the Words quam ad inquirend' and granted without Coſts. The Chief Juſtice ſaid he believed this might be done without Coſts. However as no Notice was given of the Motion, they muſt make a Rule to ſhew Cauſe, which they accordingly did. Vide ante.

Burton *and* Badly.

IN Ejectment tried before Mr. Baron Price at Nottingham Aſſies 1732, a ſpecial Verdict was found to the Effect following. The Jury find that Roger Altham, Doctor of Divinity, ſeiſed of the Lands in Queſtion in Right of his Prebendary; on the 13th of June 1712 demiſed the ſame to Sir William Owſley, Bart. for three Lives; and on the 11th of March 1714, Sir William Owſley mortgaged the ſame to Anne Robinſon, and the ſaid Anne aſſigned the ſame to John Green, Leſſor of the Plaintiff. But the Jury farther find, that on the 10th of June 1712, three Days before the Leaſe made to Sir William Owſley, Sir William Owſley acknowledged a Statute Staple to Sir William Jolliff; on the 12th of March following Sir William Jolliff ſued out an Extent againſt Sir William Owſley; and on the 4th of May 1717, an Inquiſition was taken upon it. On the 14th of the ſame Inſtant a Liberate iſſued directed to the Sheriff of Stafford, who returned a Seiſure of the Goods and Lands of Sir William Owſley in Purſuance of it. On the 12th of December following another Writ of Extent iſſued by Sir William Jolliff againſt Sir William Owſley, directed to the Sheriff of Nottingham, upon which an Inquiſition was taken the 30th of that Month, and in Purſuance of a Liberate the Lands in Queſtion were delivered to Sir William Jolliff the 23d of October 5 Geo. 1. Sometime after this Sir William Jolliff preferred a Petition to the Lord Chancellor, deſiring Liberty to enter a Prayer of the ſecond Extent of the ſame Day which the firſt was, and on the 21ſt of January 7 Geo. 1. the Chancellor made an Order, that Sir William Jolliff ſhould enter ſuch Prayer as he ſhould be adviſed. Accordingly this Prayer was afterwards entered, and under the ſecond Extent the Defendant claimed. On behalf of the Plaintiff Mr. Abney ſubmitted it, that upon this Record there unqueſtionably appeared a good Title in the Plaintiff, unleſs it was defeated by a Prior one in the Defendant. But to make the Defendant's Title good, it was neceſſary the Extent ſhould be ſhewn to be legal, which he conceived was far otherwiſe. He did agree, that two Extents may be taken out in different Counties at the ſame Time; How far a Writ of Extent ſhall be ſaid to be legal, or not.

Time; but otherwiſe where one Extent is taken out firſt of all, and afterwards another, all the Goods and Lands that were taken upon the firſt Extent muſt be eviſted, and likewiſe a Scire facias taken out before the ſecond Extent can be made good. And for this Purpoſe he cited 1 Roll's Rep. 8. 2 Cro. 338. 3 Cro. 310. Sid. 356. and 1 Lev. 92. He did agree that the Deſign of the Order was to ſupply this Defect by entering the Prayers of both the Extents as of one and the ſame Inſtant. But he conceived this Order to be abſolutely Illegal. The Chief Juſtice ſaid that this Court could not inquire into the Legality of that Order in a collateral Action. If the Order was Wrong it ought to have been ſet aſide in a proper Manner. He ſaid the Court could only conſider the Prayer of the Extent as it ſtands upon the Record, and compared it to the Caſe of a Judgment entered nunc pro tunc. The reſt of the Court were of the ſame Opinion. Accordingly Judgment was given for the Defendant.

Cooper *and* Mapſon.

Vide ante 444.

THIS Matter coming on again, to make the Recognizance good, Mr. Bootle cited Plowd. 109. Sid. 456. 2 Saund. 788. 1 Mod. 85. and Salk. 463. The Chief Juſtice and Judge Probyn ſaid that they thought that the Word happen might be underſtood after the 2d Word not, and then the Sentence would be right. Accordingly Judgment was given for the Plaintiff.

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